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CIVIL PROCEDURE CODE, Or.IX, Rule 13 & Order VII, Rule 2 – **CONSTITUTION OF INDIA,** Art.227 - Revision Petitioner filed suit for partition before Junior Civil Judge, – R1 and R6 contested suit, whereas other respondents were set ex parte - During trial PW1 and PW2 were examined on behalf of petitioner but they were not cross-examined by counsel of R1 and R6 – Court passed ex parte Decree in favour of petitioner.

R1 filed an I.A. to set aside ex parte preliminary decree, contending that delay was due to back ache and spondylitis and she could not contact her counsel as she was advised to take rest for a period of six months by her doctor –Trial Court dismissed the petition – Aggrieved by that Order, R1 preferred an appeal before Senior Civil Judge - Appellate Court held that preliminary decree passed is maintainable while setting aside order of I.A. and restored I.A. to its original number directing trial court to dispose of petition within two months – Aggrieved by Order of appellate court, petitioner preferred this civil revision petition.

Held – Trial Court was wrong in appreciating facts and law by ignoring state amendment to Rule 3 of Order XVII of CPC – Decree and Judgment passed by trial court are only ex parte decree and judgment in terms of Rule 2 of Order XVII, CPC and there by petition under Rule 13 of Order IX of CPC is maintainable – High Court cannot exercise power under Article 227 to interfere with findings recorded by Appellate Court – Civil Revision Petition is dismissed. **(Hyd.) 366**

EVIDENCE ACT(INDIAN), Sec. 154 – Trial Court rejected application filed by petitioners on ground that invoking Sec.154 of Indian Evidence Act in civil cases is not permissible and that section is invariably invoked in criminal proceedings only.

Suit instituted before Additional Senior Civil Judge, praying to grant preliminary decree declaring that respondents are entitled to 5/6th share in suit schedule properties and to pass a final decree in terms of preliminary decree – DW2 filed chief affidavit supporting stand of petitioners but when he was cross-examined he deposed against his chief examination and supported respondents – Petitioners filed an application to declare DW2 hostile and permit them to cross-examine DW2 – Above application was dismissed, Hence this revision.

Held - A plain reading of Sec.154 Indian Evidence Act makes it clear that it does not make any distinction between civil and criminal cases and it only vests discretion in Court to permit the person, who calls a witness, to put any question which can be put in cross-examination by adverse party – Permission under this section can be sought before evidence of witness is concluded – Scope of exercise of discretion by trial court under this section are on merits of plea – Reasons assigned for rejection by trial court were erroneous, but refusal to permit petitioners to call DW2 to witness box for cross-examination is upheld – Civil Revision Petition is dismissed.

(Hyd.) ***357***

INDIAN PENAL CODE, Secs. 392 & 395 - Writ Petition has been filed by petitioner seeking to quash impugned Order of 1st respondent, by which request of petitioner to engage a lawyer of his choice to defend him in departmental proceedings has been declined – On consent of counsels of both parties writ petition is taken up for final disposal at stage of admission itself.

Petitioner worked as Inspector of Police, and has been placed under suspension on account of registration of two criminal cases against him – Departmental enquiry has also been initiated for grave charges involving major penalties – Counsel for petitioner submitted that since charges leveled against petitioner are serious in nature, assistance of an advocate is required.

Held – Lawyer should be permitted to assist delinquent employee in a departmental proceeding, who had to face enquiry before a retired High Court Judge as well as before a legally trained person – In the present case, enquiry officer is a Law graduate and that cannot be a valid ground for seeking assistance of a lawyer to defend him in enquiry – If it is found that facts of cited Judgments of the Higher Forum differs with one on hand then there is no compulsion for Subordinate Courts to blindly rely on same to arrive at a conclusion - Writ petition dismissed. **(Madras) 59**

REGISTRATION ACT, 1908,Sec.49 - Suit was filed by petitioner before Principal Junior Civil Judge, for permanent injunction restraining respondent from ejecting petitioner from plaint schedule premises until expiry of term of lease under an agreement – When petition for grant of temporary injunction was coming up for enquiry, petitioner tried to mark lease agreement and respondent objected to the same on ground that said lease agreement was inadmissible in evidence as it is unregistered one.

Petitioner contended that though it is an unregistered lease agreement, it can be looked into for collateral purpose for proving possession and nature of possession – But, respondent objected on ground that unregistered lease agreement is inadmissible in evidence even for collateral purpose of proving possession as factum of lease being contentious issue – Trial Court upheld objection on ground that lease agreement was unregistered – Hence, this Civil Revision Petition.

Held – Unregistered document can be used as an evidence of collateral purpose as provided in proviso of Section 49 of Registration Act - Order of Lower Court is set aside and CRP is allowed for permitting petitioner to produce document for collateral purpose. **(Hyd.)** ***350***

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SEPARATION AGREEMENT AND JUDICIAL SEPARATION

By
Alapati Sahithya Krishna, **Advocate**
Associate Editor, Law Summary

INTRODUCTION

Marriage under all matrimonial laws is union imposing upon each of the spouses certain marital duties and gives to each of them certain legal rights. The necessary implication of marriage is that parties will live together. But often the parties, head towards separation. In legal terms, there are twoalternatives to a divorce: judicialseparation and separation byagreement. A decree of judicialseparation does not dissolve amarriage, as does a divorce. Forinstance, a woman cannot remarrywhile she is judicially separated; ifher husband dies during the periodof separation, she has the right, which she does not have if she isdivorced, to inherit his propertyalong with his other heirs. A womancan apply for judicial separation atany time during her marriage; whenfiling for a divorce, however, she hasto wait for at least a year. During theperiod of judicial separation, herconjugal rights, and those of herhusband, remain suspended. Hence,even though marital rape is not recognized as a crime in India, forciblesexual intercourse during judicial separation is a criminal offence.A separation agreement is like acontract in which a woman and herhusband agree to live separately andrelease each other from theobligations that come with marriage.Their marriage will continue to exist, but they need to go to court tovalidate this agreement.

SEPARATION AGREEMENT

These agreements are not part of matrimonial law but form part of the law of contract. This was viewed as an alternative to the remedy of judicial separation. Through private agreements, parties can free themselves from the duties and obligations of matrimonial cohabitation. Such agreements were prevalent in England. They came into vogue at a time when obtaining a decree of divorce or even judicial separation was extremely difficult. Parties began to enter into private agreements of separation so they could not be faulted for abdicating from their matrimonial responsibilities. Once entered into, neither party could accuse the other of desertion. Initially when marriages were sacramental and indissoluble, such agreements were deemed to be against public policy under English law. After many conflicting opinions, a consensus was reached in the nineteenth century, whereby it was declared that such agreements were not against public policy.[1] But it was stipulated that such agreements should be entered into only when separation was inevitable or had already taken place.

While separation agreements may stipulate some consideration, the wife's claim of maintenance is not forfeited. Since the general law of contracts regulates the separation agreement, the general principles of a contract, such as consent, apply. An agreement may become voidable on the grounds of fraud, misrepresentation, coercion, and undue influence. Stipulation regarding maintenance, custody, and education of the children are enforceable. Hence, in case of default, the aggrieved party can approach the courts for specific performance of the terms of agreement. The covenant granting maintenance must be payable under all circumstances even when the wife becomes unchaste, gets a divorce, judicial separation or annulment.

Muslim law provides for an agreement to live separately and the wife can exercise her right to separate residence and maintenance.[2] The right of a spouse to sue for divorce, judicial separation or nullity is not lost even if there is such a clause in the agreement to this effect. These are statutory rights which cannot be defeated by private agreements between the parties. Similarly, a clause in the agreement which bars the wife or children form claiming future maintenance is not binding as this is a statutory obligation of a husband/father.

The most important requisite of a separation agreement is the occurrence of actual separation or de facto separation. But primarily, separation under an agreement or a court decree is a separation from bed and board, which entitles the parties not to cohabit with each other. The woman is released from the covenant of a sexual contract with her husband which she had entered into time at the time of her marriage. So even if the parties live under the same roof, the wife (or the husband, as the case maybe) will be entitled to exercise the freedom to refuse sexual intimacy. This principle was laid down by the English courts in 1965 in **Montgomery v. Montgomery**.[3]

JUDICIAL SEPARATION

The relief of judicial separation flows in the reverse direction from the remedy of restitution of conjugal rights. While the latter is intended to enjoin the estranged couple, the former entitles one spouse to sever conjugal relations with the other, without breaking the matrimonial tie. The remedy was widely used when the stipulation for obtaining divorce were stringent. While adultery had to be proved to obtain divorce, judicial separation could be obtained on the grounds of desertion or cruelty. So for women who were subjected to cruelty, the right to judicial separation became an important remedy to obtain the right of separate residence, maintenance, and custody of children.

Judicial separation is one of the matrimonial reliefs provided under the personal law statutes. Unlike divorce, a decree of separation does not put an end to the marriage; the legal relationship of the husband and wife subsists and the parties cannot remarry. It is not however obligatory on the parties to cohabit with each other but the doors of the rapprochement are open. As aptly stated by Derrett[4] "…the real purpose of judicial separation is to enable the spouses, now relieved of their matrimonial duties towards each other, to reconsider their position, taste "single" living again … and attempt in a less emotional and urgent atmosphere to piece their lives and their futures together once again.

THE STATUTORY PROVISION UNDER DIFFERENT PERSONAL LAWS:

HINDU LAW

Under Section 10 of the Hindu Marriage Act, 1955:

Section 10 : Judicial Separation - (1) Either patty to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub- section (1) of section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented. (2) where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so. Thus, (a) the grounds for judicial separation and divorce are common; (b) the parties are under no obligation to cohabit after the decree; and (c) the decree may be rescinded. Section 13 in The Hindu Marriage Act, 1955

Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party - has, after the solemnization of the marriage, had voluntary, sexual intercourse with any person other than his or her spouse; or (ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or (ii) has ceased to be a Hindu by conversion to another religion; or (iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and

to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation - In this clause,- (a) the expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia; (b) the expression” psychopathic disorder” means a persistent disorder or disability of mind (whether or not including sub- normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it require or is susceptible to medical treatment; or (iv) has been suffering from a virulent and incurable from of leprosy; or (v) has been suffering from venereal disease in a communicable from; or (vi) has renounced the world by entering any religious order; or (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

In **ManishaTyagi v. Deepak Kumar**, [5] the apex court gave a significant judgement. The husband had sought divorce on the ground of wife’s cruelty. The trial court found that both the parties were at fault so it refused any relief. On appeal by the husband, the Single Judge Bench of the Punjab and Haryana High Court adopted a middle path and granted a decree of judicial separation instead of divorce, in favour of the husband. Aggrieved by this, the wife went in Letters Patent Appeal before the D.B. which granted divorce. The Supreme Court quashed the order of divorce.

A decree of separation can be rescinded as provided in sub-section (2) of section 10 of the Act. However this can be done only if one of the parties takes appropriate steps, and to the courts’ satisfaction. Mere assertion by a wife that she desires to join her husband is not enough.[6] Living separate under an agreement without a decree of judicial separation cannot be treated as judicial separation.[7] Also there can be no judicial separation unless grounds mentioned in section 13(1) of the Hindu Marriage Act, 1955 are satisfied. Unlike section 13-B of the Act, there cannot be a judicial separation merely upon the consent of the parties.[8] When parties are only judicially separate neither spouse can contract another marriage. Thus where a wife who had obtained a decree of separation from her first husband married the petitioner, the marriage was held to be void.[9] A marriage after a separation decree and before divorce was held to amount to bigamy in **Narasimha Reddy v.Basamma**.[10]

SPECIAL MARRIAGE ACT, 1954

The position under the Special Marriage Act, 1954 is the same as under the Hindu Marriage Act, 1955, and the grounds for separation and divorce are common.[11]

PARSI LAW

Under the Parsi Marriage and Divorce Act, 1936,[12] 'any married person may sue for judicial separation on the grounds for which such person could have filed a suit for divorce'. In other words the grounds for both the matrimonial reliefs, viz., divorce and judicial separation, are common.

CHRISTIAN LAW

The only statute which has retained some distinction between the grounds for judicial separation and divorce is the Indian Divorce Act, 1869. Prior to the amendment of the Act in 2001,[13] the grounds for divorce were very limited. Under s. 22 of the Indian Divorce Act, 1869, a husband or wife may obtain a decree for judicial separation on the ground of adultery or cruelty or desertion for two years or upwards. A decree of separation may be reversed under certain circumstances.[14]

MUSLIM LAW

The relief of judicial separation does not exist under Muslim Law.

CONCLUSION

Marriage is considered as a sanctified relationship and marital vows are meant for both the spouses to execute their essential responsibilities and remain faithful to each other.The main difference between divorce and separation is that while you are separated you might reconcile your differences and start living together again without any legal documentation. A divorced couple has to legally remarry to become a lawful husband and wife. The separation of the spouses is only legal if it has been awarded by a court of law, usually the family court. If a husband and wife are living separately without applying to the courts, the separation is not deemed legal.

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4. V.P. Bharatiya, Syed Khalid Rashid's Muslim Law, (4th ED. : 2004) (Eastern Book Company Lucknow)

Footnotes

1.Diwan and Diwan, 1997:393
2.NizammulHaque v. Begum Noorjahan, AIR 1966 Cal 465
3.(1964) 2 All ER 22
4. J. Duncan M. Derrett, "Critique of Modern Hindu Law" (1970) at 327-328
5. AIR 2010 SC 1042
6. Dolly Roy v. Raja Roy, AIR 2010 Ori 1
7.Dershan Pd. V. Civil Judge Gorakhpur, AIR 1992 SC 967
8.Prashant Singh v. Tanushree, (2010) I DMC 66 Jhar.
9.SurjeetKaur v, Jhujhav Singh AIR 1980 P&H 284
10. AIR 1976 AP 77
11. S. 23 of Special Marriage Act, 1954
12. S. 34 of Parsi Marriage and Divorce Act, 1936
13.The Indian Divorce (Amendment) Act, 2001
14. Indian Divorce Act, 1869, s. 26

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In exercise of the powers conferred by Section 585(2) of the HMC Act, the Government of A.P. made the Municipal Corporation of Hyderabad (Acquisition and Disposal of, Immovable Property) Rules, 1970 (for short the 1970 Rules) which came into force from 09.07.1970. Rule 6 of the 1970 Rules relates to transfer by lease of immovable property belonging to the Corporation and, under sub-rule (1) thereof, subject to the provisions of Section 124 and 148 of the HMC Act, the Commissioner may lease out any immovable property belonging to the Corporation. Rule 6(2) stipulates that the lease deed, for the immovable property, shall be in Form III(a) indicated in Schedule III appended to the Rules with such variations as circumstances may require. Rule 8 relates to publication of the proposed leases. Rule 8(1) stipulates that, in every case of a lease falling under Rule 6, the Commissioner shall publish a notice of the proposed lease, giving full particulars of the property to be leased, the name of the proposed lessee and the consideration for the transfer or the rent reserved under the lease - (a) in the Andhra Pradesh Gazette, if the rent reserved under the lease exceeds Rs.200/- per annum; and (b) by affixture in a conspicuous place. Rule 8(2) stipulates that, in every case where such lease is to be by public auction, a notice with full particulars of the property to be leased shall be published (a) in the Andhra Pradesh Gazette and in one or two prominent local newspapers and (c) by tom-tom in suitable places.

While Section 124(a) of the HMC Act requires any contract, on behalf of the Corporation, to be made by the Commissioner, clause (c) confers power on the Commissioner to make a contract (other than a contract relating to the acquisition of immovable property or any interest therein or any right thereto) not involving an expenditure exceeding Rs.50.00 Lakhs. Clause (b) of Section 124 disables the Commissioner from carrying out the contract for any purpose which, in accordance with any provision of the HMC Act, requires the approval or sanction of some other municipal authority to be made, until or unless such approval or sanction has first been duly given. In terms of Section 124(b) of the HMC Act unless approval or sanction has been given by the concerned municipal authority, the Commissioner cannot carry out the contract made by him.

Section 148(1) confers power on the Commissioner to grant lease of any immovable property belonging to the Corporation for any term not exceeding 12 months. Even for grant of lease, of immovable properties of the Corporation, for a period upto 12 months, the proviso toSection 148(1) obligates the Commissioner to report, the grant of such lease, to the Standing Committee within 15 days. Section 148(2) confers power on the Commissioner to grant lease of any immovable property belonging to the Corporation for a period not exceeding three years with the sanction of the Standing Committee. While the Commissioner is empowered under Section 148(1) to grant lease, of immovable properties of the Vijayawada Municipal Corporation, for a period upto 12 months, Section 148(2) requires him to obtain the sanction of the Standing Committee before he grants

a lease for a period exceeding 12 months but not exceeding three years. Grant of lease exceeding three years is covered by Section 148(3)which prohibits the Commissioner from granting lease, of immovable properties belonging to the Vijayawada Municipal Corporation, without the previous sanction of both the Corporation and the Government. In effect, the Commissioner is prohibited from granting lease of the immovable properties of the Vijayawada Municipal Corporation for a period exceeding three years unless he obtains prior sanction of both the V;ijayawada Municipal Corporation and the Government of A.P. The proviso to Section 148(3) stipulates that, in no case, the lease period, of the immovable properties of the Vijayawada Municipal Corporation, shall exceed 25 years. As a result while the Commissioner can, after obtaining approval of the Vijayawada Municipal Corporation and the Government of Andhra Pradesh, grant lease of the immovable property of the Vijayawada Municipal Corporation for a period exceeding three years but not exceeding 25 years, the proviso to Section 148(3) places an embargo, and prohibits grant of lease of immovable property belonging to the Vijayawada Municipal Corporation for a period exceeding 25 years. Even the Government of Andhra Pradesh cannot permit the Commissioner to grant lease, of any immovable property of the Vijayawada Municipal Corporation, for a period exceeding 25 years.

The Estate Officer, VMC issued memo dated 17.02.2017 informing the petitioner that his lease was due to expire on 21.04.2017 and, as such, the concerned officer would take possession of the Shadikhana after expiry of the lease. The petitioner informed the Commissioner, VMC, by his letter dated 03.03.2017, that the lease period for the Shadi Khana was to expire by 24.04.2017, on which date the 12 years lease period was getting completed; as per Government Orders, there was a possibility of extending the lease for 25 years; and, therefore, he may be granted an extension of lease for a further period of 3 years. The petitioner claims that this memo dated 17.02.2017 was served on him long after he had submitted a representation to the Commissioner on 03.03.2017. The appellant-writ petitioner was, admittedly, granted lease of the immovable property of the Vijayawada Municipal Corporation, pursuant to an auction of the lease hold rights, initially for a period of three years, which was subsequently renewed from time to time. When the current period of lease of three years expired on 24.04.2017, the appellant-writ petitioner was holding the property of the Vijayawada Municipal Corporation on lease continuously for a period of 12 years. His request for extension of lease for a further period of three years is, in effect, for lease to be granted for a period of 15 years (12 years for which lease was hitherto granted periodically, and 3 years from 24.04.2014 to 24.04.2017). In view of Section 148(3) even if the Commissioner, Vijayawada Municipal Corporation, intended to grant such a lease, he could only have done so with the previous sanction of the Vijayawada Municipal Corporation and of the Government of Andhra Pradesh.

Section 148 only confers power on the Commissioner, and does not obligate him

to grant lease. It is always open to the Commissioner not to grant lease of the immovable properties of the Corporation if, in his opinion, these properties should be put to use by the Corporation itself. Even if he chooses to grant lease, it is open to the Commissioner to decide whether the lease should be granted for a period of 12 months, or for a period beyond 12 months and below three years, or for a period beyond three years upto 25 years. While the Commissioner is empowered to decide the period for which a lease is to be granted, the restriction placed bySection 148(2) and (3) would require the Commissioner, even if he decides to grant lease for a period beyond 12 months and below 3 years, or above 3 years but below 25 years, to obtain prior sanction of the Standing Committee, and the previous sanction of the Vijayawada Municipal Corporation and the Government of Andhra Pradesh, respectively. No right is conferred on any person to claim that he should either be granted a lease, or his lease should be automatically renewed periodically upto 25 years, by the Commissioner, Vijayawada Municipal Corporation. These are all matters for the Commissioner in his discretion, and for just and valid reasons, to decide.

A fair, rational and transparent mode of grant of lease, of immovable properties of local bodies, is by way of public auction as the object for which leases are granted by the Corporation is, primarily, to maximise its revenue. It is not even the appellants case that he has been prohibited from participating in any such auction merely on the ground that he was granted a lease earlier. As the conditions prescribed for renewal of lease of immovable properties under Rule 12(4) of the 1968 Rules, are inconsistent with Section 148 of the HMC Act, Section 6(3) of the 1981 Act renders the 1968 Rules inapplicable to the Vijayawada Municipal Corporation.

II. ADMINISTRATIVE GUIDELINES, ISSUED BY THE GOVERNMENT IN G.O.MS. NO.389 DATED 24.09.2004, CANNOT BE ENFORCED IN WRIT PROCEEDINGS:

The Government of Andhra Pradesh issued G.O.Ms.No.389 dated 24.09.2004 on the subject of construction of shopping complexes in urban local bodies under goodwill auction basis. G.O.Ms. No.389 dated 24.09.2004 records that the Government, in supercession of the orders issued earlier, had ordered that Municipal Corporations and Municipalities can take up construction of shopping complexes on lands belonging to them duly following the guidelines mentioned in the said G.O which, among others, are that the lease period should not exceed 12 years, and the lease period is initially for 5 years; and the lease can be renewed for 3 years @ 33 1/3% excess over the lease amount. G.O.Ms. No.389 dated 24.09.2004 is in the nature of administrative or executive guidelines, issued by the Government to Municipal Corporations and Municipalities, regarding construction of shopping complexes in urban local bodies.

The appellants request for renewal of lease is not for a shop in a shopping complex constructed by the Vijayawada Municipal Corporation, but for a Shadikhana belonging to the Corporation. The guidelines, in G.O.Ms.No.389 dated 24.09.2004, relate

only to construction of shopping complexes and grant of lease of shops therein, and not to any other lease. Extending the said guidelines to lease of other immovable properties, belonging to the Corporation, would result in its falling foul of Section 148 of the HMC Act.

The power to issue G.O.Ms. No.389 dated 24.09.2004 is not referable to any statutory enactment or the Constitution. The said G.O. is merely in the nature of guidelines issued by the Government. Instructions in the nature of guidelines, and which do not have statutory force, do not confer a legally enforceable right. (UNION OF INDIA V. S.L. ABBAS(5) . Guidelines, which are not statutory in character, are not enforceable. (Narendra Kumar Maheshwari1; Fernandez2; R. ABDULLAH ROWTHER V. STATE TRANSPORT(6) DY.ASST. IRON & STEEL CONTROLLER V. MANEKCHAND PROPRIETOR(7) ANDHRA INDUSTRIAL WORK V. CCI & E (8); and K.M. SHANMUGHAM V. S.R.V.S. PVT. LTD(9)

The executive power of the State, under Article 162 of the Constitution, enables the Government to issue administrative instructions to its servants on how to act in certain circumstances, but that would not make such instructions statutory rules the breach of which is justiciable. Non-observance of such administrative instructions does not give any right to a person to come to Court for any relief on the alleged breach of the instructions. (G.J. FERNANDEZ2; J.R. RAGHUPATHY V. STATE OF A.P.(10). These guidelines do not confer any legally enforceable right on the appellant to claim that the lease granted to him should be periodically extended by the Corporation for a total period of 25 years. Reliance placed by the appellant-writ petitioner, on G.O.Ms. No.389 dated 24.09.2004, is therefore misplaced.

III. CAN THE APPELLANT SEEK PARITY WITH OTHERS WHOSE LEASE, OVER IMMOVEABLE PROPERTIES OF THE CORPORATION, HAS BEEN EXTENDED?

A notice was issued to one Sri Y. Srinivasa Rao, by the Estate Officer, Vijayawada Municipal Corporation, on 22.03.2016 informing him that extension of lease of the Karmal Bhavan was granted for a period of three years i.e. from 01.03.2015 to 28.02.2018; and the leaseholder should pay the amounts mentioned in the notice, register the lease agreement, and submit the same to their office. Similar extension of lease, of Karmal Bhavan at Durgapuram, was granted to Sri K. Panduranga Rao for a period of three years i.e. from 01.03.2015 to 29.02.2018 by notice dated 24.03.2016. With regards the Kalyana Mandapam at Mango Market, extension of lease of three years was granted to Sri A.Purnachandra Rao from 01.02.2016 to 31.01.2019 vide notice dated 24.03.2016.

The plea of discrimination, vis—vis those who were granted extension, and the claim for being extended a similar benefit does not merit acceptance. As held by the Supreme Court, in CHANDIGARH

5.AIR 1993 SC 2444
6.AIR 1959 SC 896
7.[1972] 3 SCR 1
8.[1975] 1 SCR 321
9.[1964] 1 SCR 809
10. AIR 1988 SC 1681

ADMINISTRATION V. JAGJIT SINGH (11) , the mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be a ground for issuing a writ in favour of the petitioner on the plea of discrimination; the order in favour of the other person might be legal and valid, or it might not be; that has to be investigated first before it can be directed to be followed in the case of the petitioner; if the order in favour of the other person is found to be contrary to law, or not warranted in the facts and circumstances of the case, such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authority to repeat the illegality or to pass another unwarranted order; the extraordinary and discretionary power of the High Court cannot be exercised for such a purpose; merely because the respondent authority has passed one illegal/ unwarranted order, does not entitle the High Court to compel the authority to repeat that illegality again and again; the illegal/ unwarranted action must be corrected, if it can be done according to law; wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law but, even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition; by refusing to direct the respondent authority to repeat the illegality, the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination; giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest; it will be a negation of law and the rule of law; if in case the order in favour of the other person is found to be lawful and justified, it can be followed and a similar relief can be given to the petitioner if it is found that the petitioners' case is similar to the other persons' case; but then why examine another person's case in his absence, rather than examining the case of the petitioner who is present before the Court and seeking the relief; it is more appropriate and convenient to examine the entitlement of the petitioner before the Court to the relief asked for in the facts and circumstances of his case, than to enquire into the correctness of the order made or action taken in another person's case, which other person is not before the Court nor is his case; such a course, barring exceptional situations, would neither be advisable nor desirable; the High Court cannot ignore the law and the well-accepted norms governing the writ jurisdiction, and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise; each case must be decided on its own merits, factual and legal, in accordance with relevant legal principles; the orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and the High Courts, nor can they be elevated to the level of the precedents as understood in the judicial world; and the question of discrimination can be said to have arisen only if two findings are recorded by the High Court, viz., (1) the order in favour of the person, with whom parity is sought, was legal and valid, and

11.AIR 1995 SC 705

(2) the case of the writ petitioners was similar in material respects to the case of the person with whom parity is sought, but he has not been accorded the same treatment.

None of the lessees, with whom the petitioner seeks parity in treatment, have been arrayed as respondents in the Writ Petition. It would be wholly inappropriate for us to examine, in their absence, whether or not extension of lease granted in their favour is in accordance with law. As noted hereinabove, the provisions of the 1981 Act read with the relevant provisions of the HMC Act confer a discretion on the Commissioner, subject to the restrictions specified therein, whether or not extension of lease should be granted. No right is conferred by these provisions on lessees to claim that they should be granted extension of lease for the mere asking. The claim for extension of lease, on the plea of discrimination, must therefore fail. IV. ORDER OF THE DIVISION BENCH IN W.P. NO.6354 OF 2009 DATED 25.08.2009 AND SECTION 277(4) OF THE A.P.

MUNICIPALITIES ACT THEIR SCOPE:

The Government of Andhra Pradesh issued G.O.Ms.No.120 dated 31.03.2011 informing the Commissioner and Director of Municipal Administration, and all Municipal Commissioners in the State that, in view of the order of the High Court in W.P.No.6354 of 2009 dated 25.08.2009, the Commissioner and Director of Municipal Administration, and all Municipal Commissioners should apprise the said orders of the High Court to the respective Chairpersons, Councils, and Municipal Commissioners; and to go for public auction, of all municipal properties, after completion of the lease period of 25 years.

The Commissioner and Director of Municipal Administration, A.P, Hyderabad, by his letter dated 11.02.2015, informed that, in terms of the directions issued in W.P.No.6354 of 2009, all the Commissioners were requested to take steps for vacating the lessees who were in occupation of the Municipal shop rooms beyond 25 years, and go for public auction for the said shop rooms; Section 277(4) of the 1965 Act prescribes that the maximum period of lease, of any municipal property, is 25 years; he should, therefore, take action to evict lessees, who have completed 25 years of lease, in terms of Section 277(4) of the 1965 Act as stipulated in the HMC Act, and in terms of the directions issued by the High Court in W.P.No.6354 of 2009 dated 25.08.2009; and the lease period, in respect of shop rooms which had not completed 25 years, may be renewed for every 3 years at a time, with an enhancement of lease rent of 33 1/3% over the existing rent, with the approval of the Council, for a total period of 25 years.

Section 277 of the 1965 Act confers power in respect of public markets. Section 277(4)stipulates that the Council may lease any land, shop, godown, building or terrace of a building owned by it and situated anywhere in the municipality for any period not exceeding five years at a time, and subject to such terms and conditions as the Council may deem fit. Under the proviso thereto, it shall be competent for the Council to grant, with the prior sanction of the Government, any such lease for a period exceeding five years but not exceeding 25

years at a time. Section 2(11) of the 1965 Act defines Council to mean a municipal council constituted under the said Act, which means a municipal council for a municipality. As Section 277(4) applies only to municipalities in the State of Andhra Pradesh and not to municipal corporations, such as the Vijayawada Municipal Corporation, reliance placed on Section 277(4) of the 1965 Act is misplaced.

The Judgment of the Division Bench of this High Court, in W.P. No.6354 of 2009 dated 25.08.2009, was also in respect of lease of immovable properties of a municipality under the 1965 Act, and not with respect to the properties belonging to municipal corporations. The Division Bench was neither called upon nor did it examine the provisions of either the 1981 Act or the HMC Act. The question which arose for consideration before the Division Bench was whether lease of properties of a municipality could be extended beyond a total period of 25 years, even if it is with the prior approval of the Government. The Division Bench held that the State Government lacked power to grant approval for extension of lease of immovable properties, belonging to municipalities, beyond a total period of 25 years. The judgment of the Division Bench, in W.P.No.6354 of 2009 dated 25.08.2009, has no application to the facts of the present case.

V. IS THE UNDERSTANDING OF GOVERNMENT OFFICIALS, REGARDING THE SCOPE OF STATUTORY PROVISIONS, BINDING?

On information being sought under the Right to Information Act, the Assistant Director, Municipal Administration Department, Government of Andhra Pradesh, vide letter dated 31.03.2017, informed that municipal complexes/Kalyana mandapams/Karmal Bhavan/shops should be given on lease through open auction/tender procedure/ continuance of lease in terms of the guidelines/rules issued by the Government from time to time, and in terms of the provisions of the Act; the lease period should accord with the guidelines/rules issued by the Government in terms of the provisions of the Act; the Municipal Council may resolve to fix the lease period; the terms and conditions for renewal of lease were envisaged in the Acquisition and Transfer of Immovable Properties Rules, 1967 under the 1965 Act wherein the Rules relating to the Acquisition and Transfer of Immovable Properties by Municipal Councils, and the terms and conditions were stipulated; extension of lease in Municipal Corporations, like Vijayawada and Guntur, were governed by G.O.Ms. No.56 MA & UD (JI) Department dated 05.02.2011; the Municipal Council may renew leases of immovable properties for a period of three years at one time; with the prior sanction of the Government, the lease could be renewed for a period exceeding three years, and not exceeding 25 years at a time; and Rule 12(1)(e) and (4) of the Receipts and Expenditure Rules, 1968 were applicable to Municipal Corporations.

In his letter dated 15.03.2017, the Deputy Commissioner, in response to a query under the Right to Information Act, opined that, according to G.O.Ms. No.56 dated 05.02.2011 and as per the provisions of the HMC Act, open auction would be conducted

by the Greater Visakhapatnam Municipal Corporation (GVMC for short) every year for vacant Kalyanamandapams and shops; the open auction would be conducted for a 3 year period only; the lease period would be renewed as per the conditions laid down in G.O.Ms. No.56 dated 05.02.2011, and as per Section 148(2) and (3) of the HMC Act; leases in Municipal Corporations, like Visakhapatnam and Vijayawada, would be extended as per G.O.Ms. No.56 dated 05.02.2011, as per Section 148 of the HMC Act, and according to the conditions specified in the lease notification of the GVMC; with regards extension of lease under Section 148(2) and (3), the Standing Committee is empowered to sanction lease for 3 years; with the previous sanction of the Corporation and the Government, the lease period can be extended upto 25 years; and Rule 12(e)(4) of the Receipt and Expenditure Rules, 1968 were being followed by the GVMC under the transitional provisions.

The understanding of Government Officers regarding the scope of statutory provisions is not binding on the Court. Contemporanea expositio est optima et fortissima in lege is a maxim meaning Contemporaneous exposition is the best and strongest in the law. (Black L. Dict.; Broom.). Where the words of an instrument are ambiguous, the Court may call in aid acts done under it as a clue to the intention. (WATCHAM V. ATTORNEY GENERAL OF THE EAST AFRICA PROTECTORATE(12). Contemporanea expositio is a well settled principle or doctrine which applies only to the construction of ambiguous language in old statutes (BAKTAWAR SINGH BAL KISHAN V. UNION OF INDIA(13), but not in interpreting Acts which are comparatively modern. (SENIOR ELECTRIC INSPECTOR V. LAXMI NARAYAN CHOPRA(14) ; J.K. Cotton Spg. & Wvg. Mills Ltd. v. Union of India (15). Even if persons who dealt with the statute understood its provisions in another sense, such mistaken construction of the statute does not bind the Court so as to prevent it from giving it its true construction. (NATIONAL & GRINDLAYS BANK LTD. V. MUNICIPAL CORPN. OF GREATER BOMBAY(16) ; PUNJAB TRADERS V. STATE OF PUNJAB(17). The rule of construction, by reference to contemporanea exposition, must give way where the language of the Statute is plain and unambiguous. (K.P. VARGHESE V. ITO (18).

Where the meaning of an enactment is obscure, the Court may resort to contemporary construction, that is the construction which the authorities have put upon it by their usage and conduct for a long period of time. (National & Grindlays Bank Ltd.16). The terms of the statute can well be construed by reference to such exposition, in the absence of anything in the statute to indicate to the contrary. (STATE OF T.N. V. MAHI TRADERS (19) ; DESH BANDHU GUPTA V. DELHI STOCK EXCHANGE ASSOCIATION LTD (20) and K.P. Varghese18).

We are satisfied that Sections 6(3) & 7(1) of the 1981 Act, and Sections 124 and 148 of the HMC Act, are unambiguous and clear. The rule of construction, by reference to contemporanea expositio, must give way where the language of the statute is plain

and unambiguous. (K.P. Varghese18). In the light of Sections 6(3) and 7(1) of the 1981 Act, and Sections 124 and 148 of the HMC Act, it is evident that Rule 12(4) of the 1968 Rules has no application to municipal corporations in the State and, therefore, lessees of immovable properties belonging to the municipal corporations cannot claim, as of right, that they should be extended the lease for periods of three years each for a total lease period of 25 years.

We find considerable force in the submission of Sri R. Sudheer, Learned Standing Counsel for the VMC, that a decision, whether or not to grant lease of immovable properties of the Corporation, is required to be taken by the Commissioner with regards each of these properties; while the Corporation may decide to use some of these properties itself, it may choose to lease some of the other properties for a certain duration; the duration, for which these immovable properties should be given on lease, is to be determined by the Commissioner bearing in mind the future needs of the Corporation; even when leases are granted it is for the Commissioner to decide, bearing in mind the object of maximising the revenues of the Corporation, whether it would be beneficial to extend the lease to the very same lessee or to conduct a public auction for grant of leasehold rights; and, as the needs of the Corporation with respect to each of its properties would differ from one to another, the petitioner is not entitled to claim parity with regards extension of lease with others who may have been granted extension of lease by the respondent-corporation.

It is only if it is held that the appellant-writ petitioner has a right to seek extension of lease, can a direction be issued to the respondent- Corporation to consider his request for grant of extension of lease. As we are satisfied that no such right enures to lessees of immovable properties of the municipal corporation, there is no justification in issuing a mandamus to the Corporation to consider the petitioners request for extension of lease. Suffice it to record the submission of Sri R. Sudheer, Learned Standing Counsel for the VMC, that the respondent-Corporation would either use the subject property itself or conduct a public auction for grant of leasehold rights of the said property. Needless to state that, in case the respondent-Corporation decides to conduct a public auction for grant of leasehold rights of the subject property, it is always open to the appellant-writ petitioner to participate therein.

Subject to the aforesaid observations, we see no reason to interfere with the order under appeal. The Writ Appeal fails and is, accordingly, dismissed. Miscellaneous Petitions pending, if any, shall stand disposed of. There shall be no order as to costs.

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2017 (2) L.S. (Hyd.) 350

HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Present:
The Hon'ble Mr.Justice
A. Ramalingeswara Rao

Moghal Sardar Hussain Baig
Markapur, Prakasam Dt ...Petitioners
Vs.
Syed Farveej Begum,
Chennai ..Respondent

REGISTRATION ACT, 1908, Sec.49 - Suit was filed by petitioner before Principal Junior Civil Judge, for permanent injunction restraining respondent from ejecting petitioner from plaint schedule premises until expiry of term of lease under an agreement – When petition for grant of temporary injunction was coming up for enquiry, petitioner tried to mark lease agreement and respondent objected to the same on ground that said lease agreement was inadmissible in evidence as it is unregistered one.

Petitioner contended that though it is an unregistered lease agreement, it can be looked into for collateral purpose for proving possession and nature of possession – But, respondent objected on ground that unregistered lease agreement is inadmissible in evidence even for collateral purpose of proving possession as factum of lease being contentious issue – Trial Court upheld objection on ground that lease agreement was unregistered – Hence, this Civil Revision Petition.

Held – Unregistered document can be used as an evidence of collateral purpose as provided in proviso of Section 49 of Registration Act - Order of Lower Court is set aside and CRP is allowed for permitting petitioner to produce document for collateral purpose.

Cases referred:
1. 1969 Law Suit (SC) 581 = 1969 (1) UJ 86 = 1969(1) SCWR 341
2. (1984) 1 SCC 369 = AIR 1984 SC 143
3. 2004(3) ALD 817 (DB)
4. 2008(6) ALD 92 (SC)
5. 2012(6) ALD 163
6. (2015) 16 SCC 787
7. 2017 (1) ALT 299
8. 2017(1) LS (Hyd) 325
9. AIR 1969 AP 242
10. 2000(2) ALD 30 = 2000 (1) ALT 568
11. 2000(5) ALD 577 = 2000(5) ALT 561

Mr.Namavarapu Chanti Babu, Advocate for the Petitioner.
Mr.Challa Sivasankar, Advocate for the Respondent.

O R D E R

Heard learned counsel for the petitioner and learned counsel for the respondent.

This Civil Revision Petition arises out of an order in I.A.No.1670 of 2016 in O.S.No.298 of 2016 dated 19.01.2017 passed by the learned Principal Junior Civil Judge, Markapur.

The petitioner is the plaintiff in the suit, whereas the respondent is the defendant. The suit was filed for permanent injunction restraining the respondent from ejecting the petitioner from the plaint schedule premises until the expiry of term of lease under an agreement dated 04.04.2016. When the petition for grant of temporary injunction was coming up for enquiry, the petitioner tried to mark the said agreement dated 04.04.2016 which was a lease agreement and the respondent objected to the same on the ground that the said lease agreement was inadmissible in evidence as it is an unregistered one. The petitioner stated that though it is an unregistered lease agreement, it can be looked into for collateral purpose for proving possession and nature of possession. But, the respondent objected on the ground that the unregistered lease agreement is inadmissible in evidence even for collateral purpose of proving possession as the factum of lease being the contentious issue. Hence the lease agreement cannot be marked and it cannot be looked into even for collateral purpose as the main suit itself is based on the terms of the lease. The trial Court upheld the objection on the ground that the lease agreement was unregistered. Challenging the said order, the above CRP was filed.

Learned counsel for the petitioner by relying on the decisions reported in RANA VIDYA BHUSHAN SINGH V. RATIRAM(1) , SATISH CHAND MAKHAN V. GOVARDHAN DAS BYAS (2)AND A. KISHORE @ KANTHA RAO V. G. SRINIVASULU(3) contended that the lease deed is admissible in evidence for collateral purpose of proving possession and nature of possession, though not for proving the terms of the lease deed and hence the order passed by the trial Court is erroneous.

Learned counsel for the respondent submitted that the lease deed cannot be looked into even for collateral purpose and relied on the decisions reported in Satish Chand Makhan v. Govardhan Das Byas (supra), K.B. SAHA AND SONS PVT. LTD., V. DEVELOPMENT CONSULTANT LIMITED(4)K. RAMAMOORTHI V. C. SURENDRANATHA REDDY (5), YELLAPU UMA MAHESWARI V. BUDDHA JAGADHEESWARA RAO(6), VYASASHRAMAM, AMANDURU VILLAGE V. CHUNDURU BHOOSHANA KUMARI (7) AND MODURABOINA DEEPIKA V. KUNA SUJATHA DEVI(8) .

Section 49 of the Registration Act, 1908, deals with the effect of unregistered documents which are required to be registered and the relevant provision reads as follows:

1. 1969 Law Suit (SC) 581 = 1969 (1) UJ 86 = 1969(1) SCWR 341
2. (1984) 1 SCC 369 = AIR 1984 SC 143
3. 2004(3) ALD 817 (DB)
4. 2008(6) ALD 92 (SC)
5. 2012(6) ALD 163
6. (2015) 16 SCC 787
7. 2017 (1) ALT 299
8. 2017(1) LS (Hyd) 325

49. Effect of non-registration of documents required to be registered:-

> (a).....
> (b).....
> (c be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:
>
> Provided that an unregistered document affecting immovable property and required by this Act, or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction nor required to be effected by registered instrument.

In CHINNAPPAREDDIGARI PEDDA MUTHYALAREDDY V. CHINNAPPA-REDDIGARI VENKATAREDDY(9) , the Larger Bench of this Court examined the effect of unregistered partition deed and held that an unregistered partition deed is inadmissible in evidence and cannot be looked into for the terms of partition but can be looked into for the purpose of establishing a severance in status.

The Honble Supreme Court in Rana Vidya Bhushan Singhs case (supra) had an occasion to consider an agreement which was unregistered and it was held that it would not create a right in favour of tenant for a period of fifteen years and it is inadmissible in evidence to support that claim. But in support of the plea that his possession was that of a tenant he was entitled to rely upon the recitals contained in that agreement of lease.

In Satish Chand Makhans case (supra) the Honble Supreme Court was examining the effect of unregistered draft lease agreement. It was held that though the unregistered draft lease agreement was ineffectual to create a valid lease for want of registration as required under Section 17(1)(d) of the Registration Act and was also inadmissible in evidence to prove the transaction of lease, but, it was admissible under the proviso to Section 49 of the Registration Act only for a collateral purpose of showing the nature and character of possession of the defendants. But in the said case it was held that the proviso was inapplicable as the terms of a lease are not a collateral purpose within its meaning.

In A. Kishore @ Kantha Raos case (supra) a Division Bench of this Court considered the decision of the Honble Supreme Court in Rana Vidya Bhushan Singhs case and other decisions while answering a reference made by a learned single Judge on the following question:

> Whether the document in question is admissible in evidence, for collateral purpose in the facts and circumstances of the case?

9. AIR 1969 AP 242

The facts in that case were also identical to the present case as it arose out of a suit for permanent injunction where a document, a deed of lease was pressed into service. An objection as to the registration was taken. A learned single Judge took note of the decisions in HUSSAIN BEGUM V. MADU RANGA RAO (10), RELANGI NAGESWARA RAO V. TATHA CHIRANJEEVA RAO(11) and Satish Chand Makhans case (supra) and opined that since such questions were cropping up off and on, it is better to pronounce authoritatively by the Division Bench. The Division Bench, after considering the decisions on the point, held that there is no judgment from the Apex Court which lays down that an unregistered lease deed which is compulsorily registerable cannot be admitted in evidence even for the purpose of proving the nature of possession. It was further held that though such lease deed cannot be used for the purpose of proving the terms of such lease or the lease itself, it can certainly be used for the purpose of proving the nature of possession and accordingly answered the reference.

Thus, the views expressed by the Honble Supreme Court and the Division Bench of this Court are in favour of the petitioner herein.

The decisions relied on by the respondent do not lay down a different point of view as noticed by our Division Bench in A. Kishore @ Kantha Raos case (supra). Satish Chand Makhans case (supra) was considered by the Division Bench. In K.B. Saha and Sons Pvt. Ltds case (supra) the Honble Supreme Court had an occasion to consider the effect of an unregistered lease agreement between the landlord and company for residential use of premises. The violation of Clause 9 of the lease deed was in issue as it provides for use of suit premises only for named officer of the company and since the decision of the case rested on the interpretation and application of the said term it was held that the said important term forming part of lease agreement cannot be looked into even for collateral purpose. The Supreme Court on the facts of the case held as follows:

21. From the principles laid down in the various decisions of this Court and the High Courts, as referred to hereinabove, it is evident that:

1. A document required to be registered is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the Proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction

10. 2000(2) ALD 30 = 2000 (1) ALT 568
11. 2000(5) ALD 577 = 2000(5) ALT 561

creating, etc. any right, title or interest in immoveable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose.

22. In our view, the particular clause in the lease agreement in question cannot be called a collateral purpose. As noted earlier, it is the case of the appellant that the suit premises was let out only for the particular named officer of the respondent and accordingly, after the same was vacated by the said officer, the respondent was not entitled to allot it to any other employee and was therefore, liable to be evicted which, in our view, was an important term forming part of the lease agreement. Therefore, such a Clause, namely, Clause 9 of the Lease Agreement in this case, cannot be looked into even for collateral purposes to come to a conclusion that the respondent was liable to be evicted because of violation of Clause 9 of the Lease Agreement. That being the position, we are unable to hold that Clause 9 of the Lease Agreement, which is admittedly unregistered, can be looked into for the purpose of evicting the respondent from the suit premises only because the respondent was not entitled to induct any other person other than the named officer in the same.

Since the interpretation of a particular Clause in the agreement of lease deed was involved, it was held that the said Clause cannot be looked into.

In K. Ramamoorthis case (supra) a learned single Judge of this Court elaborately considered several decisions touching upon the subject of collateral purpose and the effect of the proviso to Section 49 of the Registration Act arising out of a suit for permanent injunction based on a registered gift settlement deed and another suit for declaration and permanent injunction arising out of an unregistered sale deed. This Court ultimately held as follows:

24. On a compendious reference of the case law discussed above, the following conclusions emerge:

(i) A document, which is compulsorily registrable, but not registered, cannot be received as evidence of any transaction affecting such property or conferring such power. The phrase "affecting the immovable property" needs to be understood in the light of the provisions of Section 17(b) of the Registration Act, which would mean that any instrument which creates, declares, assigns, limits or extinguishes a right to immovable property, affects the immovable property.

(ii) The restriction imposed under Section 49 of the Registration Act

is confined to the use of the document to affect the immovable property and to use the document as evidence of a transaction affecting the immovable property.

(iii) If the object in putting the document in evidence does not fall within the two purposes mentioned in (ii) supra, the document cannot be excluded from evidence altogether.

(iv) A collateral transaction must be independent of or divisible from a transaction to affect the property i.e., a transaction creating any right, title or interest in the immovable property of the value of rupees hundred and upwards.

(v) The phrase "collateral purpose" is with reference to the transaction and not to the relief claimed in the suit.

(vi) The proviso to Section 49 of the Registration Act does not speak of collateral purpose but of collateral transaction i.e., one collateral to the transaction affecting immovable property by reason of which registration is necessary, rather than one collateral to the document.

(vii) Whether a transaction is collateral or not needs to be decided on the nature, purpose and recitals of the document.

25. Having culled out the legal propositions, the discussion on this issue will be incomplete if a few illustrations as to what constitutes collateral transaction are not enumerated as given out in Radhomal Alumal v. K.B. Allah Baksh Khan Jahi Muhammad Umar (AIR (29) 1942 Sind 27) and other Judgments. They are as under:

(a) If a lessor sues his lessee for rent on an unregistered lease which has expired at the date of the suit, he cannot succeed for two reasons, namely, that the lease which is registrable is unregistered and that the period of lease has expired on the date of filing of the suit. However, such a lease deed can be relied upon by the plaintiff in a suit for possession filed after expiry of the lease to prove the nature of the defendant's possession.

(b) An unregistered mortgage deed requiring registration may be received as evidence to prove the money debt, provided, the mortgage deed contains a personal covenant by the mortgagor to pay (See: Queen- Empress v Rama Tevan (92) 15 Mad. 253, P.V.M. Kunhu Moidu v T. Madhava Menon (09) 32 Mad.

410 and Vani v Bani (96) 20 Bom.553).

(c) In an unregistered agreement dealing with the right to share in certain lands and also to a share in a cash allowance, the party is entitled to sue on the document in respect of movable property (Hanmantapparao v Ramabai

Hanmant, (19) 6 AIR 1919 Bom. 38 = 21 Bom. L.R 716).

(d) An unregistered deed of gift requiring registration under Section 17 of the Registration Act is admissible in evidence not to prove the gift, but to explain by reference to it the character of the possession of the person who held the land and who claimed it, not by virtue of deed of gift but by setting up the plea of adverse possession (Varada Pillai v.

Jeevaratnammal (43 Madras 244 (PC).

(e) A sale deed of immovable property requiring registration but not registered can be used to show nature of possession (Radhomal Alumals case (supra), Bondar Singh v. Nihal Singh (AIR 2003 SC 1905) and A. Kishore @ Kantha Rao v. G. Srinivasulu (2004(3) ALD 817 (DB).

The above instances are only illustrative and not exhaustive. There may be many more situations where a transaction can be collateral to the transaction which affects the immovable property. The Courts will have to carefully decide on a case to case basis in the light of the legal principles contained in the above discussed and various other judgments holding the field.

A perusal of the above decisions shows that they support the case of the petitioner herein. The decision in Yellapu Uma Maheswaris case (supra) is also a case arising out of suit for partition and the opinion of the Honble Supreme Court is in tune with the opinion expressed by a Larger Bench of our High Court in Chinnappareddigari Pedda Muthyalareddys case (supra).

In Vyasashramams case (supra) the point did not arise and it is not relevant for the purpose of the present case. Moduraboina Deepikas case (supra) is a case arising out of declaration of title and delivery of possession. This Court considered the cases of Chinnappareddigari Pedda Muthyalareddys case (supra) and Yellapu Uma Maheswaris case (supra) and in the facts of that case held that the deed of partition and the sale deed are not admissible in evidence and cannot be relied upon even for collateral purposes. Since it was a decision rendered on the facts of that case and in the absence of any contrary to the view taken on the point of law, the principle laid down in the decisions cited by the petitioner are holding the field and, in view of the same, the document sought to be relied on by the petitioner can be looked into for collateral purpose.

Accordingly, the order of the lower Court in I.A.No.1670 of 2016 in O.S.No.298 of 2016 dated 19.01.2017 is set aside and the Civil Revision Petition is allowed for permitting the petitioner to produce the document for the purpose of collateral purpose. There shall be no order as to costs.

As a sequel thereto, the miscellaneous petitions, if any, pending in this Civil Revision Petition shall stand closed.

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2017 (2) L.S. (Hyd.) 357

HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Present:
The Hon'ble Mr.Justice
P. Naveen Rao

Mattam Ravi & Anr., ..Petitioners
Vs.
Mattam Raja Yellaiah & Ors., ..Respondents

INDIAN EVIDENCE ACT, Sec. 154 – Trial Court rejected application filed by petitioners on ground that invoking Sec.154 of Indian Evidence Act in civil cases is not permissible and that section is invariably invoked in criminal proceedings only.

Suit instituted before Additional Senior Civil Judge, praying to grant preliminary decree declaring that respondents are entitled to 5/6th share in suit schedule properties and to pass a final decree in terms of preliminary decree – DW2 filed chief affidavit supporting stand of petitioners but when he was cross-examined he deposed against his chief examination and supported respondents – Petitioners filed an application to declare DW2 hostile and permit them to cross-examine DW2 – Above application was dismissed, Hence this revision.

Held - A plain reading of Sec.154 Indian Evidence Act makes it clear that it does not make any distinction between civil and criminal cases and it only vests discretion in Court to permit the person, who calls a witness, to put any question which can be put in cross-examination by adverse party – Permission under this section can be sought before evidence of witness is concluded – Scope of exercise of discretion by trial court under this section are on merits of plea – Reasons assigned for rejection by trial court were erroneous, but refusal to permit petitioners to call DW2 to witness box for cross-examination is upheld – Civil Revision Petition is dismissed.

Cases referred:
1.(1969) 1 ALT 32
2.1996 (3) ALT 1019
3.AIR 1964 SC 1563
4.(2012) 4 SCC 327
5.(1976) 1 SCC 727
6.(2001) 2 SCC 205
7.(1976) 4 SCC 233

Mr.B.Ranganatha Rao, Advocate for the petitioners.
Mr.P.Hari Prasad, Advocate for the Respondents.

O R D E R

O.S.No.347 of 2009, on the file of II Additional Senior Civil Judge, Warangal, is instituted praying to grant preliminary decree declaring that the plaintiffs are entitled to 5/6th share in item Nos.1 to 4 of the suit schedule properties and to pass

CRP.Nos.348/17 Date: 23-6-2017

a final decree in terms of the preliminary decree. Defendants 1 and 2 filed I.A.No.720 of 2016 to summon DW.2, namely, Chilpuri Shekaraiah @ Srekaraiah, S/o Mallaiah r/o. Veluru Village, Dharmasagar Mandal, Warangal District to declare him hostile and to cross- examine him by the defendants. The said application was dismissed by the learned II Additional Senior Civil Judge on 11.11.2016, impugned in this revision.

2. The averments made in the affidavit filed in I.A.No.720 of 2016 would disclose that DW.2 filed chief affidavit on 26.08.2016 supporting the stand of the defendants. When he was cross- examined by the plaintiffs, he deposed against his chief-examination and supported the plaintiffs. The defendants, therefore, prayed to declare him hostile and to permit to cross-examine him. The said plea of the petitioners was opposed by the respondents/plaintiffs. According to them, in order to divert the issue and to create a false story contrary to the record, chief- examination affidavit was filed on behalf of DW.2. They have also opposed the plea to declare the witness as hostile.

3. Trial Court rejected the said application on the ground that invoking Section 154 of the Indian Evidence Act in civil cases is not permissible and that Section is invariably invoked in criminal proceedings only. Trial Court held that decision relied by the petitioners is not relevant for the civil cases. Aggrieved thereby, this revision is filed.

4. Heard Sri B.Ranganatha Rao, learned counsel for petitioners and Sri. Podila Hari Prasad, learned counsel for respondent no.2.

5. Learned counsel for petitioners contends that the trial Court erred in dismissing the application on the ground that provision in Section 154 of the Indian Evidence Act is not attracted to civil cases. According to the learned counsel, when a wrong deposition was given in cross-examination by the defense witness, opportunity should be given to the defendants to further cross-examine the said witness, who turned hostile and denial of the same would amount to denying the opportunity to rebut the allegations of the plaintiffs. He further submits that even assuming that Section 154 of the Indian Evidence Act is not attracted the trial Court has got inherent powers under Section 151 of Civil Procedure Code. The application is filed both under Section 154 of the Evidence Act and Section 151 of Civil Procedure Code and by exercising inherent powers under Section 151 to do complete justice, the trial Court ought to have allowed the application filed by the petitioners/defendants.

6. Learned counsel for respondents/plaintiffs opposed the claim of the petitioners. According to the learned counsel, application is not filed in a bona fide manner to elicit the information to support the stand of the petitioners. This application is filed to drag on the litigation. The suit is of the year 2009 and is at the stage of trial and petitioners are dragging the matter on one pretext or the other. He, therefore, submits that petitioners lack bona fides and that trial Court rightly dismissed the said application.

7. The issues for consideration in this revision are:

> (1) Whether Section 154 of the Indian Evidence Act is applicable only to criminal proceedings and has no application to the civil cases as held by the trial Court?; (2) In what circumstances the trial Court can grant such permission? and (3) to what relief ?
>
> 8.1. Section 154 of Indian Evidence Act reads as under: S.154. Question by party to his own witness :-- The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

8.2. A plain reading of the section makes it clear that it does not make any distinction between civil and criminal cases. It only vests discretion in the Court to permit the person, who calls a witness, to put any question which can be put in cross-examination by the adverse party. Such a request can be made in civil as well as in criminal cases. What is required to be considered is when such a request should be made and how such wide discretion vested in the Court ought to be exercised by the Court.

9. Though on a bare look at the provision, it does not appear to impose any fetters on both aspects, wealth of precedents on Section 154 illuminate path on which trial Court can tread and examine the claims made under Section 154. Having regard to narrow and pedantic view adopted by trial Court, I deem it proper to consider few precedent decisions touching various aspects of Section 154.

9.1. In B.N.CHOBE V. SAMI AHMED(1) , Justice Gopal Rao Ekbote, as he then was succinctly delineated the scope and width of Section

154. Learned Judge pleased to hold that hostility may appear either during the examination-in-chief or the cross-examination. But, permission must be obtained during the course of the examination of the witness and before it includes. Even a one day delay in making a request would defeat the very object of Section

154. Learned Judge reasoned that on such delay, it is not possible to the trial Judge to recollect the demeanor of the witness and to remember whether his attitude was hostile. No formal written application is necessary and an oral request is sufficient for the trial Judge to consider.

9.2. This Court held:

> ..To me, it seems clear that Section 154 applies when the witness is under examination. Such a permission can be sought and granted during the examination-in-chief or at the stage of cross-examination or perhaps there may be cases even where he is under re-examination. In any case, however, before his evidence is concluded, his hostility must be brought to the notice of the Court and the permission sought to put questions in cross

1.(1969) 1 ALT 32

examination by the party who happens to produce him. If this procedure is not followed and an application is filed on a subsequent date before altogether a new Judge, as is the case here, I do not think such an application can be granted.

9.3. In Y.SYAMALAMMA V. KAMALAMMA (2) , trial Court held that Section 154 is not attracted in civil cases. Learned single Judge is pleased to hold as under:

> 12. On a reading of the provision and the various decisions of several Courts on this aspect, I am inclined to say, there is no embargo to cross-examine a witness by the party who calls the witness even in civil proceedings. The provision Under Section 154 of the Evidence Act does not distinguish between civil and criminal proceedings. What all the provision postulates is that a party could be permitted to cross-examine his own witness if such witness has exhibited an element of hostility and the Court must satisfy itself as to whether such cross-examination could be permitted or not. The words so used in the provision are "The Court, may, in its discretion permit the person to put any question....." Legislature has guardedly used the word "may" while giving discretion to the Courts to grant permission or not. The Court must satisfy itself on the question of permitting a party to cross-examine his own witness. This permission, however, is not as a matter of right Therefore, it is clear mat there is no embargo in the provision Under Section 154 of the Evidence Act to restrict the benefit of cross- examination of one's own witness only to criminal proceedings.

9.4. In DAHYABHAI CHHAGANBHAI THAKKER V. STATE OF GUJARAT(3) , Supreme Court delineated the scope of Section 154. It held:

> 14. .Section 154 does not in terms, or by necessary implication confine the exercise of the power by the court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the court to exercise the power when the circumstances demand. To confine this power to the stage of examination-in-chief is to make in ineffective in practice. A clever witness in his examination-in-chief faithfully conforms to what he stated earlier to the police or in the committing court, but in the cross-examination introduces statements in a subtle way contradicting in effect what he stated in the examination-in-chief. If his design is obvious, we do not see why the court cannot, during the course of his cross-examination, permit the person calling him as a witness to put questions to him which might be put in cross-examination by the adverse party. To confine the operation of s. 154 of the Evidence

2.1996 (3) ALT 1019

3.AIR 1964 SC 1563

Act to a particular stage in the examination of a witness is to read words in the section which are not there. We cannot also agree with the High Court that if a party calling a witness is permitted to put such questions to the witness after he has been cross-examined by the adverse party, the adverse party will not have any opportunity to further cross-examine the witness on the answers elicited by putting such questions. In such an event the court certainly, in exercise of its discretion, will permit the adverse party to cross-examine the witness on the answers elicited by such questions. The court, therefore, can permit a person, who calls a witness, to put questions to him which might be put in the cross-examination at any stage of the examination of the witness, provided it takes care to give an opportunity to the accused to cross-examine him on the answers elicited which do not find place in the examination-in-chief. (emphasis supplied)

9.5. In BHAJJU @ KARAN SINGH V. STATE OF M.P.(4) Supreme Court observed:

> 19. .. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross- examination by the adverse party. The view that the evidence of the witness who has been called and cross- examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law.

9.6. In SAT PAUL V. DELHI ADMN(5). , Supreme Court extensively dealt with the terms hostile, adverse and unfavorable witnesses, the object of the provisions of the Evidence Act and the distinction between English Law of Evidence and Indian Law. Supreme Court held:

> 38. To steer clear of the controversy over the meaning of the terms hostile witness, adverse witness, unfavourable witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that, in India, the grant of permission to cross- examine his own witness by a party is not conditional on the witness being declared adverse or hostile. Whether it be the grant of permission under Section 142 to put leading questions, or the leave under Section 154 to ask questions which might be put in cross- examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court (see the observations of Sir Lawrence Jenkins in Baikuntha Nath v. Prasannamoyi [AIR 1922 PC 409 : 72 IC 286]). The discretion conferred by Section 154 on the court is unqualified and untrammelled, and is

4.(2012) 4 SCC 327

5.(1976) 1 SCC 727

> apart from any question of hostility. It is to be liberally exercised whenever the court from the witnesses' demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness. Therefore, in the order granting such permission it is preferable to avoid the use of such expressions, such as declared hostile, declared unfavourable, the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English courts.

(emphasis supplied)

9.7. In GURA SINGH V. STATE OF RAJASTHAN(6), Supreme Court cleared the misconception on the efficacy of the testimony of a witness declared hostile. After extensively referring to precedent decisions, Supreme Court held:

> 11. There appears to be a misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration..
>
> 12. The terms hostile, adverse or unfavourable witnesses are alien to the Indian Evidence Act. The terms hostile witness, adverse witness, unfavourable witness, unwilling witness are all terms of English law. The rule of not permitting a party calling the witness to cross-examine are relaxed under the common law by evolving the terms hostile witness and unfavourable witness. Under the common law a hostile witness is described as one who is not desirous of telling the truth at the instance of the party calling him and an unfavourable witness is one called by a party to prove a particular fact in issue or relevant to the issue who fails to prove such fact, or proves the opposite test. In India the right to cross-examine the witnesses by the party calling him is governed by the provisions of the Indian Evidence Act, 1872. Section 142 requires that leading question cannot be put to the witness in examination-in-chief or in re-examination except with the permission of the court. The court can, however, permit leading question as to the matters which are introductory or undisputed or which have, in its opinion, already been sufficiently proved. Section 154 authorises the court in its discretion to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. The courts are, therefore, under a

6.(2001) 2 SCC 205

> legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Permission for cross-examination in terms of Section 154 of the Evidence Act cannot and should not be granted at the mere asking of the party calling the witness.

(emphasis supplied)

9.8. In RABINDRA KUMAR DEY V. STATE OF ORISSA(7) , Supreme Court explained how to exercise discretion vested in the trial Court under Section 154 of the Evidence Act. Supreme Court observed:

> 11. It may be rather difficult to lay down a rule of universal application as to when and in what circumstances the court will be entitled to exercise its discretion under Section 154 of the Evidence Act and the matter will largely depend on the facts and circumstances of each case and on the satisfaction of the court on the basis of those circumstances. Broadly, however, this much is clear that the contingency of cross-examining the witness by the party calling him is an extraordinary phenomenon and permission should be given only in special cases. It seems to us that before a court exercises discretion in declaring a witness hostile, there must be some material to show that the witness has gone back on his earlier statement or is not speaking the truth or has exhibited an element of hostility or has changed sides and transferred his loyalty to the adversary. Furthermore, it is not merely on the basis of a small or insignificant omission that the witness may have made before the earlier authorities that the party calling the witness can ask the court to exercise its discretion. The court, before permitting the party calling the witness to cross-examine him, must scan and weigh the circumstances properly and should not exercise its discretion in a casual or routine manner.
> (emphasis supplied)

10. Principles deducible from the precedent decisions, noted above are as under:

> a) Permission under Section 154 can be sought before evidence of witness is concluded;
>
> b) Section 154 vests vide discretion in the Court to grant or refuse permission and it is an unqualified discretion.
>
> c) Such discretion should be liberally exercised whenever the Court, from the witnesses demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice.

7.(1976) 4 SCC 233

d) In Indian law, there is no scope to use words hostile and adverse, therefore, grant of permission to cross- examine his own witness by a party is not conditional on the witness being declared adverse or hostile.

e) While granting permission under Section 154, Court should avoid use of expression as declared hostile and declared un-favorable.

f) Section 154 authorizes the Court, in its discretion, to permit the person who calls a witness to put any question to him which might be put in cross examination by the adverse party.

g) The Courts are under a legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Such permission should not be granted at the mere asking of the party calling the witness.

h) Contingency as provided by Section 154 is extraordinary phenomenon and permission should be given only in special cases. There must be some material to show that the witness has gone back on his/ her earlier statement or is not speaking the truth or has exhibited an element of hostility or has changed sides and transferred his loyalty to the adversary. The Court must ignore small or insignificant omission. Court must scan and weigh the circumstances properly and should not exercise its discretion in a casual or routine manner.

i) Under Section 154, it is not necessary to file a formal application and oral request can be made during the cross examination or re-examination or immediately after the conclusion of the examination of witness.

11. Having regard to the language employed in Section 154 of the Indian Evidence Act and the law laid down in precedent decisions, few of which are noted above, it is beyond pale of doubt that the trial Court grossly erred in dismissing the application only on the ground that Section 154 is not attracted to Civil cases and erred in not applying its mind to the facts on record and to come to appropriate conclusion on the prayer of petitioners.

12. Having regard to the parameters laid down by the precedent decisions referred to above on the scope of exercise of discretion by the trial Court under Section 154, heard learned counsel for petitioners on the merits of the plea.

13. Learned counsel for the petitioner contends that no request could be made immediately after the closure of cross-examination of Dw.2, as the counsel was not present at the time of closure of evidence as he was engaged before another Court. Thus, the moment the counsel realized that

the evidence given by DW.2 was contrary to what was deposed in his chief-affidavit, the party was advised to file petition for declaring DW.2 as hostile and to cross-examine him. The time taken thereafter was only to ensure filing of affidavit and petition by the party.

14. Learned counsel for the petitioners submits that on 08.09.2016, after closing of cross-examination of DW.2, matter was adjourned for further defence evidence to 20.09.2016 and on a request made on behalf of the petitioner, on payment of costs, adjournment was granted to 27.09.2016. On 27.09.2016 petitioners filed I.A.No.720 of 2016.

15. On these adjournments, learned counsel for the petitioners submits that the delay occurred only to secure presence of the party and to file affidavit and it was not deliberate and wilful and in the peculiar facts of the case, the delay of 20 days cannot be treated as inordinate delay, in order to deny the genuine claim of the petitioner to cross-examine the defence witness No.2 having regard to his deposition in chief-examination and taking contrary stand in cross-examination.

16. The affidavit filed in support of the said I.A., makes bald assertion that DW-2 turned hostile, deposed against chief- examination, colluded with the plaintiff and, therefore, to summon him to declare him as hostile and permit to cross examine him. No details are furnished as to in what context and how DW-2 resiled from his earlier statement and such statements made are against the petitioners.

17. It is not in dispute that after conclusion of cross-examination and before closure of evidence of DW.2 or immediately thereafter, no request was made to permit the petitioner to cross-examine DW.2. The application was filed after two adjournments and after 20 days of the closure of the evidence of DW.2. Though learned counsel for the petitioner made vain attempt to explain the delay, neither in the affidavit filed in support of I.A.No.720 of 2016 nor in the grounds urged in the Revision, no such explanation was given.

18. As seen from the principles laid down in the precedent decisions, though the discretion of the trial Court is wide under Section 154, each application requires consideration, in the facts of the given case. As succinctly put by this court in B.N.Chobe (supra), request for putting questions by a person who calls a witness, as can be put by adverse party in the cross-examination, ought to be made during the course of the examination of the witness and before the examination is concluded, but not after words. Even one day delay after conclusion of recording of evidence of the concerned witness is fatal. Demeanor/hostility of the witness should be apparent either during the examination-in- chief or in the cross-examination or further examination and it is only then the question of permission by the Court to put questions in cross examination by the party, to his witness can arise. There must be sufficient material to show that the witness has gone back on his earlier deposition, Court must scan and weigh the circumstances properly and

should not exercise discretion in casual or routine manner. Such assessment may not be possible if such request is made after closure of the evidence and after some delay, as in this case. In B.N.Chobe, the evidence was closed on 16.12.1965, whereas application was filed on 9.1.1966. Having regard to the facts of the case and the delay in filing such application, the decision of the trial Court in rejecting the request for recalling the witness under Section 154, was upheld by this Court. The principle laid down therein would also equally apply to the facts of this case.

19. Further, in B.N.Chobe, on the conclusion of the evidence of P.W.3, plaintiff expressed his intention to file an application to treat P.W.3 as hostile. This Court held that mere declaration of intention that he would intend to file an application to treat the witness as hostile without asking the Court for permission to cross examine his witness would not attract the provisions of Section 154 of the Evidence Act. In the case on hand, even such a request was not made immediately after the closure of evidence. After the closure of evidence of DW.2, two adjournments were sought to bring further evidence.

20. Having regard to the above assessment of the facts of the case and law, though the Court is of the opinion that the reasons assigned for rejection by the trial Court were erroneous, refusal to permit the petitioners to call DW.2 to the witness box for cross- examination is upheld. The points in issue are answered accordingly,

21. Accordingly, the Civil Revision Petition is dismissed. Miscellaneous petitions, if any, pending in this revision petition shall stand closed. There shall be no order as to costs.

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2017 (2) L.S. (Hyd.) 366

HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Present:
The Hon'ble Mr.Justice
M. Satyanarayana Murthy

Ekkaladevi Devaiah ..Petitioner

Vs.

Bojja Laxmi & Ors., ..Respondents

CIVIL PROCEDURE CODE, Or.IX, Rule 13 & Order VII, Rule 2 – CONSTITUTION OF INDIA, Art.227 - Revision Petitioner filed suit for partition before Junior Civil Judge – R1 and R6 contested suit, whereas other respondents were set ex parte - During trial PW1 and PW2 were examined on behalf of petitioner but they were not cross-examined by counsel of R1 and R6 – Court passed ex parte Decree in favour of petitioner.

R1 filed an I.A. to set aside ex parte preliminary decree, contending that delay was due to back ache and spondylitis and she could not contact her counsel as she was advised to take

rest for a period of six months by her doctor –Trial Court dismissed the petition – Aggrieved by that Order, R1 preferred an appeal before Senior Civil Judge - Appellate Court held that preliminary decree passed is maintainable while setting aside order of I.A. and restored I.A. to its original number directing trial court to dispose of petition within two months – Aggrieved by Order of appellate court, petitioner preferred this civil revision petition.

Held – Trial Court was wrong in appreciating facts and law by ignoring state amendment to Rule 3 of Order XVII of CPC – Decree and Judgment passed by trial court are only ex parte decree and judgment in terms of Rule 2 of Order XVII, CPC and there by petition under Rule 13 of Order IX of CPC is maintainable – High Court cannot exercise power under Article 227 to interfere with findings recorded by Appellate Court – Civil Revision Petition is dismissed.

Cases referred:

1.1996(4) ALT 129
2.1997(4) ALT 77
3.2012(1) ALD 114
4.2013(6) ALT 169
5.AIR 2007 Uttaranchal 10
6.1977 M.P.H.C. 1 F.B.
7.2013(4) CCC 122 (Ori.)
8.AIR 1987 SC 42
9.1997 (4) ALT 77
10. 2013(4) ALD 72
11. 2000(2) ALD 565
12. AIR 2003 SC 3527
13. AIR 2002 SC 2436
14. 2013(6) ALD 499
15. 2008(5) ALD 333

Mr.P.V.Narayana Rao, Advocate for the petitioner.
Mr.M.Raja Malla Reddy, Advocate for the Respondent.

O R D E R

The first respondent in CMA No.5 of 2010 on the file of Senior Civil Judge, Siricilla, who is the plaintiff in O.S. No.44 of 2008, filed this revision petition under Article 227 of the Constitution of India challenging the Order dated 08.04.2011 in CMA No.5 of 2010, whereby the learned Senior Civil Judge allowed the CMA while setting aside the order dated 04.10.2010 in I.A. No.107 of 2010 in O.S. No.44 of 2008 passed by the Junior Civil Judge, Vemulawada.

The revision petitioner was the plaintiff in O.S. No.44 of 2008 and 1st respondent in I.A. No.107 of 2010, whereas the first respondent herein was the 6th defendant in O.S. No.44 of 2008 and the petitioner in I.A. No.107 of 2010 and respondents 2 to 6 were the defendants 1 to 5 in O.S. No.44 of 2008. But to avoid confusion in referring the parties, they will hereinafter be referred to as the revision petitioner and respondents as arrayed in the civil revision petition, for convenience sake.

The revision petitioner filed suit in O.S. No.44 of 2008 for partition and other consequential reliefs before the Junior Civil Judge, Vemulawada, Karimnagar District. Respondents 1 and 6 contested the suit appearing through their counsel and filed written statement, whereas the other

respondents were set exparte. During trial, P.Ws.1 and 2 were examined on behalf of the plaintiffs, but they were not cross-examined by the counsel for respondents 1 and 6 herein. Later the matter went on several adjournments, but neither the first respondent nor his counsel turned up, to cross-examine P.Ws.1 and 2 and to adduce evidence on behalf of respondents 1 and 6. Thereupon the court passed the decree on 17.03.2016.

Later on, the first respondent filed I.A. No.107 of 2010 under Rule 13 of Order IX of the Code of Civil Procedure, 1908 (for short CPC) to set aside ex parte preliminary decree, explaining the delay contending that during first week of October 2009 she suffered from severe back ache and spondylosis. As per the advise of the Doctor, she has taken bed rest for about six months, thereby she could not contact her counsel to know the stage of suit and the counsel also could not cross-examine P.Ws.1 and 2 and other witnesses produced by the plaintiff, who is the revision petitioner herein, due to lack of instructions as she was completely on bed she could not file affidavit in lieu of examination-in-chief and tender herself to cross-examine her by the adversary, examining any witness before the court. Therefore, she was prevented by a cause which is beyond her reasonable control i.e. back ache and spondylosis and thereby preliminary decree passed by the trial court is an ex parte decree and prayed to set aside the ex parte decree.

The revision petitioner filed counter denying the material allegations inter alia contending that his affidavit in lieu of examination-in-chief was filed on 09.11.2009 and thereafter documents were marked as Exs.A.1 to A.15 and the suit was adjourned for his cross-examination by the counsel for respondents 1 and 5, but they failed to cross-examine the petitioner. Later, he filed affidavit in lieu of examination-in-chief of P.W.2 under Rule 4 of Order XVIII of CPC. He was also not cross- examined inspite of granting several adjournments. Ultimately the cross-examination of P.W.2 was also closed and the suit was adjourned for defendants evidence. But respondents 1 and 6 did not examine any witness and the matter was heard on 15.03.2010, pronounced the judgment on 17.03.2010 passing the preliminary decree, on merits. Therefore, the decree passed on merits cannot be set aside and the petition under Rule 13 of Order IX of CPC is not maintainable. It is also contended that the allegations that she suffered from backache and spondylosis during the first week of October 2009 and took bed rest on the advise of doctor for a period of six months and thereby she could not contact her counsel are all false and that the docket proceedings of the suit would disclose the tactics adopted by the petitioner in protracting the trial of suit thereby the court cannot exercise its discretion, set aside the ex parte decree exercising power under Rule 13 of Order IX of CPC. The allegations made in the affidavit filed along with petition are concocted and invented for the purpose of the petition and they are all false, finally prayed to dismiss the petition.

The trial court upon hearing argument of both the counsel dismissed the petition holding that the suit was disposed of on merits. On account of failure of respondents 1 and 6, P.Ws.1 and 2 were not cross-examined and did not adduce any evidence.

Aggrieved by the order dated 04.10.2010 in I.A. No.107 of 2010, the first respondent herein preferred the appeal, in CMA No.5 of 2010 on the file of Senior Civil Judge at Siricilla, under Rule 1 of Order XLIII of CPC. The appellate court, upon hearing argument of both the counsel, based on the principle laid down by this Court in GALLA LAXMAMMA V. REPARTHI ANJAIAH(1) and RAJU KUMAR AND ANOTHER V. G.ANASUYA(2) concluded that the preliminary decree passed under Rule 13 under VIII of CPC is maintainable while setting aside the order dated 04.10.2010 in I.A. No.107 of 2010 in O.S. No.44 of 2008 passed by the Junior Civil Judge at Vemulawada and restored the I.A. to its original number directing the learned Junior Civil Judge to dispose of the petition within two months from the date of receipt of this order.

Aggrieved by the order dated 08.04.2011 in CMA No.5 of 2010, the present civil revision petition under Article 227 of Constitution of Indian is filed raising several contentions mainly on the ground that on account of conduct of respondents 1 and 6 herein to cross-examine the witnesses and did not adduce evidence on their behalf; the trial court was forced to pass the preliminary decree on merits, but it would fall within the Rule 3 of Order XVII of CPC, not under Rule 2 of Order XVII of CPC and the appellate court without considering the explanation annexed to Rule 3 of Order XVII of CPC, erroneously allowed the CMA, thereby committed illegality in allowing the petition reversing the order passed by the trial court. It is further contended that the preliminary decree passed by the trial court is not an ex parte decree, but on merits, thereby the petition under Rule 13 of Order IX of CPC is not maintainable, the said fact was not considered by the appellate court in proper perspective. The appellate court also failed to take into consideration, the conduct of the first respondent in prosecuting the proceedings, more particularly, non-payment of costs imposed by the trial court on 08.02.2010 for obtaining adjournments one after the other, to protract the matter at considerable length of time. When the first respondent failed to comply the conditional order for payment of costs, the court has no alternative except to accept the contention of the revision petitioner, but the appellate court on erroneous appreciation of facts allowed the petition setting aside the order dated 04.10.2010 in I.A. No.107 of 2010 in O.S. No.44 of 2008 passed by the Junior Civil Judge and prayed to set aside the same.

During hearing, Sri P.V.Narayana Rao, learned counsel for the revision petitioner, contended that when the matter was argued by the counsel for the first respondent, the decree cannot be described as an ex parte decree. Apart from that the trial court considered the entire material both documentary and oral evidence and arrived at the conclusion that the petitioner is entitled to a share in the property claimed in the plaint. He also produced a copy of docket proceedings to establish that the first respondent was guilty of negligence in prosecuting the proceedings, which disentitled him to claim any relief in the petition filed under Rule 13 of Order IX of CPC. It is also contended that when the court found substantial evidence to decide the real controversy between the parties as per the explanation to Rule 3 of Order XVII

1.1996(4) ALT 129
2.1997(4) ALT 77

of CPC, decided the matter on merits, cannot be faulted, consequently only appeal lies on preliminary decree, but the appellate court on erroneous appreciation committed grave error in allowing the CMA setting aside the order passed by the trial court.

In support of his contention placed reliance on several judgments of this court and other High courts. He has drawn the attention of this court to the judgments in M.RAMANJULU V. SAPPARAJU VENKATA SESHAIAH(3) , VELPURI KRISHNA RAO V. RANDHI SURYANARAYANA AND OTHERS(4) , STATE OF U.P. V. JAMAN SINGH AND ANR(5). , BUDHULAL KASTURCHAND V. CHHOTELAL AND OTHERS (6)AND FINALLY JITENDRA KUMAR CHOUDHURY V. BANKU SAHOO(7) . On the strength of the principles laid down in the judgments, he contended that the decree under challenge cannot be said to be ex parte decree to invoke jurisdiction under Rule 13 of Order IX of CPC to set aside the preliminary decree passed by the trial court. Therefore the appellate court did not follow the principles laid down by this court and other high courts in the judgments referred to above and prayed to set aside the order passed by the appellate court restoring the order passed by the trial court in I.A. No.107 of 2010 in O.S. No.44 of 2008.

The learned counsel for the first respondent while supporting the order under challenge, contended that when the first respondent failed to cross-examine P.Ws.1 and 2 and failed to adduce evidence, the course open to the court is to follow the procedure under Rule 2 of Order XVII of CPC and A.P. amendment to Rule 3 of Order XVII of CPC also directs the court to decide any such suit when the party did not produce evidence and contest the matter to decide such suit under Rule 2 of Order XVII of CPC. Therefore, the appellate court rightly held that it is only an ex parte decree and the petition under Rule 13 of Order IX of CPC is maintainable. In support of his contention he placed reliance on the judgment of the Apex Court in PRAKASH CHANDER MANCHANDA AND ANOTHER V. SMT.JANAKI MANCHANDA(8) , AND THE JUDGMENT OF THIS COURT IN RAJ KUMAR AND ANOTHER V. G.ANASUYA(9) MANDADI SRINIVASA RAO V. SHAIK MEHRUNNISA (10) AND DAKA VENKATRAMI REDDY V. CENTRAL BANK OF INDIA, ONGOLE(11) . Based on the principles propounded in the judgments referred to above, the decree can be treated as an ex-parte decree for all practical purposes. He also further contended that the first respondent never participated in the proceedings, though there is a reference about hearing of argument of counsel for the 1st respondent in the preamble of the judgment, it is a patent error in view of the observation of the trial court at last paragraph in page 5 of the judgment, since preamble is prepared by the stenographer.

On the other hand the docket proceedings produced before this court by the counsel for the revision petitioner herein also

3.2012(1) ALD 114
4.2013(6) ALT 169
5.AIR 2007 Uttaranchal 10
6.1977 M.P.H.C. 1 F.B.
7.2013(4) CCC 122 (Ori.)

8.AIR 1987 SC 42
9.1997 (4) ALT 77
10. 2013(4) ALD 72
11. 2000(2) ALD 565

disclosed that P.Ws.1 and 2 were not cross-examined despite imposing costs of Rs.50/- on 01.12.2009, Rs.100/- on 18.01.2010 and again on 08.02.2010. On any of the dates of the adjournments, the first respondent or his counsel appeared and prosecuted the proceedings, except one or two occasions, advancement of argument by the counsel for the first respondent is unbelievable and thereby hearing of arguments mentioned in the preamble cannot be accepted and as such the principle laid down in M.Ramanjulu v. Sapparaju Venkata Seshaiah (3rd supra) has no application to the present facts of the case and prayed to dismiss the revision petition affirming the order passed by the appellate court in CMA No.5 of 2010.

Considering rival contentions, the point that arose for consideration is;

Whether the Decree and Judgment dated 17.03.2010 passed by the Junior Civil Judge, Vemulawada, is an ex parte Decree and Judgment? If not, whether the petition under Rule 13 of Order IX of CPC is maintainable?

POINT:

The revision petitioner filed suit for partition against several defendants including the first respondent herein who was arrayed as 6th defendant in the suit. Respondents 2 to 5 remained ex parte. Respondents 1 and 6 alone contested the suit by filing written statement. But for one reason or the other, the counsel for the first respondent before this court did not cross-examine the witnesses, who were examined on behalf of the revision petitioner (P.Ws.1 and

2). Respondents 1 and 6 filed their written statement and the suit was posted for framing of issues on 19.04.2007, thereafter the matter was adjourned for more than 20 times for framing issues, finally on 02.02.2009 the trial court framed the issues, thereafter the suit was adjourned for about 8 times from 20.04.2009 to 03.11.2009; i.e., almost for a period of 7 months. On 09.11.2009 the affidavit of the plaintiff was filed under Rule 4 of Order XVIII of CPC in lieu of examination-in-chief, without serving any notice. On 13.11.2009 a copy of affidavit filed under Rule 4 of Order XVIII of CPC was served. On 23.11.2009 P.W.1 entered into witness box, Exs.A.1 to A.5 were marked and the matter was posted for the revision petitioner/plaintiffs further evidence. On 26.11.2009 affidavit of P.W.2 under Rule 4 of Order XVIII of CPC in lieu of examination-in-chief was filed and posted for cross-examination on 01.12.2009. However, he was absent on that day and adjourned the suit on payment of costs of Rs.50/- to 07.12.2009. Even on that day costs not paid and no representation for the revision petitioner/plaintiff and again adjourned to 14.12.2009. Even on that day he was absent, but filed a Memo informing that P.W.2 was suffering from paralysis, again filed another affidavit of P.W.2 by name Chinna Rajaiah under Rule 4 of Order XVIII of CPC on 02.01.2010, due to intervention of vacation, the matter was posted to 18.01.2010. Even on that day, P.W.2 was called absent and again adjourned on payment of costs of Rs.100/- to 29.01.2010. On 29.01.2010 P.W.2 was present, costs paid, and counsel for the revision petitioner/ plaintiff reported no further evidence, thereby, the revision petitioner/ plaintiffs evidence was closed. For defendants evidence the matter was posted to 08.02.2010. Curiously on 08.02.2010 there was no representation

on behalf of the defendants, but adjourned the suit on payment of costs of Rs.100/- to 15.02.2010, again 16.02.2010 and 22.02.2010. But there was no representation for one reason or the other on behalf of the defendants 5 and 6. The trial court on 02.03.2010 heard argument in the suit in part, again on 12.03.2010 heard in part, finally on 15.03.2010 hearing of argument in suit was concluded and pronounced judgment on 17.03.2010.

It is evident from the docket proceedings on various dates referred to above, it is clear that P.Ws.1 and 2 were not cross-examined by the counsel for respondents 1 and 6/ defendants 5 and 6 before the trial court and docket does not disclose whether P.Ws.1 and 2 were cross-examined by the counsel for the defendants or not? The court afforded more than four opportunities to the defendants to adduce evidence on their behalf. On one occasion due to abstaining courts by the Advocates, there was no representation, but on the other three occasions, none appeared and represented the matter on behalf of respondents 1 and 6/ defendants 5 and 6.

Based on the factual back ground referred to above, the first respondent contended that the decree passed by the trial court is only an ex parte decree under Rule 2 of Order XVII of CPC, but not the decree on merits. The trial court did not accept the contention. However, the appellate court accepted the contention and set aside the decree and judgment holding that the decree is only an ex parte decree, while holding the petition under Rule 13 of Order IX of CPC is maintainable. The counsel for the revision petitioner contended that though sufficient opportunity was afforded, the first respondent failed to adduce evidence. In such case, when sufficient evidence is available on record, the court can pass decree and judgment on merits in terms of the explanation to Rule 2 of Order XVII of CPC. Therefore, the decree and judgment passed by the trial court are only on merits not ex parte. In view of specific contention of the counsel for the revision petitioner, it is apposite to advert Rules 2 and 3 of Order XVII of CPC.

According to Rule 2 of Order XVII of CPC where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by order IX or make such other order as it thinks fit. But the explanation annexed to it clarified that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the court may, in its discretion, proceed with the case as if such party were present. Thus, it is clear from explanation when a substantial portion of the evidence of any party has already been recorded, the court can decide the matter on merits instead of proceeding under any one of the modes under order IX of CPC.

It is clear that in case where a party is absent only course is as mentioned in Order XVII Rule 3(b) to proceed under Rule 2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under Rule 2. Similarly the language used of Rule 2 as now stands also clearly lays down that if any one of the parties fails to appear, the Court has to proceed to dispose of the suit in one of the modes

directed under Order IX of CPC. The explanation to Rule 2 conferred discretion on the court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party who is absent, has led some evidence or has adduced substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been adduced up to that date the court has to option to proceed to dispose of the matter in accordance with Order XVII Rule 2 in any one of the modes prescribed under Order IX of CPC.

Here, the trial court proceeded to decide the matter on merits under Rule 3 of Order XVII of CPC as if there is substantial evidence on record adduced by the party who was absent i.e. defendants in the suit, but ignored A.P. amendment to Rule 3 of Order XVII of CPC. It is extracted hereunder:

Provided that in a case where there is default under this rule as well as default of appearance under Rule 2 the court will proceed under Rule 2. (27-04-1961).

Thus, from the Proviso annexed to Rule 3 of Order XVII of CPC by A.P. amendment, any default is committed by any of the parties either under Rules 2 or 3 of Order XVII of CPC, the court has to proceed under Rule 2 alone, but not under Rule 3.

For application of Rule 3 the following requisites are to be satisfied, namely:

(1) The hearing is adjourned on the application of a party to the suit, as distinguished from an adjournment by the court of its own motion;

(2) The hearing is adjourned on the application of the party who subsequently makes the default;

(3) The adjournment is granted to enable the party to produce his evidence or to cause the attendance of his witness, or to perform any other act necessary to the further progress of the suit; and the party fails to perform any of the acts for which the adjournment was granted within the time allowed by the court. In the end of Rule 3, in view of the addition of the wording the court may, notwithstanding under Rule 2 the distinction between Rules 2 and 3 is clear and the power to act as laid down therein is discretionary.

Rules 2 and 3 are not mutually exclusive. Amendment to Rule 3 now makes it clear that even in case of default within the meaning of Rule 3 there can be no decision on merits unless both the parties are present. In the absence of both or either, the court is to fall back upon Rule 2. Rule 2, no doubt still authorizes the court to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as thinks fit. But an explanation had been added to explain and guide what would be such other order. The guidelines incorporated is that the party absent shall not be treated as absent, but shall be deemed to be present if his evidence or the substantial portion of his evidence had already been recorded. The words to make such other order can no longer be interpreted to mean that the court would still be entitled to proceed under Rule 3 for the purpose of disposing of the suit on merits, in such a way as to deny the remedy under Order IX Rule 13 to the defendant, where he was absent and had not adduced any evidence earlier.

Therefore, to proceed under Rule 3 of Order XVII of CPC, the absent party must adduce evidence or substantial portion of the evidence. Otherwise the court cannot proceed under Rule 3 of Order XVII of CPC to decide the suit on merits. But A.P. amendment by way of Proviso to Rule 3 takes away the right of the court to decide on merits even under Rule 3 and the court is bound to proceed under Rule 2.

An identical question came up before the Apex Court in Prakash Chander Manchanda and another v. Smt.Janki Manchanda (8th supra). Wherein the Apex Court held as follows: "It is clear in cases where a party is absent only course is as mentioned in O.17(3)(b) to proceed under R.2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under R.2. Similarly the language of R.2 as now stands also clearly lays down that if any one of the parties fails to appear, the Court has to proceed to dispose of the suit in one of the modes directed under O.9. The explanation to R.2 gives a discretion to the Court to proceed under r.3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined up to that date the court has no option but to proceed to dispose of the matter in accordance with O.17 R.2 in any one of the modes prescribed under O.9 Civil P.C. It is therefore clear that after this amendment in O.17 R.2 and 3 Civil P.C. there remains no doubt and therefore there is no possibility of any controversy.

In B.JANAKIRAMAIAH CHETTY V. A.K. PARTHASARTHI AND ORS(12). the Apex court explained the scope of Rules 2 and 3 of Order XVII of CPC and the purpose for which the explanation to Rules 2 and 3 of Order XVII of CPC was added. The crucial expression in the explanation is, where the evidence or a substantial portion of the evidence of a party, there is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The court, while acting under the explanation, may proceed with the case, if that prima facie is the position. The court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision.

The discretion conferred under Rules 2 and 3 of Order XVII of CPC is that the power to proceed to decide on merits is permissive and not mandatory. The explanation to Rule 2 is in the nature of deeming provision, when under given circumstances, the absentee party is deemed to be present. Thus, the Apex court also laid down certain essential requirements to decide the matter on merits, exercising power under explanation to Rule 2 of Order XVII of CPC and observed that the explanation to Rule

12. AIR 2003 SC 3527

2 of Order XVII of CPC permits the court in its discretion to proceed with a case where substantial portion of evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned. As the provision itself shows, discretionary power given to the court to be exercised in a given circumstances. For application of the provision, the court has to satisfy itself that (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day: and (c) the day is one to which the hearing of the suit is adjourned.

Rule 2 permits the court to adopt any of the modes provided in Order IX or to make such order as he thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The explanation is in the nature of exception to the general power given under the Rule, conferring discretion on the court to act, under the specified circumstances. Therefore, there must be a substantial part of evidence on record of the defaulting party. In the present case, respondents 1 and 6/ defendants 5 and 6 absentee parties did not even cross-examine P.Ws.1 and 2 did not adduce any evidence on their behalf. In such case the trial court cannot exercise its discretion under explanation to Rule 2 of Order XVII of CPC in ignorance of A.P. amendment to Rule 3 of Order XVII of CPC, proceeded to decide the suit on merits. Therefore, the order under challenge is erroneous on the face of record and at best it can be treated as ex parte decree for all purposes as if the court proceeded under Rule 2 of Order XVII of CPC. In a similar situation, the Apex Court in MOHANDAS AND ORS., V. GHISIA BAI AND ORS(13). held that neither the plaintiff nor his witnesses were present on the date fixed by the court, suit has to be dismissed under Rule 2 of Order XVII of CPC. It is further observed that even Rule 3 of Order XVII of CPC itself provides that if the parties or any of them absent, the court shall proceed to decide the suit under XVII, Rule 2. The same analogy can be applied when the defendants failed to adduce evidence and proceed with the matter in the suit.

In MAILWAR NARSAPPA AND PENDYALA PRABHAKAR V. B.SANGAMMA(14) this Court held that though the defendant was absent and failed to adduce any evidence, such suit shall be disposed of in any of the modes under Order IX of CPC and such decree shall be deemed to have been an ex parte decree.

In MEKALA RAMASUBBAIAH V. POTULA YESEPU AND ORS(15)., this Court relying on the judgment of the Apex Court in Prakash Chander Manchanda and another v. Smt.Janaki Manchanda (8th supra), Galla Laxmamma v. Reparthi Anjaiah (1st supra) and Daka Venkatrami Reddy v. Central Bank of India, Ongole (11 supra) held that a decree passed in the absence of any of the parties who failed to adduce evidence or substantial portion of the evidence must be treated as an ex parte decree.

Learned counsel for the first respondent also placed reliance on the judgments of this court in Daka Venkatrami Reddy v. Central Bank of India, Ongole (11 supra), Raj Kumar and another v. G.Anasuya (9

13. AIR 2002 SC 2436
14. 2013(6) ALD 499
15. 2008(5) ALD 333

supra) and Mandadi Srinivasa Rao v. Shaik Mehrunnisa (10 supra) and the judgment of the Apex Court in Prakash Chander Manchanda and another v. Smt.Janaki Manchanda (8 supra). In these Judgments, the Apex Court and this court consistently took a view when default party failed to adduce any evidence or any substantial part of evidence, the court if passed the decree shall be deemed to be a ex parte decree and the petition under Rule 13 of Order IX of CPC is maintainable in such case.

In the instant case the trial court passed the judgment and decree discussing all the four issues at one stretch, while observing, at last paragraph of page 5, that inspite of taking several adjournments, respondents 1 and 6 failed to cross-examine P.Ws.1 and 2 and the court observed that though the counsel for respondents 1 and 6 received affidavits of P.Ws.1 and 2 filed under Rule 4 of Order XVIII of CPC, did not chose to cross-examine the witnesses. Therefore, cross-examination of P.Ws.1 and 2 treated as NIL and later the matter was adjourned for defendants evidence, but they did not adduce any evidence. Therefore, the defaulting parties are respondents 1 and 6 and when they did not adduce any evidence much less substantial portion of evidence, the court shall not proceed to decide the matter under Rule 3 of Order XVII of CPC invoking the explanation to Rule 2 of Order XVII of CPC, ignoring the AP amendment to Rule 3 of Order XVII of CPC to conclude that the decision is on merits. The trial court must advert to the various contentions raised in the written statement and the evidence if any and arrive at a conclusion recording specific finding on each issue. But here just extracted the evidence of P.Ws.1 and 2, making certain observation about the conduct of defendants 5 and 6, passed the Decree and Judgment in favour of the revision petitioner/plaintiff. Therefore, such decree and judgment are virtually ex parte decree and judgment and they cannot be treated as decree and judgment under Rule 3 of Order XVII of CPC in view of proviso added to the Rule 3 by A.P. amendment.

Sri P.V. Narayana Rao, learned counsel for the revision petitioner vehemently contended that the decree is only on merits, since the trial court heard arguments of the counsel for the defendants 5 and 6 and drawn the attention of this court to the preamble of the judgment.

The preamble of the Judgment was prepared by the Stenographer. The court itself recorded about the advancement of arguments of Sri G.Bhaskar Reddy, counsel for respondents 1 and 6/ defendants 5 and 6, in fact the preamble of the Judgment is not dictation of the Judge and in the entire judgment, the argument allegedly advanced by Sri G.Bhaskar Reddy was not referred and considered. Therefore, mere recording in the preamble that the argument of Sri G.Bhaskar Reddy, counsel for respondents 1 and 6/ defendants 5 and 6 was heard is not a ground. It would not change the nature of disposal i.e. ex parte decree and judgment. In M.Ramanjulu v. Sapparaju Venkata Seshaiah (3supra) this court, is of confirmed view that when he counsel advanced argument and participated in the trial and the same was recorded in the preamble of the judgment, the judgment shall be treated as judgment on merits, but not an ex parte judgment.

Here the very advancement of argument by Sri G.Bhaskar Reddy, counsel for respondents 1 and 6/ defendants 5 and 6 is false in view of docket proceedings produced by the counsel for the revision petitioner on various dates. From 26.11.2009 there was no representation on behalf of the parties and the docket is not clear whether Sri G.Bhaskar Reddy is the counsel for respondents 1 and 6/ defendants 5 and 6. Therefore, mere recording about hearing of counsel for defendants 5 and 6 in the preamble prepared by the stenographer is not sufficient to conclude that the counsel advanced argument. The counsel also relied on the Full Bench Judgment of Madya Pradesh High Court in Budhulal Kasturchand v. Chhotelal and Others (6supra), Jitendra Kumar Choudhury v. Banku Sahoo (7supra) and State of U.P. v. Jaman Singh and Anr. (5supra). In these judgments, the High courts held that when judgment was pronounced due to availability of substantial part of evidence, it can be treated as judgment on merits under Rule 3 of Order XVII of CPC, not an ex parte decree or judgment. But those judgments are not binding on this court, except persuasive value. In the States of Madya Pradesh, Uttaranchal and Orissa, there was no amendment identical to the A.P. amendment referred to supra to Rule 3 of Order XVII of CPC. But the law declared by in these Judgments is contrary to the law declared by the Apex Court referred supra. Therefore, the contention of the counsel for the revision petitioner that the judgment is on merits is without substance.

The trial court recorded that the defendants failed to pay costs, but non payment of costs by itself is not a ground to decide the suit on merits in view of sub-section (2) of Section 35-B of CPC which says that the costs, ordered to be paid under sub-section (1), shall not, if paid, be included in the costs awarded in the decree passed in the suit; but, if such costs are not paid, a separate order shall be drawn up indicating the amount of such costs and the names and addresses of the persons by whom such costs are payable and the order so drawn up shall be executable against such persons.

Thus, in view of sub-section (2) of Section 35-B of CPC, if the court imposed costs and the party failed to pay costs, it is the duty of the court to prepare a separate order, which is executable. Instead of following sub-section (2) of Section 35-B of CPC, the court decided the matter on merits without adverting to the contentions raised by respondents 1 and 6/ defendants 5 and 6. Therefore, the decree in O.S. No.44 of 2008 is only under Rule 2 of Order XVII of CPC, but not the decree under Rule 3 of Order XVII of CPC. In such case the respondents 1 and 6/ defendants 5 and 6 are entitled to move an application under Rule 13 of Order IX of CPC and if the court finds sufficient cause which prevented the respondents 1 and 6/ defendants 5 and 6 to appear and to adduce the evidence, the court can set aside the ex parte decree. Here the respondents 1 and 6/ defendants 5 and 6 explained the reason for his failure to adduce evidence, which is required to be considered by trial court, on its remand by the appellate court. Therefore the appellate court exercised its discretion in accordance with law. But the trial court on wrong appreciation of facts and law, in ignorance of the State amendment to Rule 3 of Order XVII of CPC by way of proviso, passed the order dated 04.10.2010 in I.A.

No.107 of 2010 in O.S. No.44 of 2008 which was set aside by the appellate court rightly.

In view of foregoing discussion, I hold that the decree and judgment passed by the trial court are only ex parte decree and judgment in terms of Rule 2 of Order XVII of CPC read with proviso to Rule 3 of Order XVII of CPC (AP amendment) and thereby the petition under Rule 13 of Order IX of CPC is maintainable. As such the appellate court rightly set aside the order passed by the trial court exercising its discretion and consequently I find no merits in the civil revision petition to exercise jurisdiction under Article 227 of Constitution of India which is supervisory in nature.

Article 227 of Constitution of India deals with power of superintendence by the High Court over all Subordinate Court and Tribunals. The power of superintendence conferred upon the High Court by Article 227 is not confined to administrative superintendence only, but includes the power of judicial revision also even where no appeal or revision lies to the High Court under the ordinary law, rather power under this Article is wider than that of Article 226, in the sense that it is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction and such power can also be exercised suo motu. It is a well settled principle that the High Court can exercise supervisory power under Article 227 of Constitution of India and interfere with the order in several circumstances, as held by the Apex Court in STATE (N.C.T. OF DELHI) V. NAVJOT SANDHU@ AFSAN GURU(16).

In view of the law laid down by the Apex Court, this Court cannot exercise its power under Article 227 of the Constitution of India though the order is wrong, since the power can be exercised only to keep the subordinate Courts and Tribunals within its bounds. Therefore, I am unable to exercise power under Article 227 of the Constitution of India to interfere with the findings recorded by the appellate court, since the appellate court acted within its bounds and passed the order, which is under challenge. Hence the civil revision petition deserves to be dismissed.

In the result, the civil revision petition is dismissed, confirming the order dated 08.04.2011 in CMA No.5 of 2010 passed by the Senior Civil Judge, Siricilla. No costs.

Miscellaneous petitions, if any, pending in this CRP shall stand closed.

--- END ---

16. (34) 2005 (3) ALT (Crl.) 125 S.C.

2017(2) L.S. (Madras) 59

IN THE HIGH COURT OF MADRAS

Present:
The Hon'ble Mr.Justice
S.Vaidyanathan

S.Gopinathpandian ..Petitioner

Vs.

The Inquiry Officer / Addl. Supdt. of Police, Dindigal & Ors., ..Respondents

INDIAN PENAL CO4DE, Secs. 392 & 395 - Writ Petition has been filed by petitioner seeking to quash impugned Order of 1st respondent, by which request of petitioner to engage a lawyer of his choice to defend him in departmental proceedings has been declined – On consent of counsels of both parties writ petition is taken up for final disposal at stage of admission itself.

Petitioner worked as Inspector of Police, and has been placed under suspension on account of registration of two criminal cases against him – Departmental enquiry has also been initiated for grave charges involving major penalties – Counsel for petitioner submitted that since charges leveled against petitioner are serious in nature, assistance of an advocate is required.

Held – Lawyer should be permitted to assist delinquent employee in a departmental proceeding, who had to face enquiry before a retired High Court Judge as well as before a legally trained person – In the present case, enquiry officer is a Law graduate and that cannot be a valid ground for seeking assistance of a lawyer to defend him in enquiry – If it is found that facts of cited Judgments of Higher Forum differs with the one on hand then there is no compulsion for Subordinate Courts to blindly rely on same to arrive at a conclusion - Writ petition dismissed.

Mr.R.Venkateswaran, Advocate Petitioner.
Mr.A.K.Baskara Pandian Spl.Govt.Pleader, Advocate for Respondents.

O R D E R

This petition has been filed, seeking to quash the impugned order of the 1st respondent dated 08.12.2016 passed in C.No.43/A/ADSP-PEW/DGL/2016, by which, the request of the petitioner to engage a Lawyer of his choice to defend him in the departmental proceedings has been declined. The petitioner also sought a direction to the 1st respondent to permit him to engage a lawyer to defend the departmental enquiry being conducted in P.R.No.41 of 2016.

2. Heard the learned counsel on either side and on consent, this writ petition is taken up for final disposal at the stage of admission itself.

3. The facts leading to filing of this writ petition are as under:

W.P.(M.O.)No.24322/16
W.M.P.(M.O.)No.17567/16 Date:20-12-2016

i) the petitioner, who worked as the Inspector of Police, Control Room, Dindigul, has been placed under suspension on account of registration two criminal cases against him in Crime No. 52 of 2016 under Section 392 IPC (taken on file in C.C.No.34 of 2016 on the file of the learned Judicial Magistrate, Nilakottai) and Crime No.55 of 2016 under Section 395 IPC; that departmental enquiry has also been initiated for the grave charges involving major penalties; that since the Enquiry Officer happens to be a Law Graduate, he filed a petition before the 1st respondent, seeking permission to allow him to engage a Lawyer to cross examine the list of witnesses, which was denied by the 1st respondent and therefore, aggrieved by the same, the petitioner is before this Court seeking the above relief .

4. Learned counsel for the petitioner would submit that since the charges levelled against the petitioner are serious in nature, assistance of an Advocate is required and that as the enquiry officer happens to be a Lawyer, the petitioner must be given an opportunity to defend himself effectively before the enquiry officer with the assistance of an Advocate in the domestic enquiry.

4.1. In support of his submission, learned counsel for the petitioner relied upon the following two judgments of the Hon'ble Apex Court;

i) Ramesh Chandra vs University Of Delhi & Ors., reported in 2015 (5) SCC 549, wherein the Apex Court has held that the Departmental inquiries conducted against the appellant therein were in violation of rules of natural justice, because the Inquiry Officer appointed therein, being a retired Judge of the High Court was a person of vast legal acumen and experience and the Presenting Officer therein also had sufficient experience in presenting case before Inquiry Officer.

ii) In yet another case in Board of Trustees of the Port of Bombay vs. Dilipkumar Raghvendranath Nandkarni and others, reported in (1983) 1 SCC 124, the Apex Court has held that if the rules prescribed for such an enquiry did not place an embargo on the right of the delinquent employee to be represented by a legal practitioner, the matter would be in the discretion of the Enquiry Officer whether looking to the nature of charges, the type of evidence and complex [pic]or simple issues that may arise in the course of enquiry, the delinquent employee in order to afford a reasonable opportunity to defend himself should be permitted to appear through a legal practitioner.

5. A reading of the judgments, refereed to above, would disclose that the Hon'ble Apex Court, while considering the facts of the case therein, came to the conclusion that a Lawyer should be permitted to assist the delinquent employee, who had to face enquiry before a retired High Court Judge as well as before a legally trained person.

6. In the present case on hand, it is admitted on both sides that the Presenting Officer is not a legally trained man and the ground raised that the enquiry officer is a Law Graduate cannot be the valid ground for seeking the assistance of a Lawyer to defend him in the enquiry.

7. The Hon'ble Supreme Court in the case of Padmasundara Rao (Dead) & others vs. State of Tamil Nadu and others, reported in (2002) 3 SCC 533 observed that if it is found that the facts of the cited judgment of the Higher Forum totally differs with the one on hand, then there is no compulsion for the subordinate courts to blindly rely on the same to arrive at a conclusion. It is appropriate to extract the relevant paragraph of the said judgment, which reads as follows:

> "Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington vs. British Railways Board (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

8. In view of the above, this Court is of the view that the judgments relied on by the learned counsel for the petitioner has no relevancy to the facts of the present case of the petitioner. Therefore, finding no merits in the writ petition, the same is liable to be dismissed.

9. Accordingly, the Writ Petition is dismissed as devoid of merits. No costs. Consequently, connected miscellaneous petitions is closed. The respondents are directed to proceed with the enquiry on day to-day basis without adjourning the matter beyond seven working days at any point of time and to bring the issue to a logical conclusion.

--- END ---

Law Summary

(Founder: Late Sri.G.S.GUPTA)

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ADVOCATES ACT:

---Secs.35 & 38 - "Duty of Advocate" - "Gross negligence".

In this case, appellant /Advocate is guilty of gross negligence in discharge of his professional service to client and hence imposed punishment of reprimand by Disciplinary Committee of Bar Council of India with further stipulation that he shall pay Rs.5000/- to Bar Council of India and equal amount to complainant within two weeks from date of receipt of order failing which he would stand suspended from practising for a period of 6 months.

There can be no doubt that nobility, sanctity and ethicality of profession has to be kept uppermost in mind of Advocate - "There is a world of difference between the giving of improper legal advice and the giving of wrong legal advice - Mere negligence unaccompanied by any moral delinquency on part of legal practitioner in exercise of his profession does not amount to professional misconduct"- "Negligence by itself is not professional misconduct; into that offence there must enter the element of moral delinquency".

Conclusion arrived at by Disciplinary Authority of Bar Council of India that negligence is gross cannot be accepted.

Order passed by Disciplinary Committee of Bar Council of India, is set aside. ***4***

CIVIL PROCEDURE CODE:

---Sec.100 **-** Second Appeal - Substantial question of law - High Court has failed to refer to substantial question of law

formulated by appellant - Material facts to establish that plea have been brought on record by appellant on duly noticed by trial Court - However efficacy there of has not been considered either by first appellate Court or High Court - High Court was obliged to examine pleas taken by appellant, including that decisions of Supreme Court relied upon by first appellate Court to answer issue against appellant were in applicable to fact situation of present case and could be distinguished - Matter remitted to to High Court for considering second appeal on merits. **1**

---Sec.100 - HINDU SUCCESSION ACT, Sec.15 - High Court was right in upholding all findings of facts of two Court below but was not right in relying upon Sec.15(2)(a) of Act for allowing plaintiff's Second Appeal by treating them to be Class - I heirs from father's side and inconsequence was also not right in decreeing plaintiff's suit in part by granting 1/3rd share to each plaintiff in the suit property - Finding of lower Courts is legally unsustainable and hence deserves to be set aside. **2**

---Or.23, Rule 1 - HIMACHAL PRADESH PUBLIC MONEY (RECOVERY OF DUES) ACT, 2000, Sec.3(1)(d)(iv) - Withdrawal of Suit - Bar on filing fresh Suit - Proceedings in a Suit are essential different from proceedings under Act - Withdrawal of Suit was no bar to proceedings under Act - There had been no abandonment of claim by appellant - It would be contrary to public policy to prevent appellant from recovery loan - Recovery proceedings were not time barred - Orders of High Court is held to be unsustainable and is set aside - Auction notice u/Sec.85 of Act shall now proceeded in accordance with law - Appeal is allowed. **1**

CRIMINAL PROCEDURE CODE:

---Sec.172 - EVIDENCE ACT, Secs.145 & 161 - Police Diary - Right of accused to cross examine Police Officer with reference to entries in Police Diary.

Held: Sec.172(3) clearly lays down that neither accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them mearly because they are referred to by Court - But in case Police Officer uses the entries in diaries to referesh his memory or if Court uses them for purpose of cotradicting such Police Officer, then provisions of Secs.145 & 161 as case may be, of evidence Act would apply.

Police Diary is only a record of day to day investigation made by investigating officer - Neither accused nor his agent is entitled to call for such case diary and also are not entitled to see them during course of inquiry or trial - The unfettered power confirmed by Statute u/Sec.172(2) of Cr.P.C on Court to examine entries of Police Diary would not allow accused to claim similar unfettered right to inspect case diary.

High Court is not justified in permitting accused to produce certain pages of Police diary at time of cross-examination of investigating officer - Impugned order is liable to be set aside - Appeal, allowed. ***4***

---Sec.439 - "Bail" - Appellant/accused is charge heeted in "chit fund scam".

It is urged on behalf of appellant/ accused that as she is in judicial custody for over 15 months and is suffering from various ailments requiring constant medical attention, she deserves to be extended the benefit of bail - Further as charge-sheet against her has been submitted and she is fully cooperating with investigation, her further confinement in judicial custody is inessential.

It is further contended on behalf of appellant/accused that not only evidence collected in course of investigation does not make out any offence as alleged, in teeth of release of principal accused on bail, appellants detention amounts to deprivation of her right 'to life and liberty enshrined in Art.21 of Constitution of India.

Detention in custody of under-trial prisoners for an indefinite period would amount to violation of Art.21 of Constitution of India - Appeal is allowed and appellant is ordered to be released on bail subject to certain conditions. ***3***

EVIDENCE ACT(INDIAN):

---Secs.45 and 73 - Respondent herein filed a suit against petitioner herein, for recovery of money on basis of a promissory note - Petitioner herein filed a written statement contending, inter alia , that he borrowed an amount of Rs.8,00,000/- from a person by name Raghava Arjuna Rao on 13-8-2010 and also created a mortgage in his favour; that at time of borrowal, said Ragha Arjuna Rao took his signatures in a blank promissory note and a blank cheque; that though entire mortgage debt was discharged by him, said Raghava Arjuna Rao filed a suit; that petitioner never borrowed any money from respondent herein and that with assistance of said Raghava Arjuna Rao, respondent fabricated blank promissory note given by him and filed present suit.

Trial Court framed issues and evidence on both sides was closed and matter was posted for arguments - At that time, defendant, who is petitioner herein, filed 2 applications, one for reopening his evidence and another for sending promissory note for examination by a Handwriting Expert - But both these applications were dismissed by trial Court, forcing petitioner to come up with above revisions.

Held, It is an admitted fact that science relating to forensic examination of Handwriting, especially in relation to fixation of age of ink, is not perfect - In cases of this nature any reference of a document to Handwriting Expert just for purpose of finding out whether ink was 5 years old at time of institution of suit or 3 years old at the time of institution of the suit, is not likely to bring any fruitful result - Therefore, it is clear that no useful purpose will be served by referring document to Handwriting Expert - Hence, dismissal of applications by Court below cannot be found fault with - Therefore, Civil Revision Petitions are dismissed. **3**

LAND ACQUISITION ACT:

---Compensation - Lands are acquired at same time and for same purpose, lands situated in three different villages and since land is similar land, it would be unfair to discriminate between land owners and other references and appellants who are land owners pay less that is Rs.2.50,000/- for Kanal to appellants and to pay more to other land owners that is Rs. 4,00,000/- for Kanal - Impugned judgment of High Court are to be set aside by enhancing compensation to Rs.4,00,000/- for Kanal - Appeals are allowed. ***2***

NEGOTIABLE INSTRUMENTS ACT:

---Sec.138, Proviso, Cl.(b) r/w Sec. 142 **-** Second notice - No bar to send a remainder notice - Second notice could be construed as a reminder of respondent's obligation to discharge his liability - As complaint, was filed within stipulated time contemplated under Cl(b) of Sec.142 of Act, therefore Sec.138 r/w Sec.142 of Act is attracted - Complaint is maintainable. ***1***

--X--

Law Summary

(Founder: Late Sri.G.S.GUPTA)

2017 (2)
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ANDHRA PRADESH HIGH COURT

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A.P. GAMING ACT, 1974:

---Sec. 15 - These Writ Petitions are filed challenging the action of respondents in interfering/obstructing petitioners' clubs from conducting card room for playing games of Rummy/Syndicate with stakes by their members and, hence, they are being disposed of by this common order - Common case of petitioners is that they were registered under Societies Registration Act and have been conducting their affairs within purview of aims and objectives and bye-laws of their respective societies - Their activities are confined to members of association and they are maintaining a card room where games of skill only are allowed to be played - Their games of skill do not fall under definition of gambling and in spite of same respondents are interfering with their activities.

Held, Act is intended to check unlawful activities and everyone including police is supposed to follow law - In case of violation of law, both parties have to face consequences - This basic principle cannot be declared by issuing a Writ of Mandamus - In case of violation of provisions of Act, burden is on prosecution to prove that members of petitioners association do not come under purview of Sec.15 of Act and it is for petitioners to plead that they come under Section 15 - Whether particular game played by persons at a particular moment comes within game of skill or not is a matter for enquiry on basis of evidence - If there is likelihood of misuse of provisions of enactment, it is for Legislature to step in and make necessary amendments in interest of public, but this Court cannot issue a Writ even without a cause of action - These Writ Petitions are, thus, not maintainable and same are, accordingly, dismissed. ***52***

A.P. MUNICIPALITIES ACT:

---Sec.326(1) - VIJAYAWADA MUNICIPAL CORPORATION ACT, Sec.6(3) - CONSTITUTION OF INDIA, Article 162 - Municipality Law - Appellant contends that action of Commissioner, Vijayawada Municipal Corporation in not renewing lease of Shadhikhana in favour of appellant as illegal, arbitrary - Appellant was successful bidder in tender floated by respondent corporation for leasing out Shadhikhana initially, which was renewed from time to time – As lease was to expire, appellant made an application requesting further extension claiming parity with another party.

Instructions in nature of guidelines, and which do not have statutory force, do not confer a legally enforceable right – Grant of a lease is discretion of Commissioner – Appellant is not entitled to claim parity with regards to extension of lease with others - Appellant has not been prohibited from participating in any auction merely on the ground that he was granted a lease earlier.

Held – No right ensures lessees of immovable properties of Municipal Corporation to seek extension of lease – However, appellant is not restricted to

participate in public auction of subject property - Writ appeal is dismissed.

334

A.P. PREVENTION OF DANGEROUS ACTIVITIES OF BOOTLEGGERS, DACOITS, DRUG OFFENDERS, GOONDAS, IMMORAL TRAFFIC OFFENDERS AND LAND GRABBERS ACT:

---Sec.8 - CONSTITUTION OF INDIA: Art.22(5).

Petitioner/ Detenu has challenged detention order issued by respondents – Detenu is resident of State of Karnataka and his known languages are Kannada and Urdu – Respondents supplied detention order and relied upon documents are supplied in Telugu and English, therefore, detenu failed to make effective representation to authorities concerned.

Held – Writ petition is allowed and detention order, quashed – It is Constitutional duty of State to make document available in any language known and understood by detenu, failing which, it would violate his constitutional right under Article 22(5) of Constitution of India.

254

A.P. (TELANGANA AREA) LAND REVENUE ACT, 1317 Fasli:

---This appeal arises out of an order passed by the learned single Judge dismissing a writ petition filed by appellants herein, questioning correctness of orders cancelling Pattas issued to them way back in the year 1961.

Held, if respondents had already taken possession in 1979 itself, question of revenue authorities themselves granting a stay and revenue authorities themselves confirming continuance of possession of appellants even in year 1998 would not have arisen - Without producing all these records, respondents appear to have simply led learned single Judge to believe that possession had already been taken over in 1979, which lead to learned Judge dismissing writ petition - Therefore, Court considered view that appeal deserves to be allowed - Accordingly, writ appeal is allowed, order of the learned single Judge is set aside and the writ petition filed by appellants is allowed. ***130***

---Section. 15(2) - These writs were filed seeking writ of mandamus directing Commissioners, Survey and Land Records to survey land of State Archeological Museums Department (1st Respondent) and fix boundaries as per orders of PA to Collector, Hyderabad District in his order, as confirmed by Commissioner, Survey Settlement Land Records in his order in Revision Petition and further to direct the 1st respondent herein to demolish the compound wall constructed in deviation from orders of the aforesaid authorities.

Held, also in the suit, 1st respondent had claimed only Ac 3-00 cents had been given to Archeological Department for

protection of the said monument. But now, it is contending in Counter affidavits that Ac 7-28 guntas is covered by compound wall - Neither for Ac 3-00 guntas nor for Ac. 7-28 guntas, in any scrap of paper filed by the 1st respondent to show that it was allotted to it by any authority - Thus it is not acting bon fide - Its action is highhanded and amounts to land grabbing without any right, title or interest therein.

For all aforesaid reasons, Writ Petitions are allowed and a direction is given to 1st respondent to demolish compound wall and further direct the respondents not to encroach upon land of petitioners. ***155***

CHIT FUNDS ACT, 1982:

---Sec.69 - Revision petitioners are judgment debtors who questioned maintainability of E.Ps on ground that original Court of jurisdiction was at Kakinada, transfer E.P. had to be filed at E.P. Court at Kakinada after getting same ordered to Court of actual execution but no such steps had been taken - Also, revision petitioners contended that it was well-settled law by this Hon'ble Court that total awarded amount has to be claimed against guarantors/ judgment debtors, proportionately by distributing it equally among all judgment debtors and as per that, judgment debtors have to contribute 1/6th share to decree holder/chit fund company but claiming total amount from some of judgment debtors was erroneous and against equity.

Held, decree holder has an option to proceed against either principal debtor or any of guarantors or against all of them - The liability of a surety is co-extensive with that of principal debtor, as Section 128 of Indian Contract Act is clearly worded - Also, proper channel through which award and certificate has to reach execution Court, is Registrar - It is only Registrar who is competent to forward application of applicant to proper authority, be it civil Court or revenue authority, for execution, along with a certificate issued by him under Sec.71 of Act - The E.P. Court does not have jurisdiction to entertain a petition for execution of award of Deputy Registrar of Chit Funds, if presented by decree holder - In result, execution Courts, in which E.Ps are filed, are directed to return petitions presented by decree holder, with a liberty to get applications forwarded to civil Court, through Registrar along with certificate issued by Registrar - Civil Revision Petitions are accordingly disposed of. ***1***

CIVIL PROCEDURE CODE:

---Sec.24 - CONTEMPT OF COURTS ACT – Disputes between petitioner and respondent with regard to immovable property – Petitioner filed a suit for partition and consequential reliefs claiming half share in subject property and suit was decreed in part declaring petitioner is entitled to 1/ 3rd share – Appeal preferred and SLP before Apex Court were dismissed.

Petitioner made an unethical attempt by making brazen allegations that respondent is influential person having contacts with political persons and with presiding officer of Additional District Judge

and filed a private complaint against presiding officer – Having failed in his attempt, he filed present petition to withdraw and transfer suit pending on file of Additional District Judge Narasaraopet to City Civil Court, Hyderabad though property is situated within jurisdictional limits of Court.

Held – If litigant loses confidence or faith on institution, no officer will work in Judiciary and if such practice is not nipped at the bud, it will spread like cancer in the entire body of Judicial institution - Allowing litigants to withdraw and transfer suit for serious allegations like these is abuse of process of Court - Present petition is vexatious litigation resorted by petitioner without any basis and therefore it is appropriate to impose compensatory costs on petitioner instead of dealing him under Contempt of Courts Act - Use of Court for wrecking vengeance, or using Court as a tool to foster injustice, would poison purity of Judicial administration – Petition is dismissed. ***301***

---Sec.151 and Order VIII Rule 1A (3) - CONSTITUTION OF INDIA, Article 227 - Civil Revision - Respondents instituted suit against petitioner before Court of Senior Civil Judge, for cancellation of a Gift deed executed by respondents in respect of plaint schedule property in favour of petitioners.

After closure of evidence on behalf of respondents, petitioner filed an application praying to receive documents by condoning delay in filing – Senior Civil Judge dismissed said application – Petitioners contended that proposed documents are very crucial and would be highly helpful for Court to come to a just and reasonable conclusion

Held – Petitioners did neither clearly state reasons for not filing said documents along with written statement nor state in affidavit that despite their due diligence, proposed documents could not be traced out at relevant point of time – Unless Order impugned suffers from jurisdictional error or patent perversity, power of judicial review under Article 227 cannot be pressed into service – Court has absolutely no scintilla of hesitation nor any shadow of doubt to hold Order under challenge does not warrant any interference by this court – Revision dismissed. ***319***

---Or. VI, Rule 4 - Trial Court observed that Ex. A1, agreement of sale was true, valid and enforceable and plaintiffs were always ready and willing to perform their part of contract and they are entitled for specific performance and accordingly decreed the suit against which this appeal arose - Appellants argue that defendant never executed Ex. A1 and delivered possession thereafter and plaintiffs taking advantage of his illiteracy, fabricated Exs. A1 to A3 obtaining his signatures on blank papers by playing fraud on him but the trial Court miserably failed to consider their evidence in proper manner and erroneously decreed the suit.

Held, as per Order VI Rule 4 CPC when a party takes the plea of misrepresentation, fraud, breach of trust, wilful default or undue influence etc.,

particulars of such act must be given - It is not enough to use general words without narrating the method and manner of perpetrating such acts for Court to be take notice - However, in instant case, defendant woefully failed to give particulars of the fraud alleged - Hence there was no strong basis in pleadings about fraud - It was suggested that since the plaintiffs have not paid the balance sale consideration under Ex. A1, the defendant executed another agreement in favour of others - This crucial suggestion itself implies admission of defendant about genuineness of Ex. A1 - Therefore, as rightly observed by trial Court, there can be no demur that Ex. A1 is a genuine document - In result, this Appeal is dismissed by confirming decree and judgment passed by trial Court.

59

---Or.IX, Rule 13 & Order VII, Rule 2 – CONSTITUTION OF INDIA**,** Art.227 - Revision Petitioner filed suit for partition before Junior Civil Judge, – R1 and R6 contested suit, whereas other respondents were set ex parte - During trial PW1 and PW2 were examined on behalf of petitioner but they were not cross-examined by counsel of R1 and R6 – Court passed ex parte Decree in favour of petitioner.

R1 filed an I.A. to set aside ex parte preliminary decree, contending that delay was due to back ache and spondylitis and she could not contact her counsel as she was advised to take rest for a period of six months by her doctor –Trial Court dismissed the petition – Aggrieved by that Order, R1 preferred an appeal before Senior Civil Judge - Appellate Court held that preliminary decree passed is maintainable while setting aside order of I.A. and restored I.A. to its original number directing trial court to dispose of petition within two months – Aggrieved by Order of appellate court, petitioner preferred this civil revision petition.

Held – Trial Court was wrong in appreciating facts and law by ignoring state amendment to Rule 3 of Order XVII of CPC – Decree and Judgment passed by trial court are only ex parte decree and judgment in terms of Rule 2 of Order XVII, CPC and there by petition under Rule 13 of Order IX of CPC is maintainable – High Court cannot exercise power under Article 227 to interfere with findings recorded by Appellate Court – Civil Revision Petition is dismissed. **366**

---Or. XIV Rule 2, Order VII Rule 14(3) r/w Section 151 - Petition under Article 227 of Constitution of India – To revise Order of Senior Civil Judge – No leave of Court to file set of documents when no sufficient cause is made as to why they were not filed at earlier stage.

Petitioner was Plaintiff, who filed a Suit seeking Specific performance of an agreement of Sale alleged to have executed by defendant company – Counsel for Petitioner argued that delay, if any, in filing documents was because of negligence on part of defendants – Documents, necessary to be filed as they are relevant and support case of Petitioner.

Held – Necessary documents were obtained recently – Affidavit was silent with respect to reasons as to why petitioner could not obtain said documents at earliest point of time, if not before filing of suit to annex along with plaint – Order XIV Rule 2 of C.P.C puts an obligation on plaintiff to state in plaint with respect to documents which are not in possession and also state in whose possession such documents are available – Order VII Rule 14(3) of CPC gives limited discretion to Court to grant leave and allow the plaintiff to file documents which are not annexed to plaint - CRP dismissed. ***183***

---Or.16 Rule 14 - Present revisions are filed against orders of lower Court wherein and whereby Court allowed petitions filed by respondent-plaintiff one U/Sec.151 CPC to reopen matter and another under Order 18 Rule 17 CPC to summon PW4 as Court Witness for purposes of cross examination respectively.

Held, a careful perusal of Or. 16, at a glance, clearly demonstrates that a person can be summoned as a court witness if he is not already called as a witness - There is a legal embargo to summon a person, who was examined as a witness on behalf of one of parties to proceedings, as a court witness under Order 16 Rule 14 CPC - While allowing petitions, trial Court has not considered scope and underlying object of Order 16 Rule 14 CPC and also legal embargo created under Order 16 Rule 14 CPC - Having regard to facts and circumstances of case and also principle enunciated in cases, Court considered view that impugned orders are not sustainable either on facts or in law - In result, these two Civil Revision Petitions are allowed, setting aside orders by trial Court. ***15***

---Or.XXXIX - LGOP was filed to declare the petitioners as land grabbers - Also, IA was filed under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure for grant of interim injunction restraining petitioners herein and respondent No. 7 from making further construction - Lower Court has granted interim injunction while ordering notice to petitioners - Feeling aggrieved by this, present writ petition was filed by respondent Nos. 1 to 7 - Petitioners submitted that Court below has failed to comply with mandatory requirements of Rule 3 of Order XXXIX CPC and lower Court has failed to consider IA for injunction by applying well-known parameters of prima facie case, balance of convenience and irreparable injury.

Held, on a thorough consideration of impugned order, Court of opinion that Court below has committed a serious jurisdictional error in failing to comply with mandatory requirement of Rule 3 of Order XXXIX CPC and also in not discussing essential elements of prima facie case, balance of convenience and irreparable injury for granting an ad interim injunction even without notice to petitioners - For afore-mentioned reasons, impugned order cannot be sustained and same is, accordingly, set aside. ***76***

CIVIL RULES OF PRACTICE AND CIRCULAR ORDERS, 1980:

---Rule 55 - LIMITATION ACT, 1963, Sec.5 - CIVIL PROCEDURE CODE, Order 9 Rule 13 - Court below dismissed I.A mainly on ground that petitioner/defendant had failed to file separate applications, one under Section 5 of the Limitation Act, 1963, seeking condonation of delay, and other under Order 9 Rule 13 CPC to set aside the ex parte decree - Court below further found that sufficient grounds had not been shown by petitioner/defendant to set aside ex parte decree - The present Revision was filed against that order.

Held, It is a settled principle of law that when valuable immovable property rights are involved, Court should ordinarily afford a hearing to both parties rather than taking a decision by hearing just one side - Court below therefore ought not to have brushed aside ostensibly adequate reason put forth by petitioner/defendant while seeking such relief in present case - Civil Revision Petition is accordingly allowed. ***49***

CONSUMER PROTECTION ACT:

---Secs.13 (3A), 18, 24 and 27 – Writ petition is filed seeking issue of writ of Prohibition against respondent no.1, District Consumer Disputes Redressal Forum-II, Hyderabad from proceeding with a case which is pending before State Consumer Disputes Redressal Forum.

Consumer dispute between petitioner and respondents in connection with an agreement of sale – Relief was granted in favour of R3 to R6 by District Forum - Aggrieved by this Order petitioner appealed in State Consumer Disputes Forum - During Pendency of appeal, R2 and R3 filed an application against petitioner for non compliance with Order of District Consumer Forum.

Held – Absence of specific provision for stay of Orders of Original forum, during pendency of appeals, is obviously for reason that legislature has assumed expeditious disposal of appeals - While prohibiting R1 from proceeding further, Court allowed R2 and R3 to file an application for expeditious hearing of appeal by State Consumer Forum – Appropriate amendment to provisions, probably by incorporating a provision for stay of Orders of Original forum and also a provision which enables successful party before original forum, to seek execution of its Orders is necessary – Writ petition is allowed. ***315***

CONTEMPT OF COURTS ACT:

--- CONSTITUTION OF INDIA, Art. 215 – - Contempt Case - This Case arises out of non-implementation of Order passed by this Court in Writ Petition No. 12970 of 2016 dated 27.06.2016.

Husband of the Petitioner, Contract driver died while in service leaving petitioner and her two minor children – Dependents, were not only eligible for additional monetary benefits but also under scheme of compassionate employment by APSRTC management – Petitioner, duly qualified all

tests and was considered for RTC Constable – Thereafter, petitioner was informed that she will not be given appointment as her husband was contract employee at time of death - This Court disposed of writ petition by directing respondents to consider case of petitioner for appointment to post – Respondent, lately filed a counter affidavit stating that petitioner was contract driver and Bread Winner Scheme is applicable only to regular employees - Mere reading of scheme clarifies that contract crew was also eligible for beneficiaries

Held, Second Respondent violated Orders of this Court – Hence liable under Contempt of Courts Act and punished to pay a fine of Rs.5,000/- within four weeks.

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COOPERATIVE SOCIETIES ACT:

---Sec.34(6) – Petitioners(18), representing elected Managing Committee of District Cooperative Central Bank Ltd - Preferred writ petition against respondents, Impugning order passed by 3rd respondent under Section 34(1)(c) of Telangana State Cooperative Societies Act, suspending Managing Committee of DCCB, for a period of six months and also appointing Collector and District Magistrate as Official Administrator to manage affairs of DCCB.

Counsel for petitioners contended - There is a statutory violation of mandatory requirement of consultation under Sec.34(6) of Cooperative Societies Act - What is referred in impugned order of consultation to what is stated in counter-affidavit of consultation, there is a variance - Special Govt. Pleader rebutted that impugned order need not detail everything, counter is to be read with impugned order for proper understanding – Respondents further contended that Writ petition is not maintainable, for there is a statutory appeal remedy under Sec.76 of the Act.

Held – Writ petition is maintainable – What is mentioned in impugned order alone is to be considered and development or improvement later cannot be considered – Consultation is not mere formality – There is no consultation in the instant case – Action of respondents covered by impugned proceedings is unsustainable and is liable to be set aside – Writ petition is allowed.

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CRIMINAL PROCEDURE CODE:

---Sec.162 – INDIAN PENAL CODE, Secs.302&498-A – DOWRY PROHIBITION ACT, Secs.3 and 4 – Criminal appeal preferred by appellant against Judgment of Additional District & Sessions Judge.

Deceased is wife of appellant/A1 – After birth of male child, appellant started harassing deceased for additional dowry – Deceased, refused to have sexual intercourse with appellant on apprehension that he was suffering from H.I.V disease – Appellant misunderstood her refusal as her having some extra marital affairs and brutally killed her by hacking with an axe – Counsel for appellant argued that entire case of prosecution is unbelievable as

examination of main witnesses, inspection of scene of offence and recovery of dead body were completed long prior to registration of FIR and hence FIR is hit by Sec.162 of Cr.P.C and liable to be dismissed.

Held – Criminal appeal is dismissed – Every information more-so a cryptic information of commission of a cognizable offence though first in point of time, need not be registered as FIR and in such an event, police may rush to spot to ascertain truth if needed be and doing these acts cannot be termed as investigation, for meaning of investigation as envisaged in Sec. 2(h) of Cr.P.C – In such an event, registration of FIR at a later stage will not be hit by Sec.162 of Cr.P.C. ***242***

EVIDENCE ACT(INDIAN):

---Secs. 33, 138 - Since DW.1 failed to appear before Court, trial Court eschewed evidence of DW.1 - An application came to be filed seeking to set aside order eschewing evidence of DW.1 on ground that plaintiffs may be put to irreparable loss and injury of order is not set aside - Said application came to be rejected, against which present Civil Revision Petition filed - Main ground urged for petitioner is that grave prejudice would be caused to plaintiffs if evidence of DW.1 is eschewed from consideration since evidence of DW.1 would tilt case in their favour - It is further urged that Court below has no jurisdiction to eschew recorded evidence merely because DW.1 failed to appear before Court for cross examination by his co-defendants.

Held, once plaintiffs were given an opportunity to cross examine DW.1, which option has been exercised, evidence of DW.1 to extent of cross examination done by plaintiffs cannot be eschewed from consideration - It is always open to defendant No.6 to take steps for production of DW.1, in accordance with law.

Accordingly, the Civil Revision Petition is allowed. ***33***

---Sec. 35 - Petitioner filed for correction of date of birth - It was rejected on ground that application for correction was made after lapse of 19 years and not within stipulated time of 3 years as per orders issued by Education Department - Present writ is filed challenging the same.

Held, in instant case petitioner completed post graduation on basis of date of birth mentioned in school records at time of admission - He cannot attribute lack of knowledge - This writ petition was filed only when he realized that he would be crossing maximum age prescribed by UPSC for attending civil services examination - Based on date of birth recorded in school records, petitioner might have taken several steps during past years and though there cannot be any dispute with regard to the birth certificate issued by the proper authority supported by evidence of hospital authorities, no direction be given in instant case based on those certificates after lapse of 19 years - It is well known that law

will come to rescue of diligent but not an indolent - Writ Petition is, accordingly, dismissed. ***70***

---Secs.63, 64, 65, 74, 75 - INDIAN REGISTRATION ACT, 1908, Sec. 60(2) - Suit was filed for declaration that plaintiff was owner of plaint schedule lands and for recovery of vacant possession of same from defendants 1 to 3 and also for declaration that registered sale deed executed by 2nd defendant in favour of 3rd defendant is null, void and not binding on plaintiff - Plaintiff's original sale deed was lost and hence he filed certified copy of registered sale deed and sought permission to lead secondary evidence to substantiate his case which was disallowed by trial Court against whose orders he filed present revision.

Held, certified copy of a registered sale deed is admissible in evidence as secondary evidence and hence permission cannot be declined on basis of contentions of defendants that its original is not genuine - Trial Court was in error in not according permission to plaintiff to adduce secondary evidence by producing and exhibiting CC of registered sale deed - Viewed thus, this Court finds that impugned order is liable to be set aside and that revision deserves to be allowed, subject to certain conditions.

In result, revision petition is allowed and orders of Senior Civil Judge, are hereby set aside. ***21***

---Sec. 154 – Trial Court rejected application filed by petitioners on ground that invoking Sec.154 of Indian Evidence Act in civil cases is not permissible and that section is invariably invoked in criminal proceedings only.

Suit instituted before Additional Senior Civil Judge, praying to grant preliminary decree declaring that respondents are entitled to 5/6th share in suit schedule properties and to pass a final decree in terms of preliminary decree – DW2 filed chief affidavit supporting stand of petitioners but when he was cross-examined he deposed against his chief examination and supported respondents – Petitioners filed an application to declare DW2 hostile and permit them to cross-examine DW2 – Above application was dismissed, Hence this revision.

Held - A plain reading of Sec.154 Indian Evidence Act makes it clear that it does not make any distinction between civil and criminal cases and it only vests discretion in Court to permit the person, who calls a witness, to put any question which can be put in cross-examination by adverse party – Permission under this section can be sought before evidence of witness is concluded – Scope of exercise of discretion by trial court under this section are on merits of plea – Reasons assigned for rejection by trial court were erroneous, but refusal to permit petitioners to call DW2 to witness box for cross-examination is upheld – Civil Revision Petition is dismissed. ***357***

HINDU MARRIAGE ACT:

---Secs.4, 16&25 - CRIMINAL PROCEDURE CODE, Sec.125 – Criminal Revision Case against Order of Metropolitan Sessions Judge – Court even cannot convert Section 125 Cr.P.C proceedings as one u/Sec.25 of HMC Act.

Petitioner married Respondent who in turn was already married to N.Srinivas – As differences arose between Respondent and N.Srinivas, they were residing separately despite efforts of elders – Couple executed a Memorandum of understanding dissolving the marriage – Later, Respondent claimed that Petitioner approached her under pretense of dropping their child, Ganesh in school and developed intimacy and lured her to marry him – Eventually Petitioner and Respondent were blessed with female child/ 2nd Respondent – Thereby respondent claim for entitlement of maintenance.

Held – Revision partly allowed - Awarding of maintenance by Trial Court per se unsustainable and liable to be set aside – Her remedy, if any, is either u/Sec.24 or 25 of Hindu Marriage Act or to maintain any suit for compensation. ***188***

---Sec.13(1)(ia) and (ib) - Appeal against Order and Decree of Family Court – Filing repeated Criminal complaints and withdrawing same after receiving money constitutes cruelty.

Appellant/Wife and Respondent/ Husband were married and duly consummated, no children were born out of their wedlock – Respondent used to belittle appellant as she completed teacher training course whereas respondent passed only intermediate and she expressed her unwillingness to stay along with parents of respondent – Even thereafter, appellant did not change her attitude – Appellant used to leave matrimonial home and join her parents house without respondent's knowledge – Mediation held by elders went futile – Appellant filed several complaints against respondent and alleged that respondent his family members harassed her for additional dowry and upon advice of elders respondent paid a sum of Rs.3 lakhs to appellant as final settlement.

Held – No proof adduced by appellant in regard to demand of dowry by respondent – Act of appellant filing complaint and withdrawing same after receiving money reflects her devious conduct – Appellant not only subjected respondent to cruelty but also left matrimonial home without any reasonable cause and thereby, she is guilty of desertion – Courts below have arrived at right conclusion - FCA dismissed. ***196***

---Sec.13 - FAMILY COURT APPEALS - Arises out of Common Order- An Unscrupulous husband cannot be granted divorce based on his own deeds – Party seeking divorce under Matrimonial Offence

theory/ Fault theory must be innocent.

Appellant is legally wedded wife of respondent – Marriage was solemnized as per Hindu rites and customs and was consummated – Couple could not beget issues, fostered a female child – Certain differences between couple, started living separately – Respondent, permitted appellant to live on ground floor portion of his house – Appellant, alleged that respondent developed illicit relationship with servant who was living with him – Respondent filed for dissolution of marriage, while appellant filed for Perpetual injunction restraining respondent from interfering with peaceful possession.

Held – Absence of respondent proving cruelty against appellant – Court below committed a serious error in granting divorce – Parties living separately for long time cannot be only ground for dissolution – Appellant, legally wedded wife – Entitled to enjoy the Possession. ***200***

HINDU SUCCESSION (AMENDMENT) ACT, 2005:

---Secs.6(1), ---6(5) and 30 - INDIAN STAMP ACT, 1899, Sec.2(15) – INDIAN EVIDENCE ACT, Sec.68 - Regular appeal by appellant as Suit for partition stands dismissed before District Judge – 'Testamentary disposition' appearing in proviso to Section 6(1) of Hindu Succession (amendment) Act, 2005 should be understood to mean only a will which had come into effect before 20-12-2004.

Suit properties are ancestral – Respondent is elder brother of appellant – Respondent contended in written statement that appellant could not be termed as 'Coparcener' and is not entitled to benefit of amended provisions of Hindu Succession Act, 2005.

Held – Appeal allowed in part – A will is merely a legal declaration of testator's intention and its essential characteristic is its ambulatoriness and revocability - Testamentary disposition can never be an actual disposition, since its coming into effect as well as extent to which it takes effect are always subject to uncertainties of time and mind, apart from birth and death. ***215***

LAND ACQUISITION ACT, 1894:

---Sec.18 – **CIVIL PROCEDURE CODE,** Order 47 Rule 1 - Review Petitions – When all other similarly situated persons were paid compensation, Court found no reason to deny such compensation to appellants in present batch of appeals.

Lands, Structures and Trees belonging to review applicants were acquired for purpose of construction of Somasila project by Government of Andhra Pradesh in year 1992 – Appellants have sought compensation from Land Acquisition Officer, Dissatisfied with fixation, appellants have sought reference to competent Civil Court – Fixation was increased to three times – State, preferred appeals wherein review applicants have filed cross-Objections.

Held, Review Petitions allowed –

Cross objections are decreed by enhancing compensation and in addition to statutory benefits. ***192***

MOTOR VEHICLES ACT, 1988:

---Sec.166 - Appeals were filed against awards of Tribunal for awarding lesser compensation by not calculating earning power, and that there was no need to prove negligence of rider of bike or opposite vehicle against which claim was maintained and said amount awarded was utterly low as injured also suffered permanent disability which affects his avocation - It was opposed by insurer company.

Held, once Tribunal is entitled to decide claim and award compensation against respondents, it is left open to respondents to proceed against owner and insurer of bike for their contribution following expression in Khenyei Vs. NIAC Limited (2015) 9 SCC 273 for non-impleadment of other joint tort feasors no way a ground to exonerate insurer but for on payment to claim apportionment for equal liability to that extent - Appeals by claimants were allowed enhancing compensation and Appeal by Insurer was disposed of. ***6***

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCE ACT:

---Secs.9(A), 25, 25(A), 28, 29 and 37 - CRIMINAL PROCEDURE CODE, Secs.167(2), 437 and 439 – Directorate of Revenue Intelligence Department, (DRI) along with independent mediators entered premises of M/s. Surya Fine Chemicals, Kadapa and found Petitioner/Accused in premises with a bag which contained 45 Kgs of 'Ephedrine Hydrochloride', valued Rs.4,51,65,000/- which is a controlled substance.

Complaint filed against accused for violation of provisions of Sec.9(A) of NDPS Act – Counsel for petitioner contended that previous bail application was dismissed as petitioner's counsel failed to bring to the notice of Court that Secs.37 of NDPS Act has no application in instant case and this court also by mistake observed as if seized contraband was commercial quantity in terms of Sec.37 of NDPS Act and also prosecution agency has failed to file complaint within 60 days after completion of investigation - Hence, petitioner claimed bail as an indefeasible right under Sec.167(2) of Cr.P.C.

Held - Criminal petition dismissed – Sec. 37 of NDPS Act has no application in the instant case – However, petitioner has not produced any record showing that immediately after expiry of period prescribed, he applied for bail under Sec. 167(2) Cr.P.C and same was dismissed – Though petitioner filed bail application earlier, it was under Sec.439 of Cr.P.C. but not under Sec.167(2) of Cr.P.C. – As such, petitioner cannot claim such alleged indefeasible right at this stage. ***274***

NEGOTIABLE INSTRUMENTS ACT:

---Sec.138 – "Dishnour of cheques" with endorsement "funds insufficient" - Appellant/ Complainant allegedly lent Rs.2 lakhs to respondent/accused – Cheques issued by respondent towards discharge of debt due to complainant were dishnoured when presented with endorsement "funds insufficient" – Hence, complaint filed by appellant/ complainant for offence punishable u/sec.138 – Trial Court dismissed complaint acquitting accused on ground that complainant failed to prove compliance of Cl.(b) of proviso to Sec.138 of N.I Act and also failed to establish that cheques issued by respondent/accused towards discharge of legally enforceable debt for offence punishable u/sec.138 of N.I Act – Hence complainant filed present Appeal.

Appellant/Complaint contends that trial Court on erroneous appreciation of evidence concluded that complainant failed to comply with mandatory requirement of Cl.(b) proviso to Sec.138 of N.I Act and that trial Court failed to consider presumption u/Secs.118 and 139 of N.I Act in proper perspective.

In view of law declared by Apex Court, High Court cannot interfere with judgment acquitting accused unless conclusions reached by trial Court are palpably wrong or based on onerous view of law or its decision is likely to result in grave injustice, normally High Court should be reluctant to interfere with its conclusions.

In this case, trial Court rightly pointed out ingredients to constitute offence punishable u/sec.138 of N.I Act - When accused could rebut presumption u/sec.138 of N.I Act burden will shift on to complainant and he has to prove that cheques were issued toward discharge of legally enforceable debt or liability, but in present case complainant failed to establish that cheques were issued towards discharge of legally enforceable debt – Further in evidence complainant categorically made an admission that he is an income tax assessee and he does not remember whether amount lent to accused is shown in his income tax returns and he has no documentary evidence to show that he advance Rs.2 lakhs to accused.

More over, amount lent by complainant to accused in unaccounted money and therefore such debt is not recoverable, consequently accused is not liable for offence punishable u/sec.138 of N.I Act and as such this Court find no perversity or illegality in judgment of trial Court, finding accused not guilty for offence u/sec.138 of N.I Act.

This Court find no infirmity or irregularity in judgment of trial Court warranting interference by exercising power u/sec.378 (4) of Cr.P.C and consequently appeal is liable to be dismissed – Appeal dismissed. ***291***

---Sec.138 - Petitioner was accused of offence u/Sec.138 of N.I Act – Respondent no.1/ Complainant entered into Sale agreement in relation to a plot which was collusively sold to Petitioner by four vendors – Petitioner entered into compromise deed – Dishonour of cheque issued by petitioner on ground of stop payment – Legal notice sent to petitioner returned as unclaimed – Petitioner was found guilty for offence before Special Magistrate and in Appeal before Addl. Metropolitan Sessions Judge - Impugning the Order, Petitioner preferred the Revision - Petitioner now contends that Notice is not legally sustainable - Respondent No.1 can retain Plot if Consideration amount in compromise deed is not paid.

Held – Revision against concurrent finding of guilt concerned, there is nothing to interfere but modified Sentence of 6months simple imprisonment & fine of Rs. 10,000/- to Imprisonment till rising of day by giving Set off to period undergone if any and fine of Rs. 10,00,000/- of which Rs.50,000 goes to State and rest to Complainant. ***178***

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PENAL CODE(INDIAN):

---Sec.120-B - CRIMINAL PROCEDURE CODE,Sec. 482, PREVENTION OF CORRUPTION ACT, Secs. 7 and 13(1)(d) - INDIAN EVIDENCE ACT, Sec.25 - Criminal revision.

Crime registered against Petitioner/ A2 for offences punishable u/ Sec. 120-B and Sec.7 and 13(1)(d) of P.C Act - Revision lis is outcome against order of Principal Special Judge, for CBI cases against petitioner in dismissal of his discharge application of cognizance taken against him – Prosecution case developed against petitioner, after A1 said at instance of petitioner, he demanded and accepted bribe - Petitioner contended that except alleged

and inadmissible telephonic conversation, there is no material to sustain accusation, tapping phone of petitioner is inadmissible in evidence, for original not produced and there is no certificate of secondary evidence apart from expert opinion.

Held - There is no material to show as to there is any criminal conspiracy or privy – It is not post occurrence conversation or acts that are admissible but acts prior to occurrence that is material to show so called conspiracy or privy - Prosecution case developed against petitioner in post-trap stage onwards – Conversation mainly to connect petitioner with A1 when he stated about demand and acceptance of bribe from defacto-complaint, petitioner responded – Mere response cannot make him a privy – It is nothing but futility in continuing prosecution by framing charges and ask accused to face trial - Revision is allowed by setting aside dismissal order of discharge petition. ***268***

---Sec.302 – CRIMINAL PROCEDURE CODE. Secs.235(2) and 428 – INDIAN EVIDENCE ACT, Secs.6, 27 and 32(1) - Criminal appeal challenging order passed by Sessions Judge – Appellant convicted and sentenced for offence u/s 302IPC – Nemo moriturus praesumitur mentire (a man will not meet his maker with a lie in his mouth).

Deceased, aged 70 was forcibly administered poison by appellant and admitted in hospital –SHO recorded dying declaration – Deceassed stated that appellant came to him while he was grazing cattle at fields and attributed that he was practicing sorcery against family of appellant and threatened to kill him if he did not sip poison and administered it into mouth of deceased – Medical officer has opined cause of death was due to Organophosphate(insecticide poison) - Counsel for appellant contended that SHO have recorded statement of victim but not dying declaration and there is no mention of General Diary number in FIR – Further contended PW1-PW5 are interested witnesses having enmity with appellant.

Held - When a statement is given by a person with regard to cause of his death or as to circumstances of transaction which resulted his death, it is a relevant factor – Any person can record dying declaration, provided statement recorded by said person must repose confidence – When any object is discovered or recovered by police when accused is in custody of police and said object is connecting accused with offence, then it is relevant fact and admissible – Confessional statement of appellant leading to discovery of article is admissible in evidence, as accused has voluntarily shown place where he had thrown glass bottle which contained poison after forcibly administering the same – Criminal appeal dismissed. **257**

---Secs.302, 376 - Appellant/accused was prosecuted on charges of both rape and murder - Plea of parents of deceased put

forth with conviction that appellant is an innocent boy implicated by police in order to save real culprits, notwithstanding, the appellant was made to stand trial, convicted for aforementioned offences, and sentenced to suffer life imprisonment and penalty against which order the present Appeal was filed.

Held, lower Court below has failed to notice various loose ends in case of prosecution believing theory of police who projected appellant as a dreaded criminal with past criminal history, being oblivious of fact that as many as five cases against appellant were quashed by this Court which fact itself throws suspicion on bona fides of police - Incongruous nature of prosecution case, improbable manner in which appellant allegedly committed crime and incredible evidence of prosecution, fully convince Court to conclude that appellant was falsely implicated in case by police - Though P.W. 1 persistently pleaded that in order to save real culprit belonging to an influential political family, police have falsely implicated appellant, evidence available on record is insufficient for us to express any opinion on this aspect - In result, Criminal Appeal is allowed with costs payable by State to appellant - Conviction and sentence recorded against appellant/accused are set aside. ***80***

REGISTRATION ACT(INDIAN):

---Rules. 26 (i) (k) (i) - Petitioners contended that unilateral cancellation deed ought not to have been registered without consent of both parties to original; document and before registering cancellation deed, no notice had been issued to them and they did not sign cancellation deed - Placing reliance on Rule 26(i)(k)(i) of Registration Act, they contended that term "conveyance of sale" used in said Rule not only covers sale deeds but also documents such as agreements of sale-cum-irrevocable General Power of Attorney and since procedure prescribed in above rule has not been complied with by 2nd respondent, cancellation deed has to be declared as null and void.

Held, accordingly, Court hold that Rule 26(i)(k)(i) is to be interpreted broadly to cover "agreements for sale"/executory contracts or "agreements for sale-cum-General Power of Attorney"or "agreements for sale-cum-irrevocable General Power of Attorney"also - Since, in present case, procedure prescribed therein has admittedly not been followed and petitioners were not put on notice by 2nd respondent before registering Deed cancelling agreement of sale cum General Power of Attorney, it is declared as null and void and of no effect - Writ Petition is accordingly allowed. **37**

---Sec.49 - Suit was filed by petitioner before Principal Junior Civil Judge, for permanent injunction restraining respondent from ejecting petitioner from plaint schedule premises until expiry of term of lease under an agreement – When petition for grant of temporary injunction was coming up for enquiry, petitioner tried to mark lease agreement and respondent objected to the

same on ground that said lease agreement was inadmissible in evidence as it is unregistered one.

Petitioner contended that though it is an unregistered lease agreement, it can be looked into for collateral purpose for proving possession and nature of possession – But, respondent objected on ground that unregistered lease agreement is inadmissible in evidence even for collateral purpose of proving possession as factum of lease being contentious issue – Trial Court upheld objection on ground that lease agreement was unregistered – Hence, this Civil Revision Petition.

Held – Unregistered document can be used as an evidence of collateral purpose as provided in proviso of Section 49 of Registration Act - Order of Lower Court is set aside and CRP is allowed for permitting petitioner to produce document for the collateral purpose. ***350***

SERVICE LAWS:

---Compulsory retirement - Petitioner preferred this writ petition requesting to quash proceedings, whereby he was compulsorily retired from service and denied retirement benefits by way of punishment – Petitioner was working in respondent company since 1978 and at the time of imposition of punishment he was working as Deputy Manager.

Petitioner was served with a show cause notice proposing punishment – Petitioner submitted his explanation at 5:00 pm on 28.04.2008 and he was handed over Order of removal by 5:10pm on same day - It is impossible for Disciplinary officer to go through petitioner's explanation and to prepare order within span of ten minutes – Therefore it is amply clear that impugned order was kept ready even before petitioners explanation – Though departmental appeal is provided, instant case deserves indulgence of this court as whole exercise is done in violation of principles of natural justice.

Held - Entire exercise from inception, formulation of charges till imposition of penalty by impugned proceedings against petitioner is vitiated and resultantly he is entitled to succeed - Writ petition, allowed. ***324***

---Doctrine of Estoppel – Petitioner contending that mere acceptance of request for voluntary retirement will not put an end to the relationship of employer and employee – Petitioner contended that his letter of withdrawal of request for voluntary retirement is before the date on which he is supposed to be relieved.

Petitioner was working as UDC in Electricity Revenue Office, for 35 years - At age of 54 years, owing to his domestic affairs and personal problems, he opted for voluntary retirement by giving three month's notice – Petitioner, later sent a letter requesting to withdraw his retirement orders

stating that he had applied for Voluntary retirement in view of lurking fear about his terminal benefits and that his position has improved – Petitioner's request was rejected and was eventually made to retire from service.

Held – Writ Petition dismissed – Petitioner, after receiving and accepting all terminal benefits without protest and having utilized part of benefits and having also drawn pension voluntarily for some months – Principle enshrined in Doctrine of 'Estoppel' would get attracted and operate – So, petitioner who kept quiet for two years from date of relief from service is estopped from seeking present relief.

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--Petitioner is working as conductor in respondent Corporation - He was assigned duty on Bus between Huselli to Zaheerabad on 19.12.2016, a check was conducted at Zaheerabad - During the check, passenger aged about 13 years was found ticket less - Alleging that petitioner indulged in cash and ticket irregularities, he was placed under suspension by order dated 07.01.2017 - On same day, he was also served with the charge memo - Petitioner challenges his suspension from service in this writ petition - He would further submit that even assuming that allegation is true at most it would amount to minor lapse and therefore, does not warrant suspension and in past department has not placed under suspension another employee in same circumstances.

Held, Past misconduct cannot be a ground to treat differently two similarly situated persons on question of suspension on a similar misconduct - If such conduct is not viewed as 'grave misconduct' to an employee, it cannot become grave to another employee, merely because he had a past misconduct - Past misconduct may be relevant at time of imposing punishment - It is appropriate to note that past misconduct is not allegation in charge memo - This amounts to arbitrary exercise of power and meeting out discriminatory treatment - In result, order of suspension is set aside - Accordingly, writ petition is allowed. **138**

SPECIFIC RELIEF ACT, 1963:

---Sec.16(c) and CIVIL PROCEDURE CODE, Order VI Rule 17 - Original suit was for specific performance of an agreement of sale of immovable property - Respondents said that parties had agreed to return advance amount and that thereafter they have come up with suit - Court below rejected prayer for specific performance on ground that though agreement of sale true and valid, defendants had not satisfied requirements of Sec.16(c) of Specific Relief Act and also in view of pendency of disputes between defendants and their tenants, it was difficult for defendants to complete transaction and handover vacant possession as per agreement of sale - Trial Court also went into question of hardship which is one of parameters on which discretionary

relief of specific performance had to be decided and held that hardship that would be caused to defendants would be much more by granting the same, but allowed alternative relief of recovery of advance money - Not satisfied with decree, plaintiffs/ appellants have come up with present Appeal.

Held, Court below had found and this Court have also found that the case on hand falls within parameters of sub-section (2) of Section 20 of Act, where court may exercise discretion not to decree specific performance - This is a case where one or more of clauses (a) to (c) of sub-section (2) of Section 20 stands satisfied - Therefore, Court considered view that both issues arising for determination are to be answered against appellants and judgment and decree of Court below do not call for any interference - In result, appeal is dismissed, **148**

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Law Summary

(Founder: Late Sri.G.S.GUPTA)

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MADRAS HIGH COURT REPORTS

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merely because defendant has not been examined, plaintiff cannot succeed automatically - In result, this Suit is dismissed. ***1***

ELECTRICITY ACT,(INDIAN) 2003:

---Sec.135 - CRIMINAL PROCEDURE CODE, Secs.200, 202 & 203 – Criminal revision as Court below has dismissed petitioner's private complaint as not maintainable.

Petitioner / Owner of building – Obtained two electricity service connections from Tamil Nadu Electricity Board, one for industrial purpose in ground floor and other for lighting purpose under commercial category in first floor – Petitioner before leaving for USA, settled above property in favour of his two sons, who further let out ground floor to one plastic manufacturing industrial unit – Upon inspection by Respondents/Executive Engineers of TANGEDCO, found that tenant in ground floor was using part of Industrial service connection for Lighting purpose – Respondents preferred a Mahazar report in absence of owner or occupier and obtained a signature from one Kannan whom respondents had falsely stated as building in-charge and filed complaint.

Held- Criminal Revision Petition is allowed – Magistrate cannot dismiss the complaint on grounds of maintainability for want of Sanction from the appropriate authorities to proceed and only has to see from complaint as well as statement of oath or enquiry whether there are sufficient grounds to proceed under Section 202 of Cr.P.C. ***29***

NEGOTIABLE INSTRUMENTS ACT:

---Sec.87 - MATERIAL ALTERATION OF DATE AND AMOUNT IN PROMISSORY NOTE.

In this case, that suit promissory not has been altered by correcting date and amount - If original date found in promissory note is taken into consideration suit will be barred by limitation - Alteration date of promissory note so as to bring it within a period of limitation is necessarily material alteration - It would render the document void u/Sec.87 of N.I. Act - Court constrained to hold that suit promissory note has been materially altered so as to render it void u/sec.85 of N.I Act and as such plaintiff is not entitled to a decree on basis of said document - Appeal is allowed - Judgment and decree of trial Court is set aside. ***17***

---Secs.138 & 139 - CRIMINAL PROCEDURE CODE, Sec.357(3) - INDIAN PENAL CODE, Sec.420 - Cheque issued by petitioner/accused in favour of respondent/complainant towards amount borrowed as hand loan returned due to "insufficiency funds" in his account - Trial Court convicted petitioner/accused and sentencing him to undergo one year simple imprisonment and also directed to pay cheque amount as compensation - Lower Appellate Court dismissed criminal appeal by confirming conviction and sentence imposed by trial Court - Hence present criminal revision case.

Petitioner accused denied incriminating materials put to him, same as false and that there is no legally recoverable debt.

Complainant contends that since petitioner/accused failed to rebut initial presumption u/Sec.139 of N.I. Act, there is no illegality and perversity in judgments of courts below.

If accused is able to raise a probable defence which creates doubts and existence of a legally enforceable debt or liability, burden shifts on complainant to prove that there is legally enforceable debt - In absence of any evidence to prove existence of legally enforceable debt or liability petitioner/ accused cannot be found guilty for offence u/Sec.138 of N.I Act.

In this case, petitioner/accused has rebutted presumption u/Sec.139 of N.I Act by raising a probable defence which creates a doubt about existence of legally enforceable debt or liability - On other hand respondent/complainant failed to prove existence of legally enforceable debt by acceptable evidence and Courts below without considering case in proper perspective has convicted petitioner.

Judgments of Courts below are liable to be set aside and petitioner/accused is entitled for acquittal - Criminal revision case, is allowed. ***9***

INDIAN PENAL CODE(INDIAN):

--- Secs. 392 & 395 - Writ Petition has been filed by petitioner seeking to quash impugned Order of 1st respondent, by which request of petitioner to engage a lawyer of his choice to defend him in departmental proceedings has been declined – On consent of counsels of both parties writ petition is taken up for final disposal at stage of admission itself.

Petitioner worked as Inspector of Police, and has been placed under suspension on account of registration of two criminal cases against him – Departmental enquiry has also been initiated for grave charges involving major penalties – Counsel for petitioner submitted that since charges leveled against petitioner are serious in nature, assistance of an advocate is required.

Held – Lawyer should be permitted to assist delinquent employee in a departmental proceeding, who had to face enquiry before a retired High Court Judge as well as before a legally trained person – In the present case, enquiry officer is a Law graduate and that cannot be a valid ground for seeking assistance of a lawyer to defend him in enquiry – If it is found that facts of cited Judgments of the Higher Forum differs with the one on hand then there is no compulsion for Subordinate Courts to blindly rely on the same to arrive at a conclusion - Writ petition dismissed. **59**

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Law Summary

(Founder: Late Sri.G.S.GUPTA)

2017 (2)

SUPREME COURT

(Vol.91)

SUPREME COURT

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to appear before him at a specified place and time - Not only there were violation of guidelines issued in case of D.K. Basu, there were also flagrant violation of mandate of law enshrined under Section 41 and Section 41A of CrPC - On a perusal of FIR, it was clear that dispute was purely of a civil nature, but a maladroit effort had been made to give it a criminal colour. ***38***

HINDU MARRIAGE ACT:

---Secs.13 and 19 – CIVIL PROCEDURE CODE, Sec.25 and Order XXV – CONSTITUTION OF INDIA, Arts.15(3), 39-A, 51-A, 243-D and 243-T – Present petition is filed seeking transfer of a case, which is pending on file of Family Court of one State to Family Court of another State – Directions issued by Supreme Court in respect of Transfer of cases in matrimonial disputes.

Petitioner/Wife was married to Respondent/Husband at Hyderabad – While living in her in-law's house at Jabalpur, M.P, she was ill-treated and subjected to mental and physical torture – Petitioner left matrimonial home – Divorce petition has been filed at Jabalpur while petitioner filed a domestic violence case at Hyderabad – Petitioner contended that she was living with her minor daughter and cannot undertake long journey and contest proceedings at Jabalpur.

Held – Doctrine of *forum non conveniens* was referred which can be applied in matrimonial proceedings for advancing interest of justice – Directions were issued which may provide alternative to seeking transfer of proceedings on account of inability of a party to contest proceedings at a place away from their ordinary residence on ground that if proceedings are not transferred it will result in denial of justice. ***31***

NEGOTIABLE INSTRUMENTS ACT:

---Sec.138 - Whether when compensation is ordered as payable for an offence committed under Section 138 of the Negotiable Instruments Act, and in default thereof, a jail sentence is prescribed and undergone, is compensation still recoverable - Apex Court held that compensation under old Code of Criminal Procedure was always recoverable as a part of fine, and that even after default imprisonment having been undergone, a fine could still be collected in manner provided by Section Under Section 421(1). ***1***

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005:

---Question arises whether counter claim by the Appellant seeking right Under Section 19 of Act, 2005 can be entertained in a suit filed against her Under Section 26 of Act, 1887- The Court held the counter claim was fully entertainable u/Sec.26 of the Act, 2005. ***11***

PENAL CODE,(INDIAN):

---Secs.107&306 – EVIDENCE ACT, Sec.32 - CONSTITUTION OF INDIA, Articles 14, 15 and 21 - Instant case – Portrays deplorable depravity of the Appellant/ Accused that has led to a heart breaking situation for a young girl who has been compelled to put an end to her life – A case of psychological harassment - Deceased was daughter of Informant/PW1 – Accused

used to threaten deceased that he would Kidnap her and had bee] constantly tease her – Deceased poured kerosene oil and set herself ablaze – Deceased gave one written document to pradhan of village stating accused was responsible for her condition - Dying declaration of deceased recorded, post-mortem was conducted and FIR was registered – Trial Court acquitted the appellant for liability under Section 306, IPC – High Court re-appreciated evidence and reversed Order of Trial Court.

Nature of Jurisdiction High Court exercises, when it reverses a Judgment of acquittal to that of conviction in exercise of appellate jurisdiction –Trial Court held that deceased sustained 80% burn injuries while Dying declaration was made, therefore dying declaration is invalid – Submission of counsel for appellant is that assuming even if allegation is proved, there is no case of abetment U/s 306 of IPC.

Held- Appeal dismissed – High Court correctly reversed Judgment of acquittal and imposed sentence - No reason to disregard dying declaration, if it is absolutely credible and nothing is brought on record that deceased was in such a condition that he or she could not have made – Certificate of fitness is not the requirement of law for a dying declaration to be valid – A person is said to have abetted in committing a suicide, when there is a positive action that creates a situation for victim to put an end to life – Accused has played active role in tarnishing self-esteem and self-respect of victim which drove victim girl to commit suicide – A woman enjoys as much equality under Article 14 of the Constitution as a man does - No one can compel a woman to love, she has the absolute right to reject.

51

---Secs.498-A and 323 - CRIMINAL PROCEDURE CODE, Sec.482 - Question arisen by way of this appeal – Whether any directions are called for to prevent misuse of Section 498-A, as acknowledged in certain studies and decisions – Appellant (Husband) demanded car and Rs. 3,00,000/- in addition to the dowry he received and in not meeting that demand he tortured and dropped his wife (R2) at her matrimonial home –Main contention raised in support of this appeal is that there is need to check tendency to rope in all family members to settle a matrimonial dispute.

Function of this Court is not to legislate but only to interpret Law, and in doing so laying down of norms is sometimes unavoidable – Violation of human rights of innocent cannot be brushed aside – Certain Directions were passed after careful consideration of whole issue :

- One or more Family Welfare Committees be constituted by District Legal Services Authorities, which shall be reviewed at least once in a year by District and Sessions Judge.
- Committees maybe constituted out of para legal volunteers/social workers/retired persons/other citizens who may be found suitable and willing.

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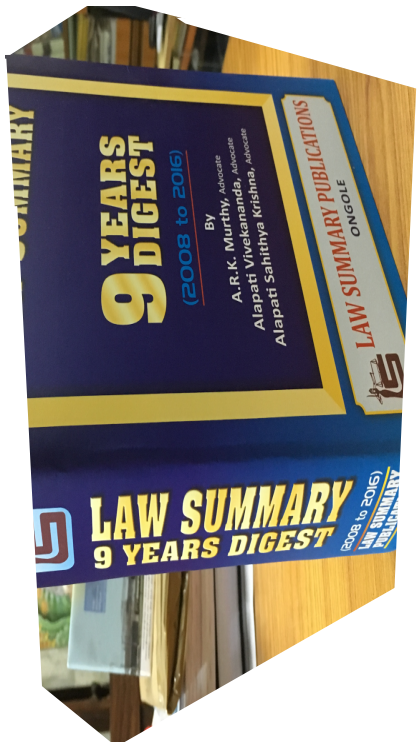

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