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Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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PART - 21 (15TH NOVEMBER 2017)

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SUBJECT - INDEX

A.P. CO-OPERATIVE SOCIETIES ACT, Secs.51 and 115-D – Instant appeal is preferred against the Order passed in writ petition, directing that the enquiry under Section 51 of A.P. Co-operative Societies Act shall go on; but, its implementation would be subject to final result of writ petition.

Enquiry is directed by the Registrar of cooperative societies, A.P, against the 7th respondent bank with regard to certain fraudulent transactions and misappropriation of funds by discharging fake fix deposits –Necessary to examine whether Section 115-D ousts the jurisdiction of the Registrar to cause an enquiry under Section 51 of the Act.

Held – Non obstante clauseis a legislative device which is usually employed to give over riding effect to certain provisions over some contrary provisions that may be found in the same enactment, that is to say, to avoid the operation and effect of all contrary provisions – Order passed in writ petition is justified in refusing to interdict the process of enquiry under Section 51 of the Act and in making the enquiry subject to the result of writ petition – Writ appeal stands dismissed. **(Hyd.) 187**

ARBITRATION AND CONCILIATION ACT, Sec.34 – **CONSTITUTION OF INDIA,** Article 162 - Contract for the execution of construction was awarded to 1st respondent and with regard to the fixation of rates for drilling of bore holes, arose a dispute between

Petitioner/Department and 1st respondent - As per the terms of contract, 1st respondent referred matter to Technical expert, which arrived at a decision in favour of 1st respondent - However, petitioner referred the matter for Arbitration.

Arbitration tribunal passed a notice to the petitioner to attend proceedings - Petitioner reported that it had no pecuniary jurisdiction to entertain the matter in view of G.O – Arbitration tribunal has also passed an award in favour of the 1st respondent – Counsel for petitioner contended that though G.O was not incorporated in the contract, still being the executive order of government should not have been ignored.

Held – Executive fiats of a state government issued in terms of Article 162 of Constitution for meeting various administrative exigencies cannot be equated with law and have no force of statute passed by the Legislature –Arbitration tribunal ought to have only decided the correctness of the decision of technical expert and should not have entertained other claims made by 1st respondent before it – Instant appeal is allowed partly.

(Hyd.) ***170***

CIVIL PROCEDURE CODE, Or.41 Rules 23, 23-A, 25 and 27 – Remand by the appellate court - Instant appeal is preferred against the order of the lower appellate court.

The Original suit was dismissed by the trial court - Appeal filed before lower appellate court was allowed setting aside the judgment and decree passed by trial court and further it also remanded the matter to the trial court for fresh disposal – Before the lower appellate court an application for additional documents was filed and the same was allowed.

Held – Order 41 Rule 23-A of C.P.C. deals with the case of remand by the appellate court of the suits which were disposed of other than on a preliminary point

-Instant case falls under Order 41 Rule 23-A of C.P.C and the order of lower appellate court can be held to be valid – Instant appeal is dismissed. **(Hyd.) 181**

CRIMINAL PROCEDURE CODE, Secs.235(2) and 374(2) – INDIAN PENAL CODE, Secs. 201, 302 and 304-B – Instant Criminal appeal preferred by appellant against the Judgment passed by Trial court.

Deceased is the wife of appellant - Appellant used to harass the deceased to sell away certain land and give cash to him – Appellant killed the deceased and tried to screen away evidence by burning her dead body.

Held – Death of the deceased is homicidal – As per section 113-B of Indian Evidence Act, soon after the death, such a woman has been subjected to cruelty or harassment for or in connection with any demands for dowry, then the court shall presume that such person had committed dowry death – Prosecution had proved guilt of the appellant beyond all reasonable doubts - Appeal stands dismissed. **(Hyd.)** ***158***

CRIMINAL PROCEDURE CODE, Secs. 247, 249, 256 and 302 – INDIAN PENALCODE Secs.34, 120B, 201, 420, 467, 468 and 471 – Appeal against the Judgment passed by the High Court allowing IA filed by the legal representatives, praying them to be substituted in place of the complainant.

Complainant died during the pendency of petition before High court which was filed challenging the order of sessions judge, rejecting the criminal revision against the order of magistrate dismissing the complaint - Legal heirs of complainant filed an application praying them to be substituted in place of complainant – High court allowed the application.

Held –There is no provision in chapter XIX of Cr.P.C. which says that, in the event of death of the complainant the complaint is to be rejected – Magistrate under Section 249 of Cr.P.C. can discharge a case where the complainant is absent - We

do not find any error in the Order of the High court – Appeal stands dismissed.

(S.C.) ***69***

JUVENILE JUSTICE ACT, 2000, Sec. 7-A - **JUVENILE JUSTICE RULES, 2007,** Rule -12 - **INDIAN PENAL CODE,** Secs.148and 302 – Review preferred by the detenu challenging the order, whereby the relief sought by the wife of the review petitioner to set him at liberty on the ground that on the date of commission of the offence, he was a juvenile, was rejected.

Held - Age determination inquiry contemplated under the Act, 2000 and Rules, 2007 is nothing to do with an inquiry contemplated under the Criminal Procedure Code - Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court or Board or the Committee need to go for medical report for age determination - Medical evidence as to the age of a person, though a very useful guiding factor, is not a conclusive proof - As an apparent error is there, correction becomes necessitous – In the instant case petitioner was imposed with life imprisonment and petitioner has served with maximum sentence of imprisonment - Hence, without referring the matter to the Juvenile Justice Board for passing appropriate order, this Court is inclined to set the petitioner at liberty - Review Petition is allowed.

(Madras) ***57***

LIMITATION ACT, Art.110 - Appellants /Sons preferred instant appeal against Respondents/Daughters and mother, challenging the preliminary decree for partition granted in their favour.

Suit schedule properties were purchased by Father, who died intestate – Properties devolved equally upon his wife, 4 daughters and 5 sons, entitling each of them to 1/10th share – Appellants contend that suit properties were not self-acquisition of their father and they were acquired from the nucleus and by sale of certain ancestral properties – Appellants further pleaded exclusion and contended that respondents

have abandoned and waived their right.

Held – Law is well settled that a person pleading ancestral nucleus and the source of purchase should prove the same – Principle of waiver is akin to principle of estoppel and the difference lies in the fact that while estoppel is a rule of evidence and not a cause of action, waiver may constitute a cause of action - None of the elements of waiver or abandonment is present in instant case – Appeal stands dismissed.

(Hyd.) 151

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JUDICIAL CUSTODY AND POLICE CUSTODY - RECENT TRENDS

By
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Assistant Sessions Judge, Avanigadda,
Krishna District.

INTRODUCTION:

Public trial in open Court is undoubtedly essential for the healthy, objective and fair administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial Tribunals, Courts must generally hear causes in open and must permit the public admission to the Court-room. See. Naresh Shridhar Mirajkar And Ors vs State Of Maharashtra And Anr, 1967 AIR, 1 1966 SCR (3) 744.

Article 22 (2) of the Constitution of India and Section 57 of Cr. P.C. give a mandate that every person who is arrested and detained in police custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of the arrest to the court of the magistrate and no such person shall be detained in the custody beyond the said period without the authority of a magistrate. These two provisions clearly manifest the intention of the law in this regard and therefore it is the magistrate who has to judicially scrutinise circumstances and if satisfied can order the detention of the accused in police custody. (See. State(Delhi Admn.) v. Dharam Pal and others, 1982 Crl. L.J.1103; Trilochan Singh's case (infra); Also see. **Central Bureau Of Investigation vs. Anupam J. Kulkarni, 1992 AIR 1768, 1992 SCR (3) 158.**

When does Section 167 come into play?

Section 167 of Cr.P.C does not confer power on a Magistrate to dispense with police custody but what it does is to empower him to extend such custody beyond what is permitted under Section 57 thereof. Reading these two sections together one can safely conclude that Section 167 comes into play only when

(1) the accused is arrested without warrant and is detained by a police officer,

(2) it appears that more than twenty-four hours will be needed for investigation,
(3) there are grounds for believing that the accusation or information against him is well founded, and
(4) the officer in charge of the police station or the investigating officer not below the rank of a Sub-Inspector forwards the accused before the Magistrate.
When this happens, the Magistrate can refuse to detain him or direct his detention either in police custody or judicial custody. When once he directs judicial custody, there is no question of police remand for the simple reason that the conditions aforesaid are no more there. See.**Trilochan Singh vs The State (Delhi Administration, 20 (1981) DLT 20 b.**

The detention in police custody is generally disfavoured by law:-

The provisions of law lay down that such detention can be allowed only in special circumstances and that can be only by a remand granted by a magistrate for reasons judicially scrutinised and for such limited purposes as the necessities of the case may require. The scheme of Section 167 is obvious and is intended to protect the accused from the methods which may be adopted by some overzealous and unscrupulous police officers.

Accused should be produced before the nearest Magistrate within 24 hours:-

Whenever any person is arrested under Section 54 Cr.P.C. he should be produced before the nearest Magistrate within 24 hours as mentioned therein. Such Magistrate may or may not have jurisdiction to try the case. If Judicial Magistrate is not available, the police officer may transmit the arrested accused to the nearest Executive Magistrate on whom the judicial powers have been conferred.

Custody of accused - either police or judicial from time to time:-

The Judicial Magistrate can in the first instance authorise the detention of the accused in such custody i.e. either police or judicial from time to time but the total period of detention cannot exceed *fifteen days* in the whole. The Privy Council in **Emperor Vs. Khwaia Nazir Ahmad, AIR 1945 PC 18** : 1945-46 Cri LJ 413 that under the Code there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime and that the functions of the judiciary and the police are complementary and not overlapping in this regard. On larger principle also, it seems apt that whilst the accused person must be guaranteed a fair investigation and a judicial trial thereafter, yet equally the police, which has a statutory duty to investigate, is not hampered or obstructed in the delicate task of unravelling crime at the threshold stage

of the investigation. Therefore, the interpretative approach to these provisions is to strike a true balance in the larger social interest between a competent and incisive investigation into serious crimes by the police, on the one hand and the guaranteed right of the citizen to personal liberty under a reasonable and fair procedure established by law, on the other. See. **S. Harsimran Singh vs State Of Punjab,1984 CriLJ 253**. Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice-versa.

Executive Magistrate is empowered to authorise accused to detain only for a week:- If the arrested accused is produced before the Executive Magistrate he is empowered to authorise the detention in such custody either police or judicial only for a week, in the same manner namely by one or more orders but after one week he should transmit him to the nearest Judicial Magistrate along with the records.

After the expiry of the first period of 15 days, the further remand during the period of investigation can only be in judicial custody:-

When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate, may authorise further detention within that period of first fifteen days to such custody either police or judicial. After the expiry of the first period of fifteen days the further remand during the period of investigation can only be in judicial custody. There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage.

What is the except to this general rule? But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided under Section 167 (2) of Cr.P.C and the proviso and can remand him to such custody as mentioned therein during the first period of fifteen days thereafter in accordance with the proviso.

If the investigation is not completed within the period of ninety days or sixty days then the accused has to be released on bail :-

If the investigation is not completed within the period of ninety days or sixty days then the accused has to be released on bail as provided under the proviso to Section 167 (2) of Cr.P.C. The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police.

Duty of the Magistrate:-

Investigation is one of the steps in that direction and that has got to be regulated by the provisions of the Code. Section 167 of Cr.P.C. insists that judicial custody can be permitted for specified period if the police custody is refused, or if allowed, the permitted days of such custody are over, only where the Magistrate is satisfied that adequate grounds exist for doing so. It is a dereliction of duty if the Magistrate did not ask for and peruse the case diary before he authorised any type of custody. He cannot be permitted to make an argument of his own lapse in the matter. See. **Trilochan Singh's 20 (1981) DLT 20 b.**

How to compute the first period of 15 days?

The first period of fifteen days mentioned in Section 167 (2) of Cr.P.C has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody. In ***Chaganti Satynarayana and Ors. Vs. State of Andhra Pradesh***, [1986] 3 S.C.C.141 the Hon'ble Supreme Court examined the scope of Section 167 (2) provisos (a)(i) and (ii) and held that the period of fifteen days, ninety days or sixty days prescribed therein are to be computed from the date of remand of the accused and not from the date of his arrest under Section 57 and that remand to police custody cannot be beyond the period of fifteen days and the further remand must be to judicial custody. Though the point that precisely arose before the Apex Court was whether the period of remand prescribed should be computed from the date of remand or from the date of arrest under Section 57, there are certain observations throwing some light on the scope of the nature of custody after the expiry of the first remand of fifteen days and when the proviso comes into operation. In Chaganti

Satyanarayan's case it was held that "It, therefore, stands to reason that the total period of 90 days or 60 days can begin to run from the date of order or remand." Therefore the first period of detention should be computed from the date of order or remand.

Person arrested and produced before Magistrate-Remand to police **custody after initial period of 15 days-Whether legal.**

It was observed thus As sub-section (2) of Section 167 as well as proviso (1) of sub -section (2) of Section 309 relate to the powers of remand of a magistrate, though under different situations, the two provisions call for a harmonious reading insofar as the periods of remand are concerned. It would, therefore, follow that the words "15 days in the whole "occurring in sub-section (2) of Section 167 would be tantamount to a period of "15 days at a time" but subject to the condition that if the accused is to be remanded to police custody the remand should be for such period as is commensurate with the requirements of a case with provision for further extensions for restricted periods,if need be, but in no case should the total period of remand to police custody exceed 15 days. Where an accused is placed in police custody for the maximum period of 15 days allowed underlaw either pursuant to a single order of remand or to more than one order, when the remand is restricted on each occasion to a lesser number of days , further detention of the accused, if warranted, has to be necessarily to judicial custody and not otherwise. The legislature having provided for an accused being placed under police custody under orders of remand for effective investigation of cases has at the same time taken care to see that the interests of the accused are not jeopardised by his being placed under police custody beyond a total period of 15 days, under any circumstances, irrespective of the gravity of the offence or the serious nature of the case. These observations make it clear that if an accused is detained in police custody, the maximum period during which he can be kept in such custody is only fifteen days either pursuant to a single order or more than one when such orders are for lesser number of days but on the whole such custody cannot be beyond fifteen days and the further remand to facilitate the investigation can only be by detention of the accused in judicial custody. See. *Chaganti Satynarayana's case; also See,* Central Bureau Of Investigation vs. Anupam J. Kulkarni,1992 AIR 1768.

When formal arrest is necessary?

As seen from Central Bureau Of Investigation vs. Anupam J. Kulkarni,1992 AIR 1768,

if during the investigation his complicity in more serious offences during the same occurrence is disclosed that does not authorise the police to ask for police custody for a further period after the expiry of the first fifteen days. If that is permitted than the police can go on adding some offence or the other of a serious nature at various stages and seek further detention in police custody repeatedly, this would defeat the very object underlying Section 167. However, the Apex court clarified that this limitation shall not apply to a different occurrence in which complicity of the arrested accused is disclosed. That would be as different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such a situation he must be formally arrested in connection with other case and then obtain the order of the magistrate for detention in police custody.

Latest and Important judgments on the Police Custody and Judicial Custody:-

1. Sundeep Kumar Bafna vs State Of Maharashtra & Anr, Criminal Appeal No. 689 OF 2014[Arising out of SLP (Crl.)No.1348 of 2014, Dt. **27 March, 2014 where in it was observed that as follows: ''**we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under Section 167(2) of Cr.P.C of the Code is made out by the investigating agency." See. **Gurbaksh Singh Sibbia Etc vs State Of Punjab, 1980 AIR 1632.**

2. ***In Dinubhai Boghabhai Solanki vs State Of Gujarat & Ors,*** Criminal Appeal No. 492 OF 2014(Arising out of SLP (Crl.) No. 8406 of 2012)**Date of judgment on 25 February, 2014, it was observed that** the courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. It was further observed that the judgments of courts are not to be construed as statutes and the observations must be read in the context in which they appear to have been stated. The Court went on to say that circumstantial applicability, one additional or different fact may make a world of difference between conclusions in two cases." See. Bharat Petroleum Corporation ... vs N.R. Vairamani And Anr.

3. As was observed in ***Dr KS Rao Vs. State of Hydrabad*****,** AIR 1957 AP 416, in remanding the accused to police custody the Magistrate ought to follow the provisions of section

167 of the Code and should give proper reasons for handing over the accused to the police custody.

4. Important rulings as to the subject matter of 'police custody and judicial custody' — ***State Rep by Inspector of Police and Ors V NMT Joy Immaculate*** *2004* 5 SCALE 330, CBI SIT New Delhi v Anupam J Kulkarni AIR 1992 SC 1768, Mithabhai Pashabhai Patel & Ors Vs St of Gujarat CDJ 2009 SC 1014.

5. ***S. Harsimran Singh vs State Of Punjab,1984 CriLJ 253***

6. *Gian Singh And Others vs State (Delhi Administration), 1981 CriLJ 670*

7. *Trilochan Singh vs The State (Delhi Administration, 20 (1981) DLT 20 b*

8. ***Chaganti Satynarayana and Ors. Vs. State of Andhra Pradesh***, [1986] 3 S.C.C.14. As was held in 1981 CriLJ 1773 (1776 – Para 9), Perusal of the case diary is a must before remand of any kind – be judicial or police custody. It is a dereliction of duty if the Magistrate did not ask for and peruse the case diary before he authorizes any custody.

9. A remand to Police custody should not be given unless the officer making the Application is able to show definite and satisfactory grounds. Remand order should not be passed mechanically without proper application of mind. State of UP versus RamsagarYadav, (1985) 1 Crimes 344.

10. S.167(2) only prescribes the maximum period of 15 days, but that does not authorize the Magistrate automatically to remand the accused for the period. At every stage when the Police seeks a remand, the Police must satisfy the Magistrate that there is sufficient evidence against the accused and further evidence might be obtained; and it is only when the Magistrate is satisfied, after looking into the case diary, that he should direct a remand. AIR 1956 Orissa 129.To authorize remand to Police custody is a very serious and sensitive judicial function of utmost responsibility.

11. The scheme of the section after the amendment of the year 1978 is intended to protect the accused from unscrupulous police officers. Great care has now been taken to see that the accused persons are not unnecessarily remanded. The object of the

section is to see that the person arrested by the Police are brought before the Magistrate with the least possible delay so that the Magistrate could decide whether the person produced should further be kept in Police custody and also to allow said accused to make such representation as he wish to make, 1980 CriLJ 1195.

12. The Magistrate should not authorize detention of an accused to any custody mechanically in routine. If the Law Officers charged with the obligation to protect the liberty of the person, are mindless of the constitutional mandate and the dictates of the Code, how can freedom survive for the ordinary citizen. See. **Mantoo Majumdar Vs. State of Bihar**, AIR 1980 SC 847.

13. It was held in **Kana Vs. St of Rajasthan**, 1980 CriLJ 344., Magistrate must give reasons for authorizing detention of accused to custody. Such orders cannot be passed as a matter of course.

14. Order of Remand is a judicial order to be passed on application of mind to the contents of the Remand report submitted by the investigating officer. It is not a empty formality or a routine course to extend remand time and again as and when sought by the police. The order therefore should contain the reason to extend remand further. See. **2003 CriLJ 701 at page 702.**

15. As has been observed in **Muthoora Vs. Heera**, AIR 1951 M B 70; 17 W R 55, if the evidence is not forthcoming, the Magistrate must not remand the prisoner in the hope that fresh evidence may turn up.

16. See **Arnesh Kumar versus State of Bihar,** JT 2014 (7) SC 527, **Joginder Kumar Versus State Of Uttar Pradesh, 1994 (4) SCC 260 : AIR 1994 SC 1349,** a critical and detailed observation of the Hon'ble Supreme Court in respect of unabated practice of mechanical arrests.

17. The Hon'ble Supreme Court in the case of **Sanjay Chandra versus CBI (2012) 1 SCC 40 (Popularly known as 2G scam case),** where in it was extensively discussed with the issue of granting or refusing the grant of Bail.

18. As was pointed out in **Kalyan Chandra sarkar Vs. Rajesh Ranjan**, AIR 2004 SC 1866, while a vague allegation that the accused may temper with the evidence or witnesses may not be a ground to refuse a bail, if the accused is of such a character that his mere presence at large would intimidate the witnesses or if there is material

to show that he will use his liberty to subvert justice or temper with the evidence, then bail may be refused.

19. In ***D K Basu versu State of West Bengal,*** *AIR 1997 SC 610*, the Hon'ble Supreme Court has given certain guidelines- 1) That Policemen must wear visible and legible identification when arresting a person and when carrying out interrogation. Names and Particulars of police personnel handling interrogation must be recorded in the register; 2) It is the right of every person detained or questioned by Police to know the grounds for detention or questioning; 3) The Person arrested must be made aware of his right to have someone informed of his arrest or detention as soon as he is put under arrest or detention; 4) A person arrested must be produced before a Judicial Magistrate/ Judge within 24 hours of his/her arrest; 5) A person arrested should be medically examined at the time of arrest and major & minor injuries on arrested person be recorded in Inspection Memo duly signed by both Police officer carrying out the arrest and the person arrested and the copy of this memo be provided to the person arrested; 6) Any person arrested must be medically examined by a doctor from an independent and approved panel of doctors, every 48 hours during detention; 7) Arrest or Search of women should only take place in presence of Women Police Officers and it should not take place in night. And women should be detained separately from men; 8) While an accused is in Police custody, his lawyer should be permitted to visit him; 9) Information of the arrest of accused person should be given to the district Control Room and the State Police Headquarters.

20. Recent judgments in ***Rajesh Sharma Vs.Uttara Pradesh***, Criminal Appeal NO. 1265 OF 2017[Arising out of Special Leave Petition (Crl.) No.2013 of 2017] which was pronounced in July 27, 2017 and Maharashtra -based **NGO *Nyayadhar's*** *cases* are also relevant to understand the issue of restoration of immediate arrest in matrimonial cases.

Conclusion:-

As seen from Central Bureau Of Investigation vs. Anupam J. Kulkarni, 1992 AIR 1768, whenever any person is arrested under Section 57 Cr.P.C. such person should be produced before the nearest Magistrate within 24 hours as mentioned therein. Such Magistrate may or may not have jurisdiction to try the case. If Judicial Magistrate is not available, the police officer may transmit the arrested accused to the nearest Executive Magistrate on whom the judicial powers have been conferred. The Judicial Magistrate can in the first instance authorise the detention of the accused in such

custody i.e. either police or judicial from time to time but the total period of detention cannot exceed fifteen days in the whole. Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice-versa. If the arrested accused is produced before the Executive Magistrate he is empowered to authorise the detention in such custody either police or judicial only for a week, in the same manner namely by one or more orders but after one week he should transmit him to the nearest Judicial Magistrate along with the records.

When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate, may authorise further detention within that period of first fifteen days to such custody either police or judicial. After the expiry of the first period of fifteen days the further remand during the period o;f investigation can only be in judicial custody. There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided under Section 167(2) of Cr.P.C and the proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with the proviso as discussed above. If the investigation is not completed within the period of ninety days or sixty days then the accused has to be released on bail as provided under the proviso to Section 167(2) of Cr.P.C. The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police. Consequently the first period of fifteen days mentioned in Section 167(2) of Cr.P.C has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody.

–X–

WARRANT EXECUTION & BAILS IN BAILABLE OFFENCES

By
Kodavati P.R.R.Naidu; B.Sc.,B.L.
Dodda.L.Ravichandra;B.Com.,B.L.
Advocates, Razole

Through this article, we want to share the practical problems of mufsil courts advocate friends.

The question is:

Q: if an accused was produced before court on executing the warrant, in a bailable offence, under which provision we have to file the bail application?

Q:Either under 436 Cr.P.C. or 437 Cr.P.C. Under which provision he has to be released?

Q:Either U/S.436 Cr.P.C. since the offence is bailable nature or U/S.437 Cr.P.C., since the court issued the warrant of non-bailable nature for production of accused.

A: According to us, the answer is 436 Cr.P.C.

Before proceeding with the legal discussion, we want to take the aid of **Proviso S.81 of Cr.P.C** to expose the notion of the statute.

In Proviso of S.81, it was mentioned that

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if the offence is bailable—	shall be released if accused willing to security or as per S.71 Cr.P.C.
If the offence is non-bailable—	shall be released subject to the Provisions of 437 Cr.P.C, by court only

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According to our opinion, the warrant withers away after it's execution and the bail shall be granted to the offence, but not to the warrants issued in process of compel appearance.

If the offence is classified as bailable, it is an indicative meaning that the offence is lesser punishable in nature. The legislature tagged the bail to the offence by classifying it as a bailable in nature. Hence the right of liberty provided Art.21 of Indian Constitution is safe guarding the rights of the offenders in bailable in nature. The subsequent warrants may not be allowed to swallow those statutory rights of citizens.

There is no word Non-bailable in the S.70 Cr.P.C. In the Form No.2 of second schedule which is the pro-forma for issuance of warrant U/S.70 Cr.P.C. is also not disclosing the word non-bailable. But it is a usual practice to call the warrants for productions as NBWs in practical sense. A relief provision is there in the follow up section of S.71 Cr.P.C. to release the accused by the executing authority.

Though there are no words of Non-bailable in the S.70 Cr.P.C., the mufsil advocates are under the notion that the section corresponds to non-bailable.

It is not out of place to submit that the Hon ble Courts used to make docket orders as: Issue NBW against accused.

These NBWs are provided only for production of accused. S.70 Cr.P.C. is in Chapter VI of Cr.P.C. The Chapter VI in Cr.P.C. is meant for **PROCESS TO COMPEL APPEARANCE**. Hence the purpose of issuance of warrant is to produce a person before court ie., either accused or witness who ever it may be. After production, the purpose of said warrant will withers away. Hence there may not any warrant in force, after execution and production before the Hon ble Court.

On three occasions the courts have power to issue warrants in process to compel appearance. They are:

S.73 Cr.P.C.	87Cr.P.C.	89Cr.P.C.
To arrest escaped Convict, proclaimed Offender & accused Of Non bailable offence & is evading arrest.	On violations of summons.	On breach of bail bonds

Thus issuance of warrants after bail, comes under the purview of S.89 Cr.P.C. Needless to submit that the bail has to grant to the offence charged against the accused. If the offence is bailable the application will be filed U/S.436 Cr.P.C. If the offence is non-bailable the application will be filed U/S.437 Cr.P.C. If the warrant is issued by the Court of Session or Hon ble High Court, the application has to be filed U/S.439 Cr.P.C.

After production of the accused before the Court, the Court has to decide whether he shall be released on bail or continue the bail with fresh sureties.

Why because, in Form No.45 of Second Schedule there is an undertaking as follows:

I shall attend such officer or court on every day on which any investigation or trial is held with regard to such charge, and in case of my making default herein, I bind myself to forfeit to Government the sum of rupees….

Hence as per the bond in **Form No.45**, if the accused is produced before the court on execution of warrant, his bonds forfeits automatically and he is liable to submit fresh bonds for his appearance in future course of time. On plain reading of Cr.P.C. provisions and Forms there under, the forfeiture is in the hands accused. If accused violates the

conditions, his bond will be forfeited automatically as per his undertaking in the Bond. Hence the bonds will be forfeited automatically when the accused violated the conditions imposed and he has produced before the court on execution of warrant. Once bonds forfeits, the court has to grant bail afresh to the accused to the offence. While granting a bail the paramount consideration is: bailable or non-bailable.

There is a slight variation between cancellation of bond and cancellation of bail. The bond will forfeits automatically on failure to maintain the bond. But the bails shall be cancelled through Judicial orders only either US/437(5) or 439(2) Cr.P.C. Needless to say that there is no provision for cancellation of bails U/S.436 Cr.P.C., in bailable offences. S.436(2) Cr.P.C. is only with regard to the non-fulfillment of conditions imposed against the accused in respect of the bond.

S.446 A Cr.P.C. says :

XX where a bond under this code is for appearance of a person in a case and it is forfeited for breach of a condition

(a)the bond executed by such person as well as the bond, if any, executed by one or more of his sureties in that case shall stand cancelled;

Thus the bonds shall stand cancelled on violation of conditions mentioned in it. On execution of warrant, the accused shall produce fresh sureties. But the bail shall be granted to the offence only but not to the warrant issued in process to compel appearance.

It is my duty to reiterate the fact there are no words of NON-BAILABLE in S.70 Cr.P.C. A procedure of warrant is provided U/S.70 Cr.P.C for production of accused. The court orders either a bailable warrant or non-bailable warrant for production of accused. But S.70 Cr.P.C. is not strictly for Non-bailable Warrants. The legislature not tagged the Non-bailable to the S.70 Cr.P.C. That is the reason a relief provision provided in the follow up S.71 Cr.P.C. It is the option of the court to issue either bailable warrant or non-bailable warrant. Hence the S.70 is not in non-bailable nature. It facilitates a procedure

to produce an accused on warrant before court. Options are with the Hon ble Court.

Now the point for discussion is if a Sessions Court (*all Sessions Cases are non-bailable in nature) issued a bailable warrant for production of an accused, can the accused be released on bail U/S.436 Cr.P.C? If he releases on bail U/S.436 Cr.P.C the record encloses with bailable bonds and earlier non-bailable bonds will be forfeited. Now the point for consideration is whether bailable bonds are permissible in a Sessions Case or not.

Bail means release of a person from legal custody. There is a link between personal liberty provided U/Art.21 of the Constitution and Bail as a matter of right provided U/S.436 Cr.P.C.

Hence the purpose of the warrants will over after production of accused before the court and the bail shall be granted as per the offence in the case. The journey of that case starts with that offence. If the genesis point is bailable, keeping the accused in jail under non-bailable warrant opens a door to the legal discussion on this aspect.

It is not out of place to submit that the IPC of 1860 is not a code of ethics. Many issues morally punishable in present day society are not punishable in IPC. For example if a person spoils huge extent of food, throwing it, in to dust bin, is not punishable under IPC, where as a hungered, who took away the said food from the afore said person's house, is designated as thief in the IPC. Hence some times morality is searching for a section in the IPC to punish a real culprit. Practicality is no answer in most of the cases. Hence punishing the citizens for their procedural mis-deeds turns into painful, if it has proved on merits that the offence is a lattice story.

We are inviting a wide range of discussion from the Senior Advocates and legal experts, to remove the clouds of doubts in the minds of mufsil courts junior advocates, since

we may be wrong in receiving the interpretations in the statutes at some points. This article is contributed in the academic interest.

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2017(3) L.S. 151 (D.B.)

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

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

A.Rama Krishna
& Ors., ..Appellants

Vs.

A.Venkatamma & Ors.,, ..Respondents

LIMITATION ACT, Art.110 - Appellants /Sons preferred instant appeal against Respondents/Daughters and mother, challenging the preliminary decree for partition granted in their favour.

Suit schedule properties were purchased by Father, who died intestate – Properties devolved equally upon his wife, 4 daughters and 5 sons, entitling each of them to 1/10th share – Appellants contend that suit properties were not self-acquisition of their father and they were acquired from the nucleus and by sale of certain ancestral properties – Appellants further pleaded exclusion and contended that respondents have abandoned and waived their right.

Held – Law is well settled that a person pleading ancestral nucleus and the source of purchase should prove the same – Principle of waiver is akin to principle of estoppel and the difference lies in the fact that while estoppel is a rule of evidence and not a cause of action, waiver may constitute a cause of action - None of the elements of waiver or abandonment is present in instant case – Appeal stands dismissed.

Mr.Vedula Venkataramana, Senior Advocate, Advocate for the Appellant Nos.1 to 5 & 9 to 12.
Mr.R.A.Chary, Advocate for the Appellant Nos. 6 to 8 & 13 to 15.
Mr.P.Raja Sripathi Rao, Advocate for Mr.G.Tirupathi Reddy, Advocate for Respondent Nos.3,4 & 5 to 11.

J U D G M E N T
(per the Hon'ble Mr.Justice
V. Ramasubramanian)

Aggrieved by the preliminary decree for partition granted in favour of the mother and daughters, the sons have come up with the above regular appeal.

2. Heard Mr. Vedula Venkata Ramana, learned Senior Counsel appearing for the appellants 1 to 5 and 9 to 12, Mr. R.A. Chary, learned counsel appearing for the appellants 6 to 8 and 13 to 15, and Mr. P.Raja Sripathi Rao, learned counsel, representing Mr. G.Tirupathi Reddy, learned counsel appearing for the respondents.

3. The 1st respondent (who is now no more) was the wife of one A.Ganapathi. She along with her daughters,

who are respondents 2 to 5 (2nd respondent in the appeal died and their legal heirs are respondents 6 to 11) filed a suit in O.S.No.109 of 2001 for partition and separate possession of the 1/10th share of each one of them in the suit schedule properties. The appellants 1 to 5 were the defendants in the suit. The appellants 3 and 4 having died during the pendency of the appeal, their legal representatives have been brought on record as respondents 6 to 8 and 9 to 12 respectively.

4. The case of the plaintiffs in the suit was that the 1st plaintiff was the wife, the plaintiffs 2 to 5 are the daughters and defendants 1 to 5 are the sons of one A.Ganapathi; that the said Ganapathi died intestate, leaving the plaint schedule properties and the plaintiffs and defendants as his legal heirs; that the suit properties were the self-acquired properties of Ganapathi; that after the death of the said Ganapathi in the year 1986, the name of the 1st plaintiff and the names of the defendants were recorded in the Revenue records, but no partition was effected; that the plaintiffs and the defendants continued to be in joint possession of the properties and that when the plaintiffs demanded partition, the defendants refused forcing the plaintiffs to come up with a suit.

5. The 1st defendant filed a written statement contending inter alia, that the suit was barred by limitation; that the suit was not properly valued and the relief sought for was not maintainable; that the suit properties were not the self-acquired properties of Ganapathi; that Ganapathi died on 21-02-1983 and not in 1986 as claimed in the plaint; that the plaintiffs were never in possession of the suit properties either prior to the demise of Ganapathi or thereafter; that the defendants alone are in exclusive possession; that it is true that Ganapathi died intestate; that the suit properties were acquired by Ganapathi from ancestral nucleus and from the sale of ancestral properties situate in Bhongir; that the Revenue records contained the name of the 1st plaintiff merely as a nominee party; that even assuming that the plaintiffs are entitled to any share, they have been excluded from possession and enjoyment during the last two decades and the plaintiffs have abandoned and waived their right and that there was no cause of action for the suit.

6. On the above pleadings, the trial Court framed the following issues for trial:

i. Whether the plaintiffs had abandoned their right of share in the suit lands more than 20 years back and if so, whether the suit claim is in time? ii. Whether the suit property is incapable of being identified as required under Order 7, Rule 3 CPC and is liable to be dismissed as pleaded by the defendants?

iii. Whether the suit is properly valued and the court fee paid is correct?

iv. Whether the plaintiffs are entitled for partition and separate possession of the suit schedule property as prayed for?

v. Whether the defendants are entitled to compensatory costs? and

vi. To what relief?

7. The 1st plaintiff, whom we shall refer to as the mother of the other plaintiffs and the defendants, was examined as P.W.1. The 2nd plaintiff was examined as P.W.2. The certified copies of the pahanies for the year 1999-2000 in respect of Survey Nos.1081, 1082, 1083 and 1084 were respectively marked on the side of the plaintiffs as Exs.A-1 to A-4.

8. On the side of the defendants, the 2nd defendant was examined as D.W.1. The sister's son of Ganapathi was examined as D.W.2. Two receipts for payment of land tax were filed as Exs.B-1 and B-2.

9. On issue No.2 relating to valuation and Court Fee, the trial Court held that there was no evidence to prove ouster and that therefore the valuation under Section 34(2) of the Andhra Pradesh Court Fees and Suits Valuation Act, was correct. On issue No.3 with regard to identification of the property, the Court below found that there was no difficulty in identifying the properties. On issue No.1, the Court below held that ouster was not established and that there was no evidence to show that the plaintiffs had abandoned or relinquished their rights. On issue No.4, the Court below found that the defendants having pleaded ancestral nucleus, miserably failed to establish the same and that therefore the plaintiffs were entitled to partition. In the light of these findings, the trial Court decreed the suit as prayed for.

10. Mr. Vedula Venkata Ramana, learned Senior Counsel appearing for the appellants, basically raised 3 contentions, namely, (i) that the trial Court wrongly shifted the burden of proof upon the defendants, without first calling upon the plaintiffs to prove that the properties were selfacquired properties, (ii) that on the question of limitation, the trial Court failed to apply Article 110 of the Schedule to the Limitation Act, 1963 and (iii) that the Court below failed to appreciate the plea of waiver in the right perspective.

11. We have carefully considered the above submissions.

12. From the contentions, it appears that the following issues arise for determination in this appeal:

(i) Whether the Court below wrongly shifted the burden of proof upon the defendants?

(ii) Whether the suit was barred by time in terms of Article 110 of the Schedule under the Limitation Act, 1963? and

(iii) Whether the plaintiffs can be said to have abandoned or waived their right? Issue No.(i):

13. The first issue arising for determination in this appeal is as to whether the trial Court wrongly shifted the burden of proof upon the defendants.

14. As we have pointed out earlier, the case of the plaintiffs before the trial Court was very simple. They pleaded that the suit schedule properties were purchased by A. Ganapathi and that after he died intestate in the year 1986 (actually in 1983), the properties devolved equally upon his wife, 4 daughters and 5 sons, entitling each one of them to 1/10th share.

15. In the written statement filed by the defendants, they claimed in Paragraph-6 that the suit schedule properties were not the self-acquisition of A. Ganapathi. Again in paragraph 7 of the written statement, the defendants claimed that the suit properties were acquired by their father from the nucleus and sale of ancestral properties situated at Bhongir and elsewhere. The defendants admitted that A. Ganapathi died intestate.

16. In the light of the above pleadings, two things were clear namely (1) that the properties stood in the name of A. Ganapathi and (2) that A. Ganapathi died intestate. Once these two aspects are clearly admitted, then any person pleading that the properties did not belong to Ganapathi absolutely and that he acquired the properties only by the sale of ancestral properties, is bound to prove what he pleads. The law is well settled that a person pleading ancestral nucleus and the source of purchase should prove the same.

17. The trial Court rightly took note of the above well established principle of law and also cited the decision of the Supreme Court in Mudi Gowda Gowdappa Sankh v. Ram Chandra Ravagowda Sankh (AIR 1969 S.C.1976), to come to conclusion that there is no presumption that the property held by a person is a joint family property. The initial burden lies upon the person who seeks to assert that the property is joint. It is only when this initial burden is discharged then the burden shifts to the other side to prove the contra.

18. Drawing our attention to the admissions made by PW.1 (mother) to the effect that A. Ganapathi acquired 5 shop rooms and a tiled house by way of succession from his adoptive father and that he disposed of the same, Mr. Vedula Venkataramana, learned senior counsel contended that the acquisition of the suit properties was from those sale proceeds. But this contention of the learned senior counsel for the appellants is unsustainable. It appears that the mother, who was the first plaintiff, was 80 years of age when she was examined as PW.1. It appears from the reexamination that at the time when her evidence was recorded, she was living with the sons. It was suggested to her during re-examination that she was residing with her sons for the past 2 months and that therefore, she was influenced by them.

19. Even de hors the statements of PW.1 during crossexamination, nothing turned on the admission made by PW.1 that 5 shops and a tiled house were sold by Ganapathi. In cross-examination, PW.1 stated that her husband was a native of Kothagudem and that when he was a child of just 12 days, he was brought by his maternal aunt and given in adoption. Those

5 shops and one tiled house belonged to the adoptive father and PW.1 claimed that they were sold for the purpose of fighting a tenancy case. It was the claim of PW.1 that the sale proceeds were utilised for the purpose of buying the suit schedule properties. On the contrary, PW.1 stated that her husband was carrying on dairy business.

20. The above statements of PW.1 are not sufficient to indicate an ancestral nucleus. The evidence of PW.1 was nowhere near a suggestion that the suit properties were brought out of the sale proceeds of ancestral properties. The shops and tiled house, got by A. Ganapathi, did not have the character of ancestral property.

21. Therefore, the trial Court was right in placing the burden of proof upon the defendants to show ancestral nucleus and a sale of the ancestral properties for the purpose of acquiring the suit properties. Hence, the first point arising for consideration is answered against the appellants and in favour of the respondents. Issue No.(ii):-

22. The second issue arising for determination is as to whether the suit is barred by time in terms of Article 110 of the Schedule under the Limitation Act, 1963? 23. For the applicability of Article 110 of the Schedule to the Limitation Act, 1963, two conditions are to be satisfied namely (a) that a person seeking to enforce a right to a share in the property should have been excluded and (b) that such exclusion should have become known to the plaintiff. Under Article 110, the period of limitation for making a claim to a share in the joint family property is 12 years, and the date of commencement of the period of limitation is the date on which the exclusion becomes known to the plaintiff. In other words, a person setting up a plea of limitation should plead as well as prove (1) exclusion and (2) knowledge of such exclusion.

24. In the case on hand, the defendants merely pleaded exclusion without even indicating the date on which such exclusion became known to the plaintiffs. In fact, after the death of A. Ganapathi in the year 1983 mutation was effected in the revenue records not exclusively in the names of the defendants, but jointly in the names of the first plaintiff and the defendants.

25. Interestingly, the claim of the defendants in para-8 of the written statement was that the plaintiffs were excluded from possession and enjoyment during the last 2 decades. But Ganapathi died even according to the defendants on 21-02-1983 and the suit was instituted in 2001. The mother was alive and she was the first plaintiff.

26. In order to discredit the testimony of the mother examined as PW.1, it was claimed by DW.1 that his mother colluded with the revenue officials and managed to get her name recorded in the revenue records. The trial Court rejected such a suggestion and rightly so, since PW.1 was with her sons when she was examined. She was an illiterate lady and

could not have colluded with the revenue officials. As rightly pointed out by the trial Court, the mere absence of the names of the daughters in the revenue records will not conclusively show ouster. It was neither pleaded not proved by the defendants that before effecting mutation, the revenue officials put the daughters on notice.

27. Ouster was not even pleaded in so many words by the defendants. The defendants pleaded exclusion, without any reference to the date from which the plaintiffs were excluded. Instead of pleading ouster, the defendants actually set up the defence of abandonment and waiver. Irrespective of the nomenclature used by the defendants, all these things require concrete proof, as they have the ability to extinguish valuable rights.

28. The trial Court rightly relied upon the decision of the Supreme Court in Karbalai Begum vs Mohd. Sayeed And Anr (AIR 1981 SC 77), wherein the Supreme Court pointed out that the mere non-participation by a co-sharer in the rents and profits of a property does not amount to ouster. Though the trial Court did not actually look at Article 110 of the Schedule to the Limitation Act, the trial Court came to the right conclusion on the plea of ouster. In such circumstances, the defendants could not prove exclusion and could not either plead or prove knowledge of exclusion, and hence, the suit cannot be said to have been barred by limitation in terms of Article 110 of the Schedule to the Limitation Act, 1963. Hence, the second issue is answered against the appellants and in favour of the respondents. Issue No.iii:-

29. The third issue arising for determination is as to whether the plaintiff can be said to have abandoned or waived their right.

30. At the cost of repetition it should be pointed out that the properties obviously stood in the name of A. Ganapathi and he admittedly died intestate in the year 1983, leaving behind him surviving his wife, 4 daughters and 5 sons. After the death of A. Ganapathi, the revenue officials effected mutation in the records, including the names of the first plaintiff and the defendants. When the mother joined the daughters and instituted the suit, the sons took a defence that neither the mother nor the daughters were entitled to a share in the suit properties. But they admitted that the mother's name was included in the revenue records. Therefore, it was for the defendants to establish abandonment or waiver by concrete evidence. But no evidence was forthcoming from the defendants. Hence, the trial Court was right in rejecting the plea of abandonment or waiver.

31. As indicated in Halsbury's Law of England, waiver is the abandonment of a right in such a way that the other party is entitled to plead abandonment by way of confession and avoidance, if the right is thereafter asserted. Waiver may arise either by virtue of equitable or promissory estoppel or from an election. Though waiver could be express or implied, waiver by implication should arise from conduct as it is inconsistent with the continuance of the

right. It is important to note that mere acts of indulgence will not amount to waiver and a party setting up the plea of waiver, cannot have benefit from the waiver unless he has altered his position in reliance on it.

32. As pointed out time and again by Courts, the principle of waiver is akin to the principle of estoppel. But the difference between two lies in the fact that while estoppels is a rule of evidence and not a cause of action, waiver may constitute a cause of action.

33. None of the elements of waiver or abandonment is present in this case. Though Mr. Vedula Venkataramana, learned senior counsel upon a decision of the Supreme Court in B.L. Sreedhar and others v. K.M. Munireddy (AIR 2003 SC 578 , we do not think that the said case has any application to the facts of the present case. The question involved in B.L. Sreedhar was as to whether one of the parties to the litigation was estoppel from questioning a sale transaction. A sale would normally defeat the right of a person to the property sold. Therefore, the failure of the party to challenge the same, in certain circumstances could be taken advantage of by raising the plea of estoppel as it is a rule of evidence. But waiver and abandonment stand on a slightly different footing. Therefore, the decision is of no assistance to the appellants.

34. Even in B.L. Sreedhar and others v. K.M. Munireddy, the Supreme Court noted the distinction between the waiver and estoppel by quoting an extract from the Halsbury's Laws of England to the following effect: "The essence of waiver is "estoppel" and where there is no "estoppel" there can be no "waiver", the connection between "estoppel" and "waiver" being very close. But, in spite of that, there is an essential difference between them and that is whereas estoppel is a rule of evidence waiver is a rule of conduct. Waiver has reference to man's conduct, while estoppel refers to the consequences of that conduct."

35. Therefore, we are considered view that the plaintiffs cannot be said to have abandoned or waived their rights. Accordingly the third issue is also answered in favour of the respondents and against the appellants.

Conclusion:

36. Therefore, we find no valid reason to interfere with the judgment of the decree of the trial Court. Hence, the appeal is dismissed with costs throughout. The miscellaneous petitions, if any, pending in this appeal shall stand closed. No costs

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2017(3) L.S. 158 (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 Sanjay Kumar &
The Hon'ble Mr.Justice Shameem akther

Kodamanchili Srirama Sarma ..Appellant

Vs.

The State of A.P., ..Respondent

CRIMINAL PROCEDURE CODE, Secs.235(2) and 374(2) – INDIAN PENAL CODE, Secs. 201, 302 and 304-B – Instant Criminal appeal preferred by appellant against the Judgment passed by Trial court.

Deceased is the wife of appellant - Appellant used to harass the deceased to sell away certain land and give cash to him – Appellant killed the deceased and tried to screen away evidence by burning her dead body.

Held – Death of the deceased is homicidal – As per section 113-B of Indian Evidence Act, soon after the death, such a woman has been subjected to cruelty or harassment for or in connection with any demands for dowry, then the court shall presume that such person had committed dowry death – Prosecution had proved guilt of the appellant beyond all reasonable doubts - Appeal stands dismissed.

Ms.A.Gayatri Reddy, Advocate for the Appellant.
Public Prosecutor for Respondent.

J U D G M E N T

This Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure, 1973 (for brevity, 'Cr.P.C.') questioning the judgment dated 19.08.2010, passed by the learned IV Additional Sessions Judge (Fast Track Court), Tanuku, West Godavari District (for brevity, 'the trial Court') in Sessions Case No.406 of 2007, whereby the trial Court convicted the appellant-accused under Section 235(2) Cr.P.C. for the offence punishable under Sections 302, 304-B and 201 of the Indian Penal Code, 1860 (for brevity, 'I.P.C.') and sentenced him to undergo imprisonment for life and to pay fine of Rs.3,000/- (Rupees three thousand only) with a default sentence of simple imprisonment for a period of three (3) years for the offence under Section 302 I.P.C.; to undergo imprisonment for life for the offence under Section 304-B I.P.C.; and to undergo simple imprisonment for a period of three (3) years and to pay fine of Rs.1,000/- (Rupees one thousand only) with a default sentence of simple imprisonment for one month for the offence under Section 201 I.P.C.; giving liberty to the appellant to set off the period of remand already undergone by him. The trial Court further directed that all the sentences imposed against the appellant for the aforesaid offences shall run concurrently.

2. Heard Smt. A.Gayatri Reddy, the learned counsel appearing for the appellant, and the learned Public Prosecutor appearing for the State.

3. The case of the prosecution, in brief, is as follows:

Smt. Kodamanchili Bhramaramba was the deceased in this case. P.W.1-Sannidhi Annapurna, mother of deceased performed the marriage of the deceased with the appellant on 05.10.2001 at Bhimavaram and gave Rs.50,000/- cash, ten sovereigns of gold and Ac.1-00 of land as dowry. The appellant and the deceased resided at Palivela village for two years, thereafter shifted to Sajjapuram of Tanuku. The appellant started harassing the deceased to sell away Ac.1-00 of land and give cash to him. While so, the deceased gave birth to a son on 22.09.2004. Due to harassment made by the appellant, P.W.1-mother of the deceased meted his demands three times by paying Rs.50,000/- to purchase a computer, Rs.50,000/- to purchase a motorcycle and Rs.25,000/- at the time of opening of an Astrology Office at Khammam by the appellant. The appellant resided with the deceased at Tanuku after that, left Palivela and there also he repeated the dowry harassment and from there, the deceased was taken back to the house of her mother-P.W.1 at Yanamaduru and stayed there for five months. After birth of a son, the appellant and the deceased took a house at Alamuru, which is the native place of the appellant, and thereafter the appellant alone left Khammam for some time and kept the deceased at Alamuru. Later the deceased was taken back to Bhimavaram and again, on 10.11.2006, the appellant took the deceased to Alamuru and resided there in a rented house. The appellant was harassing the deceased demanding additional dowry and necked her out. The deceased was returned back to her mother's house with injuries on her body and she told her mother about the harassment made by the appellant. On 30.11.2006, the mother of the deceased dropped the deceased with samans at the house of the appellant situated at Alamuru. On 02.12.2006 at about 6-00 p.m., the deceased telephoned to her mother-P.W.1 by weeping and told that the appellant was torturing and she cannot bear the harassment and requested to take back her to her house. P.W.1 replied that she will raise a dispute through her elder brother-P.W.3 and thereafter she went to the house of her brother-P.W.3 and informed the same to him, who in turn, promised to raise the dispute on the next day. On the night of 02.12.2006, the appellant killed the deceased and tried to screen away the evidence, he burnt the dead body of the deceased with kerosene, 100% burns were caused. Later, the appellant informed about the death of the deceased to the neighbours at about 3-00 a.m. on 03.12.2006. The appellant also made a phone call to P.W.4-junior maternal uncle of the deceased. P.W.4 informed P.W.1-mother about the death of deceased and all of them reached Alamuru at 5-00 a.m. on 03.12.2006 and they found the dead body completely burnt. Thereafter, P.W.1 went to Penumantra Police Station and presented Ex.P.1-report to P.W.16-the Assistant Sub Inspector of Police, who in turn, registered a case in Crime No.92 of 2006 for the offences punishable under

Sections 498-A and 306 I.P.C., issued Ex.P.7- F.I.R. to all the concerned, requested Mandal Revenue Officer to conduct inquest over the dead body of the deceased, proceeded to the scene of offence, conducted scene of offence panchanama in the presence of panchas, prepared Ex.P.4- scene observation report, Ex.P.5-inquest and Ex.P.8-rough sketch of scene of offence, seized material objects, recorded statements of the witnesses and sent the dead body to postmortem examination. P.W.9-Civil Assistant Surgeon conducted autopsy over the dead body along with P.W.13-Dr.K.Satyavathi and issued Ex.P.3-post-mortem examination report and opined that the deceased died due to asphyxia and due to pressure over the neck. P.W.17-Deputy Superintendent of Police on completion of investigation, filed charge sheet against the appellant for the offences punishable under Sections 302, 304-B, 201 I.P.C. and Section 4 of the Dowry Prohibition Act, 1961.

4. On committal, the case was made over to IV Additional Sessions Judge (Fast Track Court), Tanuku, West Godavari District. During trial, P.Ws.1 to 17 were examined and Exs.P.1 to P.10 and M.Os.1 to 9 were marked. No evidence was adduced by the appellant. The trial Court, basing on the entire evidence on record, convicted and sentenced the appellant as stated above.

5. Learned counsel for the appellant would submit that the appellant is not responsible for the death of his wife; the offences under Sections 302 and 304-B I.P.C. are distinct, one excludes the other and no sentence can be imposed for both the offences; there is no evidence to prove the offence under Section 4 of the Dowry Prohibition Act; the trial Court ought not have convicted the appellant for the offence under Section 304-B I.P.C.; the evidence placed on record leads only to the suspicion, it will not prove the guilt of the appellant for any offences; P.Ws.1 to 4 are not truthful witnesses; there is no F.S.L. Report and no attempt was made to detect the bloodstains found on walls, floor and on the body of the child; as per the medical evidence, no bleeding injury was found on the body of the deceased; there is inconsistency in the evidence of P.Ws.1 to 4 and inquest witnesses; the bad antecedents of the appellant are not relevant; the conduct of the appellant in informing the neighbours soon after seeing the dead body disproves his guilt; and ultimately, prayed to set aside the conviction and sentences recorded against the appellant.

6. Learned Public Prosecutor would submit that there is no reason for P.Ws.1 to 4 to depose falsely against the appellant; the deceased was mentally and physically harassed in connection with the demand of dowry after marriage and soon before her death; P.W.1-mother of the deceased gave substantial amounts to the appellant on several occasions and in spite of that, the appellant did not stop dowry harassment, physically and mental torture and later committed murder of the deceased and burnt the dead body thus caused disappearance of evidence; the trial Court had rightly convicted and sentenced the appellant of the charges framed against him; the prosecution proved the guilt of the

appellant beyond all reasonable doubt; and ultimately, prayed to dismiss the appeal confirming the conviction and sentence recorded against the appellant by the trial Court. 7. In view of the contentions putforth by both sides, the following points have come up for determination:

(1) Whether the death of the deceased is homicidal?

(2) Whether the appellant caused disappearance of the evidence?

(3) Whether the deceased was subjected dowry harassment soon before her death?

(4) Whether the conviction and sentences recorded by the trial Court of the offences under Sections 302, 304-B and 201 I.P.C. are sustainable?

8. POINT No.1: The evidence of P.W.9-Dr. T.Gopala Krishna reveals that he along with P.W.13-Dr. K.Satyavathi conducted joint post-mortem examination over the dead body of the deceased-Bramarambha on 04.12.2006 between 11-00 a.m. and 1-00 p.m., on examination they found superficial burns over whole body i.e., face, neck, thorax, abdomen, back, both upper and lower limbs, 100% burns, no vital reaction, no soot in the larynx and burns were post-mortem in nature. On internal examination, they found skull normal, brain and heninges congested, left side fracture of hyoid present, ribs normal and time of death was 30 to 32 hours prior to the post-mortem examination. They opined that the deceased died due to asphyxia, i.e., she appeared to have died due to pressure over the neck, which is ante-mortem and the burns sustained by the deceased are post-mortem in nature. Ex.P.3 is the post-mortem certificate issued by them. The evidence of P.W.13-Dr. K.Satyavathi reveals that she along with P.W.9-Dr. T. Gopala Krishna conducted autopsy over the dead body of the deceased in this case, by name, K.Bramarambha. She corroborated with the evidence of P.W.9 in all material particulars. P.W.13 specifically stated that the deceased died due to use of pressure over the neck, which is ante-mortem and the burns sustained by the deceased are post-mortem. P.W.13 further stated that there was fracture of hyoid bone. Ex.P.3-post-mortem examination report corroborates with the evidence of P.W.9 and P.W.13. In cross-examination, P.W.13 denied that there was improper dissection of the dead body. In cross-examination, both the witnesses deposed that they were deposing false. Nothing is brought in the cross-examination of these witnesses to discard their testimony.

9. The evidence of P.W.14-Satti Venkata Suryanarayana Reddy is that the scene of offence panchanama and inquest panchanama were conducted over the dead body, laying in rented house of the appellant. The dead body was found therein. Ex.P.4 is the scene of offence anchanama and Ex.P.5 is the inquest panchanama for seizure of clothes from the dead body of the deceased. P.W.12-Ramesh Chowdary drafted panchanamas. They opined that the deceased was throttled to death by the appellant and later the appellant burnt the

dead body. P.W.16-D.Suryanarayana, Assistant Sub Inspector of Police, also corroborated with the evidence of P.W.14 and also deposed about the receipt of Ex.P.1-report from P.W.1, issue of Ex.P.7-F.I.R., conduct of scene of offence and inquest panchanamas over the dead body of the deceased and seizure of clothes and other material objects, i.e., M.Os.1 to 9. As per the evidence of these witnesses, the scene of offence is at the rented house of appellant, situated at Alamuru. There is no reason for this witness to depose false. There is consistency in the medical evidence and the evidence of other witnesses. There is also the evidence that there were bloodstains on the child and also on the wall of the rented house of the appellant. There is cogent and convincing evidence, both oral and documentary, on record to believe that the death of the deceased was homicidal and the place of offence is rented house of the appellant, situated at Alamuru village. The point No.1 is answered accordingly.

10. POINT Nos.2 TO 3: P.W.1 is the mother of the deceased. Her evidence reveals that the deceased was her daughter, the appellant is her son-in-law, on 10.05.2001, the marriage of the deceased was performed with the appellant, she gave lot of dowry at the time of marriage, after marriage the deceased and the appellant lived together in her house at Palivela for three years, the appellant harassed her daughter demanding additional dowry, i.e., to give Acs.9-00 of land and used to threaten the deceased to kill, the deceased became pregnant, as there were no facilities, they shifted to Tanuku, the deceased was being continuously harassed by the appellant for additional dowry, she gave Rs.50,000/- to purchase a computer, another Rs.50,000/- to purchase motorcycle and also Rs.25,000/- at the time of opening of an astrology office by the appellant at Khammam. P.W.1 further deposed that even after receipt of the said amounts, the appellant did not stop harassment against the deceased and was demanding additional dowry, he continued to do so, always the appellant used to pick up quarrels with the deceased, several times the deceased informed the same to her (P.W.1), the appellant used to drink and harass her daughter for additional dowry and the appellant also necked out the deceased from his house, scratches were found on the body of the deceased, due to beating by the appellant, the deceased used to weep and inform the same to her and P.W.1 used to console and send back to the company of the appellant and ultimately she sent back the deceased on 30.11.2006 to the house of the appellant situated at Alamuru with samans and household articles. P.W.1 further deposed that on 02.12.2006, the deceased telephoned her and informed that the appellant tortured and harassed her and requested her to take her back to her house, at that time deceased was weeping, and also informed that the appellant beat the deceased and asked her to sleep outside the room, the appellant was alone sleeping inside the room by locking the doors, she consoled the deceased by saying that she would tell the same to her brother, thereafter the deceased went to the house of brother of P.W.1 and told abut the happenings, her brother promised her that he would come next day

and question the appellant, and on the next day, at 3-00 a.m., her younger brother-K.Koppeswara Rao (P.W.4) received a phone message that her daughter died, in turn, he telephoned to his elder brother-K.Venkata Subrahmanyam (P.W.3), thereafter she went to Alamuru at 5-00 a.m., she found the dead body of the deceased completely burnt lying without any dress, she noticed bloodstains on the walls and also on the son of the deceased and she made Ex.P.1-report to the police. In cross-examination, P.W.1 reiterated what she stated in her chief-examination and also stated that the appellant asked to sell away the land. The evidence of P.W.2-Sannidiraju Veerabhadra Sarma rveals that P.W.1 is his mother of the deceased, the deceased was his sister, the appellant is his brother-in-law. P.W.2 also deposed about the performance of the marriage of the deceased with the appellant, demand of additional dowry by the appellant and the appellant harassing the deceased. He corroborated with the evidence of P.W.1 in all other material particulars, such as, the appellant demanding additional dowry on several occasions. P.W.2 also stated that the appellant used to demand the deceased to sell her gold ornaments and give cash to him. On 03.12.2006, he was informed that his sister (deceased) died, then he along with others went to the house of the appellant at Alamuru at 5-00 a.m., they found the dead body of the deceased and he drafted Ex.P.1-report. In cross-examination, P.W.2 reiterated what he stated in his chief-examination. The evidence of P.W.3- Kodamanchili Venkata Subrahmanyam reveals that P.W.1 is his elder sister. He deposed about the marriage between the appellant and the deceased. He also deposed about money and the property given to the appellant at the time of marriage, the appellant addicted to bad habits, such as, drinking, etc., and also harassing the deceased for additional dowry. Further, he deposed that P.W.1 gave the appellant Rs.50,000/- to purchase a computer, Rs.50,000/- to purchase a motorcycle and Rs.25,000/- at the time of opening of astrology office by the appellant at Khammam, the appellant and the deceased begot a child, the deceased used to tell him that the appellant demanding additional dowry and harassing her, the appellant was also demanding the deceased to sell away the land and give cash to him. On 03.12.2006 at about 3-15 a.m., his younger brother telephoned him and informed him that the deceased died, he went along with others to the house of the appellant and found the dead body of the deceased with burn injuries, P.Ws.2 and 3 stated that when they questioned the appellant, he pleaded ignorance with regard to cause of death. In cross-examination, P.W.3 denied that he was deposing false and stated that three days prior to the death, the deceased made him a phone call and informed him that the appellant demanded her to sell away the land and to give cash to him. The evidence of P.W.4- Konamanchili Koppeswara Rao reveals that P.W.1 is his elder sister and P.W.3 is his elder brother. He also corroborated with the evidence of P.Ws.1 to 3 with regard to the dowry harassment and P.W.1 giving money to the appellant. There is also specific evidence of P.W.4 that on 03.12.2006 at about 3-00 a.m., the appellant made a phone call to him and could not give details properly, the person

who is said to be the neighbour of the appellant told him that the deceased died due to burns, then he informed his sister-P.W.1 about the death of the deceased and he reached the house of the appellant and found the dead body of the deceased completely burnt. In cross-examination, he reiterated the same. The evidence of P.W.5-Kotta Baburao reveals that he knew the appellant and the deceased, the appellant was an Archaka in Alamuru temple, 20 days prior to the death of the deceased, the appellant took a rented house at Alamuru, which is opposite to his house, the house belongs to P.W.10-Kovvuri Srirama Reddy, on 03.12.2006 at about 3-00 a.m., the appellant came to his house and wake him up saying that the deceased committed suicide and asked him to help, then he went and found the dead body of the deceased burnt and lying on the floor and he was examined by the police. This witness was declared hostile and the statement given by him to the police was marked as Ex.P.2, wherein it was mentioned that he suspected the appellant in the death of the deceased. The evidence of P.W.6-Kovvuri Rama Krishna Reddy reveals that he is the Trust Board Member of Sivalayam temple of Alamuru, the elder brother of the appellant worked as Archaka in the temple, he saw the wife of the appellant, he also saw the dead body of the deceased, the appellant addicted to vices and he came to know that the appellant demanded the deceased for additional dowry and harassed her. He was examined by the police. The evidence of P.W.7-Karri Nagireddy reveals that he is an agriculturist, the appellant is his neighbour, he knew the deceased in this case, about three years back, when he was sleeping in his house at night, the appellant came to him and woke up him by saying that his wife lit fire by herself, on previous day, the appellant beat his wife, he heard those cries, he also witnessed when the appellant beating his wife, he saw the dead body of the deceased, which was burnt, he noticed blood on the boy i.e., son of the deceased aged 4 or 5 years. The evidence of P.W.8-Nallamalli Rajasekhar reveals that he did not take photographs in this case. The evidence of P.W.10-Kovvuri Sri Ramareddy reveals that he saw the dead body of the deceased and found that it was burnt, he also found blood on the walls, floor and on the body of the deceased. P.W.11-Satti Atchireddy deposed about the death incident on that day and he informed the death to relatives of deceased, he saw the dead body in a burnt condition. P.W.15-G.Chandra Sekhar, photographer, deposed about taking of eight photographs of the dead body and the scene of offence, marked as Ex.P.6. P.W.17 is the Inspector of Police. His evidence reveals that he verified the investigation conducted by P.W.16-Assistant Sub Inspector of Police and found it correct, he arrested the appellant, brought him to the police station and sent him to the Court for judicial remand. He further deposed that he sent the material objects to R.F.S.L., Vijayawada, on 28.02.2007, he received Ex.P.10-R.F.S.L. Report, after completion of investigation, he filed charge sheet against the appellant for the offences punishable under Sections 302, 304-B and 201 I.P.C. and Section 4 of the Dowry Prohibition Act.

11. P.W.1 is none other than the mother of the deceased. She has

categorically deposed that there was continuous physical and mental harassment meted out to the deceased by the appellant in connection of demand of additional dowry, in spite of P.W.1 giving money on several occasions, i.e., Rs.50,000/- to purchase computer, another Rs.50,000/- to purchase motorcycle and Rs.25,000/- to establish astrology office at Khammam. The same has been corroborated with the evidence of P.Ws.3 and 4, who are brothers of P.W.1 and they are the natural persons to know about the happenings in the family. They also deposed about the continuous physical and mental torture meted out to the deceased by the appellant, the same is mentioned in Ex.P.1-report. On 30.11.2006, the deceased was left at the house of the appellant with samans and household articles, the deceased several times informed her mother and others with regard to the harassment meted out by the appellant. The death was caused on the intervening night of 2/3.12.2006. On 02.12.2006, at about 6-00 p.m., the deceased telephoned to P.W.1 and informed her that the appellant tortured her and she cannot bear the harassment and asked her mother to take back. On the next day early hours, P.W.1 and another received a phone call that the deceased died. The appellant was the person who informed the death of the deceased to his neighbours, i.e., P.Ws.5 to 7, and all these witnesses went to the house of the deceased and found the dead body of the deceased totally burnt. The appellant was the person who woke up P.Ws.5 to 7 and informed them about the death of the deceased. P.W.6 specifically stated that the appellant addicted to bad vices. P.W.7 specifically stated that he saw the appellant beating his wife. P.Ws.1, 2, 3 and 7 also saw the blood on the walls. Blood was also found on the child. There is specific evidence of P.Ws.9 and 13 doctors that there was a fracture of hyoid bone, the deceased died due to use of pressure on neck and the fracture of hyoid bone is ante-mortem, the burn injuries found over the dead body are post-mortem. Ex.P.3 is the postmortem examination report given by the doctors-P.Ws.9 and 13. There is no reason for the doctors to depose false. While answering point No.1, whether the death is homicidal or otherwise, it is held that the death was homicidal. Admittedly, the deceased and her son were in the company of the appellant and it is not the case of the appellant that the deceased was not with him on the intervening night of 2/3.12.2006. Moreover, the appellant is the person who informed the neighbours about the death of the deceased. All the neighbours deposed that they were informed the death of the deceased by the appellant and they found the dead body of the deceased totally burnt and the appellant was there at that time. P.Ws.1 to 4 have also stated that the deceased was present when they went and saw the dead body of the deceased at his rented house. When some of the witnesses questioned the appellant with regard to the cause of death, he did not state anything. When the entire incriminating evidence appearing against the appellant is put to him under Section 313 Cr.P.C., he simply denied the same and stated that a false case was foisted against him and he is not responsible for the death of his wife. The appellant did not lead any rebuttal evidence. He did not establish that he was not present with the deceased on

that night in their house and he was somewhere else or some unknown persons have caused the death of the deceased. As per Section 106 of the Indian Evidence Act, the appellant is required to explain the facts within his knowledge. Section 106 of the Evidence Act reads as follows:

> "106. Burden of proving fact especially with knowledge – When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him illustrations:
> (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
> (b) A is charged with traveling on a railway without a ticket. The burden of proving that he had a ticket is on him."

12. In the case of State of M.P. v. Ratan Lal air 1994 sc 458 , the Hon'ble Supreme Court held that in a case where various links have been satisfactorily made out and the accused did not offer any explanation consistent with their innocence, the absence of such explanation itself is an additional link which completes the chain. Similar are the circumstances in the case on hand.

13. The answers given by the appellant would go a long way in completing the chain of circumstances in establishing the guilt. The evidence of P.Ws.1 to 7 is consistent, cogent and no hypothesis or accusation is possible with regard to the innocence of the appellant. The appellant was very much present in the company of the deceased on the intervening night of 2/3.12.2006. One day before her death, the deceased telephoned to her mother with regard to the continuous dowry harassment. P.W.7 also found the deceased crying and beaten by the appellant. On 03.12.2006 at about 3-00 a.m., the appellant informed his neighbours about the death of the deceased. He alleged that the deceased committed suicide. As per the medical evidence and oral evidence, it is not a case of suicide. It goes to show that the appellant tried to mislead the people that the deceased had committed suicide. The dead body was totally burnt and the burn injuries are post-mortem. The appellant was only person in the company of the deceased. There was no possibility or reason for any other persons to burn the dead body. Therefore, it clearly establishes that the appellant strangulated the deceased to death and thereafter, he burnt the dead body. There is also evidence to establish that there was blood on the walls, scene of offence and over the dead body. It also clinchingly establishes that the appellant caused simple injuries, thereafter he throttled the deceased to death and burnt the dead body. Though there are no direct witnesses, but the circumstances placed on record would clearly establish an inference of guilt of the appellant in causing the death of his wife. The evidence on record is of definite tendency and unerringly pointing towards the guilt of the appellant in causing death of the deceased. The cumulative effect of the circumstances on record is so complete that there is no escape from the conclusion that with all human probability, the death was caused by the appellant and none else. The

circumstantial evidence is complete and incapable of explanation of any other hypothesis than that of the guilt of the appellant. The evidence on record is consistent and fairly establishes that the appellant throttled his wife to death, having tortured her mentally and physically for want of dowry and when she did not sell her land and pay sale proceeds to him.

14. Learned counsel for the appellant would submit that the appellant cannot be convicted for the offences under Sections 302 and 304-B I.P.C., as they are distinct offences. In support of her contention, she relied on a decision of the Hon'ble Supreme Court in Baijnath and others v. State of Madhya Pradesh 2017 (1) SCC (Crl.) 225

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> "To the contrary, the evidence of the defence witnesses is consistent to the effect that no demand as imputed had ever been made as the family of the husband was adequately well-off and further Appellant 1 Baijnath had been living separately from before the marriage. According to them there was no occasion for any quarrel/ confrontation or unpleasantness in the family qua this issue. Significant is also the testimony of DW 3, the sisterin-law of the deceased who indicated abandonment of the matrimonial home by her with the son of Thoran Singh, the Sarpanch of the village for which she understandably had incurred the displeasure of the in-laws. DW 4, the father of DW 3 who had given his daughter in marriage in the same family had deposed that he did not ever encounter any demand for dowry. The testimony of the prosecution witnesses PW 3 and PW 7 fully consolidate the defence version. A cumulative consideration of the overall evidence on the facet of dowry, leaves us unconvinced about the truthfulness of the charge qua the accused persons. The prosecution in our estimate, has failed to prove this indispensable component of the two offences beyond reasonable doubt. The factum of unnatural death in the matrimonial home and that too within seven years of marriage therefore is thus ipso facto not sufficient to bring home the charge under Sections 304-B and 498-A of the Code against them."

15. Under these circumstances, it is appropriate to refer the decision of Hon'ble Supreme Court in Smt. Shanti and another v. State of Haryana 1991 SCC 37 , which was referred in many other subsequent decisions. The Hon'ble Supreme Court stated the law on the point relating to an offence under Section 304-B I.P.C.

> "4…… A careful analysis of Section 304-B shows that this section has the following essentials: (1) The death of a woman should be caused by burns or bodily injury or otherwise than under normal circumstances; (2) Such death should have occurred within seven years of her marriage; (3) She must have been subjected to cruelty or harassment by her husband or any relative of her

husband;

4) Such cruelty or harassment should be for or in connection with demand for dowry. Section 113-B of the Evidence Act lays down that if soon before the death such woman has been subjected to cruelty or harassment for or in connection with any demand for dowry, then the court shall presume that such person has committed the dowry death. The meaning of "cruelty" for the purposes of these sections has to be gathered from the language as found in Section 498-A and as per that section "cruelty" means "any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life etc. or harassment to coerce her or any other person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand". As per the definition of "dowry" any property or valuable security given or agreed to be given either at or before or any time after the marriage, comes within the meaning of "dowry"……"

16. Unto the latest decision available on this point, in Baljinder Kaur v. State of Punjab 2014 13 Scale 96 , except for the required thrust with respect to the factual situation available in each case, the law has been consistent as to the requirements for constituting the offence under Section 304-B of I.P.C.

17. As per the evidence on record, the death of the deceased in this case is homicidal, it includes death "otherwise than under normal circumstances". As per the evidence on record, the date of marriage is 10.05.2001 and the death of the deceased was on the intervening night of 2/3.12.2006, i.e., within seven years of marriage. There is ample evidence on record to show that lot of dowry was given at the time of marriage, even then the appellant continuously demanded and harassed the deceased for want of additional dowry. The appellant was continuously harassing and beating the deceased to sell one acre of land and give him the sale proceeds. The deceased just before her death, i.e., on 02.12.2006 at 6-00 p.m., telephoned to her mother-P.W.1, weeping and informed her that appellant torturing, beating and harassing her and making her sleep outside and he was sleeping in a room. There is clear and unimpeachable evidence on record to believe the same. The entire harassment and cruelty meted out to the deceased by the appellant was in connection of demand of additional dowry. As per Section 113-B of the Indian Evidence Act, soon after the death, such a woman has been subjected to cruelty or harassment for or in connection with any demands for dowry, then the Court shall presume that such person had committed dowry death. The cruelty for the purpose of this section has been gathered from the language as found in Section 498-A I.P.C. and as per that section, "cruelty" means any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or cause injury or damage to life, etc., or harassment

to coerce her or any other person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. As per the definition of "dowry", any property or valuable security given or agreed to be given either at or before or any time after the marriage, comes within the meaning of "dowry". The evidence of P.Ws.1 to 5 clearly establishes that the deceased was continuously harassed and tortured by the appellant in connection with dowry. There is nothing to doubt the same. Admittedly, the ingredients of Section 302 I.P.C. and Section 304-B I.P.C. are distinct. In Baijnath's case (supra 2) on which reliance is placed by the learned counsel for the appellant, there is no dowry harassment soon before death of the deceased. But in the case on hand, the deceased was continuously harassed mentally and physically and there are innumerable instances of harassment meted out to the deceased in connection of demand of dowry including the sale of land and pay the sale consideration to the appellant soon before her death. Therefore, the decision referred by the learned counsel for the appellant cannot be relied on. In view of the oral and documentary evidence on record, the prosecution had proved the guilt of the appellant beyond all reasonable doubt for the offences under Sections 302 and 304-B I.P.C., though they are distinct offences.

18. It is also the evidence on record that the appellant made an attempt to cause disappearance of the evidence by burning the dead body. He tried to depict it as a suicidal death, but failed in his attempt to establish. Therefore, the appellant is guilty of committing an offence under Section 201 I.P.C. also. The trial Court, while analyzing the entire evidence on record, came to a correct conclusion and there is no infirmity in the impugned judgment. Therefore, it is not appropriate to take a different view. The conviction and sentences recorded against the appellant for the offences punishable under Sections 302, 304-B and 201 I.P.C. are liable to be confirmed. All the defences set up by the appellant have no merit to consider. The appeal is devoid of merits and is liable to be dismissed.

19. In the result, the appeal is dismissed and the conviction and sentence recorded against the appellant by the trial Court in Sessions Case No.406 of f2007, vide the judgment dated 19.08.2010, is confirmed.

20. A perusal of the record shows that by order dated 28.11.2016 in Crl.A.M.P. No.1900 of 2016, this Court granted bail to the appellant following the order of this Court in Batchu Ranga Rao v. State of A.P. Crl.A.M.P.No.1687 in Crl.A.No.607/11 . Therefore, the appellant shall surrender himself before the Superintendent, Central Prison, Rajahmundry, East Godavari, forthwith, to serve the remaining sentence. In default, the trial Court shall take appropriate steps against the appellant to implement the impugned judgment. 20. As a sequel, miscellaneous petitions, if any pending in this appeal, shall stand closed

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2017(3) L.S. 170 (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

The Superintendent Engineer ..Appellant

Vs.

Sri P.Ramaiah & Ors., ..Respondents

ARBITRATION AND CONCILIATION ACT, Sec.34 – CONSTITUTION OF INDIA, Article 162 - Contract for the execution of construction was awarded to 1st respondent and with regard to the fixation of rates for drilling of bore holes, arose a dispute between Petitioner/ Department and 1st respondent - As per the terms of contract, 1st respondent referred matter to Technical expert, which arrived at a decision in favour of 1st respondent - However, petitioner referred the matter for Arbitration.

Arbitration tribunal passed a notice to the petitioner to attend proceedings - Petitioner reported that it had no pecuniary jurisdiction to entertain the matter in view of G.O – Arbitration tribunal has also passed an award in favour of the 1st respondent – Counsel for petitioner contended that though G.O was not incorporated in the contract, still being the executive order of government should not have been ignored.

Held – Executive fiats of a state government issued in terms of Article 162 of Constitution for meeting various administrative exigencies cannot be equated with law and have no force of statute passed by the Legislature – Arbitration tribunal ought to have only decided the correctness of the decision of technical expert and should not have entertained other claims made by 1st respondent before it – Instant appeal is allowed partly.

Cases referred:
1) (1993) 2 SCC 507
2) 2016 (6) ALT 7 (SC)
3) AIR 2007 SC 509
4) 2014 (4) Arb.L.R.1 (SC)
5)(1973) ILR 1 Mad 364 = MANU/TN/0736/1972
6) AIR 1967 SC 1753 = MANU/SC/0050/1967
7) AIR 1980 SC 1285

Asst.G.P. for Advocate General for A.P., for Appellant.
Mr.Vemulapalli Prasad Rao, Advocate for Respondent No.1.

J U D G M E N T
(Per the Hon'ble Mr.Justice U.Durga Prasad Rao)

Challenge in this CMA is the order dated 11.07.2006 in Arbitration O.P.No.885 of 2004 whereunder the learned Principal

District Judge, West Godavari at Eluru dismissed the petition filed by the petitioner under Sections 34 and 2(a)(ii) and b(i) of the Arbitration and Conciliation Act, 1996 (for short Arbitration Act).

2) The petitioners case is thus:

a) The contract for the execution of construction of Madavayyapalem outfall Sluice at KM 74.00 of Vashista Godavari Right Bank in West Godavari District, was awarded to the 1st respondent vide S.Es Agreement No.SE/99-2000 dated 18.08.1999. The work was funded by World Bank. As per the terms of Agreement, the work has to be completed within 8 months i.e. by 17.04.2000 and it was a time bound program. During the execution of the work, some deviations took place as per the suggestions of the World Bank team. The 1st respondent applied for extension of time and the same was extended from time to time. The first extension was dated 30.06.2001 without Liquidated Damages (LD); second extension was dated 30.09.2001 without LD and third and final extension was granted on 31.01.2012 without LD. The 1st respondent specifically agreed to complete the work for the amount mentioned in the first agreement dated 18.08.1999 and supplemental agreement dated 18.12.2000. In fact the 1st respondent completed the work and received the final bill on 28.08.2002 without any protest and contract came to an end by 28.02.2002 itself. The 1st respondent has also signed the release and discharge certificate and voluntarily accepted the payment made by the Government towards full settlement of the claim without any protest. He has also taken away the EMD and security deposit and also encashed the bank guarantees. Having thus received the final bill, the 1st respondent is estopped from making any further claims.

b) While-so, the O.F. was originally conceived with casurina piles 100 MM dia, estimated accordingly and included in the bill of quantities and tenders settled. During September, 1999 designing consultants (CE S (I)) of World Bank have inspected the site and given some suggestions regarding foundation treatment with RCC piles, increasing of length of RCC barrel and reduction in the length of D/S wings and some design aspects. Accordingly, revised drawings were prepared in the office of Chief Engineer, Central Design Organization and communicated. Basing on the revised drawings, the 1st respondent quoted his rates for Rs.189 lakhs. However, the Chief Engineer, Major Irrigation approved for 400 MM and 300 MM dia at the rate of Rs.683.30 RMT and Rs.384.60 RMT respectively.

c) With regard to fixation of rates for drilling of bore holes of 400 MM dia, there arose a dispute between department and contractor. As per the terms of contract, the contractor referred the matter to Technical Expert by letter dated 04.01.2001 and requested to adopt the rate derived from the data approved in the case of some other work (Nakkala outfall sluice). The Technical Expert by letter dated 18.12.2002 arrived at a decision in favour of the 1st respondent by recommending the rate derived from the rate adopted in respect

of Nakkala outfall sluice. However, the Superintending Engineer, Irrigation Circle, Eluru informed 1st respondent vide letter dated 10.01.2003 that the rate recommended by the Technical Expert was not acceptable to the department and therefore, as per the contract, the matter need to be referred to arbitration and instructed the 1st respondent to suggest his arbitrator. The 1st respondent suggested Dr. P.Karunakar Rao as his arbitrator as per clause 25-3(A) of the contract. Then, the Institute of Engineers of India, Hyderabad appointed Sri A.S.Murthy, Chief Engineer (Retd.) as presiding arbitrator who in turn appointed Sri S.M.A.A. Jinnaah, Chief Engineer (Retd.) as third arbitrator. The Arbitral Tribunal issued a notice to the petitioner to attend the proceedings. Thereupon, the petitioner reported to the Arbitral Tribunal that it had no pecuniary jurisdiction to entertain the matter in view of G.O.Ms.No.20 I&CAD (PW) dated 31.01.1989 which ordains that the claim beyond Rs.50,000/- shall be decided by a Civil Court of competent jurisdiction by way of regular suit and not by way of arbitration. However, the Arbitral Tribunal without considering the objection raised by the petitioner passed an award dated 28.09.2004 in favour of 1st respondent for Rs.20.78 lakhs in respect of several claims made by him which were not made before the Technical Expert.

d) Aggrieved, the petitioner filed Arbitration O.P.No.885 of 2004 in the Court of District Judge, West Godavari at Eluru challenging the arbitration proceedings. The Tribunal, however, erroneously dismissed the OP without considering the valid points raised by the petitioner and confirmed the award of the Technical Expert.

Hence the CMA.

3) Heard arguments of learned Assistant Government Pleader attached to the office of Advocate General (AP) and Sri V.Prasad Rao, learned counsel for 1st respondent.
4a) Severely castigating the order of Court below, learned AGP firstly argued that Arbitral Tribunal committed grave mistake in holding that the dispute could be referred to arbitration as per the terms of contract, despite the G.O.Ms.No.20 I&CAD(PW) Department dated 31.01.1989 held that when the claim exceeds Rs.50,000/- the matter could be settled only by a Civil Court of competent jurisdiction and not by arbitration. Though the GO was not incorporated in the contract, still its efficacy and applicability, being the executive order of the Government, should not have been ignored by the Tribunal and Court. He argued, the existence of GO and its operational sphere over the subject contract was brought to the notice of Arbitral Tribunal sufficiently ahead of commencement of proceedings. Despite, the Arbitral Tribunal set petitionerdepartment ex-parte and passed the award. Hence, the award is void and nonest in the eye of law for lack of jurisdiction. He placed reliance on the judgments of the Apex Court reported in HIRANJILAL SHRILAL GOENKA VS. JASJIT SINGH(1) AND VELUGUBANTI HARIBABU VS. PARVATHINI NARASIMHA RAO(2) .

1) (1993) 2 SCC 507
2) 2016 (6) ALT 7 (SC)

b) Nextly, he would argue assuming the Arbitral Tribunal had jurisdiction, still its award suffers from vice of exceeding the scope of arbitral reference. In expatiation, learned AGP would submit, the 1st respondent approached the Technical Expert only on one issue i.e. with regard to the rate variation in drilling bore holes and the Technical Expert fixed the rate at Rs.937/-. Except it, neither the 1st respondent put-forth nor the Technical Expert did admit and adjudicate any other claim as is evident from the Technical Experts report dated 18.12.2002. Further, the 1st respondent did not express any grievance against the report of the Technical Expert. It was only the Department being aggrieved by the report, wrote a letter to 1st respondent informing that it was proposing to move the arbitration and asked the 1st respondent to choose his arbitrator, though arbitration is against the spirit of G.O.Ms.No.20. In that back drop, the only issue before the Arbitral Tribunal could be whether the rate arrived at by the Technical Expert was technically correct. Having gone through the Technical Experts report, Arbitral Tribunal should have well understood the scope of the reference and ought to have decided accordingly, despite the absence of petitioner before them. However, surprisingly the 1st respondent put-froth many more claims before the Tribunal and the Tribunal coolily entertained them and adjudicated and passed award. Learned AGP would thus submit the award in respect of claims 1 to 3 is totally uncalled for and beyond the scope of arbitration. He would submit that the 1st respondent specifically agreed to complete the work for the amounts mentioned in the first agreement dated 18.08.1999 and supplemental agreement dated 18.12.2000 and accordingly completed the work and received the final bill on 28.02.2002 without any insinuation of protest and thus, the contract came to an end by 28.02.2002 itself. Further, he also signed the release and discharge certificate and accepted the payments made by the Government towards full settlement of his claim. He also received his EMD and Security Deposit and encashed bank guarantees. In that view, putting forth additional claims before Arbitral Tribunal would tantamount to novation on the part of 1st respondent and admitting those claims and adjudicating would amount to acting beyond the scope of arbitration and thus the award is hit by Section 34(2)(iv) of Arbitration Act. In this context, he relied upon the judgment of the Apex Court in RAMNATH INTERNATIONAL CONSTRUCTION VS. UNION OF INDIA(3).

c) Nextly, learned AGP criticized the award in respect of claim No.4 as highly exorbitant and unjust. He also impugned the Tribunal awarding interest at 12% p.a.

d) Finally, he argued that one of the arbitrators did not sign the award and thereby also the award is not a valid one in the eye of law. He thus prayed to allow the appeal.

5a) Per contra, while supporting the award, learned counsel for 1st respondent would firstly argue that G.O.Ms.No.20 is only a qualified one but not an unconditional order,

3) AIR 2007 SC 509

in the sense, the G.O. would apply only when nothing contrary is provided in the contract. In the contract it is specifically mentioned that whichever party is aggrieved by the opinion of the Technical Expert can approach the Arbitration Tribunal. The procedure is prescribed in the Agreement itself. He emphasized that nowhere in the contract, G.O.Ms.No.20 was referred. Therefore, the Tribunal rightly ignored the objection of the petitioner and adjudicated the claims put-forth by the 1st respondent.

b) Secondly, justifying the claims made before the Tribunal, he would argue that even before the Technical Expert, apart from questioning the rates regarding drilling of bores, the 1st respondent also claimed that supplemental agreement was signed by him under duress and therefore the rates mentioned therein are not agreeable to him. The claim was made long before he received the amount. Thus, the claims 1 to 3 put-forth by him before the Tribunal are incidental and ancillary to the main contract and the Tribunal passed a just award in respect of those claims and also awarded interest at 12% p.a. which is quite reasonable. He would thus submit that award suffers no perversity and hence unassailable. On this aspect he relied on the judgment of the Apex Court in SWAN GOLD MINING LIMITED VS. HINDUSTAN COPPER LIMITED(4) .

6) The points for determination in this CMA are:

1) Whether the award of Arbitral Tribunal is void and nonest for lack of jurisdiction?

2) If point No.1 is held negative, whether the award passed by the Arbitral Tribunal is hit by section 34(2)(iv) of Arbitration Act?

3) Whether the rate of interest granted is exorbitant and unsustainable?

4) Whether the award is invalid for non-subscribing signature by one of the arbitrators?

5) To what relief?

7) POINT No.1: Admittedly, the petitioner and 1st respondent entered into contract on 18.08.1999. Condition Nos.24 and 25 of General Conditions of Contract and Condition No.25.3 of Special Conditions of Contract are germane for deciding point No.1. Hence, they are extracted hereunder:

Conditions of Contract (General)

24. Disputes:

24.1 If the contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Technical Expert within 14 days of the notification of the Engineers decision.

4) 2014 (4) Arb.L.R.1 (SC)

25. Procedure for Disputes:

25.1 The Technical Expert shall give a decision in writing within 28 days of receipt of a notification of a dispute.
25.2. The Technical Expert shall be paid daily at the rebate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract Data and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Technical Expert. Either party may refer a decision of the Technical Expert to an Arbitrator within 28 days of the Technical Experts written decision. If neither party refers the dispute to arbitration within the above 28 days, the Technical Experts decision will be final and binding.

25.3. The arbitration shall be conducted in accordance with the arbitration procedure stated in the Special Conditions of Contract.

Special Conditions of Contract Extract 25.3 (a) In case of Dispute of difference arising between the Employer and a domestic contractor relating to any matter arising out of or connected with the agreement, such disputes or differences shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal shall consists of 3 arbitrators one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding Arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President of the Institution of Engineers (India).

8) The above conditions would show that the party aggrieved by the decision of the Technical Expert may approach the arbitrator within 28 days of the said decision and the procedure is laid down as stated supra. Thus, admittedly, the contract contains an arbitration clause. It is also an admitted fact there is no reference about G.O.Ms.No.20 in the contract. At this juncture, it is relevant to extract G.O.Ms.No.20 here.

(G.O.Ms.No.20, Irrigation & CAD (PW) Department dated 31.01.1989)

Order:- x x x x x Except as otherwise provided in the contract, all disputes and differences arising out of or relating to the contract shall be referred to adjudication as follows:

(1) (i) Settlement of all claims upto Rs.50,000/- in value and below by way of arbitration to be referred as follows:-

(a) Claims upto Rs.10,000/- Superintending Engineer of another Circle, in the same

Department.

(b) Claims above, Rs.10,000/- Another Chief Engineer of the and upto Rs.50,000- same Department.

The arbitration proceedings will be conducted in accordance with the provisions of the Arbitration Act, to be prepared from time to time. The Arbitrator shall invariably give reasons in the award.

(ii) Settlement of all claims above Rs.50,000/ - in value: - All claims above Rs.50,000/ - in value shall be decided by a Civil Court of competent jurisdiction by way of a regular suit and not by arbitration.

9) The pith and substance of the contention of AGP is that GO is equivalent to law and therefore despite the same being not mentioned in the contract, the parties are expected to know its existence and act upon accordingly. Hence, the arbitration clause in the contract cannot prevail over G.O. and consequently the arbitration proceedings are void ab initio for lack of jurisdiction.

10) We are unable to subscribe our countenance to the argument of learned AGP. The executive fiats of a State Government issued in terms of Article 162 of Constitution for meeting various administrative exigencies cannot be equated with law and have no force of statute passed by the Legislature. It must also be noted that unless such executive orders are issued on the matrix of some statute, they cannot have force of law. Therefore, unless such executive orders i.e. G.Os are specifically mentioned in the contracts, they will not govern the contract but only the terms will govern and bind the parties. That the executive orders have no force of law has been expounded by the Constitutional Courts many a times.

11) In STATE OF TAMIL NADU VS. SAVARI CRUZ , THE HIGH COURT OF MADRAS (5) was considering the validity of the argument that the Madras Educational Rules had the force of law being issued under Article 162 of Constitution of India. Negativing such argument, Madras High Court quoted the judgment of the Apex Court in FERNANDEZ VS. STATE OF MYSORE(7) wherein it was observed thus:

> Para-17: Article 162 provides that subject to the provisions of Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws. The Executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.
>
> This Article in our opinion merely indicates the scope of the executive power of a State; it does not confer

5)(1973) ILR 1 Mad 364 = MANU/TN/0736/ 1972

6) AIR 1967 SC 1753 = MANU/SC/0050/ 1967

any power on the State Government to issue rules thereunder. As a matter of fact, wherever the Constitution envisages the issue of rules, it has so provided in specific terms...Of course under such executive power, the State can give administrative instructions to its servants how to act under certain circumstances; but that will not make such instructions statutory rules which are justifiable under certain circumstances. In order that such executive instructions have the force of statutory rules, it must be shown that they have been issued either under the authority conferred in the State Government by some statute or under some provisions of the Constitution providing therefore. (Emphasis supplied) It is not in dispute that there is no statute which confers any authority on the State Government to issue rules in matters with which the Code is concerned; nor has any provision of the Constitution been pointed out to us under which these instructions can be issued as statutory rules except Article

162. But as we have already indicated, Article 162 does not confer any authority on the State Government to issue statutory rules.

Relying on these observations, we reject the contention that the rules, upon the violation of which the impugned G.O., is said to be founded, can be said to be rules framed under Article 162 of the Constitution.

The High Court ultimately held thus:

Para-18Under our Constitution, the power to legislate belongs exclusively to the Legislature, and under certain circumstances to the President. The executive can have no power to frame rules having the force of law unless such power is delegated to it under the Constitution, or under an Act passed by the Legislature. Where there is no such power, the instructions issued by the Executive cannot have the force of law.

12) G.O.Ms.No.20 is concerned, it barely lays a policy to the Irrigation and CAD (PW) Department of the Government that all the claims above Rs.50,000/- in value shall be decided by a Civil Court of competent jurisdiction by way of a regular suit and not by arbitration. Learned AGP has not shown any statutory scaffold at the substratum of the G.O. to extend the force of law to it.

13) Admittedly, the G.O. was not referred to in the contract and on the other hand, option was given to the parties that they can approach Arbitration Tribunal in the event of their dissatisfied with the decision of the Technical Expert. Moreover, the GO itself starts with the clause except as otherwise provided in the contract indicating that sometimes the contract as in the present instance may be provided with arbitration

clause than referring the parties to Civil Court irrespective of the value of the dispute. Therefore, the appellantdepartment is estopped from contending contrary to the terms of contract by doctrine of Promissory Estoppel.

14) The applicability of this doctrine was explained in JIT RAM SHIV KUMAR VS. STATE OF HARYANA(7) as under:

> Para-39: The scope of the plea of doctrine of promissory estoppel against the Government may be summed up as follows:
>
> (1) The plea of promissory estoppel is not available against the exercise of the legislative functions of the State. (2) The doctrine cannot be invoked for preventing the Government from discharging its functions under the law. (3) When the officer of the Government acts outside the scope of his authority, the plea of promissory estoppel is not available. The doctrine of ultra vires will come into operation and the Government cannot be held bound by the authorized acts of its officers.
>
> (4) When the officer acts within the scope of his authority under a scheme and enters into an agreement and makes a representation and a person acting on that representation puts himself in a disadvantageous position, the Court is entitled to require the officer to act according to the scheme and the agreement or representation. The Officer cannot arbitrarily act on his mere whim and ignore his promise on some undefined and undisclosed grounds of necessity or change the conditions to the prejudice of the person who had acted upon such representation and put himself in a disadvantageous position.
>
> (5) The officer would be justified in changing the terms of the agreement to the prejudice of the other party on special considerations such as difficult foreign exchange position or other matters which have a bearing on general interest of the State.

15) The act of the appellant squarely falls under ground No.4 and hence the doctrine applies. To sum up, the award of the Tribunal do not suffer lack of jurisdiction as argued by the appellant. The cited decisions have no application. This point is accordingly answered against the appellant.

16) POINT Nos.2 & 3: The contention of appellant is that the only issue before the Arbitral Tribunal was whether the decision of Technical Expert was correct or not. But the Tribunal unduly permitted the 1st respondent to make claim Nos. 1 to 3, which were not made before the Technical Expert and passed the award, which, in respect of claims 1 to 3, is out of scope of arbitration.

7) AIR 1980 SC 1285

a) It was argued on behalf of 1st respondent that not only the rates for drilling bores, the 1st respondent also questioned the supplemental agreement on the ground that he was made to sign under duress and rates mentioned therein were not agreeable to him.

b) On perusal of the record, we find force in the contention of AGP. As can be seen from the letter No.CRR/TEL/54 dated 04.01.2001 addressed by the 1st respondent to the then Technical Expert Dr.P.Seethapathi Rao, he made prayers (a) to (d) therein which mainly relate to rate of boring work of concrete piles. The Technical Expert considered various aspects and fixed the rate Rs.937/- per RM for boring operation of 400 MM dia pile excluding the cost of RCC item to fill up the bore.

17a) The 1st respondent did not specifically put-forth claims 1 to 3 before the Technical Expert. Claim No.1 relates to compensation towards loss allegedly sustained by 1st respondent due to sudden stoppage of the work i.e. due to desertion of labour from the site with the advances received. The Tribunal, on the observation that the 1st respondent paid advance amount of Rs.37,000/- for skilled labour and masons, allowed the claim to that extent.

b) The second claim relates to loss due to overhead charges. The Tribunal observed that the period of prolongation of the work was about 20 months from 18.04.2000 to 31.12.2001 and the delay cannot be attributed to the 1st respondent. The Tribunal further observed during the said prolonged period 1st respondent incurred overhead charges on technical staff and other ministerial staff and awarded Rs.4,60,000/-.

c) The third claim is in respect of rise in cost of materials, labour and mobilization charges during the extended period of contract. The Tribunal though noted the objection of the department that the contractor signed the supplemental agreement with the rates mentioned thereon and therefore he was not entitled to seek for enhanced rates, however overruled the objection on the observation that the contractor claimed that he signed the agreement under duress and further, due to prolongation of the contract period there was increase in the prices, awarded Rs.5,45,785/-.

d) The award under the above three claims is factually and legally not sustainable, for the reason that the 1st respondent admittedly received the amounts on completion of the work without any protest. It appears, he has also withdrawn the EMD and bank guarantees. He has not placed on record that he received the amounts only under protest and still he is entitled to extra amount as mentioned in claims 1 to 3. Most importantly, the 1st respondent did not specifically put-forth the claims 1 to 3 before the technical expert. His only claim before the technical expert was regarding the fixation of rate for drilling the bores. Though he claimed that he signed on the supplementary contract under

duress, he did not adduce any plausible evidence in that regard. It is interesting to note that it was the petitioner who initiated the arbitration proceedings having been aggrieved by the decision of the technical expert and not by the 1st respondent. He was not even aggrieved by the decision of technical expert.

e) In all the above circumstances, we firmly believe that the only issue that could be factually and legally adjudicated by the arbitral Tribunal is regarding the correctness of the decision of the technical expert. However, the Tribunal entertained claims 1 to 3 on the ground that there was a compensation clause in the contract. In our view, said clause is not available to the 1st respondent when he signed the supplementary contract and time was extended thrice on his request without LD. Moreover, he received the amounts without registering express protest. So the claims 1 to 3 in the award are hit by 34(2)(iv) of the Arbitration Act. The decision in Swan Gold Mining Limiteds case (4 supra) cited by the respondent is of no avail to him. Sofaras the decision in Ramnath International Constructions case (3 supra) cited by the AGP is concerned, the same is also not applicable as it factually differs.

f) Sofaras claim No.4 is concerned, the technical expert has given cogent reason as to why the rate adopted by the R & B at Nellore cannot be accepted to the present work. He mentioned that the present work was nearer to the mouth of the sea, where Vashista Godavari arm was joining and the soil was very slushy and boring operations in such soils was very difficult compared to the R & B works taken at Nellore. Thus the technical expert adopted the rate approved and adopted in Nakkala outfall sluice which was taken up for similar work in the vicinity under the same circle and in the same period. The Arbitrators also approved the same and we find no illegality or perversity in the adjudication thereof.

g) As the rate of interest is concerned, following the 12% interest rate mentioned in clause 43.1 of the contract for the delayed payments, the Tribunal awarded the said rate. We find no fault and hereby approve the same. Thus points 2 and 3 are answered accordingly.

18) POINT No.4: This point is concerned, it appears one of the Arbitrators Sri S.M.A.A.Jinnah, did not sign the Award. However, he issued a letter dated 09.08.2004 stating that due to his family compulsions, he was proceedings to USA and in order to avoid the delay, the Award can be passed and signed and published by his colleagues in the Tribunal for which he was giving his unreserved consent in accordance with Sec.31(1) and (2) of the Arbitration Act. Section 31 of the Arbitration Act reads thus:

> Section 31Form and contents of arbitral award: (1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal. (2) For the purposes of sub-section (1) in arbitral proceedings with more than one

arbitrator the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) xx xx
(4) xx xx
(5) xx xx
(6) xx xx
(7) xx xx
(8) xx xx

In view of the above express provision, it does not lie in the mouth of the petitioner to contend about the validity of the Award.

19) POINT No.5: In view of the above findings, this CMA is partly allowed by modifying the order in Arbitration O.P.No.885 of 2004 of the District Judge, West Godavari and ordered as follows:

a) The Arbitration Award dated 28.09.2004 in so far as claim no.4 for a sum of Rs.10,35,788/- with interest @ 12% per annum from 46th day of Award till realization is hereby confirmed and the Award in respect of claims 1 to 3 is set aside.

b) No costs in the appeal.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

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2017(3) L.S. 181

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

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

Mohd.Ibrahim (Died)
per Lrs. & Ors., ..Appellants

Vs.

Mohd.Abdul Hannan (Died)
per Lrs.& Ors., ..Respondents

CIVIL PROCEDURE CODE, Or.41 Rules 23, 23-A, 25 and 27 – Remand by the appellate court - Instant appeal is preferred against the order of the lower appellate court.

The Original suit was dismissed by the trial court - Appeal filed before lower appellate court was allowed setting aside the judgment and decree passed by trial court and further it also remanded the matter to the trial court for fresh disposal – Before the lower appellate court an application for additional documents was filed and the same was allowed.

Held – Order 41 Rule 23-A of C.P.C. deals with the case of remand by the appellate court of the suits which were disposed of other than on a preliminary point -Instant case falls under Order 41 Rule 23-A of C.P.C and the order of lower appellate court can be held to be valid – Instant appeal is dismissed.

Cases referred:

1. 1999 (4) ALD 41
2. 2005 (1) ALD 410
3. 2014 (2) ALD 739
4. (2002) 2 SCC 686

Mr.B.Vijaysen Reddy, Advocate for the Appellant.
Mr.K.Mahipathy Rao, Advocate for the Respondent No.1.

J U D G M E N T

Heard learned counsel for the appellants and learned counsel for the respondents.

This Civil Miscellaneous Appeal is preferred by the defendants in O.S.No.226 of 1985 on the file of the District Munsif, Mahaboobnagar. The said suit was originally filed by one Mohd. Abdul Hannan, who died during the pendency of the appeal and was pursued by the legal representatives, for declaration of title and for perpetual injunction in respect of an extent of 0.23 gts., in Survey No.9 and Ac.0.33 gts., in Survey No.10 of Mahaboobnagar village and taluk, Mahaboobnagar district. The suit was dismissed by judgment and decree dated 30.12.1996 and when the plaintiff filed an appeal in A.S.No.78 of 1998 before the learned II Additional District Judge, Mahaboobnagar, the same was allowed by judgment and decree dated 06.12.2006 by setting aside the judgment and decree in O.S.No.226 of 1985 and remanding the matter to the lower Court for fresh disposal. Challenging the same, the present Civil Miscellaneous Appeal was filed.

The trial Court framed the following issues for trial:

1. Whether the plaintiff is the owner and is in exclusive possession of the suit schedule lands and entitled to the relief of declaration and permanent injunction as prayed for?

2. Whether the vendor of the plaintiff by name Md. Ismail has got alienable right in the suit schedule lands?

3. Whether the father of defendant is the original purchaser of the suit land through registered sale deed dated 03.03.1953 from its original owner M.A. Wahid, S/o Md. Ismail and patta was mutated in his name?

4. To what relief?

The trial Court also framed the following additional issue:

1. Whether the vendor of the plaintiff has perfected the title by virtue of adverse possession in respect of suit lands before the alienation in favour of plaintiff?

All the issues were decided against the plaintiff and the suit was dismissed. Before the lower appellate Court an application for additional evidence was filed under Order 41 Rule 27 CPC in I.A.No.57 of 2006 and the same was allowed by condoning the delay in receiving the additional documents. The lower appellate Court held that the appellants explained the circumstances in which they could not produce the relevant documents during the trial stage and it was therefore necessary for the trial Court to consider the same. The lower appellate Court also held that the trial Court erred in not properly considering Exs.A44 to A47 which are important documents. It also observed that the evidence of PW.2, who

stated that he was continuing in possession of the suit schedule land continuously without interruption for more than the statutory period and acquired by adverse possession, was not properly considered by the trial Court. Accordingly, it set aside the judgment and decree of the trial Court and remanded the matter to the trial Court.

Learned counsel for the appellants submitted that the reasons assigned by the lower appellate Court for remanding the matter are not proper and he relied on the decisions reported in MIDAKANTI NAGABHUSHANA REDDY V. MIDAKANTI YELLAIAH(1) , KUMMARI JANGAIAH (DIED) PER LR V. SOMAVARAPU SAVITHRI (2) AND SANNAPU REDDY VENKATA REDDY V. JILLELA BHUPAL REDDY(3).

Midakanti Nagabhushana Reddy's case (supra) did not arise out of a case for remand and hence the same is not applicable to the facts of the present case. It was a case of failure of the appellate Court to frame appropriate points for determination and recording its decision thereon.

Similarly, the case in Kummari Jangaiah (supra) was a case of consideration of various issues decided by the trial Court under a single point by the appellate Court. It also appears from the said judgment that the appellate Court has not set aside the judgment and decree of the trial Court, but remanded the matter to the trial Court by stating that the reasons assigned by the trial Court were not sound. In those circumstances, the order of remand was set aside and the lower appellate Court was directed to hear the appeal afresh.

Sannapu Reddy Venkata Reddys case (supra) arise when the trial Court rejected the documents by giving due reasons and in the appeal when the lower appellate Court remanded the case to the trial Court on the ground that there was no discussion on exhibited documents, this Court by relying on a decision reported in P. PURUSHOTTAM REDDY V. PRATAP STEELS LIMITED(4) observed that the order of remand does not fall under any provisions of Rules 23, 23-A and 25 of Order 41 CPC. In those circumstances only the order of remand was set aside.

The remand by the appellate Court is governed by the provisions of Order 41 Rules 23, 23-A and 25 of CPC.

Rule 23 of Order 41 CPC deals with a case of remand by the appellate Court, when the suit was decided on a preliminary point, whereas, Rule 23-A of Order 41 CPC deals with the suits which were disposed of other than on a preliminary point. Rule 25 of Order 41 states that if the Court from whose decree the appeal was preferred omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred. The Rule says that in such cases the appellate Court shall direct the lower Court to take the additional evidence required. Such restriction is not placed in Rule 23-A. Hence, it is necessary to reproduce Rule 23-A and Rule 25 of Order 41 CPC for better appreciation.

23A. Remand in other cases.- Where

1. 1999 (4) ALD 41
2. 2005 (1) ALD 410
3. 2014 (2) ALD 739
4. (2002) 2 SCC 686

the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

25. Where Appellate Court may frame issues and refer them for trial to court whose decree appealed from.- Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the court from whose decree the appeal is preferred and in such case shall direct such court to take the additional evidence required; and such court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons there for within such time as may be fixed by the Appellate Court or extended by it from time to time.

Since, in the present case, the appellate Court did not frame any issue and referred the matter to the trial court, the case falls under Rule 23-A.

Rule 23-A was inserted by Act 104 of 1976 pursuant to the Fourteenth Report of the Law Commission. A reading of the above Rule makes it clear that the satisfaction of the appellate Court for retrial is important.

The facts in P. Purushottam Reddys case (supra) are that a contract for sale of immovable property was entered into between the parties on 31.10.1987. The contract was subject to obtaining requisite exemption or permission under the Urban Land (Ceiling and Regulation) Act, 1976. It was stipulated that it should be obtained by 30.06.1988. Since it was not obtained by that time, a letter was written on 01.12.1988 by the vendor informing that the agreement to sell stands cancelled and part of the advance money was returned agreeing to pay the balance advance money by the end of December 1988. After exchange of legal notices, a suit for specific performance was filed on 29.06.1989. The trial Court decreed the suit on 12.03.1992 and against the same, an appeal was preferred before the High Court on 19.08.1999. The High Court allowed the appeal and set aside the judgment and decree of the trial Court and remanded the case for holding additional trial on three additional issues framed by the High Court and thereafter to decide the case afresh. Against the said order, the vendor preferred an appeal. It was noticed by the Supreme Court that the High Court remanded the case by exercising its inherent powers. The Supreme Court said that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code. It was observed that the appellate Court should be circumspect in ordering the remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided. Since the High Court framed three points, it was held that neither Rule 23 nor Rule 23-A of Order 41 applied and only Rule 25 is applicable. Then the Supreme Court examined the three points framed by the

High Court and held that the questions could have been gone into by the High Court and a finding could have been recorded on the available material in as much as the High Court, being the court of first appeal, all the questions of fact and law arising in the case were open before it for consideration and decision. The Supreme Court also observed that if the parties went to trial with full knowledge about an issue, had ample opportunity to adduce evidence thereon and fully availed themselves of the opportunity, the absence of an issue is not a ground for remand. In view of the same, the Supreme Court allowed the appeal and the order of remand by the High Court was set aside.

In the instant case, the lower appellate Court remanded the case with the following observations:

> 11During the pendency of the appeal before this Court an application for additional evidence under Order 41 Rule 27 of C.P.C. has filed by the appellant which remained undisposed off, and stated by my learned predecessor it can be called with A.S. The said petition was not disposed off, the appellant was not given sufficient opportunity by the lower court to produce the document in the trial court. I hold the petition I.A.No.57 of 2006 is allowed and the delay is condoned in receiving additional documents. The application for adduce evidence appear to the matter of considerable importance and should not have been kept in the file. The appellant have defended the suit inter alia on the ground that the plaintiff has got title. In their application the appellants have explained the circumstances in which they could not produce the relevant documents during trial stage and it was therefore necessary for the court to have considered the same proceedings to finally dispose off the appeal not having done so the judgment was set aside. In my view the case required reconsideration.

12. The learned counsel for the appellant has also placed before the court several documents which is material piece of evidence and circumstances I feel it is just and necessary to consider the documents. The lower court has not appreciated the documentary evidence in proper and perspective manner, because Ex.A.44 to A.47 are important documents for this case. It is to be those documents has to be further considered and further the lower court came to conclusion vendors of the plaintiff has no alienable rights in respect of the suit lands, but additional documents if considered the point can be decided fairly. Therefore, I feel these documents have to be considered even by lower court. After seeing the document of the lower court the lower court has not appreciated the documents Exs.A.32, A.43, A.44 to A.46A, 47-A and also evidence of the plaintiffs witnesses properly. Further the vendors of the plaintiff are entitled to alienate the suit schedule property in the capacity of legal heir of his father. Therefore an opportunity should be given to both the parties to lead further evidence and by considering the additional documents filed before this court. That the trial court failed to notice that the plaintiff

was in possession and enjoyment over the suit lands on the strength of his own right in the capacity of owner by paying land revenue to Government either cultivating personally or through tenant. In support of it, the plaintiff filed C.C. of Pahanies Exs.A2 to A11 and A35 to A41 as well as land revenue receipts, Exs.A12 to A25 and Ex.A33, A34 evidencing the payment of land revenue by PW.2 who is vendor of the plaintiff. Therefore, I remanded the matter for reconsidered these point in the suit. Further on behalf of the defendants side DW.1 has admitted the possession of father of PW.2 in respect of the suit schedule lands. According to this witnesses the suit lands were obtained as lease along with and after expiry of the lease the father of PW.2 delivered back possession to his father. The DW.No.1 in his cross-examination has clearly admitted that I have not filed any document showing the redelivery of possession of the lands in Sy.No.3, 9 and 10 by Mohd. Ismail and sons company after the period of lease is over. From the said evidence it is clear that the vendor of plaintiff PW.2 continued possession over the suit land continuously without interruption for more than statutory period and acquired by adverse possession. All these aspects the lower court has not considered properly and the documents filed before this court also has to be considered by the lower court. Therefore, I feel it is just and necessary to allow the appeal by setting aside the judgment of the lower court by allowing the appeal. The lower court shall give fresh decision on issues according to law. The learned counsel for the appellant filed I.A.No.57 of 2006 to receive documents as additional evidence the same is allowed and these documents shall be marked by lower court, as bunch of documents were filed, all these documents to be marked as per law subject to proof and relevance. Therefore the matter is remanded to lower court for fresh disposal according to law and all the documents are certified copies of sale deeds, and after giving an opportunity to both the parties.

In view of the same, I am of the opinion that the case falls under Rule 23-A of Order 41 CPC and the order of the lower appellate Court can be held to be valid.

Accordingly, the Civil Miscellaneous Appeal is dismissed by upholding the order of remand of the lower appellate Court dated 06.12.2006. There shall be no order as to costs.

As sequel thereto, the miscellaneous petitions, if any, pending in this Civil Miscellaneous Appeal shall stand closed.

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2017(3) L.S. 187 (D.B.)

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

Present:
The Hon'ble The Acting Chief Justice Ramesh Ranganathan &
The Hon'ble Ms.Justice J. Uma Devi

L.Sivasankar Reddy & Ors., ..Appellants
Vs.
State of A.P. & Ors., ..Respondents

A.P. CO-OPERATIVE SOCIETIES ACT, Secs.51 and 115-D – Instant appeal is preferred against the Order passed in writ petition, directing that the enquiry under Section 51 of A.P. Co-operative Societies Act shall go on; but, its implementation would be subject to final result of writ petition.

Enquiry is directed by the Registrar of cooperative societies, A.P, against the 7th respondent bank with regard to certain fraudulent transactions and misappropriation of funds by discharging fake fix deposits –Necessary to examine whether Section 115-D ousts the jurisdiction of the Registrar to cause an enquiry under Section 51 of the Act.

Held – *Non obstante clause* is a legislative device which is usually employed to give over riding effect to certain provisions over some contrary provisions that may be found in the same enactment, that is to say, to avoid the operation and effect of all contrary provisions – Order passed in writ petition is justified in refusing to interdict the process of enquiry under Section 51 of the Act and in making the enquiry subject to the result of writ petition – Writ appeal stands dismissed.

Mr.Vedula Srinivas Advocate for the appellants.
GP for Cooperation (AP) for Respondent Nos.1,2 & 4.
Mr.O.Manoher Reddy, Advocate for Respondent Nos.5 to 7.

Citations:
1. (2015) 10 SCC 241
2. 1984 Supp. SCC 196
3. (2005) 9 SCC 129
4. AIR 1964 SC 207
5. (2005) 2 SCC 145
6. AIR 1952 SC 369
7. AIR 1957 SC 657
8. (1976) 3 ALL ER 611
9. (1976) 2 All ER 721
10. (1834) 1 Ad & El 136
11. (1976) 3 ALL ER 611
12. (1836) 2 M&W 195
13. (1973) 2 ALL ER 204
14. (1974) 2 ALL ER 73
15. (2002) 3 SCC 722
16. 6 H.L.Ca 61
17. (1988) 3 SCC 609
18. (2004) 6 SCC 672 : 2004 SCC (Cri) 1815
19. 2004(5) ALD 180 (DB)
20. AIR 1964 SC 1419
21. (2005) 6 SCC 138
22. (2000) 2 SCC 617
23. AIR 1987 SC 2235
24. AIR 1989 SC 1972

J U D G M E N T

(per The Hon'ble The Acting Chief Justice Ramesh Ranganathan)

The appellants herein are the petitioners in W.P.No.21827 of 2017. They have preferred this appeal, under Clause 15 of the Letters Patent, aggrieved by the order of the Learned Single Judge in W.P.M.P.No.26862 of 2017 in W.P.No.21827 of 2017 dated 21.07.2017 directing that the enquiry under Section 51 of the A.P. Co-operative Societies Act, 1964 (for short the Act) shall go on; but, however, its implementation would be subject to the final result of the Writ Petition.

The order impugned in the writ petition is the proceedings of the Registrar of Cooperative Societies, Andhra Pradesh, Guntur dated 03.05.2017 directing that an enquiry be caused under Section 51 of the Act with regards certain fraudulent transactions made in the 7th respondent-bank, and misappropriation of funds by discharging fake fix deposits etc. While the impugned order refers to other matters also, it would suffice to note that an enquiry is sought to be caused by the Registrar of Co-operative Societies, in the exercise of his powers under Section 51 of the Act, since the District Co-operative Officer, Ananthapuram had, along with his letter dated 25.09.2014, enclosed the enquiry report of the Divisional Cooperative Officer, Ananthapuram dated 03.09.2014 that fake fixed deposit bonds were discharged for a sum of Rs.12,22,316/-; the fake fixed deposit amounts were credited in the S.B.Account No.14471 of one Sri P.Ramesh, son of Sri P.Ramaiah, Korrapadu Village, B.K.Samudram Mandal which was opened duly enclosing Voter-ID card No.UAV0354789; proper records were not maintained by the bank, and proper verification of KYC norms was not done; it was felt that there was active connivance of the bank staff, in opening such improper accounts, to commit this fraud intentionally; Rs.1,60,000/- was credited on 23.04.2013, and Rs.1,70,000/- was withdrawn on 14.05.2013 from this account, without relevant entries in the scroll and day book, and without supporting challans; and there was a suspicion that this fictitious account was created to make fraudulent transactions through it.

The impugned order also records that the inspection reports of National Bank for Agricultural and Rural Development Regional Office, Hyderabad (for short the NABARD), and especially the report for the year ending 31.03.2014, confirmed the occurrence of many such frauds in the bank, against which no report had been furnished by the bank so far of having taken concrete steps in bringing such cases to a logical conclusion so as to curtail further occurrence of such frauds; and he (i.e the Registrar of the Cooperative Societies) was satisfied, on an examination of the entire issue and the material available, that it was expedient to order an enquiry under Section 51 of the Act to probe deep into the matter, to cull out the facts, and fix specific responsibility against those concerned.

Section 51 of the Act relates to inquiry and enables the Registrar of Co-operative Societies, on his own motion, to hold an inquiry, or direct some person authorised by him by an order in this behalf to hold

an enquiry, into the constitution, working and financial condition of a society. The contention urged before the Learned Single Judge was, primarily, that the Registrar of Co-operative Societies lacked jurisdiction to order an enquiry under Section 51 of the Act, in view of Section 115-D of the said Act.

We pointed out to Sri Vedula Srinivas, learned counsel for the appellant-writ petitioners, that, since the main Writ Petition is still pending adjudication before the Learned Single Judge and this appeal is only against an interlocutory order, any finding recorded by us on the contentions urged by him may adversely effect the appellants interest in the main Writ Petition. Learned Counsel, however, insisted that we examine the question whether or not the Registrar of Co-operative Societies has jurisdiction to cause an enquiry under Section 51 of the Act, as the order of the Learned Single Judge enabled the Registrar to proceed to cause an enquiry and take action thereafter, subject only to the rider that any such action taken under Section 51 of the Act would be subject to the result of the Writ Petition; and, consequently, no useful purpose would be served in awaiting a final decision, in the Writ Petition, on this question of law. It is necessary for us, therefore, to examine whether Section 115-D of the Act ousts the jurisdiction of the Registrar to cause an enquiry under Section 51 of the Act.

Sri Vedula Srinivas, learned counsel for the appellants, would submit that Section 115-D of the Act, inserted by Act 16 of 2007, carves out an exception to the other provisions of the Act; these special provisions are applicable only to Co-operative Credit Societies; the 7th respondent is one such society of which the appellants are the Directors; these Societies have been conferred autonomy in all financial and internal administrative matters, subject only to the guidelines issued by the Reserve Bank of India (RBI) or NABARD; the Government of India had prepared a Package for Revival of the Short Term Rural Cooperative Credit Structure; among the reforms suggested therein was the need to remove State intervention in all financial and internal administrative matters of cooperative societies; to implement the reforms, suggested in the Package, a memorandum of understanding was entered into between the Government of India, the Government of Andhra Pradesh and NABARD on 29.08.2016; the said Memorandum records the undertaking of the Government of Andhra Pradesh to bring in amendments to the Act to give effect to the reforms envisaged under the Package; and, as Section 115-D of the Act was introduced pursuant to the memorandum of understanding and autonomy in financial and internal administrative matters has been conferred on such cooperative credit societies, the jurisdiction of the Registrar of Co-operative Societies, to cause an enquiry into the affairs of such Societies, is ousted; and, after introduction of Section 115-D of the Act, the power conferred on him, under Section 51 of the Act, cannot be exercised by the Registrar of Co-operative Societies to cause an enquiry into the internal administrative affairs of such societies.

On the other hand, Learned Government Pleader for Co-operation would submit that

Section 115-D of the Act only confers autonomy on cooperative credit societies in matters relating to its finance and internal administration; even this autonomy, that too in the areas specified in Section 115-D(2), is made subject to the guidelines of RBI and NABARD; financial autonomy, and autonomy in internal and administrative matters, would not extend to financial misappropriation and fraudulent acts; in any event, Clause (24) of Section 115-D makes the provisions of the Act applicable till guidelines are issued by RBI/NABARD; no guidelines of RBI/NABARD, which disables the Registrar of Co-operative Societies to cause an enquiry under Section 51 of the Act, has been brought to the notice of this Court by the appellants herein; and, in such circumstances, the Learned Single Judge was justified in refusing to interdict the Registrar of Co-operative Societies from proceeding to have an enquiry caused under Section 51 of the Act.

Section 115-D of the Act is a special provision applicable only to Co-operative Credit Societies. The 7th respondent is one such cooperative credit society. Section 115-D of the Act stipulates that, notwithstanding anything contained in the Act, the provisions under Section 115-D of the Act would apply to Co-operative Credit Societies. Section 115-D(2) reads thus:

The Co-operative Credit Society shall have autonomy in all financial and internal administrative matters, subject to the guidelines of Reserve Bank of India/National Bank for Agriculture and Rural Development in the following areas:-

(i) Interest rates on deposits and loans,

(ii) Borrowing and investments,

(iii) Loan policies and individual loan decisions,

(iv) Personal policy, staffing, recruitment, posting, and compensation to staff, and

(v) Internal control systems, appointment of Auditors and compensation for the audit.

Section 115-D(24) stipulates that the existing provisions of the Act, Rules and guidelines shall continue to be in force till guidelines/stipulations are issued by RBI/ NABARD where required in the above provisions.

A non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found in the same enactment, that is to say, to avoid the operation and effect of all contrary provisions. (LAXMI DEVI V. STATE OF BIHAR(1) ; UNION OF INDIA V. G.M. KOKIL(2). It is equivalent to saying that, inspite of the laws mentioned in the non-obstante clause, the provision following it will have full operation, or the laws embraced in the non-obstance clause will not be an impediment for the operation of the enactment or the provision in which the non-obstante clause occurs. (STATE OF BIHAR V. BIHAR RAJYA M.S.E.S.K.K. MAHASANGH(3) ; SOUTH INDIA CORPN. (P) LTD. V. SECRETARY, BOARD OF REVENUE, TRIVANDRUM(4). Normally the use of a non-obstante clause by the

1. (2015) 10 SCC 241
2. 1984 Supp. SCC 196
3. (2005) 9 SCC 129
4. AIR 1964 SC 207

legislature in a statutory provision, is equivalent to saying that no other provision of the Act shall be an impediment to the measure. Use of such an expression is another way of saying that the provision, in which the non-obstante clause occurs, would wholly prevail over the other provisions of the Act. Non-obstante clauses are to be regarded as clauses which remove all obstructions which might arise out of any of the other provisions of the Act in the way of the operation of the principal enacting provision to which the non-obstante clause is attached. (Bihar Rajya M.S.E.S.K.K. Mahasangh3; IRIDIUM INDIA TELECOM LTD. V. MOTOROLA INC(5)). While interpreting a provision containing a non-obstante clause, it should first be ascertained what the enacting part of the Section provides, on a fair construction of the words used according to their natural and ordinary meaning, and the non-obstante clause is to be understood as operating to set aside as no longer valid anything contained in any other law which is inconsistent with the Section containing the non-obstante clause. (ASWINI KUMAR V. ARABINDA BOSE(6) ; A.V.FERNANDEZ V. STATE OF KERALA(7)). The effect of the non-obstante clause in Section 115-D is that the provisions of Section 115-D would prevail not withstanding anything contrary thereto in any of the provisions of the Act. It is only if Section 51 is held to contravene Section 115-D, would exercise of power under Section 51, to the extent of contravention, be impermissible. Section 115-D(2) confers autonomy on cooperative credit societies in all financial and internal administrative matters in the areas referred to in Clauses (i) to (v) thereunder. These areas are confined to interest rates on deposits and loans, borrowings and investments, loan policies and individual loan decisions, personal policy, staffing, recruitment of staff, etc and internal control systems, appointment of auditors and compensation for audit. It does not extend to fraudulent acts or to misappropriation of funds. The autonomy conferred on co-operative credit societies in the aforesaid five areas is also made subject to the guidelines issued by RBI/NABARD. It is evident, therefore, that the autonomy granted to cooperative credit societies is not unfettered or absolute, but is circumscribed by twin limitations i.e (1) the autonomy is limited to the five areas mentioned in Section 115-D(2), and (2) even in these five areas, the autonomy is subject to the guidelines issued by RBI and NABARD.

Sri Vedula Srinivas, learned counsel for the appellant-writ petitioners, would submit that a purposive construction should be placed on Section 115-D in the light of the Package for Revival of Short Term Rural Cooperative Credit Structure, and the Memorandum of Understanding; and, when so construed, it is evident that the object of insertion of Section 115-D of the Act is to confer complete autonomy on all co-operative credit societies, and exclude all forms of interference by the Registrar of Co-operative Societies in matters of finance and internal administration of such societies.

The primary rule of interpretation of statutes is that a literal construction should be given to the provision, and resort to other aids is permissible only when the provision suffers from some ambiguity. The statutory language should be read grammatically and

5. (2005) 2 SCC 145
6. AIR 1952 SC 369
7. AIR 1957 SC 657

terminologically, in the ordinary and primary sense which it bears in its context, without omission or addition. (SUTHENDRAN V. IMMIGRATION APPEAL TRIBUNAL(8) ; FARRELL V. ALEXANDER(9) ; R V INHABITANTS OF BANBURY(10)). The Legislature is to be credited with good sense, so that when such an approach produces injustice, absurdity, contradiction or stultification of statutory objective the language may be modified sufficiently to avoid such disadvantage, though no further. (SUTHENDRAN V. IMMIGRATION APPEAL TRIBUNAL(11) ; BECKE V SMITH (12); R V INHABITANTS OF BANBURY10; TZU-TSAI CHENG V. GOVERNOR OF PENTONVILLE PRISON (13); APPLIN V. RACE RELATIONS BOARD(14) ; HARBHAJAN SINGH V. PRESS COUNCIL OF INDIA(15) ; Justice G.P. Singh Principles of Statutory Interpretation (8th Edn., 2001).

A departure from the golden rule is permissible only if it can be shown that the legal context in which the words are used, or the object of the statute in which they occur, require a different meaning. (Justice G.P. Singh Principles of Statutory Interpretation (8th Edn., 2001); Harbhajan Singh15). If reading statutory words in its primary and natural sense, would lead to some repugnance or inconsistency with the rest of the instrument, the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency. (GREY V. PEARSON(16) ; KEHAR SINGH V. STATE (DELHI ADMN.)(17) ; MAULAVI HUSSEIN HAJI ABRAHAM UMARJI V. STATE OF GUJARAT(18)). An ordinary meaning, or a grammatical meaning, does not imply that the Judge attributes a meaning to the words of a statute independent of their context or of the purpose of the statute, but rather that he adopts a meaning which is appropriate in relation to the immediately obvious and unresearched context and purpose in and for which they are used. By enabling citizens to rely on ordinary meanings, unless notice is given to the contrary, the legislature contributes to legal certainty and predictability for citizens, and to greater transparency in its own decisions, both of which are important values in a democratic society. (Cross in Statutory Interpretation (3rd Edn., 1995; Harbhajan Singh15). As we are satisfied that the language in Section 115-D does not suffer any ambiguity, aid of other cannons of interpretation need not be resorted to.

Clause (7) of the Package relates to legal and institutional reforms, and Clause (7.2)(ii) thereof stipulates that, as carrying out legal amendments is a time consuming process, the State Governments may issue Executive Orders, under the existing powers, to bring in the desired reforms which will relate to removing State intervention in all financial and internal administrative matters in Co-operatives. Pursuant to this Package, a Memorandum Of Understanding was entered into on 29.08.2006 between the Government

8. (1976) 3 ALL ER 611
9. (1976) 2 All ER 721
10. (1834) 1 Ad & EI 136
11. (1976) 3 ALL ER 611
12. (1836) 2 M&W 195
13. (1973) 2 ALL ER 204
14. (1974) 2 ALL ER 73
15. (2002) 3 SCC 722
17. (1988) 3 SCC 609
18. (2004) 6 SCC 672 : 2004 SCC (Cri) 1815

of India, the Government of Andhra Pradesh and NABARD. Clause (9) of the said M.O.U. records the undertaking of the Government of Andhra Pradesh to bring in amendment to the Act, and to any other relevant Acts, to give effect to the reforms envisaged under the Package in respect of all entities which are part of the cooperative credit societies. Clause (9.2) thereof reads thus:

Providing autonomy to CCS in all financial and internal administrative matters, especially in the following areas:

(i) interest rates on deposits and loans in conformity with
RBI guidelines,
(ii) borrowing and investments,
(iii) loan policies and individual loan decisions,

(iv) personal policy, staffing, recruitment, posting, and compensation to staff, and

(v) internal control systems, appointment of auditors and compensation for the audit.

The areas of autonomy specified in Clause (9.2) of the MOU has been reproduced in Section 115-D(2) of the Act, and jurisdiction has been conferred on RBI and NABARD to frame guidelines on matters enumerated in Clauses (i) to (v) of Section 115-D(2) of the Act; and interference in the financial and internal administrative autonomy of the cooperative credit societies, contrary to such guidelines, would be impermissible.

As noted hereinabove, Clause (24) of Section 115-D of the Act stipulates that the existing provisions of the Act would continue till guidelines/stipulations are issued by RBI/ NABARD where required in all the sub-sections of Section 115-D. Even with respect to the areas, referred to in Clauses (i) to (v) of Section 115-D(2) of the Act, it is only on guidelines being issued by RBI/NABARD would the other provision of the Act, including Section 51 thereof, cease to operate. No guidelines, issued by NABARD or RBI, more particularly restraining the Registrar of Co-operative Societies from enquiring into allegations of fraudulent transactions in, and misappropriation of funds of, co-operative credit societies has been brought to our notice and, consequently, Section 51 of the Act would continue to remain in force, and the Registrar of Co- operative Societies is entitled to exercise his power to cause an enquiry into allegations of fraud in, and misappropriation of the funds of, the 7th respondent-co-operative credit society.

Even otherwise, the enquiry which is sought to be caused by the Registrar of Co-operative Societies is into certain fraudulent transactions made in the 7th respondent-bank, and regarding misappropriation of funds by discharging fake fixed deposits. Financial and internal administrative autonomy conferred on co-operative credit societies would not extend to permitting its directors and employees to indulge in fraudulent transactions or in misappropriation of funds. Consequently Section 115-D of the Act, including sub-section (2) thereof, cannot be so construed as to preclude the Registrar of Co- operative Societies from causing an enquiry in this regard.

A writ of mandamus is not a writ of course or a writ of right but is, as a rule, discretionary. (C.R. Reddy Law College Employees Association, Eluru, W.G. District v. Bar Council of India, New Delhi (19). As 19. 2004(5) ALD 180 (DB)

the extra-ordinary jurisdiction of the High Court, under Article 226 of the Constitution of India, is discretionary, it is not to be exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will, ordinarily, be exercised subject to certain self-imposed limitations, (THANSINGH NATHMAL V. SUPDT. OF TAXES(20)), and not as a matter of course. The discretionary jurisdiction, under Article 226 of the Constitution of India, must be exercised with great caution and only in furtherance of public interest, and not merely on the making out of a legal point. Larger public interest must be kept in mind in order to decide whether intervention of the Court is called for or not (MASTER MARINE SERVICES PVT. LTD V. METCALFE AND HODGKINSON PVT LTD(21) ; AIR INDIA LTD V. COCHIN INTERNATIONAL AIR PORT LTD (22); RASHPAL MALHOTRA V. MRS. SAYA RAJPUT (23); COUNCIL OF SCIENTIFIC AND INDUSTRIAL RESEARCH V. K.G.S. BHATT(24)). Even if a legal flaw might be electronically detected, this Court would not interfere save manifest injustice or unless a substantial question of public importance is involved. (Rashpal Malhotra23; K.G.S. Bhatt24). Larger public interest would require Directors/employees of banks/co-operative credit societies to refrain from indulging in fraudulent transactions or from misappropriating its funds. Any enquiry, which the Registrar may cause, in this regard should have been welcomed and not sought to be interdicted by the appellant herein for, if they have nothing to hide, they should not fight shy of an enquiry being caused into the allegations of fraudulent transactions and misappropriation of funds, as they can, thereby, ensure that their reputation and integrity is not besmirched.

We are satisfied, therefore, that the Learned Single Judge was justified in refusing to interdict the process of enquiry under Section 51 of the Act, and in making the enquiry subject to the result of the Writ Petition. In an intra-Court appeal, under Clause 15 of the Letters Patent, interference with the order of the Learned Single Judge, that too an interlocutory order, would not be justified, save patent illegality. We find no such infirmity in the order under appeal. Suffice it to make it clear that we have not expressed any opinion on merits and the enquiry under Section 51 of the Act shall be caused, into the allegations made in the impugned proceedings dated 03.05.2017, uninfluenced by any observations made by us in this order, or by the pendency of the Writ Petition before the Learned Single Judge.

The Writ Appeal fails and is, accordingly, dismissed. Miscellaneous Petitions pending, if any, shall also stand dismissed. There shall be no order as to costs.

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19. 2004(5) ALD 180 (DB)
20. AIR 1964 SC 1419
21. (2005) 6 SCC 138
22. (2000) 2 SCC 617
23. AIR 1987 SC 2235
24. AIR 1989 SC 1972

2017(3) L.S. (Madras) 57

IN THE HIGH COURT OF MADRAS

Present:
The Hon'ble Mr. Justice
R. Subbiah &
The Hon'ble Mr. Justice
A.D.Jagadish Chandira,

M. Babu ..Appellant

Vs.

The State & Ors. ..Respondents

JUVENILE JUSTICE ACT, 2000, Sec. 7-A - JUVENILE JUSTICE RULES, 2007, Rule -12 - INDIAN PENAL CODE, Secs.148and 302 – Review preferred by the detenu challenging the order, whereby the relief sought by the wife of the review petitioner to set him at liberty on the ground that on the date of commission of the offence, he was a juvenile, was rejected.

Held - Age determination inquiry contemplated under the Act, 2000 and Rules, 2007 is nothing to do with an inquiry contemplated under the Criminal Procedure Code - Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court or Board or the Committee need to go for medical report for age determination - Medical evidence as to the age of a person, though a very useful guiding factor, is not a conclusive proof - As an apparent error is there, correction becomes necessitous – In the instant case petitioner was imposed with life imprisonment and petitioner has served with maximum sentence of imprisonment - Hence, without referring the matter to the Juvenile Justice Board for passing appropriate order, this Court is inclined to set the petitioner at liberty - Review Petition is allowed.

Mr.R. Narayanan, Advocate for the Appellant.
Mr.A. Ramar, Additional Public Prosecutor, Advocate for Respondents.

O R D E R

(per the Hon'ble Mr.Justice R. Subbiah)

1. This review application has been filed by the detenu himself to review the order, dated 25.07.2013, passed in H.C.P.(MD). No. 134 of 2013, whereby and whereunder, the relief sought by the wife of the review petitioner to produce her husband viz., the review petitioner/detenu, aged about 38 years, convict No. 87346, detained at Central Prison, Trichy and set him at liberty on the ground that on the date of commission of the offence, he was a juvenile, was rejected.

2. The brief facts which are necessary to decide the issue involved in this case is as follows;

(a) The petitioner herein was arrayed as A1 in S.C. No. 94 of 1991 and was convicted, along with the other accused, under Sections 302 and 148 IPC and sentenced to undergo the major punishment

of imprisonment for life by the learned District and Sessions Judge, West Thanjavur Division, Thanjavur and on appeal, the same was, subsequently, confirmed by a Division Bench of this Court in Crl.A. No. 466 of 1992, by judgment dated 21.03.2001. It is the specific case of the petitioner that he was a juvenile on the date of commission of the offence i.e., on 14.04.1991. Raising the above submission, the wife of the petitioner has filed the Habeas Corpus Petition No. 134 of 2013 before a Division Bench of this Court. In order to prove the age of the petitioner herein/detenu, along with habeas corpus petition, a Transfer Certificate (Record Sheet) was filed, wherein the date of birth of the petitioner was mentioned as 10.07.1974. According to the petitioner, as per the said school certificate, the detenu was 16 years and 9 months at the time of commission of the offence i.e., on 14.04.1991. Hence, the conviction and sentence imposed on him is illegal and he must be set at liberty forthwith.

(b) When the said habeas corpus petition came up before this Court on 16.02.2013, a Division Bench of this Court had directed the learned Principal District and Sessions Judge, Thanjavur to determine the age of the petitioner herein/A1 in S.C. No. 94 of 1991. The learned District and Sessions Judge, Thanjavur had submitted a report determining the age of the accused as 16 years 9 months on the date of commission of the offence. However, this Court, stating that the said report is not in consonance with law, by an order dated 18.02.2013, once again referred the matter to the learned Principal District Judge, Thanjavur, for determining the age of the petitioner by conducting a full-fledged enquiry. The learned Principal District Judge had examined (a) wife of the accused as C.W.1, who marked the Xerox copy of the record sheet relating to the accused issued by the Headmistress of Saint Saveriyar's Middle School, Vallam as Ex. P2; (b) the Headmistress of Saint Saveriyar's Middle school as C.W.2, who marked a Xerox copy of School Admission Register as Ex. P1; (c) the mother of the accused as C.W.3; (d) the accused as C.W.4; (e) Dr. Malarvizhi, Radiologist, Thanjavur Medical College Hospital as C.W. 5, who marked X-ray series as Ex. P3 and radiological report as Ex. P4; and (f) Dr. Tamilmani as C.W.6, who marked his reports as Exs. P5 and P6. After analysing the oral and documentary evidence, including the medical evidence, the learned Principal District Judge had submitted a report determining the age of the accused as 18 years as on the date of occurrence. Based on the said report, the Division Bench of this Court has come to the conclusion that the petitioner herein/detenu was not a juvenile on the date of commission of the offence and therefore, he is not entitled to get the relief under the Juvenile Justice (Care and Protection of Children) Act, 2000 and accordingly, dismissed the habeas corpus petition filed by the wife of the petitioner/detenu. As against the said order, this review petition has been filed by the detenu.

3. The learned counsel appearing for the petitioner submitted that while dismissing the Habeas Corpus Petition, the earlier Division Bench of this Court has not taken into consideration the provision of Section 7A of the Juvenile Justice (Care and

Protection of Children) Act, 2000 and also Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. Relying on the said provisions and also relying on a decision of the Hon'ble Supreme Court in Ashwani Kumar Saxena Vs. State of Madhya Pradesh, reported in MANU/SC/0753/2012 : (2013) 1 SCC (Cri) 594, the learned counsel for the petitioner submitted that in order to determine the age of the accused, who claimed to be a juvenile at the time of the commission of offence, the Court can obtain the matriculation or equivalent certificates, if available and only in the absence of any such matriculation or equivalent certificates, the Court needs to obtain the date of birth certificate from the school first attended other than the play school. Only in the absence of these certificates, the Court can obtain medical certificate from a duly constituted Medical Board. If the exact assessment of age cannot be determined, then the Court for the reasons recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year. In the instant case, the Record Sheet (Transfer Certificate) of the school where the petitioner herein had studied, was produced and the genuinity of the same was also not denied by the prosecution. Under such circumstances, there is no necessity to order for an enquiry. However, the earlier Division Bench ordered for an enquiry through the learned Principal District Judge, Thanjavur and based on the enquiry report submitted by the learned Principal District Judge, in which the age of the detenu was determined as 18 years, dismissed the habeas corpus petition filed by the wife of the petitioner.

4. The learned counsel for the petitioner would further submit that even assuming that the petitioner was 18 years on the date of commission of the offence, as held by the Hon'ble Supreme Court in Ashwani Kumar Saxena case, cited supra, the petitioner can be released by considering his age on the lower side within the margin of one year. Thus, the learned counsel for the petitioner prayed to review the order passed in the habeas corpus petition and to set the petitioner at liberty.

5. The learned Additional Public Prosecutor appearing for the respondents by filing a counter affidavit submitted that the credential of the school Record Sheet was ascertained by sending a copy of the same to the St. Holy Savariar Middle School, Vallam, Thanjavur District and that the school authorities also had confirmed that the date of birth of the petitioner/detenu, as per the school record is 10.07.1974 and that he studied in the said school from 1983-84. However, based on the report of the learned Principal District Judge, the earlier Division Bench of this Court has dismissed the petition. Thus, he prayed for dismissal of the petition.

6. Before going into the issue involved in this review petition, this Court is inclined to refer to the legal position involved in the claim of juvenility. First-of-all, this Court is of the view that it would be appropriate to refer to and extract Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as Act, 2000) and Rule 12 of the Juvenile

Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as "Rules, 2007) hereunder:

"Section 7A - Procedure to be followed when claim of juvenility is raised before any court.

(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary(but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect."

"Rule 12. Procedure to be followed in determination of Age. (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if

considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

(emphasis added)

7. The combined reading of the above provisions makes it clear that;

(a) The accused has a right to raise question of juvenility at any point of time;

(b) While dealing with a claim of juvenility, the Court or the Board or as the case may be the Committee shall conduct the age determining inquiry by seeking evidence by obtaining the matriculation or equivalent certificates;

(c) Only in the absence of the matriculation or equivalent certificates, the date of birth certificate from the school (other than a play school) first attended can be accepted;

(d) Only in the absence of the matriculation or equivalent certificates or the date of birth certificate issued from the school, the birth certificate given by a Corporation or a Municipal authority or a Panchayat can be accepted;

(e) In the absence of those certificates only, the medical opinion can be sought from a duly constituted Medical Board;

(f) In case exact assessment of the age cannot be done, then the Court for the reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his/her age on lower

side within the margin of one year; and

(g) After obtaining certificate or any other documentary proof, no further enquiry shall be conducted.

8. As to how the inquiry contemplated under the Act, 2000 and the Rules, 2007 should be done, has been elaborately discussed in the decision in Ashwani Kumar Saxena Vs. State of Madhya Pradesh reported in MANU/SC/0753/2012 : (2013) 1 SCC (Cri) 594 by the Hon'ble Supreme Court and held in paragraph Nos. 25 to 28 as follows:

"25. Section 7A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the J.J. Act. Criminal Courts, JJ Board, Committees etc., we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. Statute requires the Court or the Board only to make an 'inquiry' and in what manner that inquiry has to be conducted is provided in JJ Rules. Few of the expressions used in Section 7A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7A has used the expression "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates etc. as evidence need not be oral evidence.

26. Rule 12 which has to be read along with Section 7A has also used certain expressions which are also be borne in mind. Rule 12(2) uses the expression "prima facie" and "on the basis of physical appearance" or "documents, if available". Rule 12(3) uses the expression "by seeking evidence by obtaining". These expressions in our view re-emphasize the fact that what is contemplated in Section 7A and Rule 12 is only an inquiry. Further, the age determination inquiry has to be completed and age be determined within thirty days from the date of making the application; which is also an indication of the manner in which the inquiry has to be conducted and completed. The word 'inquiry' has not been defined under the J.J. Act, but Section 2(y) of the J.J. Act says that all words and expressions used and not defined in the J.J. Act but defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

27. Let us now examine the meaning of the words inquiry, enquiry, investigation and trial as we see in the Code of Criminal Procedure and their several meanings attributed to those expressions "Inquiry" as defined in Section 2(g), Cr.P.C. reads as follows:

"2(g) "Inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.

The word "enquiry" is not defined under the Code of Criminal Procedure which is an act of asking for information and also consideration of some evidence, may be documentary.

"Investigation" as defined in section 2(h), Cr.P.C. reads as follows:

"2.(h) 'Investigation' includes all the proceedings under this code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

The expressions "trial" has not been defined in the Code of Criminal Procedure but must be understood in the light of the expressions "inquiry" or "investigation" as contained in sections 2(g) and 2(h) of the Code of Criminal Procedure."

28. The expression "trial" has been generally understood as the examination by court of issues of fact and law in a case for the purpose of rendering the judgment relating some offences committed. We find in very many cases that the Court/the J.J. Board while determining the claim of juvenility forget that what they are expected to do is not to conduct an inquiry under Section 2(g) of the Code of Criminal Procedure, but an inquiry under the J.J. Act, following the procedure laid under Rule 12 and not following the procedure laid down under the Code."

9. Thus, from the above decision, it is clear that age determination inquiry contemplated under the Act, 2000 and Rules, 2007 is nothing to do with an inquiry contemplated under the Criminal Procedure Code or an enquiry contemplated other legislations, like, entry in service, retirement, promotion, etc. The Court or Board or a Committee functioning under the Act, 2000 is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court or Board or the Committee need to go for medical report for age determination.

10. While examining the scope of Rule 12 of Rules, 2007, the Hon'ble Supreme Court in the decision in Shah Nawaz vs. State of U.P., reported in MANU/SC/0910/2011 : (2012) 2 SCC (Cri) 864, has reiterated that the medical opinion from the Medical Board should be sought only when matriculation certificate or equivalent certificate or the date of birth certificate from the school first attended or any birth certificate issued by a Corporation or a municipal authority or a panchayat or municipal is not available. The Hon'ble Supreme Court has further held that the entry related to date of birth entered in the mark sheet is a valid evidence for determining the age of the accused person so also the school leaving certificate for determining the age of the accused.

11. Now coming to this case, admittedly, the wife of the petitioner had produced the school Record Sheet (Transfer Certificate) of the petitioner, wherein the date of birth of the petitioner is mentioned as 10.07.1974, which would go to show that on the date of commission of the offence i.e., on 14.04.1991, the petitioner was aged about 16 years and 9 months. The said certificate was also not disputed by the respondents. In fact, the respondents have also enquired

about the authenticity of the certificate and confirmed the same. When that be so, there is no need to order for an enquiry. But, the earlier Division Bench ordered for an enquiry, that too when the prosecution has not disputed the authenticity of the certificate.

12. As stated supra, only in cases where the documents produced found to be fabricated or manipulated, the Court shall go for medical report for age determination. In this case, the earlier Division Bench of this Court has rejected the case of the petitioner, based on the report of the learned Principal District Judge, who had, after oral and documentary evidence, including the medical evidence, determined the age of the petitioner as 18 years. It is a settled position that the medical evidence as to the age of a person, though a very useful guiding factor, is not a conclusive proof. As the age of the petitioner has not been conclusively proved, the benefit of Rule 12(3)(b) of the Rules, 2007 should be given to the petitioner by determining his age on the lower side margin of one year. Thus, even assuming that as determined by the learned Principal District Judge mainly based on medical evidence, the petitioner was aged about 18 years at the time of commission of the offence, by determining his age on the lower side margin of one year, the petitioner can be stated to be a juvenile at the time of commission of the offence.

13. In view of the above, we are of the considered view that there is an error apparent on the face of the record. As an apparent error is there, correction becomes necessitous. Admittedly, in this case, the petitioner was imposed with life imprisonment. It is submitted that the petitioner has served with maximum sentence of imprisonment. Hence, without referring the matter to the Juvenile Justice Board for passing appropriate order, this Court is inclined to set the petitioner at liberty.

14. In the result, this Review Petition is allowed and the order, dated 25.07.2013, passed by the earlier Division Bench of this Court in H.C.P. (MD). No. 134 of 2013 is reviewed and the H.C.P.(MD). No. 134 of 2013 is allowed and the respondents are directed set the petitioner/detenu viz., M. Babu, S/o. Mani, Convict Prisoner No. 87436, detained at Central Prison, Trichy, at liberty, unless his detention is required in connection with any other case.

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2017 (3) L.S. 69 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
A.K.Sikri &
The Hon'ble Mr.Justice
Ashok Bhushan

Chand Devi Daga & Ors., ..Respondents
Vs.
Manju K.Humatani & Ors., ..Respondents

CRIMINAL PROCEDURE CODE, Secs. 247, 249, 256 and 302 – INDIAN PENALCODE Secs.34, 120B, 201, 420, 467, 468 and 471 – Appeal against the Judgment passed by the High Court allowing IA filed by the legal representatives, praying them to be substituted in place of the complainant.

Complainant died during the pendency of petition before High court which was filed challenging the order of sessions judge, rejecting the criminal revision against the order of magistrate dismissing the complaint - Legal heirs of complainant filed an application praying them to be substituted in place of complainant – High court allowed the application.

Held –There is no provision in chapter XIX of Cr.P.C. which says that, in the event of death of the complainant the complaint is to be rejected – Magistrate under Section 249 of Cr.P.C. can discharge a case where the complainant is absent - We do not find any error in the Order of the High court – Appeal stands dismissed.

J U D G M E N T

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

This appeal has been filed against the judgment of the High Court of Chhatisgarh allowing an IA filed by the legal representatives of the petitioner in Criminal Misc. Petition. The respondents aggrieved by the order of the High Court dated 02.02.2017 has filed this appeal.

2. The brief facts necessary for deciding this appeal are:

Smt. Chandra Narayan Das whose legal representatives are the respondent Nos.1 to 7 had filed a complaint against the appellants alleging offence under Sections 420, 467, 468, 471, 120B, 201 and 34 IPC. The husband of Smt. Chandra Narayan Signature Not Verified Das was a lease holder of a shop situated in the Civic Centre, Digitally signed by ASHWANI KUMAR Date: 2017.11.03 17:34:23 IST Reason:

Bhilai Steel Plant, Chhatisgarh. Shop No.12 was allowed in the name of the husband of appellant No.1 in the year 1959. Although, husband of the appellant No.1, a Member of Parliament had died in 1952 itself, it was alleged by the complainant that certain agreements were got executed by legal heirs of Member of Parliament which constituted commission of offence. The complaint was dismissed by the Magistrate vide order dated 26.02.2015

holding that prima facie case under Sections 420, 467, 468, 120B and 201/34 IPC is not made out against the accused.

3. Smt. Chandra Narayan Das filed a criminal revision before the Additional Sessions Judge, Durg which was dismissed by VIIIth Additional Sessions Judge, Durg vide judgment dated 20.11.2015. Criminal Misc. Petition against the said order dated 20.11.2015 was filed in the High Court of Chhatisgarh by Smt. Chandra Narayan Das. The High Court on 18.02.2016 issued notice in the Criminal Misc. Petition. After issuance of notice the petitioner, Smt. Chandra Narayan Das died on 02.04.2016. An application was filed by the legal heirs of Smt. Chandra Narayan Das praying them to be substituted in place of the petitioner. The application was opposed by the appellants. The High Court vide its order dated 02.02.2017 allowed the said application and permitted the legal representatives of Smt. Chandra Narayan Das to come on record for prosecuting the Criminal Misc. Petition. Aggrieved by the said judgment, the appellants have come up in this appeal.

4. Learned counsel for the appellants submits that in the Code of Criminal Procedure, 1973(hereinafter referred to as "Code 1973") there is no provision which permits legal representatives of the complainant to be substituted for prosecuting the complaint. It is submitted that the present is a case where no summons were issued to the appellants since the complaint was rejected by the Magistrate and a criminal revision challenging the said order has also been dismissed. It is submitted that the High Court committed error in permitting the legal representatives of complainant to be brought on record for prosecuting the case.

5. Learned counsel for the respondents refuting the submission of the learned counsel for the appellants contends that rejection of complaint and order of the Sessions Judge dismissing the criminal revision were under challenge before the High Court on the ground that prima facie offence was disclosed in the complaint and courts below committed error in rejecting the complaint. The offence having been committed by the appellants, the High Court has every jurisdiction to permit the legal representatives to prosecute the matter in the event of death of original complainant. It is submitted that Code 1973 does not contain any provision that on death of complainant, the complaint cannot be allowed to be prosecuted by any other person including the legal representatives.

6. We have considered the submissions of the learned counsel for the parties and perused the records.

7. There is no dispute regarding facts and events in the present case. The original complainant died during the pendency of the Criminal Misc. Petition before the High Court which was filed challenging the order of the Sessions Judge rejecting the criminal revision against the order of Magistrate dismissing the complaint.

8. Section 256 of Code of Criminal Procedure, 1973 is contained in Chapter XX with the heading "Trial of summons-cases by Magistrates". Section 256 on which reliance has been placed provides as follows:

"Section 256. Non- appearance or death of complainant.-(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day: Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death."

9. Analogous provision to Section 256 of Code 1973 was contained in Section 247 of Criminal Procedure Code, 1898. In Section 247 the proviso was added in 1955 saying that "where the Magistrate is of the opinion that personal attendance is not necessary, he may dispense with such attendance". The said proviso took out the rigour of the original rule and whole thing was left to the discretion of the Court. Sub-section (1) of Section 256 contains the above proviso in the similar manner. Thus, even in case of trial of summons-case it is not necessary or mandatory that after death of complainant the complaint is to be rejected, in exercise of the power under proviso to Section 256(1), the Magistrate can proceed with the complaint. More so, the present is a case where offence was alleged under Sections 420, 467, 468, 471, 120B and 201 read with 34 IPC for which procedure for trial of summons-case was not applicable and there is no provision in Chapter XIX "Trial of warrant-cases by Magistrates" containing a provision that in the event of death of complainant the complaint is to be rejected. The Magistrate under Section 249 has power to discharge a case where the complainant is absent. The discharge under Section 249, however, is hedged with condition "the offence may be lawfully compounded or is not a cognizable offence". Had the Code 1973 intended that in case of death of complainant in a warrant case the complaint is to be rejected, the provision would have indicated any such intention which is clearly absent.

10. In this context a reference is made to judgment of this Court in Ashwin Nanubhai Vyas Vs. State of Maharashtra, AIR 1967 SCC 983. In the said case this Court had occasion to consider the provisions of Criminal Procedure Code, 1898. The complainant had filed a complaint against the appellants. The complaint was filed under Sections 498 and 496 IPC. Accused was summoned. However, during the pendency of the complaint, the complainant died. The complainant's mother applied for substituting her to act as complainant and continue the proceedings. Magistrate permitted the mother of complainant to pursue the complaint against which revision was filed before the High Court which was dismissed. Aggrieved by the order of the High Court the appellant had come up before this Court. In the above context this Court

considered the pari materia provisions of the Criminal Procedure Code, 1898 with regard to Section 247 (now Section 256) it was specifically held that said provision does not furnish any valid analogy. In paragraph 4 of the judgment following was observed:

> "4 Mr. Keswani for Vyas, in support of the abatement of the case, relied upon the analogy of Section 431 under which appeals abate and Sections 247 and 259 under which on the complainant remaining absent, the court can acquit or discharge the accused. These analogies do not avail him because they provide for special situations. Inquiries and trials before the court are of several kinds. Section 247 occurs in Chapter XX which deals with the trial of summons cases by a Magistrate and Section 259 in Chapter XXI which deals with trial of warrant cases before Magistrates. Under the former, if summons is issued on a complaint and the complainant on any day remains absent from the court, unless it decides to proceed with the trial, must acquit the accused. This can only happen in the trial of cases, which are punishable with imprisonment of less than one year. This not being the trial of a summons case but a committal inquiry, Section 247 neither applies nor can it furnish any valid analogy. Similarly, Section 259, which occurs in the Chapter on the trial of warrant cases, that is to say cases triable by a Magistrate and punishable with imprisonment exceeding one year can furnish no analogy. Under Section 259, if the offence being tried as a warrant case is compoundable or is not cognizable the Magistrate may discharge the accused before the charge is framed if the complainant remains absent. Once again this section cannot apply because the Presidency Magistrate was not trying the case under Chapter XXI."

11. This Court further had occasion to consider Section 495 of Code 1898 (now Section 302 of Criminal Procedure Code) and this Court laid down in paragraph 7 as follows:

> "7 Mr. Keswani contends that the Presidency Magistrate has made a "substitution" of a new complainant and there is nothing in the Code which warrants the substitution of one complainant for another. It is true that the Presidency Magistrate has used the word "substitute" but that is not the effect of the order. What the Presidency Magistrate has done is to allow the mother to act as the complainant to continue the prosecution. This power was undoubtedly possessed by the Presidency Magistrate because of Section 495 of the Code by which Courts are empowered (with some exceptions) to authorise the conduct of prosecution by any person. The words 'any person' would indubitably include the mother of the complainant in a case such as this. Section 198 itself contemplates that a complaint may be made

by a person other than the person aggrieved and there seems to us no valid reason why in such a serious case we should hold that the death of the complainant puts an end to the prosecution."

12. At this stage reference to Section 302 of the Criminal Procedure Code is necessary. Section 302 of the Criminal Procedure Code is contained in Chapter XXIV with the heading "General provisions as to inquiries and trials". Section 302 relates to permission to conduct prosecution which is to the following effect:

" Section 302. Permission to conduct prosecution

1. Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate -General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

2. Any person conducting the prosecution may do so personally or by a pleader."

13. This Court had occasion to consider Sections 256 and 302 in Balasaheb K. Thackeray & Anr. Vs. Venkat @ Babru, (2006) 5 SCC 530. In the above case complaint was filed under Section 500 read with Section 34 IPC. A petition was filed under Section 482 of the Code 1973 against the order of issue of process in the High Court which was dismissed. SLP was filed in this Court in which notice was issued and during the pendency of the appeal it was noted that complainant had died. It was contended that the complaint be dismissed on the ground that complainant is dead. This Court in the above context referred to Sections 256 and

302. This Court repelled the argument of the appellant that complaint be dismissed on the ground that complainant had died. Following was held in paragraphs 3 to 6:

"3. Learned counsel for the appellants with reference to Section 256 of the Code submitted that the complaint was to be dismissed on the ground of the death of the complainant. As noted above learned counsel for Respondent 1's legal heirs submitted that the legal heirs of the complainant shall file an application for permission to prosecute and, therefore, the complaint still survives consideration.

4. At this juncture it is relevant to take note of what has been stated by this Court earlier on the principles applicable. In Ashwin Nanubhai Vyas v. State of Maharashtra with reference to Section 495 of the Code of Criminal Procedure, 1898 (hereinafter referred to as "the old Code") it was held that the Magistrate had the power to permit a relative to act as the complainant to continue the prosecution. In Jimmy Jahangir Madan v. Bolly

Cariyappa Hindley after referring to Ashwin case it was held that heir of the complainant can be allowed to file a petition under Section 302 of the Code to continue the prosecution.

5. Section 302 of the Code reads as under:

"302. Permission to conduct prosecution.—(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader."

6. To bring in application of Section 302 of the Code, permission to conduct the prosecution has to be obtained from the Magistrate inquiring into or trying a case. The Magistrate is empowered to permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person other than the Advocate General or the Government Advocate or a Public Prosecutor or Assistant Public Prosecutor shall be entitled to do so without such permission."

14. Two Judge Bench in Jimmy Jahangir Madan Vs. Bolly Caiyappa Hindley (dead) By Lrs., (2004) 12 SCC 509 referring to this Court's judgment in Ashwin Nanubhai Vyas (supra) had held that heirs of complainant can continue the prosecution. Following was held in paragraph 5:

> "5. The question as to whether the heirs of the complainant can be allowed to file an application under Section 302 of the Code to continue the prosecution is no longer res integra as the same has been concluded by a decision of this Court in the case of Ashwin Nanubhai Vyas v. State of Maharashtra in which case the Court was dealing with a case under Section 495 of the Code of Criminal Procedure, 1898, which is corresponding to Section 302 of the Code. In that case, it was laid down that upon the death of the complainant, under the provisions of Section 495 of the said Code, mother of the complainant could be allowed to continue the prosecution. It was further laid down that she could make the application either herself or through a pleader. Undisputedly, in the present case, the heirs themselves have not filed the applications to continue the prosecution, rather the same have been filed by their power-of-attorney holders...."

15. In view of what has been discussed above, we are of the view that High Court did not commit any error in allowing the legal heirs of the complainant to prosecute the Criminal Misc. Petition before the High Court. We do not find any error in the order of the High Court. The appeal is dismissed.

–X–

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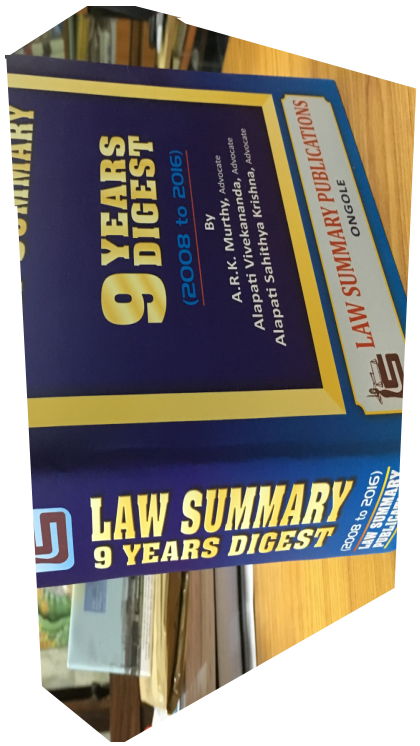

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