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Law Summary

(Founder : Late Sri G.S. GUPTA)

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ARBITRATION AND CONCILIATION ACT, 1996, Sec.8 – Petitioner filed present Civil Revision – Assailing Order passed by Trial Court, whereby application filed by petitioner to refer parties to Arbitration has been dismissed.

Case of petitioner is that when any dispute arises with regard to Kidzee Franchisee Agreement entered into by parties – Dispute shall be referred to Arbitrator – Trial Court observed that, disputes between parties are not clear since there are no pleadings of petitioner as it has not filed any written statement in the suit to know whether issue between both the parties is with regard to the said agreement – Respondent contended that signatures on Kidzee Franchisee Agreement are taken by petitioner by fraudulent means.

Held – It is nowhere mentioned in the plaint that signatures on the said agreement are taken fraudulently – It was the duty of Trial Court to direct the parties to approach arbitrator after receipt of such application by petitioner – In spite of existence of a clause

in the agreement, Trial Court erred in dismissing application filed by petitioner, without referring parties to an arbitrator – Civil Revision Petition is allowed. **(Hyd.)** ***39***

CIVIL PROCEDURE, Order IX - Rule 9 and Rule 13 - This case reflects typical mindset of a litigant in a civil litigation who perceive prolongation of litigation as far as possible itself as a gain, pushing adversary party to brink of uncertainty and frustration – Public criticism of courts for long pendency of cases overlooks contributory role of litigants, ably advised and supported by some lawyers – Litigants and Lawyers representing them being equal partners in justice dispensation need to play catalyst role, instead of playing a role of obstructionist.

Respondent filed a suit for recovery of money against the petitioner before the Trial court – As petitioners counsel was not ready to cross-examine witness, case was adjourned at his request – Yet again an adjournment was sought on next hearing date and lower court has declined the request of adjournment and closed evidence of P.W.1 by showing cross-examination as 'Nil' – Petitioner there upon filed an I.A. for recalling P.W.1 for cross-examination – Lower court has graciously allowed said application, however by imposing costs of Rs.2,500/- on petitioner – Instead of paying costs petitioner has approached this court by filing civil revision – Case was adjourned at request of counsel for petitioner – Meanwhile lower court has dismissed I.A for non-compliance with conditional order.

Held - Petitioner has been indulging in vexatious litigation evidently to procrastinate suit proceedings – It is a matter of concern that a money suit is kept pending for last six years owing to simple trick played by petitioner – One can imagine that the expenses for filing two civil revision petitions including lawyer's fees in this court would far outweigh costs imposed by lower court – Procedural safeguards provided in CPC to protect interests of bona fide litigants are being abused by dishonest litigants to such an extent that they are proving to be an obstruction in dispensation of Justice - No merits in both civil revision petitions and same are dismissed with costs of Rs.5,000/-. **(Hyd.) 26**

CIVIL PROCEDURE CODE, Order XLI Rule 27- HINDU MARRIAGE ACT, Sec.16(1) - Documents sought to be produced as additional evidence during the course of this appeal are not marked during the original suit proceedings – It has not been explained by appellant properly as to why said documents had not been marked before court below.

Suit properties originally belonged to Rathinampillai and he died intestate – When he was alive, he had married Rajammal and through her appellants were born – At the instance of his elder sisters, Rathinampillai had married Rajeswari as his second wife, who is the daughter of one of his elder sisters – Through Rajeswari respondents were born to Rathinalpillai – After the death of Rathinampillai, his second wife married Veeramuthuswamy – Respondents were under care of Palaniammal, sister of Rathinampillai – Hence, appellants contends that Rajeswari is not entitled to any share in her husbands properties - Respondents contended that Rajammal is not legally wedded wife and appellants are not the children born to Rathinampillai.

Appellants have miserably failed to establish that there has been a valid marriage between Rajammal and Rathinampillai and appellants have been born out of said wedlock and it is found that appellants as such are not entitled to claim any share in suit properties even on footing that they are illegitimate children of Rathinampillai – Plea that very recently appellants had come to know regarding said documents and therefore, same should be received as additional evidence, cannot be accepted without any material to substantiate their case – Appeal stands dismissed. **(Madras)** ***1***

(INDIAN) PENAL CODE, Secs. 120-B, 201, 302 and 364-A, CONSTITUTION OF INDIA, Art.137 - Applicants by their review petitions seeking review of Judgment of Hon'ble Supreme Court by which Judgment, Criminal appeals filed by applicants were dismissed and death sentence awarded by Trial Court and affirmed by High Court was maintained.

Trial Court convicted Vikram Singh, Jasvir Singh and Sonia (wife of Jasvir Singh) and awarded death sentence to all three accused – High Court confirmed death sentence of all the accused – In the Criminal appeal before apex court, death sentence awarded to Sonia was converted into life imprisonment – Review petitions filed by Vikram Singh and Jasvir Singh were dismissed by two-judge bench which heard criminal appeals – Application filed for reopening of review petitions.

Held – Review literally and even judicially means re-examination or reconsideration - Granting power of review to Supreme court by the Constitution is in recognition of universal principle that power of review is part of all Judicial system – In a criminal proceeding, review applications cannot be entertained except on ground of error apparent on the face of the record – By review application an applicant cannot be allowed to re-argue appeal on the grounds which were argued at the time of hearing of criminal appeal – Even if applicant succeeds in establishing that there may be another view possible on conviction or sentence of accused that is not a sufficient ground for review – Review applications are rejected. **(S.C.)** ***1***

(INDIAN) PENAL CODE, Secs.201 r/w 511, 302 & 377 – Appellant challenged Judgment passed by Trial Court, whereby, appellant was held guilty and sentenced to suffer life imprisonment - Appellant brought deceased to room and tried to have homosex – Deceased refused, appellant insisted him for carnal intercourse – When deceased tried to make cries, appellant shut his face with jeans pant and smothered him to death.

Counsel for appellant contended that prosecution has failed to establish that seized article, wherein finger prints are available, were not tampered before it reached the expert for examination as it was not packed and sealed and there is no evidence led whether bureau expert received packages with seals intact - He further contended that it is mandatory to obtain permission of a magistrate or finger prints have to be obtained in the presence of magistrate.

Held - If the sentence is for death or life imprisonment, to take finger prints, permission of magistrate is not required – Criminal appeal dismissed. **(Hyd.) *29***

(INDIAN) PENAL CODE, Secs.302 r/w 34, 304-B & 498-A - DOWRY PROHIBITION ACT, Sec.4 - Trial Court sentenced husband(appellant no.1) and mother-in-law (appellant no.2) of deceased to suffer life imprisonment along with other lesser punishments which were directed to run concurrently - Prosecution must prove cruelty or harassment of victim “soon before the occurrence” - Prosecution failed to produce evidence proving that appellants have burnt deceased, the only cause of death must inevitable be an accidental one.

Marriage of husband with deceased took place about three years prior to occurrence of alleged offence – At the time of marriage, parents of deceased gave certain amount of dowry – Since the time of marriage, appellants harassed deceased for additional dowry – Couple were blessed with a female child – Six months prior to the commission of alleged offence, appellants necked deceased out of their house – On the day of alleged offence, appellants beat deceased from the morning and around evening they killed deceased by setting fire to her.

Held – Instant Case is based on circumstantial evidence – None of the prosecution witnesses has witnessed occurrence of alleged offence – Prosecution has failed to establish demand for additional dowry – No credible evidence to show that there was harassment of deceased by appellants at any point of time - As prosecution has failed to establish guilt of accused, Judgment of lower cannot be sustained – Criminal appeal is accordingly allowed. **(Hyd.)*1***

SUIT FOR PARTITION – Adverse possession - No one can confer a better title than what he himself has (Nemodat quod non habet) - To establish adverse possession, a person making the claim should establish a Peaceful, Open and Continuous

possession as engraved in nec vi, nec clam and necprecario - Appellant/ Plaintiff filed a suit seeking partition and separate possession of her 1/5th share in scheduled properties of plaint before Trial Court - Plaintiff and defendants 1 to 4 are daughters of Kistareddy – Said Kistareddy was absolute owner of scheduled properties - Kistareddy died intestate in 1971 leaving behind his wife and five daughters.

Properties were devolved equally upon plaintiff and defendants – After the death of both parents, Defendant no.1 used to look after properties – When activities of Defendant no.1 became suspicious, plaintiff approached M.R.O and obtained certified copies of pahanies and other documents – From those documents she found that sons of defendant no.1 who were arrayed as defendants 5 to 8 got their names entered in revenue records – Appellant contended at Trial court that mutation was unlawful and she is entitled to partition – Defendants 2 to 4 filed a written statement agreeing with claim of appellant – Instead of defendant no.1, her sons defendants no.5 to 8 filed a written statement contending defendant no.1 was given in marriage to Narayanareddy who was brought to house of Kistareddy as Illatam and he was in possession and enjoyment of properties till his death, after his death defendants 5 to 8 are in possession and enjoyment of properties. **(Hyd.)** ***17***

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LAW SUMMARY
2017 (3)
JOURNAL SECTION

PRICE IN A CONTRACT OF SALE

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

INTRODUCTION:

Indian sale of goods Act came into the statute book in india in 1930. Neither the sale of goods Act nor the common Law relating to the Sale of Goods has anything to say as to what the status of sale is, though certain rules have been laid down for ascertaining the intention of the contracting parties as to when or under what conditions the property in the goods is to pass to the buyer.

Section 2(10) of the Sale of goods Actdefines a price as meaning:

Money consideration for sale of Goods. The Presence of **money consideration** is therefore an essential element in a transaction of sale. If the consideration is not money but some other valuable consideration it may be an exchange or barter but not a sale. The difference between a sale and an exchange is this, that in the former the price is paid in money, whilst in the latter it is paid in goods by way of barter. The amounts paid by the way of consideration by the purchaser to the seller of goods in pursuance of the contract of sale can legitimately be regarded as purchase price.

In **Love vs. Norman Wright (Builders) Ltd.**[1] Lord Goddard Lj observed as under:

"*So far as the purchaser is concerned, he pays for goods what the seller demands, namely, the price even though it may include taxes. That is the whole consideration for the sale and there is no reason why the whole amount paid to the seller by the purchaser should not be treated as the consideration for the sale and included in the turnover.*"

Price:

In a Contract of Sale of Goods, the word Seller must obviously refer to the party selling under the contract unless there is anything in the context suggesting otherwise.Even

if the agreement for the sale has not ripened into a completed sale, the previous owner would still be the seller within the meaning of the Act.

Price is always regarded as a part of sale of transaction of the goods. The common mode of fixing the price is that the parties themselves mention the price agreed to by them in the contract of sale itself. But sometimes the parties may agree to abide by the price to be fixed by the valuation of a third party and where such third party fails to do so the agreement of sale between the parties is avoided. But, however where the seller has delivered any part of the goods and the buyer has appropriated it, the seller is entitled to for a reasonable price for the part delivery. Whenever such third parties by whose valuation and fixing of the price, the parties agreed to abide are prevented from making the valuation as a result of fault of either to bring a suit claiming damages against the party it default.

Scope :

The Price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties. Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of the fact dependent on the circumstances of each particular case.
By enacting sub-section (2) of section 9 of the Act, Legislature has itself accepted the existence of the contracts wherein price is not fixed as not as unusual phenomenon. It allows the parties not to fix price at the time of the transfer and to leave the determination of the amount of consideration to the later date.

In **carl still G.M.B.H vs. State of Bihar,**[2]it was held that where there is a contract of sale of movables but the price is not mentioned, it has to be fixed either in the manner in the agreement, or by having regard to course of dealings between the parties, and where that is not possible, the buyer has to pay the seller a reasonable price. But the section presupposes that there is a contract of sale of Goods, and as held in **GannanDunkerley's**[3]case, such a contract requires that there must have been an agreement between the parties for the sale of the very goods in which eventually property passes. Under a contact of sale where seller before delivering the goods has paid the enhanced customs duty can claim the same from the buyer.

Where there is an agreement to sell the goods on the term that price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided. Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable

price therefor where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault.

The parties may also agree at the same time of agreement that the price maybe determined in the course of that dealing. In **M.P LaghuUdyog Nigam vs. Gwalior Steel Sales**,[4] it was agreed between the seller and the buyer that the corporation shall have the right to fix the price of the goods supplied and accordingly the corporation appointed a committee for fixing the price. The Madya Pradesh High Court held that the price fixed by the committee of the corporation shall be binding on the seller.

Contract of Sale :

A contract of sale of Goods is a contract whereby seller transfer or agrees to transfer the property in Goods to the buyer for a price. There may be a contract of sale between one part owner and other.A contact of sale may be absolute or conditional. Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the Contract is called a sale, but the where the transfer of the property of goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Section 4 makes it clear that where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract entered into by a duly authorized agent within the scope of his authority is as good as a contact entered into by the principal himself and has the same legal effect. The Promise to pay the purchase price in installments is an undertaking which amounts to the payment of the money. Scooter is a moveable property and its sale is undisputedly governed by the Sale of Goods Act.

The Expression **Sale of Goods** in entry 487 in list II of the schedule VII of the government of India Act, 1935, cannot be constructed in its popular sense but must be interpreted in its legal sense and should be given the same meaning which it has in the Sale of Goods Act, 1930. It is a nomenjuris, its essentials ingredients being an agreement to sell movables for a price and property passing there is pursuant to that agreement. In other hand, it is necessary for constituting a sale that there should be an agreement between the parties for the purpose of transferring title in the Goods, that the agreement must be supported by money consideration and that as a result of the transaction the title to the property must actually pass in the Goods.

The Principle of the law is simple as to be elementary. If a person makes an agreement of purchase of goods with another paying the price in advance, and the seller directs his agent or stocklist or the pledgee to deliver the goods to the purchaser from the stock in his possession, and the agent fails or refuses to deliver them, the purchase is against the seller and not against the seller's agent, because the latter is under no obligation or liability to him.

In **C.E.B Draper & son Ltd vs. Edward Turner & Son Ltd.**[5] it was held:

" The Essential object of the Contract of Sale there according to that definition is the exchange of property for a money price. There must be a transfer of property, or an agreement to transfer it, from one party, the seller, to the other, the buyer, in consideration of a money payment or a promise thereof by the buyer."

Footnotes:

1.[1944] 1 All E.R. 618
2.1961 AIR 1615
3.1958 AIR 560
4.AIR 1992 MP 215
5.[1965] 1 Q.B. 424

–X–

LAW SUMMARY

2017 (3)

Hyderabad High Court Reports

2017(3) L.S. 1 (D.B.)

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

Present:
The Hon'ble Mr. Justice
C.V. Nagarjuna Reddy &
The Hon'ble Ms. Justice
J. Uma Devi

Shaik Jani Pasha
& Anr., ..Appellants

Vs.

State of A.P., ..Respondent

INDIAN PENAL CODE, Secs.302 r/w 34, 304-B & 498-A - DOWRY PROHIBITION ACT, Sec.4 - Trial Court sentenced husband(appellant no.1) and mother-in-law (appellant no.2) of deceased to suffer life imprisonment along with other lesser punishments which were directed to run concurrently - Prosecution must prove cruelty or harassment of victim "soon before the occurrence" - Prosecution failed to produce evidence proving that appellants have burnt deceased, the only cause of death must inevitable be an accidental one.

Marriage of husband with deceased took place about three years prior to occurrence of alleged offence – At the time of marriage, parents of deceased gave certain amount of dowry – Since the time of marriage, appellants harassed deceased for additional dowry – Couple were blessed with a female child – Six months prior to the commission of alleged offence, appellants necked deceased out of their house – On the day of alleged offence, appellants beat deceased from the morning and around evening they killed deceased by setting fire to her.

Held – Instant Case is based on circumstantial evidence – None of the prosecution witnesses has witnessed occurrence of alleged offence – Prosecution has failed to establish demand for additional dowry – No credible evidence to show that there was harassment of deceased by appellants at any point of time - As prosecution has failed to establish guilt of accused, Judgment of lower cannot be sustained – Criminal appeal is accordingly allowed.

Crl.A.No.37/2011 Date:27-06-2017

Cases Referred:

1. Judgment in Crl. A. No.95 of 2008, dt.18.2.2011 (DB) (AP): MANU/AP/0150/2011
2. 1995 CrlLJ 368
3. (2010) 15 SCC 116
4. (2013) 7 SCC 256
5. (2013) 4 SCC 131
6. 2016 (3) ALT (Crl.) 505 (DB)(AP)

Mr. K. Surender, Advocate for the appellants. Public Prosecutor (TS), Advocate for the respondent.

J U D G M E N T

(per the Hon'ble Mr.Justice C.V.Nagarjuna Reddy)

The husband and the mother-in-law of one Shaik Sameena (hereafter referred to as the deceased) having been convicted by the V Additional Sessions Judge (III Fast Tract Court), Nalgonda at Miryalguda, vide judgment dt.12.01.2011 in S.C. No.218 of 2009, for the offences punishable under Section 302 read with Section 34 and Sections 304-B and 498-A I.P.C., and Section 4 of the Dowry Prohibition Act, 1961 (for short the Act) and sentenced, inter alia, to suffer life imprisonment for the offence punishable under Section 302 read with Section 34 I.P.C., besides other lesser punishments for the offences punishable under Section 498-A I.P.C., and Section 4 of the Act, which were directed to run concurrently, the convicts, have filed this appeal.

2. Appellant No.1 is the son of appellant No.2. The deceased was the wife of appellant No.1. As per the version of the prosecution as reflected from the charge-sheet filed by it, the marriage of appellant No.1 with the deceased took place about three years prior to the occurrence of the alleged offence; that at the time of the marriage, the parents of the deceased gave Rs.64,000/-, apart from gold and other household articles; that since the time of the marriage, the appellants started harassing the deceased for bringing additional dowry; that the couple was blessed with a female child aged 1 years; that about six months prior to the incident, the appellants beat the deceased and necked her out of their house, that since the morning of 17.12.2007 the appellants were beating the deceased and that at about 5.00 p.m., both of them killed the deceased by setting fire to her and also to the house.

3. On Ex.P-1 report given by P.W.1, the maternal uncle of the deceased, P.W.13 registered F.I.R. and commenced the investigation. He sent a requisition to P.W.12, the Tahsildar, Miryalguda, with a request to hold inquest over the dead body of the deceased. Subsequently, P.W.15 took over the investigation. Both P.Ws.13 and 15, visited the scene of offence, examined L.W.2 Shaik Hussain Miya and P.Ws.2 to 6 and recorded their statements. P.W.12 held inquest over the dead body of the deceased in the presence of the mediators - P.Ws.9, 10 and 14 and shifted the dead body of the deceased to the Government Area Hospital, Miryalguda for autopsy. P.W.11 and L.W.18 Dr.G.Sudheer Kumar conducted autopsy over the dead body of the deceased. P.W.15 conducted the scene of offence panchanama in the presence of

the mediators - P.Ws.9 and 10, seized one partly burnt snuff coloured blanket, partly burnt shirt of the accused and two silver toe rings of the deceased lying at the scene in the presence of the said mediators under the cover of Ex.P-6 Panchanama. P.W.15 also examined P.Ws.7 and 8, the caste elders, who were acquainted with the facts and recorded their statements in detail. That on 31.12.2007 at 6.30 a.m., P.W.13 along with his staff arrested the appellants at Utlapally and produced them before P.W.15 at Miryalguda Rural Police Station at 7.45 a.m. P.W.15 recorded the confessional statement of appellant No.1 in the presence of panchas - L.Ws.14 and 15 Potla Venkateshwarlu and Thippana Malla Reddy and sent the appellants for judicial remand on the same day. The Doctors, who held autopsy over the deadbody of the deceased, preserved viscera for chemical analysis, furnished Ex.P-8 post mortem report and opined that the cause of the death of the deceased is burns. That the viscera of the deceased was sent to the Forensic Science Laboratory, Hyderabad, for chemical analysis and report. P.W.15 examined and recorded the statement of L.W.10 Shaik Masood.

4. It is alleged in the charge sheet that as per the evidence collected during the course of investigation, a prima facie case was made out against the appellants for the offences punishable under Sections 498-A, 302 read with 34 I.P.C. and Sections 3 and 4 of the Act. It is further alleged in the charge sheet that from the time of the marriage, the appellants not being satisfied with the dowry, gold and other household articles given to them, started harassing the deceased to bring an additional dowry of Rs.50,000/- from her parents; that the deceased tried to convince the appellants by explaining the poor financial status of her parents; that the appellants used to beat the deceased and also necked her away from their house with a demand to bring additional dowry on several occasions; that about six months prior to the occurrence, the appellants beat the deceased indiscriminately for her failure to fulfil their demand of additional dowry and sent her to her parents house saying that if she fails to bring the additional dowry, they will not allow her to lead matrimonial life; that on coming to know about the continuous harassment of the deceased by the appellants, L.W.2 Shaik Hussain Miya and P.W.2 along with their caste elders - P.Ws.7 and 8 went to Utlapally Village and requested the appellants not to harass the deceased, but they did not change their attitude and continued their harassment towards the deceased with the same demand; that finally, on 17.12.2007 at about 10.00 a.m., both the appellants asked the deceased to bring additional dowry of Rs.50,000/-; that when the deceased refused their demand in view of poor economical position of her parents, both the appellants got annoyed over the deceased for her failure to bring additional dowry even after their demand for several times and beat her indiscriminately; that they decided to eliminate the deceased; that at about 2.00 p.m., when appellant No.1 sprinkled kerosene over the deceased with an intention to kill her with the instigation of appellant No.2, the deceased

raised hue and cry; that on hearing the same, P.W.3 rushed to the house of the deceased, rescued her from the clutches of the appellants by admonishing them, took the deceased out of the house and made her bathe; that after that P.W.3 took the deceased to the house of the appellants and left her by advising them not to harass the deceased; that after the said incident, both the appellants thought that the deceased may file a case against them for their assault on her in the morning and hatched a plan to do away with her life; that according to their plan at 17.00 hours, when the deceased sat in the front room of their hut, appellant No.1 poured kerosene over her and set fire with a match box brought by appellant No.2; that when the flames raised all of a sudden from the body of the deceased, she caught the hands and legs of appellant No.1, who also received burn injuries to his hands and legs and that when the deceased, unable to bear the burn injuries, tried to come out of the hut in an attempt to save herself, appellant No.1 pushed her into the hut and set fire to it, due to which, the deceased was completely burnt in the flames along with the hut. That later, appellant No.2 extinguished the flames of appellant No.1 with a blanket and relieved him of his shirt and in that process, the blanket and shirt of appellant No.1 were also partly burnt and that subsequently after the incident, the appellants fled away from the scene and went to the house of appellant No.2s daughter at Anantharam Village of Penpahad Mandal.

5. After completion of the investigation, the prosecution has filed the charge sheet. Based on the charge sheet, the lower Court has framed the following charges:

Charge No.1:

That you, A-1 and A-2 on or about 17-12-2007 at 5.00 P.M., at Utlapally Village in furtherance of common intention, committed murder intentionally causing the death of the deceased Sameena by you A-1 poured kerosene over the deceased and set fire with a matchbox, which was brought by you A-2 in support of you A-1 and when the deceased tried to come outside of their hut in an attempt to save herself from burning, you A-1 pushed her in to the hut and set fire to the hut and thereby you committed an offence punishable under Sec.302 r/w 34 of I.P.C., and within my cognizance.

Charge No.2:

That on the same date, time and place mentioned in the charge No.1 you A-1 and A-2 harassed the deceased Sameena both mentally and physically to bring additional dowry and thereby committed an offence punishable under Sec.498-A I.P.C., and within my cognizance.

Charge No.3:

That on the same date, time and place mentioned in the Charge No.1, you A-1 and A-2 at the time marriage

received Rs.64,000/-, other household articles and gold as dowry from the patients of deceased and that you thereby committed an offence punishable under Section 3 of Dowry Prohibition Act and within my cognizance.

Charge No.4:

That on the same date, time and place mentioned in the Charge No.1, you A-1 and A-2 after the marriage demanded the deceased to bring additional dowry of Rs.50,000/- from her parents and that you thereby committed an offence punishable Under Section 4 of Dowry Prohibition Act and within my cognizance.

On being questioned under Section 228 (2) of Cr.P.C., both the appellants have pleaded not guilty. Hence, they were tried. During the trial, the Prosecution has examined PWs.1 to 15, marked Exs.P.1 to P.9 and produced MOs.1 to 3. On behalf of the appellants, they have examined DW.1 and marked Ex.B.1- Medical Certificate issued by DW.1. On appreciation of the oral and documentary evidence, the trial Court has rendered judgment in the manner as noted hereinbefore.

6. At the hearing, Mr.K.Surender, learned Counsel for the appellants, has made the following submissions:

(1) That the lower Court has committed a grave error in holding the appellants guilty of the offences with which they were charged, in the absence of any reliable evidence and incriminating circumstances proving their guilt beyond all reasonable doubt; (2) That the charge against the appellants that they caused the death of the deceased by pouring kerosene and setting fire has not been established by either direct evidence or through circumstantial evidence and that in the absence of any such evidence, the lower Court has convicted the appellants by drawing inferences and conjectures; (3) That the medical evidence did not support the case of the Prosecution regarding the cause of death viz., burns by pouring Kerosene and that regardless of the same, the lower Court has erroneously held that charge No.1 was proved against the appellants; (4) That the lower Court has erred in convicting the appellants both for the offence punishable under Section 302 IPC and also for the offence punishable under Section 304-B IPC, which are mutually exclusive, without application of mind; (5) That Charge Nos.2, 3 and 4 pertaining to harassment of the deceased for additional dowry, the alleged payment of Rs.64,000/- and giving of household articles as dowry by the parents of the deceased to the appellants and the demand to bring additional dowry of Rs.50,000/- are wholly unsupported by evidence and that in the absence of any such evidence, the lower Court has convicted the appellants completely swayed away by baseless inferences; (6) That, while there was no evidence whatsoever proving that the death of the deceased was homicidal and that the appellants have caused the death of the deceased, equally, the prosecution miserably failed to prove the

ingredients of Section 304-B IPC.

7. The learned Public Prosecutor for the State of Telangana resisted the above submissions and tried to support the judgment of the lower Court.

8. Having regard to the respective submissions of the learned Counsel for the parties, the point that arises for consideration is, whether the conviction and sentence of the appellants imposed by the Court below are sustainable.

9. This case is based on circumstantial evidence. None of the prosecution witnesses has witnessed the occurrence. PWs.3 to 6, who are the neighbours of the appellants and the deceased, have turned hostile. Therefore, their evidence was not of much relevance. To recapitulate, the prosecution has alleged the failure of the deceased to meet the demand for additional dowry as the motive for commission of offence by the appellants. Therefore, we need to first examine as to whether it has succeeded in proving motive.

10. PW.1, who is also the de facto complainant, deposed that at the time of marriage of the deceased with appellant No.1, her parents have given cash of Rs.64,000/-, two tolas of gold and some other articles as dowry; that after the marriage, the appellants used to beat the deceased demanding her to bring additional dowry; that the deceased informed him about the harassment by the appellants for additional dowry six months prior to her death; and that the deceased further informed him that she suspects that the appellants may kill her. In his cross-examination, PW.1 admitted that as per the muslim custom, a list of articles and cash given at the time of marriage would be prepared; that the amount given at the time of marriage is called Jodiki Rakham; that the articles given at the time of marriage are known as Jahaz; that the amount given as Jodiki Rakham will be fixed as Mehar; that two Nikhanamas will be prepared in the muslim marriage; that one Nikhanama will be kept with the elders of the bridegroom; that the other Nikhanama will be kept with the bride; that in the Nikhanama, the mehar amount will be prescribed; and that he holds a copy of Nikhanama of the deceased with him. He has further deposed that two years prior to the death of the deceased, he along with her and appellant No.1 went to the Bank and deposited the dowry amount in the bank account of the deceased. He feigned ignorance whether the appellants have bank accounts or not. The witness further stated that he has visited the house of the appellants and the deceased several times; that the hut of the deceased was made with Palmyra leaves and Jammu; that by the date of the death of the deceased, they have put up a kottam (thatched hut) at a distance of about 20 or 30 feet to their main hut; that they used to cook food in the old hut; and that the deceased used to look after all the cooking. The witness could not recollect the exact date on which the appellants have beaten and driven away the deceased. He further added that the said incident happened about six months prior to her death. A suggestion was put to PW.1

that no dowry or other household articles were given to the appellants by the parents of the deceased at the time of the marriage; that the appellants never demanded any dowry from the deceased; that they never harassed her for her failure to meet the demand of additional dowry; that the deceased never complained about the same at any point of time; and that the appellants never beat and drove away the deceased demanding additional dowry six months prior to the occurrence. It was further suggested to this witness that on the date of occurrence at about 4.00 p.m., when the deceased was attending to her cooking, the hut got burnt accidentally; that she was also burnt in that process; that at that time, the appellants and the father of appellant No.1 were in the fields doing coolie work; that after coming to know about the fire accident, when appellant No.1 rushed and attempted to save the deceased, he received some burn injuries on his legs and fingers of both the hands; that by 6.00 p.m., the appellants have reached the place of occurrence; and that PW.1 and others have forced the Police to detain the dead body of the deceased and that a report was given in the night with false allegations. It was also suggested to PW.1 that by the time himself and other family members of the deceased have reached the place of occurrence, the appellants were present at the dead body but he has mentioned in Ex.P.1- report that he has seen appellant No.1 in the Police Station two days after the death of the deceased; that PW.1 and others have demanded the appellants to transfer their land to them; and that when they have refused to do so, they have foisted a false case. It was also suggested that there were no disputes between the appellants and the deceased; that they used to live amicably; that the appellants are no way connected with the death of the deceased; and that she died due to accident. All these suggestions of course were denied by PW.1.

11. PW.2- mother of the deceased in her evidence reiterated the same allegations as spoken to by PW.1 regarding payment of dowry to the appellants and their demand of additional dowry. Suggestions similar to those put to PW.1 were also put to PW.2 by the defence to the effect that no such demands were made and that the deceased and appellant No.1 lived amicably.

12. The Prosecution examined PWs.7 and 8- the alleged elders to support the stand taken by PWs.1 and 2 regarding payment of dowry and demand of additional dowry made by the appellants. PW.8 deposed that several times PW.2 informed him that the appellants were harassing the deceased demanding money. PW.7, who is a resident of Miryalguda town, deposed that six months prior to the death of the deceased, her father (LW.2) informed him that the appellants were beating and harassing her for bringing additional dowry; that he along with PW.8, Shaik Masood, PW.1, deceased and her parents went to the house of the appellants; that they chastised them for the ill treatment they are meting out to the deceased; that they asked them to look after the deceased properly; that they have convinced the appellants by stating that if any amount is to be given by the parents

of the deceased, they will give the same later; that they left the deceased at their house and came away; and that after six months, on telephonic information, he went and saw the dead body of the deceased and the burnt hut at about 5.00 p.m. In his cross-examination, the witness admitted that he is a distant relation to PW.1. He has further stated that he is unable to state as to how many days prior to the death of the deceased, PW.1 informed him that the appellants were harassing the deceased, when she was at the house of PW.1; that when they went to the house of the appellants, they did not call any elder of Utlapalli village to represent the appellants; and that no document was prepared at the house of the appellants. The witness admitted that the appellants did not demand particular quantum of amount as additional dowry, but they demanded some money. He has denied the suggestion that the parents of the deceased never requested him to mediate or that they have never left the deceased at the house of the appellants and that she deposed falsely, due to his intimacy with PW.1. PW.8, who also allegedly accompanied PW.7 six months prior to the death to the house of the appellants and left the deceased, also spoke on similar lines.

13. On a close perusal of the evidence of these witnesses, we feel that their stand lacks credibility and is wholly unconvincing. Except their ipsi dixit that the appellants have received Rs.64,000/- as dowry at the time of marriage of the deceased and that they harassed her for not bringing additional dowry, no material was placed in support thereof. Though PW.1 has stated that he had a copy of Nikhanama containing the details of the cash fixed as Mehar, for unexplained reasons, he has not produced the same before the Court to prove that at the time of marriage, the appellants have received the sum of Rs.64,000/- as Mehar. Though he has admitted that a list containing the details of the cash called Jodi Ki Rakhm and also the articles called Jahez is prepared as per Muslim custom, such a list has not been produced either by PW.1 or by PW.2-mother of the deceased. For the reasons best known to the prosecution, LW.2- father of the deceased was not even examined. Thus, while the prosecution failed to produce any evidence to show that the appellants have received dowry of Rs.64,000/- apart from the gold and household articles at the time of the marriage, the evidence of PWs.1, 2, 7 and 8 that the appellants have demanded additional dowry of Rs.50,000/- or any other sum remained unsubstantiated. Had the appellants been harassing the deceased on a continuous basis to bring additional dowry, there was no reason why PWs.1 and 2 and the father of the deceased have not given complaint to the Police even once. Even according to PWs.7 and 8, six months prior to the death of the deceased, they have taken her to the house of the appellants and left her there, after convincing them that they would not harass the deceased. It is not their case that at that time, the parents of the deceased have paid any part of the amount allegedly demanded by the appellants towards additional dowry. Thus, according to the prosecution witnesses, the appellants have allowed the deceased to live with them

for six months prior to the death. No whisper has been made by any of these witnesses that during the said six months period before the death of the deceased, any incident of harassment by the appellants has taken place. We have, therefore, no hesitation to hold that the prosecution has failed to establish the motive of the appellants for committing any offence against the deceased.

14. The next crucial question that requires to be considered is whether the prosecution has driven home its charge that the death is homicidal one and that the appellants are guilty of causing the death.

As per the case of the prosecution, none of the witnesses have witnessed the alleged offence. P.Ws.3 to 6, the neighbours, were examined to speak to the incident preceding the actual occurrence and also to speak about what they have noticed immediately after the hut and the deceased have caught fire and were in flames. Section 161 CrPC statements of P.Ws.3, 5 and 6 were marked to contradict their evidence given before the Court. P.W.3 in Ex.P.2 Section 161 CrPC statement purportedly stated that on 17.12.2007 afternoon at about 2.00 p.m. she went into her cattle shed and removed cattle dung, that meanwhile she heard a quarrel taking place between the deceased and her mother-in- law, at the house of appellant No.1; that when she went to the spot she noticed that the appellants were beating the deceased with hands; that meanwhile appellant No.2 caught hold of the deceased and appellant No.1 poured kerosene on her and that on seeing the same the witness intervened and stopped them from proceeding further and brought the deceased out, given bath and sent her into her house, while advising them not to quarrel. It was further stated that at about 5.00 p.m. on the same day when she was present in her house, the villagers were proceeding towards the house of appellant No.1 saying that the same was burnt and the deceased also died in the house and that on hearing the same she has also gone to the house of appellant No.1 and found that the same was completely burnt along with the deceased. It was further mentioned that it seems that the appellants have beaten the deceased, poured kerosene, set her on fire and later they have also burnt their house along with the deceased. The only suggestion put to the witness was that she had deposed before the Police as in Ex.P.2 and that she is deposing falsely to help the appellants. The witness has denied this suggestion. This witness has not supported the case of the prosecution and hence she was accordingly declared hostile.

15. In Ex.P.3 statement of P.W.5 she has referred to the alleged incident relating to the quarrel between the appellants on one side and the deceased on the other side taken place at 2.00 p.m. on 17.12.2007 and the alleged intervention of P.W.3 etc. It is not recorded in the statement that P.W.5 has witnessed the said event or that she witnessed the commission of offence. It was mentioned in the statement that in the evening of 17.12.2007 all of a sudden she heard cries and on her coming out of the house she has noticed the deceased burning

in flames and falling on the ground and that the appellants have escaped from the scene. Interestingly, in her chief-examination she has stated that she does not know about the disputes between the appellants and the deceased. She however admitted that the Police examined her. This witness was treated hostile by the prosecution. In her cross-examination she denied the suggestion that she had stated to the Police as in Ex.P.3 and she is deposing falsely to help the appellants. At any rate, her evidence, even if accepted, is only hearsay regarding the incident allegedly taken place at 2.00 p.m. and even if the part of her evidence regarding her noticing the deceased and the hut being in flames is accepted, it does not prove the involvement of the appellants in the commission of the offence.

16. P.W.6 was also treated hostile by the prosecution. In her Section 161 CrPC statement marked as Ex.P.4 she spoke about the appellants quarrelling with the deceased regularly and the plea that the latter has not brought sufficient dowry and that appellant No.1 used to beat and harass the deceased. As regards the occurrence, she stated that she went to coolie work and returned home in the evening at 6.00 p.m. and noticed that the house of appellant No.1 was completely burnt along with the deceased, and that she came to know that the appellants have caused the death of the deceased by pouring kerosene. In her cross-examination by the prosecution, she denied her stating to the Police as mentioned in Ex.P.4. In view of this denial, the contents of Ex.P.4 cannot be relied upon. In any event, in Ex.P.4 she did not even claim to have witnessed the occurrence.

17. The evidence of P.Ws.1 and 2 is not of any help to the prosecution to prove the commission of the alleged offence as they were not present at the scene of offence at the time of the alleged occurrence and theirs is a hearsay evidence. Thus, the evidence available on record does not support the case of the prosecution that the death is homicidal and that there was no scope for the deceased catching the fire accidentally.

18. To recapitulate, the specific charge against the appellants is that appellant No.1 has poured kerosene over the deceased and set fire to her with match box given by appellant No.2 and that when the deceased tried to come out of the hut in an attempt to save herself from the burns, appellant No.1 pushed her into the hut and set fire to the hut. As discussed earlier, there is no direct witness to the manner in which the alleged occurrence has taken place. Even the circumstantial witnesses, namely, P.Ws.2 to 5 did not support the case of the prosecution.

19. Coming to the medical evidence, Ex.P.8 post-mortem report reveals that the body was totally burnt and charred with pugilistic appearance involving deep muscles soft organs and skeletal bones. P.W.11, who conducted autopsy along with one Dr. G. Sudheerkumar, opined that the cause of the death was burns. Neither in Ex.P.8, nor in the evidence of P.W.11 presence of kerosene smell or soot marks over the body of the deceased, has been mentioned. In

the absence of any traces of use of kerosene, the charge that appellant No.1 poured kerosene over the deceased and set fire to her remained totally baseless. Added to this, in Ex.P.6, scene of offence panchanama, or the sketch drawn on it, presence of kerosene container has not been shown. The Police have seized half burnt blanket, on which burnt hair was found, half burnt shirt of appellant No.1, and two silver toe rings. Had the appellants used kerosene for causing burns, it would not have been possible for them to do so without using any tin, vessel or container for carrying kerosene. In the light of the above facts, it is not possible to accept the charge that the appellants have caused the death of the deceased by pouring kerosene and setting fire on her.

20. When the prosecution failed to produce evidence proving that the appellants have burnt the deceased, the only cause of death must inevitable be an accidental one. It was suggested to P.W.1 that at about 4.00 p.m. when the deceased was attending to cooking, the hut was burnt accidentally and in that process she was also burnt, that at that time the appellants and husband of appellant No.2 were in the fields doing coolie work and that on coming to know about the fire accident, when appellant No.1 rushed to the house and attempted to save the deceased, he has received some burns on his legs and fingers of the hands. It was also suggested to the witness that they have forced the Police to register FIR by detaining the dead body after giving police report late in the night. All these suggestions were denied by the witness.

21. Evidenly, to establish that appellant No.1 has also received burns while trying to rescue his wife, the defence has examined the Civil Assistant Surgeon, Area Hospital, Miryalaguda, as D.W.1. His evidence makes an interesting revelation. He has stated that on 18.2.2007 he has examined appellant No.1 who was brought by the Sub-Inspector of Police, Miryalaguda Rural Police Station, and found 15% burns over the left leg below knee, 5% on right leg lower knee, and 4% on both hands. He has further deposed that he has issued Ex.D.1 - medical certificate. In his cross-examination, it was not suggested to him that the Police have not brought appellant No.1 to him or that he has not examined appellant No.1. The only relevant suggestion that was put to the witness was that the injuries in Ex.D.1 are possible by a scuffle which was admitted by him. It is the specific case of the prosecution as reflected in the charge sheet that on 31.12.2007 at 6.30 hours P.W.13 along with his staff arrested the appellants and produced them before P.W.15 in Miryalaguda Rural Police Station. The evidence of D.W.1 however exposes the falsity of this claim. There is no whisper in the charge sheet that appellant No.1 was produced before D.W.1, the Civil Assistant Surgeon, on 18.12.207, before arresting him. Indeed, the Police would not have taken him to the hospital without arresting him. It is also not known as to why the investigation agency has not obtained the wound certificate of appellant No.1 and produced the same before the Court. These facts would strongly support the plea of the defence that appellant No.1 was taken into custody on the day of occurrence itself and

produced before D.W.1 for medical examination on 18.12.2007. Evidently, the appellants were in illegal custody of Police till 31.12.2007 on which date they were shown to have been arrested. This shoddy conduct of the Police suggests that they have not come out with truth before the Court and it also raises a serious suspicion that they have falsely implicated the appellants obviously at the instance of the family members of the deceased.

22. In the charge sheet it is specifically alleged that when the flames have engulfed suddenly after appellant No.1 has set the deceased on fire, the latter, not being able to tolerate the burns caused by the heavy flames, caught the hands and legs of appellant No.1, who has also received burn injuries on his hands and legs. Since no one has witnessed the occurrence, the manner in which the incident has taken place was within the knowledge of the appellants and the deceased. The incident having resulted in death of the deceased, it is beyond ones comprehension as to how the investigation agency was able to know the manner of occurrence. This part of the prosecution version has not been spoken to by any of its witnesses. The prosecution has obviously come out with this version only to explain away the burns suffered by appellant No.1 also. As noted above, the prosecution has totally suppressed the fact of appellant No.1 having been taken to the hospital on the day following the occurrence. If appellant No.1 had suffered burns in the manner as alleged by the prosecution, we do not find any reason as to why they have not produced D.W.1 as their own witness. Evidently, the prosecution has not anticipated that the defence will produce the Civil Assistant Surgeon and examine him as their own witness. Therefore, we have no hesitation to hold that the whole prosecution case lacks transparency and is shrouded in suspicion. It is sad that the false version of the prosecution has found acceptance by the lower Court.

23. Admittedly, the Police have seized the half burnt blanket and the half burnt shirt belonging to appellant No.1. In the charge sheet it was alleged that in the process of appellant No.2 rescuing appellant No.1 by extinguishing the flames on his body with the aid of the blanket, the blanket and the shirt were half burnt. This again appears to be the prosecutions own imagination without there being an iota of evidence supporting this version. In the absence of supporting evidence, it is not possible to believe such a version. On the flipside, there is also a possibility of the blanket being half burnt if appellant No.1 had tried to extinguish the flames from the body of the deceased. When there exist two different possibilities, the Court must accept the possibility which favours the accused rather than accepting unsubstantiated version of the prosecution, for, it is the fundamental principle of criminal jurisprudence that guilt of the accused must be proved beyond all reasonable doubt. When the facts and circumstances suggest distinct possibility of appellant No.1 trying to extinguish the fire, the version of the prosecution that the blanket was half burnt when appellant No.2 was trying to extinguish the flames on appellant No.1, falls in the realm of

conjecture. Unfortunately the Court below has completely failed in putting the prosecution version on various aspects discussed above to stern test and it has readily agreed the imaginary theory of the prosecution.

24. The observation of the lower Court that it is not possible to believe that a person will cook food at 4.00 p.m., which was an odd time is wholly presumptuous. We do not see any warrant for such a baseless inference, as the Court cannot presume things by applying its own perception and imagination. By any standard, 4.00 p.m., is not such an odd hour ruling out the possibility of cooking food by a housewife. Similarly, the lower Court has got carried away by a statement in the charge sheet that appellant No.1 has suffered burns on his hands and legs when the deceased caught the hands and legs of accused No.1 after she was set on fire. It has not discussed any basis for arriving at this conclusion and has erroneously observed that if appellant No.1 had really tried to save the deceased he would have taken a gunny bag or blanket or a cloth to extinguish fire, ignoring the fact that M.O.1 half burnt blanket was seized and produced before the Court. It has not discussed the prosecution story on the cause of the burning of the blanket, and rendered a finding ruling out the possibility of appellant No.1 using the blanket for extinguishing the fire on the body of the deceased. Indeed, the lower Court has completely overlooked the existence of half burnt blanket and rendered an erroneous finding that appellant No.1 should have used blanket, which exactly was the defence version.

25. The prosecution has alleged that appellant No.1 has poured kerosene on the deceased and set fire with a match box. The Court below has not discussed whether there is any such possibility in the absence of traces of kerosene or soot particles over the body of the deceased or at least a kerosene tin or container at the scene of offence.

26. Ironically, the lower Court having very correctly summarized the law governing direct or circumstantial evidence, the necessity to avoid conjectures or suspicion in holding the accused guilty and the criminal jurisprudential principle that suspicion will never take the place of proof, has committed the same errors, as pointed out by it, by drawing conjectures and inferences and placing suspicion in place of proof.

27. There is yet another aspect to be considered. The trial Court has convicted the appellants both for the offences under Section 302 IPC and also under Section 304-B IPC while not imposing a separate sentence for the latter offence. In this context, we feel it imperative to refer to a Division Bench judgment of this Court in THE STATE OF ANDHRA PRADESH V. VAGGU TARABIA AND ANOTHER(1) . In that case, the accused were charged for the offences under Sections 498-A and 302

1. Judgment in Crl. A. No.95 of 2008, dt.18.2.2011 (DB) (AP): MANU/AP/0150/2011

IPC read with Section 34 IPC. The trial Court has acquitted the accused of all the charges. On the State filing appeal, this Court observed that the trial Court ought to have charged the accused under Section 304-B IPC also. In that connection, it has relied upon a Division Bench judgment of the Delhi High Court in PRAKASH CHANDER V. THE STATE(2) and extracted the following portion from the said judgment.

We also find that Sections 302 and 304-B IPC are not mutually exclusive. If in a case material on record suggest commission of offence under Section 302 IPC and also commission of offence under Section 304-B IPC, the proper course would be to frame charges under both these sections and if the case is established then accused can be convicted under both the sections but no separate sentence need be awarded under Section 304-B, in view of substantive sentence being awarded for the higher offence under Section 302 IPC. In the present case though court rightly framed charge also under Section 304-B IPC and also in the course of judgment came to the conclusion that cruelty, demand of dowry and death within seven years of marriage had been established but ultimately proceeded to cancel the challan on the wrong assumption that the two offences are mutually exclusive. In the facts and circumstances of the case we do not think that any prejudice would be caused to the accused by examination of the case from the point of view of offence under Section 304-B IPC. In our view the learned Additional Sessions Judge, for the conclusion reached by him, after holding Prakash Chander guilty of offence under Section 304-B need not have awarded any separate sentence in respect of the said offence.

In view of aforesaid discussion our answer to the second question is that cancellation of charge for offence under Section 304-B IPC does not amount to an order of acquittal and the setting aside of the order of conviction for the offence under Section 302 IPC is not an impediment in this Court examining whether commission of offence under Section 304-B IPC stands established or not. The State not having filed any appeal against the order cancelling charge is of no effect.

We may note that in paragraph 37 of the judgment in Vaggu Tarabia (1 supra), the Division Bench referred to the judgment in Prakash Chander (2 supra) as of the Apex Court, which appears to be an inadvertent mistake.

28. In RAJBIR V. STATE OF HARYANA(3) a two-Judge Bench of the Supreme Court directed all the trial Courts in India to ordinarily add Section 302 IPC to the charge under Section 304-B IPC so that death sentences could be imposed in heinous and barbaric crimes against women. While considering the said direction, another two-Judge Bench in JASVINDER SAINI V. STATE (GOVERNMENT OF NCT OF DELHI)(4) clarified that the said direction was not meant to be followed mechanically and without due regard to the nature of the

2. 1995 CrlLJ 368

3. (2010) 15 SCC 116

4. (2013) 7 SCC 256

evidence available in the case and that what the Supreme Court in Rajbir (3 supra) meant to say was that in a case where a charge alleging dowry death is framed, a charge under Section 302 IPC can also be framed if the evidence otherwise permits. It has further held that the question whether it is a murder punishable under Section 302 IPC or dowry death punishable under Section 304-B IPC depends upon the fact situation and the evidence in the case; that if there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC, the trial Court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters and that if the main charge of murder is not proved against the accused at the trial, the Court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304-B IPC is established. The Court further observed that the ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. In the light of the above noted views expressed by the Apex Court in Jasvinder Saini (4 supra), the judgment in Prakash Chander (2 supra) may not be considered as laying down correct law.

29. While a person can be charged for both the offences under Sections 302 and 304-B IPC, if the facts prima facie attract the ingredients of both these Sections, he cannot be convicted for both the said offences falling under these provisions. The reason for this is not far to seek. Section 304-B IPC, which deals with dowry death, is attracted where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. Section 113-B of the Indian Evidence Act raises a presumption as to dowry death. Under this provision, when the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. In contrast, under Section 302 IPC, causing of death by a person is established either by direct or circumstantial evidence.

30. Dealing with Section 304-B IPC, the Supreme Court in BAKSHISH RAM AND ANOTHER VS. STATE OF PUNJAB(5) held as under:

This section will apply whenever the occurrence of death is preceded by cruelty or harassment by the husband or in-laws for dowry and death occurs in unnatural circumstances. The intention behind this section is to fasten guilt on the husband or in-laws though they did not in fact caused the death.

5. (2013) 4 SCC 131

It therefore necessarily follows that once the guilt of a person under Section 302 IPC is established, Section 304-B IPC disappears from the scene. In other words, while Section 302 IPC and Section 304-B IPC can co-exist till the end of trial, they are mutually exclusive at the stage of adjudication of the guilt or otherwise of the accused. On the analysis as above, we hold that the lower Court ought to have dropped the charge under Section 304-B IPC on its finding the appellants guilty of committing the offence under Section 302 IPC.

31. Since we have acquitted the appellants for the offence under Section 302 IPC, we need to consider whether the appellants are liable for the offence under Section 304-B IPC. On a careful analysis of the provisions of Section 304-B IPC and Section 113-B of the Indian Evidence Act and as explained by the Supreme Court in Bakshish Ram (5 supra), it is evident that in order to convict a person for the offence under Section 304-B IPC, the prosecution must prove that there was cruelty or harassment of the victim soon before the occurrence. The phrase soon must be construed as proximate in point of time to the death. Even if any occurrence has taken place in a distant past, the same cannot be brought under the expression soon before the occurrence. While there is no credible evidence to show that there was any harassment of the deceased by the appellants at any point of time, in our opinion, the prosecution has singularly failed to establish that such harassment even if taken place earlier was not caused by the appellants soon before the death of the deceased. In our opinion, the Court below has erroneously held the appellants guilty of the offence under Section 304-B IPC. For the very same reasons and the findings, the convictions and sentences imposed against the appellants for the offences under Section 498-A IPC and Section 4 of the Act, are also not sustainable.

32. As the prosecution has failed to establish the guilt of the accused appellants for all the offences with which they are charged, the judgment of the lower Court cannot be sustained and the same is accordingly set aside. The criminal appeal is accordingly allowed. The appellants shall be set at liberty forthwith, if they are not required in any other case or crime. The amount of fine, if any, paid by the appellants shall be returned to them.

A perusal of the record shows that by order dt.22.11.2016 this Court has granted bail to the appellants as they have served more than five years of the sentence, following the order of this Court in BATCHU RANGA RAO V. STATE OF A.P.(6) Therefore, the appellants shall surrender themselves before the Superintendents of the concerned Jails where they have earlier served their sentences of imprisonment, for completing the necessary formalities as per law.

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6. 2016 (3) ALT (Crl.) 505 (DB)(AP)

2017(3) L.S. 17 (D.B.)

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

Present:
The Hon'ble Mr. Justice
V. Ramasubramanian &
The Hon'ble Mr. Justice
N. Balayogi

S.Sugunamma ..Appellant

Vs.

B.Padmamma & Ors., .Respondents

SUIT FOR PARTITION – Adverse possession - No one can confer a better title than what he himself has (*Nemodat quod non habet*) - To establish adverse possession, a person making the claim should establish a Peaceful, Open and Continuous possession as engraved in *nec vi, nec clam and necprecario* - Appellant/ Plaintiff filed a suit seeking partition and separate possession of her 1/5th share in scheduled properties of plaint before Trial Court - Plaintiff and defendants 1 to 4 are daughters of Kistareddy – Said Kistareddy was absolute owner of scheduled properties - Kistareddy died intestate in 1971 leaving behind his wife and five daughters.

Properties were devolved equally upon plaintiff and defendants – After the death of both parents, Defendant no.1 used to look after properties – When activities of Defendant no.1 became suspicious, plaintiff approached M.R.O and obtained certified copies of pahanies and other documents – From those documents she found that sons of defendant no.1 who were arrayed as defendants 5 to 8 got their names entered in revenue records – Appellant contended at Trial court that mutation was unlawful and she is entitled to partition – Defendants 2 to 4 filed a written statement agreeing with claim of appellant – Instead of defendant no.1, her sons defendants no.5 to 8 filed a written statement contending defendant no.1 was given in marriage to Narayanareddy who was brought to house of Kistareddy as Illatam and he was in possession and enjoyment of properties till his death, after his death defendants 5 to 8 are in possession and enjoyment of properties.

Mr. Prabhakar Sripada, Advocate for the Appellant.

Smt. Gadiraju Rajeshwari, Advocate for Respondents 1& 5 to 8.

Mr. P.Venkat Reddy, Advocate for Respondents 2to4.

Mr. Meherchand Nori, Advocate for Respondent No.11.

Cases referred:

1. (1992) 1 SCC 197
2. AIR 1956 SC 209 (AP)
3. AIR 1957 SC 314

J U D G M E N T

(per the Hon'ble Mr.Justice V. Ramasubramanian)

Aggrieved by the dismissal of her suit for partition, the plaintiff has come up with the above appeal.

2. We have heard Mr. Prabhakar Sripada, learned counsel for the appellant, Mrs. Godi Rajeswarai, learned counsel for respondents 1 and 5 to 8, Mr. P. Venkata Reddy, learned counsel for the respondents 2 to 4 and Mr. Meharchnd Noori, learned counsel for the 11th respondent.

3. The appellant filed a suit in O.S.No.99 of 2010 on the file of the Principal District Judge, Medak, seeking partition and separate possession of her 1/5th share in the properties described in Schedules A, B, C and D of the plaint. The case of the appellant/ plaintiff in the suit was that the plaintiff and defendants 1 to 4 are the daughters of one Burigari Kista Reddy; that the said Kista Reddy was the absolute owner of properties detailed in the plaint schedules; that they were all his self-acquired properties; that Kista Reddy died intestate in the year 1971 leaving behind his wife Satyamma and 5 daughters who are appellant/plaintiff and defendants 1 to 4; that after the death of the father Kista Reddy, the name of the mother namely Satyamma was entered in the revenue records; that after the death of the mother Satyamma, the properties devolved equally upon the plaintiff and defendants 1 to 4; that during the life time of the father Kista Reddy, he performed the marriage of the plaintiff as well as the defendants 1 to 4; that after the death of both the parents, the 1st defendant used to look after the properties; that when the activities of the 1st defendant became suspicious, the plaintiff approached the Mandal Revenue Officer and obtained certified copies of the Pahanies and other documents; that from those documents he found that the sons of the 1st defendant, who were arrayed as defendants 5 to 8, got their names entered in the revenue records; that the said mutation was unlawful and that therefore, she was entitled to partition.

4. The defendants 2 to 4 (sisters of the plaintiff) filed a written statement agreeing with the claim of the plaintiff and praying for a decree as sought by the plaintiff. In other words, the defendants 2 to 4 supported the case of the plaintiff.

5. Interestingly, the 1st defendant did not file a written statement. But her sons who were arrayed as defendants 5 to 8 filed a written statement contending, inter alia, that the suit properties originally belonged to Kista Reddy; that Kista Reddy died not in the year 1971, but in the year 1968; that the 1st defendant was given in marriage to one Narayana Reddy, who was brought to the house of Kista Reddy as illatam; that the 1st defendants husband (father of defendants 5 to 8) was in possession and enjoyment of all the properties till his death; that after his death, the defendants 5 to 8 are in possession and enjoyment; that it is true that the mother Satyamma died

intestate in the year 2002; that the plaintiff and defendants 1 to 4 were not in joint possession and enjoyment of the suit properties; that the marriages of defendants 2 to 4 were not performed by the father Kista Reddy, but performed by Narayana Reddy, who was adopted as illatam son-in-law; that the property in Sy.No.621 was sold by the 5th defendant to the 9th defendant under a sale deed document No.1855/98 to meet the family necessities; that the 9th defendant in turn sold the land to the 10th defendant; that the 5th defendant sold another extent of land in the same survey number to the 11th defendant; that the 7th defendant sold the land measuring Ac.0.21 cents in Sy.No.135 to the 12th defendant; that from the date of purchase, the purchasers are in possession and enjoyment to the knowledge of the plaintiff and defendants 2, 3 and 4; that when the 1st defendants husband was brought as illatom son-in-law, a document of illarikam was executed, giving properties to him; that since Kista Reddy was suffering from Leprosy, the marriages of the plaintiff and defendants 2 to 4 were performed by 1st defendants husband, as the elder member of the family; that the marriages of the plaintiff and defendants 2 to 4 were performed respectively in the years 1962, 1954, 1957 and 1968; that after the marriages, the plaintiff and defendants 2 to 4 were separated; that after the death of Kista Reddy, his wife Satyamma wanted to have mutation effected in the revenue records, in favour of Narayan Reddy (husband of the1st defendant); that Narayan Reddy, out of regard and respect towards the elderly woman, refused to have his name recorded during the life time of Satyamma; that Narayana Reddy died in the year 1987 and Satyamma died in the year 2002; that during the life time of Satyamma, she got recorded the names of defendants 5 to 8 in the year 1979-80; that the father of defendants 5 to 8 (husband of the 1st defendant) was in exclusive possession and enjoyment of the suit properties, excluding the plaintiff and defendants 2 to 4; and that therefore, they have perfected title by adverse possession and the suit was barred by limitation.

6. The 9th defendant filed a written statement. Though he was only the purchaser of one of the suit items, she took an identical stand as the defendants 5 to 8.

7. The 11th defendant filed an independent written statement toeing the line of the defendants 5 to 8.

8. The 12th defendant remained ex parte. Therefore, on the basis of the pleadings, the trial Court originally framed 6 issues. But they were subsequently re-cast. The issues, after re-casting were as follows:

1) Whether the suit schedule properties are the self- acquired properties of Burigari Kista Reddy?

2) Whether the husband of defendant No.1 is brought on illatom by Burigari Kista Reddy and whether the illatom deed is true and valid?

3) Whether defendants No.5 to 8 have perfected their title by adverse possession and whether the suit is filed within limitation?

4) Whether the sales made by defendants 5 to 8 are valid and binding on the plaintiff?

5) Whether the plaintiff is entitled for an equal share in the suit schedule property along with defendants No.1 to 4?

6) To what relief?

9. The plaintiff examined herself as PW.1 and filed 4 documents as Exs.A.1 to A.4. Ex.A.1 was the certified copy of the Pahanies for the years 1955-58, 1961-62, 1964-65, 1979-80, 1993-94, 1997-98, 2000-01, 2004-05 and 2008-09. Exs.A.2 to A.4 were the certified copies of the sale deeds by which the defendants 5 to 8 alienated some of the suit schedule properties.

10. On behalf of the defendants, the 5th defendant was examined as DW.1. The 11th defendant was examined as DW.5. The defendants 9 and 10 were examined as Dws.6 and 7. 3 persons, who were third parties to the litigation, but who claimed to be the residents of Isnapur village, were examined as DWs.2 to 4, for the purpose of establishing the illatom adoption of Narayan Reddy (1st defendants husband). 6 documents were examined on the side of the defendants. Ex.B.1 was the illatom deed dated 26-04-1948. Exs.B.2 to B.4 were the T.C.s issued by the school authorities. Ex.B.5 was the Pattedar pass book of the 10th defendant and Ex.B.6 was the title deed in favour of the 10th defendant.

11. On the basis of the pleadings and the evidence on record, the trial Court concluded on issue No.1 that the properties were self-acquired properties of Kista Reddy; concluded on Issue No.2 that the illatom of Narayana Reddy stood highly probablised; concluded on issues 3 and 4 that defendants 5 to 8 perfected title by adverse possession and that the suit was beyond the period of limitation; concluded on issue No.5 that the plaintiff was not entitled to partition. Accordingly, the trial Court dismissed the suit. Hence, the present appeal.

12. Assailing the judgment of the trial Court, it was contended by the learned counsel for the appellant that Ex.B.1 illatom deed dated 26-04-1948 cannot override the law of succession to the property of a Hindu dying intestate; that ouster was not specifically pleaded nor established and that therefore, the finding that defendants 5 to 8 acquired prescriptive title was completely contrary to law.

13. In response, it was contended by Smt. Rajeswari, learned counsel for respondents 1, 5 to 8 that the alienations in favour of third parties took place in the years 1998, 2002 and 2009, to the knowledge of the plaintiff, but the plaintiff chose to keep quiet; that right from the year 1948, the 1st defendant, her husband and their children namely defendants 5 to 8 were in possession and enjoyment, to the exclusion of the plaintiff and defendants 2 to 4.

14. Apart from supporting the contentions of the learned counsel for respondents 1 and 5 to 8, the learned counsel for the 11th respondent pleaded that since the property was purchased by the 11th defendant long time back, at least equities should be worked out at the time of final decree proceedings, in the event of this court granting a preliminary decree for partition.

15. We have carefully considered the above submissions. From the pleadings, evidence on record and the rival contentions, we think that the following issues arise for determination in this appeal:

1) What was the effect of Ex.B.1-illatom deed dated 26-4-1948, assuming that the document is true and valid, on the rights of the plaintiff and defendants 1 to 4 to succeed to the properties of Kista Reddy?

2) Whether the defendants 5 to 8 can be said to have perfected title by adverse possession and the suit said to be barred by limitation?

3) Whether the plaintiff is entitled to any relief?

16. The first issue arising for consideration is about the effect of Ex.B-1 Illatom Deed, dated 26-4-1948, upon the rights of the plaintiff and defendants 1 to 4 to succeed to the properties of Kista Reddy.

17. At the outset, it should be pointed out that Ex.B-1 is relied upon by defendants 5 to 8, who are the sons of Narayana Reddy. Narayana Reddy passed away in the year 1987 itself. The only person who could have had personal knowledge about Ex.B-1 is the 1st defendant, the wife of Narayana Reddy and who is the mother of defendants 5 to 8. For reasons known only to her, the 1st defendant neither filed a written statement pleading the execution of Ex.B-1 Illatom Deed, nor at least went to the witness box to prove Ex.B-1.

18. It is true that Ex.B-1 is of the year 1948 and it is a document 30 years old. But the defendants 5 to 8 who sought to mark the Illatom Deed as an exhibit were all born after 1948, as they were the sons of the person who was allegedly taken as the illatom son-in-law. Therefore, the failure of the 1st defendant either to file a written statement pleading illatom or to go to the witness box to speak about Ex.B-1, is fatal to the plea taken by defendants 5 to 8. Therefore, the trial Court ought not to have acted upon Ex.B-1 as a true and valid document.

19. Be that as it may, let us assume for a minute that Ex.B-1 was a true and genuine document. Even then, it is doubtful if Ex.B-1 can have any effect upon the rights of the other legal heirs to inherit the property under the rules of Succession. It must be remembered that even admittedly the suit properties are the self-acquired properties of B.Kista Reddy. When he died in the year 1968, after the advent of the Hindu Succession Act, 1956, he left behind his widow and 5 daughters as his Class-I heirs. Though the illatom son-in-law Narayana

Reddy died in 1987, the wife of Kista Reddy survived up to the year 2002.

20. As pointed out by the Supreme Court in G.NARAYANAPPA V. GOVERNMENT OF ANDHRA PRADESH(1) , an illatom son-in-law is a creature of custom. The Supreme Court quoted in the said decision, a passage from Maynes Hindu Law, which records the fact that the custom of taking a person in illatom adoption prevailed among Reddy and Kamma castes in the Madras Presidency. But the rules that govern the rights of an illatom son-in-law, as culled out from various judicial decisions both by Mayne and by N.R. Raghavachariar are as follows:

(i) to constitute a person as illatom, a specific agreement is necessary,

(ii) after the death of the adopter, such a son-in-law is entitled to the full rights of a son even as against natural sons subsequently born or a son subsequently adopted in the usual manner,

iii) an illatom son-in-law has no right to claim partition with his father-in-law unless there is an express agreement or custom to that effect,

(iv) an illatom son-in-law cannot be taken to be an adopted son,

(v) an illatom son-in-law will not lose the rights of inheritance in his natural family and similarly the property that he takes in the adoptive family is taken by his own relations to the exclusion of those of his adoptive father,

(vi) neither he nor his descendants become coparceners in the family of adoption though on the death of the adopter he is entitled to the same rights and same share as against any subsequently born natural son or an adopted son,

(vii) the rights of an illatom son-in-law are not identical to those conferred by law on a son or an adopted son, and

(viii) an illatom son-in-law does not succeed to the properties of his father-in-law by survivorship, but only on account of custom or an agreement giving him a share in the property of his father-in-law.

21. As pointed out by a Division Bench of this Court in NARASAIAH V. RAMACHANDRAIAH(2) , it is the custom and proof of usage that give validity to this right. Commonsense and reasoning have nothing to do with the custom and the incidence cannot be extended by parity of reasoning. Reason cannot create a custom. No logical extension of the rule is permissible.

22. Therefore, if we look at the evidence on record, it could be seen that even according to D.W.2, the brother-in- law of defendants 5 to 8, there was no registered document conveying any of the properties of Kista Reddy in favour of Narayana Reddy. This admission of D.W.2 was also

1. (1992) 1 SCC 197

2. AIR 1956 SC 209 (AP)

corroborated by D.W.4, when he said: the name of Kista Reddy continued to exist in the Revenue records till he died and later the name of his wife continued in the records and it is true that Narayana Reddys name is not recorded in the Revenue records at any point of time.

23. Therefore, it is clear that the properties were not given to Narayana Reddy, as sought to be projected by defendants 5 to 8. By ensuring that their mother, namely, the 1st defendant did not participate in the proceedings by filing a written statement or by entering into the witness box, the defendants 5 to 8 completely diluted their claim with regard to illatom. In other words, the claim that the properties were given to Narayana Reddy under a written agreement was not proved, nor were they able to prove custom or usage to the effect that Narayana Reddy became the owner of these properties. Hence, we hold that Ex.B-1 did not have an effect upon the rights of the plaintiff and defendants 1 to 4 to succeed to the properties of Kista Reddy who died intestate in the year 1968. We answer issue No.1 accordingly in favour of the appellant and against the respondents.

Issue No.2:

24. The 2nd issue arising for consideration is as to whether the defendants 5 to 8 had perfected title by adverse possession and whether the suit was barred by limitation.

25. To establish adverse possession, a person making the claim should establish a peaceful, open and continuous possession, as engraved in the maxim nec vi, nec clam and nec precario. The possession of such a person should actually be an exclusive possession with animus possidendi. A person who claims adverse possession should show (i) the date on which he came into possession, (ii) the nature of his possession, (iii) whether the factum of possession was known to the other party, (iv) how long the possession continued and (v) whether his possession was open and undisturbed.

26. Keeping the above principles in mind, if we look at the pleadings as well as the evidence on behalf of the defendants 5 to 8, it would be clear that none of the 3 elements, namely, nec vi (not by force), nec clam (not by stealth) and nec precario (not by the licence of the owner) stand established in the case on hand. Admittedly, the father of defendants 5 to 8 died in the year 1987, after nearly 20 years of the death of Kista Reddy in the year 1968. During this period of 20 years, no mutation was effected in the Revenue records, in the name of Narayana Reddy. Even as per the pleadings, the Revenue records stood in the name of Satyamma, the wife of Kista Reddy. Satyamma died in the year 2002 and the suit came to be filed in the year 2010.

27. Therefore, even on admitted pleadings, neither the possession of Narayana Reddy up to his death in 1987 nor the alleged possession of defendants 5 to 8 from 1987 could be taken to be either exclusive, or

adverse to the interest of the legal heirs of Kista Reddy. The possession of the properties by Kista Reddys wife Satyamma, the mother of the plaintiff and defendants 1 to 4 can never be said to be adverse to that of her own daughters.

28. As we have pointed out earlier, an important element of adverse possession is animus possidendi. It is very clearly absent in this case. Therefore, the finding of the trial Court that the defendants 5 to 8 perfected title by adverse possession, cannot be sustained and is actually not borne out either through the pleadings or from the evidence.

29. Unfortunately, the trial Court went on a wrong reasoning that (i) the absence of a mutation of Revenue records in the names of Satyamma and her daughters jointly (ii) and a mutation only in the name of Satyamma, probablised the case of the defendants 5 to 8. The trial Court, in our considered view, instead of asking the question whether the so-called possession of the defendants 5 to 8 was adverse to that of the legal heirs, asked a wrong question as to whether the holding of the property by defendants 5 to 8 could be termed as a holding on behalf of the legal heirs.

30. The plea of adverse possession by a stranger stands on a completely different footing from the plea of adverse possession made by a co-owner or a coparcener or a member of the family as against the rest. Way back in 1957, the Supreme Court pointed out in P.Lakshmi Reddy v. L.Lakshmi Reddy that the possession of one co-heir is considered in law as possession of all the co-heirs. In order to establish an adverse possession of one co-heir as against another, it is not enough to say that one out of them is in sole possession and enjoyment of the profits of the properties. When one co-heir is found to be in possession of the properties, it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir, merely by any secret hostile animus on his part in derogation of the other co-heirs title. The Supreme Court made it clear as a settled rule of law that as between co-heirs, there must be evidence of open assertion of hostile title coupled with exclusive possession and enjoyment by one to the knowledge of the other so as to constitute ouster.

31. In this case, ouster was not even pleaded in so many terms. Animus possidendi was not established by clear evidence. Therefore, the trial Court erred in holding that the defendants 5 to 8 perfected title by adverse possession and that the suit was barred by limitation. Hence, the 2nd issue is also answered in favour of the appellant and against the contesting respondents.

Issue No.3:

32. The 3rd issue is as to whether the plaintiff is entitled to any relief. The answer to this is not far too difficult to seek. From

3. AIR 1957 SC 314

the discussion we have had, it is clear

(i) that all the suit schedule properties were admittedly the self-acquired properties of Kista Reddy;

(ii) that after his death in 1968, mutation was effected in the name of his wife Satyamma;

(iii) that Satyamma died in the year 2002 and

(iv) that the plea of adverse possession set up by the defendants 5 to 8 miserably failed.

33. Therefore, the plaintiff and defendants 1 to 4 succeeded to the suit schedule properties in equal shares and hence each of them is entitled to one-fifth share in the suit schedule properties.

34. Insofar as the alienees of some of the properties are concerned, some alienations had taken place even during the lifetime of Satyamma, but she does not appear to have executed the sale deeds. Therefore, these alienations cannot be taken to be valid in the eye of law. It is fundamental that no one can confer a better title than what he himself has (nemo dat quod non habet). All that these alienees can perhaps do is only to plead in the final decree proceedings for the allotment of these properties to the share of the 1st defendant, since neither the 1st defendant nor her children, the defendants 5 to 8 dispute the alienations.

35. Therefore, in fine, the appellant is entitled to a preliminary decree for partition and separate possession of her one-fifth share in the suit schedule properties. It may be open to the alienees to seek the allotment of the properties purchased by them to the share of the 1st defendant in the final decree proceedings.

Conclusion:

36. In the result, the appeal is allowed, the judgment and decree of the trial Court are set aside and the suit filed by the appellant is decreed with costs throughout. The miscellaneous petitions, if any, pending in this appeal shall stand closed. No costs.

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2017(3) L.S. 26

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

Present:
The Hon'ble Mr. Justice
C.V.Nagarjuna Reddy

Sarakaram Satyanarayana ..Appellant
Vs.
Kandregula Jagan Mohan
Venkata Reddam Naidu ...Respondent

CIVIL PROCEDURE, Order IX - Rule 9 and Rule 13 - This case reflects typical mindset of a litigant in a civil litigation who perceive prolongation of litigation as far as possible itself as a gain, pushing adversary party to brink of uncertainty and frustration – Public criticism of courts for long pendency of cases overlooks contributory role of litigants, ably advised and supported by some lawyers – Litigants and Lawyers representing them being equal partners in justice dispensation need to play catalyst role, instead of playing a role of obstructionist.

Respondent filed a suit for recovery of money against the petitioner before the Trial court – As petitioners counsel was not ready to cross-examine witness, case was adjourned at his request – Yet again an adjournment was sought on next hearing date and lower court has declined the request of adjournment and closed evidence of P.W.1 by showing cross-examination as 'Nil' – Petitioner there upon filed an I.A. for recalling P.W.1 for cross-examination – Lower court has graciously allowed said application, however by imposing costs of Rs.2,500/- on petitioner – Instead of paying costs petitioner has approached this court by filing civil revision – Case was adjourned at request of counsel for petitioner – Meanwhile lower court has dismissed I.A for non-compliance with conditional order.

Held - Petitioner has been indulging in vexatious litigation evidently to procrastinate suit proceedings – It is a matter of concern that a money suit is kept pending for last six years owing to simple trick played by petitioner – One can imagine that the expenses for filing two civil revision petitions including lawyer's fees in this court would far outweigh costs imposed by lower court – Procedural safeguards provided in CPC to protect interests of bona fide litigants are being abused by dishonest litigants to such an extent that they are proving to be an obstruction in dispensation of Justice - No merits in both civil revision petitions and same are dismissed with costs of Rs.5,000/-

Mrs. T.V. Sridevi, Advocate for the petitioner.
Mrs. K. Jayashree, Advocate for the Respondent.

O R D E R

These cases reflect the typical mindset of a litigant in a civil litigation who perceive prolongation of litigation as far as possible itself as a gain, pushing the adversary party to the brink of uncertainty and frustration.

2. The brief facts leading to the filing of these two civil revision petitions quite interesting as they appear to be, are that the respondent filed O.S. No.222 of 2011 on the file of the Additional Senior Civil Judge, Anakapalli, for recovery of money, against the petitioner. The respondent filed his chief examination affidavit as P.W.1 and the case was posted to 28.7.2014 for his cross-examination. As the petitioners counsel was not ready to cross-examine the witness, the case was adjourned to 7.8.2014 at his request. Even on 7.8.2014, an adjournment was sought on behalf of the petitioner. The lower Court has declined the request for adjournment and closed the evidence of P.W.1 by showing the cross-examination as nil. The petitioner thereupon filed I.A. No.161 of 2014 for recalling P.W.1 for cross-examination. The lower Court by order dt.25.8.2014 has graciously allowed the said application, however, by imposing costs of Rs.2,500/- to be paid by the petitioner on or before 27.8.2014. Instead of paying the costs, the petitioner has chosen to approach this Court by filing C.R.P. No.3637 of 2014. On 24.10.2014 the case was adjourned at the request of the learned counsel for the petitioner. Till 23.2.2017 the case has not seen the light of the day. On the said date, the case was adjourned at the request of the counsel for the respondent.

3. Meanwhile, as the petitioner has not paid the costs imposed on him and in the absence of any stay granted by this Court, the lower Court by order dt.22.6.2015 has dismissed I.A. No.161 of 2014 for non-compliance with the conditional order passed by it. The petitioner filed I.A. No.381 of 2015 under Order IX Rule 9 of the Code of Civil Procedure, 1908 (CPC), for setting aside order dt.22.6.2015 in I.A. No.161 of 2014 and to restore the same to file. This application was dismissed by the lower Court by order dt.11.7.2016. Aggrieved by the said order, the petitioner filed C.R.P. No.4077 of 2016.

4. The facts narrated above would show that the petitioner has been indulging in vexatious litigation evidently to procrastinate the suit proceedings. As noted hereinbefore, instead of paying costs of Rs.2,500/ as a condition for reopening the evidence to enable him to cross-examine P.W.1, the petitioner has filed C.R.P. No.3637 of 2014 and did not succeed in securing an interim order. As a logical consequence of non-compliance with its conditional order, the lower Court has dismissed I.A. No.161 of 2014. The subsequent I.A., i.e., I.A. No.381 of 2015 for setting aside the dismissal order in I.A. No.161 of 2014, was also rightly dismissed by the lower Court.

5. It is a mater of concern that a money suit is kept pending for the last six years owing to the simple trick played by the petitioner. Though the petitioner could not secure stay of suit proceedings in his first revision petition, the lower court obviously has given itself in by the representation before it that the case is pending before

the High Court, and went on adjourning the suit even in the absence of stay. It is not the case of the petitioner that he has no capacity to pay the costs of Rs.2,500/-. One can imagine that the expenses for filing two civil revision petitions including lawyers fees in this Court would far outweigh the costs imposed by the lower Court. The discretion exercised by the lower Court in reopening the evidence to enable the petitioner to cross-examine P.W.1 by imposing costs, by no means can be termed as arbitrary or unfair or unjust. Therefore, it is clearly evident that filing of these civil revision petitions was a tactical ploy by the petitioner to prolong the litigation and frustrate the efforts of the respondent plaintiff to secure a money decree. This kind of attempts on the part of the litigants must be put down with heavy hand.

6. The procedural safeguards provided in the CPC to protect interests of bona fide litigants are being abused by the dishonest litigants to such an extent that they are proving to be an obstruction in dispensation of justice. The unscrupulous litigants, such as the petitioner, are exploiting, nay, are allowed to exploit the liberal provisions in the Code, such as Order IX Rule 9 and Order IX Rule 13. While unwittingly such provisions are proving to be a boon for such litigants, they have become a bane for persons approaching courts with bona fide claims and genuine grievances. The public criticism of courts for long pendency of cases overlooks the contributory role of litigants, ably advised and supported by some lawyers. The basic ingredient of integrity is expected of members of bar too, as much as it is expected of members of the bench. The chariot of administration of justice cannot move forward smoothly with the desired pace, if its wheels are deliberately clogged by delay tactics and unfair methods. The litigants and the lawyers representing them being equal partners in justice dispensation need to play a catalyst role, instead of playing a role of obstructionist, in propelling the caravan of justice to reach its destination of fulfilling the aspirations of millions of litigant public for whom judiciary is their last resort in pursuit of justice.

7. In the aforementioned facts and circumstances of the case, I do not find any merit in both the civil revision petitions and the same are accordingly dismissed with costs of Rs.5,000/- (Rupees five thousand only) each payable to the respondent within four weeks.

As a sequel to dismissal of the civil revision petitions, C.R.P.M.P. Nos.4952 of 2014 and 5282 of 2016 filed in the respective revisions petitions, shall stand disposed of as infructuous.

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2017(3) L.S. 29 (D.B.)

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

Present:
The Hon'ble Mr. Justice
Suresh Kumar Kait &
The Hon'ble Mr. Justice
U.Durga Prasad Rao

Karanam Nagaraju @
Snatha Kumar ..Appellant

Vs.

The State of A.P. ..Respondent

INDIAN PENAL CODE, Secs.201 r/w 511, 302 & 377 – Appellant challenged Judgment passed by Trial Court, whereby, appellant was held guilty and sentenced to suffer life imprisonment - Appellant brought deceased to room and tried to have homosex – Deceased refused, appellant insisted him for carnal intercourse – When deceased tried to make cries, appellant shut his face with jeans pant and smothered him to death.

Counsel for appellant contended that prosecution has failed to establish that seized article, wherein finger prints are available, were not tampered before it reached the expert for examination as it was not packed and sealed and there is no evidence led whether bureau expert received packages with seals intact - He further contended that it is mandatory to obtain permission of a magistrate or finger prints have to be obtained in the presence of magistrate.

Held - If the sentence is for death or life imprisonment, to take finger prints, permission of magistrate is not required – Criminal appeal dismissed.

Mr.M.K.Raj Kumar, Advocate for Appellant.
Public Prosecutor, Advocate Respondent.

Cases Referred:
1.AIR 1997 SC 2960
2.2010 (173) DLT 741
3.(2012) 191 DLT 225 (FB)

J U D G M E N T
(per the Hon'ble Mr.Justice
Suresh Kumar Kait)

1.Vide the present appeal, the appellant has challenged the judgment dated 23rd February 2010, passed by VII Additional District & Sessions Judge (FTC), Vijayawada, in Sessions Case No.171 of 2008, whereby, the appellant is held guilty for the offence punishable under Section 302 IPC and accordingly sentenced to suffer life imprisonment and to pay a fine of Rs.500/-, in default, simple imprisonment for one month.

2. Briefly, the case of the prosecution is that on 15.11.2006, Accused No.1 (appellant) brought Phanindra Kumar (the deceased) to the room on the upstairs of rented building of one Suryanarayana and tried to have homosex. The deceased

refused, appellant insisted him for carnal intercourse. When the deceased tried to make cries, appellant shut his face with jeans pant and smothered him to death. Thereafter, latched the room from outside. On 16.11.2006 at 11 a.m., appellant reached at the scene of offence along with Accused Nos.2 and 3 with an intention to dispose of dead body, however, on account of movement of neighbours, having been afraid, they locked the room and went away. On 17.11.2006, on seeing the padlock to the room in the upstairs, PW-1 K.Uma Maheswari Devi, daughter of the building owner, reached the scene and applied another padlock. At 2.30 p.m., appellant and Accused No.2 reached the scene; unlocked the padlock and tried to break open the padlock applied by PW-1. Then, neighbour by name Uma (PW-2) objected and then appellant and Accused No.2 went away. On being informed by PW-2, PW-1 came and sensing some foul smell from the room, reported to the Police at S.N.Puram Police Station and on arrival of Police, she unlocked the room. On entering the room, they found the dead body of the deceased in decomposed state. On the report of PW-1, A.S.I. registered Crime No.618 of 2006 and later Inspector investigated the case.

3. The case against Accused No.2 was abated as he died.

4. On appearance of Accused No.1 (appellant) and Accused No.3, they were charged under Sections 302 and 377 of IPC and under Section 201 r/w.511 IPC. They pleaded not guilty and claimed to be tried.

5. To substantiate its case, the Prosecution has examined PWs.1 to 22 and marked Exs.P-1 to P-28 and M.Os.1 to 11.

6. On completion of trial, the accused were examined under Section 313 Cr.P.C. explaining the incriminative material and evidence against them to which they denied, however, choose not to examine any witnesses on their behalf.

7. The point for determination before the trial Court was whether the accused has carnal intercourse with Phanindra Kumar, the deceased, and in such inter course, caused the death by shutting the face with jeans pant ?

8. On appreciation of oral and documentary evidence on record, the trial Court convicted Accused No.1 (appellant) for the offence under Section 302 of IPC, however, acquitted him of the offence under Section 377 of IPC. Accused Nos.1 and 3 were acquitted of the offence under Section 201 r/w. 511 IPC.

9. Challenging his conviction and sentence for the offence under Section 302 of IPC, this appeal has been preferred by Accused No.1.

10. We have heard learned counsel for the appellant and the learned Public Prosecutor appearing on behalf of the State.

11. Learned counsel appearing on behalf

of appellant submits that in the present case, there are no eyewitnesses and the prosecution case depends only on the circumstantial witnesses. The conviction was based mainly on the evidence of PW-16, the ASI/Fingerprint Expert without considering the fact the fingerprints of A-1 were obtained after his arrest.

12. In expatiation, he argued, PW-1 gave complaint (Ex.P-1) to the Circle Inspector of Police, Satyanarayanapuram Police Station, stating that on 17.11.2006, when she was in school, one S.Uma, who is residing besides her fathers house, contacted her over phone and informed that two boys, claiming to be the persons of Chinna Babu, were opening the lock of the room in the upstairs saying that they kept their luggage in that room. When she asked them to wait till the house owner come and give the keys, they left the place. On suspicion, when she went to the door and peeped into, she got foul smell. It is further stated in the complaint that at about 4 p.m., she went to the house and when she peeped into the room, she got foul smell. Then she informed the Police and after their arrival, with their help, the lock was broke opened. When they went inside, a boy of 12 to 13 years old was found dead, lying supine.

13. Counsel for appellant has argued that in view of the statement of PW-1, it is established that PW-1 was not present at the scene of offence at the time of commission of the offence and therefore, her deposition cannot be relied upon. He further contended that PW-2, who is neighbour, has also not witnessed the offence.

14. Learned counsel further submitted that PW-7 V.V.Lakshminarayana, who is the father of the deceased Phanindra Kumar, came to know about the death of his son only when it was published in a newspaper. Thereafter, he went to the Police Station and identified the deceased as his son on seeing the video. PW-8 K. Padmanabhaiah has only accompanied PW-1 to the scene and informed about the incident to the Police and was present at the time when the shed was opened and dead body was found. PW-10 K. Narayana Rao is the house owner and he also came to know about the incident as informed by PW-1 and he advised PW-1 to give a report to the Police. He argued the evidence of these witnesses is of no use to connect accused to the offence. He further argued, PW-12 is a hearsay witness, who came to know about the incident from the Police. PW-13 is a Ticket Booking Clerk in Seshu Mahal theatre, who deposed that there is no identity for Ex.P-11 tickets that said tickets were issued in the year 2006. Thus, he argued, evidence of these witnesses is of no use.

15. He argued, PW-16 is concerned, he is the Sub-Inspector of Police, who visited the scene of offence along with clues team of concerned Police Station on 17.11.2006 at 7 p.m. at Door No.21/12-130 upstairs, Indira Colony, Madhuranagar. He examined the scene and found one steel box round in shape (M.O.8) and one water bottle in

the almirah. He examined and developed chance prints on the steel tiffin box and water bottle. Two chance prints were traced on the tiffin box (M.O.8) and he marked the same as A and B to facilitate for the photographs. The chance prints were got photographed by the clues team Photographer on the same day. He received the photograph from the clues team photographer on 18.11.2006. As the dead body was in de- composed state, he could not take the finger prints of the deceased. On verification of the photograph, he found that the chance print marked as B was unfit for comparison. Thereafter, he compared the chance print marked as A with local data base prints vide transaction No.73901233 and it remained un-identified. Accordingly, he sent report to the Inspector of Police by marking a copy to the Director, Finger Prints Bureau for information. He entered A marked print as un-identified chance print. He further deposed that on 09.04.2007, he received one finger prints slip from the investigating officer along with letter dated 09.04.2007 for comparison of the unidentified chance print concerned in the present case. On the same day, he compared the same with un- identified chance print. The chance prints were found identical with the left middle finger impression of K. Nagaraju (appellant).

16. Severely criticizing the above evidence, learned counsel for appellant submitted that as stated by PW-16, initially, he found the chance print marked as A not matched with the database finger prints. After arrest of A-1, his finger prints were manipulated on M.O.8 and the finger prints of appellant were sent to PW-16. Thus, the Police Officer had taken the finger prints of appellant in custody without the permission of the Court, which is in violation of the provisions of The Identification of Prisoners Act, 1920.

17. Learned counsel would thus submit that there is no direct and substantial oral evidence as to the involvement of the appellant in the commission of the offence of murder of the deceased. The prosecution has mainly relied upon the circumstantial evidence i.e. availability of chance prints on M.O.8 tiffin box found at the scene of offence and the evidence of PW-16, who compared the photographs of chance prints with the specimen finger prints of the appellant received by him. He allegedly issued Ex.P-19 finger print report and Ex.P-20 photo comparison chart without sending them to finger print expert in FSL for comparison. Learned counsel submits that there is no evidence or material against the appellant, however, the trial Court has convicted the appellant based on assumption and presumption. Thus, the present appeal deserves to be allowed.

18. On the other hand, learned Public Prosecutor would submit that the present case is based on the circumstantial evidence i.e. the availability of chance prints on M.O.8 tiffin box found at the scene of offence and the evidence of PW-16, who compared the photographs of chance prints with the specimen finger prints of appellant received by him. Said witness issued Ex.P-19 finger print report and Ex.P-20 photo comparison

chart. Ex.P-21 is the letter by the Inspector of Police, Finger Print Unit, CID, Vijayawada City, through which, Photo comparison chart (P-20) is sent to the Inspector of Police, S.N.Puram Police Station. Therefore, identical finger prints itself sufficient to warrant conviction against the appellant for causing the death of deceased.

19. Learned Public Prosecutor further submits that PW-16 is an expert qualified to examine the finger prints. He possessed the required certificate issued by All India Board Examination of Finger Print Expert. The said witness deposed that on 17th June 2006 at 7 p.m., he visited the scene along with clues team of concerned Police and examined the scene and found one steel box round in shape (M.O.8) and one water bottle in the almirah and developed chance prints on the box and water bottle and marked the chance prints found on M.O.8 tiffin box as A and B. He further deposed that the chance prints were also photographed by the clues team photographer on the same day. On 09.04.2007, he received one finger print slip from the Investigating Officer along with letter for comparison of the chance prints and on the same day he compared the chance prints with the specimen finger prints of appellant and found they are identical with left middle finger impression of appellant. Accordingly issued Ex.P-19 finger print report and Ex.P-20 photo comparison chart. Ex.P-21 is the letter by the Inspector of Police, Finger Print Unit, CID, Vijayawada City, through which, photo comparison chart (Ex.P-20) is sent to the Inspector of Police, S.N.Puram Police Station. He submits that the evidence against the appellant is scientific one and cannot be disbelieved from any stretch of imagination, therefore, the trial Court has relied upon the same connecting the appellant to the offence and accordingly convicted him for the offence punishable under Section 302 of IPC.

20. The contention of learned counsel for the appellant is that the Prosecution has failed to establish that the seized article M.O.8, wherein, the chance prints are available, were not tampered before it reached the expert for examination as it was not packed and sealed; no evidence was led whether the Bureau expert received the packages with the seals intact, and further, M.O.8 tiffin box was not sent to the finger print expert, therefore, the case of the prosecution creates any amount of doubt. He further contended that no permission was taken by the prosecution to obtain specimen finger print impression of the appellant in the presence of Magistrate. Therefore, the sole circumstance of connecting the appellant with the crime by way of finger prints, cannot be believed to arrive at a conclusion as to the guilt of the accused. He contends that on two earlier occasions, the finger prints taken were found not fit for comparison and on 3rd occasion, the finger prints were found identical, entertaining the doubt as to the procedure adopted by the investigating officer in sealing the seized articles; packing the same and later in sending the articles to the Finger Prints Bureau. Hence, he

1.AIR 1997 SC 2960

submits, in such a situation, as held in MOHD. KHAN V. STATE OF RAJASTAN (1), the appellant cannot be convicted for murder.

21. It is pertinent to note that PW-16, the finger print expert, who gave his opinion, had visited the scene of offence along with the clues team and also the investigating officer PW-22; in their presence, found M.O.8 steel tiffin box and water bottle; marked two chance prints on the tiffin box as A and B; got photographed the chance prints by the photographer of clues team, and later, on receipt of specimen finger prints of appellant on 09.04.2007, he compared the same and found the chance prints are identical with the left middle finger impression of the appellant. In such a back ground, there is no necessity to put a seal on M.O.8 and pack it and send the same to FSL or somewhere, as PW-16 himself was a finger print expert. PW-16, on receipt of specimen finger print slip of appellant on 09.04.2007, compared the chance prints and found that the chance print marked A is identical with the left middle finger impression of the finger print marked S-1 on the finger print slip of the appellant. The expert PW-16 found 10 points of identity.

22. Here two pertinent aspects would arise for consideration :

> 1. Firstly, since PW-22/the Investigating Officer admitted that he obtained the finger prints of accused on 20.11.2006 but not before the First Class Magistrate, whether, he was required to obtain the permission of the concerned Magistrate for obtaining the finger prints of accused; and
>
> 2. Secondly, whether the evidence of PW-16 is acceptable.

23. On the issue raised by the counsel for the appellant that it is mandatory to obtain the permission of a Magistrate, or, the finger prints have to be obtained in the presence of a Magistrate, in the case of K.K.SAINI V. STATE(2) decided by a Division Bench of High Court of Delhi, wherein, one of us (Suresh Kumar Kait, J) was one of the members, held as under :

> As noted above, the investigating officer, nor any other police witness, have thrown any light as to where, when and how the sample fingerprint impressions of the fingers of the appellant were taken. In any case, there is no proof that permission was taken from the competent Court to do so. There is no proof that the prisoner was duly identified as per the requirement of Section 5 of the Identification of Prisoners Act, 1920. Explaining the Constitutional Bench decision of the Supreme Court reported as AIR 1961 SC 1808 State of Bombay Vs. Kathi Kalu Oghad, in the decision reported as AIR 1980 SC 791 State of U.P. Vs. Ram Babu Mishra, which decision was followed with approval in the decisions reported as 1994 (5) SCC 152 Sukhvinder

2.2010 (173) DLT 741

Singh & Ors. Vs. State of Punjab and State of Haryana Vs. Jagbir Singh & Ors. AIR 2003 SC 4377 it was held that unless permission is taken from the Court of competent jurisdiction and further unless the prisoner is identified as per the requirements of Section 5 of the Identification of Prisoners Act, 1920 reports of finger print expert based upon sample fingerprints taken when an accused is in custody of the police would be inadmissible in evidence. Thus, we discard the report Ex.PW-4/B of the fingerprint expert which has been used by the learned Trial Judge against the appellant.

24. Thereafter, this very issue reached to the Full Bench of Delhi High Court in the case of SAPAN HALDAR & ANOTHER V. STATE(3) in Criminal Appeal No.804 of 2001, whereby, it is held;

> 22. What happens if there is no manner prescribed for an investigating officer to take the measurements of a person accused of having committed an offence ? In the decision reported as AIR 1976 SC 69; Mahmood v. State of Uttar Pradesh, specimen finger print impressions taken by the investigating officer under Section 4 of The Identification of Prisoners Act, 1920, in the absence of a manner prescribed for taking the finger print impressions, was held to be a case of evidence not being admissible with

3.(2012) 191 DLT 225 (FB)

respect to the finger prints obtained and the opinion of the expert thereon. The Supreme Court held that in said situation Section 5 of The Identification of Prisoners Act, 1920 ought to have been followed.

26. In the decision reported as 2003 Crl.L.J 2642; Thavaraj Pandian v. State, the Division Bench of the Madras High Court noted that no Rules were framed in the State of Tamil Nadu with respect to the manner in which an investigating officer could obtain the finger prints of a person accused of an offence as contemplated by Section 4 of The Identification of Prisoners Act, 1920 but noted that there were executive instructions with respect to the manner in which finger print impressions could be taken by the investigating officer and therefore opined that in said circumstance evidence relating to finger print impressions obtained by the investigating officer would be admissible in evidence; but on facts noted that the said instructions were not followed and therefore held the evidence to be inadmissible.

27. Thus, with respect to a handwriting obtained from a person accused of having committed an offence or from any person during investigation, the law is entirely different vis--vis finger print impressions and a handwriting. With respect to handwriting neither

can the investigating officer obtain a sample writing nor can even a Magistrate so direct. The Identification of Prisoners Act, 1920 is applicable only to measurements which include finger print impressions. Even with respect to finger print impressions, the weight of the judicial pronouncements leans to hold that unless there is a manner prescribed, be it under the Rules framed by the State Government or an executive instruction issued, evidence pertaining to finger print impressions obtained by the investigating officer would be inadmissible in evidence; and even when the same is provided, as held by the Supreme Court in Mohd. Amans case (supra), to obviate any suspicion, it should be desirable that procedure prescribed under Section 5 of The Identification of Prisoners Act, 1920 should be followed.

29. We note that the legislature has taken corrective action, when by virtue of Act No.25 of 2005, with effect from June 23, 2006, Section 311A has been inserted in the Code of Criminal Procedure, 1973 and has empowered a Magistrate to direct a person accused to give specimen signatures or handwriting.Section 311A reads as under :-

311A. Power of Magistrate to order person to give specimen signatures or handwriting :- If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting:

Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.

31. We answer the reference as follows :-

(i) Handwriting and signature are not measurements as defined under clause (a) of Section 2 of The Identification of Prisoners Act, 1920. Therefore, Section 4 and Section 5 of The Identification of Prisoners Act, 1920 will not apply to a handwriting sample or a sample signature. Thus, an investigating officer, during investigation, cannot obtain a handwriting sample or a signature sample from a person accused of having committed an offence.

(ii) Prior to June 23, 2006, when Act No.25 of 2005 was notified, inter-

alia, inserting Section 311A in the Code of Criminal Procedure, 1973, even a Magistrate could not direct a person accused to give specimen signatures or handwriting samples. In cases where Magistrates have directed so, the evidence was held to be inadmissible as per the decision of the Supreme Court in Ram Babu Mishras case (supra). According to Section 73 of the Indian Evidence Act, 1872, only the Court concerned can direct a person appearing before it to submit samples of his handwriting and/or signature for purposes of comparison.

32. Though not falling for consideration in this reference, with respect to finger prints, which are included in measurements, the weight of the authorities is that if by way of Rules or Executive instructions the manner is prescribed to take the measurements, alone then can an Investigating Officer, under Section 4 obtain the measurements but strictly as per manner prescribed; but it would be eminently desirable, as per the decision in Mohd. Amans case (supra) to follow the procedure ordained under Section 5 of The Identification of Prisoners Act, 1920.

33. Relevant would it be to further note that in relation to offences punishable with death of imprisonment for life, Section 4 of The Identification of Prisoners Act, 1920 would not be applicable because the said provision specifies a prerequisite; that the person concerned is accused of having committed an offence which is punishable with a sentence to undergo rigorous imprisonment for a term of one year or upwards i.e. the sentence must relate to imprisonment for a term and would thus exclude such offences where either capital punishment or imprisonment for life is the sentence contemplated.

25. In the case in hand, the appellant is convicted and sentenced to undergo rigorous imprisonment for life. As per the settled law, cited above, if the sentence is for death or life, in such case, to take finger prints, permission of the Magistrate is not required. However, if the offence is punishable for a term of one year or upward, the prior permission of the Magistrate is required. Thus, if the sentence is upto a specified period of years, the permission is required but not in case of life and death sentence. Why such view has been taken by Courts mentioned above, we find no answer even from the counsel appearing for the parties. It hardly makes difference whether the sentence is upto 10 years or life.

26. Be that as it may, in view of the decision of the Full Bench of Delhi High Court, the settled law is that Section 4 of The Identification of Prisoners Act, 1920 would not be applicable because the said provision specifies a prerequisite that the person concerned is accused of having committed

an offence which is punishable with a sentence to undergo rigorous imprisonment for a term of one year or upwards i.e. the sentence must relate to imprisonment for certain term, and would thus, exclude such offences, where, either capital punishment or imprisonment for life is the sentence contemplated. Thus, in view of the settled law as discussed above, there is no substance in the submission of counsel for the appellant that the Police had taken finger prints of the appellant without permission of the Court.

27. Sofaras the evidentiary value of PW-16 is concerned, he is a finger print expert in the rank of S.I. of Police in Fingerprint Unit of CID, Vijayawada City. Thus, he is an independent Fingerprint expert working for CID. He stated that he passed All India Board Examination for Fingerprint and obtained certificate. He reached the scene of offence along with the Clues Team and also Investigating Officer and in their presence, he found M.O.8/Steel tiffin box and therefrom, he lifted two chance prints A and B and got those chance prints photographed by a photographer of the Clues Team and later, on receipt of specimen finger prints on 09.04.2007, compared the same and found the chance prints were identical with the left middle finger impression of K.Nagaraj(A-1). Since PW-16 reached the scene of offence along with PW-22 and Clues Team and got photographed the chance prints then and there itself, there was no necessity for sealing M.O.8/Tiffin box and packing the seal and seizure of the same and sending the same to another expert. When Ex.P-20/report is perused, PW-16 could found 10 points of identity between the chance print developed on the stainless steel tiffin box (M.O.8) and the left middle finger impression of accused No.1. In view of the similarities in 10 ridge characteristics, which could not be challenged to be false or incorrect, the opinion of PW-16, in our considered view, can be accepted.

28. Accordingly, we find no illegality or perversity in the judgment dated 23rd February 2010, passed by the Court below in Sessions Case No.171 of 2008. The appeal is accordingly dismissed.

Pending miscellaneous applications, if any, shall stand closed.

–X–

2017(3) L.S. 39 (D.B.)

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

Present:
The Hon'ble Mr. Justice
Suresh Kumar Kait &
The Hon'ble Mr. Justice
A.Shankar Narayana

Zee Learn Ltd ..Petitioner

Vs.

J.Naveen Kumar ..Respondent

ARBITRATION AND CONCILIATION ACT, 1996, Sec.8 – Petitioner filed present Civil Revision – Assailing Order passed by Trial Court, whereby application filed by petitioner to refer parties to Arbitration has been dismissed.

Case of petitioner is that when any dispute arises with regard to Kidzee Franchisee Agreement entered into by parties – Dispute shall be referred to Arbitrator – Trial Court observed that, disputes between parties are not clear since there are no pleadings of petitioner as it has not filed any written statement in the suit to know whether issue between both the parties is with regard to the said agreement – Respondent contended that signatures on Kidzee Franchisee Agreement are taken by petitioner by fraudulent means.

Held – It is nowhere mentioned in the plaint that signatures on the said agreement are taken fraudulently – It was the duty of Trial Court to direct the parties to approach arbitrator after receipt of such application by petitioner – In spite of existence of a clause in the agreement, Trial Court erred in dismissing application filed by petitioner, without referring parties to an arbitrator – Civil Revision Petition is allowed.

Mr.V.R.N. Prashanth, Advocate for the Petitioner.
Mr.C. Ramaiah, Advocate for Respondent.

O R D E R (O R A L)
(per the Hon'ble Mr.Justice Suresh Kumar Kait)

This Civil Revision Petition is filed assailing the order dated 10.03.2016 in I.A.No. 17 of 2016 in O.S.No. 2015 of 2015 passed by the learned V Junior Civil Judge, City Civil Court, Hyderabad whereby the application filed by the petitioner-defendant under Section 8 of the Arbitration and Conciliation Act, 1996 has been dismissed.

The case of the petitioner-defendant before the trial Court was that when any dispute arose with regard to Kidzee Franchisee Agreement entered into by the parties on 12.12.2014, as per Clause 19 of the Agreement, the dispute shall be referred to Arbitrator.

The trial Court observed that the dispute

between the petitioner-defendant and the respondentplaintiff is not clear since there are no pleadings of the petitioner as it has not filed written statement in the suit to know whether the issue between both the parties is with regard to Kidzee Franchisee Agreement dated 12.12.2014 or not. It is further observed that as per the pleadings of the respondent-plaintiff, the dispute is not with regard to Kidzee Franchisee Agreement dated 12.12.2014. Even though as per Clause 19 of Kidzee Franchisee Agreement dated 12.12.2014, the parties shall be referred to the Arbitrator, but there are no pleadings to the effect that the dispute is with regard to Kidzee Franchisee Agreement dated 12.12.2014.

As per the plaint filed by the respondent-plaintiff, the cause of action for the suit arose on 09.12.2014 when the petitioner-defendant received advance amount from the plaintiff, and thereafter, the petitioner-defendant executed agreement in favour of the plaintiff on 12.12.2014. It is specifically stated that the plaintiff issued a legal notice to the defendant, but the defendant has failed to repay the advance amount to the plaintiff in time.

It is not in dispute that an amount of Rs.2,50,000/- was paid by the respondent-plaintiff on 09.12.2014 towards franchisee fee. However, the case of the respondent-plaintiff is that signatures on the Agreement dated 12.12.2014 are taken by the petitioner-defendant by fraudulent means.

We have gone through the plaint, however, it is nowhere mentioned that the signatures of the respondent- plaintiff on the Agreement are taken fraudulently. However, the case of the respondent-plaintiff is that the said agreement was not handed over to the respondent-plaintiff and only a draft was handed over wherein such clause of arbitration is not found place.

As per the plaint, the admitted case of the respondent- plaintiff is that he paid an amount of Rs.2,50,000/- on 09.12.2014, and thereafter, Kidzee Franchisee Agreement was entered into between the parties on 12.12.2014.

For better adjudication of the case, Section 8 of the Arbitration and Conciliation Act, 1996 is reproduced hereunder:

> 8. Power to refer parties to arbitration where there is an arbitration agreement:- (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

LAW SUMMARY
2017 (3)
Madras High Court Reports

2017(3) L.S. (Madras) 1

IN THE HIGH COURT OF MADRAS

Present:
The Hon'ble Mr. Justice
T.Ravindran

Rajaselvi & Anr., ..Appellants

Vs.

Meenatchi & Ors., ..Respondents

CIVIL PROCEDURE CODE, Order XLI Rule 27- HINDU MARRIAGE ACT, Sec.16(1) - Documents sought to be produced as additional evidence during the course of this appeal are not marked during the original suit proceedings – It has not been explained by appellant properly as to why said documents had not been marked before court below.

Suit properties originally belonged to Rathinampillai and he died intestate – When he was alive, he had married Rajammal and through her appellants were born – At the instance of his elder sisters, Rathinampillai had married Rajeswari as his second wife, who is the daughter of one of his elder sisters – Through Rajeswari respondents were born to Rathinalpillai – After the death of Rathinampillai, his second wife married Veeramuthuswamy – Respondents were under care of Palaniammal, sister of Rathinampillai – Hence, appellants contends that Rajeswari is not entitled to any share in her husbands properties - Respondents contended that Rajammal is not legally wedded wife and appellants are not the children born to Rathinampillai.

Appellants have miserably failed to establish that there has been a valid marriage between Rajammal and Rathinampillai and appellants have been born out of said wedlock and it is found that appellants as such are not entitled to claim any share in suit properties even on footing that they are illegitimate children of Rathinampillai – Plea that very recently appellants had come to know regarding said documents and therefore, same should be received as additional evidence, cannot be accepted without any material to substantiate their case – Appeal stands dismissed.

Mr.M.Thirunavukkarasu, Advocate for Appellants.

Mr.R.Vijayakumar, Advocate For Respondents 2 & 3.

J U D G M E N T

Impugning the Judgment and Decree, dated 27.09.2002, passed in O.S.No.66 of 1985, on the file of the Sub Court, Periyakulam, the first appeal has been preferred by the plaintiffs.

2. The suit in O.S.No.66 of 1985 has been laid by the plaintiffs for partition and separate possession of the suit properties.

3. The averments contained in the plaint are briefly stated as follows: 3.1. The suit properties originally belonged to Murugapillai alias Rathinam Pillai and he died intestate on 24.11.1976 and when he was alive, he had taken Rajammal as his wife and through her, the plaintiffs were born and all along Rajammal was living with Rathinam Pillai and Rathinam Pillai had two elder sisters, namely, Palaniammal and Sakunthala and at the instance of his sisters, Rathinam Pillai had married Rajeswari, who is the daughter of Sakunthala, as his second wife and through Rajeswari, the defendants 1 to 3 were born to Rathinam Pillai. Rathinam Pillai had shown equal affection to all his daughters and he spent for their eduction and after his death, the second wife Rajeswari had developed contact with one Viputhi Veeramuthuswamy and thereby, she eloped with him and also took away the first defendant along with her and subsequently, the plaintiffs learnt that Rajeswari married Viputhi Veeramuthuswamy and the two other daughters of the deceased Rathinam Pillai, namely, defendants 2 and 3, were under the care and custody of their aunt Palaniammal. Hence, Rajeswari as such is not entitled to any share in her husband's properties on account of her above said conduct and as misunderstandings had arisen between the parties and the plaintiffs finding that it is no longer possible to be in the joint possession of the suit properties and thereby demanded partition and separate possession and inasmuch as the defendants did not come forward to effect amicable partition of the same, according to the plaintiffs, they had been necessitated to lay the suit for partition claiming their 2/5th share in the same. Further, according to the plaintiffs, if the Court for any reason comes to the conclusion that the marriage of Rathinam Pillai with Rajammal is not proved, still she being kept as the exclusive mistress of the deceased Rathinam Pillai, the plaintiffs should be treated as his illegitimate children and thus, would be entitled to 1/4th share in the suit properties.

4. The averments contained in the written statement filed by the defendants 2 and 3 in brief are as follows:

4.1. The suit properties originally belonged to Murugapillai alias Rathinam Pillai and it is correct to state that Rathinam Pillai died intestate on 24.11.1976. It is false to state that he had taken Rajammal as his wife when he was alive and the plaintiffs were born through Rajammal out of the above said alleged marriage between Rajammal and Rathinam Pillai and it is false to state that Rajammal was all along living with Rathinam Pillai. The date of marriage has not been given in the plaint for the reasons best known to the plaintiffs. It is true that Rathinam Pillai had two sisters, namely, Palaniammal and Sakunthala. It is

false to state that Rathinam Pillai had married Rajeswari, who is the daughter of Sakunthala, as his second wife, on the other hand, Rajeswari was the only wife of Rathinam Pillai and out of the said wedlock, the defendants were born to Rathinam Pillai and Rajeswari. The plaintiffs are not the daughters of Rathinam Pillai and he expired on 24.11.1976. It is false to state that after his death, Rajeswari developed contact with one Vibuthi Veeramuthuswamy and eloped with him and took the first defendant along with her. It is true that she married Vibuthi Veeramuthuswamy and leading a married life with him. It is false to state that Rajeswari is not entitled to claim any share in suit properties. The plaintiffs not being the legal heirs of the deceased Rathinam Pillai, they cannot be deemed to be in joint possession of the suit properties and it is false to state that the plaintiffs demanded partition of the suit properties and the defendants failed to effect amicable partition. Rathinam Pillai never married Rajammal and the same had also been described by Rathinam Pillai in the settlement deed effected by him in favour of Rajammal and the plaintiffs are, thus, not entitled to claim share in the suit properties as the legal heirs of the deceased Rathinam Pillai and the Court fee paid is incorrect and hence, the suit is liable to be dismissed.

5. On the basis of the pleadings set out by the respective parties, the following issues were framed by the Trial Court:

i. Whether the plaintiffs are entitled to obtain the decree as prayed for in the plaint?

ii. Whether the plaintiffs are the legal representatives of the deceased Rathinam Pillai?

iii. Whether the suit is maintainable?

iv. Whether the Court fee paid by the plaintiffs is correct? and

v. To what relief the plaintiffs are entitled to?

6. In support of the plaintiffs' case, P.Ws.1 to 4 were examined and Exs.P1 to P17 were marked and on the side of the defendants' D.Ws.1 and 2 were examined and Exs.D1 to D13 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties, the Court below was pleased to dismiss the suit. Challenging the same, the present appeal has been preferred.

8. Pending first appeal, the appellants have filed M.P.(MD) No.1 of 2011, under Order XLI Rule 27 C.P.C., for reception of certain documents as additional evidence in support of their case.

9. The averments contained in the affidavit appended to the said miscellaneous petition are briefly stated as follows: 9.1. The appellants have preferred the appeal impugning the Judgment and Decree of the

Court below rendered in their suit for partition and separate possession and according to them, they were unaware of the legal issues involved in the suit and the school transfer certificate of the first appellant got misplaced and thereby, she preferred a complaint to the S.I. of Police, Uthamapalayam Police Station, who issued a non-traceable certificate to her on 31.07.2011 and they are now able to get the four documents detailed in the petition being marriage invitation card of the second appellant, birth certificate of a female child born to Rajammal and Rathinam Pillai on 20.12.1970, school transfer certificate issued to the first appellant by Mohamed Fathima Girls High School, Uthamapalayam and the certificate issued by S.I.of Police, Uthamapalayam Police Station, which would clinchingly establish the appellants / plaintiffs case that they are the legal heirs of the deceased Rathinam Pillai and hence, according to them, the said documents should be received as additional documents in this appeal and hence, the miscellaneous petition.

10. The averments contained in the counter affidavit of the respondents 2 and 3 / defendants 2 and 3 to the said miscellaneous petition are briefly stated as follows:

10.1. The said miscellaneous petition is not maintainable either in law or on facts. The documents sought to be produced as additional documents cannot be received in evidence as such. The alleged birth certificate of the second appellant / second plaintiff shows that she was born in Madurai. However, there is no pleading in the plaint that at any point of time, Rajammal and the deceased Rathinam Pillai were residing in Madurai and further the said document being obtained during the pendency of the appeal cannot be received in evidence and it is not admissible in evidence. The marriage invitation card of the second appellant / second plaintiff is inadmissible as in the settlement deed marked as Ex.D1, it has been clearly averred by the deceased Rathinam Pillai that the second plaintiff is the daughter of Rajammal and not his daughter and hence, the said document is also inadmissible. Further, the school transfer certificate of the first appellant / first plaintiff shows the date of birth as 17.03.1962, whereas the school transfer certificate already produced and marked as Ex.D11 shows her date of birth as 04.05.1962 and the name of her parents as Shanmugavel and Rajammal and further in Column No.19, it is shown as the first appellant has studied 6th to 8th Standards during the academic year 1973 ? 1974, which is unbelievable and hence, the said document is also not genuine and inadmissible in evidence. Further, the certificate issued by S.I.of Police, Uthamapalayam Police Station, is not genuine and would not in any manner advance the case of the appellants / plaintiffs and further inasmuch as the ingredients of Order XLI Rule 27 C.P.C., have not been

complied with and the documents sought to be produced are found to be in contravention of the pleadings and the evidence already adduced, the above said miscellaneous petition is liable to be dismissed.

11. In addition to the above said miscellaneous petition, the appellants / plaintiffs have also filed C.M.P.(MD) No.6506 of 2017 under the same provision of law for reception of the marriage registration certificate of the first appellant / first plaintiff as an additional document in support of their case.

12. The averments contained in the affidavit appended to the said miscellaneous petition are briefly stated as follows: 12.1. The petitioners / appellants have laid the first appeal impugning the Judgment and Decree rendered by the Court below in the suit laid by them for partition and separate possession. It is stated that the marriage of the first appellant / first plaintiff was solemnized with P.W.4 at Arulmigu Meenakshi Sundareswarar Temple, Madurai, on 21.01.1977 and the same was registered, wherein her father's name was mentioned as M.R.P.Rathinam Pillai and the name of the village was mentioned as Uthamapalayam and further, the deceased Rathinam Pillai had put his signature in the marriage register and the marriage registration certificate had come to the knowledge of the first appellant / first plaintiff only recently and obtained the certificate of the same from the Officer concerned and hence, the said document should be received in evidence as additional document to substantiate her case and hence, the petition.

13. The averments contained in the counter affidavit of the respondents 2 and 3 / defendants and 3 to the said miscellaneous petition are briefly stated as follows:

13.1. The miscellaneous petition is not maintainable either in law or on facts and as per the oral evidence tendered on the side of the plaintiffs, the marriage of the first appellant / first plaintiff took place at Thiruparankundram Temple, however, the present additional document sought to be marked states that her marriage had taken place at Arulmigu Meenakshi Sundareswarar Temple, Madurai, which goes to show the contradictions in the case of the plaintiffs and further, the deceased Rathinam Pillai, who is alleged to have signed in the marriage register for the marriage of the first appellant / first plaintiff at Meenakshi Amman Temple, Madurai, which took place on 21.01.1977, but the fact remains that Rathinam Pillai died on 24.11.1976 as averred in Paragraph No.4 of the plaint and hence, the projected additional document is false and it is a forged document and not admissible in evidence and further, the ingredients of Order XLI Rule 27 have not been complied with and hence, the petition is liable to be rejected.

14. The following points arise for consideration in this first appeal: i. Whether Rajammal is the legally wedded wife of the deceased Rathinam Pillai?

ii. Whether the appellants / plaintiffs are the legal heirs of the deceased Rathinam Pillai born to him out of the lawful wedlock with Rajammal? iii. Whether the appellants / plaintiffs are entitled to claim partition and separate possession of their respective shares in the suit properties as claimed in the plaint?

iv. Whether Rajeswari is the legally wedded wife of the deceased Rathinam Pillai and whether the respondents / defendants are the children of the deceased Rathinam Pillai?

v. To what relief the appellants / plaintiffs are entitled to? and vi. Whether the miscellaneous petitions in M.P.(MD) No.1 of 2011 and C.M.P.(MD) No.6506 of 2017, under Order XLI Rule 27 C.P.C., are entitled for acceptance?

POINT NOS.I TO IV:

15. The plaintiffs have laid the suit claiming partition and separate possession in the suit properties on the footing that Rathinam Pillai married their mother Rajammal and out of the said wedlock, they were born and thus, they are the legal heirs of the deceased Rathinam Pillai, who died on 24.11.1976 and further, it is the case of the plaintiffs that Rathinam Pillai had married one Rajeswari, who is none other than the daughter of his elder sister, namely, Sakunthala, as his second wife and out of the said wedlock, the defendants were born and thus, according to the plaintiffs, they and the defendants are the children of the deceased Rathinam Pillai and thus, it is the case of the plaintiffs that they are entitled to their respective shares in the suit properties as the legal heirs of the deceased Rathinam Pillai and hence, the suit for the above mentioned reliefs. The plaintiffs have also taken a plea in the plaint itself that in case the Court holds that Rajammal is not married to Rathinam Pillai and that she had been kept as the exclusive mistress of the deceased Rathinam Pillai, the status of the plaintiffs shall be treated as the illegitimate children of the deceased Rathinam Pillai and thus, they are entitled to get their respective shares in the suit properties and accordingly, the relief should be moulded in their favour.

16. The defendants have taken a specific defence that Rajammal is not the legally wedded wife of the deceased Rathinam Pillai as projected by the plaintiffs and at no point of time, Rajammal lived with Rathinam Pillai as his wife and it is the further case of the defendants that the plaintiffs are not the children born to Rathinam Pillai through Rajammal and the plaintiffs are not the legal heirs of the deceased Rathinam Pillai. It is the further case of the defendants that the deceased Rathinam Pillai married only

Rajeswari during his lifetime and out of the said wedlock, the defendants were born to him and Rajeswari and thus, it is contended that it is only the defendants, who are the legal heirs of the deceased Rathinam Pillai and therefore, the plaintiffs cannot lay any claim or share in the suit properties.

17. It is not in dispute that the suit properties belonged to the deceased Rathinam Pillai. Originally, when the suit had come to be laid, the second plaintiff, being a minor, it is found that Rajammal was shown as the mother and guardian of the minor second plaintiff. It is therefore found that on the date of laying of the suit, Rajammal was alive. Therefore, the immediate question that arises for consideration is, if according to the plaintiffs Rajammal is the legally wedded wife of the deceased Rathinam Pillai, then she would also be entitled to claim her due share in the suit properties left behind by the deceased Rathinam Pillai. However, it is found that only the plaintiffs have chosen to lay the suit for partition and separate possession leaving their mother away. This itself raises a suspicion as to whether Rajammal is the legally wedded wife of the deceased Rathinam Pillai.

18. Be that as it may, though the plaintiffs in the plaint would claim that the deceased Rathinam Pillai had married Rajammal, as put forth by the defendants, it is strange that the plaintiffs have not whispered anything in the plaint averments as to when the marriage between Rathinam Pillai and Rajammal had taken place, the venue of the marriage and the persons, who had attended the marriage etc. All that has been stated in the plaint is that Rajammal was taken as the wife of Rathinam Pillai and through Rajammal, the plaintiffs were born. As adverted above, the defendants have taken a specific plea in the written statement that Rajammal is not the legally wedded wife of the deceased Rathinam Pillai and that no marriage took place between Rathinam Pillai and Rajammal as per law and further, they have also taken a specific plea that the plaintiffs were not born to the deceased Rathinam Pillai and Rajammal and hence, the plaintiffs are not the legal heirs of the deceased Rathinam Pillai. Such being the defence projected by the defendants, it could be seen, as rightly argued by the learned counsel for the defendants 2 and 3, that the best person, who could throw light on the factum of the marriage between Rathinam Pillai and Rajammal, would be only Rajammal. If according to the plaintiffs Rajammal was the legally wedded wife of the deceased Rathinam Pillai and if she is his first wife as pleaded in the plaint, the defendants having repudiated the same in black and white, it is for the plaintiffs to examine their mother Rajammal to establish their case, but peculiarly, they have not chosen to examine Rajammal to substantiate their case. This would only go to show as rightly determined by the Court below that inasmuch as the plaintiffs' case that Rajammal married Rathinam Pillai is not

true and the plaintiffs were not born to Rathinam Pillai through Rajammal, it is found that the plaintiffs though were in possession of the best evidence, did not evince any interest to project the same for the reasons best known to them. This further raises a strong suspicion in the case projected by the plaintiffs.

19. The plaintiffs, in order to establish the factum of marriage between Rajammal and the deceased Rathinam Pillai, have adduced oral evidence through P.Ws.1 to 4. P.W.1 is the first plaintiff and as seen from the evidence tendered by her during both chief as well as the cross-examination, as rightly found the Court below, admittedly her evidence regarding the factum of the marriage of Rajammal and Rathinam Pillai being only a hearsay evidence and when further according to P.W.1, she had derived the knowledge of the same only through her mother Rajammal, it is rightly held by the Court below, the evidence of P.W.1 would not in any manner serve the case of the plaintiffs. Therefore, it is found that the evidence of P.W.1 cannot be taken into consideration for upholding the plaintiffs' case.

20. The next witness P.W.2 ? Rajangam would claim to have attended the wedding reception of the marriage between Rajammal and Rathinam Pillai at Uthamapalayam. It is, therefore, found that he had not attended the alleged marriage between Rajammal and Rathinam Pillai. According to P.W.2, as seen from his evidence that the marriage between Rajammal and Rathinam Pillai took place during 1959 or 1960. However, based upon the above said oral evidence of P.W.2, as rightly held by the Court below, we cannot safely conclude that a valid marriage had taken place between Rajammal and Rathinam Pillai as deposed by P.W.2 when the fact remains that he has not witnessed the marriage. That apart, it is also found that P.W.2 was under the employment of P.W.4 ? Manikandan, who is none other than the husband of P.W.1. Therefore, it could be seen that the evidence of P.W.2 has to be accepted only with the pinch of salt and cannot be relied upon straightaway to accept the case of the plaintiffs.

21. P.W.3 ? Munusamy has also admitted that he has only heard about the marriage, which took place between Rajammal and Rathinam Pillai. However, according to him, he had attended the wedding reception, which took place at the Karnam house at Uthamapalayam and on the basis of the above piece of evidence, the plaintiffs have endeavoured to establish the factum of marriage between Rajammal and the deceased Rathinam Pillai. However, as rightly found by the Court below, his evidence cannot also be accepted as the same being in the nature of the hearsay evidence. Further, P.W.3 has also admitted that he is cultivating the lands of P.W.4 ? Manikandan on othi basis. Therefore, it is found that P.W.3 is also an interested evidence and his evidence, without any basis

or material, cannot be relied upon to accept the plaintiffs' case.

22. From the evidence of P.Ws.2 and 3, it is found that the plaintiffs' case is that the wedding reception of Rajammal and Rathinam Pillai took place at the Karnam house, Uthamapalayam. As seen earlier, according to them, the marriage took place during 1959 or 1960. In this connection, Manikandan, who is the husband of P.W.1 and examined as P.W.4, has deposed that the marriage between Rajammal and Rathinam Pillai took place at Srivilliputtur Krishnan Temple in 1959 and further he has clearly admitted that Rathinam Pillai married Rajarajeswari on 08.02.1962 and the marriage invitation card pertaining to the said marriage is Ex.D6 and further, he has also admitted that on the previous day i.e., on 07.02.1962, reception was held and the above said function was conducted in Karnam house at Uthamapalayam. A perusal of Ex.D6 coupled with the admission of P.W.4 would go to show that on 08.02.1962, the marriage between Rathinam Pillai and Rajarajeswari took place in the newly constructed house of Rathinam Pillai at Uthamapalayam and it is also found that on the same date, the housewarming ceremony of the newly constructed house was also celebrated and in such view of the matter, when the housewarming ceremony of the newly constructed house i.e., Karnam's house at Uthamapalayam was celebrated only on 08.02.1962 along with the marriage of Rathinam Pillai and Rajarajeswari, the case of the plaintiffs as spoken to through P.Ws.2 and 3 that the wedding reception of Rathinam Pillai and Rajammal took place in Karnam house at Uthamapalayam cannot be believed as the Karnam house had been completely constructed only on 08.02.1962. Therefore, the above aspect of the matter also throws a serious doubt in the case projected by the plaintiffs that Rajammal had been taken as the wife of Rathinam Pillai through a lawful wedlock. It is not out of place to mention here that P.W.4 is none other than the brother of Rajarajeswari and therefore, as rightly found by the Court below, P.W.4 is competent to depose about the marriage of his sister Rajarajeswari with Rathinam Pillai and therefore, it is found that through the evidence of P.W.4 and the document marked as Ex.D6 i.e., wedding invitation card, the lawful marriage between Rajarajeswari and Rathinam Pillai had been duly established. As regards the evidence of P.W.4 with reference to the alleged marriage between Rajammal and the deceased Rathinam Pillai, it could be seen that he is also not in the know of things directly and in such view of the matter, his evidence cannot also be relied upon to hold that there has been a valid marriage between Rajammal and Rathinam Pillai.

23. In the light of the above said discussions, it is found that the case of the plaintiffs that Rathinam Pillai had taken Rajammal as his first wife and only thereafter, he married Rajeswari as the second wife is

not true. On the other hand, the oral evidence tendered by the plaintiffs to establish the alleged marriage between Rajammal and the deceased Rathinam Pillai being of the above nature, which could not be safely relied upon for the reasons afore-stated and when there is no convincing material to hold that there has been a valid lawful marriage between Rajammal and the deceased Rathinam Pillai, it is found that the case of the plaintiffs as regards the above fact cannot be upheld, particularly, solely based on the oral evidence of P.Ws.1 to 4.

24. The defendants have examined Rathinam Pillai's sister, namely, Palaniammal as D.W.1. As rightly found by the Trial Court, D.W.1 being the eldest person in the family, would be in the know of things about the marital status of Rathinam Pillai, he being her brother, it is found that the evidence of D.W.1 requires consideration in this matter. As seen from the evidence of D.W.1, it is found that Rajammal and her husband, namely, Shanmugavel were in the employment at the house of Rathinam Pillai and in such circumstances, according to D.W.1, there has been an illegitimate relationship between Rajammal and Rathinam Pillai and as the said issue had cropped up at one point of time, according to D.W.1, Rajammal was taken by her husband to her native place at Rajapalayam and therefore, it is found from the evidence of D.W.1 that there has been some illegitimate connection or relationship between Rajammal and Rathinam Pillai at that point of time and the same had not developed into any valid marriage as such between them and it is further found that Rajammal even at that point of time was married to one Shanmugavel. Therefore, it is found that Rajammal being the legally wedded wife of Shanmugavel and when it is further found that the plaintiffs have miserably failed to establish the factum of marriage between Rajammal and Rathinam Pillai as projected by them and when it is found that Rathinam Pillai was having only illicit relationship with Rajammal, it is seen that Rajammal at no point of time has been taken or treated as the wife of Rathinam Pillai either by Rathinam Pillai or by the Society at large.

25. In this lis, the letters said to have been sent by Rajammal to Rathinam Pillai have been marked as Exs.D8 to D10 and that the said letters are written only by Rajammal has been admitted and her signatures in the said letters had come to be marked as Exs.D3 to D5. Therefore, the Court below has taken into consideration the contents of the above said letters to assess the merits of the case at hand. It is not the case of the plaintiffs that the above said letters have not been written by Rajammal. Further, to controvert that the above said letters have not been written by Rajammal, the plaintiffs have not chosen to examine their mother Rajammal with reference to the same. Therefore, no fault could be attributed on the part of the Court for relying

upon the contents of the above said letters for determining the issues involved in the matter. It is found from Ex.D8 that there is a clear reference by Rajammal herself that her husband is only Shanmugavel and such being the position, the case of the plaintiffs that Rajammal had married Rathinam Pillai as such cannot be accepted in any manner. Further, as seen from the contents of Ex.D10, it is found that only the illicit relationship of Rajammal with Rathinam Pillai was adverted to and the said letter, dated 03.04.1963, would only probablize the case as spoken to by D.W.1 that during the stay of Rajammal at Rathinam Pillai's house, when she was in employment, there has been some illicit relationship between them and therefore, it is found that the same had been adverted to by Rajammal in Ex.D10. Therefore, the contents of Ex.D10 would also only improbablize the case of the plaintiffs that she is the legally wedded wife of the deceased Rathinam Pillai. That apart, the contents of Ex.D9 would go to show that following the estrangement between the couples i.e., Rajammal and Shanmugavel, it is found that Shanmugavel and his family members demanded the custody of the first plaintiff from Rajammal and she had refused to accede to the request stating that she cannot handover the custody of the first plaintiff, she being the girl baby. From the contents of Ex.D9, it is found that the demand for the custody of the first plaintiff was made by Shanmugavel and his family members on the footing that the first plaintiff was born to Shanmugavel through Rajammal. This piece of evidence would only go to show that inasmuch as Rajammal was the wife of Shanmugavel and the first plaintiff was born to them through the said wedlock, it is found that Shanmugavel as a matter of right demanded the custody of the first plaintiff following the difference of opinion between them. Therefore, the contents found in Exs.D8 to D10, which had not been repudiated by Rajammal or by the plaintiffs as the case may be, only go to establish the falsity of the plaintiffs' case that Rathinam Pillai had married Rajammal and taken her as his wife and that the plaintiffs are the children born to Rathinam Pillai through Rajammal.

26. In addition to that it is found that Rathinam Pillai had executed a settlement deed in favour of Rajammal, which has come to be marked as Ex.D1 and on a perusal of the same, would only go to show that therein Rathinam Pillai has only described Rajammal as his ?mgpkhd!;jphp? and not his wife as such and further, he has described the plaintiffs in the said settlement deed as only the daughters of Rajammal and not as his daughters. This also would only strengthen the defence version put forth by the defendants that Rathinam Pillai had never taken Rajammal as his wife at any point of time and further, inasmuch as the plaintiffs were not born to Rathinam Pillai through Rajammal, he has described the plaintiffs as the daughters of Rajammal and not as his daughters. The above said

averments contained in Ex.D1 cannot be repudiated by the plaintiffs inasmuch as the plaintiffs thereafter along with their mother had alienated the subject property under Ex.D2 and therefore, it is found that through Ex.D1, the defendants have exposed the falsity of the plaintiffs' case. That apart, on the same date of Ex.D1, Rathinam Pillai had executed settlement deeds marked as Exs.D12 and D13 in favour of Rajarajeswari and her children, namely, defendants, wherein he has clearly described Rajarajeswari as his wife and the defendants as his children and therefore, Rathinam Pillai being fully aware about the status of Rajarajeswari and the defendants born to him through her has clearly spelt out the said relationship in the above said documents and accordingly, he also being aware of the status of Rajammal has clearly described her as his ?mgpkhd!;jphp? in Ex.D1. Therefore, the above documents marked as Exs.D1, D12 and D13 cumulatively would only go to establish that Rajammal is not the legally wedded wife of the deceased Rathinam Pillai and that the plaintiffs were not born to the deceased Rathinam Pillai through Rajammal.

27. The marriage between Rajammal and Shanmugavel having come to be established or in other words, Rajammal being the wife of Shanmugavel, which fact having been admitted by Rajammal herself in Ex.D8 and when the said marriage has not been annulled in the manner known to law, it is found that as rightly determined by the Court below and also invoking Section 112 of the Indian Evidence Act, inasmuch as it is only Rajammal and Shanmugavel, who had been having access to each other during the continuance of their marriage, it is found that even the second plaintiff born to Rajammal is only an offspring through Shanmugavel and therefore, it cannot be held that the second plaintiff was born to Rajammal through Rathinam Pillai without any basis or material.

28. However, the plaintiffs have projected the transfer certificate of the second plaintiff as Ex.P2 to show that Rathinam Pillai was the father of the second plaintiff. However, a perusal of Ex.P2 would only go to show that the second plaintiff therein has been described as Maheswari.R, thereby alone it cannot be construed that the initial ?R? stands for Rathinam Pillai without any material or hold. As rightly found by the Court below, ?R? may also denote her mother Rajammal and therefore, by Ex.P2 alone it cannot be construed that there bas been a valid marriage between Rajammal and Rathinam Pillai as put forth by the plaintiffs and that the second plaintiff Maheswari was born to Rathinam Pillai through Rajammal. Therefore, Ex.P2 would not in any manner support of the plaintiffs' case. The marriage invitation card of the first plaintiff with P.W.4 has been marked as Ex.P3 and this document is relied upon by the plaintiffs on the footing that in the same, the deceased Rathinam Pillai has been shown as the father of the first plaintiff.

As rightly found by the Court below, the said invitation card has come be printed after the death of Rathinam Pillai and it has not been established as to who had been instrumental in bringing the above said printing card. Therefore, the mere reference of Rathinam Pillai as the father of the first plaintiff in the invitation card marked as Ex.P3 after his death alone would not in any manner lead to the conclusion that Rajammal had been taken as the lawful wedded wife by the Rathinam Pillai and that the first plaintiff was born out of the said wedlock. On the other hand, when it is found that Shanmugavel is the husband of Rajammal and when it is not clear on what basis the above said description had come to be incorporated in the invitation card, it is found that the same cannot be the deciding factor for upholding the plaintiffs' case.

29. The other document on which the plaintiffs have placed reliance is Ex.P8, which is the proposal given to the Insurance Corporation by Rathinam Pillai in respect of the first plaintiff. Merely on the basis of the same, when it has not been established that the contents found in the same are mooted by Rathinam Pillai and further when any further action has been initiated thereupon, as rightly determined by the Court below, the same having not been established to have emanated from deceased Rathinam Pillai, in my opinion, the said document cannot be considered as a valid piece of evidence to accept the plaintiffs' case.

30. On the other hand, it is seen from Ex.D11, the birth certificate of the first plaintiff, which document is not in dispute, it is found that the first plaintiff is stated to have been born on 03.05.1962 at Uthamapalayam South Street and the name of the parents of the first plaintiff has been clearly stated as Shanmugavel and Rajammal. Therefore, when it is found from Ex.D11 that the first plaintiff is shown to have been born only to Shanmugavel and Rajammal, the whole case of the plaintiffs get belied on the above said document also and therefore, the reference about Rathinam Pillai as the father of the first plaintiff in Exs.P3 and P8 could not in any manner be believed and equally, the reference of the second plaintiff as R.Maheswari in Ex.P2 also would not serve any purpose to establish the plaintiffs' case. Coupled with the facts that as discussed above, when Rajammal herself has admitted that she is only the wife of Shanmugavel as seen from Ex.P8 and also refused to handover the custody of the first plaintiff to Shanmugavel as being the female daughter and when Rathinam Pillai himself has described Rajammal only as his ?mgpkhd!;jphp? and the plaintiffs as the daughters of Rajammal in Ex.D1, all these facts cumulatively would only go to establish that there has been no marriage at all muchless a valid marriage between Rajammal and the deceased Rathinam Pillai and consequently, it is found that the plaintiffs are not the children born to Rathinam Pillai through Rajammal out of the said wedlock.

31. In support of his contentions, the learned counsel for the plaintiffs placed reliance upon the decisions reported in 2004-TLNJ-383 [V.V.Kannan and another vs. K.Sridhar], 2008 (3) LW 471 [Chandrammal and others vs. S.Sankar (died) and others], 2009 (3) CTC 760 [Balamani and another vs. S.Balasundaram], 2009 (4) CTC 440 [K.V.Ramasamy vs. K.V.Raghavan and others], 2009 (9) SCC 52 [R.Mahalakshmi vs. A.V.Anantharaman and others] and 2010 (2) CTC 622 [Kuppan vs. Muniammal and another]. Similarly, the learned counsel for the defendants 2 and 3 placed reliance upon the decisions reported in 2008(1) MLJ 1253 (SC) [K.R.Mohan Reddy vs. Net Work INC.], 2017 (1) MWN(C) 225 [S.K.P.Subramaniam and another vs. S.K.Chinnarsaj (Deceased) and others], 2015 (4) LW 509 [Baby @ Rohini (Deceased) and others vs. Kamalam Kumerasan and others], 1995 (1) LW 487 [K.Munuswami Gounder and another vs. M.Govindaraju and others] and 1989 (2) LW 197 (DB) [Mohan and another vs. Santha Bai Ammal and others]. The principles of the law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

32. Considering the fact that the plaintiffs have miserably failed to establish that there has been a valid marriage between Rajammal and Rathinam Pillai and that the plaintiffs have been born out of the said wedlock or even born to him through Rajammal illegally, it is found that the plaintiffs as such are not entitled to claim any share in the suit properties even on the footing that they are the illegitimate children of Rathinam Pillai and accordingly, it is found that the plaintiffs are not entitled to invoke Section 16(1) of the Hindu Marriage Act for claiming the limited reliefs as prayed for in the plaint.

33. In the light of the above discussions, I hold that Rajammal is not the legally wedded wife of the deceased Rathinam Pillai, I further hold that the plaintiffs are not the children of the deceased Rathinam Pillai. Consequently, I hold that the plaintiffs are not entitled to claim any partition and separate possession of their respective shares in the suit properties as prayed for. I further hold that Rajeswari is the legally wedded wife of the deceased Rathinam Pillai and the defendants are the children of the deceased Rathinam Pillai. Accordingly, Point Nos.I to IV are answered against the plaintiffs and in favour of the defendants.

POINT NO.VI:

34. During the appeal proceedings, the plaintiffs have chosen to file two miscellaneous petitions for the reception of additional evidence, under Order XLI Rule 27 C.P.C., in order to substantiate their case. Under M.P.(MD) No.1 of 2011, they seek to produce four documents as additional evidence. As regards the first document, namely, marriage invitation of the second plaintiff dated 15.12.1985, as

rightly argued by the learned counsel for the defendants 2 and 3, the said document / invitation card has come into existence after the death of Rathinam Pillai and therefore, it could be seen that Rathinam Pillai cannot be construed as the author of the said document. That apart when Rathinam Pillai has described the plaintiffs as the daughters of Rajammal in Ex.D1, it is found that the above said document would not in any manner advance the case of the plaintiffs and that apart no valid reason has been adduced by the plaintiffs as to why they have not chosen to mark the said document before the Court below.

35. The second document, namely, birth certificate, dated 28.07.2011, which according to the plaintiffs would show that Rathinam Pillai was the father of the female child mentioned therein through Rajammal, has come to be issued by Madurai Corporation and when there is no plea in the plaint that at that point of time, Rajammal was living as the wedded wife of Rathinam Pillai at Madurai and on the other hand, when the evidence disclose as pointed out earlier that Rajammal was the wife of Shanmugavel, it is found that the above said document / birth certificate would also not in any manner be helpful to sustain the case of the plaintiffs.

36. The third document, namely, the school transfer certificate projected by the plaintiffs would only go to show that the date of birth of the first plaintiff is 17.03.1962, whereas her birth certificate had also been marked as Ex.D11, wherein her date of birth is shown as 04.05.1962 and her parents are described as Shanmugavel and Rajammal. On the other hand, the projected document shows that her date of birth is 17.03.1962 and described her father as P.Rathinam and further it is also mentioned that during one academic year, the first plaintiff had studied Standards VI to VIII. This also is found to be against the pleadings already set out in the plaint and evidence of the parties and hence, the same cannot be countenanced and no explanation whatsoever is placed as to why the said document has not been marked in the Court below.

37. The fourth document, namely, the certificate issued by the Police Department regarding loss of transfer certificate. However, as rightly argued by the learned counsel for the defendants 2 and 3, the said document not shown to be established by the due authority as per law, by producing the other connected documents, it is found that the said document also cannot be accepted as additional document in support of the plaintiffs' case.

38. Through C.M.P.No.6506 of 2017, the plaintiffs are endeavouring to mark the marriage certificate of the first plaintiff and P.W.4, which would only go to that the marriage had taken place at Meenakshi Amman Temple, Madurai. But, in the evidence deposed in the matter, the marriage

is said to have been taken place at Thirupparankundram Temple and therefore, on the face of it, the said projected document is found to be unacceptable. That apart, when it has been admitted in black and white in the plaint that Rathinam Pillai had died on 24.11.1976, the case of the plaintiffs that Rathinam Pillai had signed in the marriage register of the first plaintiff, which took place on 21.01.1977 also would expose the falsity of the document and therefore, as rightly put forth by the learned counsel for the defendants 2 and 3, the said document also does not merit acceptance for reception of the same as additional evidence.

39. The above documents sought to be produced as additional evidence during the course of this appeal are not marked during the original suit proceedings. It has not been explained by the plaintiff properly as to why the said documents had not been marked before the Court below. The case of the plaintiffs that they had come to know about the said documents only recently as such cannot be straightaway accepted. When the case of the plaintiffs has been stoutly resisted by the defendants in all aspects, the plaintiffs knowing about their status even at that point of time should have endeavoured to mark all the documents in support of their case before the Court below. On the other hand, failing to do and subsequently when their case has been thrown out by the Trial Court and the plaintiffs now coming forward with the plea that only recently they had come to know of the above said documents and therefore, the same should be received as additional evidence, cannot be accepted without any material to substantiate their case. That apart, as rightly argued by the learned counsel for the defendants 2 and 3, when the above said documents are not referred to in the plaint and further also not disclosed during the course of evidence tendered by the plaintiffs one way or the other and on the other hand, when the documents projected are found to be inconsistent with the pleadings set out in the plaint and also the evidence adduced in the matter and further, when it is found that the above said petitions for the reception of the additional evidence also do not comply with the ingredients of Order XLI Rule 27 C.P.C., as rightly put forth by the learned counsel for the defendants 2 and 3, the above said petitions preferred for the reception of the additional evidence cannot be accepted and hence, they are dismissed. Accordingly, Point No.VI is answered.

POINT NO.V:

40. In conclusion, i. The Judgment and Decree, dated 27.09.2002, passed in O.S.No.66 of 1985, on the file of the Sub Court, Periyakulam, are confirmed and resultantly, the first appeal is dismissed with costs;

ii. M.P.(MD) No.1 of 2011 and C.M.P.(MD) No.6506 of 2017 are also dismissed; and

iii. Consequently, the other connected M.P.(MD) No.1 of 2013 is closed.

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LAW SUMMARY

2017 (3)

Supreme Court Reports

2017 (3) L.S. 1 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Dipak Misra
The Hon'ble Mr.Justice
R.Bhanumathi
The Hon'ble Mr.Justice
Ashok Bhushan

Vikram Singh &
Ors., ..Appellants

Vs.

State of Punjab & Ors., ..Respondents

INDIAN PENAL CODE, Secs. 120-B, 201, 302 and 364-A, CONSTITUTION OF INDIA, Art.137 - Applicants by their review petitions seeking review of Judgment of Hon'ble Supreme Court by which Judgment, Criminal appeals filed by applicants were dismissed and death sentence awarded by Trial Court and affirmed by High Court was maintained.

Trial Court convicted Vikram Singh, Jasvir Singh and Sonia (wife of Jasvir Singh) and awarded death sentence to all three accused – High Court confirmed death sentence of all the accused – In the Criminal appeal before apex court, death sentence awarded to Sonia was converted into life imprisonment – Review petitions filed by Vikram Singh and Jasvir Singh were dismissed by two-judge bench which heard criminal appeals – Application filed for reopening of review petitions.

Held – Review literally and even judicially means re-examination or reconsideration - Granting power of review to Supreme court by the Constitution is in recognition of universal principle that power of review is part of all Judicial system – In a criminal proceeding, review applications cannot be entertained except on ground of error apparent on the face of the record – By review application an applicant cannot be allowed to re-argue appeal on the grounds which were argued at the time of hearing of criminal appeal – Even if applicant succeeds in establishing that there may be another view possible on conviction or sentence of accused that is not a sufficient ground for review – Review applications are rejected.

Crl.M.P.Nos.16673-16674/16 Dt:7-7-2017

J U D G M E N T

(per the Hon'ble Mr.Justice Ashok Bhushan)

Delay condoned.

These criminal miscellaneous petitions have been filed by the applicants for reopening the Review Petition (Crl.) Nos. 192-193 of 2016 in Criminal Appeal Nos.1396-1397 of 2008 on the basis of Constitution Bench judgment in Mohd. Arif 2 alias Ashfaq versus Registrar, Supreme Court Of India And Others, 2014(9) SCC 737, by which judgment liberty was granted to those petitioners whose review applications seeking review of judgment of this Court confirming death sentence were rejected by circulation but death sentences were not executed.

2. Both the applicants Vikram Singh @ Vicky Walia and Jasvir Singh @ Jassa were tried for offences under Section 302, 364A, 201 and 120B IPC. The trial court vide its judgment dated 20th December, 2016/21st December, 2016 convicted both the applicants as well as one Smt. Sonia wife of Jasvir Singh and awarded death sentence to all the three accused under Section 302 and 364A IPC. Criminal Appeal No.105-DB of 2007 was filed before the High Court by all the accused against the judgment of Sessions Judge, Hoshiarpur. Murder Reference No. 1 of 2007 was also made by the Sessions 3 Judge before the High Court seeking confirmation of death sentence. Both Murder Reference No.1 of 2007 as well as Criminal Appeal No.105-DB of 2007 were heard and disposed of by a common judgment of the High Court dated 30.05.2008. The High Court accepted the Murder Reference No.1 of 2007 and confirmed the death sentence awarded by the trial court resultantly Criminal Appeal No.105-DB/2007 was dismissed. Aggrieved by the judgment of the High court dated 30.05.2008 Criminal Appeal Nos.1396-1397 of 2008 were filed by the accused.

This court heard the criminal appeals. Two Judge Bench of this Court by its judgment dated 25.01.2010 dismissed the criminal appeals of Vikram Singh and Jasvir Singh whereas death sentence awarded to Smt. Sonia, the third accused was converted into life imprisonment. Vikram Singh and Jasvir Singh filed Review Petition (Crl.) Nos.192-193 of 2011 which 4 review petitions were dismissed by circulation vide order dated 20.04.2011 by two-Judge Bench which had heard the criminal appeals on the ground of delay as well as on merits. As noted above after the Constitution Bench judgment of this Court in Mohd. Arif alias Ashfaq (supra) Criminal M.P.Nos.16673-16674 of 2016 and 16675-16676 of 2016 were filed by the applicants for reopening the Review Petition (Crl.) Nos.192-193 of 2011.

3. Learned counsel for the parties were permitted to advance their oral submissions on 24.10.2016 in support of Review Petition (Crl.) Nos.192-193 of 2011.

4. We have heard Shri K.T.S. Tulsi, learned senior counsel appearing for Vikram Singh whereas Shri Tripurari Ray has been heard for applicant No.2. Shri V. Madhukar, learned Additional Advocate General has been heard for 5 the State of Punjab and Haryana and Ms. Anvita Cowshish, learned counsel for complainant.

5. The applicants by their review petitions are seeking review of the judgment of this Court dated 25.01.2010 by which judgment criminal appeals filed by the applicants were dismissed and death sentence awarded by the trial court and affirmed by the High Court was maintained by dismissing the appeals.

6. Before we proceed to examine the review petitions, it is necessary to note the ambit, scope and parameters of the review jurisdiction of this Court.

7. Article 137 of the Constitution of India provides for review of judgments or orders of this Court in following words: "137. Review of judgments or orders by the Supreme Court.- Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to 6 review any judgment pronounced or order made by it."

8. Order 40 of Supreme Court Rules, 1966 deals with the review, Rule 1 of which provides: "1. The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order 47 Rule 1 of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record."

9. This Court has constitutional power to review its judgment as granted by Article 137 of the Constitution which is subject to provisions of any law made by Parliament or any Rules made under Article 145. Under Article 145 the Supreme Court has framed Rules, 1966 as noted above. As per Rule 1 of Order 40 an application for review in a criminal proceeding can be entertained on the ground of an error apparent on the face of the record.

10. Granting power of review to this Court by the Constitution is in recognition of the universal principle that the power of review is part of all judicial system. Rule 1 of Order 40 of Supreme Court Rules, 1966 provides for the procedure and manner in which the power of review can be exercised by this Court. The ambit and scope of power of review of this Court has come up for consideration time and again before this Court. Justice Krishna Iyer in Sow Chandra Kante and another vs. Sheikh Hai, (1975) 1 SCC 674, held that to review of a judgment of this Court are subject to the rules of the game and cannot be lightly entertained. Explaining the scope and ambit of the review jurisdiction of this Court following was stated:

"A review of a judgment is a serious step

and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in 8 earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."

11. As noticed above although Rule 1 of Order 40 prohibits filing of review application in a criminal proceeding except on the ground of error apparent on the fact of the record. The Constitution Bench of this Court has occasion again to consider the ambit and scope of review jurisdiction in P.N. Eswara Iyer and others vs. Registrar, Supreme Court of India, (1980) 4 SCC 680. In the above case Order 40 Rule 3 as amended in 1978 was under challenge. In the above context this Court had occasion to consider contour of the review jurisdiction and the Constitution Bench speaking through Justice Krishna Iyer categorically held that although Order 40 Rule 1 limits the ground viz-a-viz 9 criminal proceedings to errors apparent on the face of the record but the power to review in Article 137 is wide and framers of the rules never intended a restrictive review over criminal orders or judgments.

In paragraphs 34 and 35 following was laid down: "34. The rule, on its face, affords a wider set of grounds for review for orders in civil proceedings, but limits the ground vis-a-vis criminal proceedings to "errors apparent on the face of the record".

If at all, the concern of the law to avoid judicial error should be heightened when life or liberty is in peril since civil penalties are often less traumatic. So, it is reasonable to assume that the framers of the rules could not have intended a restrictive review over criminal orders or judgments. It is likely to be the other way about. Supposing an accused is sentenced to death by the Supreme Court and the "deceased" shows up in court and the court discovers the tragic treachery of the recorded testimony. Is the court helpless to review and set aside the sentence of hanging?

We think not. The power to review is in Article 137 and it is equally wide 10 in all proceedings. The rule merely canalises the flow from the reservoir of power. The stream cannot stifle the source. Moreover, the dynamics of interpretation depend on the demand of the context and the lexical limits of the test. Here "record" means any material which is already on record or may, with the permission of the court, be brought on record. If justice summons the Judges to allow a vital material in, it becomes part of the record; and if apparent error is there, correction becomes necessitous.

35. The purpose is plain, the language is elastic and interpretation of a necessary power must naturally be expansive. The substantive power is derived from Article

137 and is as wide for criminal as for civil proceedings. Even the difference in phraseology in the rule (Order 40 Rule 2) must, therefore, be read to encompass the same area and not to engraft an artificial divergence productive of anomaly. If the expression "record" is read to mean, in its semantic sweep, any material even later brought on record, with the leave of the court, it will embrace subsequent events, new light and other grounds which we find in Order 47 Rule 1, CPC. We see no insuperable difficulty in equating the area in 11 civil and criminal proceedings when review power is invoked from the same source."

12. This Court in subsequent judgments has also noticed that scope of review in criminal proceedings has been considerably widened by the Constitution Bench of this Court in P.N. Eswara (supra). In Suthendraraja alias Suthenthira Raja alias Santhan and others vs. State through Superintendent of Police, CBI, (1999) 9 SCC 323, Justice D.P Wadhwa made the following observation: "5. It would be seen that the scope of review in criminal proceedings has been considerably widened by the pronouncement in the aforesaid judgment. In any case review is not rehearing of the appeal all over again and to maintain a review petition it has to be shown that there has been a miscarriage of justice. Of course, the expression "miscarriage of justice" is all-embracing..."

13. Again a two-Judge Bench in Lily Thomas and others vs. Union of India and others, 12 (2000) 6 SCC 224, had the occasion to consider the scope of review jurisdiction of this Court. In paragraph 52 following was laid down: "52. The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correction or improvement". It cannot be denied that the review is the creation of a statute. This Court in Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji, (1971) 3 SCC 844, held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice.

If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in a miscarriage of justice nothing would preclude the Court from rectifying the error. This Court in S. Nagaraj v. State of 13 Karnataka, 1993 Supp (4) SCC 595, held: (SCC pp. 619-20, para 19) "19. Review literally and even judicially means re-examination or reconsideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes

lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice.

Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai, AIR 1941 FC 1, the Court observed that even though no rules had been framed permitting the highest court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords.

The Court approved the principle laid down by the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh, (1836) 1 Moo PC 117:2 MIA 181, that an 14 order made by the Court was final and could not be altered: '... nevertheless, if by misprision in embodying the judgments, errors have been introduced, these courts possess, by common law, the same power which the courts of record and statute have of rectifying the mistakes which have crept in....

The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies.'

Basis for exercise of the power was stated in the same decision as under: 'It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being 15 done by a court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard.' Rectification of an order thus stems from the fundamental principle that justice is above all.

It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an

order in civil proceedings on grounds analogous to Order 47 Rule 1 of the Civil Procedure Code.

The expression, 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order 16 passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice." The mere fact that two views on the same subject are possible is no ground to review the earlier judgment passed by a Bench of the same strength."

14. It was further held that mere possibility of two views on the same subject is not a ground for review. In paragraph 56 following was stated: "56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in 17 disguise. The mere possibility of two views on the subject is not a ground for review..." 15. Further in Devender Pal Singh vs. State, NCT of Delhi and another, (2003) 2 SCC 501, Arijit Pasayat,J., elaborately examined the scope and ambit of review jurisdiction of this Court after referring to all earlier relevant judgments of this Court. In paragraph 11 following was stated:

"11. Though the scope of review in criminal proceedings has been widened to a considerable extent, in view of the aforesaid exposition of law by the Constitutional Bench, in any case review is not rehearing of the appeal all over again, and as was observed in Suthendraraja in order to maintain the review petition, it has to be shown that there is a miscarriage of justice. Though the expression "miscarriage of justice" is of a wider amplitude, it has to be kept in mind that the scope of interference is very limited....."

16. It was further held that resort to review is proper only where a omission or patent mistake or like grave error has crept in earlier judgment by judicial fallibility. In paragraph 16 following has been stated: "16. As was observed by this Court in Col. Avtar Singh Sekhon v. Union of India, 1980 Supp SCC 562, review is not a routine procedure. A review of an earlier order is not permissible unless the Court is satisfied that material error, manifest on the face of the order undermines its soundness or results in miscarriage of justice. A review of judgment in a case is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by

judicial fallibility.... The stage of review is not a virgin ground but review of an earlier order which has the normal feature of finality."

17. As noted above under Order 40 Rule 1 no application for review can be entertained except on the ground of an error apparent on the fact of the record. Although, the power of 19 review given to this Court in wider as has been held by the Constitution Bench in P.N. Eshwara (supra), Justice Krishna Iyer has given an illustration where the Court will not hesitate in exercising its power to review in a case where deceased himself walks in the Court on whose murder accused were convicted. Justice Krishna Iyer rightly observed that Court is not powerless to do justice in such case. Thus, although the power of review granted to this Court is wider but normally and ordinarily the review in a criminal case has to be on the grounds as enumerated in Rule 1 of Order 40.

18. What is "an error apparent on the face of the record" has also been a subject matter of consideration by this Court in a large number of cases. What are the grounds on which this Court shall exercise its jurisdiction and what is the error apparent on the face of the record came to be considered by this Court in Kamlesh 20 Verma vs. Mayawati and others, (2013) 8 SCC 320 (in which case one of us Dipak Misra, J. was also a party). This Court held that an error which is not self-evident and has to be detected by a process of reasoning is not an error apparent on the face of the record. In paragraphs 15 and 16 following was laid down:

"15. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. This Court in Parsion Devi v. Sumitri Devi, 1997 (8) SCC 715, held as under: (SCC pp. 718-19, paras 7-9)

"7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In Thungabhadra Industries Ltd. v. Govt. of A.P., AIR 1964 SC 1372, this Court opined: (AIR p. 1377, para 11) 21 '11. What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an "error apparent on the face of the record". The fact that on the earlier occasion the court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an "error apparent on the face of the record", for there is a distinction which is real, though it might not always

be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.'

8. Again, in Meera Bhanja v. Nirmala Kumari Choudhury, 1995 (1) SCC 170, while quoting with approval a passage from Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, 1979 (4) SCC 389, this Court once again held that review proceedings are not by way of an 22 appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC. 9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be 'reheard and corrected'. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise'."

(emphasis in original)

16. Error contemplated under the Rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The power of review can be exercised for correction of a mistake but not to substitute a view. The mere possibility of two views on the subject is not a ground for review."

19. Further elaborating on the parameters of review jurisdiction following was laid down in paragraphs 17 and 18:

"17. In a review petition, it is not open to the Court to reappreciate the evidence and reach a different conclusion, even if that is possible. Conclusion arrived at on appreciation of evidence cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto.

This Court in Kerala SEB v. Hitech Electrothermics & Hydropower Ltd., 2005 (6)SCC 651, held as under: (SCC p. 656, para 10) "10. ... In a review petition it is not open to this Court to reappreciate the evidence and reach a different conclusion, even if that is possible. The learned counsel for the Board at best sought to impress us that the correspondence exchanged between the parties did not support the conclusion reached by this Court. We are afraid such a submission cannot be permitted to be advanced in a review petition. The appreciation of evidence on record is fully within the domain of the appellate court.

If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless

it is shown that there is an error apparent on the face of the record or for some reason akin thereto. It has not been contended before us that there is any error apparent on the face of the record. To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise."

18. Review is not rehearing of an original matter. The power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. A repetition of old and overruled argument is not enough to reopen concluded adjudications. This Court in Jain Studios Ltd. v. Shin Satellite Public Co. Ltd., (2006) 5 SCC 501, held as under: (SCC pp. 504-505, paras 11-12)

"11. So far as the grievance of the applicant on merits is concerned, the learned counsel for the opponent is right in submitting that virtually the applicant seeks the same relief which had been sought at the 25 time of arguing the main matter and had been negatived. Once such a prayer had been refused, no review petition would lie which would convert rehearing of the original matter. It is settled law that the power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases.

12. When a prayer to appoint an arbitrator by the applicant herein had been made at the time when the arbitration petition was heard and was rejected, the same relief cannot be sought by an indirect method by filing a review petition. Such petition, in my opinion, is in the nature of 'second innings' which is impermissible and unwarranted and cannot be granted.""

20. Summarising the principles when review will be maintainable and review will not be 26 maintainable following was held in paragraphs 20.1 and 20.2:

"20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason. The words "any other sufficient reason" have been interpreted in Chhajju Ram v. Neki,AIR 1922 PC 112, and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius, AIR 1954 SC 526, to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur

Manganese & Iron Ores Ltd.(2013)8 SCC 337.

20.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

21. In view of above, it is clear that scope, ambit and parameters of review jurisdiction are well defined. Normally in a criminal proceeding, review applications cannot be entertained except on the ground of error 28 apparent on the face of the record. Further, the power given to this Court under Article 137 is wider and in an appropriate case can be exercised to mitigate a manifest injustice. By review application an applicant cannot be allowed to re-argue the appeal on the grounds which were urged at the time of the hearing of the criminal appeal.

Even if the applicant succeeds in establishing that there may be another view possible on the conviction or sentence of the accused that is not a sufficient ground for review. This Court shall exercise its jurisdiction to review only when a glaring omission or patent mistake has crept in earlier decision due to judicial fallibility. There has to be error apparent on the face of the record leading miscarriage of justice to exercise the review jurisdiction under Article 137 read with Order 40 Rule 1. There has to be a material error manifest on the face of the 29 record with results in the miscarriage of the justice.

22. In view of parameters of the review jurisdiction as noticed above, we now proceed to examine the review petition to find out as to whether there are sufficient grounds as enumerated above for reviewing the judgment of the criminal appeal affirming the death sentence awarded to the

applicants.

23. Learned counsel contended that the tape-recorded conversation has been relied on without there being any certificate under Section 65B of the Evidence Act, 1872. It was contended that audio tapes are recorded on magnetic media, the same could be established through a certificate under Section 65B and in the absence of the certificate, the document which constitutes electronic record, cannot be deemed to be a valid evidence and has to be ignored from consideration.

Reliance has been 30 placed by the learned counsel on the judgment of this Court in Anvar P.V. vs. P.K. Basheer and others, (2014) 10 SCC 473. The conversation on the landline phone of the complainant situate in a shop was recorded by the complainant. The same cassette containing conversation by which ransom call was made on the landline phone was handed over by the complainant in original to the Police. This Court in its judgment dated 25.01.2010 has referred to the aforesaid fact and has noted the said fact to the following effect: "The cassette on which the conversations had been recorded on the landline was handed over by Ravi Verma to S.I. Jiwan Kumar and on a replay of the tape, the conversation was clearly audible and was heard by the Police."

24. The tape recorded conversation was not secondary evidence which required certificate under Section 65B, since it was the original cassette by which ransom call was 31 tape-recorded, there cannot be any dispute that for admission of secondary evidence of electronic record a certificate as contemplated by Section 65B is a mandatory condition. In Anvar P.V. (supra) this Court had laid down the above proposition in paragraph 22. However, in the same judgment this Court has observed that the situation would have been different, had the primary evidence was produced.

The conversation recorded by the complainant contains ransom calls was relevant under Section 7 and was primary evidence which was relied on by the complainant. In paragraph 24 of the judgment of this Court in Anvar P.V. it is categorically held that if an electronic record is used as primary evidence the same is admissible in evidence, without compliance with the conditions in Section 65B. Paragraph 24 is as extracted below:

"24. The situation would have been different had the appellant 32 adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case.

The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were

made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65-B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act."

25. He has further contended that on the plain reading of the Chemical Examiner's report, it 33 is clear that the death was caused due to overdose of chloroform and pentazocine poisoning. Hence, the conviction ought to have been under Section 304A IPC and not under Section 302 IPC. The conviction against the applicants under Section 302 and 364A was recorded after considering entire evidence on record. This Court while dismissing the criminal appeals and affirming the death Reference No.1 has appreciated the entire evidence and approved the decision of the trial court and the High Court. The conviction of the applicant was based on cogent, ocular and medical evidence and in the review application applicants have again asked this Court to re-appraise the evidence and come to a different conclusion.

There is no apparent error on the face of the record in recording conviction of the applicants under Section 302 and 364A. 34 26. It is further contended that this Court had relied on the disclosure statement of Jasvir Singh, which led to the recovery of the dead body which disclosure statement does not connect Vikram Singh with the crime. The trial court as well as the High Court marshaled the ocular evidence by which evidence role of Vikram Singh was duly proved in commission of crime. Hence, this submission deserves to be rejected. 27. Lastly, Shri K.T.S. Tulsi, learned senior counsel submits that this Court in paragraph 18 has recorded its conclusion that the finger prints of Vikram Singh were found on the Alto and Chevrolet cars, therefore, connection of Vikram Singh is established in the crime.

It is submitted that since this Court recorded at para 18 that the said cars belong to Vikram Singh, the existence of finger prints cannot by itself be of any significance with regard to 35 his culpability in the crime. It is submitted that by relying on finger prints, this Court had committed an apparent error on the face of the record. The above submission of learned counsel is misconceived and incorrect. In para 18 of the judgment this Court never observed that Alto and Chevrolet cars belonged to Vikram Singh. The statement of facts made in para 18 was to the effect that the finger prints from the Alto and Chevrolet cars belong to Vikram Singh and Jasvir Singh respectively.

It is useful to extract below para 18 of the

judgment: "18. We also find that the prosecution has been able to show that the finger prints lifted by the Police Officers from the Alto and Chevrolet cars belonged to Vikram Singh and Jasvir Singh respectively. It is significant that the Chloroform bottle recovered from Darshan Kaur's residence was also examined and the thumb impression of Jasvir Singh was detected thereon." 36 28. There is evidence of the owner of Alto car, PW.3, Naresh Kumar Sharma who had stated in his statement that the car was lent by him to Vikram Singh in the morning of 14th February, 2005 at about 7 a.m. to 7.30 a.m. Thus, it was no one's case that Alto car belonged to Vikram Singh. The argument raised by Shri K.T.S. Tulsi is misconceived and we unhesitatingly repel the same.

29. Learned counsel has further contended that present was not a case where death penalty could have been awarded to the applicants. In the review petition reliance has been placed by the applicants on Constitution Bench judgment in Bachan Singh vs. State of Punjab, (1980) 2 SCC 684, and judgment in Machhi Singh and others vs. State of Punjab, (1983) 3 SCC 470.

This Court in its judgment dismissing the appeals referred to Bachan Singh and Machhi Singh and has categorically applied its mind to 37 various parameters laid down in the aforesaid judgments and on the broad principle which emerged from the judgments for evaluating the category of the rarest of the rare case. Various mitigating and aggravated factors which have been noted in the judgment of the High Court were referred to by this Court, and this Court recorded its conclusion that balance-sheet has been drawn by the High Court of aggravating and mitigating circumstances which was duly adopted by this Court. We do not find any error apparent on the record in the above consideration by this Court in affirming the judgment of the High Court.

30. Learned counsel appearing for Jasvir Singh adopted the submissions of Shri K.T.S. Tulsi on legal issues and on the question of sentence. Certain other submissions have been raised on behalf of the second applicant which also do not disclose any ground which can be said to be 38 a valid ground for exercising review jurisdiction.

31. We, after carefully considering the submissions of the applicants, are of the considered opinion that submissions raised in the review petitions do not raise any ground for review of judgment of this Court dated 25.01.2010.

32. In the result, the review applications are rejected.

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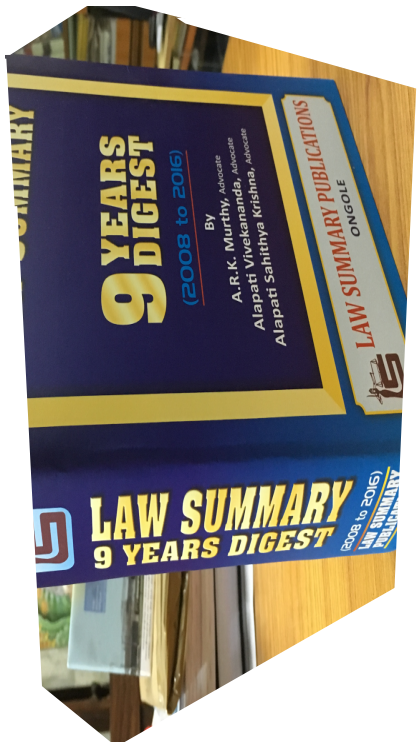

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