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Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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(Founder : Late Sri G.S. GUPTA)

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PART - 23 (15TH DECEMBER 2017)

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Writ Petitioners opposed the claim on ground that there was no sale as claimed by them and sale deed was a false document - Objection of petitioners before Joint Collector, that no decision shall be made in the revision as there was pending suit before a Civil Court was rejected holding that same suit was for perpetual injunction and no injunction orders were granted by the Court and allowed the revision and ordered to restore the name of respondents – Hence this Writ petition.

Held – As there was no adjudication of title dispute, the decision of revisional authority does not amount to decision made on title dispute – No error in the revisional authority exercising quasi-judicial power under section 9 of the Act, merely because suit is pending on a prayer to grant perpetual injunction – Contentions on title/owner ship and possession are left to be agitated in pending suit or other proceedings - Writ petition is dismissed. **(A.P.) *235***

CIVIL PROCEDURE CODE, Secs.47 & 151 - Civil Revision Petition is filed against the Order of Trial Court which allowed the Application of respondent by setting aside the sale – Revision petitioner contends that Court below has erroneously allowed the Application as Sec.47 of CPC has no application since 1st respondent is not a party to the suit.

Held – 1st respondent is neither a decree holder nor auction purchaser in the

auction conducted by Court below – No material on record or evidence to the effect that any fraud or illegality is played by petitioner while purchasing EP schedule property in the auction conducted by Court below – Having participated in the auction and having kept quite at that time, 1st respondent/ third party cannot question the auction sale of EP schedule property by way of an Application u/Sec.47 r/w 151 of CPC – Impugned order of Court below is set aside and Civil Revision is allowed. **(Hyd.)** ***276***

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Held - While ordinarily the Court has to proceed on the basis of material produced with the charge sheet for dealing with the issue of charge but if the Court is satisfied that there is material of sterling quality which has been withheld by the investigator/ prosecutor, the Court is not debarred from summoning or relying upon the same even if such document is not part of a charge sheet – It does not mean that the defence has a right to invoke Sec.91 of Cr.P.C. de hors the satisfaction of the Court, at the stage of charge - Appeal preferred by the appellants to set aside the view taken by the High Court is allowed. **(Hyd.)** ***87***

NEGOTIABLE INSTRUMENTS ACT, Sec.138 – Whether complainant in a complaint case u/Sec.138 of the NI Act is victim as defined u/Sec.2(wa) of Cr.P.C. – If so, is he entitled to file an appeal invoking the proviso u/Sec. 372 of Cr.P.C. before the court to which an appeal lies against conviction – If not, whether complainant in a complaint case u/Sec.138 of NI Act and also for any other offence either bailable or non- bailable is required to file an appeal against acquittal in a complaint case seeking special leave of the court u/Sec.378(4) of Cr.P.C.

Held - An offence u/Sec.138 of N.I Act would only be a 'summons case' wherein no charge requires to be framed and as the accused in a cheque-dishonour case is not charged, the complainant in such a case, though may suffer loss and injury by the omission of the accused to pay his dues, cannot be brought within the ambit of a 'victim' as defined u/Sec. 2(wa) of Cr.P.C – Such a complainant would not be entitled to avail the remedy of an appeal under proviso to Sec.372 of Cr.P.C. and must continue to avail special remedy to appeal provided u/Sec.378(4) of Cr.P.C after obtaining the special leave. **(Hyd.)** ***252***

(INDIAN) PENAL CODE, Secs.302, 304-B & 498-A - **CRIMINAL PROCEDURE CODE,** Sec.374(2) –Criminal Appeal - Husband/Accused is found guilty of murder of his wife and demanding additional dowry.

Held – A charge u/Sec. 304-B, IPC ought to have been framed against the accused – Therefore, in the Interest of Justice, the accused be charged and tried u/Sec.304-B IPC at this stage – It may be noted that u/Sec.304-B, IPC it is not necessary to establish a homicidal death for proving the offence of dowry death – It is sufficient if the death of the woman is otherwise than under the normal circumstances – As the accused was never charged with an offence u/Sec. 304-B, IPC and did not have the opportunity to rebut the same, it would be appropriate if Sessions Court frame the charge at this stage and give him an opportunity to meet it – Sessions Court shall permit prosecution to adduce additional evidence, oral and documentary and appellant shall be permitted to recall any of the witnesses already examined for further cross-examination – Criminal Appeal allowed partly. **(Hyd.) 283**

(INDIAN)PENAL CODE, Sec. 201 and 302 - Appellant/Accused has challenged the legality of the conviction and sentence passed by the Trial Court against him - Case of the prosecution rests upon circumstantial evidence.

Held – If the case of the prosecution rests upon circumstantial evidence, it is bounden duty of prosecution to link the chain of circumstances unerringly to connect the accused for the commission of offence, but they have miserably failed to do so – Circumstance of last seen together does not by itself necessarily lead to inference that it was accused who committed the crime but there must be something more to connect the accused with the crime and to point out guilt of accused and none else - There are very many gaps and holes in the case projected by the prosecution and the chain of circumstances to link the accused with the commission of offence is not at all complete and therefore, benefit of doubt shall endure in favour of the appellant - Criminal appeal is allowed – Conviction recorded and sentence imposed on appellant is set aside. **(Madras)** ***77***

SC/ST PREVENTION OF ATROCITIES ACT, Sec.3(2)(V) - **INDIAN PENAL CODE,** Secs.323, 376(2)(g) and 450 – Post amendment of the SC/ST Act, mere knowledge of the accused that the person upon whom the offence is committed belongs to SC/ST community suffices to bring home the charge under Section 3(2)(v) of the Act.

In the instant case so far as conviction U/S 376(2)(g), IPC is not interfered - Since unamended provisions of the SC/ST Act are applicable in the present case and evidence and materials on record do not show that appellant had committed rape on victim on the ground that she belonged to SC/ST community, the same cannot be sustained – Accused already undergone imprisonment for more than ten years, appellant is ordered to be released forthwith. **(S.C.)** ***90***

A NOTE ON PLEADINGS IN CIVIL CASES

By
Y. Srinivasa Rao,M.A(English)., B.Ed., LL.M,
Senior Civil Judge, Avanigadda, Krishna Dt.

Introduction:

Pleadings avow basic positions of the parties in a civil suit. There are the circular orders and administrative instructions are being issued from time to time for the guidance of all the subordinate Civil Courts by the respective High Courts. As to pleadings of civil suits are concerned, it is seminal to refer to Order 6 the Code of Civil Procedure,1908 (CPC). ''*Pleading*'' shall mean *plaint* or *written statement* as seen from Order 6 Rule 1 CPC. All plaints, written Statements and other proceedings presented to the court, shall be written, type written or printed, fairly and legible on stamped paper or on substantial foolscap folio paper. For example, a plaint shall be headed with a cause-title, as in Form No.1 of Andhra Pradesh Civil Rules of Practice (CRP). Certain Form of Proceedings are set out in Chapter -II of the Civil Rules of Practice for the guidance of all the subordinate Civil Courts. For instance, when a document produced with any pleading appears to be *defaced*, *torn*, or *in any way damaged*, or where its condition or appearance required special notice, a note of its condition and appearance shall be made on the list of documents by the party producing the same and should be checked and initialed, if correct, by the receiving officer. The rule is that civil cases are decided on the basis of *preponderance of evidence*. See. Syed Askari's, 2009 (3) SCALE 604). Of course, there are instances that defendant drags the proceedings without filing his written satement for months together. If defendant was deliberately delaying the proceedings and had failed to assign good and sufficient cause for not filing the written statement, the Court could forfeit his right of defence. See. Smt. Sushila Jain vs. Rajasthan Finacial Corporation Jaipur, AIR 1979 Raj 215.

Pleadings are very crucial:

Generally, pleadings shall contain the following factors as was provided in Order 6 of CPC. No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. As to material contents of a document, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material. Every pleading shall be signed by the party and his pleader (if any). where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf. It is advised to go through Order 6 of CPC.

Sections 40, 41, and 42 Indian Evidence are irrelevant. :

Significantly enough, Section 43 of the Evidence Act categorically states that judgments, orders or decrees, other than those mentioned in Sections 40, 41, and 42 are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of the Act. No other provision of the Indian Evidence or for

that matter any other statute has been brought to our notice.

Some discussion about Sections 40, 41, and 42 Evidence Act is important because in M/s Karam Chand Ganga Prasad & anr. etc. vs. Union of India & ors, (1970) 3 SCC 694, wherein it was categorically held that the decisions of the civil courts will be binding on the criminal courts but the converse is not true, was overruled, stating:

> "33. Hence, the observation made by this Court in V.M. Shah case that the finding recorded by the criminal court stands superseded by the finding recorded by the civil court is not correct enunciation of law. Further, the general observations made in Karam Chand case are in context of the facts of the case stated above. The Court was not required to consider the earlier decision of the Constitution Bench in M.S. Sheriff case as well as Section 40 to 43 of the Evidence Act."

Facts admitted need not be proved

See. section 58 of Indian Evidence Act. This section postulates that things admitted need not be proved.This principle was laid down in Avtar Singh and Ors. vs. Gurdial Singh and Ors, (2006) 12 SCC 269. Also see. Gannamani Anasuya and Ors., vs. Parvatini Amarendra Chowdary and Ors, (2007) 10 SCC 296; Balraj Taneja & Anr vs. Madan & Anr.

A thing admitted in view of Section 58 of the Indian Evidence Act need not be proved. Order VIII Rule 5 of the Code of Civil Procedure provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the plaintiff. Relying on or on the basis thereof a suit, having regard to the provisions of Order XII Rule 6 of the Code of Civil Procedure may also be decreed on admission. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom. See. (2008) 2 SCC 85.

> *An admission made in a pleading is not to be treated in the same manner as an admission in a document. An admission made by a party to the lis is admissible against him proprio vigore*. See. Gautham Sarup vs. Leela Jetly, (2008) 2 SCC 85.

Effect of an admission :

Curiously enough, the law as regards the effect of an admission is also no longer *res integra*. Whereas a party may not be permitted to resile from his admission at a subsequent stage of the same proceedings, it is also trite that an admission made contrary to law shall not be binding on the State. See. (2007) 1 SCC 457, State Of Haryana & Ors vs M.P. Mohla.

Preponderance of probabilities *:*

Civil cases are decided on the basis of preponderance of evidence.Ref: Syed Askari Hadi Ali Augustine Imam and Anr vs. State (Delhi Admn.) and Anr, 2009 (3) SCALE 604. In this

contenxt, it is seminal to see that indeed, proof of facts by preponderance of probabilities as in a civil case is not foreign to criminal jurisprudence as was held in AIR 1978 SC 961, State (Delhi Administration) vs Sanjay Gandhi. It is observed in G.Vasu's case,AIR 1987 AP 139, a fact is said not to be proved when it is neither proved nor disproved. It will be seen that the words 'proved' and 'disproved' are closely connected with the theory of '*preponderance of probabilities*."

Evidence is to be given only on a plea :

The ordinary rule of law is that evidence is to be given only on a plea properly raised and not in contradiction of the plea." The Supreme Court in the case of Mrs. Om Prabha Jain Vs. Abnash CHand and Anr, 1968 AIR 1083. The evidence to be admitted cannot travel beyond the pleadings. See. Harihar Prasad Singh And Ors vs Balmiki Prasad Singh And Ors, 1975 AIR 733, 1975 SCR (2) 932. As was pointed out in evidence adduced beyond the pleadings would not be admissible nor can any evidence be permitted to be adduced which is at variance with the pleadings. See. AIR 1966 SC 773, Dr.Jagjit Singh Vs.Gaini Kartar Singh.

Is not a judgment of a civil court binding on a criminal court ?

A judgment in a criminal case, thus, is admissible for a limited purpose. relying only on or on the basis thereof, a civil proceeding cannot be determined, but that would not mean that it is not admissible for any purpose whatsoever. See. Seth Ramdayal Jat vs. Laxmi Prasad, Civil Appeal no. 2543/2009, Arising out of SLP (Civil) No. 23441/2007, dt.15-04-2009. *Axiomatically*, if judgment of a civil court is not binding on a criminal court, a judgment of a criminal court will certainly not be binding on a civil court. Basically, civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein (Ref. AIR 1954 SC 397, M.S.Sheriff's case). A judgment of a civil court shall be binding on the criminal court as was held in Shanti Kumar Panda vs. Shakuntala, (2004) 1 SCC 438. It is well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case. See. AIR 2008 SC 1884, P. Swaroopa Rani vs M. Hari Narayana @ Hari Babu. Also see. (2005) 4 SCC 370,Iqbal Singh Marwah's case.

Civil proceedings and criminal proceedings can proceed simultaneously : See. P.Swaroopa Rani vs. M.Hari Narayana @ Hari Babu, AIR 2008 SC 1884

Any amount of evidence, without pleadings should be eschewed :

Darisi Masthanamma vs. Mandiga Rama Krishna, AIR 2006 AP286. M.B. Subramanyam vs. A.Ramaswamy, SA Nos. 1668 & 1669/2008 and M.P. No. 1/2008. Mohamed Ismail and anr vs. Khadirsa Rowther and Ors, (1982) 2 MLJ 367. **The decision of a case cannot be 'based on grounds outside the pleadings of the parties, AIR 1953 SC**

235; Trojan and company Vs R.M.N.N Nagappa chettiar; Johnson v. Rex ([1904] A.C. 817) referred to. It is well settled that the decision of a case cannot be 'based on grounds outside the pleadings of the parties and that it is the case pleaded that has to be found.

Without an amendment of the plaint the court was not entitled to grant the relief not asked for AIR 1953 SC 235, Trojan and company Vs R.M.N.N Nagappa chettiar, Without an amendment of the plaint the court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case.

***Entire pleadings on both sides can be looked into*:-**

2017(2) ALT 24 (DNSC), Kuldeep singh Pathavia Vs. Bikram Singh Jorgal. Principal Of Law is that pleadings on both sides can be looked into under order 14 Rule 2(2) to seek where the court has jurisdiction and whether there to a bar for entertaining the suit.

Pleadings are not statues :

As was held in AIR 1987 SC 193 SB Noronar Vs Prem Kundi, Pleadings are not statutes and legalism is not verbatim common sense should not be kept in cold storage,when pleadings are constructed. Plea regarding maintainability of suit is required to be raised in the first instance 2017(2) ALT 40 (SC), A.Kanthamani (Mrs) Mrs. VS.Nasreen Ahmed.

Conclusion :

It is curious to note that pleading to state material facts and not evidence. Particulars of facts to be given where necessary. Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant. No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation f fact inconsistent with the previous pleadings of the party pleading the same. Bare denial of contract shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract. As to material contents of a document, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material. Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied. Every pleading shall be signed by the party and his pleader (if any). where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf. Pleadins shall contain address for service of notice. Verification of pleadings is also an important task. Sequentially, striking out pleadings and amendment of pleadings are significant factors. *See. Order VI of CPC*.

2017(3) L.S. 235

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

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

Abdul Rafeeq & Ors. ..Appellant

Vs.

State of Telangana & Ors., ..Respondent

ANDHRA PRADESH RIGHTS IN LAND AND PATTADAR PASS BOOKS ACT, Sec.9 - Writ petition – Respondents 4 to 6 filed revision before the Joint Collector to carryout corrections of illegal entry in the old ROR in respect of their land and further contended that they are the rightful owners of the land.

Writ Petitioners opposed the claim on ground that there was no sale as claimed by them and sale deed was a false document - Objection of petitioners before Joint Collector, that no decision shall be made in the revision as there was pending suit before a Civil Court was rejected holding that same suit was for perpetual injunction and no injunction orders were granted by the Court and allowed the revision and ordered to restore the name of respondents – Hence this Writ petition.

Held – As there was no adjudication of title dispute, the decision of revisional authority does not amount to decision made on title dispute – No error in the revisional authority exercising quasi-judicial power under section 9 of the Act, merely because suit is pending on a prayer to grant perpetual injunction – Contentions on title/owner ship and possession are left to be agitated in pending suit or other proceedings - Writ petition is dismissed.

Cases referred:

1.1996 LawSuit (AP) 906
2.1997 (2) ALT 625 (D.B.)
3.2000 (1) ALD 672
4.2003 (1) ALD 85 (SC)
5.2011 (4) ALD 567
6.2014 (1) ALT 365
7.(2015) 3 SCC 695
8.2014(3) ALT 176 (DB)
9.2015 (4) ALD 427
10(2009) 9 SCC 352
11(2010) 8 SCC 467
12.(2006) 3 SCC 173
13.(2003) 3 SCC 583
14.2015 (6) ALD 609 (DB)

Mr.M.Damodhar Reddy, Advocate for the Appellant.

Government Pleader for Revenue, Advocate for the Respondents 1 TO 3..

Mr.N.Vasudeva Reddy, Advocate for respondents 4 to 6.

O R D E R

Heard Sri M.Damodar Reddy, learned counsel for petitioners, learned Government Pleader for Revenue (TG) for respondents 1 to 3 and Sri N.Vasudeva Reddy, learned counsel for respondents 4 to 6.

2. Respondents 4 to 6 and one other person filed revision under Section 9 of the Andhra Pradesh Rights in Land and Pattadar Pass Books Act 1971 (Act, 1971) before the Joint Collector, Vikarabad District praying to carryout corrections of illegal entry in the old ROR of 1979-80 in respect of land in Sy.No.1145 to an extent of Ac.9.18 guntas of Dudyal Village of Bomraspet Mandal by deleting the name of late Abdul Hameed. Revision petitioners contended that one Babu Rao is the original owner of the above land and he sold the same to the father of the revision petitioners through sale deed dated 29.02.1950. In Khasra pahani 1954-55, the name of father of revision petitioners was recorded as purchaser and in subsequent years name of their father recorded as owner and pattadar. In the year 1983, Government issued pattadar pass books in the name of their father. In support of their contention that they are owners, they have also stated that in the year, 1973 their father obtained loan from the Land Mortgage Bank (LMB) to dig open bore-well. According to them, for the first time in 1979- 80 old ROR, name of father of respondents was recorded without any file number, proceedings number and without mention of document or decree of Civil Court as source to undertake such exercise.

3. Detailed contentions were urged respectively. Suffice to note that, respondents before the revisional authority (petitioners herein) opposed the claim of revision petitioners (respondents 4 to 6 herein) primarily on the ground that there was no sale as claimed by them and it was a false document. It was further contended that if there was un-registered sale deed, they would have got the same regularized and obtained certificate under Section 50-B of the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act, 1950 (Act, 1950). As no such certificate was obtained, entire claim of revision petitioners falls to ground.

4. On extensive consideration of rival claims, the Joint Collector noticed that in P.T. Register of Dudyal village for the year 1950-51, name of Smt. Srishasani Bogum was shown as pattadar and Chinthakindi Veerappa (through whom respondents 4 to 6 claim passing on title to them) was shown as protected tenant. In the Sethwar for the year 1351 Fasli of Bomraspet village, the subject land was classified as Sarkari (patta) with the Khatedar name Srishasani Bogum. In the year 1954-55, Srishasani Bogum was shown as pattadar and Chinthakindi Veerappa was shown as occupant of land by way of purchasers. He was also shown as protected tenant and actual cultivator of the land. According to Joint Collector, the entries made in the year 1954-55 continued up to the pahani of 1978-79 and only in the pahani of 1979-80, name of Chinthakindi Veerappa was deleted and name of Mohd.Moulana was recorded as pattadar. The same was also reflected in the pahanies of 1987-88, 1990-91 onwards. In possession column of pahanies for the years 1990-91, 1998-99 and 2009-10, names of respondents were recorded as occupants, whereas in pahanies for the year 1982-83, 1987-88, 1996-97, 2002-03, 2005-06, 2006-07, possession column is kept blank. He also noticed that in the year 2009-10 pahani, land is divided among respondents before him in equal shares

claiming as successors of late Mohd.Moulana. According to the Joint Collector, it is not known how respondents or their late father Moulana are related to original pattadar; not filed any documentary evidence to show that it was ancestral property and they have acquired rights by virtue of succession. According to the Joint Collector, name of father of respondents was unauthorizedly recorded as pattadar in the ROR Register of 1979- 80 and pahanies of 1979-80, 1982-83 etc., without any documentary evidence and no file number is mentioned for making such changes.

5. The objection of the respondents before him that O.S.No.2 of 2010 is pending on the file of Junior Civil Judge at Kodangal and, therefore, no decision should be made was rejected holding that the said suit was for perpetual injunction and no injunction orders were granted by the trial Court and that injunction suit has no relevance with issue involved in the revision. Having regard to findings recorded by him, as briefly noted above, he allowed the revision and ordered to restore the name of Chinthakindi Veerappa as pattadar while deleting the name of Mohd. Moulana. Aggrieved thereby, this writ petition is filed.

6. Sri M.Damodar Reddy, learned counsel for petitioners contended that:

i) revision petition was entertained after long lapse of time and there was no sufficient explanation as to why such petition was preferred after long lapse of time. According to the learned counsel, even according to the unofficial respondents, entry of late Abdul Hameed was made in revenue records of the year 1979-80 and in the subsequent years also name was shown and for the year 2009-10 pahani would reflect that names of the petitioners were reflected as owners with equal shares by way of succession. If that is so, unofficial respondents ought to have preferred revision soon thereafter. Though Section 9 of the Act do not prescribe any limitation, such revision has to be preferred within a reasonable time and in the facts of the case, it cannot be said that revision filed in the year 2013 was within a reasonable time and this ought to have been appreciated by the revisional authority and ought not to have entertained the revision. Even assuming that un-official respondents were not aware of entries made in revenue records till notice was received by them in O.S.No.2 of 2010, they could have filed such revision immediately thereafter, even if same is treated as date of knowledge. But even after notice was received in the suit, they kept quiet for three long years and in the mean time, they have also filed written statement in the suit. It is thus contended that revision was not filed within reasonable time. There was inordinate delay and the revision ought to have been dismissed on that ground alone.

ii) It is further contended that as petitioners were in possession and respondents 4 to 6 tried to dispossess them, petitioners instituted O.S.No.2 of 2010 praying to grant perpetual injunction. The unofficial respondents filed their written statement and suit is pending trial. After entering their appearance in the suit and after filing written statement, instant revision is filed. In the

written statement, they have also raised similar objections as urged before the revisional authority, whereas petitioners have categorically denied alleged purchase made by their late father on 29.02.1950 and it being an ancestral property, it has fallen to their share as successors to late Abdul Hameed. Since suit is pending, the revisional authority erred in entertaining and deciding the issue which would adversely affect claims made by petitioners in their suit. Once competent Court is seized of the matter, the revisional authority under the Act, 1971 ought not to have entertained the revision and enter into rival claims and decide such claims. His decision to reject their objection on this aspect is erroneous.

iii) In addition to the above contentions, learned counsel also made extensive submissions on merits of the rival claims, more particularly with reference to the provisions of A.P. (Telanana Area) Tenancy Agricultural Lands Act, 1950 and the legality/ genuineness of the sale deed dated 29.02.1950, based on which claim is set up by unofficial respondents.

iv) In support of his contentions, learned counsel placed reliance on following decisions:

I) IBRAHIMPATNAM TALUK VYAVASAYA COOLIE SANGAM, REP.BY ITS GENERAL SECRETARY, GEETHA RAMASWAMY V. K.SURESH REDDY(1) ;

II) MOHD. KAREEMUDDIN KHAN (DIED) AND OTHERS V. SYED AZAM(2) ;

III) G.K.NAIK V. SUSHEELA NAIK AND ANOTHER(3) ;

IV) MAHILA BAJRANGI (DEAD) BY LRS AND OTHERS V. BADRIBAI AND ANOTHER(4) ;

V) KUTHURU NARASIMHA REDDY V PUSALA VENKATAIAH AND OTHERS(5);

VI) BASIREDDY RUKMINAMMA V. JOINT COLLECTOR, KADAPA AND OTHERS(6) AND

VII) JOINT COLLECTOR RANGA REDDY DISTRICT AND ANOTHER V. D.NARSING RAO AND OTHERS(7) .

7 (i). Per contra, Sri N.Vasudeva Reddy, learned counsel for respondents 4 to 6 contended that filing of revision on 18.05.2013 to rectify illegal entries made in the revenue records cannot be called as one made after long lapse of time and revision cannot be thrown out on the ground that there was inordinate delay, more particularly in the peculiar facts of this case. Having noticed from contents of suit instituted by petitioners and on verification of revenue records, revision was filed on 18.05.2013. However, he would submit that unofficial respondents were pursuing the matter even earlier. He would therefore submit that there was no delay much less inordinate delay in filing the revision.

1.1996 LawSuit (AP) 906
2.1997 (2) ALT 625 (D.B.)
3.2000 (1) ALD 672
4.2003 (1) ALD 85 (SC)
5.2011 (4) ALD 567
6.2014 (1) ALT 365
7.(2015) 3 SCC 695

ii) According to the learned counsel, right from 1954-55 name of father of unofficial respondents appeared. He was protected tenant and he purchased land from pattadar in the year 1950. Sale deed of 1950 would evidence such purchase made. Tenancy Register of 1956-57 & 1957-58 would reflect the name of father of petitioners as tenants. Phanies for the year 1957-58 also reflect name of father of unofficial respondents. Pattadar pass books were issued reflecting name of late father of unofficial respondents. Only for the first time in the year 1979-80, name of Mohd. Moulana appeared. No record is shown how his name is reflected in revenue records. According to learned counsel, panchanama conducted on 17.12.2009 would reflect that unofficial respondents were in possession and continued to be in possession. On 27.12.2009 pattadar pass books and title deeds were issued reflecting names of unofficial respondents. Before issuance of pattadar pass books, notices were issued to petitioners and they did not appear. Report of the Tahsildar dated 15.11.2012 which was addressed to the Revenue Divisional Officer would also reflect that in Khasra pahani for the year 1954-55 name of Chintakindi Veerappa was recorded as occupant by way of purchase for ? 380/- and for the years 1955-1958, his name was recorded in pattadar and occupant columns. The report would disclose that having noticed wrong entry made, notice was issued to petitioners to produce the documents to show how their names were entered in pattadar column, but no documents were produced in support of their claim, except stating that it is their ancestral property. On 18.01.2013, the Revenue Divisional Officer directed the Tahsildar that he being competent authority to restore or to make the corrections of illegal and unauthorized entries made, he should take appropriate steps. He would therefore submit that documents enclosed to counter-affidavit would reflect that wrong entry was made and unofficial respondents have been prosecuting the matter.

iii) By narrating above facts, learned counsel contended that it cannot be said that unofficial respondents kept quiet even though they were aware of wrong entries made in revenue records. Panchanama conducted on 17.12.2009 would reflect that illegally some entry was made without following due procedure and without putting unofficial respondents on notice and that there was no occasion for unofficial respondents to know about alleged illegal entry made, allegation that in spite of knowledge of such illegal entry made, they kept quiet for unreasonably long time deserves to be rejected. On the contrary, reports of Tahsildar and decision of the revisional authority disclose that patent illegality was committed in making wrong entry in revenue records of 1979-80 for the first time. In spite of granting sufficient time and opportunity to petitioners by various authorities, they were unable to establish source how title was validly passed on to their father and what was the relationship of original pattadar with their father. Further more, name of Moulana was not continuously reflected in revenue records as noticed by the revisional authority. Thus, in the facts of this case, decisions relied by the learned counsel have no application and decision by revisional authority cannot be set aside on mere

ground that no challenge was made soon after entry was made in the year 1979-80 in revenue records. According to learned counsel, revisional jurisdiction was validly exercised.

iv) He further submitted that pending suit is not a bar for entertaining revision under Section 9 of the Act, 1971. Suit is for mere injunction and not for declaration of title and, therefore, pending such suit is not a bar for exercising revisional power under Section 9 of the Act, 1971.

v) He would further submit that revisional authority considered all aspects and on considering rival contentions and on applying his mind, decision was made by him. Against decisions made by quasi-judicial authorities, the jurisdiction of the writ Court is limited and when there is no perversity or patent illegality in the decision made by the quasi-judicial authority writ Court cannot interfere as if the Court is sitting in appeal against such decision.

vi) Learned counsel fairly submitted that decision arrived at by revisional authority cannot affect rival contentions in the pending suit and it is always open to plaintiffs to contest claim of defendants on merits and to prove that they are in possession.

vii) Learned counsel also extensively referred to provisions of Tenancy Act and Act, 1971 as well as on merits of their claim.

viii) In support of his contentions, learned counsel Sri N.Vasudeva Reddy, placed reliance on following decisions:

i) ERUKALA UMA V GOVERNMENT OF ANDHRA PRADESH, REP.BY ITS JOINT COLLECTOR, KARIMNAGAR AND ANOTHER(8) ; AND

II) G.PRABHAKAR V. STATE OF TELANGANA AND OTHERS(9) .

8. In reply, learned counsel Sri Damodar Reddy, by referring to relevant portions of order of revisional authority (page-23 of writ petition material paper book) contended that said assessment made by the Joint Collector would itself reflect that entry of Mohd.Moulana was made in revenue records as early as in the year 1979-80 and limitation has to be counted from that year onwards. Though Section 9 of the Act, 1971 do not prescribe period of limitation to prefer revision, such revision has to be preferred within a reasonable time and preferring revision in May, 2013 against alleged wrong entries made in the year 1979-80 cannot be said as made within reasonable time. He emphasized that in view of decisions relied upon by him entertaining of revision after such long lapse of time was erroneous and on that ground alone revision ought to have been dismissed. He further reiterated that when suit is pending, revisional authority ought not to have entertained the revision.

9. Before appreciating rival contentions, it is to be noted that O.S.No.2 of 2010 is pending in the Court of Junior Civil Judge, Kodangal. Therefore, Court is not inclined to go into the merits of rival contentions on the title and ownership at this stage.

8.2014(3) ALT 176 (DB)
9.2015 (4) ALD 427

10. Thus, only issues for consideration in this writ petition are,

(i) Whether the revision petition filed by unofficial respondents is hit by inordinate delay and latches and whether Joint Collector erred in entertaining revision after long lapse of time and altering revenue records in their favour by deleting names of the petitioners herein ?; and

(ii) Whether Joint Collector erred in entertaining revision when O.S.No.2 of 2010 is pending inter-parties ?

ISSUE NO. (i):

11. Section 9 of the Act, 1971 reads as under:

> Section 9 Revision: The Collector may either suo motu or on an application made to him, call for and examine the record of any Recording Authority, Mandal Revenue Officer or Revenue Divisional Officer under Sections 3, 5, 5-A or 5-B, in respect of any record of rights prepared or maintained to satisfy himself as to the regularity, correctness, legality or propriety of any decision taken, order passed or proceedings made in respect thereof and if it appears to the Collector that any such decision, order or proceedings should be modified, annulled or reversed or remitted for re- consideration, he may pass orders accordingly.--
>
> Provided that no such order adversely affecting any person shall be passed under this section unless he had an opportunity of making a representation.

12. A plain reading of this section makes it clear that, Act does not prescribe limitation to exercise power of revision by the revisional authority. Such power can be exercised suo moto or on an application. It vests powers in him to verify the concerned record and assess as to regularity, correctness, legality or propriety of decisions taken by his subordinates. It is a sweeping power. Such power can be invoked to rectify any injustice caused to a person at the hands of his subordinates. It vests wide discretion.

13. There are similar such provisions in various enactments vesting power in an authority to exercise revisional jurisdiction without stipulating time limit. In plethora of decisions Constitutional Courts have considered the scope of exercise of such power. A few of the decisions, some of them cited at the bar, are referred hereunder.

13.1. In Ibrahimpatnam, the Division Bench of this Court held as under:

> 3. The learned single Judge allowed the writ petition on the twin considerations that the purported action suo moto proceedings initiated after 13 to 15 years was unwarranted and could not be considered as reasonable exercise of the suo moto power and on the ground that since the Joint Collector found the respondents to have been put in possession of the lands in the year

1965, their applications for issue of validation certificates had been made within time as was lat extended, for which, the certificates cannot be held to be bad in law.

5.. Exercise of such power after 14 to 15 years is ipso facto unreasonable. There is absolute no explanatio\n before us to why though Section 50(B) was amended in the year 1979, the Joint Collector waited till 1989 to invoke the power. Every man has the legitimate expectation of regarding a set of things, or facts which have continued over a period of time, to have become settled so that he can plan his future course of action on the basis of such accepted situation. Unsettling such facts after long delay upsets not only his entire programme but also affects in the long run the society itself. Even in the present case, the respondents have taken the stand that they filed returns before the ceiling authorities under the Ceiling Act, 1973, showing these lands as their holdings authorities and that such plead had been upheld. Unsettling such position may mean even reopening the ceiling proceedings which must have become final long time back. In that view of the matter, we agree with the observations of the learned single Judge in that respect.(emphasis supplied)

13.2. In Joint Collector Ranga Reddy (supra), Supreme Court reviewed the law declared in earlier decisions on the subject. Supreme Court noticed, having regard to facts of that case, that authorities of the state were aware of claims of respondent on the subject land but kept quiet. Supreme Court, therefore held that exercise of suo moto revisional power after five decades, in the facts of that case, opposed to concept of rule of law, even though period of limitation is not prescribed to exercise such power.

13.3. In SANTOSHKUMAR SHIVGONDA PATIL AND OTHERS V. BALASAHEB TUKARAM SHEVALE AND OTHERS(10) , on 30.03.1976 Tahsildar passed orders, where under 3/4th portion of land earlier in occupation of Tukaram was granted in favour of Shivgonda Satgonda Patil on the basis of his occupation as cultivator and 1/4th remained in favour of Tukaram Sakharam Shevale. Tukaram Sakharam Shevale died in the year 1990. In 1993, his legal heirs filed application before the Sub-Divisional Officer seeking revision of order of Tahsildar dated 30.03.1976. Said revision was allowed. Supreme Court noticed that after the order of Tahsildar dated 30.03.1976, Tukharam Sakharam Shevale though survived till 1990 did not challenge the same and kept quiet. Supreme Court also noticed that it was not the case of the legal heirs of Tukharam Sakharam Shevale that he was not aware of the order passed on 30.03.1976 and that it was not the case of the Sub-Divisional Officer that order dated 30.03.1976 was obtained fraudulently. In the above factual background, Supreme Court held that exercise of revisional power after lapse of 17 years would amount to abuse an exercise of such power. Supreme

10(2009) 9 SCC 352

Court held as under:

> 11. It seems to be fairly settled that if a statute does not prescribe the time-limit for exercise of revisional power, it does not mean that such power can be exercised at any time; rather it should be exercised within a reasonable time. It is so because the law does not expect a settled thing to be unsettled after a long lapse of time. Where the legislature does not provide for any length of time within which the power of revision is to be exercised by the authority, suo motu or otherwise, it is plain that exercise of such power within reasonable time is inherent therein.(emphasis supplied)

13.4. In SULOCHANA CHANDRAKANT GALANDE V. PUNE MUNICIPAL TRANSPORT AND OTHERS(11) , the facts in brief are as under:

The subject property came within the urban limits on 17.05.1976 and was governed by the Urban Land (Ceiling and Regulation) Act, 1976 (Act, 1976). The said land was acquired under the Act in the year 1978-1979; possession was taken; handed over to Pune Municipal Transport (PMT); in 1988 the bus depot was constructed on a part of the suit land. On 06.04.1988, appellant preferred revision under Section 34 of the Act, 1976 contending that land ought not to have acquired under the Act on the ground that on the date of commencement of the Act, 1976 land was not within the limits of Urban area. The revision was allowed on 29.09.1998 and challenge was made by the PMT, High Court of Maharashtra allowed the revision petition. Supreme Court noticed that the revisional authority erred in not granting the point of delay interpreting the provision contained in Section 34 of the Act, 1976. Supreme Court held as under:

> 28. The legislature in its wisdom did not fix a time-limit for exercising the revisional power nor inserted the words at any time in Section 34 of the 1976 Act. It does not mean that the legislature intended to leave the orders passed under the Act open to variation for an indefinite period inasmuch as it would have the effect of rendering title of the holders/ allottee(s) permanently precarious and in a state of perpetual uncertainty. In case, it is assumed that the legislature has conferred an everlasting and interminable power in point of time, the title over the declared surplus land, in the hands of the State/allottee, would forever remain virtually insecure. The Court has to construe the statutory provision in a way which makes the provisions workable, advancing the purpose and object of enactment of the statute.
>
> 29. In view of the above, we reach the inescapable conclusion that the revisional powers cannot be used arbitrarily at a belated stage for the reason that the order passed in revision under Section 34 of the 1976 Act, is a judicial order. What should be reasonable time, would depend upon the facts and circumstances

11(2010) 8 SCC 467

of each case. (emphasis supplied)

14. From the long line of precedent decisions, it is manifest that though Constitutional Courts have conceded revision power perse but were concerned about manner of exercise of such power in individual cases. Courts expressed displeasure in invoking such power after long lapse of time and upsetting settled issues. Therefore, courts have laid down limits to exercising such power. Courts have held that even in the absence of fixing time limit such power ought to be exercised within reasonable time. However, what is reasonable time is left to be decided in individual cases.

15. The constitutional Courts mandated exercise of such power within reasonable time only to ensure that exercise of such power after long lapse of time would upset legitimate expectation flowing out of a decision made by executive authority long time back; accrual of certain rights flowing out of such decisions; accrual of third party interests; and that there should not be perpetual uncertainty on any issue. In other words, there must be some finality to an issue.

16. Since power to undertake review is conceded to revisional authority and time limit is not prescribed to exercise such power, what is required to be considered in a given case is whether there was delay in making an application for revision of decisions of lower authorities and if there was delay whether such delay was unexplained or unreasonable long. Thus, there cannot be straight jacket formula to hold every case of delay in making such a claim as perse vitiated and therefore in a given case whether party was justified in filing revision after long time and whether there was sufficient justification for the revisional authority to entertain revision made after long lapse of time and decided the same on merits depends on the facts of a given case. Thus, to hold that a revision was entertained and decided after long lapse of time, it must be established that such revision was made after long lapse of time of occurring of an event and there was no valid justification to file such revision after inordinate delay. Thus the issue whether revision was filed within reasonable time is mixed question of fact and law. Therefore, specific objection must be raised before the revisional authority and invite finding from him.

17. No doubt revision power being a residuary power, must be exercised sparingly/cautiously, more so when a person files revision after long lapse of time of an event. In a given case, invoking such power can be tested on the ground whether it was exercised arbitrarily and whimsically and on other well laid down parameters of judicial review of administrative action, but foundation must be laid before the revisional authority. Judicial review of such action can be made based on the foundation of facts and not in isolation. Thus, parties are required to raise specific objection and invite finding from the revisional authority on maintainability of revision before testing his decision by invoking the writ jurisdiction of this court.

18. It is to be noted that petitioners filed

written arguments before revisional authority. Extensive contentions were made on merits against unofficial respondents claim that their father was protected tenant and that sale was made between original owner of property and their father etc., but no contention was raised on maintainability of revision after long lapse of time. It is to be noted that petitioners contended that to enforce an order of Revenue Divisional Officer by Tahsildar, revision is not maintainable and party ought to have approached Revenue Divisional Officer to issue appropriate directions to Tahsildar. Thus, there was no occasion for the revisional authority to examine the issue of maintainability of revision on the ground of delay in filing such revision vis--vis the facts of the case and defense of unofficial respondents. Petitioners ought to have raised their objections before revisional authority on maintainability of revision on the ground of inordinate delay in filing revision and invited a finding from him.

19. Further, even in the writ petition, no plea is raised against entertainment of revision by the revisional authority after long lapse of time. Contentions are urged on merits and primarily, plea raised before revisional authority as well as in writ petition is on the ground that petitioners filed O.S.No.2 of 2010 praying to grant perpetual injunction and during the pendency of suit, revisional authority ought not to have entertained revision and granted relief to correct the entries in revenue records.

20. Thus, no foundation is laid either before revisional authority or in this writ petition on the contention of entertaining revision after long lapse of time.

21. On the contrary, respondents have made extensive averments justifying the petition filed before revisional authority, resulting in order impugned, which averments made in their counter are not denied.

22. It is specific case of the unofficial respondents that since 1983, unofficial respondents were agitating against wrong entries made in revenue records and made several representations to Tahsildar. On 17.12.2009, spot inspection was made and panchanama was conducted. Panchanama would disclose that unofficial respondents are in possession of land to an extent of Ac.9.18 guntas in Sy.No.1145. They were issued pattadar pass books and title deeds on 27.12.2009. Thereafter representations were made to Revenue Divisional Officer for correction of entries in revenue records. Report was called from Tahsildar and Tahsildar submitted his report on 15.11.2012. Report of Tahsildar would disclose that Tahsildar directed the petitioners to produce documents in support of their claim of ownership. In response, no documents were produced in support of their contentions that subject property is their ancestral property. On consideration of said report, Revenue Divisional Officer directed the Tahsildar to take a decision as he is competent authority. Alleging inaction and continuous reflection of wrong entries in revenue records, unofficial respondents filed revision under Section 9 of the Act.

23. Specific averments made by unofficial respondents in their counter-affidavit are not controverted. According to averments in

counter-affidavit filed by unofficial respondents, their ancestors were protected tenants and also shown as purchasers of very same land. Subsequent revenue records would disclose their continuity in possession and enjoyment.

24. A reading of order in revision would show that on elaborate consideration of respective submissions, revisional authority found that as per Protected Tenant Register of 1950-51 of Dudyal village, name of Ch.Veerappa was shown as protected tenant. Detailed analysis of various developments on property and various changes made in revenue records were discussed by revisional authority. It appears, from reading of material placed on record by respective parties and order of revisional authority, name of Md.Moulana figured as pattadar in land in pahani 1979-80 and from 1990-91 onwards. However, it appears for the years 1990-91, 1998-99, 2009-10, names of unofficial respondents were shown as occupants of land. In the pahanies for the years 1982-83, 1987- 88, 1996-97, 2002-03, 2005-06, 2006-07, possession column was kept blank. In the year 2009-10, revenue record reflected division of land in equal shares and recording of names of unofficial petitioners by way of succession.

25. Record would disclose that no material was placed on record before revenue authorities on source of title to Mohd.Moulana, through whom petitioners were claiming as succeeded to property. It appears from reading of revisional order that illegal entry was made for the first time in the year 1979-80 showing name of Mohd.Moulana as pattadar and said entry is not supported by any document of ownership and entries were not supported by decision consciously taken on due consideration of the issue. It appears, unofficial respondents were not put on notice before undertaking such exercise.

26. Thus, even though in pattadar column name of ancestor of petitioners was shown after 1979, though not continuously, names of unofficial respondents were reflected in possessor/enjoyers column and reports of revenue authorities would disclose that unofficial respondents are in continuous possession and enjoyment of subject property. Further, it is not the case of petitioners that third party rights accrued on account of petitioners being treated as pattadars in revenue records. It is not the case of the petitioners that they have challenged the entries reflecting unofficial respondents in possessor column. Thus, it cannot be said that revision proceedings are vitiated on the ground of delay and latches.

27. In exercise of power of judicial review under Article 226 of the Constitution of India an order of administrative authority, more particularly made in exercise of quasi-judicial power, can be tested and writ court may interfere only if Court comes to a conclusion that there is error of jurisdiction or decision is perverse. Writ Court does not sit as appellate authority over such decision. Thus, judicial review is confined to jurisdictional error and perversity of decision. The scope of judicial review is confined to decision making process and not the decision perse.

28. The following two decisions succinctly put the scope of judicial review of administrative decisions.

28.1. In Commissioner of POLICE V. SYED HUSSAIN(12) , dealing with scope of judicial review of administrative action, Supreme Court held as under:

> 10. It is one thing to say that order passed by the statutory authority is wholly arbitrary and thus violative of Article 14 of the Constitution and thus liable to be set aside, but it is another thing to say that the discretionary jurisdiction exercised by such authority should not ordinarily be interfered with by a superior court while exercising its power of judicial review unless one or the other ground upon which and on the basis whereof the power of judicial review can be exercised, exists.
>
> 11. It is not the contention of the learned counsel for the respondent that the impugned order of punishment smacks of arbitrariness so as to attract the wrath of Article 14 of the Constitution. The jurisdiction of the disciplinary authority to impose such punishment is also not in question.
>
> 12. Thus, even assuming that a time has come where this Court can develop administrative law by following the recent decisions of the House of Lords, we are of the opinion that it is not one of such cases where the doctrine of proportionality should be invoked. In ex p Daly [(2001) 3 All ER 433 (HL)] it was held that the depth of judicial review and the deference due to the administrative discretion vary with the subject-matter. It was further stated: (All ER p. 447, para 32) It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.
>
> As for example in Huang v. Secy. of State for the Home Deptt. [(2005) 3 All ER 435] referring to R. v. Secy. of State of the Home Deptt., ex p Daly [(2001) 3 All ER 433 (HL)] , it was held that in certain cases, the adjudicator may require to conduct a judicial exercise which is not merely more intrusive than Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1947) 2 All ER 680 : (1948) 1 KB 223 (CA)] , but involves a full-blown merits judgment, which is yet more than [what] ex p Daly [(2001) 3 All ER 433 (HL)] requires on a judicial review where the court has to decide a proportionality issue.
>
> 13. It is, therefore, beyond any doubt or dispute that the doctrine of proportionality has to be applied in appropriate case as the depth of judicial review will depend on the facts and circumstances of each case.

(emphasis supplied)

28.2. In LALIT POPLI V. CANARA BANK (13), Supreme Court delineated scope of judicial review as under:

> 17. While exercising jurisdiction under Article 226 of the Constitution the High Court does not act as an appellate authority. Its jurisdiction is circumscribed by limits of judicial review to correct errors of law or procedural errors leading to manifest injustice or violation of principles of natural justice. Judicial review is not akin to adjudication of the case on merits as an appellate authority.

(emphasis supplied)

29. As seen from record, briefly noted above, there was extensive consideration and on application of mind, revisional authority held that illegally name of father of petitioners was reflected in revenue records and later on, names of petitioners were shown as successors and no material was placed on record before revisional authority or before Revenue Divisional Officer or Tahsildar in support of their claim that their father was owner of the property and title validly flown to their father and from their father to them. Thus, it cannot be said that decision arrived at by revisional authority is perverse.

30. In the facts of this case and narration of events as noted above, it cannot be said that there was error, much less patent error in exercising revisional power. The decision cannot be held as irrational nor can be held as weighed by irrelevant consideration. It cannot amount to outrageous defiance of logic. I see no infirmity in the decision making process. The specific contentions urged by unofficial respondents in counter-affidavit, explaining the steps taken by them for rectification in the errors committed in revenue records are not controverted. I am of the considered opinion that no case is made out to nullify the decision of revisional authority.

31. At this stage, it is necessary to consider few other submissions of learned counsel for petitioners.

32. Learned counsel for petitioner would further contend that having appealed to Revenue Divisional Officer and Revenue Divisional Officer directed Tahsildar to consider the same, unofficial respondents could not have gone before revisional authority and petition filed before revisional authority is nothing but enforcement of directions issued by Revenue Divisional Officer to Tahsildar and such relief cannot be prayed in revision petition. Moreover, unofficial respondents could have gone before appellate authority for enforcement his own order, but not before revisional authority. In support of his contention, he placed reliance on decision of Basireddy Rukminamma.

33. It appears from reading of judgment in Basireddy Rukminamma, revisional authority while holding that there is a serious title dispute set aside pattadar pass books and title deeds issued to petitioner. Learned single Judge of this Court found fault with decision of Revenue Divisional Officer on the ground that having held that there was a serious title dispute and was not competent to decide the same, he could

13.(2003) 3 SCC 583

not have cancelled pattadar pass books and title deeds and further held that without availing remedy of appeal under Section 5(5) of the Act, person ought not to have availed remedy of filing revision.

34. Issue whether appeal is maintainable against issuance of pattadar pass books and title deeds was considered by the Division Bench of this Court in RATNAMMA V. REVENUE DIVISIONAL OFFICER, DHARMAVARAM, ANANTAPUR DISTRICT AND OTHERS(14) . Division Bench held that no appeal is maintainable against issuing of pattadar pass books and title deeds. Thus, view taken by learned single Judge in Basireddy Rukminamma may not hold the field. Furthermore, in the facts of this case, it cannot be said that revisional authority decided the title dispute. Further, pending suit is only on the issue of possession.

35. There is merit in the contention of the learned counsel for unofficial respondents that Tahsildar has no competence in undertake correction in the revenue records once revenue records reflected the name of father of the petitioners. This issue was considered by the learned single Judge of this Court in G.Prabhakar. This Court held as under:

36. In G.Prabhakar, single Judge of this Court held as under:

> 2. It is the case of the petitioner that the family of Syed Miya were issued pattadar pass books and in which the land in Sy. No. 490 was recorded as a patta land and whereas in the year 2003 a mistake has crept and the nature of the land was recorded as 'Lavani Patta' instead of 'Private Patta' and the same is being continued as such. Bringing this fact to the notice of the 3rd respondent, petitioner had submitted an application on 04.10.2012 to the 2nd respondent vide complaint No. 26346, requesting him to correct the entries in the revenue records..
>
> xxxx
>
> 4. A perusal of Sections 3 to 5 and 9 of the Act leave no manner of doubt that the Tahsildar is not vested with any powers to make corrections either suo motu or on an application except at the time of making entries for the first time in terms of the notification issued under Sections 3(1), 3(2) of the Act. Any corrections in relation to the entries could be made in the given circumstances satisfying Section 3(3) of the Act within one year. If the case requiring corrections of the revenue records beyond the time limit of one year, necessary orders can be passed only by the District Collector in exercise of the revisional powers and the Tahsildar is not vested with any such power.

37. Learned counsel for petitioners forcibly contended that unregistered private sale deed dated 29.02.1950 claimed by unofficial respondents is not valid for want of prior permission from the revenue authorities under Section 47 of the A.P. (Telangana

14.2015 (6) ALD 609 (DB)

Area) Tenancy and Agricultural Lands Act, 1950 and the sale was not validated under Section 50-B of the Act. In support of the said contention, learned counsel placed reliance on the decision of this Court in Mohd.Kareemuddim.

38. In Mohd.Kareemuddin, Division Bench of this Court held as under:

> 14. While we reach such conclusion we have however also to advert to the submission urged on behalf of the appellants of the sales to have been invalid because the transfer of the land had not been made with the sanction of the competent authority as laid down under Section 47 of the Act. It has to be said at the outset that this submission having been given up before the learned single Judge, it cannot be raised at this stage. It is however argued before us that since it is a question of law, the question can be raised also at this stage and that the concession was not legally sound. Section 47 of the Act, which has since been deleted on 18-3-1969, barred any permanent alienation or any other transfer of land unless it was made with the previous sanction of the Tahsildar. Admittedly, no such permission had been taken when Exs. B-1 and B-2 were executed though Section 47 of the Act was then in force. The sales hence were apparently invalid. Section 50-B which was brought in by the same amendment provided for validation of the invalid sales on application to be made within the prescribed period to the Tahsildar for a certificate declaring the alienation or transfer to be valid. No such application had been made by the respondent for validation. We have hence to hold that the sales were invalid.

39. Decision in Mahila Bajrangi do not come to aid of petitioners on issue in this writ petition.

40. Decision in Kuthuru Narasimha Reddy also do not come to aid of petitioners as there is no adjudication by revisional authority on title dispute. It is seen that observations made by revisional authority on the entry of name of father of petitioners and later, name of petitioners was not supported by any material and that exclusion of name of unofficial respondents was with reference to entry of names in revenue records. Thus, decision of revisional authority does not amount to decision made on title dispute.

41. For the reasons stated above, the issue is answered in favour of unofficial respondents and against the petitioners. ISSUE NO. (ii):

42. Learned counsel for petitioners contended that when dispute is pending in Court, Revisional authority ought not to have entertained revision and passed orders in favour of unofficial respondents.

43. The averments of the petitioners and the unofficial respondents would disclose that suit filed by the petitioners is to grant perpetual injunction against respondents to

restrain the defendants from interfering with the peaceful possession of the plaintiffs over the subject property.

44. In Erukala Uma, after referring to scheme of Act, 1971, Division Bench of this Court held as under:

> 10. Keeping this legislative scheme in mind, it is difficult to accept the contention that the moment any civil suit is filed, the authorities under the ROR Act have to stay their hands and cannot exercise any of the statutory powers under the ROR Act, awaiting decision of the civil Court. The remedies under the ROR Act are provided to give expeditious relief in respect of rights in land and pattadar pass books. Such right, therefore, does not get affected merely because of pendency of any civil suit before any Court. But section 8(2) of the Act specifies that only the decree in such suits seeking declaration of right under Chapter VI to Specific Relief Act would be binding on the authorities under the ROR Act.

xxxx

15. Hence, we deem it appropriate to clarify the judgment of the learned single Judge of this Court in V. Goutham Rao's case, to the extent that, when a show cause notice is issued by a competent authority, just because a civil suit is pending, ipso facto, it will not entitle a party to approach the High Court under Article 226 of the Constitution in view of the law laid down in V. Gowtham Rao's case, but the party has to approach the authority by way of a reply and should bring all the relevant facts to the notice of the authority otherwise, the purpose of the Act itself would be frustrated, which is enacted for effective implementation of entries in Record of Rights.

45. As held by the Division Bench of this Court in Erukala Uma, pendency of suit is no ground to stop enquiry under the Act, 1971 and it is for the party to place on record all the relevant facts before the authority. Furthermore, it appears, suit was filed praying to grant permanent injunction against interference in possession and does not concern the title dispute.

46. I do not see any error in the revisional authority exercising the quasi-judicial power under Section 9 of the Act, 1971 merely because suit is pending on a prayer to grant perpetual injunction.

47. Thus, the issue is held against petitioners and in favour of unofficial respondents.

48. In view of the above findings, the writ petition is liable to be dismissed and is accordingly dismissed. However, contentions on title/ownership and possession are left to be agitated in pending suit or in any other proceedings. It is made clear that observations made herein above are only for the purpose of consideration of the order of revisional authority made in exercise of revisional jurisdiction under Section 9 of the Act, 1971 on two issues formulated for consideration.

Miscellaneous petitions if any pending in the writ petition shall stand closed. There shall be no order as to costs.

--X--

2017(3) L.S. 252 (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 Dr.Justice Shameem Akther

Smt.P. Vijaya Laxmi ..Petitioner

Vs.

Smt.S.P.Sravana & Anr. ..Respondents

NEGOTIABLE INSTRUMENTS ACT, Sec.138 – Whether complainant in a complaint case u/Sec..138 of the NI Act is victim as defined u/Sec.2(wa) of Cr.P.C. – If so, is he entitled to file an appeal invoking the proviso u/Sec. 372 of Cr.P.C. before the court to which an appeal lies against conviction – If not, whether complainant in a complaint case u/Sec.138 of NI Act and also for any other offence either bailable or non- bailable is required to file an appeal against acquittal in a complaint case seeking special leave of the court u/Sec.378(4) of Cr.P.C.

Crl.P.No.16742/2016 Date:27-10-2017

Held - An offence u/Sec.138 of N.I Act would only be a 'summons case' wherein no charge requires to be framed and as the accused in a cheque-dishonour case is not charged, the complainant in such a case, though may suffer loss and injury by the omission of the accused to pay his dues, cannot be brought within the ambit of a 'victim' as defined u/Sec. 2(wa) of Cr.P.C – Such a complainant would not be entitled to avail the remedy of an appeal under proviso to Sec.372 of Cr.P.C. and must continue to avail special remedy to appeal provided u/Sec.378(4) of Cr.P.C after obtaining the special leave.

Cases Referred:

1. 2011 (1) ALD (Crl.) 201 (AP)
2. 2014 (2) ALD (Crl.) 900
3. 2015 (3) ALT (Crl.) 107 (AP)
4. (2015) CRI.L.J. 2784 (DB)
5. (2015) CRI.L.J. 1627 (DB)
6. 2013 LawSuit (P&H) 1375
7. 2016 (1) ALD (Crl.) 288 (SC) : (2015) 15 SCC 613
8. LAWS(RAJ)-2014-12-22 : 2014 SCC OnLine Raj 5499 : Order dated 02.12.2014 in Criminal Revision Petition Nos.411/2012 and 145/2013
9. (2010) 5 SCC 663
10. (2013) 2 SCC 17
11. 2015 (1) NIJ 166 (Del) : Judgment dated 03.09.2014 in Crl.A.Nos.972 and 1163 of 2012
12. 2013 (1) ALD (Crl.) 366 (AP)
13. 2010 (1) SCALE 17
14. Order dated 24.02.2015 in Criminal Petition No.6072/2014
15. Order dated 16.06.2011 in Criminal

Application (APPA) No.708/2010
16. Oral Judgment dated 09.01.2013 in Criminal Revision Application No.158 of 2012
17. Judgment dated 01.09.2016 in CRR No.3793 of 2014
18. 2016 ALL MR (Cri.) Journal 492
19. 2015 (1) MWN (Cr) DCC 26 (Mad.)
20. (2008) 4 SCC 91
21. (1994) 1 SCC 34
22. AIR 1965 SC 703
23. (1986) 4 SCC 436
24. 1994 Supp (1) SCC 257
25. (2014) 5 SCC 219
26. (2002) 2 SCC 318
27. (2014) 5 SCC 377
28. 2017 SCC OnLine SC 924
29. 2015 SCC OnLine GAU 505 : (2017) 1 GAU LR 471
30. (2014) CrLJ 1046
31. AIR 1952 SC 369
32. (1992) 1 SCC 335
33. AIR 1963 SC 90
34. (1985) 2 SCC 279

O R D E R

(per the Hon'ble Mr.Justice Sanjay Kumar)

A learned Judge referred this case to a Division Bench for an authoritative pronouncement on the following questions of law: (1) Whether the complainant in a complaint case for the offence punishable under Section 138 of Negotiable Instruments Act is a victim as defined under Section 2(wa) of Cr.P.C. as amended by the Act No.5 of 2009 with effect from 31.12.2009 (2) If the complainant is a victim within the definition of Section 2(wa) of Cr.P.C., is he entitled to file an appeal invoking the proviso to Section 372 of Cr.P.C. before the Court to which an appeal lies against the conviction (3) If not, whether the complainant in a complaint case for the offence punishable under Section 138 of Negotiable Instruments Act or for any other offence either bailable or non- bailable is required to file an appeal against acquittal in a complaint case seeking special leave of the Court under Section 378 (4) of Cr.P.C.

Hence, the matter was placed before us.

The factual matrix from which the aforestated questions arise is as under: The petitioner herein is the accused in C.C.No.87 of 2015 on the file of the learned XXIII Special Magistrate, Hyderabad, arising out of the private complaint filed by the first respondent herein under Section 200 of the Code of Criminal Procedure, 1973 (for brevity, the Code), in relation to an offence under Section 138 of the Negotiable Instruments Act, 1881 (for brevity, the Act of 1881). By judgment dated 12.02.2016 passed therein, the learned XXIII Special Magistrate, Hyderabad, acquitted her. Aggrieved thereby, the first respondent/complainant filed an appeal before the learned Metropolitan Sessions Judge, Hyderabad. The petitioner, being the respondent therein, raised an objection as to the maintainability of the appeal. However, overruling her objection, the learned Metropolitan Sessions Judge, Hyderabad, passed orders on 17.10.2016 in Crl.M.P.No.1233 of 2016 filed in the appeal, condoning the delay of 24 days in its presentation on payment of costs. The appeal was thereupon numbered as Criminal Appeal No.926 of 2016. Aggrieved thereby, the petitioner approached this Court by way

of the present petition under Section 482 of the Code. Her contention is that the learned Metropolitan Sessions Judge, Hyderabad, lacks jurisdiction to entertain an appeal arising out of the acquittal in a case instituted upon a complaint and that an appeal therefrom would only lie to the High Court under Section 378(4) of the Code. She accordingly seeks quashing of the appeal on the file of the learned Metropolitan Sessions Judge, Hyderabad. The learned single Judge who heard the case found that there was divergence of opinion on the framed questions of law and opined that an authoritative pronouncement would be desirable to give a quietus to the issue.

Sri Anand Kumar Kapoor, learned counsel representing M/s.Lawyers & Solicitors, counsel for the petitioner, advanced copious arguments on various aspects. The learned Public Prosecutors of the State of Telangana and the State of Andhra Pradesh assisted the Court as a pronouncement on the issues raised would have far-reaching consequences.

Sri M.Veera Prasada Chary, learned counsel, who appeared for the first respondent/ complainant before the learned Judge at the time of the reference, did not choose to appear before us or advance arguments, though the matter was heard at length.

As the core controversy revolves around the construction and interpretation of essentially two provisions of the Code, it would be appropriate to extract them hereunder:

Section 372. No appeal to lie unless otherwise provided. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.

Section 378. Appeal in case of acquittal. (1) Save as otherwise provided in sub-section (2), and subject to the provisions of sub-sections (3) and (5),

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court not being an order under clause

(a) or an order of acquittal passed by the Court of Session in revision.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered

to make investigation into an offence under any Central Act other than this Code, the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal

(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non- bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision.

(3) No appeal to the High Court under sub-section (1) or sub- section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If, in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2).

Chapter XXIX of the Code deals with appeals. Section 372, being the first provision therein, stipulates that no appeal would lie from any judgment or order of a Criminal Court except as provided for by the Code or by any other law for the time being in force. A proviso was inserted in Section 372 of the Code, vide the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009), with effect from 31.12.2009. By way of the said proviso, a victim was given the right to prefer an appeal against an order passed by the Criminal Court either acquitting the accused or convicting him of a lesser offence or awarding inadequate compensation; and such an appeal would lie to the Court to which an appeal would ordinarily lie against an order of conviction passed by such Criminal Court.

At this stage, it would be apposite to examine certain definitions in the Code. Section 2(d) thereof defines a complaint thus:

Complaint means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation. A report made by a police officer in a case which discloses, after investigation, the commission of a non-

cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant.

Section 2(wa) was inserted in the Code by Act 5 of 2009, with effect from 31.12.2009, and defines a victim as under:

Victim means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir.

The broad issue arising for consideration presently is whether an appeal would lie to the Sessions Court under the proviso to Section 372 of the Code against an order of acquittal in a case arising out of a private complaint, by treating the complainant therein as a victim within the meaning of Section 2(wa) of the Code.

Reference may now be made to the surfeit of case law on the subject and the diverse views taken by Courts across the country on these issues.

The decisions of this Court in G.BASAWARAJ V/s. STATE OF ANDHRA PRADESH(1) , PETTA SATYA GOVINDA RAMACHANDRA RAO @ BABJI(2) V/s. YARLAGADDA VIJAYA KUMAR and TAMILNAD MERCANTILE BANK LTD. V/s. M/S. SUBAIAH GAS AGENCY (3) held to the effect that an appeal would lie from such an order of acquittal to the High Court under Section 378(4) of the Code or to the Sessions Court under the proviso to Section 372 of the Code. The decisions of the Kerala High Court in OMANA JOSE V/s. STATE OF KERALA(4) , the Chhattisgarh High Court in KAILASH MURARKA V/s. K.GEET SRIJAN(5) and the Punjab & Haryana High Court in TATA STEEL LTD. V/s. ATMA TUBE PRODUCTS LTD(6). were however to the effect that an appeal would lie only to the High Court against acquittal in a complaint-case under Section 378(4) of the Code.

In G.BASAWARAJ1, a learned Judge of this Court was dealing with two criminal petitions filed by an accused aggrieved by the filing of criminal appeals by the complainant before the Sessions Court against the judgments acquitting him of offences under Section 138 of the Act of 1881. The issue before the learned Judge was whether an appeal would lie at the behest of the complainant before the High Court under Section 378(4) of the Code or whether such a complainant would have to file an appeal before the Sessions Court under the proviso to Section 372 of the Code, treating him as a victim under Section 2(wa) of the Code. The learned Judge observed that prior to amendment of Section 372 of the Code, the only remedy available either to the State in a case registered upon a police report or to a complainant in a case registered upon his private complaint, was to invoke Section 378(4) and to approach the High Court with an appeal and a petition seeking special leave to file such appeal.

1. 2011 (1) ALD (Crl.) 201 (AP)
2. 2014 (2) ALD (Crl.) 900
3. 2015 (3) ALT (Crl.) 107 (AP)
4. (2015) CRI.L.J. 2784 (DB)
5. (2015) CRI.L.J. 1627 (DB)
6. 2013 LawSuit (P&H) 1375

The learned Judge was however of the opinion that this position was totally changed after insertion of the proviso to Section 372 of the Code. Opining that the proviso to Section 372 of the Code made inroads into the original general provision contained in Section372, the learned Judge held that the field became enlarged, clothing a victim also with the right to file an appeal apart from the State or the complainant, as the case may be. The learned Judge further observed that the words victim and complainant were not synonymous though at times, a complainant may include a victim and vice versa, but not always. The learned Judge held that a plain, simple and proper reading of the language employed in Section 378(4) of the Code and the proviso to Section 372 thereof made it clear that there was no clash or conflict or inconsistency between the two and upon harmonious reading of both the provisions, it is evident that the pre- existing provision in Section 378(4) of the Code provided for filing of an appeal against acquittal, by the State or by the complainant to the High Court with special leave, whereas the amended Section 372 of the Code provided for an appeal against acquittal by the victim of the offence, to the Court to which an appeal would ordinarily lie, had an order of conviction been passed in the case. The learned Judge therefore held that where the victim is also a complainant in a case instituted by way of a private complaint, then such a person would have two options - to file an appeal against the order of acquittal to the High Court under Section 378(4) of the Code or to the Sessions Court/High Court under the proviso to Section 372 of the Code. The learned Judge opined that it would be open to the person who is a victim as well as a complainant to choose one of the two remedies available to him in law and approach the appellate Court of his choice, depending upon the status of the trial Court which recorded the order of acquittal. The learned Judge observed that in case an order of conviction was passed by an Assistant Sessions Court, then the appeal would lie to the Sessions Court or to the High Court depending upon the quantum of sentence of imprisonment and in case a conviction was recorded by a Sessions Court or Additional Sessions Court, then the appeal would straightaway lie to the High Court. The learned Judge was of the opinion that even otherwise, if the appeals were not maintainable, they would not be quashed and the proper course would be to return them for presentation to the proper Court or to transfer them to such Court. As the appeals in that case were both filed before the insertion of the proviso to Section 372 of the Code, the learned Judge held them to be not maintainable on that ground and accordingly transferred them to this Court.

A contrary view, to some extent, was taken by another learned Judge of this Court in PETTA SATYA GOVINDA RAMACHANDRA RAO @ BABJI2. This was also a case arising out of a judgment acquitting the accused of an offence under Section 138 of the Act of 1881. The complainant therein preferred an appeal before this Court under Section 378(4) of the Code and special leave was granted on 11.07.2005. By that date, the proviso to Section 372 of the Code had not been inserted in the statute book. Referring to the fact that till the amendment

of the Code in 2009 came into force, an appeal against an acquittal in a cheque-dishonour case would lie only under Section 378(4) of the Code, the learned Judge opined that the right of appeal was then provided to the victim by virtue of the proviso introduced in Section 372 of the Code in the year 2009. The learned Judge opined that a complainant in a cheque-dishonour case would also come within the meaning of victim, having suffered loss or injury from such dishonour, so as to maintain an appeal before the Sessions Court thereunder. Pointing out that Section 378(4) of the Code required grant of special leave for invocation of the right to appeal, while the proviso to Section 372 did not insist upon such leave, the learned Judge opined that they were not irreconcilable. Significantly, the learned Judge observed that it cannot be readily presumed that these provisions give concurrent jurisdiction for an appellant to select one or the other Court of appeal, as observed in G.BASAWARAJ1. In this regard, the learned Judge stated thus:

> 15. It is to say instead of filing appeal under Section 372 Cr.P.C., if allowed to file under Section 378(4) Cr.P.C., with leave, it takes away the prospective likelihood of approaching by accused to avail right of appeal under Section 378(4) Cr.P.C., before High Court. It is because, the absolute statutory right without even leave of Court to file appeal before Court of Session which is available with effect from 31.12.2009, if availed by the complainant under Section 372 Cr.P.C and did so, in the event of that Court deciding the appeal against such acquittal by reversing and for any reason convicting, there is right of appeal under Section 378(4) Cr.P.C., to such accused to approach the High Court with leave. Without invoking such right before Court of Session by the complainant as appellant against acquittal by trial Court and allowed to proceed before High Court by granting leave, it is nothing but taking away said right of the accused in future of remedy to approach the High Court in such event and one way interfering with such right. It is for the reason that any right of revision or approaching by invoking Section 482 Cr.P.C or writ jurisdiction no way substitute to the right of appeal. Thereby also, it is the duty of the appellant-complainant rather than approaching the High Court for filing appeal with leave under Section 378(4) Cr.P.C; to approach the Court of Session where no leave is required to file such appeal there. Needless to say by virtue of the amended provision without invoking the Court of Session for filing appeal against acquittal, approaching the high Court by saying concurrent right and therefrom, granting leave by the Court by exercise of discretion since amounts to interference with such right of accused and taking away another future right of appeal in such contingency to approach the High Court and as the discretion is to be exercised judiciously within the canons of law, and this is when taken into consideration, this Court under

Section 378(4) Cr.P.C., must be slow for grant of such leave but for any special reasons and for any exceptional circumstances to accord by so assigning besides the party approaching for filing appeal to satisfy by giving the reasons and exceptional circumstances in the leave application. As such, no appellant of appeal against acquittal can say that there are two forums with concurrent jurisdiction available and he got right to approach any of the forums and thereby can file appeal before the High Court and grant of leave or not is though the discretion of the High Court on such filing.

The thrust of the opinion of the learned Judge appears to be that by allowing duality of remedies to a complainant/victim, the right of the accused to a remedy would be prejudicially affected in the event the acquittal is overturned. The learned Judge was therefore of the view that under Section 378(4) of the Code, this Court should be slow to grant special leave and only for special reasons and in exceptional circumstances, such leave should be granted. The learned Judge opined that an absolute statutory right of appeal without the need of seeking leave was conferred upon the victim against an order of acquittal in 2009, by virtue of the amendment of the Code. The learned Judge therefore held that an appeal would have to be filed before the Court of Session in exercise of the absolute statutory right provided by the proviso to Section 372 of the Code and not to the High Court with a petition seeking leave to file an appeal under Section 378(4) of the Code. The learned Judge categorically held that the victims right of appeal under the proviso to Section 372 of the Code was in no way controlled by Section 378(3) of the Code and there was nothing to infer any requirement of leave as in Section 378(4) of the Code so as to present an appeal under Section 372 proviso against an order of acquittal or conviction of a lesser offence or for inadequate compensation. The learned Judge further observed that in matters where leave was already granted under Section 378(4) of the Code and appeals were admitted against acquittals in cheque-dishonour cases, this Court can, for sub-serving the ends of justice, direct the Sessions Court to hear and dispose of the said appeals on merits by making them over. Exercising such power under Section 381(2) read with Section 482 of the Code, the learned Judge made over the appeal preferred to this Court under Section 378(4) of the Code to the Sessions Court.

It is pertinent to note that the view expressed by the learned Judge to the effect that no leave under Section 378(3) of the Code is necessary for filing an appeal under the proviso to Section 372 of the Code is not good law in the light of the recent judgment of the Supreme Court in SATYA PAL SINGH V/s. STATE OF M.P.(7) , wherein it was held that the proviso to Section 372 of the Code must be read along with the main enactment, i.e., Section 372 itself, and with Section 378(3), as reading it otherwise would render the substantive provision of Section 372 of the Code nugatory. The Supreme Court concluded that the right of questioning

7. 2016 (1) ALD (Crl.) 288 (SC) : (2015) 15 SCC 613

the correctness of the order of acquittal by preferring an appeal to the High Court is conferred upon the victim, including the legal heir and others, as defined under Section 2(wa) of the Code, under the proviso to Section 372 but only after obtaining leave of the High Court as required under Section 378(3) of the Code. In the light of this authoritative edict by the Supreme Court, the judgments of various High Courts holding to the contrary, referred to hereinafter, no longer constitute good law.

In TAMILNAD MERCANTILE BANK LTD.3, the learned Judge who decided PETTA SATYA GOVINDA RAMACHANDRA RAO @ BABJI2 again had an occasion to deal with the issue. This case also involved conviction of an accused under Section 138 of the Act of 1881. Aggrieved by the convictions and sentences, the accused preferred criminal revision petitions before the Sessions Court under Section 397 of the Code. The Sessions Court allowed both the revisions and set aside the convictions by the trial Court. Aggrieved thereby, the complainant preferred appeals before this Court. The accused contended before this Court that the appeals were not maintainable. The learned Judge opined that even against an order of acquittal passed by a revision Court in a case arising out of a private complaint, an appeal would lie to the High Court. The learned Judge further observed that by virtue of the proviso to Section 372 of the Code, any order passed by a Court acquitting an accused would be appealable by the victim thereunder. The learned Judge therefore opined that under the proviso to Section 372 of the Code, an appeal would lie against the revisional order of acquittal of the Sessions Court reversing the conviction by the trial Court.

In OMANA JOSE4, a Division Bench of the Kerala High Court was also dealing with the question as to whether an appeal would lie to the Sessions Court under the proviso to Section 372 of the Code against the acquittal of the accused in a case under Section 138 of the Act of 1881. Earlier, one learned Judge of the Kerala High Court had held that such an appeal would not lie to the Sessions Court but only to the High Court under Section 378(4) of the Code, while another learned Judge held to the contrary in a subsequent case. The issue was therefore referred to a Division Bench. The Division Bench held that a complainant in a case under Section 138 of the Act of 1881 could not challenge the order of acquittal before the Sessions Court under the proviso to Section 372 of the Code and his only remedy is to file an appeal to the High Court with special leave under Section 378(4) of the Code. The Division Bench stated that before amendment of the Code in 2009, the remedy available to a complainant against an order of acquittal in a case instituted on a complaint was to file an appeal under Section 378(4) of the Code before the High Court with special leave. This provision remained intact even after the amendment. Though drastic changes were made to the said provision in the year 2005, Section 378(4) was not amended. The Division Bench therefore opined that it could not be assumed that the Parliament was not aware of the remedy provided under Section 378(4). Adverting to the fact that before this amendment, in a case instituted on a police report, the victim

could only challenge the order of acquittal by way of a revision under Section 397 of the Code and after the amendment and introduction of Section 2(wa) defining a victim, such a victim was conferred with the right of preferring an appeal to the Sessions Court against an order passed by the trial Court acquitting the accused or convicting him of a lesser offence or awarding inadequate compensation, the Division Bench pointed out that if it is to be construed that a complainant could also file an appeal to the Sessions Court under Section 372 proviso or to the High Court under Section 378(4) of the Code, it would mean that a complainant in a complaint case would have two remedies and if he chooses the remedy under Section 372 proviso, he could file an appeal as of right to the Sessions Court without leave and if he files an appeal under Section 378(4) of the Code, special leave is required. The Bench was of the view that the law makers would not have wanted to provide two remedies to a complainant in a complaint case, who is also a victim, as there is no provision either in Section 372 or in Section 378 of the Code that, when an appeal against an order of acquittal filed before the Sessions Court by the complainant is dismissed, such a complainant is precluded from filing an appeal before the High Court under Section 378(4) of the Code. As the said provision does not state that an appeal lies to the High Court only against an original order of acquittal, the Division Bench opined that if the provisions are to be interpreted to mean that Section 372 proviso covers an appeal against acquittal in a complaint case also, nothing would prevent the complainant from filing a further appeal to the High Court under Section 378(4) of the Code if the Sessions Court also acquits the accused, confirming the order of acquittal passed by the trial Court. Concluding that the amendment of the Code in 2009 was not with the intention of providing multiple remedies to a complainant, the Division Bench observed that the law makers did not confer concurrent jurisdiction on the Sessions Court and the High Court to entertain an appeal by the complainant against acquittal in a complaint case. The Division Bench observed that the expression unless the context otherwise requires occurring in Section 2 is a helpful tool for interpreting the proviso to Section 372 to resolve the question as to whether the term victim would take within its purview a complainant in a complaint case and concluded that the expression victim would exclude the complainant in a complaint-case from the purview of Section 2(wa) of the Code.

In KAILASH MURARKA5, a Division Bench of the Chhattisgarh High Court held that a complainant is not entitled to prefer an appeal under the proviso to Section 372 of the Code before the Sessions Court against an order of acquittal passed by a subordinate Criminal Court arising out of a criminal complaint filed by the complainant and that such a complainant is required to prefer an appeal under Section 378(4) of the Code before the High Court after obtaining special leave. It was observed that in a case instituted upon a complaint, the complainant has much of a role to play in the Court proceedings whereas, as is apparent from the Statement of Objects and Reasons of Act No.5 of 2009, changes

were brought in with a view to give certain rights to the victims in cases based on police reports, including the right to compensation, as they did not have much of a role in Court proceedings. The Division Bench therefore concluded that incorporation of the proviso to Section 372 of the Code by Act No.5 of 2009, thereby providing a right of appeal to the victim, would not come to the aid of those victims who qualify as complainants, already having sufficient role in the Court proceedings.

In TATA STEEL LTD.6, a Full Bench of the Punjab & Haryana High Court summed up its conclusions on this issue as under:

> Question (B)(iii) The complainant in a complaint-case who is also a victim and the victim other than a complainant in such case, shall have remedy of appeal against acquittal under Section 378(4) only, except where he/she succeeds in establishing the guilt of an accused but is aggrieved at the conviction for a lesser offence or imposition of an inadequate compensation, for which he/she shall be entitled to avail the remedy of appeal under proviso to Section 372 of the Code.
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> (iv) The victim who is not the complainant in a private complaint-case, is not entitled to prefer appeal against acquittal under proviso to Section 372 and his/her right to appeal, if any, continues to be governed by the unamended provisions read with Section 378(4) of the Code.
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> (v) those victims of complaint-cases whose right to appeal have been recognized under proviso to Section 372, are not required to seek leave or special leave to appeal from the High Court in the manner contemplated under Section 378(3) & (4) of the Code.
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> Question (E) (vii) In view of the proviso to Section 372 an appeal preferred by a victim against an order of acquittal passed by a Magistrate in respect of a cognizable offence whether bailable or nonbailable shall lie to the Court of Session, the States appeal under Section 378(1)(a) of the Code against the very order shall be entertained and/or transferred to the same Sessions Court.

In DHANNE SINGH V/s. STATE OF RAJASTHAN(8) , a Division Bench of the Rajasthan High Court took the same view as was expressed by the Full Bench of the Punjab & Haryana High Court in TATA STEEL LTD.6 and answered the reference to the effect that the complainant in a complaint case who is also a victim and a victim, other than a complainant in such a case, would have the remedy of an appeal against acquittal only under Section 378(4) of the Code, except where the complainant succeeds in establishing the guilt of the accused but is aggrieved by his conviction

8. LAWS(RAJ)-2014-12-22 : 2014 SCC OnLine Raj 5499 : Order dated 02.12.2014 in Criminal Revision Petition Nos.411/2012 and 145/2013

of a lesser offence or award of inadequate compensation and in such cases, the complainant shall be entitled to avail the remedy of appeal under Section 372 proviso. The Division Bench further held that a victim who is not the complainant in a private complaint case is not entitled to prefer an appeal against acquittal under Section 372 proviso and his right, if any, continues to be governed by Section 378(4) of the Code. The Division Bench also observed that no leave or special leave was required to file an appeal under Section 372 proviso and that the right conferred thereunder is a substantive and independent right.

Pertinent to note, the Supreme Court, in DAMODAR S. PRABHU V/s. SYED BABALAL H.(9) , opined as under:

20. It may be noted here that Section 143 of the Act makes an offence under Section 138 triable by a Judicial Magistrate, First Class (JMFC). After trial, the progression of further legal proceedings would depend on whether there has been a conviction or an acquittal.

> In the case of conviction, an appeal would lie to the Court of Sessions under Section 374(3)(a) CrPC; thereafter a revision to the High Court under Sections 397/401 CrPC and finally a petition before the Supreme Court, seeking special leave to appeal under Section 136 of the Constitution of India. Thus, in case of conviction there will be four levels of litigation.
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> In the case of acquittal by JMFC, the complainant could appeal to the High Court under Section 378(4) CrPC, and thereafter for special leave to appeal to the Supreme Court under Article 136. In such an instance, therefore, there will be three levels of proceedings.

In SUBHASH CHAND V/s. STATE (DELHI ADMINISTRATION)(10) , the Supreme Court was dealing with the validity of an order passed by the High Court of Delhi holding to the effect that an appeal filed by the State against the order of acquittal therein would lie to the Sessions Court under Section 378(1) of the Code and not to the High Court under Section 378(4) thereof. The Supreme Court encapsulated the point for consideration thus: whether in a complaint case, an appeal from an order of acquittal of the Magistrate would lie to the Sessions Court under Section 378(1)(a) of the Code or to the High Court under Section 378(4) thereof. Referring to the Law Commissions 154th and 221st reports opining that there was no provision in the Code under which an appeal in a complaint case could be filed in the Sessions Court, the Supreme Court expressed agreement with the said opinion. The Supreme Court, upon analysis of Section 378 of the Code, observed that it is clear therefrom that the State Government cannot direct the Public Prosecutor under Sections 378(1)(a) and (b) to file an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence because of the categorical bar created by Section 378(1)(b) of the Code. Pointing out that such appeals can only be filed in the

9. (2010) 5 SCC 663

10. (2013) 2 SCC 17

Sessions Court at the instance of the Public Prosecutor or as directed by the District Magistrate, the Supreme Court observed that in all other cases where orders of acquittal are passed, appeals would be filed by the Public Prosecutor as directed by the State Government only before the High Court. Referring to Section 378(4) of the Code, the Supreme Court stated that it made provision for appeals against orders of acquittal in cases instituted upon complaints and in such cases, after the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present his appeal to the High Court. The Supreme Court observed that as the said sub- section speaks of special leave, as opposed to leave in sub-section (3) of Section 378 of the Code, the complainants appeal against an order of acquittal is a category by itself. The Supreme Court further observed that a complainant could be a private person or a public servant, as is evident from Section 378(5) which speaks of six months time to file the application for special leave where the complainant is a public servant and sixty days in every other case. The Supreme Court pointed out that Section 378(6) of the Code was important and that it stated to the effect that if in any case, the complainants application for special leave is refused, no appeal from the order of acquittal would lie at the behest of the State Government thereafter, under sub-sections (1) or (2) of Section 378 of the Code. In effect, if special leave is not granted to the complainant to appeal against an order of acquittal, the matter must end there. Neither the District Magistrate nor the State Government can appeal against such order of acquittal. The Supreme Court opined that the idea appeared to be to accord quietus to the case in such a situation. The Supreme Court further concluded that a complainant can file an application for special leave to appeal against an order of acquittal of any kind only to the High Court and he cannot file such an appeal in the Sessions Court. This judgment was delivered on 08.01.2013, long after insertion of Section 2(wa) and the proviso to Section 372 in the Code.

In THE BHAJANPURA COOPERATIVE URBAN THRIFT & CREDIT SOCIETY LTD. V/s. SUSHIL KUMAR(11) , a learned Judge of the Delhi High Court took the view to the effect that the remedy available to a complainant in a case under Section 138 of the Act of 1881 against an order of acquittal is only to seek special leave to file an appeal under Section 378(4) to the High Court and not under Section 372 proviso of the Code.

In D.SUDHAKAR V/s. PANAPU SREENIVASULU @ EVONE WATER SREENIVASULU (12), a Division Bench of this Court, drawing support from NATIONAL COMMISSION FOR WOMEN V/s. STATE OF DELHI(13) , held that as the amendment to Section 372 of the Code came into the effect only on 31.12.2009 creating a right in the victim to prefer an appeal, such an amendment would have no application to

10. (2013) 2 SCC 17
11. 2015 (1) NIJ 166 (Del) : Judgment dated 03.09.2014 in Crl.A.Nos.972 and 1163 of 2012
12. 2013 (1) ALD (Crl.) 366 (AP)
13. 2010 (1) SCALE 17

cases where the incident took place prior thereto.

In M/S. HILL RANGE POWER PROJECT DEVELOPERS V/s. M/S. ACCIONA WIND ENERGY PRIVATE LTD(14). , a learned Judge of the Karnataka High Court opined that the word complainant in the proviso to Section 142 of the Act of 1881 and a victim as per Section 2(wa) of the Code are not one and the same and therefore, such a complainant cannot maintain an appeal under Section 372 proviso.

In M/S. TOP NOTCH INFOTRONIX (I) PVT. LTD. V/s. M/S. INFOSOFT SYSTEMS(15) , a learned Judge of the Bombay High Court at Nagpur opined that Section 372 proviso does not, in any manner, affect the provisions of Section 378(4) of the Code which deals with an appeal against the order of acquittal in a case instituted upon a complaint. It was therefore held that against acquittal in a case instituted by a complainant under Section 138 of the Act of 1881, an appeal would only lie to the High Court under Section 378(4).

Similar was the view taken by another learned Judge of the Bombay High Court at Aurangabad in SOW. KALPANA V/s. THE STATE OF MAHARASHTRA(16) . The learned Judge categorically held that such an appeal would not come within the purview and ambit of the amended provisions of Section 372 of the Code and the remedy provided to the person aggrieved by an acquittal in a cheque-bounce case under Section 138 of the Act of 1881 was only before the High Court in terms of Section 378(4) of the Code, upon seeking leave.

In M.K.PRODUCTS V/s. M/S. BLUE OCEAN EXPORTS (P) LTD(17). , a learned Judge of the Calcutta High Court agreed with the view taken in OMANA JOSE4 and held that that a complainant in a case under Section 138 of the Act of 1881 could not challenge the order of acquittal before the Sessions Court under the proviso to Section 372 of the Code and that his remedy is to file an appeal to the High Court with special leave under Section 378 of the Code.

In S.GANAPATHY V/s. N.SENTHILVEL(18) , a Full Bench of the Madurai Bench of the Madras High Court dealt with the issue as to whether an appeal would be maintainable under Section 378 of the Code, beyond the period of sixty days prescribed under Section 378(5) thereof, at the behest of the complainant in a case arising under Section 138 of the Act of 1881 The questions framed for consideration by the Full Bench were as under:

1. Whether a victim of a crime, who has prosecuted an accused by way of a private complaint, does not have statutory right of appeal against acquittal under proviso to Section 372 of the Code of Criminal Procedure

14. Order dated 24.02.2015 in Criminal Petition No.6072/2014

15. Order dated 16.06.2011 in Criminal Application (APPA) No.708/2010

16. Oral Judgment dated 09.01.2013 in Criminal Revision Application No.158 of 2012

17. Judgment dated 01.09.2016 in CRR No.3793 of 2014

18. 2016 ALL MR (Cri.) Journal 492

2. Whether a complainant, in a private compliant case, who is not a victim, has got the remedy to seek only leave to file appeal under Section 378(4) of the Code of Criminal Procedure in the event of acquittal of the accused

3. In a private complaint case, if a victim does not happen to be a complainant and in the event of acquittal, whether he has got right of appeal under proviso to Section 372 of the Code of Criminal Procedure or he has to seek leave to file appeal under Section 378(4) of the Code of Criminal Procedure

4. Whether a victim in a case instituted on a police report, has a better place in the criminal justice delivery system than a victim in a private complaint case

5. Whether the term victim as defined in Section 2(wa) of the Code of Criminal Procedure excludes a complainant in a private complaint case, though he has suffered loss or injury on account of the offence committed against him and

6. Whether the view held in the judgment of this Court in Selvaraj Vs.Venkatachalapathy, reported in 2015 (1) MWN (Cr) DCC 26 (Mad.), reflects correct exposition of law or the same requires to be overruled

Earlier, in SELVARAJ V/s. VENKATACHALAPATHY(19) , a learned Judge of the Madras High Court opined that victim in Section 372 proviso would not include a complainant in a complaint case and the term victim used in the said proviso should be confined only to victims in cases instituted otherwise than on a complaint.

The Full Bench recorded its conclusions on the questions posed to it as under:

(1) A victim of the crime, who has prosecuted an accused by way of a private complaint, has a statutory right of appeal within the limits prescribed under Section 372 of Cr.P.C.

(2) A complainant (in a private complaint), who is not a victim, has a remedy and can file an appeal in the event of acquittal of the accused after obtaining leave to appeal under Section 378(4) of Cr.P.C.

(3) In a private complaint, even if the victim is not a complainant, he has a right to appeal under the proviso to Section 372 of Cr.P.C., but he has to seek leave as held by the Supreme Court in Satyapal Singh.

(4) The term victim has been correctly interpreted by the Full Bench of the Delhi High Court in Ramphal and we are in agreement with the same.

(5) A victim (as defined under Section 2(wa) of the Cr.P.C. does not cease to be a victim merely because he also happens to be a complainant and he can avail all the rights and privileges of a victim also and (6) The decision of the Single Judge in Selvaraj 19. 2015 (1) MWN (Cr) DCC 26 (Mad.)

holding that the term victim found in Section 372 excludes a complainant, is not legally correct and in a given case, a complainant, who is also a victim, can avail right granted under Section 372 of Cr.P.C.

On a more general note, in SUMITOMO CORPORATION V/s. CDC FINANCIAL SERVICES (MAURITIUS) LTD.(20) , the Supreme Court observed that an appeal is a statutory remedy and can only lie to the specified forum. The appellate forum cannot be decided on the basis of cause of action as applicable to original proceedings such as a suit, which could be filed in any Court where part of the cause of action arises. Earlier, in STRIDEWELL LEATHERS (P) LTD. V/s. BHANKERPUR SIMBHAOLI BEVERAGES (P) LTD(21). , the Supreme Court observed that ordinarily, substitution of a new forum for the existing forum of appeal should not be readily inferred in the absence of a clear provision to that effect or at least any incongruity resulting from that view. It was further observed that express provision would be made in the statutory amendment to indicate a different or substituted appellate forum than the existing appellate forum if that was the intention of the amendment of jurisdiction of the Court for the purpose of an appeal had been altered in any manner and the absence of any indication in the amendment to suggest any change or substitution in the appellate forum is a pointer in the direction that the same continued unaltered.

As regards the sanctity of the remedy provided, reference may be made to MUKUND DEO (DEAD) REPRESENTED BY HIS LEGAL REPRESENTATIVES KASIBAI AND OTHERS V/s. MAHADU AND OTHERS(22) , wherein the Supreme Court found on facts that under Section 602 of the Hyderabad Civil Procedure Code, 1328 Fasli, a second appeal lay to the High Court on questions of fact as well as of law and this was the position in law on the date the suit was instituted. However, the said Code was repealed and when the Code of Civil Procedure, 1908, was extended to Hyderabad State, after it became part of the Indian Union, second appeals before the High Court were maintainable under Section 100 thereof. It was therefore argued that the High Court could not set aside the findings of fact. The Supreme Court however disagreed and observed that as a general rule, alterations in law of procedure would be retrospective, but a right of appeal to a particular forum is a substantive right and is not lost by alteration in the law, unless provision is made expressly in that behalf or by necessary implication.

Again, in PANDURANG V/s. STATE OF MAHARASHTRA(23) , the Supreme Court observed that when a matter required to be heard by a Division Bench of the High Court but is decided by a learned single Judge, such a judgment would be a nullity as the accused was entitled to have his case heard and claim a verdict as regards his guilt or innocence at the hands of two learned Judges and such right could not be taken away except by amending the rules and so long as the rules remained in operation, it would be arbitrary and

20. (2008) 4 SCC 91
21. (1994) 1 SCC 34
22. AIR 1965 SC 703
23. (1986) 4 SCC 436

discriminatory to deny him this right.

On similar lines, in COMMISSIONER OF INCOME TAX, ORISSA V/s. DHADI SAHU (24), the Supreme Court observed that no litigant had a vested right in a matter of procedural law but where the question is of change of forum, it ceases to be procedure only as the forum of appeal is a vested right as opposed to pure procedure to be followed before a particular forum. It was further observed that the right becomes vested when the proceedings are initiated in the tribunal or the Court of first instance and unless the legislature has, by express words or by necessary implication, clearly so indicated, that vested right would continue in spite of the change of jurisdiction of the different tribunals or fora.

In HIMACHAL PRADESH STATE ELECTRICITY REGULATORY COMMISSION V/s. HIMACHAL PRADESH STATE ELECTRICITY BOARD(25) , the Supreme Court culled out three basic principles from earlier case law:

> 22.1. The forum of appeal available to a suitor in a pending action of an appeal to a superior tribunal which belongs to him as of right is a very different thing from regulating procedure;
>
> 22.2. That it is an integral part of the right when the action was initiated at the time of the institution of action; and 22.3. That if the court to which an appeal lies is altogether abolished without any forum constituted in its place for the disposal of pending matters or for lodgment of the appeals, vested right perishes.

The Supreme Court concluded that that what is unaffected by repeal of a statute is a right acquired under it and not a mere hope or expectation of, or liberty to apply for, acquiring the right.

On the aspect of interpretation of statutes, the following case law is of guidance: In STATE OF MAHARASHTRA V/ s.MARWANJEE F. DESAI(26) , the Supreme Court observed that the statute has to be considered in its entirety and picking up one word from one particular provision and thereby analyzing it in a manner contrary to the Statement of Objects and Reasons is neither permissible nor warranted. Adverting to the fixed canons of construction and interpretation of statutes, the Supreme Court held that a statute cannot be read in the manner as was done by the High Court and the true intent of the legislature has to be gathered and deciphered in its true spirit, having due regard to the language used therein. The Statement of Objects and Reasons was held to be undoubtedly an aid to construction and a useful guide but the interpretation and the intent should be gathered from the entirety of the statute and when language of the Section providing an appeal to a forum is clear and categorical, no external aid is permissible while interpreting the same. The Supreme Court was of the view that once the legislature had deliberately used every order, if a

24. 1994 Supp (1) SCC 257
25. (2014) 5 SCC 219
26. (2002) 2 SCC 318

restrictive meaning is attributed, as was done by the High Court, the word every becomes totally redundant, but as the legislature avoids redundancy, all the words used in the provision have to be attributed meaning and attribution of any meaning to the word every by itself would negate the interpretation that found favour with the High Court. As the word every was totally ignored, the Supreme Court held that it was neither permissible nor warranted.

Again, in PERUMAL V/s. JANAKI(27) , the Supreme Court observed that the language of Section 195(4) of the Code creates a legal fiction whereby it is declared that the original Court is subordinate to that Court to which appeals ordinarily lie from the judgments or orders of the original Court and such a fiction must be understood in the context of Article 227 of the Constitution and Sections 10(1) and 15(1) of the Code. The Supreme Court further observed that each one of the streams of the Courts under Sections 10(1) and 15(1) of the Code have their administrative hierarchy depending upon the law by which they were brought into existence and certain Courts have appellate jurisdiction while certain Courts have original jurisdiction. As appellate jurisdiction is a creature of the statute and dependent upon the scheme of a particular statute, the Supreme Court held that the forum of appeal would vary and generally, such appellate fora are created on the basis of either subject-matter of the dispute or economic implications or nature of crime, etc.

In RAKESH KUMAR PAUL V/s. STATE OF ASSAM(28) , the Supreme Court observed as under:

> While interpreting any statutory provision, it has always been accepted as a golden rule of interpretation that the words used by the legislature should be given their natural meaning. Normally, the courts should be hesitant to add words or subtract words from the statutory provision. An effort should always be made to read the legislative provision in such a way that there is no wastage of words and any construction which makes some words of the statute redundant should be avoided. No doubt, if the natural meaning of the words leads to an interpretation which is contrary to the objects of the Act or makes the provision unworkable or highly unreasonable and arbitrary, then the Courts either add words or subtract words or read down the statute, but this should only be done when there is an ambiguity in the language used. In my view, there is no ambiguity in the wording of Section 167(2) of the Code and, therefore, the wise course would be to follow the principle laid down by Patanjali Shastry, CJI in Aswini Kumar Ghose v. Arabinda Bose, AIR 1952 SC 369, where he very eloquently held as follows:

It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances

27. (2014) 5 SCC 377

28. 2017 SCC OnLine SC 924

conceivably within the contemplation of the statute.

Sri Anand Kumar Kapoor, learned counsel, would point out that a complaint case under Section 138 of the Act of 1881 is tried as a summons case, within the meaning of Section 2(w) of the Code, and the procedure for trial of such a case is as per Chapter XX of the Code. He would submit that no charge is framed in such a case and specific provision for an appeal remedy is made under Section 378(4) of the Code for an aggrieved complainant in the event of acquittal of the accused. He would point out that a victim as defined in Section 2(wa) of the Code has to be construed strictly in terms of the language used therein and that a complainant in a cheque-bounce complaint case under Section 138 of the Act of 1881 cannot be brought within the ambit of victim as defined thereunder. He would point out that in SUBHASH CHAND10, the Supreme Court, despite being aware of the changes in the Code, did not advert to the proviso to Section 372 of the Code and merely held that an appeal would lie from an acquittal to the High Court under Section 378(4) of the Code and not to the Sessions Court under Section 378(1)(a) of the Code.

The learned Public Prosecutor for the State of Andhra Pradesh supported Sri Anand Kumar Kapoor, learned counsel. He would submit that Section 372 proviso of the Code provides a victim the right of preferring an appeal only in cases arising out of a police report as earlier, the limited remedy available to such a victim when the trial Court acquitted the accused was to prefer a revision under Section 397 of the Code which, at best, could only result in the setting aside of the acquittal and a consequential remand but not a conviction. The legislature, in its wisdom, therefore wished to provide a separate recourse to such an aggrieved victim by allowing an appeal at his behest. Therefore, a complainant in a case arising out of a private complaint, who was already provided the right of appeal under Section 378(4) of the Code, cannot be permitted to take recourse to Section 372 proviso of the Code. Learned Public Prosecutor would point out that a Division Bench of the Gauhati High Court in PAYE MOSING V/s. NABA BORA @ JALIA(29) dealt with the question of limitation in relation to an appeal filed by a victim under the proviso to Section 372 and, disagreeing with the view taken by the Patna High Court in PARMESHWAR MANDAL V/s. STATE OF BIHAR (30), held that on extension of an existing right (for enforcement of which the period of limitation has already been prescribed under the law) to a new class/classes of persons, such existing law of limitation, applicable to the old class/classes of persons, shall automatically be applicable to the new class/classes of persons in whose favour such right has subsequently been extended. The Division Bench accordingly applied the law of limitation to such appeals also. He would point out that the limitation adopted was on par with the limitation applicable to appeals arising out of cases based on police reports and therefore, a complainant in a Section 138 complaint case under the Act

29. 2015 SCC OnLine GAU 505 : (2017) 1 GAU LR 471
30. (2014) CrLJ 1046

of 1881 could not be put on par with a victim under Section 2(wa) of the Code.

The learned Public Prosecutor for the State of Telangana would refer to the judgment of the Chhattisgarh High Court in KAILASH MURARKA5 and point out that para 2 of the Statement of Objects and Reasons of Act No.5 of 2009, referred to therein, reflects the concern for victims by summing up that at present the victims are worst sufferers in a crime and they do not have much role in Court proceedings. They need to be given certain rights and compensation so that there is no distortion of the criminal justice system. He would assert that this observation would manifest that a complainant in a case arising out of a private complaint, who already plays a major role in the Court proceedings, cannot be brought within the ambit of victim under Section 2(wa) introduced under Act No.5 of 2009. He would also rely on OMANA JOSE4, wherein the Kerala High Court observed that before amendment of the Code under Act No.5 of 2009, a victim in a case instituted on a police report could only challenge the order of acquittal by filing a revision under Section 397 of the Code and it was only the State which could direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than the High Court or an order of acquittal passed by a Court of Session in revision. He would point out that the legislature cannot be assumed to be ignorant of Section 378(4) of the Code, whereunder the specific remedy of appeal was already provided to a complainant against the acquittal of an accused in a case arising out of a private complaint.

At the outset, it would be necessary to understand and delineate the contours of a complainant in the scheme of the Code. Though the term complainant has not been defined thereunder, sufficient guidance is available to understand its content and import from the definition of a complaint under Section 2(d) of the Code. This definition makes it clear that a police report is not included in the ambit of a complaint, as defined, but the explanation appended thereto indicates that such a police report shall be deemed to be a complaint and the police officer making such police report shall be deemed to be the complainant therein. The distinction between a private complainant and the police officer submitting a police report, who is deemed to be a complainant in that case, is therefore clear. The victim or his near relation, in the case of homicide, who gives information to the police as to the commission of a non-cognizable offence, though they are the actual affected parties, do not assume the status of a complainant in that case and it is only the police officer who finally submits the police report under Section 173 of the Code, who is conferred the deemed status of being the complainant in that case. In consequence, in a criminal case arising out of a police report under Section 173 of the Code, the actual victim or his near relation, in the case of homicide, has a very limited participatory role. The law, as it existed prior to amendment of Section 372 of the Code, only provided for appeals being preferred against acquittal in such cases by the State. The victim or his near relation in a case of this nature only had the right of preferring a revision under

Section 397 of the Code, if an order of acquittal was passed therein. As it was felt that this limited remedy of revision was not adequate, as the scope of interference in a revision would be far less than in an appeal, the law makers thought it fit to provide the right of appeal to such a victim or his near relation by inserting the proviso to Section 372 of the Code. This being one aspect, Section 142 of the Act of 1881 demonstrates that cognizance of an offence under Section 138 thereof would not be taken by the Court except upon the written complaint of the payee of the cheque or its holder in due course. Therefore, law is set in motion in such a case upon the private complaint itself and the police have little role to play. It is the complainant who practically prosecutes the accused in the case. However, the scheme of the Act of 1881 does not visualize the complainant in such a case being compensated and no provision is made for awarding him compensation. Section 138 of the Act of 1881 merely speaks of levy of a fine upon the accused which may extend to twice the amount of the cheque. The use of the word fine in the provision clearly indicates that the levy is punitive in nature and not compensatory. The complainant would therefore have no say in the quantum of the fine levied and it would be entirely within the judicious discretion of the Court to fix the same.

From the scheme of the Code, it is clear that after amendment of Section 378 in the year 2005, which came into effect on 23.06.2006, appeals against acquittals had to be in conformity therewith. Under 378(1)(a) thereof, the District Magistrate was empowered to direct the Public Prosecutor to present an appeal to the Sessions Court from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence in any case. Under Section 378(1)(b) thereof, the State Government was empowered in any case to direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than the High Court not being an order falling within the ambit of Clause (a) of that sub-section or an order of acquittal passed by a Court of Session in revision. Section 378(2) provided for filing of appeals to the Court of Session or to the High Court in cases investigated by the Delhi Special Police Establishment or by any other agency under a Central Act other than the Code. Section 378(3) made it clear that no appeal would lie to the High Court under Sections 378(1) or (2) except with the leave of the High Court. Section 378(4) provided for an appeal by the complainant against an order of acquittal passed in any case instituted upon a complaint and the forum created for such an appeal was the High Court which had to grant special leave to appeal to the complainant for presenting such an appeal. Section 378(5) made it clear that grant of special leave to appeal under sub-section (4) had to be within six months where the complainant was a public servant and within sixty days in every other case, computed from the date of the order of acquittal. Finality was given under Section 378(6) to the order of acquittal if the High Court refused grant of special leave to appeal therefrom under Section 378(4) and no appeal could lie thereafter against such acquittal either under Section 378(1) or (2).

Therefore, even as on the date of amendment of the Code vide the Act No.5 of 2009, a complainant in a case arising out of a private complaint had the right to prefer an appeal to the High Court against acquittal therein, with special leave. As rightly pointed out, it cannot be presumed that the legislature was unaware of the existing appellate remedy while creating a right of appeal in favour of a victim, by inserting Section 2(wa) in the Code along with a proviso to Section 372 thereof. Had it been the intention of the legislature to provide dual remedies to such a complainant by allowing him to come within the ambit of a victim under Section 2(wa) and avail the right of appeal under the proviso to Section 372, express mention would have been made of the same. Be it noted, Section 397 of the Code specifically confers upon an aggrieved party the right of revision either before the Sessions Court or before the High Court and once the remedy of revision is invoked before either of the aforestated fora, a further revision would not lie thereunder to the other forum.

Significantly, apart from the aforestated aspects, there is a more decisive factor to be taken into account to decide the controversy. Section 2(wa) of the Code speaks of a victim being a person who has suffered any loss or injury by reason of the act or omission for which an accused has been charged. It may be noted that none of the judgments on the issue considered the plain and unambiguous language used by the legislature in Section 2(wa) while defining a victim. As pointed out in ASWINI KUMAR GHOSE V/s. ARABINDA BOSE(31) and RAKESH KUMAR PAUL28, no word or phrase utilized by the legislature can be rendered redundant or given no meaning and the provision has to be interpreted and given effect to in its entirety. When the legislature, in its wisdom, defined victim to mean a person who suffered any loss or injury caused by an act or omission for which an accused person has been charged, use of the word charged has to be given full effect. Charge is defined rather vaguely under Section 2(b) of the Code to include any head of charge when the charge contains more heads than one. However, framing of a charge in the context of the statutory scheme of the Code cannot be belittled, as an entire chapter, viz., Chapter XVII of the Code, is devoted to the charge. Section 211 thereunder defines contents of a charge. Every charge under the Code shall state the offence with which the accused is charged and the law and the section of law against which the offence is said to have been committed is also to be mentioned therein.

Section 321 of the Code makes it clear that framing of a charge is crucial in matters where such a procedure is prescribed, as an accused is liable to be discharged in respect of an offence where the prosecution is withdrawn before a charge has been framed against him whereas, if the withdrawal from the prosecution takes place after the charge is framed or when, under the Code no charge is required, he is acquitted in respect of such offence or offences.

The use of the word charged in Section 2(wa) of the Code therefore assumes great

31. AIR 1952 SC 369

significance and it is only in cases where an accused is charged of an offence and he is acquitted of such charge, the person, who suffered any loss or injury caused by such alleged act or omission of the accused which formed part of the charge, would be a victim for the purpose of Section 2(wa) of the Code and for preferring an appeal under the proviso to Section 372 of the Code. Notably, cases under Section 138 of the Act of 1881 are tried as summons cases. A summons case is defined under Section 2(w) of the Code to mean a case relating to an offence not being a warrant case, while Section 2(x) defines a warrant case to mean a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. As an offence under Section 138 of the Act of 1881 attracts imprisonment for a term which may extend upto two years only, such a complaint case would be only a summons case, wherein no charge requires to be framed. Under Chapter XIX of the Code relating to trial of warrant cases, framing of a charge is required under Section 240, while no such procedure is contemplated under Chapter XX of the Code, dealing with trial of summons cases. As the accused in a cheque-dishonour case under Section 138 of the Act of 1881 is not charged, the complainant in such a case, though he may suffer loss and injury by the omission of the accused to pay his dues, cannot be brought within the ambit of a victim as defined in Section 2(wa) of the Code.

Ergo, a complainant in a cheque-dishonour complaint case under Section 138 of the Act of 1881 cannot be categorized a victim in terms of the definition under Section 2(wa) of the Code. Excluded from the ambit of Section 2(wa) of the Code, such a complainant would not be entitled to avail the remedy of appeal under the proviso to Section 372 of the Code and must continue to avail the special remedy of appeal provided under Section 378(4) of the Code after obtaining special leave.

As regards the remedy of appeal available to complainants against orders of acquittal in cases pertaining to any other offence, it may be noted that the right of appeal given to victims under the proviso to Section 372 of the Code is a general remedy provided to all such victims. This general remedy cannot be extended to complainants in cases arising out of private complaints, who already have the special remedy of appeal provided under Section 378(4) of the Code. Trite to state, the general provision cannot override the special provision unless specifically provided so or by necessary implication (See R.S.RAGHUNATH V/s. STATE OF KARNATAKA (32), WAVERLY JUTE MILLS CO. LTD V/s. RAYMON & CO. (INDIA) (P) LTD (33) and MOTIRAM GHELABHAI V/s. JAGAN NAGAR).(34) Further, by virtue of such extension, consequent to the interpretation sought to be given to Section 2(wa) of the Code so as to include within its ambit complainants who are already provided the remedy of appeal under Section 378(4) of the Code, the three levels of remedies provided to such complainant are being converted into four levels, though the law makers never

32. (1992) 1 SCC 335
33. AIR 1963 SC 90
34. (1985) 2 SCC 279

expressed any intention to do so. Once the statute provided the general and special remedies of appeal and prescribed the fora therefor, it is not open to the Courts to interpret the statute otherwise and blur the lines between the two strata, so as to multiply the appeal remedies and the fora therefor. The judgments of the Supreme Court in DAMODAR S. PRABHU9 and SUBHASH CHAND10, decisions rendered after insertion of Section 2(wa) and the proviso to Section 372 in the Code, also support this view.

Therefore, even though there may be complainants in cases arising out of private complaint cases where the accused are charged, unlike a complaint case arising under Section 138 of the Act of 1881, they still cannot aspire to maintain an appeal against an order of acquittal in such a case under the proviso to Section 372 of the Code. Given the special remedy already provided to them under Section 378(4) of the Code in the status of being a complainant, the general remedy provided to victims under the proviso to Section 372 of the Code cannot be extended to them. They would therefore have to continue to avail the remedy of appeal under Section 378(4) of the Code by following the due procedure.

To sum up, we answer the first question as to whether the complainant in a complaint case for an offence punishable under Section 138 of the Act of 1881 is a victim as defined under Section 2(wa) of the Code, as amended by Act No.5 of 2009, in the negative. Such a complainant is not a victim within the meaning of Section 2(wa) of the Code and would stand excluded therefrom, by virtue of the fact that the accused in such a case is not subjected to a charge.

In consequence, we also answer the second question as to whether such a complainant would be entitled to file an appeal under the proviso to Section 372 of the Code before the Court to which an appeal lies against conviction, in the negative. As such a complainant does not come within the ambit of a victim under Section 2(wa) of the Code, his only remedy is to prefer an appeal under Section 378(4) of the Code, with special leave.

The third question is answered holding that a complainant in a complaint case relating to an offence under Section 138 of the Act of 1881 would be required to file an appeal against acquittal in such case only under Section 378(4) of the Code, after seeking special leave. In all other complaint cases relating to offences, either bailable or non-bailable, even if the accused therein is charged, the complainant therein would not have the right of preferring an appeal under the proviso to Section 372 of the Code and he would have to continue to avail the special remedy of appeal provided to him under Section 378(4) of the Code, duly seeking special leave.

The reference is answered accordingly. In the light of our findings on the referred questions of law, the appeal filed under the proviso to Section 372 of the Code by the first respondent herein, the complainant in a complaint case under Section 138 of the Act of 1881, is not maintainable. In consequence, the criminal petition is

allowed quashing Criminal Appeal No.926 of 2016 on the file of the learned Metropolitan Sessions Judge, Hyderabad.

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2017(3) L.S. 276

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

Present:
The Hon'ble Mr.Justice
A.Rajasheker Reddy

Addepalli Bhaskar Rao ...Petitioner

Vs.

Karmanchi Anil Kumar & Anr., ..Respondents

CIVIL PROCEDURE CODE, Secs.47 & 151 - Civil Revision Petition is filed against the Order of Trial Court which allowed the Application of respondent by setting aside the sale – Revision petitioner contends that Court below has erroneously allowed the Application as Sec.47 of CPC has no application since 1st respondent is not a party to the suit.

Held – 1st respondent is neither a decree holder nor auction purchaser in the auction conducted by Court below – No material on record or evidence to the effect that any fraud or illegality is played by petitioner while purchasing EP schedule property in the auction conducted by Court below – Having participated in the auction and having kept quite at that time, 1st respondent/ third party cannot question the auction sale of EP schedule property by way of an Application u/Sec.47 r/w 151 of CPC – Impugned order of Court below is set aside and Civil Revision is allowed.

Cases referred

1.AIR 1967 Kerala 145
2. (2000) 3 Supreme Court Cases 87
3. (2006) 4 Supreme Court Cases 412
4. 2002 (6) ALD 834
5.AIR 1964 SC 1300: (1964) 6 SCR 1001
6.(2003) 11 Supreme Court Cases 584

Sri N.Bhaskar Rao, Advocate for the Petitioner.
Sri V.Satyanarayana Prasad, Advocate for the Respondent.

O R D E R

This Civil Revision Petition is filed against order dated 23.08.2007 in EA No.47 of 2005 in E.P.No.133 of 2003 in O.S.No.35 of 2002, wherein the Court below has allowed the application filed by the 1st respondent herein under Section 47 and Section 151 of CPC by setting aside the sale held on 29.11.2004.

2. Brief facts which are necessary for disposal of this Civil Revision Petition are that the 1st respondent filed E.A.No.47 of 2005 claiming to be the tenant of the EP schedule property along with some other property and doing business in the said scheduled shop. Originally, the EP Schedule

property belongs to one Kurravari family. The father of the JDR-2nd respondent herein i.e.,Uppala Kasiviswanadham, Chanduluri Satyanarayana and Nagasuri Somaiah jointly purchased the EP Schedule property under two sale deeds dated 09.02.978 and 25.11.1978, as such, the JDR has got only 1/3rd share in the EP schedule property and that the sale of entire EP schedule property is not valid under law.

3. The Decree Holder-petitioner herein filed counter denying the allegations in the petition and contended that the sale held is in accordance with the law and procedure and that the 1st respondent herein is not the tenant or owner of the property. That the 1st respondent also participated in the open auction held by the Court below on 29.11.2004 and the Court Amin has read over the contents of sale notification, but the 1st respondent has not raised any objection, as such, he is estopped from raising such pleas. That the provision of law quoted by the 1st respondent is not correct and that the sale of EP schedule property in the open auction by the Court is after following due process of law.

4. P.Ws.1 and 2 were examined on behalf of the 1st respondent and Exs.A1 to A6 were got marked. On behalf of the petitioner herein, R.Ws.1 and 2 were examined and Exs.B1 to B6 were got marked.

5. The Court below passed impugned order in the Revision Petition holding that the 2nd respondent-JDR has got saleable interest in respect of 1/3rd share of the EP schedule property only but not for the entire EP schedule property and sale of entire schedule property in respect of entire EP schedule property was set aside.

6. Learned counsel for the revision petitioner submits that the Court below erroneously allowed the application filed by the 1st respondent under Section 47 read with Section 151 of CPC, as Section 47 of CPC has no application since the 1st respondent is not a party to the suit. He submits that when once the 1st respondent participated in the open auction conducted by the Court, and the Court Amin has read over the contents of the sale notification, he is estopped from raising all such pleas regarding saleable interest of JDR-2nd respondent. He submits that the application filed by the 1st respondent before the Court below is not maintainable. He submits that the saleable interest of the JDR can only be questioned by the auction purchaser under Order 21 Rule 98 but nobody else. He submits that the Court below erroneously allowed the application holding that the JDR has no saleable interest in respect of entire EP Schedule property. He submits that the application under Order 21 Rule 99 can be maintained only on certain grounds and that the 1st respondent has not made out any such grounds. In support of his contentions, he relied on the judgments reported in P.NARAYANA PILLAI V. KUNJU KUNJU GOPALAN(1) AND KADIYALA RAMA RAO V. GUTALA KAHNA RAO (DEAD) BY LRS(2) .

7. On the other hand, learned counsel for the 1st respondent submits that the application filed by the 1st respondent under

1.AIR 1967 Kerala 145
2. (2000) 3 Supreme Court Cases 87

Section 47 r/w Section 151 CPC can be treated as one under Order 21 Rule 97 of CPC, since the case of the 1st respondent falls under the said provision. He submits that the Court below after considering the oral and documentary evidence adduced on either side, passed judgment and decree, as such, this Revision Petition does not lie before this Court and that the petitioner has to prefer appeal under Order 21 Rule 103 of CPC. He submits that the 1st respondent is the owner and tenant in respect of 1/3rd share of the EP schedule property, as such, the Court below rightly set aside the sale of entire EP schedule property.In support of his contentions, he relied on the judgments reported in S.RAJESWARI V. S.N.KULASEKARAN AND D.KYATHAPPA(3) AND OTHERS V. K.L.SIDDARAMAPPA(4) .

8. Before considering the rival contentions of both parties, it is relevant to extract Section 47 of CPC.

> Section 47. Questions to be determined by the Court executing decree: (1): All questions arising between the parties to the suit in which the decree was passed, or their, representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.
>
> 2)xxxx
>
> 3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

A reading of Section 47 of CPC goes to show that all the questions arising between the parties to the suit in which the decree was passed, shall be determined by the Court executing the decree and not by a separate suit. Obviously the said provision has no application to the facts of the present case on hand, since the 1st respondent is not a party to the suit i.e., OS No.35 of 2002. According to the learned counsel for the 1st respondent/claimant, when once the 1st respondent has remedy under Order 21 Rule 97 of CPC, the question of invoking Section 151 of CPC does not arise. Even an application under Order 21 Rule 91 of CPC also cannot be invoked by the 1st respondent, since the 1st respondent has filed application on the ground that the judgment debtor has no saleable interest in respect of the entire EP schedule property as only purchaser of the EP schedule property is entitled to make such an application under Order 21 Rule 91 CPC, as held by the Honble Apex Court in Kadiyala Rama Rao v. Gutala Kahna Rao (dead) by LRs. (supra), wherein it is held as follows:

> 14. The contextual facts depict that the Revision Petition was dismissed on 11th April, 1980 that is long after the completion of sale which has been totally ignored and the Learned Single Judge as a matter of fact has

3. (2006) 4 Supreme Court Cases 412
4. 2002 (6) ALD 834

proceeded on a total misconception of facts. Be it noted that at no point of time, any question was raised as regards the total purchase price and as such the attempt on the part of the respondent herein before this Court to denounce the sale on the ground of inadequacy of price ought not to be permitted to be raised before this Court at this juncture. The Learned Single Judge erroneously proceeded on certain misconception of facts as also of law by reason of the factum of challenge of sale being on the ground of saleability. Order 21 Rule 90 does not envisage the issue of saleability and the Learned Single Judge was in error in introducing such a concept under Order 21 Rule 90 of the Code. In any event as noticed above the issue of saleable interest can only be agitated by the purchaser in terms of Order 21 Rule 91 and not in any event by the Judgment-debtor. The ground of challenge is specific in the provision itself, namely, material irregularity or fraud and in the absence of any evidence or even an allegation in regard thereto in the petition under Order 21 Rule 90, question of introduction of the concept of no saleable interest or another opportunity to the judgment-debtor does not and cannot arise.

In this case, admittedly, the Court below has set aside the sale at the instance of the 1st respondent, who is a third party to the suit. Moreover, he also unsuccessfully participated in the auction conducted by the Court below for purchase of entire EP Schedule property, as he was not the highest bidder in the said auction. In the cross-examination of 1st respondent as P.W.1 before the Court below in the claim petition, he admitted that the sale notification was read over to him by the Amin, but he never objected to the same either on the ground that he is tenant or on the ground that he is having 1/3rd share in the EP schedule property, as such, he is estopped from raising such pleas in the present application once again. Obviously, the 1st respondent has no locus standi to question the same on the ground that the 2nd respondent-Judgment Debtor has no saleable interest in respect of the entire EP schedule property, but the petitioner herein, being the auction purchaser, only has got right to question the same and entitled to do so under Order 21 Rule 91 of CPC. As such, the impugned order of the Court below is liable to be set aside.

9. The other contention raised by the learned counsel for the 1st respondent that the application should have been treated under Order 21 Rule 97 of CPC. The said contention is also without any substance because Order 21 Rule 97 has no application as the same deals with filing of application by the Decree Holder or purchaser on the resistance or obstruction by third parties.

Order 21 Rule 97 reads as follows:

97. Resistance or obstruction to possession of immovable property: (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such

property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

The provisions of Order 21 rule 97 thus categorically envisage that the holder of a decree for the possession of immovable property or the purchaser of such property sold in execution of a decree is resisted or obstructed, he may make such an application to the Court complaining such resistance or obstruction. But in this case, application is made by the 1st respondent being third party, as such, said contention cannot be accepted in view of the fact that the 1st respondent is neither a decree holder nor auction purchaser in the auction conducted by the Court below.

10. That apart, the 1st respondent cannot also invoke Order 21 Rule 90 of CPC since he himself participated in the auction conducted by the Court below for purchase of entire EP schedule property and also admitted in his cross- examination, as already observed supra that the sale notification was read over to him by the Court Amin, he never objected to the same, as such, the application cannot also be treated under Order 21 Rule 90 of CPC also as held by the Honble Supreme Court in Kadiyala Rama Rao v. Gutala Kahna Rao (dead) by LRs. (supra), as follows:

7. On a plain reading of the provisions thus three several factors emerge and which ought to be taken note of in the matter of setting aside the sale of an immovable property, viz.,

(i) material irregularity and fraud in publishing or conducting the sale;

(ii) the Court dealing with such an application is satisfied that the applicant has sustained substantial injury by reason of such an irregularity or fraud; and

(iii) no application would be entertained upon a ground which the applicant could have taken on or before the date of drawing up of the proclamation of sale.

8. The third requirement as above needs, however, special mention by reason of the factum of incorporation of the principles analogous to the doctrine of constructive res judicata as envisaged under Section 11 of the Code. The legislative intent is clear and categorical in both the provisions as above that in the event of an intentional relinquishment of a known right, question of proceeding further would not arise.

9. This observation finds favour in the decision of this Court in DHIRENDRA NATH GORAI V. SUDHIR CHANDRA GHOSH(5) . It is significant to note, however, that at the time of auction Judgment-debtor 2 was present in court and Judgment-debtor 2 was

5.AIR 1964 SC 1300: (1964) 6 SCR 1001

also a signatory to the application under Order 21 rule 90.

It is needless to point out that there is no material on record or evidence to the effect that any fraud or illegality is played by the petitioner while purchasing the EP schedule property in the auction conducted by the Court below. However, the 1st respondent had filed an application by invoking the provision under Section 47 of CPC read with Section 151 of CPC.

Section 151 of CPC reads as follows:

151. Saving of inherent powers of Court:- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court.

Section 151 of CPC provides for inherent powers on the court to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Court, but not as a matter of course. Obviously, the 1st respondent is neither party to the suit nor to the EP and Section 151 CPC can only be invoked to meet the ends of justice or to prevent the abuse of process of Court. But in the present case, it is not the case of the 1st respondent that there is abuse of process of Court and that there is no finding of the Court below to that effect.

11. While dealing with the question whether an application filed by decree holder under Section 151 CPC for removing the obstruction to delivery of possession of land claimed by decree-holder held to be treated as an application under Order 21 Rule 97 and the Court has followed the procedure laid down by Order 21 Rule 98 to 100, the Honble Supreme Court in S.Rajeswari v. S.N.Kulasekaran and others (supra) held that only appeal lies against the order passed under Order 21 Rule 97 treating the order passed in the application under Section 151 CPC as one under Order 21 rule 97 since factual aspects raised in the application under Section 151 of CPC attracted the provisions of Order 21 Rule

97. The Court below in that case also followed the procedure under Order 21 Rule 97 and held that the said order is appealable under Order 21 Rule 103 of CPC. But the facts in the present case on hand are otherwise. Having participated in the auction and having kept quite at that time, the 1st respondent/third party cannot question the auction sale of EP schedule property by way of an application under Section 47 r/w Section 151 CPC. Moreover, when Section 47 of CPC has no application and it is deemed that the Court passed orders under Section 151 CPC, which is not appealable, the Court below by of allowing the application, has terminated the entire EP, which is erroneous. The order setting aside the sale of EP schedule property will have the effect of disposal of EP itself and nothing survives for adjudication in the EP, as such, contention of the learned counsel for the 1st respondent that the impugned order is interlocutory in nature, and that revision is not maintainable also cannot be accepted and the judgments cited by the learned counsel for the 1st respondent in S.Rajeswari v. S.N.Kulasekaran and others

(supra) & D.Kyathappa and others v. K.L.Siddaramappa have no application to the facts of the present case on hand. Moreover, judgments of Courts are not to be construed as statues as held by the Honble Supreme Court in the judgment reported in ASHWANI KUMAR SINGH V. U.P.PUBLIC SERVICE COMMISSION AND OTHERS(6) , wherein the Honble Supreme Court held as follows:

> 10. 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. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of statute, it may become necessary for Judges to embark into lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton, (1951) AC 737 at p. 761, Lord Mac Dermot observed:
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> "The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J, as though they were part of an Act of parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge."
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> 11. In Home Officer V. Dorset Yacht Co., [1970] 2 All ER 294 Lord Reid said, "Lord Atkin's speech.....is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J in Shepherd Homes Ltd. v. Sandham, (No. 2) (1971) 1 WER 1062 observed: "One must not, of course, construe even a reserved judgment of Russell, L.J. as if it were an Act of Parliament." In Herrington v. British Railways Board, (1972) 2 Wl R 537 Lord Morris said :
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> "There is always peril in treating the words of a speech or judgment as though they are words in legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."
>
> 12. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.
>
> 13. The following words of Hidayatullah, J. in the matter of applying precedents have become locus classicus: (Abdul kayoom v.

6.(2003) 11 Supreme Court Cases 584

CIT (AIR 1962 SC 680), AIR p.688, para 19 "19.Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

"Precedent would be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches, else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

For the foregoing reasons, the impugned order of the Court below is set aside.

Accordingly, the Civil Revision Petition is allowed. There shall be no order as to costs. Miscellaneous petitions, if any, pending in this Civil Revision Petition shall stand disposed of.

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2017(3) L.S. 283 (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
T.Amarnath Goud

Madasu Rambabu ..Appellant

Vs.

The State of A.P., ..Respondent

INDIAN PENAL CODE, Secs.302, 304-B & 498-A - CRIMINAL PROCEDURE CODE, Sec.374(2) –Criminal Appeal - Husband/Accused is found guilty of murder of his wife and demanding additional dowry.

Held – A charge u/Sec. 304-B, IPC ought to have been framed against the accused – Therefore, in the Interest of Justice, the accused be charged and tried u/Sec.304-B IPC at this stage – It may be noted that u/Sec.304-B, IPC it is not necessary to establish a homicidal death for proving the offence of dowry death – It is sufficient if the death of the woman is otherwise than under the normal circumstances – As the accused was never charged with an offence u/Sec. 304-B, IPC and did not have the opportunity to rebut the same, it would be appropriate if Sessions Court frame

the charge at this stage and give him an opportunity to meet it – Sessions Court shall permit prosecution to adduce additional evidence, oral and documentary and appellant shall be permitted to recall any of the witnesses already examined for further cross-examination – Criminal Appeal allowed partly.

Cases Referred:

1. (2013) 16 SCC 353
2. (2014) 15 SCC 163
3. (2000) 5 SCC 207 = 2000 SCC (Crl) 935
4. (2013) 4 SCC 131
5. (2001) 2 SCC 577

Mr.P.Prabhakar Reddy, Advocate for the Appellant.

Public Prosecutor,Telangana, Advocate for the Respondent.

J U D G M E N T

(per the Hon'ble Mr.Justice Sanjay Kumar)

Madasu Nirmala Kumari was found dead in the early hours of 19.11.2008 in the sump at her house at Cheruvu Bazar, Khammam. Her husband, Madasu Rambabu, was charged with her murder, punishable under Section 302 IPC, in Sessions Case No.241 of 2010 on the file of the learned Principal Sessions Judge, Khammam. He was also charged under Section 498-A IPC of committing the offence of demanding additional dowry of Rs.50,000/- and a motorcycle. By judgment dated 21.02.2011, the Sessions Court held him guilty on both charges and sentenced him to life imprisonment apart from paying a fine of Rs.100/-, in default of which he was to suffer rigorous imprisonment for one month, for his conviction under Section 302 IPC and to rigorous imprisonment for one year apart from paying a fine of Rs.1,000/-, in default of which he was to suffer rigorous imprisonment for three months, for his conviction under Section 498-A IPC. Aggrieved thereby, Madasu Rambabu, the accused, is in appeal under Section 374(2) CrPC.

The history of the case, in brief, is as under:

The Sub-Inspector of Police, Khammam I Town (P.W.12), received telephonic information at about 8.30 AM on 19.11.2008 and visited the house of P.W.1, the father of the deceased, where he received Ex.P1 report. Therein, P.W.1 spoke of the marriage of the deceased, his second daughter, with the accused on 10.09.2004 and her harassment thereafter by the accused on suspicion and for a motorcycle and cash. He stated that he had given Rs.1,00,000/- in cash and three tulas of gold before the marriage and he again gave Rs.50,000/- for purchase of a motorcycle by the accused. He adverted to the case filed by him under the Protection of Women from Domestic Violence Act, 2005, which was thereafter compromised. He stated that since February, 2008, his deceased daughter and the accused were living in the two rooms on the rear side of his house along with their child. On 18.11.2008 at about 9.30 PM, his deceased daughter and the accused slept in their portion and at about 6.30 AM, when his wife was cleaning the house premises, she found the body of the deceased in the water tank. He said that

they found their grand- daughter crying in the room and the accused was not to be seen anywhere. His motorcycle was also missing. P.W.1 stated that the accused had left his wet clothes, changed his dress and had run away. He prayed that necessary action be taken.

Thereupon, P.W.12 registered Crime No.248 of 2008 under Section 302 IPC. Ex.P13 is the FIR. He again visited the scene of the offence where he filled in the Crime Details Form and drew up a rough sketch in the presence of mediators. Ex.P4 is the Crime Details Form along with the rough sketch. He seized the shirt and pant (M.Os.1 and 2) found near the water sump. He got photographed the body of the deceased. Ex.P2 is the set of photographs with negatives. He sent for the Tahsildar, Khammam, and upon arrival, the Tahsildar conducted an inquest over the dead body. The body was then sent to the Government Hospital, Khammam, for post-mortem examination. P.W.12 drew a water sample from the sump for diatom test. He also recorded the statements of P.Ws.1 to 5 on the same day. He then handed over the case to the In-charge Station House Officer, Women Police Station, for further investigation. The DSP (Trainee), Khammam (P.W.13), then took up investigation. On 04.12.2008, she examined P.W.6 and P.W.10. She collected Ex.P12 medical certificate of the accused from P.W.10. On 16.12.2008, the accused surrendered before her. He was arrested and remanded to custody. The investigation was then continued by the Circle Inspector of Police, Khammam Town (P.W.14). He obtained the post-mortem examination report (Ex.P7), F.S.L. reports (Exs.P8 and 11), a report from Siddhartha Medical College (Ex.P9) and the final opinion on the post-mortem examination (Ex.P10). After completion of the investigation, he laid the charge sheet. The charges framed by the Sessions Court against the accused read as under:

FIRSTLY:

That you of the accused on 18th day of November, 2008 at about 12.00 mid night at your house situated at Cheruvu Bazar, Khammam, you of the accused forcibly put the neck of your wife by name Madasu Nirmala Kumari in the water till her death and you thereby committed an offence punishable U/s. 302 of the Indian Penal Code and within my cognizance.

SECONDLY :

That you of the accused prior to the death of your wife ie. deceased Nirmala Kumari harassed her by demanding additional dowry of Rs.50,000/- and a motor cycle and you thereby committed an offence punishable U/s. 498-A of the Indian Penal Code and within my cognizance.

The accused denied the charges and claimed to be tried. During the trial, the prosecution examined 14 witnesses and marked in evidence 14 exhibits. Exs.X1 and X2 were marked by the Court. The accused chose not to lead any evidence. Case properties were shown as M.Os.1 and 2. Considering the material on record, the Sessions Court held that there were no major discrepancies in the prosecutions case and convicted the accused of both

the offences and sentenced him as stated supra. Hence, this appeal.

At the outset, it may be noticed that the marriage of the deceased with the accused was solemnized on 10.09.2004 and she died on 19.11.2008. As she died within 7 years of her marriage, a charge under Section 304-B IPC ought to have been framed in relation to her dowry death, as there was a specific charge against the accused under Section 498-A IPC in relation to subjecting her to cruelty in connection with his unlawful demands for a motorcycle and cash. Unfortunately, the Sessions Court merely framed a charge under Section 302 IPC and, at that, wrongly showing it to be a case of drowning though the post-mortem examination certified that the deceased had died of asphyxia due to strangulation.

Perusal of the evidence reflects that there were no eye-witnesses to the incident whereby the deceased came to meet with her death. Neither P.W.1 nor P.W.2, the parents of the deceased, specifically stated that they saw the accused on 18.11.2008 during the night time. P.W.1 stated to this effect in Ex.P1 but in his deposition before the Court, he stated that on 18.11.2008, as usual, his deceased daughter and her daughter went to sleep in their portion. P.W.2, the mother of the deceased, initially stated that on 18.11.2008, as usual, the accused and the deceased went to sleep in their room but in her cross-examination, she said that only the deceased and she had taken their food at about 8.00 PM on that night and thereafter, the deceased and her daughter went to their portion and slept. She did not say anything about the accused. Significantly, neither P.W.1 nor P.W.2 mentioned anything about the presence of the motorcycle of the accused at that time either. The further case of the prosecution was that the accused fled to the house of his father (P.W.6) on his motorcycle and tried to commit suicide there. Exs.X1 and X2 were marked in proof of this.

The Civil Assistant Surgeon, Government Head Quarters Hospital, Khammam, who conducted the post-mortem examination of the body of the deceased, was examined as P.W.9. He found the following ante-mortem injuries on her body:

1. Laceration on right wrist x x inch.
2. Abrasion on back of elbow on right hand x inch.
3. Abrasion on back of elbow left hand 1 x inch.
4. Abrasion on left knee 1 x inch.

He stated that no internal injuries were seen. He certified that the cause of death was asphyxia due to strangulation. He confirmed that he did not notice any signs of drowning. He stated that he observed a faded mark of a ligature on the neck and sent the skin in the front of the neck for histo-pathological examination along with the sternum for diatom test and the viscera for chemical analysis. He identified Ex.P7 as his post-mortem examination report, Ex.P8 as the RFSL report dated 27.12.2008, Ex.P9 as the pathology report, Ex.P10 as his final opinion and Ex.P11 as the report of FSL, Hyderabad. Ex.P8 RFSL report confirmed that diatoms were not detected either on the sternum or in the water sample drawn from the sump. Ex.P11 FSL report confirmed that examination of the viscera of the deceased indicated that she was not poisoned. P.W.9 fixed the appropriate time

of death between 0 24 hours prior to commencement of the post- mortem. In his cross-examination, P.W.9 said that he did not find any external injury on the neck of the deceased. He explained that as the body was removed from water, he could not clearly see any marks on the neck and therefore, he sent the skin to the Department of Pathology, Siddhartha Medical College, Vijayawada. The body was normal but was slightly wet. He admitted that no injuries were noted in Column No.5 of Ex.P7 post-mortem examination report. He further admitted that he had not recorded in the said report that he suspected ligature marks on the neck. He added that on seeing, there was apparently no ligature mark around the neck of the deceased. He said that he gave his opinion on the basis of the reports from RFSL, Warangal; FSL, Hyderabad; and from Vijayawada. He further stated that the injuries on the body were not sufficient to cause death. In his further cross-examination, P.W.9 stated that he did not notice any signs of drowning and there were also no signs of death by strangulation. He said that he did not find any compression of the wind pipe and the hyoid bone was not fractured. He admitted that his opinion as to the cause of death was solely based upon the report given by the forensic laboratory after examining the skin from the neck. He said that he did not take the entire skin around the neck and that he did not find any ligature marks around the neck. He said that he did not know whether the report of the FSL was obtained by the police falsely. He stated that if death is due to strangulation, invariably there should be compression of the wind pipe.

Ex.P9 report from the Department of Pathology, Siddhartha Medical College, Vijayawada, was furnished in relation to examination of the skin from the front portion of the neck of the deceased (two pieces), which were sent for histo-pathological examination. The report certified that one piece showed a ligature mark along its length which is 0.2 cms each width, and the cut section showed congestion. The skin covered specimen received showed vascular congestion and hemorrhages. The picture was stated to be suggestive of ante-mortem nature of the lesion. However, the evidence of P.W.9 is to the effect that he observed a faded mark of a ligature on the neck and sent the skin in the front of the neck for examination. Unfortunately, Ex.P9 pathology report does not indicate the age of the ligature mark on the skin sample sent for examination. Given the testimony of P.W.9 to the effect that the ligature mark was faded, it cannot be ruled out that this injury was not of recent origin.

The evidence of P.W.9 and Exs.P8 and P.11 lab reports put it beyond the realm of doubt that the deceased did not die due to either poisoning or drowning. P.W.9 also asserted that he found no signs of death being caused by strangulation. He stated that there was no compression of the wind pipe and the hyoid bone was not fractured. He confirmed that if death is due to strangulation, invariably there would be compression of the wind pipe. He explained that the only reason that he gave the report to the effect that the cause of death was asphyxia due to strangulation was because of the opinion expressed by the forensic laboratory upon examining the skin sample from the neck of the deceased. However, as already

pointed out, P.W.9 had confirmed that the ligature mark found on the neck of the deceased was faded. The pathology department, unfortunately, did not ascertain the age of the said ligature mark. Therefore, the possibility that this ligature was not of recent origin cannot be ruled out. The benefit of doubt in this regard would invariably go to the accused. In effect, there is no conclusive proof or evidence of the death of the deceased being homicidal. In the absence of clear proof as to homicide having been committed, the question of bringing the accused to book for it does not arise. The charge against the accused under Section 302 IPC is therefore not made out as there is no clear evidence of the death of the deceased being a homicidal death.

That having been said, this Court is conscious of the fact that accused was also charged under Section 498-A IPC. In consequence, as the deceased died within seven years of her marriage and there was a charge under Section 498-A IPC, Section 304-B IPC would stand attracted. It may be noted that under Section 304B IPC, it is not necessary to establish a homicidal death for proving the offence of dowry death. It is sufficient if the death of the woman is otherwise than under normal circumstances. Any accidental death occurring otherwise than under normal circumstances would also come within its ambit. In SURESH KUMAR V/s. STATE OF HARYANA (1), the Supreme Court pointed out that any kind of death of a woman, whether homicidal or suicidal or accidental, would attract Section 304B IPC, if the other ingredients therein were proved and once such ingredients stand proved, the onus would shift upon the accused who must establish by cogent evidence that even such accidental death occurred under normal circumstances.

As there was also a charge against the accused under Section 498-A IPC, a concomitant presumption would normally arise under Section 113B of the Indian Evidence Act, 1872 (for brevity, the Act of 1872), if the said charge is proved, that the death of the deceased was a dowry death caused by his cruelty and harassment in connection with his demands for dowry. However, as already noted supra, no separate charge was framed under Section 304-B IPC. It is therefore in the interest of justice that the accused be charged and tried under Section 304B IPC at least at this stage.

In this regard, it would be apposite to refer to the observations of the Supreme Court in VIJAY PAL SINGH V/s. STATE OF UTTARAKHAND(2) that generally, in cases where a married woman dies within seven years of marriage, no inquiry is usually conducted to see whether there is evidence as to whether the offence falls under Section 302 IPC. The Supreme Court cautioned that where there is any evidence, direct or circumstantial, to show that the offence may fall under Section 302 IPC, the trial Court should frame a charge under Section 302 IPC even if the police has not expressed any opinion in that regard in the final report and Section 304-B IPC can be put as an alternate charge. It was further observed that in the course of the trial, if the Court finds that there is no evidence and proof, beyond reasonable doubt, is not available

1. (2013) 16 SCC 353

2. (2014) 15 SCC 163

to establish that the death is a homicide, in such a situation, if the ingredients under Section 304-B IPC are available, the Court should proceed under the said provision.

In KANS RAJ V/s. STATE OF PUNJAB(3) , the ingredients of Section 304-B IPC were rephrased in the following words:

> (a) the death of a woman was caused by burns or bodily injury or had occurred otherwise than under normal circumstances;
> (b) such death should have occurred within seven years of her marriage;
>
> (c) the deceased was subjected to cruelty or harassment by her husband or by any relative of her husband;
>
> (d) such cruelty or harassment should be for or in connection with the demand of dowry; and
>
> (e) to such cruelty or harassment the deceased should have been subjected soon before her death.

The expression otherwise than under normal circumstances was explained to mean death not in the usual course but apparently under suspicious circumstances, if not caused by burns or bodily injury.

More recently, in BAKSHISH RAM V/s. STATE OF PUNJAB(4) , the ingredients of Section 304-B IPC were abbreviated in these words:

> (a) that a married woman had died otherwise than under normal circumstances;
>
> (b) such death was within seven years of her marriage; and
>
> (c) the prosecution has established that there was cruelty and harassment in connection with demand for dowry soon before her death.

Significantly, in SHAMNSAHEB M. MULTTANI V/s. STATE OF KARNATAKA(5) , a Bench of three Judges of the Supreme Court dealt with the issue as to whether an accused charged under Section 302 IPC could be convicted under Section 304B IPC if the charge under Section 302 IPC is not established, without affording him an opportunity to enter his defence and disprove the presumption raised thereunder, read with Section 113B of the Act of 1872. The Supreme Court observed that where the accused is called upon only to defend against a charge under Section 302 IPC, the burden of proof never shifts onto him and it remains with the prosecution, which has to prove the charge beyond all reasonable doubt. No compulsory presumption would go to the assistance of the prosecution in such a situation. If that be so, when an accused has no notice of the charge under Section 304B IPC, as he was only defending against a charge under Section 302 IPC, it would lead to grave miscarriage of justice when he is alternatively convicted under Section 304B IPC, because he is deprived of the opportunity to disprove the burden cast on him by law. The Supreme Court therefore

3. (2000) 5 SCC 207 = 2000 SCC (Crl) 935

4. (2013) 4 SCC 131

5. (2001) 2 SCC 577

held that if an accused is convicted under Section 304B IPC without an opportunity being granted to him to enter on his defence in respect of the said charge and an opportunity is not afforded to him to discharge his burden, the conviction under Section 304-B IPC cannot be sustained.

In SURESH KUMAR1, the Supreme Court following the decision in SHAMNSAHEB M. MULTTANI5, held that the initial burden of proving the death of a woman within seven years of her marriage in circumstances that are not normal is on the prosecution; such death should be in connection with or for a demand of dowry which is accompanied by such cruelty or harassment that eventually leads to the womans death in circumstances that are not normal and after the initial burden of a deemed dowry death is discharged by the prosecution, a reverse onus is put on the accused to prove his innocence by showing, inter alia, that the death was accidental.

In that view of the matter, as the appellant/ accused was never charged with an offence under Section 304B IPC and did not have an opportunity to rebut the statutory presumption that would weigh against him if the death of his wife is treated as a dowry death, it would be appropriate that the Sessions Court frame the charge at least at this stage and give him an opportunity to meet it.

As regards the conviction of the accused under Section 498-A IPC, we find that there is no discussion whatsoever by the Sessions Court on this aspect in support of its final finding in the judgment under appeal. Further, as a finding on this aspect is crucial and would impact the charge to be framed under Section 304-B IPC, we are of the opinion that this issue also needs to be adjudicated afresh.

The judgment under appeal in Sessions Case No.241 of 2010 on the file of the learned Principal Sessions Judge, Khammam, is accordingly set aside and the matter is remitted to the file of the learned Principal Sessions Judge, Khammam, with a direction to frame an alternate charge under Section 304B IPC and adjudicate upon the charges under Section 304-B IPC and Section 498-A IPC. The Sessions Court shall permit the prosecution to adduce additional evidence, oral and documentary, to prove that the death of the deceased was a dowry death. The appellant/accused shall then be permitted to recall any of the witnesses already examined for further cross-examination, if he so chooses, apart from letting in such evidence as he may wish to adduce independently. In the light of the fact that this is the second round, the Sessions Court shall endeavour to dispose of the matter expeditiously and preferably within six months from the date of receipt of a copy of this order. As the appellant/ accused has already been enlarged on bail pending disposal of this appeal, he shall remain at liberty until the disposal of the case afresh by the Sessions Court. Bail bonds furnished by him shall not be discharged until the disposal of the case upon remand, pursuant to this order.

The appeal is allowed to the extent indicated above.

–X–

2017(3) L.S. (Madras) 77

IN THE HIGH COURT OF MADRAS

Present:
The Hon'ble Mr. Justice
M.Sathyanarayan &
The Hon'ble Mr. Justice
N.Seshasayee

Mathesh ..Appellant

Vs.

State ..Respondent

INDIAN PENAL CODE, Sec. 201 and 302 - Appellant/Accused has challenged the legality of the conviction and sentence passed by the Trial Court against him - Case of the prosecution rests upon circumstantial evidence.

Held – If the case of the prosecution rests upon circumstantial evidence, it is bounden duty of prosecution to link the chain of circumstances unerringly to connect the accused for the commission of offence, but they have miserably failed to do so – Circumstance of last seen together does not by itself necessarily lead to inference that it was accused who committed the crime but there must be something more to connect the accused with the crime and to point out guilt of accused and none else - There are very many gaps and holes in the case projected by the prosecution and the chain of circumstances to link the accused with the commission of offence is not at all complete and therefore, benefit of doubt shall endure in favour of the appellant - Criminal appeal is allowed – Conviction recorded and sentence imposed on appellant is set aside.

Mr.C.R.Malarvannan, for M/s.V. Raja mohan Advocate for Appellant.
Mr.R.Ravichandran, Government Advocate (Crl.Side), Advocate for Respondent.

J U D G M E N T

(per the Hon'ble Mr.Justice M.Sathyanarayan)

The appellant was arrayed as accused in S.C.No.137 of 2015 on the file of the Court of Sessions (Mahila), Fast Tract Court, Dharmapuri District and he stood charged and tried for the commission of offences under Sections 302 I.P.C and 201 r/w. 302 I.P.C. The Trial Court, vide impugned judgment dated 06.03.2017, found him not guilty for the offence under Section 201 r/w.302 I.P.C. and acquitted him for the said offence and however convicted him for the offence under Section 302 I.P.C. and sentenced him to undergo imprisonment for life with a fine of Rs.2,000/- in default to undergo 2 months rigorous imprisonment. The Trial Court has also granted set off under Section 428 Cr.P.C. The appellant/ accused, challenging the legality of the conviction and sentence passed by the Trial Court, has filed this appeal.

2. The case of the prosecution, briefly narrated and necessary for the disposal of

this appeal, are as follows:

2.1. The deceased, namely Neela, is the mother of PW1. According to the prosecution, the appellant/accused and the juvenile accused, namely Mani as well as the deceased belong to the same place. At about 10.00 p.m. on 11.08.2013, when the deceased/Neela was in his house, the appellant/accused as well as the juvenile accused Mani started consuming liquor and when it was questioned by the deceased, she was abused. PW1 is the daughter of the deceased and she informed to her neighbour PW2-Surya about the said incident and PW1 asked her morther not to indulge in unwanted things and made her to sit in the house of PW2 and she went back to her home at 10.30 p.m. on 11.08.2013. The deceased/Neela was having conversation with PW2 for sometime and thereafter, she went back to his house on 12.08.2013 at about 6.00 a.m. When PW2 proceeded to his lands, she passed through the house of the mother of PW1 and found blood stains near the entrance of the house and also found that the doors were found open and developing suspision, she went inside the house and found that Neela was dead and she informed the same to PW1-daughter of the deceased.

2.2. PW1 developed suspension that on account of the wordy altercation that had happened between the appellant/accused and the juvenile accused and her mother, she would have been done to death and went to Karimangalam Police Station and lodged a written complaint to PW13- Sub-Inspector of Police, Kariamangalam Police Station. PW13, on receipt of the written compliant, registered a case in Crime No.279 of 2013 at about 8.a.m. on 12.08.2013 for the commission of offence under Section 302 I.P.C. The printed F.I.R. was marked as Ex.P7. PW13 despatched the original complaint as well as F.I.R. to the Jurisdictional Magistrate.

2.3. PW19 was the Station House Officer of Mathikanpalayam Police Station and also In-charge of Karimangalam Police Station and on receipt of the F.I.R., took up the investigation and went to the scene of occurrence and in the present of PW6 and Palani, inspected the said area and prepared the Observation Mahazar and Rough Sketch, marked as Exs.P2 and P13 respectively. PW19 examined PWs.1, 8, 9, 10, 11, 2, 3, 4, 5, 6 and 12 and recorded their statements under Section 161(3) Cr.P.C., and conducted inquest on the body of the deceased in the presence of Panchayatdhars and the Inquest Report was marked as Ex.P14. PW19, through PW15, made a requestion for conducting postmortem and also prepared a report, which was marked as Ex.P15.

2.4. PW16 was the Assistant Surgeon attached to Dharmapuri, Medical College Hospital and he received the body of the deceased along with a requisition at about 2.00 p.m. on 12.08.2013 and seen the body at 2.15 p.m. and noted the presence of Rigor Mortis in all four limbs and commenced the postmortem at about 2.15 p.m. on 12.08.2013 and noted the following

features:

A body of a female aged about 75 years, lying on its back, arms by the side R/L.

External Injuries: Fracture all skull exposing brain matter 2) 3 x 1 cm abrasion over cheek. 3) Abrasion over left cheek. 4) Laceration 3 x 1 over right side forehead.

Thorax & Abdomen: Hyoid -intact, sternum-intact, Ribs-normal, Lungs-normal, C/s-pale.

Thoracic cavity: Heart normal in size, Empty Chambers, stomach 400 gm partially digested food with no specific odom, pale mucosa Liver-normal in size. C/s- Pale, Spleen-normal, C/s-Pale. Kidney-normal in size, Bladder-empty, Uterus (n.c.) C/s.Empty, External genitalia normal.

Head : 15 x 12 cm cavity deep irregular laceration involving right and left fronto parietal region exposing multiple fractured pieces of underlying right fronto parietal vault. Irregular lacerated duramter (?), brainstem and base of skull major part of lacerated. Brain matter was oozed out. Oozed brain matter was collected in separate plastic bag. PW16, after completion of postmortem, opined that the death would have occurred 12-24 hours prior to autopsy and issued the Postmortem Certificate, marked as Ex.P9.

2.5. PW19 continued with the investigation and searched for the accused and on information, effected the arrest of the accused/appellant as well as juvenile accused near the area going around the hill in the presence of PW12/VAO and his menial. The appellant/accused voluntarily came forward to give confession statement and as per the admissible portion of the confession statement marked as Ex.P16, M.O.1-Stone and M.O.4- Blood Stained Shirt worn by the accused were recovered under Mahazars Ex.P3 and Ex.P5 respectively. PW19 sent the material objects for chemical and biologial analysis through requisition letter marked as Ex.P17. PW19 also recovered M.O.2- Blood Stained Earth and M.O.3- Sample Earth under Mahazar Ex.P4 and after bring the accused to the police station, sent him to the Jurisdictional Magistrate Court for remand and custody. PW19 received the Chemical Analysis Reports, marked as Exs.P10 to P12 and thereafter handed over the case papers to his successor, namely Mr.Thangadurai/ Inspector of Police and based upon the materials collected during investigation, has altered the Section from 302 I.P.C to Sections 302 and 201 I.P.C. The Alteration Report was marked as Ex.P18.

2.6. PW18, the successor of PW19, continued with the investigation and after completing the investigation, filed the Final Report/Charge Sheet on the file of the Court of Judicial Magistrate, Palacode, charge sheeting the appellant/accused for the offences under Sections 302 and 201 r/w. 302 I.P.C., which was taken on file in P.R.C.No.31/2015. The Committal Court summoned the accused and on his appearance, furnished copies of the documents under Section 207 CrPC. The Committal Court, having found that the case

is exclusively triable by the Court of Sessions, committed the same under Section 209 CrPC to the Principal Sessions Court, Dharmapuri and the said Court made over the case to the Sessions Judge, Mahila Fast Tract Court, Dharmapuri in S.C.No.137 of 2015.

2.7. The Trial Court had issued summons to the accused and on his appearance, framed charges for the offences under Sections 302 I.P.C and 201 r/w. 302 I.P.C. The appellant/accused pleaded guilty to the charges framed against him.

2.8. The prosecution, in order to sustain their case, examined PWs.1 to 19, marked Exs.P1 to P18 and also marked M.Os.1 to 4. The accused/appellant was questioned under Section 313(1)(b) CrPC with regard to incriminating circumstances made out against him in the evidence rendered by the prosecution and he denied it as false. On behalf of the accused, no witness was examined and no document was marked.

2.9. The Trial Court, on consideration and appreciation of oral and documentary evidence and other materials, convicted and sentenced the accused for the offence under Section 302 I.P.C. and however acquitted him for the offence under Section 201 r/w. 302 I.P.C. and the State did not prefer any appeal against the acquittal of the appellant/accused for the offence under Section 201 r/w. 302 I.P.C. The appellant/accused, challenging the legality of the conviction and sentence passed by the Trial Court, has filed this appeal.

3. Mr.C.R.Malarvannan, learned counsel appearing for the appellant/accused made the following submissions:

(a) The case of the prosecution rests upon circumstancial evidence and the following circumstances are projected by the prosecution:

(i) Motive

(ii) Last Seen Theory spoken to by PWs.1 to 4.

(b) As per the testimony of PW1, she did not write the complaint and she was not even aware of the contents of the F.I.R and admittedly, F.I.R came to be registered on the basis of Ex.P1/complaint given by PW1 and since the writing of the complaint itself is doubtful and the evidence of the prosecution case based upon such a complaint got weekened, as it rests upon weaker foundation.

(c) Though the witnesses, namely PWs.1, 2, 3 and 4 had spoken about wordy altercation between the appellant/accused and the deceased, the same would not lead to the inference that they had committed the heinous crime of murder and even as per the prosecution, wordy alteration took place in drunken state, they have not uttered any word stating that they will do away or finish the life of the deceased.

(d) The arrest of the accused at about 2.00 p.m. on 12.08.2013 and the recovery of

incriminating articles are also doubtful for the reason that according to PW2, immediately after the occurrence, police was informed and they came to the spot at about 7.00 a.m. on 12.08.2013 and at that time, they brought the accused and the juvenile accused and sometime thereafter, they were taken to the police station.

(e) The Mahazar Witness for the recovery of M.Os.1 and 4, namely PW6 would also disclose that his signature was obtained at about 9.00 or 10.00 a.m. on 12.08.2013 and his statement was recoreded at that time and according to the prosecution, the accused was arrested only at 2.00 p.m. on 12.08.2013 and as such, the time of arrest of the accused and the recovery of incriminating articles, as projected by the prosecution, is also highly doubtful.

(f) The material witnesses, namely PWs.1 to 4, who had spoken about the Last Seen Theory, made very many improvements from that of the statements recorded from them under Section 161(3) CrPC and as such, their evidence ought to have been eschewed in toto by the Trial Court.

(g) The Trial Court has recorded conviction merely on the basis of the Chemical Analysis Reports, which would disclose that M.O.4-Shirt worn by the accused and M.O.1-Stone were tainted with blood and mere recovery of incriminating articles and the Chemical Analysis Reports would not lead to the presumption that the appellant/accused along with juvenile accused has committed the offence and even assuming that those circumstances have been proved, the rest of the circumstances such as Last Seen Theory and Mens Rea on the part of the appellant/accused to do away with the life of the deceased/Neela have not been proved by the prosecution and since the chain of circumstances projected by the prosecution is not complete and further, the case of the prosecution bristles with infirmities and inconsistencies, the Trial Court ought to have awarded benefit of doubt and acquitted the accused and instead, without assigning proper and tenable reasons, has convicted and sentenced him and prays for setting aside the impugned judgment of conviction and sentence passed by the Trial Court.

4. Per contra, Mr.R.Ravichandran, learned Government Advocate (Crl.Side) appearing for the respondent/State, in his usual vehemence and relentless pursuit, made forcecul submission that the prosecution, through the testimonies of PWs.1 to 4, coupled with scientific evidence and other evidence, had cogently linked the chain of circumstances pointing out the guilt on the part of the appellant/accused and trivial/ minor discrepancies have not affected the core of the prosecution. It is the further submission of the learned Government Advocate (Crl. Side) that admittedly, the witnesses were examined nearly 3 years after the date of occurrence and therefore, embellishment and discrepancies are bound to occur and this Court has to take into consideration the over all evidence of all witnesses and find out as to whether the prosecution has proved the chain of

circumstances to link the accused with the commission of the offence. It is the further submission of the learned Government Advocate (Crl. Side) that the appellant/ accused, while questioned under Section 313(1)(b) CrPC, merely denied the incriminating circumstances and it could be an added or additional circumstance to connect the accused with the commission of the offence and the Trial Court, on a thorough consideration of oral and documentary evidences, has rightly reached the conclusion to convict and sentence the accused and it may not be interfered with and prays for dismissal of this appeal. The learned Government Advocate (Crl.Side), in support of his submissions, relied upon the following decisions:

(i)G.Parshwanatha v. State of Karnataka [(2010) 8 SCC 593]

(ii) Kishor Bhadke v. State of Maharashtra [(2017) 3 SCC 760]

(iii) Abu Thakir and Others v. State of Tamil Nadu, rep. by Inspector of Police, Tamil Nadu [(2010) 5 SCC 91]

(iv)Dharnidhar v. State of Uttar Pradesh and Others [(2010) 7 SCC 759]

(v) Aftab Ahmad Ansari v. State of Uttaranchal [(2010) 2 SCC 583]

5. This Court paid it's anxious consideration and best attention to the submission made by the learned counsel appearing for the appellant and the learned Government Advocate (Crl.Side) appearing for the State and perused the oral and documentary evidence and other materials.

6. It is a well settled proposition that In cases where evidence is of a circumstancial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established; each fact sough to be relied upon must be proved individually. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the Court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case and the Court thereafter, has to consider the effect of proved facts. [See G.Parshwanath v. State of Karnataka (2010) 8 SCC 593].

7. This Court, keeping in mind the time tested principles in a case of circumstantial nature, has carefully scrutinized and analyzed the oral and documentary evidence.

8. PW1 is the daughter of the deceased and in her chief examination, she has spoken about the wordy altercation, especially the use of filthy and abusive words by the accused as well as juvenile accused in front of the house of the deceased under the influence of alcohol and she would further state that on 11.08.2013 at about 11.00

p.m. after the wordy altercation was over, she saw the accused along with juvenile accused going on the side of her mother house and on the next day, she was informed by her neighbour about the blood stains found in her mother house. In the cross examination, PW1 made a crucial admission that she did not write the complaint and it was written in the police station and she was not aware of the contents of the complaint. PW1 also made a crucial admission that in the statement recorded during investigation, she did not state about seeing both the accused going by the side of her mother house and she would further state that the compliant was given at 10.00 to 11.00 a.m. and even prior to that, police, on receipt of information, came to the spot.

9. PW2 is the neighbour of PW1 and she has corroborated the version of PW1 with regard to wordy altercation. In the cross examination, PW2 would admit that at about 6.30 a.m. on 12.08.2013, he was aware of the demise of Neela and immediately information was given and police came to the sport at about 7.00 a.m. and even at that time, they brought the accused/ appellant and the juvenile accused and some time thereafter, they were taken to the police station.

10. PW3 has also corroborated the evidence of PW1 and in the chief examination she had seen both the accused together at 11.00 p.m. and however in the cross examination admitted that she has not stated so during the course of investigation.

11. PW4 has corroborated the testimonies of PWs.1 to 3 with regard to wordy altercation and in the cross examination, he has stated that at about 1.30 a.m. on 12.08.2013, he saw the appellant/accused along with juvenile accused with a lighted cigarette and both of them went near the house of the deceased and however, in the cross examination, PW4 would depose that he did not state so during the course of investigation that he saw both accused at about 1.30 a.m. on 12.08.2013.

12. The testimonies of PWs.1 to 4, no doubt, have sustained the case of the prosecution insofar as wordy altercation or use of filthy words by the appellant/accused under the influence of alcohol. It is to be pointed out at this juncture that it is for the prosecution to prove beyond reasonable doubt that the appellant along with juvenile accused has committed the heinous offence of murder.

13. As regards the crucial aspect of seeing both the accused near the house of the deceased, the above said witnesses did not state so while their statements were recorded under Section 161(3) CrPC during the course of investigation and however, made improvements by leaps and bounds during the course of their oral testimonies.

14. As regards arrest and recovery of incriminating articles in pursuant to the admissible portion of the confession statement, marked as Ex.P16, is concerned, hereagain, the prosecution has

failed to prove the same. As already pointed out, PW2, in his cross examination, has stated that police came to the spot on receipt of information at about 7.00 a.m. on 12.08.2013 and at that time, they brought the accused as well as the juvenile accused. PW6- Mahazar Witness, in his cross examination, would depose that his signature was obtained in the recovery mahazar at about 9.00 to 10.00 a.m. on 12.08.2013 and would admit that though in his chief examination, he deposed that both the accused voluntarily surrendered and prayed for pardon before PW5, he did not state so during the course of investigation and would further depose that he was in the police station till 2.00 p.m. and till he was present in the police station, both the accused were kept in the police station.

15. In the light of the above said testimonies, the case of the prosecution that the accused was arrested at 2.00 p.m. on 12.08.2013 and thereafter, in pursuant to the admissible portion of the confession statement marked as Ex.P16, recovery was effected, became unsustainable and this Court is of the considered view that the arrest of the accused and recovery of incriminating articles became doubtful.

16. Insofar as the recovery of M.O.1-Stone is concerned, as per the evidence of PW12/ VAO, immediately on receipt of the information, he went to the house of Neela and found her dead with head injuries on the head and nearby a stone-M.O.1 was found and on returning to his office, he informed the same to his higher official and at about 2.00 p.m. police came to be spot and asked him to subscribe his signature and as per Ex.P3/Mahazar, M.O.1-Stone was recovered. PW12 would admit that he has signed the mahazar only at the police station and thereby implying that he has not signed the mahazar at the scene of occurrence.

17. A perusal of the Recovery Mahazar/ Ex.P3 would also disclose that M.O.1-Stone was recovered from a pond located behind the house of the deceased and whereas PW6 would depose that it was found near the body of the deceased. Therefore, the recovery of incriminating articles, especially M.O.1-Stone, which was used by the accused as well as juvenile accused for the commission of offene, have not been proved by the prosecution.

18. No doubt, the scientific evidence in the form of Exs.P10 P12/Chemical Analysis Reports would disclose that the articles were tainted with human blood and however, that may not be the sole circumstance so as to enable the Trial Court to reach the conclusion that the appellant has committed the offence. That apart, the Investigating Officer/PW19, in his cross examination, was also put a specific question as to the belated despatch of F.I.R. and in the cross examination would admit that the F.I.R was despatched with 4 hours delay and it was despatched through the Head Constable Mr.Balasubramaniam, but he was not examined during the course of investigation. PW19 would also admit about the improvements in the testimonies of the above

cited witnesses and also admitted that he has recorded the confession statement and though he has admitted that the confession statement was recorded at about 12.00 noon on 12.08.2013, wheres the accused was arrested at about 2.00 p.m. on 12.08.2013. The prosecution has drawn the inference simply because the appellant/ accused along with juvenile accused going nearby the house of the deceased and they would have committed the murder. As already pointed out, with regard to the said crucial aspect, the material witnesses have made very many improvements from that of their statements recorded under Section 161(3) CrPC and therefore, it is not safe to rely upon their testimonies with regard to that material aspect.

19. The learned Government Advocate (Crl.Side) has also made a valiant attempt by inviting the attention ofthis Court to the judgments in Aftab Ahmad Ansari v. State of Uttaranchal [(2010) 2 SCC 583], Dharnidhar v. State of Uttar Pradesh and Others [(2010) 7 SCC 759] and Abu Thakir and Others v. State of Tamil Nadu [(2010) 5 SCC 91] and would submit that as per the ratio laid down in the above cited judgments, the prosecution has established the chain of circumstances and therefore, interference may not be warranted.

20. This Court, on going through the above cited decisions, is of the considered view that the said decisions have no application to the case on hand.

21. In Aftab Ahmad Anasari v. State of Uttaranchal [(2010) 2 SCC 583], the Hon'ble Supreme Court of India held that if bloodstains are found on visible part of clothes worn, normally such person would not move around with those clothes and further the appellant therein had not denied the said fact in the course of his examination under Section 313 CrPC. However, in the case on hand, this Court already held that the arrest of the accused at 2.00 p.m. on 12.08.2013 itself is doubtful and so also the recoery of incriminating articles viz., M.Os.1 to 4 and as such, the said decision has no application to the case on hand.

22. In Dharnidhar v. State of Uttar Pradesh and Others [(2010) 7 SCC 759], the Hon'ble Supreme Court of India held that admission or confession of accused under S.313 CrPC recorded in course of trial can be acted upon and Court can rely on these confessions to convict the accused. In the case on hand, PW2 has spoken the fact that the accused were present in the custody of police even at about 7.00 a.m. on 12.08.2013 and whereas according to the prosecution, they were arrested at about 2.00 p.m. on 12.08.2013 and as such, in the light of the infirmities pointed out above, the said judgment also have no application to the case on hand.

23. In Abu Thakir and Others v. State of Tamil Nadu [(2010) 5 SCC 91] it is held that Criminal justice should not be made a casualty for the wrongs committed by the Investigating Officers in the case; if the Court is convinced that the testimony of a witness to the occurrence is true, the

Court is free to act on it albeit the investigating officer's suspicious role in the case .

24. It is to be remembered at this juncture that if the case of the prosecution rests upon cicumstantial evience, it is the bounden duty of the prosecution to link the chain of circumstances unerringly to connect the accused for the commission of offence, but they have miserably failed to do so.

25. In Kanhaiya Lal v. State of Rajasthan [(2014) 4 SCC 715], the Hon'ble Supreme Court of India held that circumstance of last seen together does not by itself necessarily lead to inference that it was accused who committed the crime but there must be something more to connect the accused with the crime and to point out guilt of accused and none else.

26. In Shyamal Ghosh v. State of West Bengal [(2012) 7 SCC 646], the Hon'ble Supreme Court of India held that the reasonableness of the time gap is .... of some significance. If the time gap is very large, then it is not only difficult but may even not be proper for the Court to infer that the accused had been last seen alive with the deceased and thus was responsible for commission of the offence. However, facts of the said case would disclose that evidence was available as to the deceased last seen together alive with the accused/ appellant therein, but in the case on hand, the prosecution has failed to establish the same.

27. In the considered opinion of the Court, there are very many gaps and holes in the case projected by the prosecution and the chain of circumstances to link the accused with the commission of offence is not at all complete and therefore, benefit of doubt shall enure in favour of the appellant.

28. In the result, this Criminal Appeal is allowed and the conviction recorded and sentence imposed on the appellant under Section 302 I.P.C., vide impugned judgment dated 06.03.2017 made in S.C.No.137 of 2015 passed by the learned Sessions Judge, Mahila Fast Track Court, Dharmapuri, Dharmapuri District is set aside and the appellant/sole accused is acquitted of the charge framed against him.

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2017 (3) L.S. 87 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Adarsh Kumar Goel &
The Hon'ble Mr.Justice
Uday Umesh Lalit

Nitya Dharmananda @
K.Lenin & Anr., ..Appellants
Vs
Sri Gopal Sheelum Reddy
& Anr., ..Respondents

CRIMINAL PROCEDURE CODE, Sec.91 - INDIAN PENAL CODE, Sec.376 - Respondent approached High Court with the prayer that entire material available with the investigator, which was not made part of the charge sheet, ought to be summoned u/Sec.91 of Cr.P.C. – Said Application was allowed.

Held - While ordinarily the Court has to proceed on the basis of material produced with the charge sheet for dealing with the issue of charge but if the Court is satisfied that there is material of sterling quality which has been withheld by the investigator/ prosecutor, the Court is not debarred from summoning or relying upon the same even if such document is not part of a charge sheet – It does not mean that the defence has a right to invoke Sec.91 of Cr.P.C. de hors the satisfaction of the Court, at the stage of charge - Appeal preferred by the appellants to set aside the view taken by the High Court is allowed.

J U D G M E N T

Delay condoned. Leave granted.

2. We have heard learned counsel for the State, the Digitally signed by complainant, the accused and the learned amicus, Mr. Siddharth MAHABIR SINGH Date: 2017.12.08 16:55:29 IST Reason:

Luthra, Senior Advocate.

3. The respondent, Gopal Sheelum Reddy alias Nithya Bhaktananda, was charge sheeted for offences, inter alia, under Section 376 of the Indian Penal Code. The respondent approached the High Court with the prayer that the entire material available with the investigator, which was not made part of the chargesheet, ought to be summoned under Section 91 of the Cr.P.C. The High Court, reversing the contrary view of the trial court, allowed the said application.

4. Contention raised on behalf of the appellants is that the view of the High Court is contrary to law laid down by this Court in State of Orissa versus Debendra Nath Padhi (2005) 1 SCC 568 and reiterated in the subsequent decisions. The defence

could not be considered at the stage of framing of charge so as to avoid a mini trial.

5. Learned counsel for the defence, on the other hand, submitted that if the investigator is not fair and the material of sterling quality, though seized during investigation and available with him, is deliberately left out from the chargesheet, there is no bar for the court to summon the said material.

6. It is settled law that at the stage of framing of charge, the accused cannot ordinarily invoke Section 91. However, the court being under the obligation to impart justice and to uphold the law, is not debarred from exercising its power, if the interest of justice in a given case so require, even if the accused may have no right ˇto invoke Section 91. To exercise this power, the court is to be satisfied that the material available with the investigator, not made part of the chargesheet, has crucial bearing on the issue of framing of charge.

7. In Debendra Nath Padhi, supra, it was observed:

"25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is "necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code". The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227, what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for ˇ production of document can be issued by court and under a written order an officer in charge of a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may

be initiated to compel production thereof."

8. In Hardeep Singh Etc. versus State of Punjab and ors. Etc. (2014) 3 SCC 92 a Bench of five-Judges observed:

> "19. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."

9. Thus, it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge sheet. It does not mean that the defence has a right to invoke Section 91 Cr.P.C. de hors the satisfaction of the court, at the stage of charge.

10. Accordingly, the view to the contrary in the impugned judgment cannot be sustained and is set aside.

11. The trial court may now proceed to deal with the issue of framing of charge in the light of the observations made hereinabove and also to proceed with the matter expeditiously in accordance with law.

The parties are directed to appear before the trial court for further proceedings on Monday, the 12th February, 2018.

We record our deep appreciation for the valuable assistance rendered by Mr. Siddharth Luthra, learned senior counsel, as amicus.

The appeals are accordingly disposed of.

–X–

2017 (3) L.S. 90 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Ranjan Gogoi &
The Hon'ble Mr.Justice
R.Banumathi

Asharfi ..Appellant

Vs.

State of Uttar Pradesh ..Respondent

SC/ST PREVENTION OF ATROCITIES ACT, Sec.3(2)(V) - INDIAN PENAL CODE, Secs.323, 376(2)(g) and 450 – Post amendment of the SC/ST Act, mere knowledge of the accused that the person upon whom the offence is committed belongs to SC/ST community suffices to bring home the charge under Section 3(2)(v) of the Act.

In the instant case so far as conviction U/S 376(2)(g), IPC is not interfered - Since unamended provisions of the SC/ST Act are applicable in the present case and evidence and materials on record do not show that appellant had committed rape on victim on the ground that she belonged to SC/ ST community, the same cannot be sustained – Accused already undergone imprisonment for more than ten years, appellant is ordered to be released forthwith-

Crl.A.No.1182/15 Date: 8-12-2017

J U D G M E N T

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

1. This appeal arises out of the judgment of the Allahabad High Court in Criminal Appeal No. 8270 of 2007 dated 29.01.2013 in and by which the High Court affirmed the conviction and sentence of the appellant awarded by the trial court. The trial court vide its judgment dated 30.11.2007 convicted the appellant for the offences under Sections 450, 376(2)(g), 323 IPC and under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 [for short 'the SC/ST Prevention of Atrocities Act]. For conviction under Section 376(2)(g) IPC, the appellant was sentenced ˇto undergo rigorous imprisonment for ten years with fine of Rs. 8,000/- with default clause and for conviction under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act, the appellant was sentenced to undergo life imprisonment with fine of Rs. 10,000/- with default clause. The appellant was also imposed sentence of imprisonment for other offences under Indian Penal Code.

2. Case of the prosecution is that on the intervening night of 8/9.12.1995, appellant Asharfi and one Udai Bhan are alleged to have forcibly opened the door and entered inside the house of PW-3-Phoola Devi and PW-4-Brij Lal and said to have committed rape on PW-3 Phoola Devi. PW-4-Brij Lal was kept away on the point of pistol. On raising alarm, neighbours (PW-1-Rassu and

PW-2-Baghraj) came there and on seeing them, the accused persons ran away threatening the witnesses. Based on the complaint lodged by the complainant Brij Lal, FIR was registered in Case Crime No.76 of 1996 under Sections 376/452/323/506 IPC and under Section 3(1) 12 SC/ST Act against appellant and one Udai Bhan. After completion of investigation, chargesheet was filed against the appellant and the said Udai Bhan for the abovesaid offences. As noted above, the appellant and Udai Bhan were convicted for various offences by the trial court. In the appeal ˇpreferred by the appellant before the High Court, the High Court affirmed the conviction of the appellant and the said Udai Bhan.

3. We have heard the learned amicus curiae appearing for the appellant. None appeared on behalf of the respondent. We have carefully perused the impugned judgment and materials on record.

4. So far as the conviction under Section 376(2)(g) IPC is concerned, based upon the evidence of PW-3-Phoola Devi and PW-4 Brij Lal and the medical evidence, both the courts below recorded concurrent findings that the charge of rape has been proved. We are not inclined to interfere with the same and also the sentence of ten years of imprisonment imposed upon him. We also find no perversity with respect to the conviction and sentence of the appellant with respect to other offences under Indian Penal Code.

5. In respect of the offence under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act, the appellant had been sentenced to life imprisonment. The gravamen of Section 3(2)(v) of SC/ST Prevention of Atrocities Act is that any offence, envisaged under Indian Penal Code punishable with imprisonment for a term of ten years or more, against a person belonging Scheduled Caste/ Scheduled Tribe, should have been committed on the ground that "such person is a member of ˇa Scheduled Caste or a Scheduled Tribe or such property belongs to such member". Prior to the Amendment Act 1 of 2016, the words used in Section 3(2)(v) of the SC/ST Prevention of Atrocities Act are ".....on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe".

6. Section 3(2)(v) of the SC/ST Prevention of Atrocities Act has now been amended by virtue of Amendment Act 1 of 2016. By way of this amendment, the words ".....on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe" have been substituted with the words ".....knowing that such person is a member of a Scheduled Caste or Scheduled Tribe". Therefore, if subsequent to 26.01.2016 (i.e. the day on which the amendment came into effect), an offence under Indian Penal Code which is punishable with imprisonment for a term of ten years or more, is committed upon a victim who belongs to SC/ST community and the accused person has knowledge that such victim belongs to SC/ ST community, then the charge of Section

3(2)(v) of SC/ST Prevention of Atrocities Act is attracted. Thus, after the amendment, mere knowledge of the accused that the person upon whom the offence is committed belongs to SC/ST ˇcommunity suffices to bring home the charge under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act.

7. In the present case, unamended Section 3(2)(v) of the SC/ST Prevention of Atrocities Act is applicable as the occurrence was on the night of 8/9.12.1995. From the unamended provisions of Section 3(2)

(v) of the SC/ST Prevention of Atrocities Act, it is clear that the statute laid stress on the intention of the accused in committing such offence in order to belittle the person as he/she belongs to Scheduled Caste or Scheduled Tribe community.

8. The evidence and materials on record do not show that the appellant had committed rape on the victim on the ground that she belonged to Scheduled Caste. Section 3(2)(v) of the SC/ST Prevention of Atrocities Act can be pressed into service only if it is proved that the rape has been committed on the ground that PW-3 Phoola Devi belonged to Scheduled Caste community. In the absence of evidence proving intention of the appellant in committing the offence upon PW-3-Phoola Devi only because she belongs to Scheduled Caste community, the conviction of the appellant under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act cannot be sustained.

9. In the result, the conviction of the appellant under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and the sentence of life imprisonment imposed upon him are set aside and the appeal is partly allowed.

10. So far as the conviction of the appellant under Section 376(2)(g) IPC and other offences and sentence of imprisonment imposed upon him are confirmed. As the appellant had already undergone more than ten years, the appellant is ordered to be released forthwith unless he is required in any other case.

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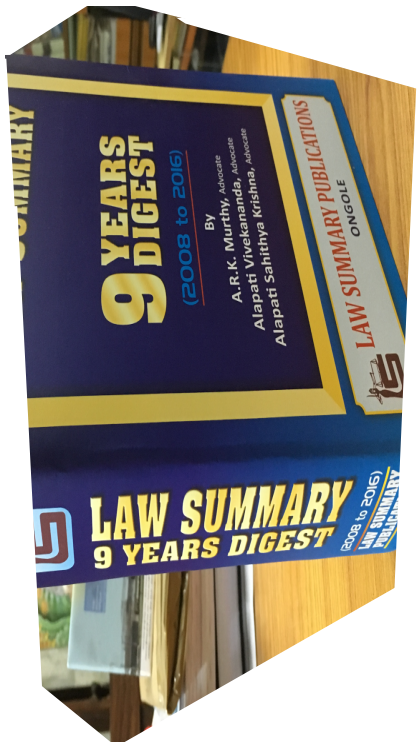

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