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Law Summary

(Founder : Late Sri G.S. GUPTA)

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A.P. BUILDINGS (LEASE, RENT AND EVICTION) CONTROL ACT, 1960 – Secs,3(a)(i)(a),10(2)(i)(ii)(b) & 20 – Petitioner took schedule property on lease from respondents - First respondent is owner of the premises, affairs of the premises are taken care by second respondent who is the grand father of first respondent - Schedule premises were let out for commercial purpose with a clause that petitioner has to meet the charges for conversion of electricity meter from category –I to category- II.

Respondents filed a petition before Trial Court against petitioner for eviction from schedule premises and to deliver vacant possession to respondents with costs – Petition

was allowed by the trial court, directing petitioner to vacate schedule premises within two months from date of Order.

Held - It is for the land lord to decide which portion is convenient for him to reside in schedule property and tenant cannot dictate to landlord to occupy a particular portion – Petitioner has deviated from agreement by using schedule premises for domestic purpose apart from commercial purpose – Instant petition stands dismissed.

(Hyd.) ***78***

CIVIL PROCEDUE CODE, Or.VI, VII, XIV and XVIII Rule 1 – **INDIAN EVIDENCE ACT,** Secs.101, 102, 103 and 104 – Civil Revision Petition – The basis to begin the suit depends upon whom the burden of proof lies on the main issue.

Instant petitioner is the defendant and respondent is the plaintiff at the Trial Court – Respondent filed suit for specific performance basing on agreement of sale and consequential perpetual injunction – Petitioner filed written statement denying very nature of document of agreement of sale – Respondent filed Memo, with a prayer to direct petitioner to begin the trial for which petitioner filed objections – Trial court over-ruled objections and directed petitioner to begin the trial.

Held – A perusal of Order XVIII Rule 1 of CPC clearly demonstrates that, as a general rule, plaintiff has the right to begin the suit, exception is the right of defendant to begin – Since petitioner denies the very nature of suit document itself, the burden of proof lies on respondent/ plaintiff that suit document was executed by petitioner - Memo filed by respondent is not sustainable either on facts or in law – Order of trial court is liable to be set aside – Civil revision petition is allowed. **(Hyd.)** ***71***

CIVIL PROCEDURE CODE, Or. IX, Rule.13 - Petitioner has laid suit before Trial Court for the reliefs of declaration – From 1999 onwards suit had been listed for filing written statement by respondents and only some of the respondents have filed written statement in the year 2003, resultantly, set ex parte.

Respondents have come forward with an application to set aside ex parte decree passed against them as there was a delay of 2735 days – The reason given by respondents for the said delay is that they were not aware of ex parte decree passed and no intimation had been received from their advocate about the progress of the suit – Trial Court has entertained application preferred by respondents.

Held – Plea of respondents that on account of their advocate's failure to send communication to them about the progress of the suit, they are unable to know about the progress cannot be believed and accepted in any manner – Respondents have not endeavored to set aside ex parte decree passed against them immediately after coming to know about the same – Order of Trail Court in entertaining application preferred by respondents to condone delay of 2735 days is incorrect and unacceptable and accordingly, it deserves to be set aside – Civil revision petition is allowed. **(Madras) *17***

CIVIL PROCEDURE CODE, Or.XVIII, Rule 17 & Sec.151 – Civil Revision Petitions – Petitioners made two applications before Trial Court to reopen the case for further cross-examination of P.W. 2 and also in respect of admission made by her with regard to an exhibit, that it is a forged and created document.

Trial court did not accede to the request of petitioners – Petitioners contended that they have a genuine reason for reopening and recalling P.W. 2 and applications can be filed at any stage of the suit and trial court without proper appreciation of reasons assigned by them, dismissed both the applications – On the other hand respondents stated that there are no convincing grounds to reopen the case and recall P.W. 2

Held – Object of enacting Order XVIII, Rule 17 is obvious, power to recall a witness under said provision for further cross-examination is intended only to clarify the courts to clear any ambiguity, but not intended to fill up, any omissions in evidence

– Petitioners are unsuccessful in showing that the applications are intended to prevent abuse of process of the Court – Petitioners failed to set out convincing grounds that said two applications are intended to achieve the ends of the justice – Revision petitions are dismissed. **(Hyd.)** ***63***

CRIMINAL PROCEDURE CODE, Secs. 41, 41-A, 209(a) and 438 – **INDIAN PENAL CODE,** Secs.323 and 506 – SC & ST (POA) Act, Sec.3(1)(x) –Petitioner filed instant petition seeking pre-arrest bail - De-facto complainant in his complaint stated that petitioner was purohit and arranged photography, cook and utensils for a sum of Rs. 70,000 for which complainant paid Rs. 40,000 at the time of his marriage and requested some time to pay balance amount – When petitioner demanded balance amount, complainant requested for some more time to repay, for which petitioner grew wild and abused him in filthy language touching name of his caste and also beat him with hands on his cheek and threatened him.

Trial Court observed that since petitioner was on station bail, he was ordered to be continued on bail till conclusion of trial and committed case before Special Sessions Judge cum Additional District Judge – Sessions Judge returned entire case record for non-compliance of Section 209(a) Cr.P.C and observed that bail order was not on record and called for explanation of I.O regarding bail order – I.O stated that after investigation, he served notice under Section 41-A of Cr.P.C and since offences of the case were punishable below 7 years of imprisonment and he did not consider necessary to arrest the accused as accused had not failed to comply with terms of the said notice.

Held – Where accused complies and continues to comply with the notice under 41-A Cr.P.C, accused shall not be arrested in respect of the offence referred to in notice, unless for reasons to be recorded, the police officer is of the opinion that he ought to be arrested – Therefore, the procedure contemplated under Section 41 and

41-A of Cr.P.C, squarely apply to alleged offences and said sections have not made any express distinction between offences punishable under IPC and other Special enactments – Procedural Order under section 41-A Cr.P.C cannot be equated with an order passed by a court under Section 438 of Cr.P.C – There is no procedural violation – Committal court is directed to submit the bail bonds produced before the I.O by accused and sureties to Additional District Judge. **(Hyd.)** ***52***

CRIMINAL PROCEDURE CODE. Sec.125 – Petitioner was already married – He duped the respondent and married her also by suppressing factum of first marriage – Petitioner cannot be permitted to deny the benefit of maintenance to respondent, taking advantage of his own wrong.

After getting divorce from her first husband, on demand of petitioner, respondent married him as per Hindu Rites and Customs –After three months of her marriage, Shobha came to the house of petitioner and claimed herself to be his wife by then respondent was already pregnant – On enquiring about shobha with petitioner he said that if respondent wanted to cohabit with him, then she should reside quietly – In the instant petition, Petitioner denied his relation with respondent and contended that he never entered with any matrimonial alliance with respondent.

Held – Respondent has been able to prove, by strong evidence that she was married to petitioner – While dealing with application of destitute wife or hapless children or parents under section 125 of Cr.P.C, Court is dealing with marginalized sections of society – Purpose is to achieve “Social Justice” which is the constitutional vision – Therefore, it becomes bounden duty of Courts to advance the cause of social justice – While giving interpretation to a particular provision, Court is supposed to bridge gap between the Law and Society – Courts have to adopt different approaches in “Social justice adjudication” as mere “Adversarial approach” may not be very appropriate – It would amount to giving a premium to husband for defrauding the wife/respondent therefore, for the purpose of section 125 of Cr.P.C, such a woman is to be treated as legally wedded wife – Petitions stands dismissed. **(S.C.)** ***15***

GUARDIAN AND WARDS ACT, Sec.25 - Appellants seek direction to set aside the decree and order passed by Trial Court – Appellants are maternal grand parents of minor girl, aged about 6 years - Respondent married daughter of appellants and the couple were blessed with the said girl child – Respondent admitted his wife at Hospital for second delivery – She gave birth to a son but due to negligence of doctors, wife of respondent and son died immediately.

When respondent was planning to perform cremation of his wife in his native place, appellants had taken away dead body of his wife along with his daughter who was then two years old – Counsel for appellants contended that respondent has solemnized second marriage and one male child was also born out of their wedlock, therefore minor daughter will not be happy to stay with respondent because she never stayed with him in past and she does not even recognize respondent as her father.

Held – In a matter of this nature, where the grand parents are seeking preferential custodial right over the natural father's claim for custody for the minor child, it is essential for the grand parents to plead and establish that the natural guardian being father is unfit or is otherwise disqualified from being given the custody of the child – In the instant case, respondent/ father is drawing a salary of Rs. 45,000/- per month – He had assured this court that welfare of the child will not be compromised under any circumstances – Appeal stands dismissed. **(Hyd.)** ***49***

(INDIAN) PENAL CODE, Secs.302 and 34 – CRIMINAL PROCEDURE CODE, Sec.174 - When the witness has come out with diagonally opposite versions, it is always safe to rely upon the earliest version - State has preferred instant appeal assailing Judgment passed by Trial Court whereby all five accused were acquitted.

A1 is husband of deceased Radha, A2 to A5 are family members of A1 – When father of deceased got to know about the death of deceased at her matrimonial house,

he went to house of A1 along with his wife and son – Enquiries from villagers did not reveal any suspicion about death of deceased - Three months after the marriage of A1 with deceased, A1 had taken deceased to house of concubine saroja and forced deceased to live in the house of said saroja – After coming to know about illegal intimacy of A1 with saroja, deceased questioned A1 who in return paid a deaf-ear - Deceased complained to her parents and also lodged a complaint before a Police station.

Held – Instant case is based on circumstantial evidence – In a case based on circumstantial evidence, motive plays an important role – It is therefore, not possible to accept the version of prosecution that A2 to A5 have shared common motive with A1 for eliminating deceased to pave way for latter to continue his illicit relationship with another woman – Illicit relationship is considered as a taboo in the society and other family members would not generally approve of such relationship – Prosecution has miserably failed to prove guilt of accused beyond all reasonable doubt and trial court rightly acquitted all the accused of charge framed against them – Criminal appeal and revision case are dismissed. **(Hyd.)** ***56***

TELENGANA PREVENTION OF DANGEROUS ACTIVITIES OF BOOT-LEGGERS, DECOITS, DRUG OFFENDERS, GOONDAS, IMMORAL TRAFFIC OFFENDERS AND LAND GRABBERS ACT, 1986, Sec.2(g) – Petitioner has challenged the detention Order and consequently to direct respondents to release the detenu, who is her husband – Detenu has been detained by detaining authority on the ground that he has been involved in the offences of criminal conspiracy, cheating, kidnapping, extortion etc., - 4 out of 6 cases against detenu are concerning to the gangster, Nayeem.

Counsel appearing on behalf of petitioner submits that it is well settled law that imposition of preventive detention is very harsh and unconstitu-tional, unless there is a brazen conduct, which affects the tempo of public life – Collusion with gangster nayeem and involvement in some sale transactions does not warrant imposition of preventive detention.

Held – Detaining authority has good grounds to detain the detenu - Detenu is a habitual offender and his activities fall within the ambit of Sec.2 (g) of the Act, 1986 which defines 'Goonda' – A person who has been habitually engaging himself in unlawful acts of committing kidnapping, cheating and extortion, which create a sense of insecurity in the minds of public and pose threat to maintenance of peace and public tranquility in the society – If such person is not curbed, he will continue to do same activities – Writ petition is dismissed. **(Hyd.)** ***42***

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LAW OF DEFAMATION

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

Defamation:

Defamation is the publication of statement which reflects on a person's reputation and tends to lower him in the estimation of right thinking members of society generally or tends to make them shun or avoid him. The defamation law gives protection to a man's reputation which to some is dearer than life itself. The aim of law of defamation is to protect one's reputation,honour and dignity in the society.There are laws which deal with defamation. The basic idea of having a defamation law is to balance the private right to protect one's reputation with the public right to freedom of speech. It allows people to sue those who say or publish false and malicious comments. In simple term it means tarnishing somebody's image by speaking or writing something which damages the reputation. There are two types of defamation:

1. Libel: Written / Published form of defamation
2. Slander: Spoken / Oral form of defamation

Legal Position in India :

The law of civil defamation,as in English and other common law countries, is uncodified in India and is largely based on case laws.The main difference between Civil & Criminal proceeding for defamation is pertaining to compensation. While the object of Civil action is to adequately compensate the person defamed for the loss of reputation by damages; the object of Criminal prosecution is to punish the offender by way of imprisonment of fine or both.A malicious printing or writing or signs, diagrams, cartoons, pictures or visible expression (broadcast) tending to tarnish the reputation of a person so as to expose him/her to public hatred, contempt or ridicule comes under libel. This kind of a libel is usually categorized as civil defamation answerable in damages to the person against whom it is committed. If a libel published by a newspaper / media tends to incite a riot that would be a criminal defamation punishable by the State for the protection of public safety & public good. Publication of obscene, seditious or blasphemous words is punishable under the criminal law of defamation.The law of criminal defamation on the other hand is codified under sections 499 to 502 of Indian Penal Code, 1860. In a civil action for defamation in tort, truth is a defence, where as in criminal law the truth as well as the intention of publication needs to be proved.[1]

In ***Ashok Kumar vs Radha Kishan Vij And Others***[2] it was held that :

The law of tort of defamation is different from the criminal law of defamation in this country. In the law of tort we follow the English law. The civil liability for defamation to pay damages is not governed by any statute law but is determined with reference to the principles of justice, equity and goods conscience which have been imported into

*this country from the English law.*In ***Deepak Balraj Bajaj v.State of Maharashtra***[3] The Supreme Court went to the extent of holding that reputation of a person was a part of his 'right to life' guaranteed under Article 19 of the Indian Constitution.

Section 499 of the Indian Penal Code, defines defamation as - '*Whoever, by words either spoken or intended to be read, or by signs or by visible, representations makes or publishes any imputation concerning any person intending to harm, or having reason to believe that such imputation will harm the reputation of such person, is said except in cases here in after expected, to defame that person.'*

This section basically states that when an act of imputation amounts to defamations,using terms which expressly require mensrea and provides defences to a charge of defamation expressly stated in ten exceptions attached to the section.The section further explains what may amount to defamation:

1. To impute anything to a deceased person, if the imputation would harm the reputation of that person if living and is intended to be harmful to the feelings of his family or other near relatives;

2. To make an imputation concerning a company or an association or collection of persons as such;

3. To make an imputation in the form of an alternative or expressed ironically

4. But no imputation is said to harm a person's reputation unless that imputation directly or indirectly in the estimation of others lowers the moral or intellectual character of that person or lowers that character of that person in respect of his caste or his calling, or lowers the credit of that person or causes it to be believed that the body of that person is in a loathsome state or in a state generally consider as disgraceful.

Exception's :

These are the exceptions to the charge of defamation,when a statement would not attract penalty.The burden of proof of exception is on the accused.They strike a balance between freedom of speech under article 19(1)(a) of the Constituion and the individuals right to reputation.

First Exception.- Imputation of truth which public good requires to be made or published.- It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

In ***Sahib Singh Mehrav.State of U.P.***[4] **:**

In this case the appellant was prosecuted under section 500 of IPC for publishing an article entitled' ulta chor kotwal ko dante' (Thief reprimand police officer) in a newspaper published from Aligarh.The Supreme Court held that the impugned remarks were persay defamatory and there was nothing on record to prove that they were made for public good.

Second Exception - Public conduct of public servants - It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception - Conduct of any person touching any public question.- It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Fourth Exception - Publication of reports of proceedings of courts- It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation - A Justice of the Peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception - Merits of case decided in Court or conduct of witnesses and others concerned. It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Sixth Exception.- Merits of public performance - It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no farther.

Explanation.- A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Seventh Exception - Censure passed in good faith by person having lawful authority over another.- It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Eighth Exception - Accusation preferred in good faith to authorised person - It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject- matter of accusation.

Ninth Exception- Imputation made in good faith by person for protection of his or other' s interests.- It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

In Harbhajan Singh v.State of Punjab[5] In this csse Chief Minister of the state had complained that the appellant had published defamatory statement about hi son saying

that he is a criminal and smuggler in a monthly magazine published from Bombay. But the Apex Court acquitted him saying that the statement was made in good faith. In Manna v.Ram Gallam[6], it was held that communication of a caste resolution excommunicating a member can claim protection under this exception**.**

Tenth Exception - Caution intended for good of person to whom conveyed or for public good - It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good**.**

Chapter XXI, Section 500, 501, and 502 of the IPC deals with the punishment for defamation:
Section 500: Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years or with fine or with both.

Section 501: Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Section 502: Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years or with fine or with both.

Defamation otherwise is also an offence. Section 5B, Cinematograph Act, 1952 prohibits exhibition of a film which is defamatory. Even freedom of the press does not permit to publish defamatory matter though there can't be prior ban on publication. In ***R. Rajagopal vs State of Tamil Nadu***[7] the Supreme Court held that neither the Government nor the officials had any authority to impose a prior restraint upon publication of a material on the ground that such material was likely to be defamatory of them. It said that penal sanction is better than prior restraint.

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Footnotes:

1. Desmond vThorne
2.1983 CriLJ 48, 1983
3. AIR 2009 SC 268
4. AIR 1965 SC 1451
5. AIR 1966 SC 97
6. AIR 1950 A11 619
7. 1995 AIR 264

–X–

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof: [Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court].

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and on arbitral award made.

Having regard to the facts and circumstances of the case and in the light of the above provision, we are of the considered view that the petitioner-defendant has rightly moved an application under Section 8 of the Act mentioned above, before the trial Court and on receipt of such application it was the duty of the Court to direct the parties to approach the Arbitrator. However, in spite of existence of Clause No.19 of the Kidzee Franchisee Agreement, dated 12.12.2014, the learned Junior Civil Judge, City Civil Court, Hyderabad, without referring the parties to an arbitrator, has erred in dismissing the application filed by the petitioner- defendant.

Hence, the Civil Revision Petition is allowed setting aside the impugned 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. The respondent- plaintiff is at liberty to take steps as may be available under law for getting an Arbitrator appointed to resolve the dispute between the parties. No order as to costs.

As a sequel, Miscellaneous Petitions, if any pending, shall stand disposed of as infructuous.

–X–

2017(3) L.S. 42 (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

Sama Aruna ..Petitioner

Vs.

The State of Telangana & Ors., ..Respondents

TELENGANA PREVENTION OF DANGEROUS ACTIVITIES OF BOOT-LEGGERS, DECOITS, DRUG OFFENDERS, GOONDAS, IMMORAL TRAFFIC OFFENDERS AND LAND GRABBERS ACT, 1986, Sec.2(g) – Petitioner has challenged the detention Order and consequently to direct respondents to release the detenu, who is her husband – Detenu has been detained by detaining authority on the ground that he has been involved in the offences of criminal conspiracy, cheating, kidnapping, extortion etc., - 4 out of 6 cases against detenu are concerning to the gangster, Nayeem.

Counsel appearing on behalf of petitioner submits that it is well settled law that imposition of preventive detention is very harsh and unconstitutional, unless there is a brazen conduct, which affects the tempo of public life – Collusion with gangster nayeem and involvement in some sale transactions does not warrant imposition of preventive detention.

Held – Detaining authority has good grounds to detain the detenu - Detenu is a habitual offender and his activities fall within the ambit of Sec.2 (g) of the Act, 1986 which defines 'Goonda' – A person who has been habitually engaging himself in unlawful acts of committing kidnapping, cheating and extortion, which create a sense of insecurity in the minds of public and pose threat to maintenance of peace and public tranquility in the society – If such person is not curbed, he will continue to do same activities – Writ petition is dismissed.

Cases Referred:
1.2016 (3) ALT 519 (D.B)
2.1970 (1) Supreme Court Cases 98
3.(1966) 1 SCR 709
4.(1986) 4 Supreme Court Cases 407

M/s Bhardwaj Associates, Advocate for the Petitioner.
G.P. for Home, Advocate for the Respondents.

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

Vide the present petition, the petitioner has challenged the detention order dated 23.11.2016 issued by the second

respondent and the same has been confirmed by the first respondent under the provisions of the Telangana Prevention of Dangerous Activities of Boot-Leggers, Decoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 (for short the Act, 1986) and consequently to direct the respondents to release/set free her husband i.e., Sama Sanjeev Reddy.

2. In the affidavit filed in support of the present petition, the petitioner states that her husband Sama Sanjeev Reddy (hereinafter referred to as detenu) was falsely implicated in the following offences:

a) Crime No.554 of 2013 of Ibrahimpatnam Police Station for the offences under Sections 447, 427, 506 IPC (arrested on 11.11.2016)

b) Crime No.8 of 2014 of Adibhatla Police Station for the offences under Section 447 and 427 of IPC

c) Crime No.361 of 2016 of Pahadi Sharief Police Station for the offences under Section 363, 384, 420, 120B of IPC and Section 4 of the A.P. Land Grabbing Act and Section 25(1b) of the Arms Act.

d) Crime No.362 of 2016 of Pahadi Sharief Police Station for the same offences as shown above.

e) Crime No.367 of 2016 of Pahadi Sharief Police Station for the same offences as stated above.

f) Crime No.221 of 2016 of Adibhatla Police station for the offences under Sections 419, 420, 468, 363, 452, 323, 342, 386, 506 r/w Section 120B of IPC and Section 25(1)(b) of the Arms Act and Section 4 of the A.P. Land Grabbing Act.

3. The 4 out of 6 cases are concerning to the Gangster Nayeemuddin @ Nayeem. The grounds of detention would disclose that the second respondent has not applied his mind and erroneously invoked the provisions of the Act 1986. It would also disclose that there is no basis for imposing preventive detention on the detenu since the alleged involvement of the detenu is yet to be proved in the criminal Court and that even the allegations in the said crimes do not amount to committing breach of public order.

4. Learned counsel appearing on behalf of the petitioner submits that it is well settled law that imposition of preventive detention is very harsh and unconstitutional, unless there is a brazen conduct, which affects the tempo of public life. The said fact is missing in the present case. Thus, the preventive detention is exfacie illegal. Collusion with Gangster Nayeem and involvement in some sale transactions does not warrant imposition of preventive detention. When there are criminal cases for regular offences, preventive detention cannot be resorted to. The grounds of detention are not falling into the arena of public order.

5. Learned counsel further submits that the

4 cases relied upon out of 6 cases mentioned above are all old cases, however the same are registered in the year 2016. The detenu has been detained by the detaining authority on the ground that the detenu has been involved in the offences of criminal conspiracy, cheating, kidnapping, extortion, criminal trespass and damaging landed property and threatening the owners of lands with dire consequences in order to grab their landed properties etc., Thus, the detenu has repeatedly committed crimes by creating constant fear and panic among the poor and innocent agriculturists in the limits of Adibhatla and Pahadi Sharief Police Station and caused a feeling of insecurity to their agricultural landed properties. Due to which, large sections of people are adversely affected by his unlawful activities. The detenu being the active member in the gang of most dangerous and notorious gangster Nayeemuddin @ Nayeem (who died in an exchange of fire on 08.08.2016 in the limits of shadnagar) has been indulging in unlawful activities of committing offences as noted above, which is prejudicial to the maintenance of public order.

6. Learned counsel further submits that all the offences are related to the year 2013-2014. However, no alleged crime has been committed by the detenu. Therefore, the detaining authority ought not to have come to the conclusion that the detenu is prejudicial to the public order. Thus, the detention order passed by the detaining authority is arbitrary and illegal, which deserves to be quashed.

7. To strengthen his arguments, learned counsel has relied upon a case reported in SAMALA DHANA LAXMI V. STATE OF TELANGANA REP. BY ITS SECRETARY, REVENUE DEPARTMENT AND OTHERS(1) , whereby the meaning of the words maintenance of public order has been discussed that in the context of special laws entailing detention of persons without a trial on the pure subjective determination of the Executive, is confined to graver episodes not involving cases of law and order, which are not disturbances of public tranquility but of ordre publique.

The test to be adopted, in determining whether an act affects law and order or public order, is: does it lead to disturbance of the current life of the community so as to amount to disturbance of the public order or does it affect merely an individual leaving tranquility of the society undisturbed? Public order embraces more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even of specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the Society to the extent of causing a general disturbance of public tranquility.

It is further held that acts similar in nature, but committed in different contexts and circumstances, might cause different reactions. In one case, it might affect specific individuals only and, therefore, touch the problem of law and order only, while in

another it might affect the public order. Thus, the State is at the centre and society surrounds it. The acts become graver as we journey from the periphery of the largest circle towards the centre. For expounding the phrase maintenance of public order, one has to imagine three concentric circles : Law and order represents the largest circle within which is the next circle representing public and the smallest circle represents the security of the State. All cases of disturbances of public tranquility fall in the largest circle but some of them are outside public order for the purpose of the phrase maintenance of public order. Every infraction of the law must necessarily affect the order, but an act affecting law and order may not necessarily also affect the public order. The true test is not the kind, but the potentiality of the act in question.

Stray and unorganized crimes of theft and assault are not matters of public order since they do not tend to affect the even flow of public life.

8. Learned counsel further submits that the cases relied upon by the detaining authority, are if believed, may be the problem of law and order, however, the said cases are not in any sense disturb the public order. Moreover, the detention order is passed on 23.11.2016 and approved by the State of Telangana vide its order dated 01.12.2016, whereas, there is no proximity with the date of detention order. All the offences as mentioned in 4 cases are from the year 2007 to 2016. At present, there is no imminent danger to the public order. Therefore, the detention order is arbitrary and illegal, which deserves to be set aside.

9. On the other hand, learned Government Pleader appearing on behalf of the respondents submits that the detenu has committed as many as 4 cases of criminal conspiracy, cheating, kidnapping and extortion in the limits of Pahadi Sharief Police Station and Adibhatla Police Station of Rachakonda Commissionerate. The detention of the detenu is essentially required as his presence creates sense of insecurity in the minds of public and poses threat to maintenance of peace and public tranquility in the society, which are prejudicial to the maintenance of public order. The detenu is a notorious criminal and one of the gang members of most dangerous and notorious Gangster Nayeem. The detenu is habitual offender and member of notorious gangster Nayeem, indulged in heinous crimes, such as kidnapping, extortion, threatening the innocent people at the point of swords, sickles and fire arms to grab their landed properties. Due to the activities of aforesaid gang, there is feeling of insecurity among the general public and landlords residing in the limits of Rachakonda commisssionerate. Nayeem was the Gangster, and the detenu is one of his members. Their activities have been creating terror in the minds of people as by taking the name of gangster Nayeem, his members have threatening the poor farmers with dire consequences. Their modus operandi was and is to grab the properties of the poor farmers.

10. Learned Government Pleader further submits that there are 174 crimes registered against Nayeem and his associates. One lakh square yards of land apart from agricultural land has been grabbed during the lifetime of Nayeem. His terror in the society was so high that during his lifetime, no complaint was made by any of the victim due to fear that the said gang may destroy their life and properties. Subsequent to his death on 08.08.2016, the complainant came forward, and only thereafter, one after another cases were registered against Nayeem, individually and his associates. Thus, the detenu was the member of the said gang involved in 4 cases noted above which were relied upon while passing the detention order. Thus, the detenu is also dangerous to the public order.

11. Heard the learned counsel appearing on behalf of the petitioner and the learned Government Pleader appearing on behalf of the respondents. Also perused the material available on record.

12. On a perusal of the record, it is established that during the year 2013, the detenu has been involved in cases of criminal trespass, damage and abusing in most filthy language, therefore Crime No.554 of 2013 for the offences punishable under Sections 447, 427 and 506 IPC of Ibrahimpatnam police station, was registered on the ground that the detenu along with five accused criminally trespassed into the agricultural land of Ac 8.01 guntas in Sy No.289 situated at Adibhatla village, Ibrahimpatnam Mandal, and removed crop (tomato crop). Also abused the complainant and others, who were attending their agricultural works and threatened them with dire consequences. Thereafter, from the year 2014 to 2016, he has committed similar offences, which are mentioned in the grounds of detention. During the period 2013-2016, the detenu along with his associates, created fear and panic in the minds of poor farmers that any of the farmers may be targeted and property would be grabbed by using of modus operandi of compelling the farmers to transfer their agricultural lands in favour of the persons of their choice. The detenu and his associates created constant fear and panic among the poor and innocent agriculturists. Thus, the detaining authority declared the detenu as per clause (g) of Section 2 of the Act 1986 as goonda.

13. Section 2 (g) of the Act, 1986 defines 'Goonda' as follows:

> ' 'goonda' means a person, who either by himself or as a member of or leader of a gang, habitually commits, or attempts to commit or abets the commission of offences punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code."

14. The detenu being the active member of most dangerous and notorious gangster Nayeemuddin @ Nayeem has been indulging in unlawful activities of committing offences of criminal conspiracy, cheating,

kidnapping, extortion and land grabbing, criminal trespass, criminal intimidation, threatening with dire consequences and damaging agricultural crops, kadies etc., Thus, the detenu being the member of Nayeem gang, has created fear and panic in the minds of innocent and poor agricultural families, who are eaking out their livelihood by doing agriculture, and thereby, disturbing the public order and tranquility in the area. Thus, their unlawful activities have caused a feeling of insecurity to their properties. The detenu has been persistently indulging in the activities mentioned in the detention order despite the cases being registered on earlier occasions. Thus, it establishes that the detenu is a habitual offender and his activities fall within the ambit of Section 2 (g) of the Act 1986.

15. In a case reported in ARUN GHOSH VERSUS STATE OF WEST BENGAL(2) , wherein it was observed that an act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely place. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its affect upon the public tranquility there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies.

The Honble Supreme Court further observed in the afore cited case while referring DR RAM MAOHAR LOHIA V. STATE OF BIHARS(3) case, that how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its affect upon the community. The question to ask is: Does it lead to disturbance of the current of life of the community so as to amount a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another.

2.1970 (1) Supreme Court Cases 98

3.(1966) 1 SCR 709

4.(1986) 4 Supreme Court Cases 407

In case of RAJ KUMAR SINGH VERSUS STATE OF BIHAR AND OTHERS(4) , the Honble Supreme Court has held that preventive detention for the social protection of community is necessary. Anti-social elements creating havoc have to be taken care of by law. Lawless multitude bring democracy and constitution disrepute. Bad facts bring hard laws. But these should be properly and legally applied. It should be so construed that it does not endanger social defence or the defence of the community, at the same time does not infringe the liberties of the citizen.

16. A person who has been habitually engaging himself in unlawful acts of committing kidnapping, cheating and extortion, which create a sense of insecurity in the minds of public and pose threat to maintenance of peace and public tranquility in the society, such are obviously prejudicial to the maintenance of public order. If such person is not curbed, he will continue to do the same activities.

17. Therefore, keeping in view the involvement of the detenu in various cases and his association with notorious gangster Nayeem, and his indulgence in heinous crimes as mentioned above, causing fear and insecurity among the general public and landlords, the authorities have rightly passed the detention order.

18. The justification for passing the detention order was that out of 4 cases registered against the detenu, he filed bail petitions in 3 cases, and was released on bail. In Crime No.221 of 2016 of Adibhatla police Station, his arrest was regularized by filing PT warrants. There was every likelihood that he might resort to similar offences of Kidnapping, cheating and extortion by threatening innocent people, which affect the public order adversely.

19. In view of the above discussion, we are of the considered opinion that the detaining authority had good grounds to detain the detenu. There are no merits in the instant petition.

20. Accordingly, the Writ Petition is dismissed. Miscellaneous petitions, if any pending, shall stand closed.

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2017(3) L.S. 49 (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

P. Malla Reddy ..Petitioner

Vs.

L.Srinivas Reddy ..Respondent

GUARDIAN AND WARDS ACT, Sec.25 - Appellants seek direction to set aside the decree and order passed by Trial Court – Appellants are maternal grand parents of minor girl, aged about 6 years - Respondent married daughter of appellants and the couple were blessed with the said girl child – Respondent admitted his wife at Hospital for second delivery – She gave birth to a son but due to negligence of doctors, wife of respondent and son died immediately.

When respondent was planning to perform cremation of his wife in his native place, appellants had taken away dead body of his wife along with his daughter who was then two years old – Counsel for appellants contended that respondent has solemnized second marriage and one male child was also born out of their wedlock, therefore minor daughter will not be happy to stay with respondent because she never stayed with him in past and she does not even recognize respondent as her father.

Held – In a matter of this nature, where the grand parents are seeking preferential custodial right over the natural father's claim for custody for the minor child, it is essential for the grand parents to plead and establish that the natural guardian being father is unfit or is otherwise disqualified from being given the custody of the child – In the instant case, respondent/ father is drawing a salary of Rs. 45,000/- per month – He had assured this court that welfare of the child will not be compromised under any circumstances – Appeal stands dismissed.

Cases Referred:
1.AIR 1992 (Kerala) 277
2. 2008 (6) ALT 360 (DB)

Vijaya Prashanthi, Advocate for the Petitioner.
Mr.Nagendra Reddy, Advocate for the Respondent.

O R D E R

(per Hon'ble Mr.Justice Suresh Kumar Kait)

Vide the present appeal, the present appellants seek direction thereby to set aside the decree and order in GWOP No.724 of 2013 dated 27.01.2017 passed by the XV Additional Chief Judge-cum-II Additional Family Judge, Ranga Reddy District, Kukatpally, at Miyapur.

2) The appellants are maternal grand parents of the minor girl—L.Sanvi Reddy, aged about 6 years.

3) The respondent, who is the father of said minor girl, filed a petition under Sec.25 of the Guardians and Wards Act to appoint him as natural guardian of the minor child and consequently, direct the appellants herein to handover the child to the respondent.

4) The respondent averred in his petition that he married with the daughter of the appellants herein on 27.05.2010. The marriage was registered at Sub-Registrar office, Madira on 24.06.2010. Later, they lived happily and a girl by name L.Sanvi Reddy was born on 07.03.2011. On 10.02.2013, the respondent admitted his wife in Nest Hospital for second delivery. On 11.02.2013, she gave birth to a son but due to the negligence of "2 doctors, the wife of respondent and son died immediately. The respondent made a complaint in Kukatpally Police Station against the doctors. Consequently, the police registered a case against the doctors for the offence punishable under Sec.304A of I.P.C.

5) It is further stated in the said petition that when the respondent was planning to perform the cremation in his native place, the appellants had taken away the dead body of his wife forcibly to Karimnagar and completed the cremation without the consent of respondent. The appellants had also taken away the daughter of the respondent. Even to perform pedda karma, they had not attended and did not send his daughter. The appellants, who are grand parents of the minor child, are old aged persons of 75 and 70 years and they are not in a position to look after the child. The mother of the respondent was hale and healthy, as she was staying with the respondent and in the absence of the respondent, she would look after the child. The respondent being father is a natural guardian and hence, for the welfare of the child, it is always necessary for the child to stay along with the respondent. After enquiry, the trial Court allowed the petition. Hence the CMA.

6) Learned counsel appearing on behalf of the appellants would submit that the Court below failed to appreciate the arguments put-forth by them and did not consider the decision in BABY SAROJAM VS. S.VIJAYAKRISHNAN NAIR(1) except considering the decision in K.VENKAT REDDY VS. CHINNAPAREDDY VISWANADHA REDDY(2) submitted by the respondent. He argued that the lower Court erred in observing that the petitioner therein was an educated person, doing job and was qualified and it is not a fit case to consider the request of the respondent. The Court failed to see the evidence of the respondent/PW.1. During the cross-examination, he clearly stated that he had not contributed any amount towards welfare and maintenance of his daughter and also in-laws. Also stated that he did not send any school fees for his daughter's education to his in-laws and his daughter was not in exclusive custody of his mother. Despite it, the lower Court allowed the petition.

7) Learned counsel further submitted that

1. AIR 1992 (Kerala) 277
2..2008 (6) ALT 360 (DB)

the respondent has solemnized second marriage and one male child was also born out of their wedlock and therefore, the minor daughter will not be happy to stay with the respondent because she never stayed with him in past and she does not even recognize the respondent as her father. He further submitted that the paramount interest of the child has to be taken into consideration and in that view, the child may be ordered to remain with the appellants, who are the maternal grand parents of the child.

8) It is not in dispute that before the death of the daughter of the appellants, there was no matrimonial dispute between the respondent and the daughter of the appellants. The wife of the respondent died in the hospital at the time of second delivery. The respondent made complaint to the police against the negligence of the doctors while attending delivery of the second child. Consequently, a case under Sec.304-A IPC registered against the doctors.

9) It is not in dispute that the minor child in question was born on 07.03.2011 and her mother died on 11.02.2013. At that stage, she was just 2 years old and immediately, thereafter she was taken by the appellants. Thereafter, she never met the respondent and there was no occasion for respondent to look after her welfare. Hence, the respondent filed GWOP No.724 of 2013 under Sec.25 of the Guardian and wards Act to appoint him as a natural guardian of the minor child.

10) On behalf of respondent, he himself was examined as PW.1 and got marked Exs.P.1 to P.11. On behalf of the appellants, appellant No.2 was examined as RW.1, neighbour of RW.1 was examined as RW.2 and other daughter of appellants was examined as RW.3 and Exs.R.1 to R.4 were marked on their behalf.

11) The issue before the Court below and this Court was whether the respondent is entitled for the relief as prayed by him.

12) Admittedly, the respondent and daughter of the appellants are husband and wife respectively. The minor child, who is aged about 7 years now, is the daughter of the respondent and the grand daughter of the appellants. The ages of the appellants 1 and 2 are shown as 75 and 70 years respectively and the contention of the respondent is that they are old aged and hence they are not in a position to look after the child. Appellant No.2, who was examined as RW.1, admitted in her crossexamination that she was an illiterate; her son and other daughters studied only upto Intermediate and their native place is Karimnagar. Whereas it is stated before the Court below by the respondent that because the appellants are old aged persons they are not in a position to look after the child. Moreover, as per Hindu law, the respondent being the father, is a natural guardian of the child.

13) In view of the above observations, the Court below has relied upon K.Venkat Reddy's case (2 supra), wherein it was observed that the interest and welfare of the minor child being the paramount consideration, the economic condition of the father and the status in society also needs to be assessed vis-à- vis the maternal

grand father. In a matter of this nature where the grandparents are seeking preferential custodial right over the natural father's claim for custody of the minor child, it is essential for the grand parents to plead and establish that the natural Guardian being father is unfit or is otherwise disqualified from being given the custody of the child. 14) The respondent/father of the child is present in Court. On query by the Court, he would submit that he works as a Senior Developer in Capgemini India Pvt. Ltd and getting salary of Rs.45,000/- p.m. He can look after the welfare of the child well and she would get best education available as per his capacity. He has assured this Court, child would not face any ill-treatment or inconvenience at his residence in the hands of his second wife. In any eventuality, he would certainly take hard decision and admit the child in a boarding school. The welfare of the child will not be compromised under any circumstances.

15) In the light of the above observations and assurance of the respondent, we hereby find no merit in the instant appeal and the same is accordingly dismissed at the admission stage. As a sequel, Miscellaneous Petitions, if any pending, shall stand closed.

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2017(3) L.S. 52

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

Present:
The Hon'ble Mr. Justice
U. Durga Prasada Rao

Konidhana Ananda Sharma. ...Petitioner

Vs.

The State of A.P., ..Respondent

CRIMINAL PROCEDURE CODE, Secs. 41, 41-A, 209(a) and 438 – INDIAN PENAL CODE, Secs.323 and 506 – SC & ST (POA) Act, Sec.3(1)(x) –Petitioner filed instant petition seeking pre-arrest bail - *De-facto* complainant in his complaint stated that petitioner was purohit and arranged photography, cook and utensils for a sum of Rs. 70,000 for which complainant paid Rs. 40,000 at the time of his marriage and requested some time to pay balance amount – When petitioner demanded balance amount, complainant requested for some more time to repay, for which petitioner grew wild and abused him in filthy language touching name of his caste and also beat him with hands on his cheek and threatened him.

Trial Court observed that since petitioner was on station bail, he was

Crl.P.No.3452/2017 Date:22-06-2017

ordered to be continued on bail till conclusion of trial and committed case before Special Sessions Judge cum Additional District Judge – Sessions Judge returned entire case record for non-compliance of Section 209(a) Cr.P.C and observed that bail order was not on record and called for explanation of I.O regarding bail order – I.O stated that after investigation, he served notice under Section 41-A of Cr.P.C and since offences of the case were punishable below 7 years of imprisonment and he did not consider necessary to arrest the accused as accused had not failed to comply with terms of the said notice.

Held – Where accused complies and continues to comply with the notice under 41-A Cr.P.C, accused shall not be arrested in respect of the offence referred to in notice, unless for reasons to be recorded, the police officer is of the opinion that he ought to be arrested – Therefore, the procedure contemplated under Section 41 and 41-A of Cr.P.C, squarely apply to alleged offences and said sections have not made any express distinction between offences punishable under IPC and other Special enactments – Procedural Order under section 41-A Cr.P.C cannot be equated with an order passed by a court under Section 438 of Cr.P.C – There is no procedural violation – Committal court is directed to submit the bail bonds produced before the I.O by accused and sureties to Additional District Judge.

Mr.Akkapeddi Srinivas, Advocate for Petitioner.

Public Prosecutor for State (A.P), Advocate for Respondent.

O R D E R

Petitioner/accused filed the instant petition under Section 438 Cr.P.C., seeking pre-arrest bail in P.R.C.No.30 of 2015 on the file of Additional Judicial Magistrate of First Class, Piler (arising out of Cr.No.188 of 2014 of Piler PS) in which the petitioner allegedly committed offence under Sections 323, 506 IPC and Section 3(1)(x) of SC & ST (POA)Act, 1989.

2) The de-facto complainant lodged a complaint with the Piler PS stating that his marriage was held on 19.06.2014 at TTD Kalyana Mandapam, Piler for which the petitioner, who is a purohit in Ramalayam, Piler arranged photography, cook and utensils for a sum of Rs.70,000/-; he paid Rs.40,000/- at the time of marriage and requested some time to pay the balance amount; thereafter, due to paucity of money, he could not pay the balance amount. While so, on 30.09.2014 at 7 PM, petitioner came to his house and took him to the welding shop opposite to the telephone office and demanded the balance amount of Rs.30,000/- and when he requested for some more time to repay the amount, petitioner grew wild and abused him in filthy language touching the name of his caste and also beat him with hands on his cheek and threatened him with dire consequences.

Hence the complaint.

3) On the basis of the said complaint, the police registered a case in Cr.No.188 of 2014 and the Sub-Divisional Police Officer, Madanapalle granted station bail to the petitioner on 28.10.2014 and after completion of investigation filed charge sheet before the Additional Judicial Magistrate of First Class, Piler. The learned Magistrate by order dated 16.11.2015 while committing the case to the Special Sessions Judge-cum-IV Additional District Judge, Tirupati for trial observed that since the petitioner was on station bail, he was ordered to be continued on bail till conclusion of trial. The learned Special Sessions Judge by letter Dis.No.19 dated 02.01.2016 returned the entire case record for non-compliance of Section 209(a) Cr.P.C and observed that bail order of the petitioner was not on record. Thereupon, the committal Court called for the explanation of the investigating officer regarding the bail order. It appears, the SDPO Madanapalle, in his letter dated 13.04.2017 submitted that his predecessor SDPO Madanapalle, conducted the investigation and he served notice to accused under Sec.41-A Cr.P.C since the offences of the case were punishable below 7 years of imprisonment and he did not consider necessary to arrest the accused as the accused had not failed to comply with the terms of the notice under Sec.41-A Cr.P.C and he cannot submit more than that and prayed the Court to pass orders.

4) After receiving the aforesaid explanation, the Addl. Junior Civil Judge, Piler passed an order dated 18.05.2017 which raised an apprehension in the mind of petitioner to seek for anticipatory bail. The learned Addl. Junior Civil Judge while observing that Sec.41-A Cr.P.C does not apply to the facts of the present case as the offence was a special Act offence and grave in nature as per Sec.2(d) and 18 of SC, ST (POA) Act and directed the SDPO Madanapalle to comply with the provisions of Sec.209(a) Cr.P.C and to file neat copy of charge sheet.

5) What can be inferred from the above order is that learned Magistrate felt that since no anticipatory bail can be granted in respect of an offence under SC, ST (POA) Act in view of the bar under Sec.18, the investigating officer ought not to have granted station bail to accused while dealing with him under Sec.41-A Cr.P.C and further held that Sec.41-A had no application since the offence is a special Act offence.

It must be said, the above observation is legally incorrect. No doubt, Sec.18 of SC, ST (POA) Act, creates a bar for invoking Sec.438 of Cr.P.C i.e, entertaining a pre-arrest bail application by the Court. However, Sec.18 cannot militate and operate as an interdict against the power of a police officer under Sec.41 and 41-A Cr.P.C. A conjunctive reading of Sec.41 & 41-A Cr.P.C give an understanding that where a reasonable complaint has been made or a credible information has been received or a reasonable suspicion exist against an accused that he has committed a cognizable offence punishable with imprisonment for a term which may be less than 7 years or which may extend to 7 years with or without fine, the investigating

officer may, without the warrant of the Court arrest such an accused, provided the police officer is satisfied that such arrest is necessary for the reasons enumerated in Sec.41 Cr.P.C. Provided, if the police officer feels that the arrest of the accused is not required, record the reasons in writing for not making the arrest. This is the procedure to be followed by the police officer in respect of a cognizable offence punishable upto 7 years as enumerated in Sec.41 Cr.P.C. We are not concerned with other part of the said Section.

Then coming to Sec.41-A Cr.P.C, in cases where the arrest is not required under the provisions of Sec.41(1) Cr.P.C, the police officer shall issue notice directing the accused to appear before him for interrogation. Where such person i.e, accused complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice, unless for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

6) The offences alleged in the instant case are under Sec.323, 506 IPC and Sec.3(1)(x) of SC, ST (POA) Act, 1989. All the aforesaid offences are punishable with a term less than 7 years. Therefore, the procedure contemplated under Sec.41 and 41-A Cr.P.C, squarely apply to them and those Sections have not made any express distinction between the offences punishable under IPC and other Special enactments. Therefore, the contra view expressed by learned Addl. Junior Civil Judge, is incorrect. The explanation of the SDPO Madanapalle dated 13.04.2017 shows that since the offence was punishable below 7 years of imprisonment and as the accused had not failed to comply with the terms of notice under Sec.41-A Cr.P.C, the I.O did not consider it necessary to arrest the accused. Therefore, the I.O granted station bail by securing the bail bonds of the sureties on behalf of the accused. This procedural order under Sec.41-A Cr.P.C cannot be equated with an order passed by a Court under Sec.438 Cr.P.C. Therefore, in my view, there is no procedural violation. Consequently, the committal Court is directed to submit the bail bonds produced before the I.O by the accused and sureties to the Special Sessions Judge-cum-IV Additional District Judge, Tirupati, in which case they shall be deemed to be the due compliance under Sec.209(a) of Cr.P.C by the Sessions Court.

7) This Criminal Petition is disposed of accordingly.

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2017(3) L.S. 56 (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

The State of A.P. ..Appellant

Vs.

Sivala Chandra Reddy,
& Ors., ..Respondents

INDIAN PENAL CODE, Secs.302 and 34 – CRIMINAL PROCEDURE CODE, Sec.174 - When the witness has come out with diagonally opposite versions, it is always safe to rely upon the earliest version - State has preferred instant appeal assailing Judgment passed by Trial Court whereby all five accused were acquitted.

A1 is husband of deceased Radha, A2 to A5 are family members of A1 – When father of deceased got to know about the death of deceased at her matrimonial house, he went to house of A1 along with his wife and son – Enquiries from villagers did not reveal any suspicion about death of deceased - Three months after the marriage of A1 with deceased, A1 had taken deceased to house of concubine saroja and forced deceased to live in the house of said saroja – After coming to know about illegal intimacy of A1 with saroja, deceased questioned A1 who in return paid a deaf-ear - Deceased complained to her parents and also lodged a complaint before a Police station.

Held – Instant case is based on circumstantial evidence – In a case based on circumstantial evidence, motive plays an important role – It is therefore, not possible to accept the version of prosecution that A2 to A5 have shared common motive with A1 for eliminating deceased to pave way for latter to continue his illicit relationship with another woman – Illicit relationship is considered as a taboo in the society and other family members would not generally approve of such relationship – Prosecution has miserably failed to prove guilt of accused beyond all reasonable doubt and trial court rightly acquitted all the accused of charge framed against them – Criminal appeal and revision case are dismissed.

Public Prosecutor (AP) for Appellant.
Mr.Masthan Naidu Cherukuri, Advocate for Respondents.

C O M M O N J U D G M E N T
(per the Hon'ble Mr.Justice
C.V. Nagarjuna Reddy)

The State has filed Crl.A.No. 1441 of 2010 assailing the judgment dated 30.6.2009 in

Sessions Case No. 150 of 2007 on the file of the V-Additional District & Sessions Judge, Tirupati, whereby all the five accused were acquitted of the charge under Section 302 read with 34 IPC. The defacto-complainant-P.W.1 filed Crl.R.C.No. 941 of 2010 questioning the same judgment.

We have heard the learned Public Prosecutor appearing for the State of Andhra Pradesh, Mr. A. Chandraiah Naidu, learned counsel for the defacto-complainant-P.W.1, the revision petitioner in criminal revision case and Mr. Cherukuri Masthan Naidu, learned counsel appearing for all the accused in both the cases.

The parties are referred to as they are arrayed in the Sessions Case.

The case of the prosecution, in brief, as reflected in the charge sheet is that A1 to A3 are residents of Eguva Mudikuppam village of SR Puram Mandal and A4 and A5 are residents of Ammapalli village, K. Nagar Mandal; that A1 is the husband of the deceased Radha, A2 is the mother of A1, A3 is the junior paternal uncle of A1, A4 is the younger sister of A1 and A5 is the husband of A4; that on 11.11.2006 at 12.00 noon the Sub-Inspector of Police, S.R. Puram Police Station received a written report from P.W.1, the father of the deceased, wherein he stated that the marriage of his daughter-deceased with A1 was celebrated at Tirumala, that they were blessed with two daughters viz., Lakshmi, aged about 3 years and Shanti, aged about 2 years and there were no disputes between the couple since their marriage; that often the deceased was suffering from stomach-ache; that on 11.11.2006 P.W.1 received information through one Koneti Chenga Reddy s/o Koneti Muni Reddy of Eguva Mudikuppam village regarding the death of the deceased at her matrimonial house; that immediately he along with his wife Padmavathamma, his son Koneti Eswara Reddy and Annareddi Govinda Reddy, the husband of his sister-in-law, and other relatives went to the house of A1, found the dead body of the deceased which was kept on a mat and there were no external injuries on her body; and that the enquiries from the villagers did not reveal any suspicion about the death of the deceased and that the deceased died of natural death.

That a case in Cr.No. 48 of 2006 was registered under Section 174 Cr.P.C. by the Sub-Inspector of Police, SR Puram Police Station on 11.11.2006 at 12.00 noon and the case was investigated; that inquest over the dead body of the deceased was held and the dead body was sent for post mortem examination; and that after receipt of Ex.P8-post mortem report along with final opinion, the section of law was altered to Section 302 IPC on 15.11.2006 at 4.00 P.M.

That during the course of investigation, from the statements of witnesses it was disclosed that the marriage of the deceased with A1 had taken place on 23.8.2002 and they lived happily for some days; that about three months after the marriage, A1 had taken his wife to the house of his concubine Saroja at Jeevakona, Tirupati and forced

her to live in the house of the said Saroja for some days; that after coming to know about the illegal intimacy of A1 with Saroja, the deceased questioned A1 who paid a deaf-ear and the deceased thereupon went and complained to her parents; that A1 later on visited the house of P.W.1 and took the deceased to his house promising that he will look after her well and thereafter two children were born to them, but A1 did not change his attitude even after the birth of the second child and differences between them persisted; that the deceased lodged a complaint against A1 at Tirupati East Police Station regarding his illegal intimacy with Saroja; that on the intervention of the village elders including P.W.7, A1 executed Ex.P2, a conditional letter stating that he will look after the welfare of his wife and children properly and that if he fails to do so, he will return 12 sovereigns of gold jewellery, cash of Rs.50,000/- and in addition thereto, he will register 10 kuntas of land each in the name of his daughters and on that assurance, the deceased had returned back to her matrimonial home to live with A1; that A1 continued his illegal intimacy with Saroja and A2 to A5 were supporting A1 in his illegal activities; that A1 brought the son of her concubine Saroja, kept him in his house and warned the deceased that she should take care of him very well, otherwise he would kill her with the support of his family members; that the deceased went to her parents house and informed the same to them and two days later, P.W.1 brought the deceased to the house of A1, dropped her at his house with a request to look after her well and left the place; that about one month prior to the death of the deceased, on two occasions the deceased went to the house of P.W.1 and complained that all the accused were hatching a plan to do away with her life; that the village elders convened a panchayath and chastised A1 to look after her well and in the said panchayath, A1 agreed to return gold jewellery given at the time of their marriage and also give the landed properties to his daughters; that while so, on the night of 10.11.2006 at about 9.00 P.M. A1 went to a temple where a chit was held and after bidding the chit, A1 slept at the house of one Venkatesh Reddy; that at about 2.15 AM on the intervening night of 10/11.11.2006 A1 received information about the death of his wife-deceased at his house; that he thereupon went to his house and saw the dead body of his wife; that on information, P.W.1 and his family members reached the house of A1 and saw the dead body of the deceased and all the accused requested P.W.1 not to give any complaint against them for the sake of children and promised to return the gold jewellery and cash and give landed property to the children of the deceased and thus P.W.1 was convinced not to give any report against the accused; that after cremation of the deceased, P.W.1 and other family members came to know about the suspicious death of the deceased; and that as promised, the accused registered 10 kuntas of landed property in the names of the two children of the deceased.

That during the course of further investigation, on 29.11.2006 at 3.30 PM

L.W.15-Ganapathi Vijayavelu Reddy appeared before P.W.13-Inspector of Police, K. Nagar Circle and produced the five accused along with a report stating that the accused made an extra-judicial confession to him to the effect that they committed the offence, as A1 got vexed with his wife because she knew about the illegal intimacy of A1 with one Saroja and therefore, all the accused decided to do away with her and in pursuance thereof, they forcibly administered liquor mixed with mercury and insecticide poison to the deceased and when she attempted to resist them, A2 to A4 caught hold of her, A1 pressed a pillow firmly on the face of the deceased till she died and thus they killed her; that P.W.13 secured the presence of mediators-P.Ws. 8 and 9, arrested all the accused at 3.30 P.M. and interrogated them in the presence of the said mediators and all the five accused admitted to have committed the offence; that A1 confessed that after committing the offence, he abandoned the liquor bottle in the nearby dilapidated pit and promised to produce it, if they followed him and in pursuance of the confessional statement made by him, A1 led the police party and mediators to the dilapidated pit nearby the house of the accused at 5.30 P.M. and A1 brought one cork contained nip bottle which contained a little quantity of liquor and the same was seized under the cover of a panchanama which was duly attested by mediators and subsequently the accused were sent for remand; that P.W.10 and L.W.24 conducted autopsy over the dead body of the deceased, preserved the viscera of the deceased and reserved their opinion, that however they gave a preliminary opinion stating that the post mortem finding is suggestive of asphyxia due to obstruction to air passage and that thereby a prima facie case of murder is made out against all the accused; and that after receiving preliminary medical opinion, a preliminary charge sheet was filed and it is stated in the said charge sheet that a final charge sheet will be filed on receipt of final medical opinion as to the cause of death on receipt of RFSL report from the Regional Director, RFSL, Tirupati. However, it appears that no subsequent charge sheet was filed in the case.

The following charge was framed against the accused by the trial Court, which reads as under:

Firstly that you A-1 to A-5 on 29.11.2006 at 3.30 P.M confessed before Panchayat Secretary of Muddikuppam panchayat of S.R.Puram Mandal that you have made your extra judicial confession that you have committed the offence that you killed Radha brutally by pouring liquor mixed with mercury and insecticide poison, A-2 to A-5 of you caught hold of the deceased Radha forcibly and A-1 of you pressed a pillow firmly on the face of the deceased till her death and committed the offence under Section 302 read with Section 34 of Indian Penal Code and within the cognizance of Court of Sessions.

The accused denied the said charge, pleaded not guilty and claimed to be tried.

During the trial, the prosecution examined P.Ws.1 to 13 and got Exs.P1 to P17 marked. It has also produced M.O.1- Quarter Brandy bottle. On behalf of the accused, no evidence was adduced.

On appreciation of evidence on record, the trial Court held that the prosecution failed to prove the charge framed against the accused beyond all reasonable doubt and accordingly it has acquitted them.

At the hearing, the learned Public Prosecutor for the State and Sri A.Chandraiah Naidu, learned Counsel for the de facto complainant/revision petitioner strenuously submitted that the evidence of P.W.1, P.W.2, P.W.7 and P.W.10 clinchingly establishes that the death of the deceased was homicidal one and that all the accused are responsible for the said death. They have further argued that the evidence of P.W.7, a mediator, and Ex.P2-Undertaking letter executed by A-1, would clearly prove that A-1 had illicit relationship with a woman by name Saroja and as the deceased was found to be an obstacle in the way of A-1 maintaining their illicit relationship, all the accused had hatched a plan to eliminate the deceased.

Sri Masthan Naidu Cherukuri, learned Counsel for the accused, however, referred to the inherent contradictions in the stand of the prosecution witnesses at different stages and submitted that the accused have been falsely implicated and that the contents of Ex.P1 and also Section 161 Cr.P.C. statement of P.W.1 disclose that the death was natural as the deceased was suffering from stomach pain.

We have carefully considered the submissions of the learned Counsel for both parties and perused the material on record.

This case is based on circumstantial evidence. The law is well settled that in a case based on circumstantial evidence, motive plays an important role. In this case, as could be seen from the charge sheet, the motive for the accused to do away with the life of the deceased was the alleged illicit intimacy of A1 with one Saroja and the deceased questioning A1 about the same. It is not the case of the prosecution that A-2 to A-5 had any individual motive for doing away with the life of the deceased. If at all, A-1, who allegedly had illicit intimacy with Saroja, would have had the motive for committing the death of his wife. It is, therefore, not possible to accept the version of the prosecution that A-2 to A5 have shared common motive with A-1 for eliminating the deceased to pave way for the latter to continue his illicit relationship with another woman. This part of the prosecution version appears to be wholly unnatural as generally, illicit relationship is considered as a taboo in the society and other family members would not generally approve of such relationship. At any rate, it is not possible to believe that in order to facilitate A-1 to continue with his illicit relationship with another woman, A-2 to A-5 would have joined A1 in hatching a plan to eliminate the deceased. Therefore, the very motive pleaded by the prosecution appears to be

inherently weak.

As regards the evidence on record, Ex.P1, the report given by P.W.1, the father of the deceased, reflects his earliest version on the death of her daughter. P.W.1 stated therein that the deceased and A-1 led happy marital life without any disputes; that the deceased used to suffer stomach pain and he came to know about the death of his daughter through a third party and on arrival at the matrimonial home of his daughter, he made enquiries, which revealed that the death of his daughter was natural and that he could not find any injuries on the body of the deceased. He further stated that he did not have any suspicion about the death of his daughter. Five days after the death, P.W.1 had given a statement under Section 161 Cr.P.C., wherein also he reiterated his stand as reflected in Ex.P1. Even in Ex.P5-Inquest report, it is stated that the deceased was suffering from stomach pain for two years before her death and because of the said reason, the deceased died.

Thereafter, there is a marginal shift in the case of the prosecution. In his evidence P.W.1 has reneged on his earliest version. He stated in his evidence that due to illicit intimacy with one Saroja by A-1, differences cropped up between A-1 and the deceased; that A-1 used to harass the deceased and on the intervention of elders, a police complaint given against A- 1 was withdrawn; that when he visited the dead body of his daughter, he saw a bottle near the dead body; that he had given a complaint to the police on suspicious death of the deceased. In his cross-examination, P.W.1 admitted that in Ex.P1 he stated that A-1 and the deceased lived happily and that he reiterated the same thing during investigation and that he has also stated that the deceased died due to stomach pain. He has also admitted that he has stated in Ex.P1 that no injuries were found on the dead body of the deceased. Nowhere in his evidence, P.W.1 explained the reason for his volte-face from his previous version. In the charge sheet, it is sought to explain that as the accused convinced P.W.1 that if he does not complain against them, they will return the jewellery and property, he did not complain against the accused. But, this explanation has not come forth from P.W.1 himself. In our opinion, when the witness has come out with diagonally opposite versions, it is always safe to rely upon the earliest version.

P.W.2, the son of P.W.1, also deposed on the same lines as his father did. P.W.7, the alleged mediator, was examined to prove that A-1 had illicit intimacy with one Saroja and in that connection A-1 executed Ex.P2 letter. Though in the cross-examination of P.W.7 it was put to him that there was difference in ink in the contents of Ex.P2 and its contents were subsequently incorporated after obtaining the signatures, no suggestion was put to him that the signature on Ex.P2 did not belong to A-1. Assuming that A-1 had illicit intimacy with one Saroja and that he executed Ex.P2, that by itself would not prove the case of the prosecution that he along with other family members have done away with the life of the deceased.

The learned Public Prosecutor has placed heavy reliance on the medical evidence such as Ex.P8-Post Mortem Certificate and the oral testimony of P.W.10-doctor, who conducted post mortem examination on the dead body of the deceased. A perusal of Ex.P8 shows that there were no significant external injuries except right eye blocking and the preliminary finding on the cause of death was due to obstruction to air passage. However, in the final opinion, it is stated as under:

The deceased would have been (sic) died of Manocrotophos, an insecticide poison and mercury, a Metallic poison along with Ethyl alcohol which causes cardio respiratory failure.

It is significant to note in this connection that the charge sheet was filed based on the preliminary opinion of the doctor which was suggestive of asphyxia due to obstruction to air passage. However, in the final opinion, the cause of death was shown as insecticide poison and metallic poison along with Ethyl alcohol which causes cardio respiratory failure. As noted herein before, contrary to what is stated in the preliminary charge sheet the prosecution has not filed final charge sheet based on the final opinion on the cause of death. It is further significant to note that in the charge framed by the trial Court, it is alleged that the accused have committed the offence by pouring liquor mixed with mercury, an insecticide poison, and also pressing a pillow firmly on the face of the deceased till her death. Thus, while the charge sheet as also the charge framed by the Court are suggestive of both poisoning as well as smothering with pillow as the cause of death, the final opinion suggested only poisoning as the cause of death of the deceased. Thus, the charge of cause of death due to asphyxia has not been supported by the medical evidence.

As regards the death due to poisoning, the trial Court has taken a view which we commend and it reads as follows:

Coming to the Post Mortem certificate P.W.10 the Doctor evidence reveal that the deceased would have died of manocrotopas an insecticide poison and mercury metallic poison along with Ethyl alcohol. It is the case of prosecution that accused administered the poison forcibly by pouring the same into the mouth of deceased. As already referred there is no direct witness for the same. There is much delay in sending viscera and liquor bottle to scientific officer, P.W.12, for chemical analysis. The viscera was preserved on 12.11.2006, but the same was sent along with liquor bottle in two card board boxes on 08.12.2006. The police kept the viscera in their custody for 26 days and the liquor bottle for 9 days in their custody. So, there is any amount of suspicion about the keeping the viscera and liquor bottle by the police till the arrest of accused by them.

Moreover the viscera contain mercury metallic poison along with Ethyl alcohol. According to P.W.10, mercury is a corrosive substance and it caused damage to the lips, mouth, throat and oesonghages. But,

there is no corrosive appearance on the lips, mouth and throat of the deceased to fix up the liability against the accused that they poured manocrotopas mercury metallic poison in the mouth of deceased and killed her.

On a careful appreciation of the entire oral and documentary evidence on record and the reasons assigned by the trial Court, we are of the opinion that the prosecution has miserably failed to prove the guilt of the accused beyond all reasonable doubt and that the trial Court has rightly acquitted all the accused of the charge framed against them. Hence, we do not find any merit in this appeal as well as in the revision.

Accordingly, the Criminal Appeal and the Criminal Revision Case are dismissed.

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2017(3) L.S. 63

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

Present:
The Hon'ble Mr. Justice
A. Shankar Narayana

Md.Karamathulla Khan
& Ors., ..Petitioners

Vs.

Akkireddy Chandraiah ..Respondent

CIVIL PROCEDURE CODE,Or.XVIII, Rule 17 & Sec.151 – Civil Revision Petitions – Petitioners made two applications before Trial Court to reopen the case for further cross-examination of P.W.2 and also in respect of admission made by her with regard to an exhibit, that it is a forged and created document.

Trial court did not accede to the request of petitioners – Petitioners contended that they have a genuine reason for reopening and recalling P.W. 2 and applications can be filed at any stage of the suit and trial court without proper appreciation of reasons assigned by them, dismissed both the applications – On the other hand respondents stated that there are no convincing grounds to reopen the case and recall P.W. 2.

C.R.P.Nos.6135&6401/2016 Dt:20.01.2017

Held – Object of enacting Order XVIII, Rule 17 is obvious, power to recall a witness under said provision for further cross-examination is intended only to clarify the courts to clear any ambiguity, but not intended to fill up, any omissions in evidence – Petitioners are unsuccessful in showing that the applications are intended to prevent abuse of process of the Court – Petitioners failed to set out convincing grounds that said two applications are intended to achieve the ends of the justice – Revision petitions are dismissed.

Cases Referred:
1. 2011 (4) SCJ 48
2. AIR 1980 AP 265 (1)
3. 2007 LawSuit(P&H) 1125
4. (2009) 4 SCC 410
5. AIR 2003 Bombay 293
6. 2014 (1) ALT 268
7. 2015 (1) ALT 509
8. 2008 (1) ALD 806

Mr.Bhanu Prasad, Advocate for Petitioner.
Mr.Ravi Kiran, Advocate for Respondent.

O R D E R

1. Both these Civil Revision Petitions are filed under Article 227 of the Constitution of India questioning the orders dated 05.12.2016 in I.A. No. 628 of 2016 and I.A. No. 629 of 2016 in O.S. No. 289 of 2013, on the file of Principal Junior Civil Judge, Mancherial, Adilabad District. I.A. No. 628 of 2016 was filed by the revision petitioners under Section 151 of Code of Civil Procedure, 1908 (for short 'CPC') to reopen the case for further cross-examination of PW. 2, whereas I.A. No. 629 of 2016 was filed under Order XVIII Rule 17 read with Section 151 CPC, requesting to recall PW. 2 for further cross-examination in respect of admission made by her with regard to Ex A-7 that it is a forged and created document.

2. The learned Principal Junior Civil Judge, Mancherial did not accede to the request to reopen the case for further cross-examination of PW. 2. He has set out certain reasons in paragraph No. 11 of the order under challenge stating that when PW. 2 deposed in Court as a witness, she did not whisper that under the influence of respondent - plaintiff, she made a false statement; even the written statement filed by the revision petitioners - defendants does not disclose that they did take any plea that PW. 2 executed a document before the Notary stating that Ex. A-1 is forged and fabricated document and, on the other hand, in her cross-examination when a question was put, she admitted that a criminal case was registered against her, respondent-plaintiff and attestors on the complaint lodged by the revision petitioners-defendants stating that they created the signatures of executants - Ameer Khan subsequent to his death on 30.12.1994, and thereby drawn an inference that the revision petitioners filed the said application under Section 151 C.P.C. only to protract the litigation knowing full well that PW. 2 was examined on 17.11.2014 and she was

cross-examined at length. Yet another reason assigned by the Court below has been, that the revision petitioners failed to satisfy that the document now sought to be confronted to the witness was not within her knowledge or that the revision petitioners could not produce the same when they were leading evidence.

(i) The Court below also referred to the exercise of inherent power under Section 151 CPC and under Order XVIII Rule 17 CPC stating that Section 151 CPC does not limit the power of the Court and the inherent powers can be exercised in order to render justice or to prevent the abuse of process of Court and the said inherent power is not effected by the express power conferred upon the Court. Opining that the revision petitioners failed to explain the reasons to reopen the matter for further cross-examination of PW. 2 and the reason assigned, that PW. 2 gave evidence under the influence and instructions of the respondent - plaintiff is not sufficient to order the petition, refused to grant the requests.

3. The learned Principal Junior Civil Judge has passed an identical order in I.A. No. 629 of 2016 filed under Order XVIII Rule 17 CPC to recall PW. 2. The only addition made is extracting the provisions of Order XVIII Rule 17 CPC in paragraph No. 7, and the observation being that the evidence affidavit of PW. 2 goes to show that she gave evidence voluntarily before the Court below and nowhere she deposed that she gave evidence under the pressure of respondent - plaintiff.

4. In the grounds of appeal in both the revisions, the petitioners would contend that though, they approached the Court with a genuine reason for reopening and recalling PW. 2, and though, such applications can be filed at any stage of the suit, and the only rider is that an application should be filed on sufficient and convincing grounds and despite the fact that they made out good cause for reopening the case and evidence, the Court below without proper appreciation of the reasons assigned by them, observing that the applications have been filed at the fag-end in a routine manner to drag on the proceedings, dismissed them and, therefore, to set aside the orders.

5. Heard Sri K.V. Bhanu Prasad, learned counsel for the revision petitioners - defendants and Sri V. Ravi KiranRao, learned counsel for respondent - plaintiff.

6. Referring to the ruling of the Hon'ble Supreme Court in K.K. VELUSAMY V. N. PALAMSAMY(1) the learned counsel for the revision petitioners would submit that power to recall a witness under Order XVIII Rule 17 CPC can be exercised by Courts either on its motion or on an application filed by any of the parties to the suit requesting it to exercise the said power and, therefore, the Court below was not

1. 2011 (4) SCJ 48

right in rejecting such a request when PW. 2 is sought to be recalled to confront her with the notarized declaration made by her to prove certain facts touching execution of Ex. A-1 and its genuineness. The learned counsel would submit that though, the suit is reserved for judgment, when kept in view, the need for the Court to act in a manner to achieve the ends of justice does not end when arguments were heard and judgment is reserved as held by the Hon'ble Supreme Court in the ruling referred to in the above and, therefore, sought to set aside the orders passed by the Court below and to afford an opportunity to the revision petitioners to further cross-examine PW. 2 by confronting the document which they termed as 'notarized declaration'.

7. The main submission of the learned counsel for the respondent - plaintiff is, that no convincing grounds have been shown to reopen the case and to recall PW. 2 and the notarized declaration now sought to be introduced cannot be allowed as PW. 2 has given positive admissions as to the execution of Ex. A-1 in favour of the respondent, and there is absolutely no ambiguity occurring in the evidence of PW. 2 necessitating any clarification in which event the applications under Section 151 CPC and Order XVIII Rule 17 CPC are not maintainable and, therefore, sought to dismiss the present revisions.

(i) The learned counsel places reliance in T. RAMACHANDRA MURTHY V. K. RAMA MURTHY AND OTHERS(2) BINDER SINGH V. BABU RAM(3) VADIRAJ NAGGAPPA VERNEKAR (DEAD) THROUGH L.RS. V. SHARADCHANDRAPRABHAKARGOGATE(4) BALKRISHNASHIVAPPASHETTY V. MAHESH NENSHIBHAKTA AND OTHERS (5) SHAIKGOUSIYA BEGUM V. SHAIKHUSSAN AND OTHERS(6) A.R.K. RAJU V. A.V.S. RAJU(7) CHEERLA @ CUDDAPAHNAGANNA V. KOYANAGANNA (8) and also the authority relied on by the learned counsel for the revision petitioners in K.K. Velusamy (Supra).

8. The decision in K.K. Velusamy (supra) was rendered subsequent to deletion of provision in Order XVIII Rule 17-A with effect from 01.07.2002. The object of enacting Rule 17 of Order XVIII CPC is obvious. The power to recall a witness under the said provision for his further cross-examination is intended only to clarify the Court's to clear any ambiguity, but not intended to fill up, any omissions in his evidence, as the expression occurring in the said provision "put such questions to him as the Court thinks fit" explains. By the Act 46 of 1999, Rule 17-A was omitted. The said provision was intended for production of evidence not previously known or the evidence which

2. AIR 1980 AP 265 (1)
3. 2007 LawSuit(P&H) 1125
4. (2009) 4 SCC 410
5. AIR 2003 Bombay 293
6. 2014 (1) ALT 268
7. 2015 (1) ALT 509
8. 2008 (1) ALD 806

could not be produced despite due diligence and it enables the Court to permit a party to produce any evidence even at a later stage, after the conclusion of his evidence if he satisfies the Court that even after the exercise of due diligence, the evidence was not within his knowledge and could not be produced by him when he was leading the evidence.

(i) In K.K. Velusamy (supra), the applications were made before conclusion of the arguments, it was held that power is discretionary and should be used sparingly in appropriate cases to enable the Court to clarify any doubts which may have in regard to the evidence led by the parties and not intended to be used to fill up omissions in the evidence of a witness, who has already been examined. It was further held that if there is abuse of process of the Court, or if interest of justice require the Court to do something or take note of something, the discretion to do those things does not disappear merely because the arguments are heard either fully or partly. While cautioning that the power under Section 151 of CPC or Order XVIII Rule 17 CPC is not intended to be used routinely, merely for the asking, as it will defeat the very purpose of various amendments to the Code to expedite trials, and if the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the Court to clarify the evidence on the issues and will assist in rendering justice, and satisfy that non-production earlier was for valid and sufficient reasons, the Court may exercise its discretion to recall the witnesses or permit the fresh evidence, held in paragraph No. 16 thus:

> "16. We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. If the

application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application."

Whether the above principle would attract the present fact-situation requires examination, which would be taken up a little later after referring to catena of decisions relied on by the learned counsel for respondent herein.

9. In T. Ramachandra Murthy (supra), a learned Single Judge of this Court held that application under Order XVIII Rule 17 CPC cannot be allowed when made after arguments were over and judgment was reserved and power under Section 151 CPC could not be exercised in that regard.

(i) In Binder Singh 2007 Law Suit (P&H) 1125 (supra), a learned Single Judge of High Court of Punjab & Haryana held the reason that some material question could not be put to PW - Babu Ram witness when he was cross-examined cannot be a ground for recalling him as it cannot be made the basis for recalling the said witness.

(ii) In VadirajNaggappaVernekar (Supra), the Hon'ble Supreme Court held that the power under the provisions of Order XVIII Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties, as that is not the scheme or intention of Order XVIII Rule 17 CPC, and the power to recall any witness under Order XVIII Rule 17 CPC can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit, and such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded, but to clear any ambiguity that may have arisen during the course of his cross-examination.

(iii) In Balkrishna Shivappa Shetty (Supra), a learned Single Judge of Bombay High Court held that provisions of Order XVIII Rule 17 and Section 151 CPC do not empower the Court to recall the witness for purpose of cross-examination at sweet will of either of parties, but it only permits

recall of witness for examination by Court.

(iv) In Cheerla @ CuddapahNaganna (Supra), a learned Single Judge of this Court held that power to recall and examine witness is discretionary, but such power has to be exercised judiciously having regard to facts and circumstances of particular case.

(v) In ShaikGoasiya Begum (supra), a learned Single Judge of this Court referred to the ruling of Hon'ble Supreme Court in VadirajNaggappaVernekar (supra) stating that power of Court to recall any witness under Order XVIII Rule 17 CPC can be invoked only to clear any ambiguity arisen in the evidence but not to fill up the lacunae in the evidence of the witnesses already recorded.

(vi) In A.R.K. Raju (Supra), another Single Judge of this Court, while expressing that the provisions of Order XVIII Rule 17 CPC empowers the Court to recall any witness for further examination even at the instance of a party, held that the said provision, however, is not intended to be used to fill up omissions in the evidence of a witness who was already examined.

10. Turning to the case in hand, arguments in the suit in O.S. No. 289 of 2013 were concluded and the learned Principal Junior Civil Judge, Mancherial has reserved the suit for judgment on 16.12.2016, which is not in dispute between the parties. The suit was filed by the respondent herein for grant of perpetual injunction. PW. 2 - Mukhthar Begum is the vendor of respondent, who sold the suit house to the respondent in 1998 under a registered sale deed and delivered possession thereof and she purchased it from Ameer Khan under a registered sale deed, dated 19.11.1996. The purpose for which the evidence of plaintiff sought to be reopened by the revision petitioners - defendants is to further cross-examine PW. 2 by confronting a 'notarized declaration' said to have made by her.

11. In course of hearing in the present revisions, the learned counsel for the revision petitioners has placed a copy of the said declaration and the learned counsel for the respondent has filed material papers containing the evidence of PWs. 1 to 3 and DWs. 1 and 2. As could be seen from the dates of examination of witnesses, PWs. 1 to 3 were examined in 2014 and, thereafter, affidavit-in-chief of DW. 1 was filed and he was cross-examined on 11.08.2015 and examined in chief further and was cross-examined on 22.09.2016, and after filing the affidavit in chief of DW. 2, he was cross-examined on 09.11.2016. The alleged 'notarized declaration' shows the date as 01.10.2016. Thus, it is clear that the said document purported to have been made by PW. 2 was dated 01.10.2016, whereas PW. 2 filed her examination-in-chief on 15.11.2014 and she was cross-examined on 17.11.2014. DW. 2 was examined on

09.11.2016, which was subsequent to the alleged 'notarized declaration' of PW. 2. He speaks everything though, he claims to be one of the attestors of a Will said to have executed by Ameer Khan, vendor under Ex. A-7, though, by then itself the 'notarized declaration' now sought to be introduced was available, DW. 2 did not speak anything about the said document. The appropriate stage at which the petitions under challenge could have been filed was prior to examination of DW. 2 himself as by then according to DW. 1, PW. 2 said to have made that declaration.

12. Be that as it may, when perused the affidavit filed by revision petitioner No. 2, he states that he recently came to know that PW. 2 admitted that under the influence of plaintiff, she was constrained to give evidence as per his instructions and Ex. A-7 is a created and forged document having no legal sanctity and to that effect, she has also executed declaration before notary-advocate, the same is now required to be confronted to PW. 2 and for that purpose, the applications in I.A. Nos. 628 and 629 of 2016 were filed. No other reasons are shown to reopen and recall PW. 2. The revision petitioners are unsuccessful in showing that the applications are intended to prevent abuse of process of the Court, nor set out any convincing grounds that these two applications are intended to achieve ends of justice. There is yet another reason why the requests in these applications cannot be acceded to, that being, the revision petitioners have to lay factual foundation touching the alleged notarized declaration, as it is post litem motam document as could be seen from the facts narrated in the above. Even, the revision petitions are not intended in the direction of clarifying any ambiguity in the evidence of PW. 2. Thus, seen, certainly, even the ruling in K.K. Velusamy MANU/SC/0267/2011 : 2011 (4) SCJ 48 : 2011 (5) ALT 12.1 (DN SC) (supra) would not assist the revision petitioners to accede to their requests. There is no merit in the present revisions. Therefore, both the revision petitions are dismissed. However, there shall be no order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending in the revisions, stand disposed of.

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2017(3) L.S. 71

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

Present:
The Hon'ble Mr. Justice
T. Sunil Chowdary

K. Arjuna Rao ..Appellant

Vs.

KaturuYedukondalu ..Respondent

CIVIL PROCEDUE CODE, Or.VI, VII, XIV and XVIII Rule 1 – INDIAN EVIDENCE ACT, Secs.101, 102, 103 and 104 – Civil Revision Petition – The basis to begin the suit depends upon whom the burden of proof lies on the main issue.

Instant petitioner is the defendant and respondent is the plaintiff at the Trial Court – Respondent filed suit for specific performance basing on agreement of sale and consequential perpetual injunction – Petitioner filed written statement denying very nature of document of agreement of sale – Respondent filed Memo, with a prayer to direct petitioner to begin the trial for which petitioner filed objections – Trial court over-ruled objections and directed petitioner to begin the trial.

Held – A perusal of Order XVIII Rule 1 of CPC clearly demonstrates that, as a general rule, plaintiff has the right to begin the suit, exception is the right of defendant to begin – Since petitioner denies the very nature of suit document itself, the burden of proof lies on respondent/ plaintiff that suit document was executed by petitioner - Memo filed by respondent is not sustainable either on facts or in law – Order of trial court is liable to be set aside – Civil revision petition is allowed.

Cases Referred:

1) 1996 (3) Civil LJ 135 (Kerala)
2) AIR 1957 Pat 145
3) AIR 1979 Pat 174
4) AIR 1995 Guj 166
5) AIR 1964 SC 136
6) AIR 1996 Mad 408
7) AIR 2004 Mad 243
8) 2008 (6) ALT 314
9) 2001 (4) CCC 415 (Bom.)

Mr.Gopal Das, Advocate for the Appellant.
Srinivas Emani, Advocate for Respondent.

O R D E R

1. This civil revision petition is filed under Article 227 of the Constitution of India challenging the order dated 12.6.2013 passed on Memo in O.S. No. 28 of 2006 on the file of the Court of Junior Civil Judge, Gannavaram. The petitioner is the defendant and the respondent is plaintiff in O.S. No. 28 of 2006. For the sake of convenience, the parties are hereinafter referred to as they are arrayed in the suit.

2. The plaintiff filed the suit for specific performance basing on the agreement of sale dated 09.7.2000 and consequential perpetual injunction. The defendant filed written statement denying the very nature of the document dated 09.7.2000. The plaintiff filed Memo before the trial court with a prayer to direct the defendant to begin the trial for which the defendant filed objections. However, the trial Court over-ruled the objections and directed the defendant to begin the trial. Hence, the defendant filed the present revision petition.

3. The contention of learned counsel for the petitioner-defendant is four fold: (1) the finding of the trial court that the defendant admitted execution of the document, therefore he has to begin the trial, at the first instance, is factually incorrect and legally unsustainable; (2) when the burden of proof lies on the plaintiff in respect of some of issues, the trial court ought not to have directed the defendant to begin the trial; (3) the trial court failed to consider that the defendant has been disputing the very nature of the document dated 09.7.2000; and (4) Order XVIII Rule 1 of CPC confers a right on the defendant to begin the trial if he/she so wishes and there is no obligation on the part of the defendant to begin the trial. Per contra, learned counsel for the respondent-plaintiff submitted that having admitted the execution of the document dated 09.7.2000, the burden of proof lies on the defendant to establish that the said document is not legally enforceable. He further submitted that the burden of proof lies on the defendant on the main issue; therefore he has to begin the trial. He also submitted that there are no grounds, which warrant interference with the impugned order passed by the trial court.

4. The edifice of civil suit is built on pleadings. Pleadings form bedrock in a civil suit. Order VI of CPC deals with pleadings. The word 'pleading' encompasses in it all material facts, which give rise for cause of action. Pleading is nothing but a precise statement of material facts. It is the primary duty of the plaintiff to plead all material facts and if such facts are proved, he is entitled for the relief sought. In view of the provisions of Order VII of CPC, a duty is cast on the defendant to specifically deny or traverse the material facts pleaded by the plaintiff. Mere or general denial of the pleadings by the defendant itself is not sufficient to demolish the case of the plaintiff. The defendant has to specifically deny the material facts pleaded in the plaint in order to substantiate his/her stand. It is needless to say that any amount of oral or documentary evidence, without a pleading, is of no avail.

5. Order XIV of CPC deals with framing of the issues. While framing the issues the court has to keep in mind the scope of Order XVIII Rule 1 of CPC. The underlying object of Order XIV of CPC is mainly to focus on the lis involved in the suit, which is the basis for framing of the issues for

adjudication, thereby to enable the parties to adduce evidence to substantiate their stand. A perusal of Order XVIII Rule 1 of CPC clearly demonstrates that, as a general rule, the plaintiff has the right to begin the suit, exception is the right of the defendant to begin. Who has to begin the suit depends upon the facts and circumstances of each case. There is no obligation on the part of the defendant to begin the suit first. Though Order XVIII Rule 1 of CPC does not obligate the defendant to begin the trial, the defendant has to come into the witness box at the first instance, if the burden of proof lies on him on all the issues. Even when burden of proof lies on the defendant on the main issue, he has to begin the trial, though the burden of proof on the other issues lies on the plaintiff. However, Rule 3 of Order XVIII of CPC enables the party who begins the suit to reserve his or her right to adduce rebuttal evidence.

6. It is needless to say that Sections 101 to 104 of the Evidence Act deal with burden of proof. It is a settled principle of law that burden of proof lies on the person, who would fail if no evidence is adduced on either side. The burden of proof is always static and does not shift. If the plaintiff discharges the burden cast on him, the onus of proof shifts on the defendant to substantiate the stand taken by him. The onus of proof shifts from one party to the other party depending upon facts and circumstances of each case. If both parties adduce evidence, the onus of proof loses its significance. The basis to begin the suit depends upon whom the burden of proof lies on the main issue.

7. In view of the principles enunciated in CHANDRALATHA V. ANNAMALLAI FINANCE LTD(1). RAMESH CHANDRA V. H.D. JAIN COLLEGE(2) RAM NARAIN PRASAD V. SETH SAO(3) and KESHAVLALDURLABHASINBHAI'S FIRM V. SHRIJALARAM PULSE MILLS(4), the defendant has to begin the suit in the following circumstances: (1) if the defendant unconditionally admits the material facts pleaded by the plaintiff, (2) when any fact is especially within the knowledge of the defendant in view of Section 106 of the Indian Evidence Act, (3) when the defendant pleads certain additional facts, and (4) if the defendant denies the suit claim, such denial is without any substance, in view of the other admitted facts.

(1) In ADDAGADARAGHAVAMMA V. ADDAGADACHENCHAMMA(5) the Hon'ble Supreme Court held at paragraph No. 15 (Manupatra) as follows:

> 15.....There is an essential distinction between burden of proof and onus of proof; burden of proof lies upon the person who has to

1) 1996 (3) Civil LJ 135 (Kerala)
2) AIR 1957 Pat 145
3) AIR 1979 Pat 174
4) AIR 1995 Guj 166
5) AIR 1964 SC 136

prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances, of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence.

(2) In CHINNAYYAN V. JAYARAMAN(6) the Madras High Court held at Paragraph No. 7 (Manupatra) as follows:

7.....Having thus considered the two reliefs, viz., the relief claimed in the suit as well as the counter-claim made in the written statement, with reference to the pleadings of the both the parties, it is all well to say that both the reliefs are different and distinct and the plaintiff and the defendant are put on separate onus to prove the said reliefs by adducing legal evidence. But, however, pursuant to the Order 18, Rule 1 of the Code of Civil Procedure, since the plaintiff has come forward with the suit with a specific relief, it is for him to discharge his onus first and then, the defendant is entitled to adduce rebuttal evidence, which may sometimes or if allowed by the trial Court, include the first issue framed for the purpose of trial regarding the counterclaim made in the written statement.

(emphasis supplied)

8. To substantiate the argument, learned counsel for the plaintiff has relied upon the judgment in MRS. BAMA V. RUKIYALBIVI(7) wherein the Madras High Court held at paragraph No. 6 as follows:

6.....If the defendant admits material allegations in the plaint, the defendant may begin. However, the plaintiff must prima facie satisfy that there are reasons to believe that particular thing is within the knowledge of the defendant....

9. The learned counsel for the defendant submitted that in a civil suit, evidence has to be recorded in a comprehensive manner touching all the issues but it cannot be split issue-wise. He further submitted that the defendant never admitted execution of agreement of sale dated 09.7.2000 and hence no legal obligation is cast on him to begin the trial. In support of his contentions, he has drawn attention of this court to the following decisions:

(1) SUNDARAGIRIRAMULU V

6) AIR 1996 Mad 408

7) AIR 2004 Mad 243

SUNDARAGIRISIDDIRAJAIAH @ SIDDIRAJU(8) wherein this court held at Paragraph Nos. 4 and 5 as follows:

> 4. In a suit for partition, the burden squarely rests upon the plaintiff, not only to prove, that the suit schedule property is liable to be partitioned, but also to establish his entitlement for a share, in it. The denial by the defendant, in such a suit, of any plea raised by the plaintiff, would only lead to a necessity, to undertake trial. The mere fact that the defendant had pleaded prior partition of the properties, does not alter the sequence, provided for, under Order 18 C.P.C.
>
> 5. The contention of the petitioner, that the respondent must be required to discharge his burden, as regards issue No. 1, is equally untenable. Issues are framed by the Trial Court, based upon the pleadings of the parties. While the burden to prove some issues may rest upon the plaintiff, the one, as regards the others, may be upon the defendant. The evidence in a suit is adduced by the parties, and recorded by the trial Court, in a comprehensive manner, touching all the issues. The evidence that is adduced by a party, would take care, not only of the issues, on which the burden is upon him, but also, those, as regards of which, the burden is, on the other party. Oral or documentary evidence cannot be split, with reference to each issue. Therefore, the application filed by the petitioner was untenable, and the Trial Court had rightly dismissed it.

(2) HARAN BIDI SUPPLIERS V. M/S. V.M. AND CO.(9) wherein Bombay High Court held at Paragraph Nos. 2, 3 and 4 as follows:

> 2.....The only reason indicated in the said order is that burden is cast on the plaintiff to prove only four issues out of total 14 issues and, therefore, the defendants have been directed to enter the witness-box. According to the non-applicant/ plaintiff, the said order was in terms of Order 18 Rule 1. Order 18 Rule 1 reads thus:
>
> "The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin."
>
> 3. On the plain language of the said provisions, it would appear that it is

8) 2008 (6) ALT 314
9) 2001 (4) CCC 415 (Bom.)

only an enabling provision entitling the defendant of right to begin. In my view, this provision cannot be interpreted to mean that the Court would be competent to direct the defendant to enter the witness-box before the plaintiff and lead evidence in support of its case. In the circumstances, the impugned order passed by the Trial Court cannot be sustained in law.

10. Let me consider the facts of the case on hand, in the light of the above legal principles. Basing on the pleadings of both parties, the trial court framed the following issues:

(1) Whether the agreement of sale deed dated 09.7.2006 (sic, 2000) was executed as a security for payment of ' 10,000/- by the defendant?

(2) Whether the plaintiff is in possession and enjoyment of the plaint schedule property?

(3) Whether the suit is bad for non-joinder of proper and necessary party?

(4) Whether the plaintiff is entitled to specific performance of agreement of sale dated 09.7.2000 as prayed for?

(5) Whether the plaintiff is entitled to injunction as prayed for?

(6) To what relief?

11. Issue Nos. 1 and 4 are interrelated to each other. Issue No. 4 is the main issue in the suit when compared to issue No. 1. On issue Nos. 2, 3 and 4, the burden of proof lies on the plaintiff. It is the case of the plaintiff that the defendant executed the agreement of sale in his favour on 09.7.2000. It is the case of the defendant that he executed a document dated 09.7.2000 as a security and not the agreement of sale. The defendant specifically and unequivocally denied that he never executed agreement of sale. The plea of the defendant is that he executed a deed as a security and not the agreement of sale. A perusal of the written statement prima facie reveals that the defendant has been challenging the very nature of the agreement of sale. The very basis for the plaintiff to file the suit is the document in question dated 09.7.2000. The defendant never admitted the document in question as an agreement of sale, as pleaded by the plaintiff. Mere admission of execution of a document does not amount to admission of the nature of the document. The real controversy between the parties in the suit is whether the document dated 09.7.2000 is an agreement of sale or a deed of security. In order to succeed the suit, the plaintiff has to prima facie establish that the document dated 09.7.2000 is an agreement of sale. If the plaintiff discharges

the burden of proof cast on him, the onus of proof shifts on the defendant to establish that the document dated 09.7.2000 is not an agreement of sale and it is only a deed of security. This is the real test to be followed by the trial court before directing the one of the parties to the suit to begin the trial.

12. The learned counsel for the plaintiff strenuously submitted that the defendant admitted the execution of the document; therefore he has to begin the trial. The finding of the trial court is that the defendant himself admitted execution of the document dated 09.7.2000; therefore, he has to begin the trial.

13. The trial court, in its order, made the following observation, "No doubt with regard to the hearing of 1st issue the burden rests on the plaintiff. Unless the defendant discharges his prima facie burden of proving alleged execution of said agreement of sale as a security, it may be held, the burden will be shifted to the plaintiff. As such the direction can be given to the defendant to commence the trial, in view of the discussion and objections made supra." A perusal of the extracted portion gives an impression even to an ordinary prudent man that the burden of proof of lies on the plaintiff on issue No. 1. Whether the trial court is justified in directing the defendant to begin the trial, having come to such a conclusion, is one of the points to be considered by this court. By overruling the objection of the defendant on the Memo, though not directly by necessary implication, the trial court has accepted the contention of the plaintiff that the document dated 09.7.2000 is an agreement of sale and not a security bond, even before commencement of trial, which is impermissible under law. The finding of the trial court, as referred supra, is contrary to Order XVIII of CPC. Had the defendant admitted the execution of "agreement of sale" dated 09.7.2000, the burden of proof lies on the defendant, but, the defendant denied the very nature of the document itself. Since the defendant denies the very nature of the suit document itself, the burden of proof of lies on the plaintiff that the suit document is an agreement of sale dated 09.7.2000 executed by the defendant. Once the plaintiff discharges the burden of proof cast on him then only the onus of proof shifts on the defendant to prove his stand. Leave that apart, the trial court has not considered the scope of issue No. 4, which is the core issue in the suit. Undoubtedly, the burden of proof lies on the plaintiff on issue No. 4. Though issue Nos. 2 and 3 are ancillary to issue No. 4, the burden of proof lies on the plaintiff on these two issues. Out of four issues framed by the trial court, the burden of proof lies on the plaintiff on three issues, which includes the core issue. In such circumstances, directing the defendant to begin the trial is contrary to Order XVIII Rule 1 of CPC and Sections 101 to 104 of Indian Evidence Act. The trial court has not expressed any opinion on whom the burden

of proof lies on issue Nos. 2, 3 and 4.

14. Having regard to the facts and circumstances of the case and also principle enunciated in the cases cited supra, the Memo filed by the plaintiff is not sustainable either on facts or in law. While exercising the jurisdiction under Article 227 of the Constitution of India, this court can interfere with the order passed by the trial court when there is illegality or irregularity apparent on the face of the record. If the order of the trial court is allowed to stand, certainly it would amount to miscarriage of justice. Hence, it is liable to be set aside. In the result, the civil revision petition is allowed, setting aside the order dated 12.6.2013 passed on Memo in O.S. No. 28 of 2006. Consequently, the Memo filed by the plaintiff in O.S. No. 28 of 2006 on the file of the Court of Junior Civil Judge, Gannavaram is hereby rejected. Miscellaneous petitions, if any pending in this civil revision petition shall stand closed.

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2017(3) L.S. 78

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

Mohammad Abdul Raheem ..Appellant

Vs.

Kavuri Sarath Raj ..Respondent

A.P. BUILDINGS (LEASE, RENT AND EVICTION) CONTROL ACT, 1960 – Secs,3(a)(i)(a),10(2)(i)(ii)(b) & 20 – Petitioner took schedule property on lease from respondents - First respondent is owner of the premises, affairs of the premises are taken care by second respondent who is the grand father of first respondent - Schedule premises were let out for commercial purpose with a clause that petitioner has to meet the charges for conversion of electricity meter from category –I to category- II.

Respondents filed a petition before Trial Court against petitioner for eviction from schedule premises and to deliver vacant possession to respondents with costs – Petition was allowed by the trial court, directing petitioner to vacate schedule premises

CRP.No.3677/2016 Dt:14-02-2017

within two months from date of Order.

Held - It is for the land lord to decide which portion is convenient for him to reside in schedule property and tenant cannot dictate to landlord to occupy a particular portion – Petitioner has deviated from agreement by using schedule premises for domestic purpose apart from commercial purpose – Instant petition stands dismissed.

Cases referred:
2009 (2) ALT 537
2012(3) ALD 100
2001 (8) SCC 561
2006 (4) ALD 523
2003 (6) ALD (NOC) 16

Mr.Koneti Raja Reddy, Advocate for the Appellant.

O R D E R

This revision has been filed by petitioner challenging the order and decree dated 30.11.2013 passed in RCC No.5 of 2009 on the file of Rent Controller-cum-Principal Junior Civil Judge, Tenali.

2. The brief facts of the case are that the respondents herein filed a petition in RCC No.5 of 2009 against the petitioner herein under Section 10 (2)(i)(ii)(b) and Section 3(a)(i)(a) of A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960 for eviction of the petitioner from the schedule premises and to deliver the vacant possession to the respondents with costs. The said petition was allowed with costs by directing the petitioner to vacate the schedule premises within two months from the date of the order. Failing which, the respondents are at liberty to evict the petitioner as per law contemplated. The advocate fee also fixed at Rs.2,000/-.

3. However, the respondents preferred RCA No.2 of 2014 filed under Section 20 of A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960 against the order and decree dated 30.11.2013 passed in RCC No.5 of 2009 by the Rent controller-cum-Principal Junior Civil Judge, Tenali, to set aside the findings dated 30.11.2013 in RCC No.5 of 2009 in respect of (a) willful default aspect; (b) towards costs. The said RCC was allowed directing the petitioner to vacate the schedule premises within two months from the date of the order on the ground of willful default in payment of rent.

4. Being aggrieved by the aforesaid order, the petitioner filed the present civil revision petition on the ground that the Courts below erred in holding that the respondents require the premises for their bonafide personal occupation, is incorrect. From the date of filing of the petition, adjacent portion to the portion in which the second respondent was in occupation was vacant which could be more convenient for the first respondent to occupy by the second respondent and his wife.

5. The Courts below further erred in holding that the petitioner was not using the premises for the purpose for which it was let out. The courts below failed to see that the schedule premises was let out for computer classes for teaching as well as partial residential purposes to take rest by the teachers does not amount to change of use.

6. The Courts below further failed to see that admittedly the premises let out is a residential portion and as such the use of the same even for residential purpose do not give rise to eviction and the understanding of the Courts below in this regard is incorrect. So long as the rent as agreed is paid, the used premises as residential premises for which it was meant do not give rise to a cause to evict the petitioner.

7. Further ground is taken by the petitioner is that use of premises even for residential purpose do not cause any damage to the property or loss to the landlord or in any way affect the parties, accordingly, the same is not a ground for eviction.

8. The case of the petitioner is that he took the schedule property on lease in the year 1997 and later he entered into an agreement on 05.05.2001 with the first respondent. The petitioner had occupied the premises on 15th May 2001 and paid Rs.15,000/- as advance and the agreed rent, under the agreement, was Rs.400/- per month. Later, he gradually enhanced the same from Rs.400/- to Rs.1500/- per month at the instance of the respondents. The petitioner has been regularly paying the rents. As the respondents refused to receive the rent in December 2008, he sent the rent by way of pay order. The reply notice got issued by him clearly discloses the same. Later, the respondents had received the rents regularly.

9. Learned counsel appearing on behalf of the petitioner submitted that the petitioner is running Intel Computers in the schedule property and the brothers of the petitioner are the teachers. All his brothers are running the said institution in shift duty. Due to adamant behavior of the respondents, the strength of the students was decreased gradually. In fact, some of the tenants in the complex are using their portion for commercial purpose and others are using for residential purpose. Originally the complex in which the schedule property is, a part was built for residential purpose. By the date of issuance of notice by the respondents, there were four empty portions in the complex. During trial, one portion was occupied by Veda Software for running the computer education. Still there are two vacant portions in the complex. If really, the respondents intend to occupy the additional accommodation, they can occupy one of the portions which are still vacant. However, the respondents with an ulterior motive are determined to vacate the petitioner with all false allegations for the

reasons best known to them. The petitioner had paid an amount of Rs.15,000/- as advance to the respondents and Rs.15,000/- towards penalty to convert the electricity meter from Category-I to Category-II . He has been paying rent regularly. The petitioner has also using the premises as per the terms and conditions of the understanding between the respondents and the petitioner. Hence, the order passed by the court below is contrary to the material available on file.

10. On the other hand, learned counsel appearing on behalf of the respondents herein submitted that the first respondent is the absolute owner of the petition schedule property and the second respondent, who is the grandfather of first respondent, is looking after the affairs of first respondent on his behalf. The schedule property is the residential portion having electricity meter under Category-I for domestic purpose bearing No.28294. The petitioner had taken the schedule property on lease for running Intel Computers for 11 months i.e., from 01.07.2000 to 01.06.2001 from second respondent at a monthly rent of Rs.1900/- plus Rs.100/- towards providing water and other facilities payable by the 5th day of every succeeding month. The petitioner had agreed to pay the electricity charges as service connection is under Category-I. However, in spite of repeated requests made by the second respondent, the petitioner delayed in obtaining permission from the electricity department for changing the service connection under Category-II. Therefore, the Electricity Department got issued a notice to the wife of the second respondent on 18.08.2000 as if guilty of malpractice. The petitioner did not pay the rent of Rs.2000/- from August 2000 onwards, and accordingly, he had committed willful default in payment of rent. Instead of paying the rent and vacating the premises, the petitioner got filed a suit in O.S.No.205 of 2003 on the file of Principal Junior Civil Judge, Tenali against the respondents and got obtained decree on 09.08.2007. Though the petitioner had taken the schedule property for running Intel Computers, which is for non-residential purpose, he has been using the schedule property for domestic purpose and residing with his family in the schedule property. Moreover, the petitioner has also been causing waste and damage to the schedule premises by closing the doors under lock and key for months together.

11. It is also submitted that now the first respondent has been residing at Ithanagar in other house. Therefore, the respondents got issued a registered legal notice on 31.12.2008 not only demanding the petitioner for payment of arrears of rent from August 2000 to till December 2008 and also demanded to deliver the vacant possession of the schedule property. The petitioner received the said notice on 07.01.2009 and sent an envelope cover on 13.01.2009 with a pay order for Rs.1,500/- without any particulars. However, without prejudice to their contention and by not admitting that

the rent per month is only Rs.1500/-. After sending the first pay order, the petitioner got issued a reply through his counsel with all false allegations. By receiving the legal notice, the respondent had came to know that Rs.1500/- is sent by the petitioner towards rent of December,2008. Therefore, it is clear that the petitioner has not only committed willful default in payment of rent other than he has let out and the respondents are also require the schedule property for their bonafide requirements. Hence, the respondents prayed for eviction of the petition schedule property.

12. Heard learned counsel for the parties and perused the material on record.

13. The issues before the Court below and before this Court are that:

1) Whether the petitioner is a willful defaulter in payment of rent?

2) Whether the respondents require the schedule premises for their bonafide requirement?

3) Whether the petitioner has changed the nature of using of the schedule property from commercial to domestic purpose, thereby he is liable to be evicted from the schedule property?

14. The case of the respondents is that the petitioner had taken the schedule premises on 01.07.2000 for a period of 11 months till 01.06.2001 for a monthly rent of Rs.1900/- + Rs.100/- towards water charges. Since then, the petitioner has been in possession of the schedule premises. The petitioner has paid one month rent after he had taken possession of the schedule property. Thereafter, the petitioner has made default in payment of rent and did not render any rent thereafter, thereby committed willful default in payment of rents.

15. To establish the case, the second respondent was examined as PW.1 who deposed that the first respondent is the owner of the schedule property and managing the entire property of the first respondent and the petitioner had entered into an agreement with him for establishing Intel Computers in the schedule premises and entered into an agreement on 01.07.2000 agreeing to pay the rent at Rs.1900/- and Rs.100/- towards water charges per month. At the time of agreement it was agreed by the petitioner that he shall to take steps for conversion of electricity connection from Category I to Category II. However, he did not heed the words of the second respondent in spite of several requests made by him and avoided the conversion of electricity service connection, consequently, the electricity department had issued a notice to the wife of the second respondent demanding for payment of penalty. Thereafter, the petitioner had paid penalty for conversion of electricity connection. The schedule property is having eight portions and the petitioner has

occupied one of the portions and the remaining seven are let out. The respondents also let out one of the portions to ICICI bank. There is a variation of rents for the portions which are abutting to the road which are let out for commercial purpose with that of the portions which are situated back side to the building and which are using for residential purpose. Out of 8 portions, three portions are leased out for commercial purpose and four portions are leased out for domestic purpose and one portion is in his occupation. The said respondent admitted that he has been receiving the pay orders to a tune of Rs.1500/- per month since the date of issuance of legal notice by the first respondent as per Ex.A2.

16. It is pertinent to mention here that the petitioner has filed a suit vide O.S.No.205 of 2003 and thereafter the respondent filed suit vide O.S.No.65 of 2004. The case of the petitioner is that he has entered into the schedule premises in the year 1997 and since then he is having possession of the schedule property and running Intel Computers in it. Subsequently, on 05.05.2004 he has entered into a lease agreement with the respondent and the rent was fixed at Rs.400/- per month. Thereafter, in four intervals the same was enhanced from time to time with the consent of the respondents and in the year 2008, the rent was came to Rs.1500/- per month. To prove his contention, the petitioner himself was examined as RW.1 and deposed that though there are disputes between him and respondents, he has been paying the rents regularly as per the agreement between them. During December, 2008 the petitioner had tendered rent to the respondents. But, the respondents refused to receive the rent and issued a legal notice. Then the petitioner sent rent by way of Pay Order to a tune of Rs.1500/- till to date he has been sending the amounts by way of Pay Orders and the same was received by the respondents. He deposed innocence with regard to the existence of the lease deed dated 01.07.2000.

17. As per the settled law, the initial burden is on the respondents to prove that the petitioner is in willful defaulter in payment of rents. In a case reported in VENUKONDA RADHA KRISHNA VS. PULLIVARTHI RAMAIAH(1) , wherein it was held that under the law of evidence when once a particular party asserted that the other party committed willful default in payment of the rent, the burden is on him to prove that the tenant willfully failed to pay the rent.

18. Keeping in view the facts discussed above, it is established that the respondents filed petition for eviction of the petitioner from the schedule premises as if he has been committing willful default in payment of rents since August 2000 and he is in arrears of rent to be paid to the respondents. In that eventuality, the entire onus is on the respondents to show that the petitioner is in willful default in payment of rent. To

1. 2009 (2) ALT 537

prove the same, the respondents themselves examined as PWs.2 and 1, who deposed about the entering of lease agreement by them with the petitioner on 01.07.2000 and fixing of rent at Rs.2,000/- per month. Though there is a variation with regard to when petitioner came into possession of the schedule property. But from the evidence of both parties, it is established that the schedule premises was let out to the petitioner for running Intel Computers.

19. It is also an admitted fact that originally the schedule premises is built for residential purpose but the same was let out for commercial purpose for running a computer institution. From the evidence of RW1 also it is established that the petitioner was agreed to pay the conversion charges of the electricity service connection to be used for commercial purpose. From the evidence of PW.1 and RW.1 it is established that subsequently the electricity department has got issued a notice to the wife of the second respondent calling upon her to pay penalty for using of the service connection for commercial purpose instead of residential purpose. From the evidence of RW.1, it is proved that he has paid an amount of Rs.15,000/- for penalty to the electricity department as per the demand made by the electricity department.

20. In view of the facts recorded above, the Court below opined that from the evidence of both parties and admission of payment of penalty to the electricity department by the petitioner, it is clear that there is a written agreement between the parties, but either party has failed to produce the alleged lease agreements, dated 01.07.2000. Further as per the version of the petitioner the said agreement was executed on 05.05.2001. From the evidence of both parties, it is clear that there is no passing of receipts between them. From the evidence of PW.1 it reveals that immediately after the petitioner entered into the schedule premises after lapsing of one month the electricity department had issued a notice to the wife of the second respondent. It is also the evidence of RW.1 that there arose a dispute between him and the second respondent with regard to the enhancement of rent and demanding for conversion of the electricity connection, thereby the petitioenr had instituted a suit vide O.S.No.205 of 2003 for permanent injunction against the respondents and the said suit was decreed in the year 2007. Though the petitioner had filed injunction suit against the respondents in the year 2003, it is the contention of the respondents that after lapse of one month of the entering of the petitioner into the schedule property as a tenant, the petitioner had not paid any rent, thus became willful defaulter. But the respondents did not got issued any notice even after filing of the suit by the petitioner against them in the year 2003. Though it is an admitted fact that in the year 2004 the respondents had filed a suit for arrears of rent vide O.S.No.64 of 2004 but prior to the filing of that suit during the pendency of

O.S.No.205 of 2003, he did not got issued any legal notice demanding the petitioner calling him to pay the rent due to him along with arrears of rent which is alleged by the respondents.

21. It is also on record that in the suit filed by the petitioner, he has relied on lease deed dated 05.05.2001 and basing on it, the court has also decreed injunction against the plaintiff. Then it is presumed that there is a lease deed dated 05.05.2001. However, coming to the evidence of RW.1, the lease deed dated 01.07.2000 is in the following lines:

The lease agreement of 01.07.2000 are counter part is with first respondent and another counter part of document was filed by him in the court proceedings for the suit in the year 2003. In the lease agreement dated 01.07.2000, there is no stipulation by whom the conversion charges has to be paid.

22. From the above evidence of RW.1, it appears that there is also a lease agreement dated 01.07.2000 as alleged by the respondents. However, why the parties have entered into two lease agreements within a period of ten months, the said fact has not come on record as either party failed to file said lease agreement before the Court. However, on accepting the rent at the rate of Rs.1500/- per month and on a perusal of income tax assessments as per Ex.P8 to Ex.P14, it reveals that might be as on the date of filing of the petition, rent for the schedule premises was Rs.1500/- per month. It is also an admitted fact that the suit which was filed by the respondents vide O.S.No.64 of 2004 was dismissed for default during the pendency of injunction suit which was filed by the petitioner.

23. It is not out of place to mention here that the aforesaid issue was not before the Court below however it came on record from the evidence and on perusal of Ex.A1, and as per Ex.A1, the suit filed by the petitioner was decreed in the year 2007.

24. As per the case of the respondents, the date of dispute is in the month of August 2000 from where the petitioner has not been tendering amount/rents to them. Thus, the cause of action arose in the month of August 2000. From the admissions made by PW.2 in his evidence that even after the date of disputes between him and the petitioner as well as after passing of notice between them, the petitioner has been paying the rents regularly itself disclosed that not only pay order which was paid by the petitioner after notice, the petitioner is tendering rents regularly as pleaded by him.

25. In a case reported in GISULAL GULABCHAND VS D. HARINARAYANA(2) , wherein it was held by this Court in para No.18 by referring the case of Jametti Satyanarayana, Nimmagadda Krishna Hari and anothers case and Mohd Khajas case

2. 2012(3) ALD 100

, wherein it was held that Procedure prescribed under Section 8 of the Act is not mandatory in nature but only directory. However, the court observed that it is bound by the judgment of the Apex Court in M. Bhaskars case, which was not placed before the Court in the above referred decisions of this Court.

26. The petitioner has adduced evidence of himself as RW.1 and also examined RW.2 to RW.4, who are the lecturers of his institution showing that the petitioner is paying rents without any default from the date of entering into lease agreement in the year 2001 till date of issuance of notice in the December, 2008. However, the petitioner has failed to show that the amounts which are rendered by the respondents is not original rent amount as alleged by him. Except the evidence of PWs.1 and 2, who are owner and Manager of the property, they did not adduce any evidence of the other tenants, though it was came on the record from the evidence of PW.1 that schedule property contains 8 portions and he had given three portions for residential purpose and 4 portions for commercial purpose and he has occupied one of the portions. Form the above discussion, it is established that the petitioner has been a willful defaulter in payment of rent.

27. On the issue of whether the respondents required the schedule premises for their bonafide requirement? The second respondent is an old aged person and the grand parents of the first respondent are effected with old age ailments and the continuous service of respondent is necessary for which he has to occupy the schedule property, which is convenient for him to reside.

28. In a case reported in SIDDALINGAMMA AND ANOTHER VS. MAMTHA SHENOY (3) , wherein the Honble Apex Court has considered the parameters of bonafide requirement and it was held that bonafide requirement must be the outcome of sincere, honest desire in contradistinction with a mere pretext for evicting the tenant on the part of the landlord claiming to occupy the premises or for any member of the family. Thus, the bonafide means a good faith and genuine cause for seeking possession of the schedule property which is in good faith without fraud or deceit.

29. It is established from the evidence of PW.1 as well as pleadings, since the beginning, the respondents claiming the schedule premises for their bonafide occupation, as if the grand parents of the first respondent are old in age and they are suffering with old age ailments and he is the only person to see the welfare of his parents, thereby residing near the schedule premises is necessary to look after his grand parents. Moreover, from the evidence of RW.1, it is established that the second respondent is an old aged person and both

3. 2001 (8) SCC 561

grand parents are residing in first floor of the schedule property and they require the services of this respondent being a grandson.

30. It is settled preposition of law that it is the landlord to decide which portion is convenient for him to reside in the schedule property. However, the tenant cannot dictate to the landlord to occupy a particular portion. Tthe judgment rendered by this Court reported in DUNNA VENKATA RAO VS. MOOTHA RAMAKOTI(4) , is relevant in the present case, wherein it was held that it is the choice of the landlord to choose his premises for the purpose of accommodating his own business. In the light of the same, the contradictory stand if any taken in pleading and proof can not come in the way of the landlord getting an order of eviction on the ground of bonafide personal requirement.

31. In a case reported in NARAYANA RAO PATALAY (DIED) BY LRSVS. NARESH THAPPOR(5) , wherein this Court held that landlord has a right to choose any premises of his choice.

32. Though there are some other vacant portions in the first floor as the building contains eight portions, the respondents could choose other portion instead of the schedule premises. However, keeping in view the judgments cited above, the landlord has a choice to choose a place for his residence or bonafide necessity to run the business.

33. Coming back to the case in hand, the petitioner has changed nature of using of the schedule property from commercial to domestic. The schedule property is in occupation of the petitioner as a tenant to run computer institution, which is for commercial purpose. The said fact also came on record from the evidence of PW.1, PW.2 and RW.1 that though the schedule property was constructed for domestic purpose, however, it was let out for commercial purpose with a clause that the petitioner has to meet the charges for conversion of electricity service connection from Category-I to Category-II. It is also on record from the evidence of both parties that in August 2000 electricity department has got issued a notice to the wife of the second respondent to pay penalty and the same was paid by the petitioner, who had agreed the same in view of the agreement arose in between them. Moreover, Ex.P15-certified copy of meter reading with regard to the electricity consumption of the schedule premises from January 2006 to April 2012, reveals that the petitioner was not consuming the electricity though he claimed to be running computer centre in the schedule premises.

34. Moreover, to prove the aforesaid fact, an Advocate Commissioner was appointed who visited the schedule property and filed his report under Ex.C2 whereby stated that

4.2006 (4) ALD 523
5.2003 (6) ALD (NOC) 16

apart form the office room and class room, in the bed room there are household articles. He also found gas stove and other utensils which are used in kitchen in the verandah outside the schedule property which includes the Washing Machine, Deewan Cot, Sofa Set, Single cot etc. It is further mentioned in the report that except one computer which is in the office room none of the computers are working. It was further noticed by the Advocate Commissioner that it was reported by the petitioner that the other six computers are not working in view of the not functioning of the stabilizer.

35. The court below, on a perusal of entire contents of the Advocate Commissioner, it is opined that there is no running of classes in the schedule property. Though, there is evidence from the deposition of RWs.1, 2 to 4, who are lecturers in the Intel Computers, however failed to file any single piece of document with regard to the running of classes; attendance register of the students; how many batches are running and what are the number of students in each batch; account books and the information with regard to the examinations conducted by the said institute etc.

36. It is established from the evidence of RW.1 that since 2002, there is no good running of the business in the schedule property. Since then, the petitioner is continued in the schedule property as if he is running Intel Computers in the schedule property. But in Ex.C2, it is very clear that the petitioner is using the schedule property for domestic purpose. Thus, it is clear that the petitioner has deviated from the agreement by using the schedule premises for domestic purpose apart from commercial purpose.

37. In view of the above discussion, I find no perversity or illegality in the impugned order and decree dated 30.11.2013 passed in RCC No.5 of 2009 by the Rent Controller-cum-Principal Junior Civil Judge, Tenali.

38. Finding no merit in the instant petition and the same is accordingly dismissed. There shall be no order as to costs.

Miscellaneous Petitions, if any pending, shall stand closed.

–X–

2017(3) L.S. (Madras) 17

IN THE HIGH COURT OF MADRAS

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

Karthikeyan ..Petitioner

Vs.

K.K.Ramesh Babu
& Ors., ..Respondents

CIVIL PROCEDURE CODE, Or. IX, Rule.13 - Petitioner has laid suit before Trial Court for the reliefs of declaration – From 1999 onwards suit had been listed for filing written statement by respondents and only some of the respondents have filed written statement in the year 2003, resultantly, set ex parte.

Respondents have come forward with an application to set aside ex parte decree passed against them as there was a delay of 2735 days – The reason given by respondents for the said delay is that they were not aware of ex parte decree passed and no intimation had been received from their advocate about the progress of the suit – Trial Court has entertained application preferred by respondents.

Held – Plea of respondents that on account of their advocate's failure to send communication to them about the progress of the suit, they are unable to know about the progress cannot be believed and accepted in any manner – Respondents have not endeavored to set aside ex parte decree passed against them immediately after coming to know about the same – Order of Trail Court in entertaining application preferred by respondents to condone delay of 2735 days is incorrect and unacceptable and accordingly, it deserves to be set aside – Civil revision petition is allowed.

Mr.J.Barathan, Advocate for Petitioner .
Mr.R.Subramanian for R1 to R9, Advocate For Respondents.

O R D E R

The petitioner / plaintiff has laid the suit, in O.S.No.1603 of 2006, on the file of the Principal District Munsif Court, Madurai Town, for the reliefs of declaration and it is found that the respondents herein are the defendants 1 to 9 in the said suit. It is further found that the above said suit of the petitioner / plaintiff was originally instituted as a pauper original petition in P.O.P.No.72 of 1988, on the file of the Sub Court, Madurai and thereafter, on the basis of the pecuniary jurisdiction, it is found that the above said suit had come to be transferred to the Principal District Munsif Court, Madurai and renumbered as O.S.No.1603 of 2006. It is found that the defendants 1 to 9 had entered appearance in the suit, when the matter was pending at the stage of in forma pauperis, through an Advocate by name M.N.Sankaran and

contested the matter. Further, it is found that the request of the petitioner / plaintiff to permit him to file the suit in forma pauperis was negatived by the Court below. It is further found that after the intervention of the High Court, the pauper original petition had been converted into a regular suit as adverted above and even thereafter, the defendants 1 to 9 have been contesting the suit of the plaintiff and taking time for filing their written statement in the matter. It is further found that from 1999 onwards, the suit had been listed for filing written statement by the defendants in the suit and finally only some defendants have filed their written statement and accordingly, on 27.02.2003, inasmuch as the other defendants did not file written statement, they were called absent and resultantly, set ex parte. It is found that thereafter, issues were framed in the suit and the suit had been posted for trial. These happenings had occurred when the suit had been pending on the file of the Sub Court, Madurai. Thereafter, it is found that at the trial stage of the suit, on account of pecuniary jurisdiction, the suit had come to be transferred to the Principal District Munsif Court, Madurai and renumbered as O.S.No.1603 of 2006. It is, thus, found that the defendants 1 to 9 had been set ex parte in the suit even when the matter was pending on the file of the Sub Court, Madurai. In such view of the matter, it is found that inasmuch as the suit had been contested by the other defendants in the matter when the suit had been transferred to the file of the Principal District Munsif, Madurai, on account of pecuniary jurisdiction and inasmuch as the defendants 1 to 9 had already been set ex parte, according to the learned counsel for the plaintiff, on such transfer, it is not necessary to send notice to the defendants 1 to 9, who had already been set ex parte in the suit proceedings. Thereafter, on the suit having been transferred to the Principal District Munsif Court, Madurai, when the suit was listed for trial and inasmuch as the remaining defendants had also not contested the suit and remained ex parte, it is found that the ex parte decree had come to be passed as against all the defendants on 16.11.2007.

2. Now, the defendants 1 to 9 have come forward with an application to set aside the ex parte decree passed against them in the suit on 16.11.2007 and inasmuch as there is a delay of 2735 days in filing the said application, it is found that the defendants 1 to 9 have laid the application in I.A.No.441 of 2015 to condone the said delay. The reasons given by the defendants 1 to 9 for the said delay is that they were not aware of the ex parte decree passed in the suit on 16.11.2007 and though they had engaged an Advocate M.N.Sankaran to defend their cause and inasmuch as, according to them, no intimation or information had been received from the said Advocate as to the progress of the suit and as they were bona fidely believing that the

said Advocate would inform them about the status of the suit and as their Advocate had not sent any communication, according to them, they were unable to know the progress of the suit and further, according to them, only on 12.12.2014 they had come to know about the ex parte decree passed in the suit as by that point of time, according to them, the plaintiff had filed a claim application in the TANPID Court for raising the attachment and accordingly, on coming to know about the ex parte decree passed against them, it is stated that they have taken steps to set aside the same and hence the delay had occurred. It is found that in the affidavit, the defendants 1 to 9 have not stated that they are unaware of the transfer of the suit from the Sub Court, Madurai, to the Principal District Munsif Court, Madurai, on account of the pecuniary jurisdiction. A reading of the reasons given by the defendants 1 to 9 for the condonation of the delay would only go to disclose that they have thrown the entire blame on the Advocate M.N.Sankaran for the ex parte decree passed against them and further, according to them, the said M.N.Sankaran had acted in collusion with the plaintiff and acted against their interest and thereby it is stated that the ex parte decree had been passed without their knowledge and hence, the same is liable to be set aside.

3. The above said application of the defendants 1 to 9 had been stiffly resisted by the plaintiff contending that all along the defendants 1 to 9 had been represented by their Advocate in the suit proceedings right from its inception and they have been fighting tooth and nail and accordingly, the Court below had been granting adequate time for filing written statement on their behalf and inasmuch as they had not filed written statement, accordingly they were set ex parte and the suit proceeded along with the contest of the other defendants and thereafter, on the question of pecuniary jurisdiction, the suit had come to be transferred to the Principal District Munsif Court, Madurai and thereafter, inasmuch as the other defendants also did not contest the matter and remained ex parte, the ex parte decree had come to be passed in the suit on 16.11.2007. It is the further case of the plaintiff that the defendants 1 to 9 have conveniently thrown the blame on their Advocate M.N.Sankaran for justifying the huge and inordinate delay and if the defendants 1 to 9 have diligently followed the case and had a good case to defend the matter, they would not have waited endlessly for more than 7 + years for the intimation about the progress of the suit from the Advocate concerned and on the other hand, inasmuch as they have no case at all to defend, it is stated that the defendants 1 to 9 have not taken care to file the written statement and also not contested the matter as per law and only thereafter, it is alleged that the defendant 1 to 9's power agent, on seeing the efforts of the plaintiff' to raise the attachment of

the property concerned in the TANPID Court, had preferred the application without any sufficient cause and it is further stated that even as per the case of the defendants 1 to 9, on coming to know about the ex parte decree on 12.12.2014, even thereafter also immediately they have not preferred the application to set aside the ex parte decree and only 22.06.2015, the application has come to be preferred and hence, it is stated that with a view to cause irreparable loss and hardship to the plaintiff and to delay the proceedings endlessly, the defendants 1 to 9 have come forward with the delay condonation application containing false reasons and hence, the application is liable to be dismissed.

4. In support of the defendants 1 to 9's case, P.Ws.1 and 2 were examined and Exs.P1 to P20 were marked and on the side of the plaintiff, R.Ws.1 and 2 were examined and Exs.R1 to R11 were marked.

5. The Court below, on a consideration of the rival contentions put forth by the respective parties and the materials placed, entertained the application preferred by the defendants 1 to 9. Impugning the same, the present civil revision petition has been preferred by the plaintiff.

6. In the suit laid by the plaintiff, the defendants 1 to 9 have been set ex parte for their failure in filing the written statement. Thereafter, it is found that inasmuch as the other defendants had also failed to contest the suit laid by the plaintiff, on 16.11.2007, an ex parte decree had come to be passed in the suit in favour of the plaintiff. In order to set aside the same, the defendants 1 to 9 have preferred an application, under Order IX Rule 13 C.P.C. Inasmuch as there is a delay of 2735 days in filing the said application, the application in I.A.No.441 of 2015 has been preferred to condone the said delay. The reasons given by the defendants 1 to 9 for the condonation of the delay is that they were not aware of the ex parte decree passed against them in the suit and inasmuch as their Advocate M.N.Sankaran had not informed about the progress of the suit by sending any communication to them and as they were waiting endlessly for the communication from the Advocate, they were not in a position to know about the progress of the suit and only after the plaintiff had taken steps to raise the attachment of the property concerned in the TANPID Court, according to them, they had come to know about the ex parte decree passed against them in the suit and hence, the delay had occurred. A reading of the averments contained in the affidavit filed by the defendants 1 to 9 for the condonation of the delay would go to show that they have completely thrown the blame on their Advocate. It is their case that since their Advocate failed to inform them about the progress of the suit, they were kept in dark. However, as rightly contended by the learned counsel for the

plaintiff, if the defendants 1 to 9 were serious in their defence and had a valid defence to resist the suit, as prudent persons, they would have endeavoured to know the progress of the suit from the Advocate concerned now and then. Therefore, the plea of the defendants 1 to 9 that on account of their Advocate's failure to send communication to them about the progress of the suit, they are unable to know about the progress of the suit as such cannot be believed and accepted in any manner. It is further stated that the Advocate concerned had acted in collusion with the plaintiff and against their interest and thereby, he had left the suit to go for ex parte against them. However, with reference to the allegation that the Advocate concerned had acted in collusion with the plaintiff, there is no acceptable and reliable material. Even as regards the allegation that the said Advocate had acted against their interest, it is found that there is no acceptable and reliable material. It is further seen that according to the defendants 1 to 9, they came to know about the ex parte decree only on 12.12.2014 only, when the plaintiff preferred a claim application to raise the attachment in the TANPID Court, however it is found that the present application had come to be preferred by the defendants 1 to 9 only on 22.06.2015. It is, thus, seen that even after coming to know about the ex parte decree, as per the case of the defendants 1 to 9, they had not chosen to prefer the application at the earliest opportunity and they have taken their own time in preferring the application five months thereafter. This would only go to show that the defendants 1 to 9 are not serious in defending the matter and their only aim is to procrastinate the matter one way or the other.

7. A perusal of the reasons given by the defendants 1 to 9 for the delay would go to show that they had thrown the entire blame on their Advocate, who entered appearance on their behalf in the suit. However, it is found that at the stage when the defendants 1 to 9 were set ex parte in the proceedings, they were not represented by their power agent and only at the time of filing of the present application, it is found that they are being represented by the power agent. Therefore, it could be seen that the power agent would not have any personal knowledge about the suit proceedings, which had occurred till the date of the defendants 1 to 9 were set ex parte in the proceedings. This has been admitted by the power agent also, who has been examined as P.W.1. Now, according to the defendants 1 to 9, only on 12.12.2014 they had come to know about the ex parte decree passed against them. With reference to their case, they had chosen to examine the power agent as P.W.1. P.W.1, during the course of cross-examination, has admitted that he does not know whether the defendants 1 to 9 have not filed written statement in the suit and also admitted that he does not know whether the defendants 10 to 15 have filed written statement in the suit and also admitted that he does not know whether the suit had ended in an ex

parte decree one year after the suit had been transferred to the Principal District Munsif Court, Madurai and renumbered as O.S.No.1603 of 2006. It is further admitted by him that till the passing of the ex parte decree in the suit, he had not taken part in the suit proceedings. It is, therefore, found that P.W.1 is not personally aware of the happenings, which had occurred prior to the passing of the ex parte decree in the suit. In such view of the matter, it is found that the evidence of P.W.1 would not in any manner be useful to sustain the case of the defendants 1 to 9 for the condonation of the delay. When P.W.1 had come to the picture only at the stage of filing of the application to set aside the ex parte decree and not aware of the happenings prior to the passing of the ex parte decree, his evidence that the defendants 1 to 9 were not aware of the progress of the suit on account of the mistake committed by their Advocate as put forth cannot be accepted in any manner. Now, according to the defendants 1 to 9, only on 12.12.2014, they had come to know about the ex parte decree. However, the above said case itself is found to be false. In this connection, it is found that P.W.1, during the course of cross-examination, has admitted that the defendants 1 to 9 were represented by their Advocate M.N.Sankaran at the stage when the suit was laid as in forma pauperis and the defendants 1 to 9 themselves had engaged the said Advocate and the said Advocate is a Senior Advocate and known to him and the said Advocate would conduct the case honestly. This admission of P.W.1 would go to show that the reasons given by the defendants 1 to 9 that they have no knowledge about the progress of the suit on account of the mistake committed by their Advocate would fall to the ground. When according to P.W.1, the Advocate engaged by the defendants 1 to 9 is an honest Advocate and he would conduct the case properly and diligently, the present allegation put forth against him that he had not informed about the progress of the suit to the defendants 1 to 9 and hence, they were unaware of the progress of the suit etc., cannot at all be accepted in any manner. Further, when P.W.1 was asked as to when he had met the Advocate M.N.Sankaran after the passing of the ex parte decree, he has deposed that after four or five days after the passing of the ex parte decree, he met the concerned Advocate. Therefore, it is found that after the passing of the ex parte decree, P.W.1 had met the Advocate. Therefore, to state that the defendants 1 to 9 or for the matter, P.W.1 had come to know about the ex parte decree only on 12.12.2014 as such cannot be accepted. On the other hand, it is found that the defendants 1 to 9 are aware of the ex parte decree even within four to five days after the passing of the same through their Advocate and this fact has been admitted by P.W.1 as above stated. In such view of the matter, the reasons given by the defendants 1 to 9 for the condonation of the delay are found to be not true and false. Further, P.W.1 has also admitted that when he met the Advocate four or five days after the passing of the ex parte decree, he along with the defendants 1 to 9 met the Advocate and he was informed by the defendants 1 to 9 that they had come to know about the ex parte decree through the Advocate Ranjith and accordingly, they had requested him to accompany him when

they go to meet the Advocate M.N.Sankaran. Therefore, it is found that the defendants 1 to 9 as well as P.W.1 are fully aware of the ex parte decree passed against the defendants 1 to 9 in the matter and therefore, to state that they have become aware of the ex parte decree only on 12.12.2014 cannot be accepted and believed.

8. A reading of the impugned order would go to show that the Court below instead of analyzing the evidence on record and further, without determining whether the the cause given by the defendants 1 to 9 for the delay is acceptable or not, entertained the application on the footing that inasmuch as no notice had been sent to the defendants 1 to 9 about the transfer of the suit from the Sub Court, Madurai, to the Principal District Munsif Court, Madurai, on account of the pecuniary jurisdiction, the same had caused serious prejudice to the defendants 1 to 9 and in such view of the matter, inasmuch as the above error is due to the mistake committed by the Court, in the interest of justice, the Court below had entertained the application with a view to enable the defendants 1 to 9 to contest the matter on merits. However, it is found that as rightly contended by the learned counsel for the plaintiff, the defendants 1 to 9 were set ex parte even when the suit was pending on the file of the Sub Court, Madurai, on account of the fact that they failed to file written statement despite affording several opportunities and at that time also, the defendants 1 to 9's Advocate was M.N.Sankaran. As seen above, the defendants 1 to 9 have not placed any material to show that the Advocate acted against their interest, on the other hand, P.W.1 has admitted that the said Advocate is an honest Advocate and he would conduct the case properly and diligently. In such view of the matter, it is found that the defendants 1 to 9, knowing about the stage of the suit and deliberately as they failed to file the written statement as directed by the Court despite affording adequate opportunities, it is found that they have been set ex parte. The other defendants have filed their written statement and thereafter, the suit had been listed for trial, subsequently, the suit had been transferred to the Principal District Munsif Court, Madurai. In such view of the matter, when the suit had been transferred to another Court on account of pecuniary jurisdiction and even prior to the same, inasmuch as the defendants 1 to 9 had been set ex parte, in my considered opinion, there is no need for again sending the notice about the transfer of the suit to the defendants, who have already been set ex parte and accordingly, when the suit had been transferred to the District Munsif Court, Madurai, as the suit was at the stage of trial, the transferee Court had taken up the suit as sent and accordingly, proceeded with the trial and inasmuch as the other defendants had also later failed to contest the suit, it is found that the ex parte decree had come to be passed on 16.11.2007. It is further seen that nowhere in the application filed for the condonation of the delay, the defendants 1 to 9 have averred that they are unaware of the transfer of the

suit from the Sub Court, Madurai, to the Principal District Munsif Court, Madurai, on account of pecuniary jurisdiction. It is, thus, found that the defendants 1 to 9 are also aware of the transfer of the suit to the Principal District Munsif Court, Madurai, on account of pecuniary jurisdiction. Accordingly, it is found that as admitted by P.W.1, after the passing of the ex parte decree in the suit, they had chosen to meet the Advocate four or five days thereafter and it is found that P.W.1 along with the defendants 1 to 9 have met the Advocate four or five days after the passing of the final decree and therefore, it is found that the defendants 1 to 9 and P.W.1 are fully aware of the transfer of the suit to the Principal District Munsif Court, Madurai, even at the time of transfer of the suit and despite the same, they had not chosen to contest the matter one way or the other and inasmuch as they had already been set ex parte, when the matter was pending on the file of the Sub Court, Madurai, it is further found that inasmuch as they have no valid defence to resist the plaintiff's suit, they had left the matter as such to go for ex parte and therefore, to contend that they have no knowledge about the ex parte decree passed in the suit as such cannot be believed and accepted. In such view of the matter, the reasonings of the Court below that the defendants 1 to 9 are not aware of the transfer of the suit as such cannot be accepted and hence, the same appears to be a special pleading entertained by the Court below for the purpose of this case. As seen above, when it is not even the case of the defendants that they are not aware of the transfer of the suit, it is seen that the endeavour of the Court below to entertain the application on the above ground as such cannot be accepted.

9. It is contended by the learned counsel for the defendants 1 to 9 that at one stage of the matter, the learned counsel, who appeared for the respondents 1 to 9, had reported ?no instruction? and subsequently, he had endorsed ?no objection? in the application preferred by the plaintiff for the return of the documents and this would only go to show that the said Advocate had not acted properly and hence, the apprehension of the defendants 1 to 9 that the said Advocate had acted against their interest should be considered by this Court. However, if that be so, P.W.1 would not have admitted that the said Advocate is an honest Advocate and that he would conduct the case properly. Be that as it may, if according to the defendants 1 to 9, the Advocate engaged by them had acted against their interest and only on account of his mistakes and laches, they were unable to contest the suit and if the said allegations have any semblance of truth, as rightly argued by the learned counsel for the plaintiff, it is always open to the defendants 1 to 9 to proceed as against the said Advocate in the manner known to law. Therefore, when it is found that without any basis, the defendants 1 to 9 had thrown the blame on their Advocate and when the same has been stoutly resisted by the plaintiff and when with reference to the same there is no material worthwhile acceptance

forthcoming, it is found that the reasons given by the defendants 1 to 9 for the condonation of the huge and inordinate delay are nothing but false reasons.

10. As seen above, the defendants 1 to 9, through their power agent, have prior to the present application, filed another set of applications marked as Exs.R1 and R2 in January, 2015 itself and the reasons given therein for the setting aside of the ex parte decree are found to be different. It is further found that though the copies of the said applications have been served on the plaintiff, they have not chosen to prosecute the same diligently and suppressing the same, it is found that they have thereafter in the month of June, 2015, have filed the present application giving a new set of facts i.e., throwing the blame on the Advocate engaged by them.

11. But for the above said stray incident that their Advocate has endorsed no objection in the application filed by the plaintiff after having reported no instruction, there is no other material at all placed to show that the said Advocate has acted against their interest in any manner. Therefore, to say that on account of the communication not being sent by the Advocate concerned, they were unable to know the stage and progress of the suit as such cannot be believed. As above adverted to, if really the defendants 1 to 9 have a valid defence to resist the suit of the plaintiff, as prudent persons, they would have endeavoured to contest the suit at the earliest opportunity and on the other hand, after leaving the matter to go for ex parte, their conduct in coming forward with the applications to set aside the ex parte decree 7 + years after the passing of the same without any justifiable cause and when the said cause is found to be not true and also not established by acceptable and reliable materials and on the other hand when the evidence adduced would go to show that the said cause is untrue and false, in my considered opinion, the applications preferred by the defendants 1 to 9 should not have been entertained by the Court below. When it is not even the case of the defendants 1 to 9 that they are not aware of the transfer of the proceedings to the Principal District Munsif Court, Madurai, the reasonings of the Court below in entertaining the application of the defendants 1 to 9 on that ground are found to be erroneous and cannot be accepted as such.

12. In support of his contentions, the learned counsel for the petitioner / plaintiff has placed reliance upon the decisions reported in (2008) 17 SCC 448 [Pundlik Jalam Patil (Dead) by Lrs., vs. Executive Engineer, Jalgaon Medium Project and another], 2013 (6) CTC 143 [Padmavathy and others vs. D.Mariappan], 2013-4-L.W.515 [V.Radhakrishnan vs. P.Radhakrishnan], (2013) 12 SCC 649 [Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and others] and 2015-3-L.W.319 [S.Muthukumar vs. M.Pari]. The learned counsel for the respondents / defendants 1 to 9, in support of his contentions, has placed reliance upon the

decisions reported in (1997) 9 SCC 688 [Hanamanthappa and another vs. Chandrashekharappa and others], 1998 (II) CTC 533 [N.Balakrishnan vs. M.Krishnamurthy], 2000-1-L.W.547 [V.Amudha vs. S.A.Arumugham and others], (2002) 3 SCC 195 [Ram Nath Sao alias Ram Nath Sahu and others vs. Gobardhan Sao and others], 2006 (3) CTC 484 [Danial Textiles and another vs. State Bank of Travancore], (2008) 12 SCC 589 [Reena Sadh vs. Anjana Enterprises], 2011-3-L.W.80 [M/s.Meenakshisundaram Textiles vs. M/s.Valliammal Textiles Ltd.], 2013 (6) CTC 314 [Radhakrishna Reddy (Died) and others vs. G.Ayyavoo and others], 2013 (1) CTC 38 [Olympic Cards Limited vs. Standard Chartered Bank] and 2015-3-L.W.241 [S.Arul Dhas vs. F.Hubert and another]. The principles of law outlined in the above cited decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

13. In the light of the above discussions, it is found that the reasons given by the defendants 1 to 9 for the condonation of the huge and inordinate delay are found to be false and unacceptable and it is further found that the reasons given by the defendants 1 to 9 are also not substantiated with acceptable convincing and reliable materials. It is further found that the defendants 1 to 9 have not endeavoured to set aside the ex parte decree passed against them immediately even after coming to know about the same as per the case on 12.12.2014. It is further found that the defendants 1 to 9 are well aware of the ex parte decree passed against them and also aware of the progress of the suit right from the inception till its culmination in ex parte decree. In the light of the above position, the impugned order of the Court below in entertaining the application preferred by the defendants 1 to 9 to condone the delay of 2746 days is found to be incorrect and unacceptable and accordingly, it deserves to be set aside.

14. In conclusion, the fair and decreetal order, dated 25.04.2017, passed in I.A.No.441 of 2015 in O.S.No.1603 of 2006, on the file of the Principal District Munsif Court, Madurai Town, are set aside and consequently, I.A.No.441 of 2015 is dismissed. Resultantly, the civil revision petition is allowed with costs. Consequently, connected miscellaneous petition is closed.

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2017 (3) L.S. 15 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Ranjan Prakash Desai
The Hon'ble Mr.Justice
A.K.Sikri

Badshah ..Petitioner
Vs.
Sou.Urmila Badshah
Godse&Anr ….Respondents

CRIMINAL PROCEDURE CODE. Sec.125 – Petitioner was already married – He duped the respondent and married her also by suppressing factum of first marriage – Petitioner cannot be permitted to deny the benefit of maintenance to respondent, taking advantage of his own wrong.

After getting divorce from her first husband, on demand of petitioner, respondent married him as per Hindu Rites and Customs –After three months of her marriage, Shobha came to the house of petitioner and claimed herself to be his wife by then respondent was already pregnant – On enquiring about shobha with petitioner he said that if respondent wanted to cohabit with him, then she should reside quietly – In the instant petition, Petitioner denied his relation with respondent and contended that he never entered with any matrimonial alliance with respondent.

Held – Respondent has been able to prove, by strong evidence that she was married to petitioner – While dealing with application of destitute wife or hapless children or parents under section 125 of Cr.P.C, Court is dealing with marginalized sections of society – Purpose is to achieve "Social Justice" which is the constitutional vision – Therefore, it becomes bounden duty of Courts to advance the cause of social justice – While giving interpretation to a particular provision, Court is supposed to bridge gap between the Law and Society – Courts have to adopt different approaches in "Social justice adjudication" as mere "Adversarial approach" may not be very appropriate – It would amount to giving a premium to husband for defrauding the wife/respondent therefore, for the purpose of section 125 of Cr.P.C, such a woman is to be treated as legally wedded wife – Petitions stands dismissed.

J U D G M E N T
(per the Hon'ble Mr.Justice A.K.Sikri)

1. There is a delay of 63 days in filing the present Special Leave Petition and further delay of 11 days in refilling Special Leave Petition. For the reasons contained in the application for condonation of delay, the delay in filing and refilling of SLP is

Crl.M.P.No.19530/2013 Date:18-10-2013

condoned.

2. The petitioner seeks leave to appeal against the judgment and order dated 28.2.2013 passed by the High Court of Judicature at Bombay, Bench at Aurangabad in Criminal Writ Petition No.144/2012. By means of the impugned order, the High Court has upheld the award of maintenance to respondent No.1 at the rate of Rs.1000/- per month and to respondent No.2 (daughter) at the rate of Rs.500/- per month in the application filed by them under Section 125 of the Code of Criminal Procedure (Cr.P.C.) by the learned Trial Court and affirmed by the learned Additional Sessions Judge. Respondents herein had filed proceedings under Section 125, Cr.P.C. before Judicial Magistrate First Class (JMFC) alleging therein that respondent No.1 was the wife of the petitioner herein and respondent No.2 was their daughter, who was born out of the wedlock.

3. The respondents had stated in the petition that respondent No.1 was married with PopatFapale. However, in the year 1997 she got divorce from her first husband. After getting divorce from her first husband in the year 1997 till the year 2005 she resided at the house of her parents. On demand of the petitioner for her marriage through mediators, she married him on 10.2.2005 at Devgad Temple situated at Hivargav-Pavsa. Her marriage was performed with the petitioner as per Hindu Rites and customs. After her marriage, she resided and cohabited with the petitioner. Initially for 3 months, the petitioner cohabited and maintained her nicely. After about three months of her marriage with petitioner, one lady Shobha came to the house of the petitioner and claimed herself to be his wife. On inquiring from the petitioner about the said lady Shobha, he replied that if she wanted to cohabit with him, she should reside quietly. Otherwise she was free to go back to her parents house. When Shobha came to the house of petitioner, respondent No.1 was already pregnant from the petitioner. Therefore, she tolerated the ill-treatment of the petitioner and stayed alongwithShobha. However, the petitioner started giving mental and physical torture to her under the influence of liquor. The petitioner also used to doubt that her womb is begotten from somebody else and it should be aborted. However, when the ill-treatment of the petitioner became intolerable, she came back to the house of her parents. Respondent No.2, Shivanjali, was born on 28.11.2005. On the aforesaid averments, the respondents claimed maintenance for themselves.

4. The petitioner contested the petition by filing his written statement. He dined his relation with respondent Nos.1 and 2 as his wife and daughter respectively. He alleged that he never entered with any matrimonial alliance with respondent No.1 on 10.2.2005, as claimed by respondent No.1 and in fact respondent No.1, who was in the habit of leveling false allegation, was trying to blackmail him. He also denied co-habitation

with respondent No.1 and claimed that he was not the father of respondent No.2 either. According to the petitioner, he had married Shobha on 17.2.1979 and from that marriage he had two children viz. one daughter aged 20 years and one son aged 17 years and Shobha had been residing with him ever since their marriage. Therefore, respondent No.1 was not and could not be his wife during the subsistence of his first marriage and she had filed a false petition claiming her relationship with him.

5. Evidence was led by both the parties and after hearing the arguments the learned JMFC negatived the defence of the petitioner. In his judgment, the JMFC formulated four points and gave his answer thereto as under:

1	Does applicant no.1 Urmila proves that she is a wife and applicant No.2 Shivanjali is daughter of non applicant?	Yes
2.	Does applicant No.1 Urmila proves that non-applicant has deserted and neglected them to maintain them through having sufficient means?	Yes
3.	Whether applicant No.1 Urmila and Applicant No.2 Shivanjali are entitled to get maintenance from non-applicant?	Yes
4.	If yes, at what rate?	Rs. 1,000/- p.m to Applicant No. 1 and Rs. 500/- p.m. to Applicant No. 2.

6. It is not necessary to discuss the reasons which prevailed with the learned JMFC in giving his findings on Point Nos.1 and 2 on the basis of evidence produced before the Court. We say so because of the reason that these findings are upheld by the learned Additional Sessions Judge in his judgment while dismissing the revision petition of the petitioner herein as well as the High Court. These are concurrent findings of facts with no blemish or perversity. It was not even argued before us as the argument raised

was that in any case respondent No.1 could not be treated as "wife" of the petitioner as he was already married and therefore petition under Section 125 of the Cr.P.C. at her instance was not maintainable. Since, we are primarily concerned with this issue, which is the bone of contention, we proceed on the basis that the marriage between the petitioner and respondent No.1 was solemnized; respondent No.1 co-habited with the petitioner after the said marriage; and respondent No.2 is begotten as out of the said co-habitation, whose biological father is the petitioner. However, it would be pertinent to record that respondent No.1 had produced overwhelming evidence, which was believed by the learned JMFC that the marriage between the parties took place on 10.2.2005 at Devgad Temple. This evidence included photographs of marriage. Another finding of fact was arrived at, namely, respondent No.1 was a divorcee and divorce had taken place in the year 1997 between her and her first husband, which fact was in the clear knowledge of the petitioner, who had admitted the same even in his cross-examination.

7. The learned JMFC proceeded on the basis that the petitioner was married to Shobha and was having two children out of the wedlock. However, at the time of solemnizing the marriage with respondent No.1, the petitioner intentionally suppressed this fact from her and co-habited with respondent No.1 as his wife.

8. The aforesaid facts emerging on record would reveal that at the time when the petitioner married the respondent No.1, he had living wife and the said marriage was still subsisting. Therefore, under the provisions of Hindu Marriage Act, the petitioner could not have married second time. At the same time, it has also come on record that the petitioner duped respondent No.1 by not revealing the fact of his first marriage and pretending that he was single. After this marriage both lived together and respondent No.2 was also born from this wedlock. In such circumstances, whether respondents could filed application under Section 125 of the Cr.P.C., is the issue. We would like to pin point that in so far as respondent No.2 is concerned, who is proved to be the daughter of the petitioner, in no case he can shun the liability and obligation to pay maintenance to her. The learned counsel ventured to dispute the legal obligation qua respondent No.1 only.

9. The learned counsel for the petitioner referred to the judgment of this Court in YamunabaiAnantraoAdhav vs. AnantraoShivramAdhay&Anr. ((1988) 1 SCC 530) In that case, it was held that a Hindu lady who married after coming into force Hindu Marriage Act, with a person who had a living lawfully wedded wife cannot be treated to be "legally wedded wife" and consequently her claim for maintenance under Section 125, Cr.P.C. is not

maintainable. He also referred to later judgments in the case of SavitabenSomabaiBhatiya vs. State of Gujarat &Ors.[(2005) 3 SCC 636] wherein the aforesaid judgment was followed. On the strength of these two judgments, the learned counsel argued that the expression "wife" in Section 125 cannot be stretched beyond the legislative intent, which means only a legally wedded-wife. He argued that Section 5(1) (i) of the Hindu Marriage Act, 1955 clearly prohibits 2nd marriage during the subsistence of the 1st marriage, and so respondent No.1 cannot claim any equity; that the explanation clause

(b) to Section 125 Cr.P.C. mentions the term "divorce" as a category of claimant, thus showing that only a legally wedded-wife can claim maintenance. He, thus, submitted that since the petitioner had proved that he was already married to Shobha and the said marriage was subsisting on the date of marriage with respondent No.1, this marriage was void and respondent No.1 was not legally wedded wife and therefore had no right to move application under Section 125 of the Cr.P.C.

10. Before we deal with the aforesaid submission, we would like to refer two more judgments of this Court. First case is known as Dwarika Prasad Satpathy vs. BidyutPrava Dixit &Anr.[(1999) 7 SCC 675] In this case it was held:

"The validity of the marriage for the purpose of summary proceeding under s.125Cr.P.C. is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceeding is not as strict as is required in a trial of offence under section 494 of the IPC. If the claimant in proceedings under s.125 of the Code succeeds in showing that she and the respondent have lived together as husband and wife, the court can presume that they are legally wedded spouse, and in such a situation, the party who denies the marital status can rebut the presumption. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe into whether the said procedure was complete as per the Hindu Rites in the proceedings under S.125,Cr.P.C. From the evidence which is led if the Magistrate is prima facie satisfied with regard to the performance of marriage in proceedings under S.125,Cr.P.C. which are of summary nature strict proof of performance of essential rites is not required.

It is further held:

It is to be remembered that the order passed in an application under section 125Cr.P.C. does not finally determine the rights and obligations of the parties and the said section is enacted with a view to provide summary remedy for providing maintenance to a wife, children and parents. For the purpose of getting his rights determined, the appellant has also filed Civil Suit which is spending

before the trial court. In such a situation, this Court in S.SethurathinamPillai vs. Barbaraalias Dolly Sethurathinam, (1971) 3 SCC 923, observed that maintenance undersection 488, Cr.P.C. 1898 (similar to Section 125, Cr.P.C.) cannot be denied where there was some evidence on which conclusion for grant of maintenance could be reached. It was held that order passed under Section 488 is a summary order which does not finally determine the rights and obligations of the parties; the decision of the criminal Court that there was a valid marriage between the parties will not operate as decisive in any civil proceeding between the parties."

11. No doubt, it is not a case of second marriage but deals with standard of proof underSection 125, Cr.P.C. by the applicant to prove her marriage with the respondent and was not a case of second marriage. However, at the same time, this reflects the approach which is to be adopted while considering the cases of maintenance under Section 125,Cr.P.C. which proceedings are in the nature of summary proceedings.

12. Second case which we would like to refer is Chanmuniya vs. Virendra Kumar Singh Kushwaha&Anr.[(2011) 1 SCC 141] The Court has held that the term "wife" occurring in Section 125,Cr.P.C. is to be given very wide interpretation. This is so stated in the following manner:

"A broad and expansive interpretation should be given to the term "wife" to include even those cases where a man and woman have been living together as husband and wife for reasonably long period of time, and strict proof of marriage should not be a pre-condition for maintenance under Section 125 of the Cr.P.C. so as to fulfill the true spirit and essence of the beneficial provision of maintenance under Section 125."

13. No doubt, in Chanmuniya (supra), the Division Bench of this Court took the view that the matter needs to be considered with respect to Section 125,Cr.P.C., by larger bench and in para 41, three questions are formulated for determination by a larger bench which are as follows:

"1. Whether the living together of a man and woman as husband and wife for a considerable period of time would raise the presumption of a valid marriage between them and whether such a presumption would entitle the woman to maintenance under Section 125,Cr.P.C.?

2. Whether strict proof of marriage is essential for a claim of maintenance underSection 125,Cr.P.C. having regard to the provisions of the Domestic Violence Act, 2005?

3. Whether a marriage performed according to the customary rites and ceremonies, without strictly fulfilling the requisites of Section 7(1) of the Hindu Marriage Act,

1955, or any other personal law would entitle the woman to maintenance under Section 125,Cr.P.C.?"

14. On this basis, it was pleaded before us that this matter be also tagged along with the aforesaid case. However, in the facts of the present case, we do not deem it proper to do so as we find that the view taken by the courts below is perfectly justified. We are dealing with a situation where the marriage between the parties has been proved. However, the petitioner was already married. But he duped the respondent by suppressing the factum of alleged first marriage. On these facts, in our opinion, he cannot be permitted to deny the benefit of maintenance to the respondent, taking advantage of his own wrong. Our reasons for this course of action are stated hereinafter.

15. Firstly, in Chanmuniya case, the parties had been living together for a long time and on that basis question arose as to whether there would be a presumption of marriage between the two because of the said reason, thus, giving rise to claim of maintenance under Section 125,Cr.P.C. by interpreting the term "wife" widely. The Court has impressed that if man and woman have been living together for a long time even without a valid marriage, as in that case, term of valid marriage entitling such a woman to maintenance should be drawn and a woman in such a case should be entitled to maintain application under Section 125,Cr.P.C. On the other hand, in the present case, respondent No.1 has been able to prove, by cogent and strong evidence, that the petitioner and respondent No.1 had been married each other.

16. Secondly, as already discussed above, when the marriage between respondent No.1 and petitioner was solemnized, the petitioner had kept the respondent No.1 in dark about her first marriage. A false representation was given to respondent No.1 that he was single and was competent to enter into martial tie with respondent No.1. In such circumstances, can the petitioner be allowed to take advantage of his own wrong and turn around to say that respondents are not entitled to maintenance by filing the petition under Section 125,Cr.P.C.as respondent No.1 is not "legally wedded wife" of the petitioner? Our answer is in the negative. We are of the view that at least for the purpose of Section 125 Cr.P.C., respondent No.1 would be treated as the wife of the petitioner, going by the spirit of the two judgments we have reproduced above. For this reason, we are of the opinion that the judgments of this Court in Adhav and Savitaben cases would apply only in those circumstances where a woman married a man with full knowledge of the first subsisting marriage. In such cases, she should know that second marriage with such a person is impermissible and there is an embargo under the Hindu Marriage Act and therefore she has to suffer the consequences thereof. The said judgment would not apply to those cases where a man marriages second time by keeping that lady in dark about the first surviving

marriage. That is the only way two sets of judgments can be reconciled and harmonized.

17. Thirdly, in such cases, purposive interpretation needs to be given to the provisions ofSection 125,Cr.P.C. While dealing with the application of destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalized sections of the society. The purpose is to achieve "social justice" which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society.

18. Of late, in this very direction, it is emphasized that the Courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate. There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. MadhavaMenon describes it eloquently:

"It is, therefore, respectfully submitted that "social context judging" is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social- economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication."[Delivered a key note address on "Legal Education in Social Context"

19. Provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from "adversarial" litigation to social context adjudication is the need of the hour.

20. The law regulates relationships between people. It prescribes patterns of behavior. It reflects the values of society. The role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the

law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both Constitutional and statutory interpretation, the Court is supposed to exercise direction in determining the proper relationship between the subjective and objective purpose of the law.

21. Cardozo acknowledges in his classic[The Nature of Judicial Process] "….no system of jus scriptum has been able to escape the need of it", and he elaborates: "It is true that Codes and Statutes do not render the Judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however, obscure and latent, had none the less a real and ascertainable pre- existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a stature." Says Gray in his lecture[From the Book "The Nature and Sources of the Law" by John Chipman Gray

] "The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine that the legislature did mean on a point which was present to its mind, but to guess what is would have intended on a point not present to its mind, if the point had been present."

22. The Court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision— "libre recherché sceintifique" i.e. "free Scientific research". We are of the opinion that there is a non-rebuttable presumption that the Legislature while making a provision like Section 125Cr.P.C., to fulfill its Constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances.

23. This approach is particularly needed while deciding the issues relating to gender justice. We already have examples of exemplary efforts in this regard. Journey from Shah Bano[AIR 1985 SC 945] to ShabanaBano[AIR 2010 SC 305] guaranteeing maintenance rights to Muslim women is a classical example.

24. In RameshchandraDaga v. RameshwariDaga[AIR 2005 SC 422]the right of another woman in a similar situation was upheld. Here the Court had accepted that Hindu marriages have continued to be bigamous despite the enactment of the Hindu Marriage Act in 1955. The Court had commented that though such marriages are illegal as per the provisions of the Act, they are not 'immoral' and hence a financially dependent woman cannot be denied maintenance on this ground.

25. Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to

suppress. It is this mischief rule, first propounded in Heydon'sCase[(1854) 3 Co.Rep.7a,7b] which became the historical source of purposive interpretation. The court would also invoke the legal maxim construction ut res magisvaleatguampereat, in such cases i.e. where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125, Cr.P.C., such a woman is to be treated as the legally wedded wife.

26. The principles of Hindu Personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against destitution. The manifest purpose is to achieve the social objectives for making bare minimum provision to sustain the members of relatively smaller social groups. Its foundation spring is humanistic. In its operation field all though, it lays down the permissible categories under its benefaction, which are so entitled either because of the tenets supported by clear public policy or because of the need to subserve the social and individual morality measured for maintenance.

27. In taking the aforesaid view, we are also encouraged by the following observations of this Court in Capt. Ramesh Chander Kaushal vs. VeenaKaushal [(1978) 4 SCC 70]:

"The brooding presence of the Constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause – the cause of the derelicts."

28. For the aforesaid reasons, we are not inclined to grant leave and dismiss this petition.

–X–

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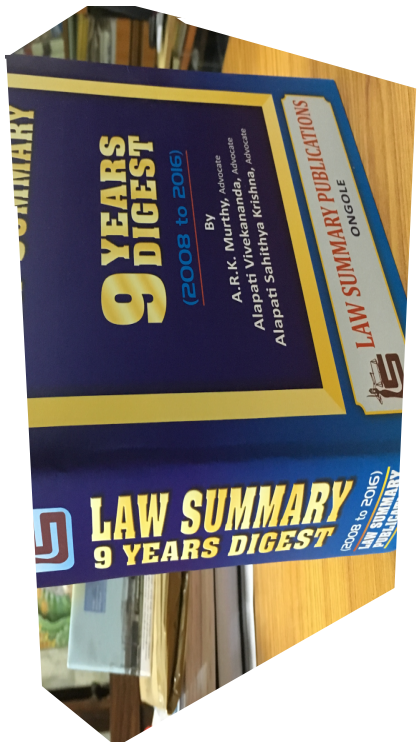

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