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Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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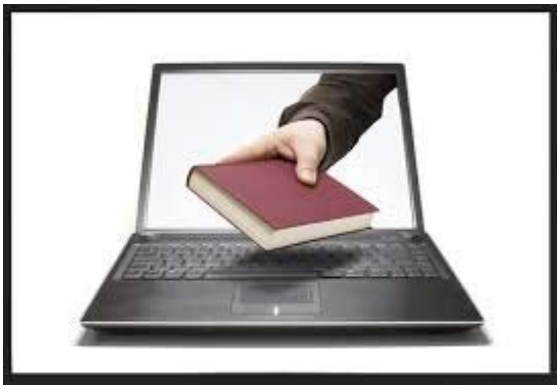

Law Summary

(Founder : Late Sri G.S. GUPTA)

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PART - 2 (31ST JANUARY 2018)

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CIVIL PROCEDURE CODE, Order XXVI Rule 9 and Sec.75 - Petitioner filed an IA before Trial Court for appointment of advocate commi-ssioner for inspection to

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Held - Lower Court went wrong in saying in a suit for injunction, purpose to note down physical features is fishing out information – There is no such rule which says in which suit, a commissioner can be appointed, and cannot be appointed as in any civil suit, a commissioner can be appointed, where the Court thinks fit – Petitioner is given liberty to file a fresh petition before Lower court. **(Hyd.) *59***

CRIMINAL PROCEDURE CODE, Sec.145(1) – SCOPE, OBJECT AND JURISDICTION – Stated – Tahsildar passed order u/Sec.145(1) basing on material placed before him that there existed dispute with respect to subject land which was likely to cause breach of peace - Contention that order of Tahsildar is contrary to Sec.145(1) Cr.P.C., it is an abuse of power and excess of jurisdiction conferred on him.

Held - Object of Sec,145(1) Cr.P.C. is to maintain law and order and prevent the breach of peace by maintaining one or other of the parties in possession, and not for evicting any person from possession - Order u/Sec.145(1) Cr.P.C. is passed primarily to ensure that a breach of peace does not occur and import of such an order cannot travel beyond that - It is incumbent upon administrative authorities to pass a speaking and reasoned order – As long as there is information on record in this regard, it is wholly unnecessary for the Executive Magistrate to await police report before passing order u/Sec.145(1) Cr.P.C.

Satisfaction u/Sec.145(1) Cr.P.C that a dispute which is likely to cause breach of peace exists concerning any land is that of Executive Magistrate which constitutes the foundation for exercise of power conferred by Sec.145(1) Cr.P.C., is neither absolute nor unfettered, but is circumscribed by conditions, stipulated in Section itself that executive Magistrate should make an order in writing stating grounds of satisfaction - Mere existence of dispute would, however, not suffice for what is required u/sec.145(1) Cr,P.C. is that existing dispute concerning any land must be one which is likely to cause breach of peace,

In this case only material on record which forms basis for passing an order U/sec.145(1) Cr.P.C. is evidently FIR dated 13-5-2017 which refers to an incident which allegedly occurred on 7-5-2017 – Allegations in FIR dt13-5-2017 can undoubtedly, Form basis of Tahsildar's satisfaction that dispute concerning land which is likely to cause breach of peace – Fact however remains that alleged incident which forms only basis for exercise of power u/sec.145(1) Cr.P.C. is said to have taken place on 7-5-2017 five months prior to 17-10-2017 when Tahsildar passed impugned order and material on record does not refer to any other incident in interregnum - Order of Tahsildar set aside

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CRIMINAL PROCEDURE CODE. Sec.482 – Appellants/Accused preferred instant appeal against impugned Judgment, whereby High Court partly allowed their application seeking quashing of FIR.

Held – In impugned Judgment, High court concluded that some part of FIR in question is bad in law because it does not disclose any cognizable offence against accused persons and only a part of FIR is good as it discloses a prima facie case against accused persons – In doing so, High court virtually decided all the issues arising out of the case - While examining whether factual contents of FIR disclose any prima facie cognizable offences or not, the High Court cannot act like an investigating agency nor can exercise powers like an appellate court. **(S.C.)** ***20***

HINDU MARRIAGE ACT, Sec.5(ii)(b) - **CENTRAL CIVIL SERVICES (CONDUCT) RULES** - Writ Appeal preferred by Appellants/Union of India against direction issued in a writ petition to pay family pension to Respondent/Second wife of deceased government servant – Appellants contend that Central Civil Service Rules prohibits government servants from entering into a marriage, while having a spouse living – Respondent contends that marriage with first wife stood automatically annulled on account of her physical disability for procreation of children.

Held - Marriage of respondent with deceased government servant was void on account of Section 5(i) of Hindu Marriage Act – Respondent is not entitled to family pension under Rule 54(7)(a) of Central Civil Service Rules as there was no legally valid marriage with deceased government servant – Family pension, cannot be construed as a property left behind by a deceased government servant - Writ appeal is allowed. **(Hyd.)** ***65***

NATIONAL LEGAL SERVICES AUTHORITY (LOK ADALATS) REGULATIONS, 2009 - ANDHRA PRADESH STATE LEGAL SERVICES AUTHORITY REGULATIONS, 1999 - Writ Petitioners contended that certain respondents in collusion got suit in Trial Court referred to Lok Adalat and without any notice to petitioners, Lok Adalat had passed Award.

Held – Even if some parties to dispute originally instituted remained exparte, that hardly justifies Lok Adalat to ignore them while considering passing of an award - Parties who are set exparte also have certain rights to pursue their claim further - Impugned Lok Adalat Award is not sustainable and same is accordingly set aside – Writ petition is allowed. **(Hyd.)** ***61***

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2018(1) L.S. 59

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

Present:
The Hon'ble Dr. Justice
B. Siva Sankara Rao

Shameem Begum ...Petitioner
Vs.
Vennapusa Chenna Reddy
& Anr., ..Respondents

CIVIL PROCEDURE CODE, Order XXVI Rule 9 and Sec.75 - Petitioner filed an IA before Trial Court for appointment of advocate commissioner for inspection to note down physical features of plaint schedule property in suit for bare injunction – Trial court dismissed IA and impugning said Order, petitioner preferred instant revision.

Held - Lower Court went wrong in saying in a suit for injunction, purpose to note down physical features is fishing out information – There is no such rule which says in which suit, a commissioner can be appointed, and cannot be appointed as in any civil suit, a commissioner can be appointed, where the Court thinks fit – Petitioner is given liberty to file a fresh petition before Lower court.

C.R.P.NO.4105 /2010 Date:20-11-2017

Cases referred:
CDJ 2016 APHC 619

M/s.V.Raghu, Advocate for the petitioner.

O R D E R

This revision is filed by the petitioner/plaintiff, aggrieved by the order dated 08.07.2010 in I.A.No.964 of 2010 in O.S.No.253 of 2010 passed by the Principal Junior Civil Judge, Vijaywada.

2. Heard the learned counsel for the petitioner/plaintiff and taken as heard the respondents, who are defendants in the said suit, since served failed to attend.

3. The revision is pending since 2010 even without ordering notice at the stage before admission before ordering notice. The petitioner/plaintiff filed I.A.No.964 of 2010 under Order XXVI Rule 9 C.P.C. for appointment of an advocate commissioner for local inspection to note down the physical features of the plaint schedule property in the suit for bare injunction and the lower Court, after contest, dismissed the petition on 08.07.2010. The same is now impugned in the revision.

4. The impugned dismissal order of the lower Court, under a mistaken impression and without even reading properly the Order XXVI Rule 9 and Section 75 C.P.C., says the purpose of appointment of an advocate commissioner sought to note down the physical features regarding possession of property cannot be allowed as a party cannot be allowed to fish out evidence by appointment of a commissioner. The lower

Court did not even notice the distinction between fishing out information (which is not permissible) and collection of evidence (which is permissible). What is prohibited of fish out information by commissioner is X or Y stated to him at the time of inspection A or B in possession and the like. It is not prohibited of apparently visible physical features (which is even collection of evidence).

5. In fact, this Court, in BANDI SAMUEL AND ANOTHER V. MEDIDA NAGESWARA RAO(1) referring to the several expressions considered the scope of Order XXVI Rule 9(1) and Section 75 C.P.C. The very wording of Rule IX of Order XXVI says Commissions to make local investigation. In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mense profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court. Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules. The very rule no way says in which suit, a commissioner can be appointed and cannot be appointed, as in any civil suit, a commissioner can be appointed, where the Court thinks fit of necessary of any local investigation having deemed fit. The very wording is local investigation and the purpose of local investigation is to elucidate any matter in dispute itself indicates permissibility of collection of evidence, but mainly from the unique feature of such collection saves much oral evidence and valuable time of the Court and parties or by oral evidence cannot effectively be proved like measurement and demarcation, identify on ground and physical features noting etc.,

6. The lower Court went wrong in saying in a suit for injunction, the purpose to note down the physical features is fishing out information. The expression in Bandi Samuel (supra) clearly distinguished what is meant by fishing out information and what is elucidating the matter in controversy other than by fishing out information. Fishing information prohibited is to make a local enquiry of hearsay material from the persons gathered there or the like, that is prohibited and not noting of physical features.

7. Having regard to the above instead of passing any order on the revision, that too, in the absence of the other side and instead of keeping the matter further pending at this stage, after seven years to order notice, the petitioner is given liberty to file a fresh petition before the lower Court to consider on own merits after contest with reference to the settled expressions by noting the distinction referred supra.

8. Accordingly, the Civil Revision Petition is disposed of.

9. Consequently, miscellaneous petitions, if any, pending shall stand closed. No costs.

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1. CDJ 2016 APHC 619

2018(1) L.S. 61 (D.B.)

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

Present:
The Hon'ble Mr. Justice
C.V. Nagarjuna Reddy &
The Hon'ble Smt. Justice
Vijaya Lakshmi

Nalla Anjavva & Anr., ...Petitioners
Vs.
The Lok Adalat Bench
at Sircilla & Ors., ..Respondents

NATIONAL LEGAL SERVICES AUTHORITY (LOK ADALATS) REGULATIONS, 2009 - ANDHRA PRADESH STATE LEGAL SERVICES AUTHORITY REGULATIONS, 1999 - Writ Petitioners contended that certain respondents in collusion got suit in Trial Court referred to Lok Adalat and without any notice to petitioners, Lok Adalat had passed Award.

Held – Even if some parties to dispute originally instituted remained *exparte*, that hardly justifies Lok Adalat to ignore them while considering passing of an award - Parties who are set *exparte* also have certain rights to pursue their claim further - Impugned Lok Adalat Award is not sustainable and same is accordingly set aside – Writ petition is allowed.

W.P.No.25121/17 Date:27-10-2017

Mr.Surya Satish, Advocate for the Petitioner.
Mr.J.Anil Kumar, Advocate for the Respondent No.1.
Mr.P.V. Narayana Rao, Advocate for Respondent Nos.22 to 24.
Mr.K.Venumadhav, Advocate for the Respondent Nos.19 to 21.
Mr.Venkateswara Varanasi, Advocate for the Respondent Nos.6,7 & 11.
Mr.T.Bala Mohan Reddy, Advocate for the Respondent Nos.8 & 10.

O R D E R

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

This Writ Petition is filed by defendant Nos. 4 and 5 in O.S.No. 146 of 2012 on the file of the Court of Senior Civil Judge at Sircilla filed for partition and separate possession of agricultural land admeasuring Ac. 2.06 guntas in survey No. 373 of Venkatraopally of Narsingapur Revenue Village filed by respondent No. 2. 2. The petitioners pleaded that petitioner No. 1 is daughter-in-law of late Baswaiah and petitioner No. 2 is her daughter. They have claimed interest over 1/3rd share in the joint ancestral property left behind by Sri Nallala Sayebu which is subject matter of the suit. It is their further pleaded case that recently they have noticed that respondent No. 21 started construction over a part of the suit schedule property; that when they objected to the same, the said respondent informed them that he acquired rights over part of the suit schedule land on the strength of Lok Adalat Award dated 06-01-2017 passed by respondent No. 1 and that the subsequent information gathered by them revealed that the advocates in collusion with respondent Nos. 2 to 22 forged

the petitioners' thumb impressions and made false representations in order to usurp their 1/3rd share in a fraudulent manner. The petitioners have alleged that no notice was served on them to appear either before the civil Court in which the suit was instituted or before the Lok Adalat. The petitioners also made certain allegations against respondent Nos. 22 and 23, the advocates who appeared for some of the respondents in the suit. For disposal of the Writ Petition, these allegations need not be considered.

3. The sum and substance of the grievance of the petitioners is that behind their back, respondent No. 2 in collusion with respondent No. 19 to 21 got the suit referred to Lok Adalat and without any notice to them, the Lok Adalat passed Award on 06-01-2017. The gist of the Lok Adalat Award has been referred to in para No. 9 of the affidavit filed in support of the Writ Petition which reads as under:

> "The A – Part admeasuring Ac. 0.20 Gts. was allotted to Plaintiff, Defendant No. 2 and 14 to 18 together jointly and part B land admeasuring Ac. 0.02 ½ Gts was allotted to Defendant No. 20 and C – Part admeasuring Ac. 1.00 ½ Gts. was allotted to Defenant No. 21 and D – Part admeasuring Ac. 0.03 ½ Gts. was allotted to Defendant No. 10 and E – Part admeasuring Ac. 0.04 ½ Gts. was allotted to Defendant No. 8 by recording that an extent of Ac. 1.31 Gts. is available after the Respondent of the land got merged with PWD road situated to the south of the suit schedule property. It was further recorded in the Compromise that the sale deeds Document Nos. 4487/2011 dated 05-08-2011, 4488/2011 dated 05-08- 2011, 5071/2011 dated 27-08-2011, 5321/2011 dated 03-09-2011 and 329/2012 dated 20-01-2012, registered gift settlement deed Document No. 3842/2012 dated 12-06-2012 and other registered sale deeds bearing Document Nos. 3843/2012 dated 12-06-2012, 3844/2012 dated 12-06- 2012, 6332/2015 dated 13-11-2015 and 6071/2016 dated 28-09-2016 of the office of the Sub-Registrar Vemulawada are declared as null and void in terms of the compromise."

4. Respondent Nos. 22 to 24 filed separate counter affidavits. Being the advocates, their counter affidavits may not be of relevance. In the counter affidavit filed by respondent No. 21 on behalf of himself and respondent Nos. 19 and 20, they have denied the allegation that no notices were served on the petitioners in the suit. He has further stated that the petitioners were not at all parties to the Lok Adalat Award dated 06-01-2017 and that therefore the said Award has not been passed against them.

5. Learned counsel for respondent No. 2 has not been present during the two hearings including that of today. Learned counsel for respondent Nos. 6 to 8, 10, 11 and 19 to 21 submitted that as the petitioners were set ex parte in the suit and the Award not being passed against them, they cannot be treated as aggrieved parties and that if they are aggrieved by

the Award, they are entitled to avail appropriate legal remedies.

6. Sri T.Surya Satish, learned counsel for the petitioners, submitted that respondent No. 1 committed a serious error in passing the impugned Award without ensuring that all the parties to the dispute in O.S.No. 146 of 2012 entered into a compromise and appeared before it. In support of this submission, he has placed reliance on order dated 06-07-2017 in W.P.No. 46801 of 2016 (Sai Vuma Chit Fund Company & Group of Companies Suffers Welfare Association Vs. The State of Andhra Pradesh). He has further submitted that by passing the Award, the interests of his clients have been seriously jeopardized as they will now be forced to initiate a fresh round of litigation for challenging the Lok Adalat Award.

7. We have considered the respective submissions of learned counsel for both parties. In Sai Vuma Chit Fund Company (supra), this Court has dealt with a more or less similar situation, whereunder Lok Adalat Award dated 07-12-2015 in W.P.No. 18653 2011 was challenged. The said Writ Petition was filed questioning G.O.Ms.No. 205 dated 07-08-2010 attaching the properties of M/s. Sai Vuma Chit Fund Company and its Group of Companies before the order of attachment was made absolute. During the pendency of the said Writ Petition, final attachment of the properties was made by learned Metropolitan Sessions Judge, Vijayawada. The Writ Petitioner and respondent No. 2 in the Writ Petition requested this Court to refer the dispute to Lok Adalat. On such reference, the Lok Adalat passed its Award dated 07-12-2015 based on a compromise entered into between the Writ Petitioner and respondent No. 2. A Welfare Association of M/s. Sai Vuma Chit Fund Company and its Group of Companies filed W.P.No. 46801 of 2016 before this Court questioning the said Award. After referring to various provisions of Andhra Pradesh Protection of Depositors of Financial Institutions Act, 1999, National Legal Services Authority (Lok Adalats) Regulations, 2009 (for short, '2009 Regulations') and Andhra Pradesh State Legal Services Authority Regulations, 1999 (for short, '1999 Regulations'), this Court held as under:

> "In our opinion, when any of the parties to the proceeding before the Lok Adalat does not appear for any reason, it is not permissible for the Lok Adalat to act on the settlement entered into by the other parties for, it will not be exercising its adjudicatory power when it passes an Award based on a settlement simplicitor. In a case as the one on hand, when respondent Nos. 4 to 6 herein have not entered appearance on receipt of notices in Writ Petition No. 18653 of 2011, the Lok Adalat had no option other than closing the proceeding and referring the said Writ Petition back to this Court."

In this view of the matter, we hold that the impugned Lok Adalat Award, drawn based on the settlement between respondent Nos. 2 and 3 leaving out respondent Nos. 4 to 6, is not in conformity with the

Regulations referred to above and it suffers from an incurable legal defect on this count also."

8. Learned counsel for the respondents sought to distinguish the judgment in Sai Vuma Chit Fund Company (supra) with the present case by pointing out that in the former case, all the parties were before the Lok Adalat and that in that context, this Court observed that when respondent Nos. 4 to 6 did not appear before the Lok Adalat, it should not have passed the Award. In our opinion, there is no difference between a case where all the parties were shown to have been before the Lok Adalat and a case where some of the parties to the litigation were not parties before the Lok Adalat. As held by this Court in Sai Vuma Chit Fund Company (supra), while passing its Award based on settlement simplicitor, the Lok Adalat will not be exercising its adjudicatory power and that under Regulation 17 (1) of 2009 Regulations, drawing up of the Award is merely an administrative act by incorporating the terms of settlement or compromise agreed between the parties under the guidance and assistance from Lok Adalat. Under Regulation 39 (2) of 1999 Regulations, the parties to the dispute shall be required to affix their signatures or, as the case may be, thumb impressions on the Award of the Lok Adalat. In our opinion, the expression "the parties in dispute" is referable to the parties in original dispute before the Court which has been referred to Lok Adalat. If a few of the parties to the dispute are allowed to file compromise petition to the exclusion of other parties, that would give raise to serious complications leading to litigation taking different turns. Such an approach is neither contemplated under the Act or the Regulations made thereunder nor the same is desirable. After all the intendment of law in envisaging settlement of disputes before Lok Adalats is to ensure that all the parties to the dispute arrive at a mutually agreed settlement, so that there will not be further litigation in relation to the dispute which was initially brought before the Court and later referred to the Lok Adalat. Even if some of the parties to the dispute originally instituted remained ex parte, that hardly justifies the Lok Adalat to ignore them while considering passing of the Award, for even the parties who are set ex parte also have certain rights to pursue their claim further by filing an application for setting aside the ex parte orders or even by filing appeals on merits if they suffer an order or judgment adverse to their interests. Therefore, the fact that the petitioners were set ex parte would not justify respondent No. 1 to allow some of the parties to the suit to enter into a compromise and pass the Award. This course, instead of settling the dispute between the parties once and for all, would have the effect of opening the floodgates of litigation.

9. For the aforementioned reasons, the impugned Lok Adalat Award is not sustainable and the same is accordingly set aside. The Writ Petition is allowed. O.S.No. 146 of 2012 on the file of the Court of Senior Civil Judge, Sircilla, shall be restored to file and proceed from the stage at which it was referred to the Lok Adalat.

10. As a sequel to disposal of the Writ Petition, W.P.M.P.No. 31150 of 2017 shall stand closed as infructuous.

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2018(1) L.S. 65 (D.B.)

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

Present:
The Hon'ble Mr. Justice V. Ramasubramanian &
The Hon'ble Mr. Justice M.Ganga Rao

Union of India & Ors., ..Appellants

Vs.

Lakshmi Suri ..Respondent

HINDU MARRIAGE ACT, Sec.5(ii)(b) - CENTRAL CIVIL SERVICES (CONDUCT) RULES - Writ Appeal preferred by Appellants/Union of India against direction issued in a writ petition to pay family pension to Respondent/Second wife of deceased government servant – Appellants contend that Central Civil Service Rules prohibits government servants from entering into a marriage, while having a spouse living – Respondent contends that marriage with first wife stood automatically annulled on account of her physical disability for procreation of children.

Held - Marriage of respondent with deceased government servant was void on account of Section 5(i) of Hindu Marriage Act – Respondent is not entitled to family pension under Rule 54(7)(a) of Central Civil Service Rules as there was no legally valid marriage with deceased government servant – Family pension, cannot be construed as a property left behind by a deceased government servant - Writ appeal is allowed.

Cases Referred:
2000(2) SCC 431
AIR 2015 SC 2697

Mr.B.Krishna Mohan, Advocate for the Appellant.
Mr.T.Deena Dayal, party inperson for Respondent.

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

Aggrieved by a direction issued by the learned Single Judge in a writ petition filed by the respondent, to pay family pension to the respondent, at least from the date of the death of the first wife, the Union of India has come up with the above writ appeal.

2. Heard Mr. B. Krishna Mohan, learned Standing Counsel appearing for the appellant and Mr. T. Deena Dayal, General Power of Attorney holder of the respondent appearing in-person.

3. The respondent filed a writ

petition in W.P.No.27522 of 2016 seeking a direction to the Union of India to sanction to her, the family pension payable on account of the death of her husband, contending inter alia that she was married to the deceased Government Servant on 18.04.1983; that she lived with him as his wife till his death on 18.12.1997 and also had three sons born in the relationship; that she submitted a petition on 28.03.2000, to the Minister for Consumer Affairs seeking family pension, not only for herself but also for her three minor children; that however no order was passed, presumably at the intervention of another lady (impleaded as the 3rd respondent in the main writ petition), the alleged first wife of the husband of the respondent; that the marriage claimed by the 3rd respondent in the writ petition was void under Section 5 (ii) (b) of the Hindu Marriage Act, 1955, due to her incapacity to have cohabitation and to bear children; that she filed one writ petition in W.P.No.22212 of 2000 on the file of this Court, in which a direction was issued on 03.07.2001 to the authorities to dispose of the representation of the respondent on merits; that in the said order, an observation was also made by this Court that this Court cannot go into the details of the marriage of the respondent herein; that challenging the observation so made, the respondent filed an appeal in W.A.No.2266 of 2003 and the same was disposed of by a Bench of this Court on 04.12.2003 permitting the respondent to give a fresh representation and with a further direction to the Government to take action on the representation within four months; that however there was no post of Regional Director in Department of Food, to enable the respondent to give a representation as per the directions of the Division Bench; that therefore the respondent filed a fresh writ petition in W.P.No.25865 of 2005; that the said writ petition was disposed of by a learned Judge, by an order dated 24.06.2013 directing the Secretaries in the Ministry of Consumer Affairs and in the Department of Pension to conduct a de novo enquiry into the matter, after affording reasonable opportunity both to the 1st respondent herein and to the person who claimed to be the first wife and to take further action depending upon the outcome of the enquiry; that thereafter an order was passed by the then Secretary to Government, Ministry of Consumer Affairs on 07.02.2014 rejecting the claim of the 1st respondent, on the ground that the 1st respondent is not the legally wedded wife of the deceased Government Servant; that thereafter the respondent submitted a petition to the Honble the Chief Justice of this Court on 19.10.2014, requesting the Chief Justice to treat her letter as a writ petition to take appropriate action; that the said letter was forwarded to the High Court Legal Services Committee; that the Secretary of the High Court Legal Services Committee opined that the respondent should approach the Ministry of Consumer Affairs; that thereafter the respondent filed a Contempt Case, but the same was closed by a learned Judge of this Court, with liberty to the respondent to challenge the order dated 07.02.2014 by way of a separate writ petition and that therefore the respondent was obliged to file the present writ petition W.P.No.27522 of 2016 out of which the present writ appeal arises.

4. Before proceeding further, we

are obliged to take note of two things, viz., (1) that the person, who claimed to be the first wife, who was arrayed as the 3rd respondent in the main writ petition, died on 01.07.2015; (2) that the three children born to the respondent in this writ appeal have already attained majority and (3) that the Union of India did not have an opportunity to file a counter to the writ petition.

5. The learned Judge, before whom the writ petition came up, allowed the writ petition after recording the following findings, viz., (1) that the deceased Government servant, viz., Amarnath Suri, first married Smt. Santhoshi Kumari, who was arrayed as the 3rd respondent in the writ petition; (2) that thereafter, the deceased Government servant married the respondent herein since the first wife was not able to beget children, due to a cyst in the abdomen; (3) that the enquiry conducted by the 2nd respondent, pursuant to the orders passed by a learned Judge of this Court in W.P.No.25865 of 2005, was perfunctory in nature, since the enquiry officer did not go into the question of the legal status of the respondent; (4) that the conclusion reached by the 2nd respondent in the writ petition (2nd appellant herein) that the respondent was not the legally wedded wife, was not based upon any concrete material; (5) that Rule 54 recognises the right of the children born to the second wife to receive a share in the family pension, even if the marriage is declared as void; (6) that Rule 54 of the Central Civil Services (Pension) Rules, 1972 obliges the Government to pay family pension to all the widows, wherever there are more than one, in equal shares; (7) that even if the second marriage of a Government servant, during the subsistence of the first marriage, tantamount to a misconduct, the 2nd wife cannot be penalized for the sins of the ex-employee; and (8) that therefore the respondent was entitled to the grant of a share in the family pension up to the date of death of the first wife and to the full family pension at least from the date of the death of the first wife.

6. Assailing the judgment of the learned Single Judge, it is contended by Mr. B. Krishna Mohan, learned Standing Counsel for Union of India that Rule 21(2) of the Central Civil Services (Conduct) Rules, 1964 prohibits a Government servant from entering into a marriage with any person, while having a spouse living; that the proviso to sub-rule (2) of Rule 21 carves out an exception, only in cases where the personal law applicable to the Government servants, permits such marriage; that it is only to take care of such contingencies that Rule 54 (7) provides for the sharing of the family pension between the widows where there are more than one; and that the issue raised in this case is already settled by at least two decisions of the Supreme Court, one in RAMESHWARI DEVI V. STATE OF BIHAR(1) AND RAJ KUMAR V. KRISHNA(2) .

7. In response to the above contentions, Mr. T. Deena Dayal, the General Power of Attorney holder of the respondent, submitted (1) that by virtue of Section 5 (ii)(b) of the Hindu Marriage Act, 1955, the marriage of the deceased Government servant with his first wife Smt.

1. 2000(2) SCC 431
2. AIR 2015 SC 2697

Santhoshi Kumari, stood automatically annulled on account of her physical disability for cohabitation and procreation of children; (2) that therefore in law, the respondent was the only legally wedded wife of the deceased Government servant; (3) that Section 10 of the Hindu Succession Act, 1956 recognises that there can be more widows than one and enables all the widows to take one share of the property of an intestate, together; (4) that when the statutory Rule, viz., Rule 54 recognises the entitlement of more than one widow to receive a share in the family pension, the appellants cannot go into the question of validity of the marriage; and that at any rate none of the contentions now raised by the Standing Counsel for the Central Government were raised before the learned Judge and hence they should not be taken into consideration.

8. We have carefully considered the rival contentions. From the rival contentions the following questions arise for our consideration:

1. Whether the respondent could be taken to be the legally wedded wife of the deceased Government servant, despite the admitted fact that there was already a valid marriage subsisting, on the date of the Government servant contracting a second marriage?

2. Whether by virtue of Rule 1 under Section 10 of the Hindu Succession Act, 1956 read with Rule 54 of the Central Civil Services (Pension) Rules, 1972 a lady whose marriage with the Government servant was not lawful, was entitled to a share in the family pension?

Issue No.1:

9. There is no dispute about the fact that on the date on which the respondent claims to have married the deceased Government servant namely, 18.04.1983, he already had a lawfully wedded wife by name Santhoshi Kumari living and the marriage between them was subsisting. Therefore, even the power agent of the respondent appearing in-person admits that the marriage of the respondent with the deceased Government servant was in violation of Section 5(i) of the Hindu Marriage Act 1955. It is seen from paragraphs 2 and 3 of the affidavit filed by the respondent in the writ petition (out of which the present writ appeal arises) that the respondent claims her marriage to be a lawful marriage by a convoluted logic that the marriage with the first wife became automatically void under Section 5(ii) (b) of the Hindu Marriage Act, 1955 due to the disability of the first wife to have cohabitation and procreate children.

10. To say the least, the contention of the power agent of the respondent in this regard is obnoxious. Section 5 (ii) (b) of the Hindu Marriage Act prescribes as one of the conditions for a valid marriage between two Hindus that at the time of marriage neither party should be suffering from a mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children. Section 5 may be extracted usefully as follows:

Conditions for a Hindu marriage: A

marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party, -

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity

(iii) the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

11. It is not and it was never the case of the respondent through out the period of this litigation that the first wife of the decease Government servant was suffering from a mental disorder of such a kind or to such an extent, as to be unfit for marriage and the procreation of children. The respondent came into the life of the deceased Government servant only in the year 1983, long after the marriage of the deceased Government servant with his first wife. Therefore, the respondent cannot even know what was the mental condition of the first wife at the time of marriage. The emphasis in Section 5(ii) is on the condition of the spouse at the time of the marriage and not thereafter. All that is stated by the respondent in paragraph-3 of the affidavit in support of the writ petition is that the marriage of the Government servant with his first wife was void under Section 5(ii) (b) of the Hindu Marriage Act, 1955 due to a cyst in her abdomen, on account of which, she was unable to cohabitate and procreate children. This averment does not even meet what is required under Section 5 (ii), leave alone the perverse interpretation sought to be given to the provision by the respondent.

12. It was contended by the power agent of the respondent that it is only in cases where the marriage between two Hindus was in contravention of any of the conditions specified in Clauses (i), (iv) and (v) of Section 5 that there is a requirement under Section 11 for the affected party to approach the Court and seek declaration by a decree of nullity and that in cases where the contravention was under Clauses (ii) or (iii), there is not even a necessity

to approach the Court and seek a decree of nullity.

13. In other words, the contention of the power agent of the respondent is, (1) that in cases covered by Clauses (i), (iv), (v) of Section 5, of the Hindu Marriage Act, 1955 there is a requirement to approach the Court and seek a decree of nullity; and (2) that in cases covered by Section 5 (ii) and (iii), the marriage would automatically become void without any necessity even to approach the Court with a petition.

14. We doubt whether any counsel would dare to advance such an abhorring proposition. If a counsel had been appearing for the respondent, we would not allow him even to raise such a contention. But when parties appear in-person or through their power agents (about which we have something to say at the end), it is unavoidable for the Courts to listen to such arguments.

15. Be that as it may, a marriage contracted in violation of Section 5(ii) of the Hindu Marriage Act, 1955 is only a voidable marriage, by virtue of Section 12 (1) (b). In other words, the contravention of clauses (i), (iv) & (v) of Section 5 would make a marriage void, but a contravention of Section 5(ii), would make the marriage only voidable. It is not the case of the respondent that the deceased Government servant sought annulment of his marriage with the first wife, by a decree of nullity, in terms of Section 12 (1) (b). Therefore, there is no doubt that even by her own admissions, the marriage of the respondent with the deceased Government servant, was void on account of Section 5(i). When this is so clear even on admitted facts, we do not know why this Court entertained a doubt in its mind in the second round of litigation in W.P.No.25865 of 2005 and directed the 2nd appellant to hold an enquiry into the status of the respondent. The status of the respondent was so obvious from her own pleadings and contentions and the same did not require wastage of time in the form of an enquiry.

16. Unfortunately, the learned Judge against whose order the present appeal arises, termed the enquiry conducted pursuant to the order passed in W.P.No.25865 of 2005 to be perfunctory and the order dated 07.02.2014 passed by the 2nd appellant to be arbitrary. In our considered view, the status of the 2nd respondent has turned out so clearly from her own pleadings and hence no amount of enquiry could have improved it. Therefore, we do not agree with the findings recorded by the learned Single Judge that the enquiry conducted into the status of the respondent was perfunctory and that the order rejecting her claim was illegal. By her own pleadings, the status of the respondent was that of a person who contracted a marriage with another, who already had a spouse living and the marriage with her subsisting at that time. Issue No.2:

17. The second issue arising for consideration is as to whether in the light of Rule 1 under Section 10 of the Hindu Succession Act, 1956 and Rule 54 of the Central Civil Services (Pension) Rules, 1972, a lady whose marriage with the deceased Government is void, will be entitled to claim

a share in the family pension or not.

18. Let us first take up Rule 1 under Section 10 of the Hindu Succession Act, 1956. Section 10 reads as follows: Section 10:- Distribution of property among heirs in class I of the Schedule.The property of an intestate shall be divided among the heirs in class I of the Schedule in accordance with the following rules:

> Rule 1. The intestates widow, or if there are more widows than one, all the widows together, shall take one share; Rule 2. The surviving sons and daughters and the mother of the intestate shall each take one share;
>
> Rule 3. The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share;
>
> Rule 4. The distribution of the share referred to in Rule 3;
>
> (i) among the heirs in the branch of the pre-deceased son shall be so made that his widow (or widows together) and the surviving sons and daughters gets equal portions; and the branch of his predeceased sons gets the same portion;

(ii) among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions.

19. The contention of the Power Agent of the respondent appearing in person is that what is contained in rule 1 of section 10 is a recognition of the fact that there could be more than one widow and that all of them will be entitled to a share irrespective of the legitimacy of the marriage.

20. But the said contention is misconceived. Section 10, as can be seen from its plain language, prescribes the Rules for the distribution of property of an intestate, among the heirs in class-I of the Schedule. Family pension, cannot by any stretch of imagination, be construed as a property left behind by a deceased Government servant. If it is treated as a property left behind by a Government servant, then he would be entitled even to dispose of the same by way of a testamentary instrument. Alternatively, even if it is construed as a property by an imaginative interpretation, on account of the facility of nomination available to the Government servant, when he is alive, then the nomination would, by the same logic, become a kind of last wish (we are careful in not equating the nomination to the level of testamentary instrument). In such a contingency also the respondent will not get a share, since in this case, the deceased Government servant had nominated his first wife and the nomination continued till his death.

21. The second difficulty in applying Section 10 would be that if section 10 has any application, then de hors the Central Civil Services (Pension) Rules, 1972, a family pension may have to be distributed among all the class-I heirs, such as, son, daughter, widow, mother, son of a pre-deceased son, and so on and so forth. The Central Civil Services (Pension) Rules, 1972

confer a right upon some of the legal heirs of the deceased Government servant to receive pension and that too in accordance with the rules. But for the Central Civil Services (Pension) Rules, 1972, there can be no right to receive pension. In fact, the beneficiaries of the Central Civil Services (Pension) Rules, 1972, are the legal heirs of the deceased Government servant and not the Government Servant himself. Therefore, what applies to a property left behind by him, cannot be applied to a right that accrues to some of his legal heirs after his death. Hence the argument based upon Section 10 (1) has to be rejected outright.

22. That takes us to the next part of the argument revolving around Rule 54 of the Central Civil Services (Pension) Rules, 1972. Sub- Rule 7 (a) (i) of Rule 54, no doubt, states that where family pension is payable to more widows than one, the family pension shall be paid to the widows in equal shares. The learned Judge, in the order impugned in this appeal considered Rule 54 (7) (a) (i) to be a statutory recognition of the right of woman other than the one legally wedded to the deceased Government servant to receive a share in the family pension, irrespective of whether such marriage is recognised by or prohibited in law. The learned Judge put it, purely on the humanitarian perspective that the Government recognised the possibility of an employee having more than one wife and the responsibility of such employee to look after the welfare of such wives. Taking such a view, the learned Judge held in paragraph-18 of the impugned judgment that the employer, by incorporating Rule 54(7), condoned the sins of the ex-employees.

23. But what has been omitted to be taken note of is that it is not open or up to the Government to condone the sins of its ex-employees. The sins of a sinner can be condoned only by the person, who is sinned against and not by a third party. If Rule 54 (7) (a) (i) is to be interpreted in such a manner, the lawfully wedded wife gets deprived of a portion of the family pension that she is otherwise entitled to in full, merely because her husband has committed a sin. It may be true that the lady, whom a Government servant marries during the subsistence of the first marriage, may also be a victim, if without any knowledge of the subsistence of the first marriage, she enters into the marriage with the Government servant. But among the two victims of such a marriage, the first wifes position becomes more precarious, if the Rule is interpreted in the manner done by the learned Judge. This is for the reason that the quantum of family pension payable does not increase with the number of wives taken by a deceased Government servant. Rule 54(7)(a) contemplates only a distribution of one single pension among all the widows. Therefore, Rule 54(7)(a) cannot be interpreted in such a manner as to penalize one widow who was the lawfully wedded wife of the deceased Government servant, merely because another woman cannot be left in the lurch.

24. As rightly pointed out by the learned Standing Counsel for the Central Government, we cannot interpret Rule 54 (7) (a) of the Pension Rules in isolation. This Rule has to be interpreted, keeping in mind (1) the personal law applicable to the parties; (2) the provisions of Section

5(i) of the Hindu Marriage Act, 1955, if the deceased Government servant was a Hindu; and (3) Rule 21 (2) of the Central Civil Services (Conduct) Rules, 1972. Once a marriage is declared void in terms of a parliamentary enactment and once the marriage of a Government servant with another person, even while having a spouse living, is declared as a misconduct, it is not possible to interpret Rule 54 (7) (a) of the Pension Rules in such a manner as to reward (i) a violation of the law and (ii)a misconduct.

24. The only manner in which Rule 54 (7) (a) of the Pension Rules can be harmoniously construed in tune with Rule 21 (2) of the Central Civil Services (Conduct) Rules, 1964 is to hold that the distribution of family pension among all the widows is made possible by Rule 54 (7) only in cases where the proviso (a) to sub-rule (2) of Rule 21 of the Central Civil Services (Conduct) Rules, 1972 apply. Rule 21 of the Central Civil Services (Conduct) Rules, 1964 reads as follows: Rule 21:- (1) No Government servant shall enter into, or contract, a marriage with a person having a spouse living; and (2) No Government servant having a spouse living, shall enter into, or contract, a marriage with any person;

> Provided that the Central Government may permit a Government servant to enter into, or contract, any such marriage as is referred to in Clause (1) or Clause (2), if it is satisfied that- Su\ch marriage is permissible under the personal law applicable to such Government servant and the other party to the marriage; and There are other grounds for so doing. (3) A Government servant who has married or marries a person other than of Indian nationality shall forthwith intimate the fact to the Government.

25. The object of the provision made under Rule 54 (7) (a) is to provide for all the women who get into a legally valid marriage with the Government servant. There may be cases where the Government servant divorced his first wife and lawfully married another. In such cases, the right to receive maintenance from the husband would have continued for the divorced wife up to the date of death of the Government servant. Probably, in order to ensure that such a woman, who is deprived of the monthly maintenance after the death of her husband, is not thrown to the streets that Rule 54 (7) (a) is carefully worded. In fact the above interpretation is fortified by sub-rules (11A) and (11B) of Rule 54, which enables a judicially separated wife to receive family pension. Sub-rules (11A) and (11B) read as follows:

> (11A) Where a female Government servant or male Government servant dies leaving behind a judicially separated husband or widow and no child or children, the family pension in respect of the deceased shall be payable to the person surviving:
>
> Provided that where in a case the judicial separation is granted on the ground of adultery and the death of the Government servant taken place during the period of such judicial separation, the family pension shall

not be payable to the person surviving if such person surviving was held guilty of committing adultery.

(11B) (a) Where a female Government servant or male Government servant dies leaving behind a judicially separated husband/widow with a child or children, the family pension payable in respect of deceased shall be payable to the surviving person, provided he or she is the guardian of such child or children.

26. Though sub-rules (11A) and (11B) use the expression judicial separation and not the expression divorce, the purport of the rule is made clear by what follows in the proviso to sub-rule (11A). The proviso to sub-rule (11A) of Rule 54 carves out an exception to sub-rule (11A) by providing that if judicial separation had been granted on the ground of adultery, and the death of the Government servant takes place during the period of such judicial separation, the family pension shall not be payable to the survivor, who is held guilty of committing adultery.

27. In other words, a wife, who is not divorced, but judicially separated, on account of which her status as a lawfully wedded wife continues, is disentitled from receiving family pension, by virtue of the proviso to sub-rule (11A) of Rule 54 if the conditions stipulated therein are present. Therefore, the rule 54 (7) in entirety, appears to focus only on a relationship born out of lawful wedlock and not otherwise.

28. A question may arise, as a fall out of the interpretation that we have given in the preceding paragraphs, as to what would happen to a lady with whom the deceased Government servant had a living in relationship, especially after the advent of The Protection of Women from Domestic Violence Act, 2005. It is true that this Act, came long after India ratified the Convention on the Elimination of Discrimination Against Woman. It is also true that the Domestic Violence Act recognises certain rights for a woman, who was in a living in relationship with a person.

29. But the right that such a woman would have as against the individual with whom she had such a relationship, is not to be confused with a right that is sought to be enforced as against the Government in terms of the Pension Rules. If the Government servant was alive and the respondent was seeking to enforce certain rights as against him, in terms of the Domestic Violence Act, the same would certainly go in favour of the respondent, to the extent she is conferred with certain rights. But no right would arise even under the Domestic Violence Act, for the respondent to claim a share in the pension that the lawfully wedded wife is entitled to. If there was no lawfully wedded wife, then the person in a relationship with the Government servant may also have a right to seek pension. But where there is already a lawfully wedded wife living at the time of death of the Government servant and the marriage between her and the deceased had not been dissolved or annulled, then it is that wife who will get the family pension.

30. As a matter of fact the

Government appears to have already taken a decision on the applicability of Rule 54 (7)(a) of the Pension Rules, way-back in the year 1987. The decision of the Government of India in this regard is found in para (15) under Rule 54 of the Central Civil Services (Pension) Rules, 1972. Paragraph-15 quotes a DO letter No.1/39/86-P & P.W., dated 16.02.1987, reproducing the advise given by the Ministry of Law. Paragraph-15 also quotes Letter No.211-Audit I/13- 86, dated 04.03.1987 of the Comptroller and Auditor General. This paragraph-15 is extracted as follows:

> (15) When second wife not entitled to the family pension, -- The Department of Pension and Pensioners Welfare have since clarified that the second wife will not be entitled to family pension as a legally wedded wife, a copy of their clarification is enclosed for information.
>
> (C.& A.G. New Delhi, Letter No.211-Audit I/13-86, dated the 4th March, 1987) COPY OF D.O., LETTER NO.1/39/86-P. & P.W., DATED 16.02.1987 RECEIVED FROM SHRI HAZARA SINGH, DEPUTY SECRETARY, DEPARTMENT OF PENSION AND P.W., NEW DELHI.
>
> An extract of the relevant advice given by the Ministry of Lw in the matter is enclosed. You may like to take necessary action in the matter accordingly.
>
> EXTRACT
>
> It is specifically a question arising under the Hindu Marriage Act, 1955. Under Rule 54(7) of the CCS (Pension) Rules, 1972, in case a deceased Government servant leaves behind more than one widow or a widow and eligible offspring from another widow, they are entitled to family pension in respect of that deceased Government servant. Section 11 of the Act provides that nay marriage solemnized after the commencement of the Act shall be null and void and can be annulled against the other party by a decree of nullity if the same contravenes any of the conditions specified in Clauses (i), (iv) and (v) of Section 5 of the Act. Section 5(1) stipulates that the marriage cannot be legally solemnized when either party has a spouse living at the time of such marriage. Therefore, any second marriage by a Hindu male after the commencement of 1955 Act during the lifetime of his first wife will be a nullity and have no legal effect. Such marriage cannot be valid on the ground of any custom. In fact, a custom opposed to an expressed provision of law is of no legal effect. So under these circumstances, the second wife will not be entitled to the family pension as a legally wedded wife.

31. Unfortunately, the decision of the Government of India extracted above, was not brought to the notice of the learned Judge. Therefore, we are of the considered view that the respondent, even by her own

admission with regard to her status, was not entitled to family pension.

32. In Rameswari Devi, the Supreme Court was concerned with the correctness of a judgment of the Division Bench of the Patna High Court, which held that the second wife was not entitled to family pension. While approving the decision of the Patna High Court and dismissing the appeal, the Supreme Court held as follows:

It cannot be disputed that the marriage between Narain Lal and Yogmaya Devi was in contravention of clause (i) of Section 5 of the Hindu Marriage Act and was a void marriage. Under section 16 of the Act, children of void marriage are legitimate. Under the Hindu Succession Act, 1956, property of a male Hindu dying intestate devolve firstly on heirs in clause (1) which include widow and son. Among the widow and son, they all get shares (see Sections 8, 10 and the Schedule to the Hindu Succession Act, 1956). Yogamaya Devi cannot be described a widow of Narain Lal, her marriage with Narain Lal being void. Sons of the marriage between Narain Lal and Yogmaya Devi being the legitimate sons of Narain Lal would be entitled to the property of Narain Lal in equal shares along with that of Rameshwari Devi and the son born from the marriage of Rameshwari Devi with Narain Lal. That is, however, legal position when Hindu male dies intestate. Here, however, we are concerned with the family pension and death-cum-retirement gratuity payments which is governed by the relevant rules. It is not disputed before us that if the legal position as aforesaid is correct, there is no error with the directions issued by the learned single Judge in the judgment which is upheld by the Division Bench in LPA by the impugned judgment.

33. Similarly a 3 Member Bench of the Supreme Court held in Raj Kumari v. Krishna that pension is payable only to the legally wedded wife of the deceased employee. Paragraph-15 of the said decision is clear on this aspect.

34. As a matter of fact, there is no ambiguity in clause (a) of sub- rule (7) of Rule 54. Clause (a) of sub-rule (7) of Rule 54 reads as follows:

> (7) (a) (i) Where the family pension is payable to more widows than one, the family pension shall be paid to the widows in equal shares.
>
> (ii) On the death of a widow, her dhare of the family pension sall become payable to her eligible cild:
>
> Provided that if the widow is not survived by any child, her share of the family pension shall not lapse but shall be payable to the other widows in equal shares, or if there is only one such other widow, in full, to her.

35. Sub-clause (i) of clause (a) of sub-rule (7) enables the distribution of family pension in equal shares among widows, only in cases where family pension is payable to more widows than one. The expression used in the rule is where payable. The question that arises in these cases is whether it is payable at all. It is

only if family pension is payable lawfully to someone that the question of paying the same in equal shares under sub-rule (7) would arise. The word payable clinches the issue. Therefore, we are of the considered view that the respondent is not entitled to family pension and the order of the learned Judge is to be set aside.

36. One contention advanced by the power agent of the respondent is that the arguments now raised by the learned standing counsel for the Union of India, were not raised in the writ petition and that therefore, they cannot now be raised. But we do not agree. All the contentions raised by the learned standing counsel for the Union of India are only legal submissions. The Union of India has not placed before us any facts, which can be disputed by the respondent. In fact we have found the status of the respondent, even by her own pleadings, to be that of a person whose marriage with the deceased Government servant was void. The learned senior standing counsel made submissions only on the legal consequences flowing out of such a status. Therefore, the absence of pleadings, will not deprive the Union of India from advancing legal arguments on admitted facts.

37. But before parting, we are constrained to say something. In the affidavit filed by the respondent in support of the writ petition, she has mentioned the names of all the learned Judges, who have dealt with this litigation in the past. Apart from mentioning the names of the learned Judges, the respondent has also made certain remarks. For instance, in paragraph-4 of the affidavit in support of the writ petition, the respondent has commented that one particular Judge, who passed orders on 03.07.2001 in W.P.No.22212 of 2000, made an unwarranted remark forcing the respondent to file a writ appeal. In the same paragraph, the respondent has also stated that a Division Bench of this Court while disposing of her writ appeal No.2266 of 2003, directed her to make a fresh petition to a non-existing person, viz., Regional Director, Department of Food, Southern Region, Chennai, which post was abolished forty years back.

38. Apart from making a mention of all the learned Judges, who dealt with all her previous writ petitions and apart from making certain comments, the respondent seems to have engaged a person as power agent to pursue her case. The power agent of the respondent does not appear to be related to the respondent. A person has a right of audience in the court, either as a party-in-person or through a counsel appointed by self or through a counsel appointed by the Legal Services Authority. In some cases, close relatives, such as, parents, spouse or children, may act as power agents to present the case of a party. But a third party cannot take a power from a litigant and seek to argue a case before this Court.

39. As a matter of fact, Justice Jagannadha Rao (as he then was), held in Hari Om Rajendra Kumar and others v. Chief Rationing Officer of Civil Supplies (AIR 1990 AP 340), that after the advent of Section 33 of the Advocates Act, 1961, a non-advocate cannot be permitted to address

the Court on the strength of the power of attorney. The learned Judge pointed out that the provisions of Order III Rule 1 of the Code, are also subject to the provisions of the Advocates Act, 1961, in particular Sections 32 and 33. After tracing the history of the bar imposed by the Bar upon non-advocates from representing causes, the learned Judge pointed out that though this Court has power to grant permission for non-lawyers to plead/argue cases in certain special circumstances, it cannot be done in a routine fashion.

40. But unfortunately, in this case something strange had transpired earlier. Along with the writ petition in W.P.No.27522 of 2016 (out of which the present appeal arises), the respondent filed a petition in WPMP.No.6878 of 2016 for permission to appear through her power agent. This petition was ordered on 08-08-2016, by a learned single Judge, on the sole ground that in a writ appeal filed by the respondent in an earlier round of litigation W.A.No.153 of 2006, the respondent was permitted to revoke the vakalath given to her advocate and to allow her power of attorney agent to appear on her behalf.

41. But in W.A.No.153 of 2016, the Division Bench did not go into the question as to whether the power agent of the respondent can claim as a matter of right, to appear and argue on behalf of the respondent. A Miscellaneous Petition in WAMP.No.684 of 2006 in W.A.No.153 of 2006 for revoking the vakalath of the previous advocate and to permit the G.P.A. holder to appear was just allowed by the Division Bench without going into the law.

42. The law is, as enunciated by the learned Judge of this Court in Hari Om Rajendra Kumar, that no party to a case, as of right can plead and argue his/her case through a power agent though in special circumstances, this Court can permit such representation.

43. If in special circumstances this Court can permit a party to be represented by a power agent, such special circumstances should be established in every case. The permission granted in W.A.No.153 of 2006 is not a reservoir to allow the power of flow at all times.

44. In fact, we have heard the power agent of the respondent in full without raising any objection to his entitlement and we have decided the case actually on merits. A question would naturally arise as to why we are now spending our valuable time on the entitlement of the power agent of the respondent to appear, especially when we have already heard him in full on 08-11-2017 and reserved for judgment. The answer to this question is to be found in something that happened at the stage of the writ petition.

45. As we have stated earlier, the respondent filed the writ petition W.P.No.27522 of 2016 (out of which the present appeal arises), along with WPMP.No.6878 of 2016 for permission for the power agent to appear and argue. Though one learned Judge ordered the petition on 08-08-2016 by just referring to the permission granted in an earlier case in W.A.No.153 of 2006, without finding out the existence of special circumstances, another learned

Judge passed an order on 01-11-2016 quoting the decision in Hari Om Rajendra Kumar and directing the respondent to engage a counsel.

46. Thereafter, the respondent filed a petition in MP.No.47810 of 2016 seeking a very strange and contentious prayer. The prayer made in MP.No.47810 of 2016 is as follows:

For the reasons stated in the accompanying affidavit, the petitioner prays that this Honble Court may be pleased to ignore the decision of this Honble Court in Hari Om Rajendra Kumar and others v. Chief Rationing Officer of Civil Supplies (AIR 1990 (AP) 340) and restore the permission granted to Sri T.D. Dayal, G.P.A. of the petitioner Smt. Lakshmi Suri in WPMP.No.6878 of 2016 in W.P.No.27522 of 2016 in the interest of justice and/or pass such other order or orders deemed fit and proper in the circumstances of the case.

47. In the affidavit in support of the said petition, the respondent claimed that in a Special Leave Petition filed by the respondent as against one order of the Division Bench of this Court, the power agent was permitted to appear and plead on her behalf.

48. Actually, the order passed by the Supreme Court on 15-03- 2010 in SLP (Civil) No.298 of 2010 is as follows:

SLP (C)298/2010
Application for permission to Sri T.D. Dayal, holder of the GPA of the petitioner to appear and plead on her behalf is granted.

The Special Leave Petition is dismissed.

SLP/2010 (CC 217/2010) The Special Leave Petition is dismissed on the ground of delay.

49. The aforesaid order of the Supreme Court was not a permanent licence granted to the power agent of the respondent to practice in Law Courts, forever on behalf of the respondent. The law laid down in Hari Om Rajendra Kumar, was not set at naught by the Division Bench or the Supreme Court in any case. Therefore, it was nothing but audacity on the part of the respondent to pray in MP.No.47810 of 2016 to ignore the decision of this Court in Hari Om Rajendra Kumar and to permit the power agent to appear.

50. In fact we are not carried away by such small things, as it is more important to deal with a case on its merits rather than on peripherals. This is why we have actually dealt with the case on its merits. But before parting we were also compelled to take note of these things, only because of the manner in which the names of all the learned Judges are mentioned in the affidavit and remarks are passed about the judgments rendered by them.

51. In fine, we are of the considered view that the respondent is not entitled to family pension. Rule 54 (7)(a) of the CCS (Pension) Rules, 1972 cannot be interpreted in such a manner as to be directly in conflict with Rule 21 (2) of the CCS (Conduct) Rules

and Section 5 (i) of the Hindu Marriage Act, 1955.

Therefore, the writ appeal is allowed and the order of the learned Judge is set aside. The writ petition filed by the respondent shall stand rejected.

As a sequel, miscellaneous petitions pending in this appeal, if any, shall stand closed. There shall be no order as to costs.

--X--

2018(1) L.S. 80

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

Present:
The Hon'ble Dr. Justice
B. Siva Sankara Rao

Tata Kesava Rao ..Petitioner

Vs.

Shaik Hasan Ahmed ..Respondent

CIVIL PROCEDURE CODE, Order XXI Rule 37 – Upon the failure of Judgment-debtor to pay decreed amount, decree-holder filed E.P. for the recovery of the decreed money and for arrest of Judgment-debtor - Trial Court dismissed the prayer of arrest of judgment-debtor – Hence, instant Civil Revision.

Held – Despite Judgment-debtor denying contentions of decree-holder that he possessed certain movable and immovable properties, decree-holder did not file any proof or scrap of paper on whom burden lies to support his contentions and also did not establish the means of judgment-debtor – Decree-holder can proceed against properties of judgment-debtor rather than person of judgment-debtor – Decree-holder is at liberty to file an affidavit of particulars of alleged properties of judgment-debtor or a fresh petition lies under Rule 41 of Order XXI of CPC - High court sitting in revision cannot interfere with impugned order - Civil Revision Petition is dismissed.

Case Referred:
2011(4) ALD143

Mr.Venkata Siva Prasad, Advocate for the Petitioner.
Mr.Devalraju Anil Kumar, Advocate for the Respondent.

O R D E R

The revision petitioner is the decree-holder in E.P.No.146 of 2010 of the decree obtained as plaintiff in O.S.No.8 of 2008 against the respondent/judgment-debtor/defendant. Impugning the order of the Court, dated 12.09.2011, in the E.P. dismissing the prayer for arrest of the judgment-debtor by the learned I Additional Senior Civil Judge, Vijayawada, the present revision is maintained.

2. The contention mentioned in the grounds urged in the revision vis-à-vis the oral submissions during the course of

C.R.P.No.5744/11 Date:7-11-2017

hearing are that impugned order of the Executing Court is perverse and unsustainable and from ill-appreciation of the settled principles and propositions, the Executing Court should have adopt a pragmatic approach and the impugned order is erroneous and contrary to law and facts and should have been allowed the Execution Petition for arrest of the judgmentdebtor and did not even go through the expression of this Court in 2011 (4) ALD 143 and thereby, sought for setting aside the dismissal order by allowing the revision and order arrest of the judgmentdebtor.

3. Whereas, it is the submission of the counsel for the judgmentdebtor/ respondent to the revision that the impugned order of the lower Court is on contest by appreciation of the oral evidence of the decreeholder as PW.1 and another witness PW.2, besides that of respondentjudgment-debtor as RW.1 with four documents Exs.B.1 to B.4 are running in six pages supported by reasons and for this Court while sitting in revision, there is no illegality or impropriety and thereby sought dismissal of the revision.

4. Heard as referred supra and perused the other material on record from the grounds urged supra.

5. Order XXI Rule 37 C.P.C. reads as follows:

> Discretionary power to permit judgment-debtor to show cause against detention in prison:-(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court [shall], instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison: [Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.]
>
> (2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

6. From the very proviso to the above Rule 37 sub-rule (1), though from sub-rule(1) it mandates by C.P.C. amended Act 21 of 1936 substituting 'shall' for 'may' in saying in an application for arrest of the judgment-debtor for detention in civil prison for recovery of money where judgment-debtor liable to be arrested, the Court shall issue notice calling upon him to appear before the Court on a day to be specified to show-cause why shall not be committed to the civil prison rather than directly issuing warrant for his arrest; what the proviso says

is such notice shall not be necessary if the Court is satisfied by affidavit, or otherwise, that, with the object of defeating or delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.

7. With reference to the A.P. amendment, same as Madras, with effect from 30.03.1967, the warrant for arrest of the judgment-debtor shall direct the officer to whom warrant entrusted to bring him before the Court with all convenient speed, unless the amount ordered to pay, together with interest and costs, which he is liable, be sooner paid or unless satisfaction of the Court be endorsed by the decree-holder on the warrant in the manner provided by Rule 25(2) of or XXI C.P.C.

8. Rule 25 of Order XXI C.P.C. deals with endorsement on process and A.P. amendment, same as Madras amendment, with effect from very same date supra, requires the decree holder's endorsement on the warrant of decree specified and not necessary to execute or otherwise.

9. The above procedure is different from the procedure contemplated by Order XXI Rule 11 sub-rule (1) of C.P.C., which speaks where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

10. Order XXI Rule 11 sub-clauses (2) and (3) speaks of the need of written application with the enclosing certified copy of the decree in support of the prayer as to the mode of execution.

11. It is relevant now to refer the amended provision by Act 104 of 1976, with effect from 01.02.1977, incorporating Rule 11A to Order XXI, which reads as follows:

> Application for arrest to state grounds- Where an application is made for the arrest and detention in prison of the judgment-debtor, it shall state, or be accompanied by an affidavit stating, the grounds on which arrest is applied for.

12. Thus, though Order XXI Rule 37 C.P.C. proviso speaks the satisfaction by affidavit or otherwise of the Court of the necessity for immediate arrest before ordering notice otherwise mandatory before issuing arrest warrant; from this Rule 11(A) every application for arrest and detention in civil prison of the judgment-debtor (which is contemplated by Order XXI Rule 11 supra) shall state, or be accompanied by an affidavit stating, the grounds on which arrest is applied for. Thus, the grounds in the execution application are mandatory for the prayer of arrest of the judgment-debtor and how and what basis, such grounds can be either stated in the execution application or by accompanying affidavit. However, from the combined reading of Rule 37 and Rule 11A of Order XXI supra, for immediate arrest before notice concerned, affidavit generally required and otherwise even affidavit generally required. Thus, it is always safe for the executing Court to obtain an affidavit

of the decree-holder or any person on behalf of the decree-holder in support of the prayer for arrest of the judgment-debtor sought by stating the grounds therein on what basis the arrest is seeking as to how the judgment-debtor got means and willfully avoiding to satisfy the decree and on arrest it could be recovered.

13. Rule 17 of Order XXI speaks as follows:

> Procedure on receiving application for execution of decree-(1) on receiving an application for the execution of a decree as provided by Rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and if they have not been complied with, [the Court shall allow] the defect to be remedied then and there or within a time to be fixed by it. [(1A) If the defect is not so remedied, the Court shall reject the application: Provided that where, in the opinion of the Court, there is some inaccuracy as to the amount referred to in clauses (g) and (h) of sub-rule (2) of rule 11, the Court shall, instead of rejecting the application, decide provisionally (without prejudice to the right of the parties to have the amount finally decided in the course of the proceedings) the amount and make an order for the execution of the decree for the amount so provisionally decided.]
>
> (2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented. (3) Every amendment made under this rule shall be signed or initialled by the Judge. (4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application. Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree. 14. Rule 17A is inserted by A.P. amendment as in Madras amendment, with effect from 29.03.1945.

15. From the above, on receiving the written application of a decree under execution as per Rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 (so far as arrest concerned Rule 11A that applies and so far as attachment of movable and immovable property concerned rules 12 to 14 that apply) as may be applicable to the case to see that it being complied with, if not to reject the execution application itself, unless any inaccuracy requires further decision rather than rejecting by proviso proceeding with and on entering the same in the execution petition register.

16. Rule 40 of Order XXI C.P.C.

speaks that where judgmentdebtor in obedience to notice or on arrest warrant appeared or produced before the Executing Court for recovery of money, the Executing Court shall proceed to hear the decree-holder and take all such evidence as may be produced in support of his application for execution, and then shall give to the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison. Pending the conclusion of such enquiry, the Executing Court may, in its discretion, order the judgment-debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his future appearance as and when required.

17. Thus, in every execution application, the presence of the judgment-debtor, where notice ordered and where not issued directly warrant for his arrest and production, is necessary and not to dispense with by allowing any application to put appearance through Advocate, but for after his presence in view of the requirement for compliance of the above.

18. From this, coming to Rule 40 sub-rules (3) to (5) of Order XXI C.P.C. to be read with Section 51 C.P.C., on conclusion of such enquiry from judgment-debtor appeared on notice or produced on warrant with arrangement for detention under the officer of the Court for a period not exceeding 15 days or by releasing him on furnishing security for his due appearance, the Court may order for detention of the judgment-debtor in civil prison and if not already under arrest as referred supra, shall cause him be arrested. The judgment-debtor released may be re-arrested even, unless orders release of the judgment-debtor where held no arrest of him required for recovery of amount or the decree satisfied or otherwise or for no grounds to order arrest from the enquiry. Such warrant of committal supra, as per the A.P. amendment shall be signed by Magistrate of the Executing Court/District Munsif and before committal, there must be provided of substance allowance for that period by the decree-holder as contemplated by Rule 39 or Order XXI C.P.C., which is also for payment of charges for conveyance of the judgment-debtor by bus, train or otherwise whichever is available from the place of arrest to the Court-house or civil prison or vice versa, as the case may be.

19. From this background, Rule 21 of Order XXI speaks of simultaneous execution against person and property of the judgmentdebtor at a time rather than one after the other within the discretion of the Court to permit where necessary. Rule 22 speaks of the execution petition filed more than two years from the date of the decree or against the legal representatives of a party to the decree or against the assignee or receiver in insolvency, where the party to the decree has been adjudged as insolvent, the Executing Court shall issue notice to the person against whom execution applied to show-cause and where the Court feels necessary that notice can be dispensed with if already the matter once executed or otherwise, as the case may be.

20. Rule 41 which is also relevant in this context to mention though the chapter

heading before commencement of rule 41, 'as attachment of property', from the very wording of the rule is clear of examination of judgment-debtor as to his property, that where a decree is for the payment of money, the decree-holder may apply to the Court for an order to direct the judgment-debtor individual or the juristic personality represented by any officer of it responsible or any other person either by oral examination as to any and what debts owing to the judgment-debtor and whether judgment-debtor has any and what other property or means of satisfying the decree including by ordering attendance and examination of such judgment-debtor an individual or the officer of the juristic personality or other person including for production of books or documents and where a decree for payment of money remained unsatisfied for thirty days on the application of the decree-holder required the judgment-debtor supra to file an affidavit stating the particulars of the assets of him/her/it and any disobedience enables the Executing Court either to direct or to cause through another Court, for any disobedience to detention in civil prison for a term not exceeding three months and meantime to release on furnishing by affidavit such particulars, as the case may be. This Rule 41 of Order XXI C.P.C. is almost a kin on original side under Order XI C.P.C. of serving interrogatories to answer etc.,

21. From this, now coming to the means enquiry for arrest and detention, Sections 55 to 59 are relevant. Section 59 speaks of even after warrant for arrest of judgment-debtor issued, the Court may cancel the same on the ground of illness of judgment-debtor or where arrested and committed to civil prison for his release if he is not in fit state of health to be detained in the civil prison or the State Government on the ground of the existence of any infectious or contagious disease or by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness for release of the judgment-debtor, which no way prevent his re-arrest. However, the detention in civil prison shall not exceeding the period what is provided by Section 58. Section 58 speaks in case of default of payment of money of above five thousand rupees, the detention period totally shall not exceed three months and where it is below five thousand rupees and is exceeding to two thousand rupees, the detention period shall not be exceeding six weeks and even the decree not satisfied, he shall be released from such detention after its expiry, if at all earlier the amount covered by warrant of detention paid to the officer in charge of the civil prison or decree otherwise satisfied from any order of Court for release or from non payment of subsistence allowance by the decree-holder for the detention of the judgment-debtor. It further speaks if the amount of execution under a decree for money not exceeding two thousand rupees, question of arrest and detention of the judgment-debtor in civil prison does not arise. It is further clarified that after expiry of the period supra, it does not mean discharge from the decree debt, but for not liable to be re-arrested where the total period of earlier arrest is at the limit supra. Section 57 like Rule 39 Order XXI speaks the subsistence allowance to be fixed by the State Government. Section

56 speaks the Court shall not order the arrest or detention in the civil prison of a women in execution of decree for payment of money.

22. Now, Section 55, which is material, reads as follows:

> 55. Arrest and detention.(1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the State Government may appoint for the detention of persons ordered by the Courts of such district to be detained :
>
> Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise;
>
> Provided, secondly, that no outer door of a dwellinghouse shall be broken open unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorised to make the arrest has duly gained access to any dwelling house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found;
>
> Provided, thirdly, that if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorised to make the arrest shall give notice to her that she is at liberty to withdraw, and , after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest;
>
> Provided fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.
>
> (2) The State Government may, by notification in the Official Gazette declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the State Government in this behalf.
>
> (3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall

inform him that he may apply to be declared an insolvent, and that he may be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realised or commit him to the civil prison in execution of the decree.

23. Here, from sub-rule 4 of Section 55, it is clear that judgmentdebtor appeared from notice or on warrant having satisfied about the necessity of arrest in the pre-enquiry of judgment-debtor about his means, where judgment-debtor expresses his intention to apply to be declared as insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be released or commit him to the civil prison in execution of the decree. Thus, apart from the right of the decree-holder including from Rule 41 of Order XXI C.P.C. about the means of the judgment-debtor as to his properties and assets and liability, for that by affidavit to call for to make a request, to call for it is for the decree-holder to establish the means of the judgment-debtor.

24. In the background of law supra, now coming to the facts of the impugned order, the suit O.S.No.8 of 2008 was decreed on 26.02.2009 by the Senior Civil Judge, Avanigadda, for Rs.1,29,973/- with subsequent interest and costs. It is for recovery of the same with execution costs, the E.P. for arrest of the judgment-debtor to realize sought for saying by the decree-holder, the judgment-debtor got a house at Tadigadapa village of Krishna District and getting rent of Rs.2,000/- per month and running mechanic shop with name and style 'Star Mechanic Works' at Autonagar, Vijayawada, by earning at Rs.15,000/- per month and also doing broker business and getting Rs.5,000/- per month and also possessed other movable and immovable properties and despite means willfully neglecting and failed to pay and if arrest is ordered the amount can be realized easily. The judgment-debtor filed counter in saying he is unemployee, not having any avocation and unable to survive himself, being a heart patient requires minimum Rs.2,000/- per month towards treatment and not doing any work from that ill-health and not in a position to pay the decree debt though is he willing to pay, thereby sought for fixing the payment by installments at Rs.1,000/- per month and that he is the allegation of means within

the knowledge of the decree-holder, hence to dismiss the E.P. otherwise.

25. As referred supra, in the course of hearing, on behalf of decreeholder, PWs.1 and 2 examined and R.W.1-judgment-debtor deposed with reference to Exs.B1 to B4.

26. PW.1-decree-holder reiterated the above facts regarding sufficient means of judgment-debtor and he is willfully avoiding payment and PW.2 deposed of he is working as mechanic in Autonagar and judgment-debtor is running Star Mechanic Works at Autonagar and getting Rs.15,000/- per month income and also doing broker business and getting Rs.5,000/- per month. The judgmentdebtor reiterated in his affidavit what he contended in the counter and mainly coming to Exs.B1 to B4 concerned Ex. B4 is the application of PW.2 to ascertain the house particulars of the judgment-debtor. Ex.B1 is the medical bills of the judgment-debtor including as to he underwent bypass surgery in 2006. Ex.B2 photos are of the period for undergoing surgery. Ex.B3 is the medical prescriptions. From the above what the trial Court observed is the decree holder did not file any proof of what is the house property and did not show any record about the judgment-debtor running Star Mechanic Works to show he is owning the same, despite the judgment-debtor denied the same. Apart from it, if at all the judgment-debtor got the means as held by this Court in VISARAPU SOMESWARA RAO V. MUTYALA GANGA RAJU(1) , of if owning house and other properties, the decree-holder can proceed against the properties of the judgment-debtor rather than person of the judgment-debtor. It is with these conclusions the executing Court dismissed the petition for arrest of the judgment-debtor saying the decree-holder did not establish the means of the judgment-debtor.

27. Coming the impugnment with reference to the above, once the order is supported by reasons, and what PWs.1 and 2 orally deposed is denied by RW.1-judgment-debtor of not possessing any Star Mechanic Works, not getting income, not having house, no means, no avocation and there is no scrap of paper filed by the decree-holder on whom the burden lies, for this Court while sitting in revision, there is nothing to interfere with the dismissal order.

28. Accordingly, the civil revision petition is dismissed and it is made clear while dismissing the revision that it is left open to the decree-holder if at all the particulars are of the Star Mechanic Works and the house property particulars secured including by affidavit or otherwise if at all from the judgment-debtor through Executing Court under Rule 41 of Order XXI C.P.C., a fresh petition lies.

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1. 2011(4) ALD143

2018(1) L.S. 89

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

Present:
The Hon'ble The Acting Chief Justice Ramesh Ranganathan &
The Hon'ble Mr. Justice Gudiseva Shyam Prasad

Yelugubanti Hari Babu ..Appellant
Vs.
State of A.P., & Ors., ..Respondents

CRIMINAL PROCEDURE CODE, Sec.145(1) – SCOPE, OBJECT AND JURISDICTION – Stated – Tahsildar passed order u/Sec.145(1) basing on material placed before him that there existed dispute with respect to subject land which was likely to cause breach of peace - Contention that order of Tahsildar is contrary to Sec.145(1) Cr.P.C., it is an abuse of power and excess of jurisdiction conferred on him.

Held - Object of Sec,145(1) Cr.P.C. is to maintain law and order and prevent the breach of peace by maintaining one or other of the parties in possession, and not for evicting any person from possession - Order u/ Sec.145(1) Cr.P.C. is passed primarily to ensure that a breach of peace does not occur and import of such an order cannot travel beyond that - It is incumbent upon administrative authorities to pass a speaking and reasoned order – As long as there is information on record in this regard, it is wholly unnecessary for the Executive Magistrate to await police report before passing order u/Sec.145(1) Cr.P.C.

Satisfaction u/Sec.145(1) Cr.P.C that a dispute which is likely to cause breach of peace exists concerning any land is that of Executive Magistrate which constitutes the foundation for exercise of power conferred by Sec.145(1) Cr.P.C., is neither absolute nor unfettered, but is circumscribed by conditions, stipulated in Section itself that executive Magistrate should make an order in writing stating grounds of satisfaction - Mere existence of dispute would, however, not suffice for what is required u/sec.145(1) Cr,P.C. is that existing dispute concerning any land must be one which is likely to cause breach of peace,

In this case only material on record which forms basis for passing an order U/sec.145(1) Cr.P.C. is evidently FIR dated 13-5-2017 which refers to an incident which allegedly occurred on 7-5-2017 – Allegations in FIR dt13-5-2017 can undoubtedly, Form basis of Tahsildar's satisfaction that dispute concerning land which is likely to cause breach of peace – Fact however remains that alleged incident which forms only basis for exercise of power u/sec.145(1) Cr.P.C. is said to have taken place on 7-5-2017 five months prior to 17-10-2017 when Tahsildar passed impugned order and material on record does not refer to any other incident

in interregnum - Order of Tahsildar set aside and matter remitted for consideration afresh and in accordance with law – Writ appeal and writ petition are allowed.

Cases Referred:

1)(2013) 3 SCC 366
2) (Judgment in Crl.Rev.Appl.No.654 of 2014 dated 31.01.2013 (Gujarat HighCourt)
3)(2012) 4 SCC 407
4)(1991 Supp (1) SCC 414 AIR 1990 SC 2205
5)AIR 1967 SC 1269
6)(1978) 1 SCC 405
7)(1991) 3 SCC 38
8)(2010) 2 SCC 497
9)(1990) 4 SCC 594
10)(1992) 4 SCC 605 = AIR 1993 SC 1407
11)(2004) 7 SCC 467
12)(1985) 3 SCC 398
13)(1977) 39 STC 478 (SC)
14)[1969] 1 S.C.R. 317
15)[1949] 1 All. England Reports 108
16)AIR 1978 SC 597
17)(1971) 3 SCC 864 = AIR 1973 SC 205
18)(1977) 2 SCC 256
19)(1993) 4 SCC 727
20)(2010) 13 SCC 216)
21)AIR 1984 S.C. 1030
22)(2006) 3 SCC 276
23)(1970) 2 SCC 458
24)(1981) 1 SCC 664
25)(1975) 2 SCC 81
26)(1986) 4 SCC 378
27)AIR 1967 SC 295
28)(1999) 4 SCC 514
29)(2005) 7 SCC 627
30)(2008)1 SCC 728
31)(1990)4 SCC 356
32)(2007)2 SCC 181
33)AIR 1964 SC 72
34)AIR 1950 FC 129
35)AIR 1969 SC 707

Mr.C. Ramachandra Raju, Advocate for the Appellant.
GP for Revenue (AP) for Respondent.

C O M M O N J U D G M E N T

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

While this appeal is, no doubt, preferred against the interlocutory order passed by the Learned Single Judge in W.P.No.39133 of 2017 dated 27.11.2017, both Sri C.Ramachandra Raju, learned counsel for the appellant-writ petitioner, and the learned Government Pleader for Revenue, on instructions from the 2nd respondent, agree that the writ petition itself be heard and decided at the stage of admission.

The Learned Single Judge had, before passing the order under appeal, called for the records and noted that there were criminal cases pending against the appellant-writ petitioner. We had also called for the records to satisfy ourselves that the satisfaction of the Tahsildar, that there existed a dispute with respect to the subject land which was likely to cause a breach of peace necessitating an order being passed under Section 145(1) Cr.P.C, was formed on the basis of the material placed before him.

Sri C. Ramachandra Raju, Learned Counsel for the petitioner, would submit that the order of the Tahsildar dated 17.10.2017,

(the validity of which is impugned in the Writ Petition), is contrary to Section 145 Cr.P.C; it is an abuse of power, and is in excess of the jurisdiction conferred on the Tahsildar who was obligated to record reasons stating the grounds on which he was satisfied that there was a likelihood of breach of peace; action under Section 145(1) Cr.P.C. can only be taken on the basis of a police report, to which no reference is made in the impugned order; reference ought to have been made by the Tahsildar to the material based on which he had arrived at the conclusion that there was a likelihood of breach of peace; and, in any event, no order could have been passed under Section 145 Cr.P.C without putting the appellant-writ petitioner on notice, and without giving him an opportunity of being heard.

On the other hand, learned Government Pleader for Revenue would contend that, as long as the record discloses material to show that there was a likelihood of breach of peace, the mere fact that they have not been referred to in detail in the order of the Tahsildar would not denude him of the power to pass an order under Section 145 Cr.P.C; it is evident from the material on record, based on which the order impugned in the writ petition was passed, that there were three criminal cases pending against the appellant-writ petitioner; FIR No.118 of 2017 explicitly refers to the appellant-writ petitioner having trespassed into the subject land along with his henchmen, to have cut the trees in the land, and to have carried the logs away; the complaint also records the appellant-writ petitioner having threatened the complainant in FIR No.118 of 2017 with dire consequences, if she did not vacate the land; and the material on record suffices for the Tahsildar to arrive at the satisfaction that an order under Section 145(1) Cr.P.C was necessary to prevent a breach of peace as a result of the dispute relating to the subject property.

I. SECTION 145 CRPC : ITS SCOPE:

Section 145 Cr.P.C prescribes the procedure where a dispute, concerning land or water, is likely to cause breach of peace. Sub-Section (1) thereof stipulates that whenever an Executive Magistrate is satisfied, from a report of a police officer or upon other information, that a dispute, likely to cause a breach of the peace, exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned, in such a dispute, to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respect to the fact of actual possession of the subject land in dispute.

The object of Section 145 CrPC is to maintain law and order, and prevent the breach of peace by maintaining one or other of the parties in possession, and not for evicting any person from possession. (ASHOK KUMAR V. STATE OF UTTARAKHAND(1) . The scope of enquiry under Section 145 Cr.P.C. is in respect of actual possession without reference to the merits or claim of any of the parties to a right to possess

1)(2013) 3 SCC 366

the subject of dispute. (Ashok Kumar1). The order, passed under Section 145(1) thereof, is an executive order. It does not determine the rights of the parties in respect of the subject land for which it operates. Such an order does not also determine any rights either with respect to possession or about ownership of the parties which may be agitated by the parties before the Civil Court or any other adjudicatory forum. Sub-section (4) of Section 145 Cr.P.C. makes it clear that the order passed by the Executive Magistrate is without reference to the merits of the claim, of any of the parties, to the right to possess the subject matter of the dispute. An order, under Section 145(1) Cr.P.C, is passed primarily to ensure that a breach of peace does not occur. The import of such an order cannot travel beyond that. (NAGABHAI MERABHAI BHARVAD - THRO' V. STATE OF GUJARAT (2)). If, after an enquiry under Section 145 Cr.P.C, the Executive Magistrate is of the opinion that none of the parties was in actual possession of the subject of dispute at the time of the order passed under Section 145(1), or is unable to decide which of the parties was in such possession, he may attach the subject of dispute until a competent court has determined the right of the parties thereto with regard to the person entitled to possession thereof. (Ashok Kumar1).

II. ORDER UNDER SECTION 145(1) CRPC MUST RECORD REASONS TO SHOW THAT THE CONDITIONS STIPLATED IN THE PROVISION ARE FULFILLED:

Section 145(1) Cr.P.C. also requires the Executive Magistrate to make an order in writing, and to state the ground of his satisfaction. The emphasis placed by Section 145(1) Cr.P.C, on the need of an Executive Magistrate to make an order in writing, stating the grounds on which his satisfaction, that a dispute likely to cause breach of peace exists concerning any land, is that, if the decision reveals the inscrutable face of the sphinx, it can, by its silence, render it virtually impossible for the Courts to exercise the power of judicial review in adjudging the validity of the decision. A right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind of the authority before the Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out the reasons for the order made, in other words, a speaking out. (RAVI YASHWANT BHOIR V. COLLECTOR (3); STATE OF W.B. V. ATUL KRISHNA SHAW (4).

Apart from the requirement of the statutory provision, it is well settled that principles of natural justice are applicable to administrative orders having civil consequences. Civil consequences cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non- pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence. (STATE OF ORISSA

2) (Judgment in Crl.Rev.Appl.No.654 of 2014 dated 31.01.2013 (Gujarat HighCourt)

3)(2012) 4 SCC 407

4)(1991 Supp (1) SCC 414 AIR 1990 SC 2205

V. DR (MISS) BINAPANI DEVI (5); MOHINDER SINGH GILL V. CHIEF ELECTION COMMISSIONER(6) ; UNION OF INDIA V. E.G. NAMBUDIRI(7).The requirement of recording reasons by an administrative authority entrusted with the task of passing an order adversely affecting an individual, and communication thereof to the affected person, is a recognised facet of the rules of natural justice, and violation thereof has the effect of vitiating the order passed by the authority concerned. (G. VALLIKUMARI V. ANDHRA EDUCATION SOCIETY(8). It is incumbent upon administrative authorities to pass a speaking and a reasoned order. Except in cases where the requirement to record reasons is expressly or by necessary implication dispensed with, an administrative authority must record reasons for its decision. (Ravi Yashwant Bhoir3; S.N. MUKHERJEE V. UNION OF INDIA(9)). Reasons demonstrate how the mind of the maker was activated and actuated, and their rational nexus and synthesis with the facts considered and the conclusions reached. (RAVI YASHWANT BHOIR3 KRISHNA SWAMI V. UNION OF INDIA(10)).

Let us now examine whether the order passed by the Tahsildar assigns reasons to show that the conditions stipulated in Section 145(1) Cr.P.C. have been fulfilled. The proceedings, under challenge in the Writ Petition, is the order passed by the Mandal Executive Magistrate and Tahsildar, Rajamahendravaram dated 17.10.2017 issuing prohibitory orders under Section 145 Cr.P.C. The said order records that the appellant-writ petitioner, along with three others, was claiming the land in R.S.Nos.416/2B2A and 416/2B2B admeasuring Ac.15.53 cents of land at Rajamahendravaram Urban Mandal, and was agitating their rights over the property; they were carrying their henchmen, and hurling challenges against each other; and cases were also registered against them in the SHO, Bommuru. The order further records that a dispute, regarding the subject land, is pending in LCC.No.919/RJY/75 before the LRAT, Kakinada; and a revision appeal is pending before the Joint Collector, Kakinada under Section 9 of the A.P. Record of Rights in Land and Pattadar Pass Books Act, 1971 (for short the ROR Act).

The Tahsildar, thereafter, observed that the dispute was likely to induce a breach of peace between the two parties, and then held that, in order to maintain law and order and to avoid breach of peace, there was every need to take preventive steps by restraining both the parties from entering into the subject land, by invoking his powers under Section 145 Cr.P.C, till the dispute was settled. The Tahsildar recorded his satisfaction, from the material placed before him, that there were sufficient grounds for proceeding under Section 145 Cr.P.C; immediate prevention was desirable; and the situation, if not properly checked immediately, may lead to undesirable consequences paralysing the peaceful atmosphere. The Tahsildar, in the exercise of his powers under Section 145 Cr.P.C,

5)AIR 1967 SC 1269
6)(1978) 1 SCC 405
7)(1991) 3 SCC 38
8)(2010) 2 SCC 497
9)(1990) 4 SCC 594
10)(1992) 4 SCC 605 = AIR 1993 SC 1407

prohibited entry into the subject land until further orders. He also recorded that the order was passed ex parte against the public in general and the interested parties, and it would be in force until further orders.

While the order of the Tahsildar dated 17.10.2017 takes note of factors which may not be germane such as the proceedings pending before the LRAT, Kakinada and the Joint Collector under Section 9 of the ROR Act, which only reflect the existing disputes between the parties and nothing more, the impugned order also indicates, albeit in brief, the grounds based on which he was satisfied that a dispute exists with respect to the subject land which is likely to cause breach of peace, in that it is stated therein that the appellant-writ petitioners, along with three others, was claiming the land in R.S. No.416/2B2A and 416/2B2B admeasuring Ac.15.53 cts of land at Rajamahendravaram Urban Mandal, and was agitating their rights over the property; they were carrying their henchmen and were hurling challenges against each other; and cases were also registered against them in the SHO, Bommuru.

III. CAN THE EXECUTIVE MAGISTRATE EXERCISE POWER, UNDER SECTION 145(1) CRPC, ONLY ON RECEIPT OF A POLICE REPORT?

The contention that it is only on receipt of a police report, can action be taken under Section 145 (1) Cr.P.C. is not tenable, as the said provision enables the Executive Magistrate to arrive at his satisfaction, of the existence of a dispute relating to land which is likely to cause a breach of peace, either from the report of a police officer or upon such other information. The words upon such other information in Section 145(1) Cr.P.C. would enable the Executive Magistrate to act on any information, that he may have before him, and not merely on the basis of the report of a police officer. Such information may afford the basis for a sufficiently strong suspicion to take action, and need not satisfy the test of legal proof. (COMMR. OF POLICE V. C. ANITA)(11)). It would suffice if there is some information on record before the Executive Magistrate, which can be said to form a reasonable basis for his satisfaction that there exists a dispute with respect to the land, which is likely to cause breach of peace. As long as there is some information on record in this regard, it is wholly unnecessary for the Executive Magistrate to await a police report before passing the order under Section 145 (1) Cr.P.C. In any event, the records placed before us, for our perusal, show that the order passed by the Tahsildar on 17.10.2017 is also based on the report of the Inspector of Police, Bommuru P.S., dated 6.7.2017.

IV. ARE THE PARTIES TO THE DISPUTE REQUIRED TO BE PUT ON NOTICE, AND BE GIVEN AN OPPORTUNITY OF BEING HEARD, BEFORE AN ORDER UNDER SECTION 145 (1) CR.P.C. IS PASSED?

The order passed by the Executive Magistrate, exercising his powers under Section 145 (1) Cr.P.C, is on his being satisfied that a dispute, likely to cause breach of peace concerning any land, exists necessitating an order being passed to prevent such breach. Exercise of power

11)(2004) 7 SCC 467

under Section 145(1) Cr.P.C, to pass an order to prevent a breach of peace, is at a stage anterior to the occurrence of the breach. It is clear from Section 145(1) Cr.P.C. that the Executive Magistrate is required to make an order in writing stating the grounds for his satisfaction that a dispute, likely to cause a breach of peace, exists concerning any land, and requiring the parties concerned to attend before him in person or by pleader, on a specified date and time, and put in a written statements of their respective claims. That an opportunity of hearing is required to be afforded, at a stage posterior to the passing of an order under Section 145 (1) Cr.P.C, is clear from Section 145 (4) Cr.P.C which requires the Magistrate, after getting a copy of the order under Section 145 (1) Cr.P.C. served upon such person or persons, to peruse the written statements put in by the parties, hear them, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary; and thereafter, if it is possible for him to do so, to decide whether any, and which, of the parties was, on the date he made the order under Section 145 (1) Cr.P.C., in possession of the subject land. The proviso to Section 145 (4) Cr.P.C. confers power on the Magistrate, if it appears to him that a party has been forcibly and wrongfully dispossessed within two months before the date on which he received information and before the date of the order under Section 145 (1) Cr.P.C., to treat the parties, so dispossessed, as if he/she is the party in possession on the date of the order made under Section 145 (1) Cr.P.C. The sub-sections of Section 145 Cr.P.C. show that an opportunity of putting their claims, and to be afforded an opportunity of being heard, is made available to the parties at a stage posterior to the order made under Section 145 (1) Cr.P.C.

Rules of natural justice are not statutory rules. They are not cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable but flexible. These rules can be adapted and modified by statutes and statutory rules. (UNION OF INDIA V. TULSIRAM PATEL(12). The rules of natural justice are not a constant: they are not absolute and rigid rules having universal application. The requirement of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the authority is acting, the subject matter that is being dealt with, and so forth. (STATE OF KERALA V. K.T. SHADULI YOUSUFF(13) SURESH KOSHY GEORGE V. THE UNIVERSITY OF KERALA(14) ; RUSSEL V. DUKE OF NORFOLK (15). As the rules of natural justice are not embodied rules, what particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case and the framework of the law. (MANEKA GANDHI V. UNION OF INDIA (16); SURESH KOSHY GEORGE14D.F.O., SOUTH KHERI V. RAM SANEHI SINGH(17).

Principles of natural justice is not a mantra

12)(1985) 3 SCC 398
13)(1977) 39 STC 478 (SC)
14)[1969] 1 S.C.R. 317
15)[1949] 1 All. England Reports 108
16)AIR 1978 SC 597
17)(1971) 3 SCC 864 = AIR 1973 SC 205

to be applied in a vacuum, or be put in a straitjacket. Natural justice is not an unruly horse, no lurking landmine, nor a judicial cure-all. The court has to determine whether observance of the principles of natural justice was necessary for that particular case. (CHAIRMAN, BOARD OF MINING EXAMINATION AND CHIEF INSPECTOR OF MINES V. RAMJEE(18) ; Tulsiram Patel12; ECIL V. B. KARUNAKAR (19); MUNICIPAL COMMITTEE, HOSHIARPUR V. PUNJAB STATE ELECTRICITY BOARD(20). It should not proceed as if there are inflexible rules of natural justice of universal application. Each case depends on its own circumstances. Rules of natural justice vary with the laws prescribed by the legislature. (M/S. CHINGLEPUT BOTTLERS V. M/S. MAJESTIC BOTTLING CO.(21).

Not only can principles of natural justice be modified but, in exceptional cases, they can even be excluded where the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions warrant its exclusion. (TULSIRAM PATEL12; STATE OF U.P. V. SHEO SHANKER LAL SRIVASTAVA(22). If a statutory provision either specifically, or by necessary implication, excludes the application of any or all the principles of natural justice, then the court cannot ignore the mandate of the Legislature or the statutory authority and read, into the concerned provision, principles of natural justice. (UNION OF INDIA V. COL. J.N. SINHA(23) Tulsiram Patel12). The implication of natural justice being presumptive, it may be excluded by express words of the statute or by necessary intendment. (SWADESHI COTTON MILLS V. UNION OF INDIA(24) ; Tulsiram Patel12).

The statutory procedure prescribed in Section 145 Cr.P.C. explicitly requires the parties to be called upon to put forth their claims, to be given an opportunity of being heard, and to adduce evidence in support of their claims, only after an order is passed under Section 145 (1) Cr.P.C, as putting the parties to the dispute on notice, and giving them an opportunity of being heard, before passing an order under Section 145(1) Cr.P.C. may well result in a breach of peace rendering the very purpose of enacting Section 145 Cr.P.C. redundant. We must, therefore, express our inability to agree with the submission of Sri C. Ramachandra Raju, learned counsel for the petitioner, that, before an order under Section 145(1) Cr.P.C. is passed, the affected parties should be put on notice and be given an opportunity of being heard, or that the petitioner was entitled to be put on notice, and to be heard, at a stage prior to the making of an order under Section 145 (1) Cr.P.C.

V. JUDICIAL REVIEW OF THE EXERCISE OF SUBJECTIVE SATISFACTION BY THE EXECUTIVE MAGISTRATE UNDER SECTION 145(1) CRPC:

The power, under Section 145(1) Cr.P.C, is a preventive measure, and is taken by way of precaution to prevent a breach of peace.

18)(1977) 2 SCC 256
19)(1993) 4 SCC 727
20)(2010) 13 SCC 216)
21)AIR 1984 S.C. 1030
22)(2006) 3 SCC 276
23)(1970) 2 SCC 458
24)(1981) 1 SCC 664

Since every preventive measure is based on the principle that a person should be prevented from doing something which, if left free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof. The words is satisfied, in Section 145(1) Cr.P.C, imports subjective satisfaction on the part of the Executive Magistrate before an order is made. (KHUDIRAM DAS V. STATE OF W.B.(25).

The satisfaction under Section 145 Cr.P.C., that a dispute which is likely to cause breach of peace exists concerning any land, is that of the Executive Magistrate and is subjective. Such satisfaction of the Executive Magistrate, which constitutes the foundation for exercise of the power conferred by Section 145(1) Cr.P.C, is neither absolute nor unfettered, but is circumscribed by the conditions, stipulated in the Section itself that the Executive Magistrate should make an order in writing stating the grounds of his satisfaction. The Court, however, cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction of the Executive Magistrate is based. Nor can it, on a review of the information available with the Executive Magistrate, substitute its own opinion for that of his, for what is made a condition precedent, to the exercise of the power under Section 145(1) Cr.P.C, is not an objective determination of the necessity to pass the order, but the subjective opinion of the Executive Magistrate; and if a subjective opinion is formed by him, as regards the necessity, the condition for exercise of power would be fulfilled. (Khudiram Das25).

If the facts alleged are presumed to be true, there is a causal connection between the facts alleged and the purpose of the order, and the formation of the opinion is not malafide, then the sufficiency of the grounds and the truth of the grounds is not germane. (SURAJ PAL SAHU V. STATE OF MAHARASHTRA(26) ; BARIUM CHEMICALS LTD. V. COMPANY LAW BOARD (27). What is required to be considered is whether there was credible material before the Executive Magistrate on the basis of which a reasonable inference could have been drawn as regards the likelihood of a breach of peace being caused. Whether the material is sufficient or not is not for the Courts to decide by applying an objective test as it is a matter of subjective satisfaction of the Executive Magistrate. (KANUJI S. ZALA V. STATE OF GUJARAT(28).

Since the satisfaction under Section 145(1) Cr.P.C. is that of the Executive Magistrate, this Court, in proceedings under Article 226 of the Constitution of India, would not substitute its satisfaction for that of his. The subjective satisfaction of the Executive Magistrate, in passing an order under Section 145 Cr.P.C, is however not wholly immune from judicial review. There is an area, limited though it be, within which the validity of the subjective satisfaction can be subjected to judicial scrutiny. As subjective satisfaction is a condition

25)(1975) 2 SCC 81

26)(1986) 4 SCC 378

27)AIR 1967 SC 295

28)(1999) 4 SCC 514

precedent for exercise of the power conferred on the Executive Magistrate, the Court can always examine whether the requisite satisfaction is arrived at by him. If it is not, the condition precedent would not be fulfilled, and the exercise of power would be illegal. (Khudiram Das25). Existence of circumstances, relevant to the inference as the sine qua non for action, must be demonstrable. If the action is questioned on the ground that no circumstances, leading to an inference of the kind contemplated by the Section, exists, the action might be exposed to interference unless the existence of the circumstances is made out. It is not reasonable to say that Section 145(1) Cr.P.C. permitted the Executive Magistrate to say that it has formed the opinion on circumstances which it thinks exist. Since the existence of circumstances is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness. (Barium Chemicals Ltd.27; Swadeshi Cotton Mills24).

If there be found in the Statute, expressly or by implication, matters which the authority ought to have regard to, then, in exercising the power, the authority must have regard to those matters. The authority must call its attention to the matters which it is bound to consider. (Khudiram Das25). Formation of opinion must be preceded by application of mind as regards consideration of relevant factors and rejection of irrelevant ones. (HINDUSTAN PETROLEUM CORPN. LTD. V. DARIUS SHAPUR CHENAI(29) ; DEVINDER SINGH V. STATE OF PUNJAB(30). While the formation of opinion is subjective, existence of circumstances relevant to the inference, as the sine qua non for action, must be demonstrable. (Barium Chemicals Ltd.27; Swadeshi Cotton Mills24). In the formation of opinion regard must be had to the factors enumerated in Section 145(1) Cr.P.C. together with all other factors relevant for the exercise of that power. Formation of opinion must be based on objective considerations. (INDIA CEMENT LTD. V. UNION OF INDIA (31), RAJESH KUMAR V. DY. CIT (32). The satisfaction of the authority must be grounded on materials which are of rationally probative value. The grounds on which the satisfaction is based must be such as a rational human being can consider as being connected with the fact in respect of which the satisfaction is to be reached. They must be relevant to the subject-matter of the inquiry and must not be extraneous to the scope and purpose of the Statute. If the authority has taken into account, it may even be with the best of intention, as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, exercise of the power would be illegal. (Khudiram Das25; PRATAP SINGH V. STATE OF PUNJAB (33);

29)(2005) 7 SCC 627
30)(2008)1 SCC 728
31)(1990)4 SCC 356
32)(2007)2 SCC 181
33)AIR 1964 SC 72

MACHINDAR V. KING (34).

Existence of the circumstances, stipulated in Section 145(1) Cr.P.C, is a condition precedent for the formation of the requisite opinion and, if the existence of those conditions is challenged, Courts are entitled to examine whether those circumstances existed when the order was made. (ROHTAS INDUSTRIES LTD V. S.D. AGARWAL(35)). If it is shown that the circumstances do not exist, or that they are such that it is impossible for any one to form an opinion therefrom, the opinion can be challenged on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the Statute. (Barium Chemicals Ltd.27). If the satisfaction, regarding the existence of any of the conditions stipulated in Section 145(1) Cr.P.C, is based on no evidence or on irrelevant and extraneous considerations, the Court will be justified in quashing such an illegal order. (Swadeshi Cotton Mills24). Let us now examine whether formation of opinion by the Executive Magistrate is based on the material on record before him; whether the satisfaction under Section 145(1) Cr.P.C. is based on relevant, and not irrelevant, factors; and whether the order dated 17.10.2017 suffers from non-application of mind to the conditions germane to Section 145(1) Cr.P.C.

The records placed before us, (based on which the Tahsildar passed the order under Section 145(1) Cr.P.C. on 17.10.2017), contains three criminal complaints lodged against the petitioner. The first is FIR No.353 of 2015 which was registered with the Bommuru police station on 24.10.2015, and records the date and time of occurrence of the incident as 21.03.2013 at 00.05 hours. It is alleged therein that the petitioner had approached the complainant with the malafide intention of claiming that he was the absolute owner of the landed property of an extent of 14 acres covered by Sy. No.416/2B2 situated near Kavalagoyyi Road, Rajahmundry by virtue of a will dated 14.08.1985 said to have been executed by Sri K. Pardhasarathi in favour of his father, and later the property was succeeded by him; he had offered to sell the said property to the complainant, and had entered into a sale agreement dated 21.03.2013; believing the words of the accused, the complainant had paid Rs.90 lakhs periodically, towards advance of the sale proceeds, to him; subsequently the accused had denied, having executed a sale deed, with false allegations; later the complainant came to know that the alleged will dated 14.08.1985 was forged and fabricated, and Sri K. Pardhasaradhi had never executed such a will in favour of the father of the accused; the signature/thumb impression put on the papers were different; and the accused had cheated the complainant, and had gained wrongfully, causing the complainant irreparable loss of Rs.90 lakhs.

The next complaint, registered as FIR No.118 of 2017 dated 13.05.2017 under Sections 420, 465, 468, 471, 447, 427, 506 read with 34 IPC, records the date of occurrence of the incident as 07.05.2017. The said FIR records that the complainant owned an

34)AIR 1950 FC 129
35)AIR 1969 SC 707

extent of Ac.16.00 cts in R.S. No.416/2B3 at Kalavagoyyi Road, Rajamahendravaram which she inherited from her adoptive father Sri K. Pardhasaradhi; she is in possession and enjoyment of the said property, but the accused and the petitioner had fraudulently created a fake codicil in respect of her property, with the help of Alla Srinu, Alla Lakshmi, Alla China, by manipulating the records at the Sub-Registrars office, Gandhinagar, Vijayawada taking advantage of violence that raged after the assassination of Sri Vangaveeti Mohana Ranga; the accused had got his name entered in the revenue records, which acts were declared to be illegal by the Sub-Collector; the accused was harassing her to vacate her land; on 07.05.2017, the accused, together with his henchmen Hemanth, Relangi Sathibabu, Relangi Srinu, John, Yesu Rathnam, Uppara Venkateswarao, had criminally trespassed into her land with JCB Machines, tractors; had cut the trees mischievously causing damage to her garden, and had shifted them from her land; later they visited her house, in two cars bearing Nos.AP 9 1234 and AP 16 5055, and had threatened her with dire consequences if she failed to leave her property to them.

The third complaint, registered against the petitioner, is FIR No.194 of 2017 dated 05.07.2017 wherein the complainant, Sri Tangella Raja Rajeswara Rao, the Tahsildar, alleged that the petitioner had indulged in forgery of the signature of Sri K. Narasimha Murthy, the then MRO, Rajahmundry; he had tampered with the revenue records, and had got pattadar pass books and title deeds in his favour in respect of the land in Sy. No.416/2A2B and 416/2B2B admeasuring Ac.15.53 cts; the Sub-Collector, Rajamahendravaram had conducted an enquiry, and had sent the signatures on the ROR 1B register to the Forensic Science Laboratory, Hyderabad which, in turn, certified that the signatures were got tampered.

The records placed before us also contains the report of the Inspector of Police, Bommuru police station dated 06.07.2017 wherein it is stated that the petitioner had registered the complaint in Cr. No.248 of 2013 with Bommuru police Station claiming that his tenants Sri Meda Srinivas, Mattaparthi Sivayya, Mattaparthi Satyanarayana and Mattaparthi Srinu had made attempt to grab his land in collusion with a rowdy sheeter Sri Mattaparthi Srinu; he had also filed a civil suit against them in O.S. No.705 of 2012 for injunction; Smt Parvathi Narasimharao had conspired together with Sri M.V.V. Bapayya Chowdary, Sri S. Prasad, Sri Ch.M.V.S.N.S.D. Prasad, Sri P. Rajakumar and Sri Nemani Krishna Raja Sekhar; she had created a memorandum of understanding which was forged and fabricated, and was purportedly executed on 27.05.2013 by the petitioner in favour of the first accused; and the same was brought into existence dishonestly with an intention to grab the land.

The report of the Inspector of Police dated 06.07.2017 further records that Sri N. Krishna Raja Sekhar had lodged a counter-complaint alleging that the petitioner had approached him with the malafide intention, claiming that he was the absolute owner of the land; believing his words he had paid Rs.90 lakhs

periodically; subsequently the petitioner denied having executed a sale deed; later he came to know that the alleged will dated 14.08.1985 was forged and fabricated, and no will was executed in favour of the petitioners father. The Inspectors report records the counter-complaint to have been registered on 24.10.2015 (evidently FIR No.352 of 2015 dated 24.10.2015 which refers to an incident which took place two and half years prior thereto on 21.03.2013).

The Inspectors report also refers to the complaint lodged on 13.05.2017 by Smt. Chelluri Sarojini (evidently FIR No.118 of 2017) that, on 07.05.2017, the petitioner and his henchmen had criminally trespassed into the complainants land with JCB machines and tractors, they had cut the trees, and had mischievously caused damage to her property; they later visited her house in two cars, and threatened to kill her if she failed to leave her property to them. The said report also refers to the report of the Tahsildar based on which FIR No.194 of 2017 was registered on 05.07.2017.

In his report dated 06.07.2017, (sent to the Tahsildar, a day after 05.07.2017 when the complaint of the Tahsildar was registered as FIR No.194 of 2017), the Inspector of Police further states that the parties were agitating upon their rights over the disputed property; they had carried their henchmen, hurled challenges against each other; and the parties, with their respective claims, had placed their henchmen around the schedule property, resulting in the disputed land becoming tense and chaotic.

The Section 145 (1) Cr.P.C. proceedings were passed by the Tahsildar, more than three months after receipt of report of the Inspector of Police dated 6.7.2017, on 17.10.2017. The documents filed by the appellant-writ petitioner, along with the appeal, show that even prior to registration of the complaint in FIR No.118 of 2017 dated 13.05.2017, the petitioner had filed A.S. No.393 of 2017 and a Division Bench of this Court, by its order in A.S.M.P. No.955 of 2017 in A.S. No.393 of 2017 dated 27.4.2017, had suspended operation of the order passed, in A.A.O.P. No.22 of 2016 dated 06.02.2017, by the District Judge, Rajamahendravaram. Prior to registration of FIR No.194 of 2017 dated 05.07.2017, and receipt of the report of the Inspector of Police dated 06.07.2017, W.P. No.41438 of 2016, filed by the petitioner, questioning the order dated 19.11.2016, passed by the Sub-Collector, Rajamahendravaram under the R.O.R. Act, was disposed of by a learned Single Judge of this Court by his order dated 29.6.2016. The order of the Sub-Collector, Rajamahendravaram dated 19.11.2016 was set aside in view of the consensus, among the learned counsel for the parties, that the said order was without jurisdiction. Granting liberty to the unofficial respondents to avail their remedy under Section 9 of the R.O.R. Act, the learned Single Judge had directed that the entries, in the 1-B Register and the Pass Books, should not be utilized by any person till the Revision was heard and decided by the District Collector, who was directed to dispose of the revision within four months.

Aggrieved thereby, the petitioner preferred an appeal and a Division Bench of this

Court, in its order in W.A. No.963 of 2017 dated 24.7.2017, held that the direction to the parties, not to utilize the entries in the revenue records, suffered from a patent error necessitating its being set aside. The order of the learned Single Judge, to the limited extent he had directed the parties not to utilize the entries in the revenue records till the Revision was disposed of by the District Collector, was set aside making it clear that the other part of the order of the learned Single Judge was not being interfered with.

While the order of the Division bench, in A.S.M.P. No.955 of 2017 in A.S. No.393 of 2017 dated 27.04.2017 and the order of the learned Single Judge, in W.P. No.41438 of 2016, dated 29.06.2017, precede the report of the Inspector of Police, Bommuru P.S., dated 6.7.2017, even subsequent thereto, and prior to the order passed by the Tahsildar under Section 145 Cr.P.C. on 17.10.2017, a Division Bench of this Court had passed the order in W.A. No.963 of 2017 dated 24.7.2017.

The satisfaction which the Executive Magistrate should arrive at, in order to exercise the powers conferred on him under Section 145(1) Cr.P.C, is that an existing dispute, concerning any land, is likely to cause a breach of peace. For an order to be passed thereunder, the requirement of Section 145(1) Cr.P.C is that (i) a dispute, concerning any land, should exist (ii) the existing dispute should be such as is likely to cause a breach of peace. It is evident that a dispute exists, between the parties, concerning the subject land. Mere existence of a dispute would, however, not suffice, for what is required under Section 145(1) Cr.P.C. is that the existing dispute, concerning any land, must be one which is likely to cause a breach of peace. Not all criminal offences, alleged to have been committed concerning land, would attract Section 145(1) Cr.P.C, and while such allegations would undoubtedly necessitate investigation and action being taken to bring the offenders to book, it may not suffice for an order to be passed under Section 145(1) Cr.P.C.

As noted hereinabove in the order passed by him, under Section 145(1) Cr.P.C. on 17.10.2017, the Tahsildar has referred to the pendency of LCC.No.919/RJY/75 before the LRAT, Kakinada, and the pendency of a revision before the Joint Collector, Kakinada under Section 9 of the ROR Act. Pendency of these proceedings have no bearing on the existing dispute in relation to the subject land which is likely to cause a breach of peace. The complaint in FIR No.353 of 2015, registered with the Bommuru police station on 24.10.2015, relates to an incident regarding forgery of a Will dated 14.08.1985, and a sale agreement having been entered into on 21.03.2013. This complaint contains no allegation of any dispute, concerning land, which is likely to cause a breach of peace. Likewise the complaint in Cr. No.194 of 2017 dated 05.07.2017 also alleges forgery and tampering of revenue records by the petitioner. This complaint cannot also form the basis for the satisfaction of the Tahsildar that an order shoulod be passed under Section 145(1) Cr.P.C.

The only material on record which forms

the basis of the satisfaction of the Tahsildar for passing an order under Section 145(1) Cr.P.C, is that the petitioner, along with three others and their henchmen, were hurling challenges against each other, and cases were also registered against them at the SHO, Bommuru. These allegations are to be found in the report of the Inspector of Police dated 06.07.2017 and the complaint in FIR No.118 of 2017 dated 13.05.2017. The report of the Inspector of Police dated 06.07.2017, to the extent it records that the parties were agitating upon their rights over the disputed property, they had carried their henchmen, hurled challenges against each other, and the parties with their respective claims had placed their henchmen around the schedule property resulting in the disputed land becoming tense and chaotic, does not refer to any specific incident other than the allegations in FIR No.118 of 2017 dated 13.05.2017, which refer to an incident which allegedly took place on 07.05.2017.

The only material on record, which forms the basis for passing an order under Section 145(1) Cr.P.C, is evidently FIR No.118 of 2017 dated 13.05.2017 which refers to an incident which allegedly occurred on 07.05.2017. The allegations in FIR No.118 of 2017 dated 13.05.2017 can, undoubtedly, form the basis of the Tahsildars satisfaction that a dispute concerning the land, which is likely to cause breach of peace, exists. The fact, however, remains that the alleged incident, which forms the only basis for exercise of power under Section 145(1) Cr.P.C, is said to have taken place on 07.05.2017, five months prior to 17.10.2017 when the Tahsildar passed the impugned order. The material on record does not refer to any other incident in the interregnum. The impugned order dated 17.10.2017 does not also reflect consideration by the Tahsildar as to whether an incident, which allegedly took place five months earlier on 07.05.2017, would trigger occurrence of an event, causing breach of peace, justifying a preventive order being passed under Section 145(1) Cr.P.C. on 17.10.2017, more so in the absence of any material on record of any untoward incident having occurred thereafter. We may not be understood to have held that such an incident, which allegedly took place on 07.05.2017, can, only because of passage of time of five months, never form the basis for an order to be passed under Section 145(1) Cr.P.C. All that we have held is that the Tahsildar should have taken the passage of time, of more than five months from the alleged incident which took place on 07.05.2017 and absence of any material on record to show any other incident having taken place thereafter till he passed the order on 17.10.2017, into consideration while taking a decision whether or not an order, under Section 145(1) Cr.P.C, was necessitated in the facts and circumstances of the case.

On the short ground that the Tahsildar did not apply his mind to the question, whether the alleged incident which took place on 07.05.2017, (which forms the basis of his satisfaction for passing an order under Section 145(1) Cr.P.C), justified a preventive order being passed more than five months thereafter on 17.10.2017, the impugned order dated 17.10.2017 is set aside. The Tahsildar shall reconsider the matter, bearing in mind that the material on record does not refer

to any incident of breach of peace during the five month period from the alleged incident dated 07.05.2017 till the impugned order was passed on 17.10.2017, and three months after the police report dated 06.07.2017.

VI. ORDERS PASSED BY THE HIGH COURT SUBSEQUENT TO THE IMPUGNED ORDER DATED 17.10.2017 : THEIR RELEVANCE:

The documents, enclosed along with the present appeal, also show that, after the Tahsildar had passed the order under Section 145(1) Cr.P.C. on 17.10.2017, the petitioner had filed W.P. No.36254 of 2017 questioning the action of the respondents in treating as a title disputes, the land in Sy.Nos.416/2B 2A admeasuring Ac.11-65 cents and Survey No.416/2B 2B admeasuring Ac.3.88 cents, totalling Ac.15.53 cents; and a learned Single Judge of this Court, in his order in W.P.M.P. No.45049 of 2017 in W.P. No.36254 of 2017 dated 31.10.2017, had observed that, prima facie, the action of the Tahsildar in showing the subject land under title dispute, in the Mee Bhoomi web portal maintained by the State Government, could not be sustained since, admittedly, the revision, to which the petitioner was a party, was still pending decision before the Joint Collector, East Godavari District. The Learned Single Judge granted interim suspension as prayed for.

The petitioner also filed Criminal Petition No.10456 of 2017, under Section 482 Cr.P.C, to quash F.I.R. No.118 of 2017 of Bommuru Police Station, after the Tahsildar passed the impugned order dated 17.10.2017. In his order, in Criminal Petition M.P. No.11865 of 2017 in Criminal Petition No.10656 of 2017 dated 14.11.2017, a learned Single Judge of this Court observed that, prima facie, it appeared that the dispute was with regards the claim over property based on a testamentary disposition both by registered and unregistered wills by rival parties; and the complaint gave a cloak of criminal offence to a civil litigation. Interim stay of all further proceedings was granted for a period of one month.

The validity of an order passed under Section 145(1) Cr.P.C. must no doubt be examined with reference to the material on record available with the Tahsildar when he passed the said order on 17.10.2017. The orders in W.P.M.P. No.45049 of 2017 in W.P. No.36254 of 2017 dated 31.10.2017, and in Criminal Petition M.P. No.11865 of 2017 in Criminal Petition No.10656 of 2017 dated 14.11.2107 were both passed subsequent to the impugned order of the Tahsildar dated 17.10.2017. The relevance of the interim order passed in W.P.M.P. No.45049 of 2017 in W.P. No.36254 of 2017 dated 31.10.2017 is that it relates to the subject land; and the significance of the order, in Criminal Petition M.P. No.11865 of 2017 in Criminal Petition No.10656 of 2017 dated 14.11.2017, is that all further proceedings in FIR No.118 of 2017, (wherein allegations are made which can be said to be an existing dispute concerning the land which is likely to cause breach of peace), has been stayed. Since the Executive Magistrate-cum-Tahsildar is now required to reconsider the matter afresh, he shall also taken into consideration the fact that further proceedings, pursuant to

FIR No.118 of 2017, has been stayed by this Court. We may not be understood to have expressed any opinion on merits, or on the justification of passing an order under Section 145(1) Cr.P.C, for these are all matters which the Executive Magistrate-cum- Tahsildar should consider on the basis of the material on record.

VII. CONCLUSION:

The order of the Tahsildar dated 17.10.2017, which is impugned in the Writ Petition, is set aside, and the matter is remitted for his consideration afresh and in accordance with law. Both the Writ Appeal and the Writ Petition are, accordingly, disposed of. However, in the circumstances, without costs. Miscellaneous petitions pending, if any, in both the Writ Appeal and the Writ Petition are also closed.

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2018(1) L.S. 105

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

Present:
The Hon'ble Mr. Justice
A.V. Sesha Sai

Challa Raju ..Petitioner

Vs.

Pyla Gireenu (died) per Lrs., & Ors., ..Respondents

CIVIL PROCEDURE CODE, Or.12, Rules 1 and 6 – Appeal suit against Judgment and Order of Trial Court – Defendants 1&2 executed sale deed in favour of plaintiff agreeing to sell plaint property and even plaintiff paid advance amount – Defendants 1&2 asked plaintiff to receive back advance amount and to return agreement executed by him on ground that certificates for registration could not be secured – Plaintiff called upon 1st defendant to perform contract – Defendants 1&2 filed written statements and 3rd defendant also filed his written statement.

Held – Instant case, knowing fully about existence of sale agreement in favour of plaintiff, 3rd defendant purchased property – Plaintiff proved his readiness and willingness to perform his part of contract and it is defendants who went back agreement of sale and executed unreasonably in favour of 3rd

defendant – Appeal suit is allowed, decreeing suit as prayed for – Judgment and Order of Trial court is set aside.

Cases referred:
1.(2010) 4 SCC 753
2.(2012) 11 SCC 405
3.(2010) 10 SCC 512
4.(2010) 4 SCC 753
5.(2004) 7 SCC 277
6.(2004) 6 SCC 325
7.2011 (1) ALD 296
8.2011 (5) ALD 508
9.AIR 2005 SC 439
10.(1999) 3 SCC 573
11.AIR 2003 Bombay 369
12.2010(6) ALD 119 (SC)
13.2014(3) ALD 449

Mr.S.Ashok Anand Kumar, Advocate for the Appellant.
Mr. G.Ramgopal, Advocate for Respondent No.2.
Mr,P.Sri Raghuram, Counsel for Respondent No.3.

J U D G M E N T

Plaintiff in O.S.No.155 of 1988 on the file of Court of III Additional Subordinate Judge, Visakhapatnam, is the appellant in the present Appeal Suit, preferred under Section 96 of Code of Civil Procedure against the judgment and decree dated 30.1.1997 passed by the said Court.

2. The appellant herein instituted the said suit for the following reliefs:

(1) Permanent injunction restraining the defendants 1 and 2 from selling the suit schedule I and II site with a thatched house to third defendant or any other person.

(2) And as a consequential relief to set aside the sale dated 29.3.1988 in respect of Schedule-II property which is given as a passage of the width of 2 feet and length of 52 feet for road accessibility or in the alternative to declare the sale in respect of Schedule-II property which is included in the sale deed dated 29.3.1988 as null and void.

(3) For specific performance of the suit agreement dated 26.4.1987 by directing the defendants 1 and 2 to register the suit schedule I and II site in favour of the plaintiff after receiving the balance of sale consideration after deducting the interest payable by the defendants to the plaintiff at the rate of 24% per annum from 26.5.1987 as directed by this Hon'ble Court and in case defendants 1 and 2 fails to register the same in favour of the plaintiff, this Hon'ble Court to register the sale deed in favour of the plaintiff on behalf of the defendants 1 and 2 and for delivery of possession.

(4) And in case the specific performance cannot be granted this Hon'ble Court direct the defendants 1 and 2 to order the return the advance of Rs.15,000/- with interest at 24% per annum from 26.4.1987 and also for a sum of Rs.10,000/- being the damages for breach of contract.

(5) For costs of the suit; and

(6) For such other relief or reliefs which this Hon'ble Court maydeem fit and proper under the circumstances of the case.

3. The schedule of properties is as follows:

SCHEDULE-I

The suit schedule land consisting of 2 roomed old tatched house with vacant space of 60 sq.yards situated in the backyard of Door No.34-11-12, Ward No.38, S.No.295, Block No.13, Holly Cross Street, Gnanapuram, Visakhapatnam, marked as A, B, C, D in plaint plan bounded by:

East : The house of Gullipilli Santhaiah

South : Allotted 3 lane with Municipal drainage

West : Asbestos sheet house of one Pyla Atchanna

North : Tiled house of the Defendants 1 and 2 with vacant land

Total extent 60 (sixty only) sq.yards
Total value Rs.36,000/-

SCHEDULE-II

The 2 feet width and about 50 feet length common passage on the Eastern side of the tiled house with D.No.34-11-12 S.No.295 Block No.13, Holy Cross Street, Gnanapuram, Visakhapatnam, marked as D, E, F, G in the plaint plan is bounded as follows:

East ; The house of Gullipilli Santhaiah
South : Vacant land with tatched house.
West : Tiled house and terraced and asbestos sheet rooms.
North : Municipal Road

Total extent :

4. Defendants 1 and 2 executed Ex.A3 Agreement of Sale dated 26.4.1987 in favour of the plaintiff, agreeing to sell the plaint property for a total consideration of Rs.36,000/-. On the date of Ex.A3, plaintiff paid an advance amount of rs.15,000/-. By way of Ex.A4 notice dated 11.1.1988, 1st defendant asked the plaintiff to receive back the advance amount of Rs.15,000/- with interest and to return the agreement executed by him on the ground that necessary certificates for registration could not be secured. In response to the same, plaintiff got issued Ex.A5 reply dated 26.1.1988, calling upon to perform the contract within (10) days. Thereafter, plaintiff also got issued Ex.A7 notice dated 29.3.1988 to the Joint Sub-Registrar, Visakhapatnam, asking not to register any transaction in respect of the subject property. First defendant executed Ex.A8 sale deed dated 29.3.1988 in favour of 3rd defendant. First defendant filed written statement and he passed away pending suit and after his death, on 9.10.1996, 2nd defendant, son of 1st defendant filed additional written statement. Third defendant also filed written statement, resisting the suit. On the basis of the pleadings, the learned Subordinate Judge, framed the following issues for trial:

(1) Whether the plaintiff has been always ready and willing to perform his part of contract?

(2) Whether the plaintiff is entitled for specific performance of agreement of sale?

(3) Whether the plaintiff is alternatively entitled for return of earnest money with interest and damages of Rs.10,000/-?

(4) To what relief?

Additional Issues:

(1) Whether the plaintiff is entitled for permanent injunction as prayed for?

(2) Whether the plaintiff is entitled for a consequential relief to set aside the sale deed dated 29.3.1988 created by 1st and 2nd defendants in favour of 3rd defendant as prayed for?

5. On behalf of plaintiff, P.Ws.1 and 2 were examined and Exs.A1 to A8 were marked and on behalf of defendants, D.Ws.1 and 2 were examined and Exs.B1 and B2 were marked. The learned Subordinate Judge, passed the impugned judgment and decree on 30.1.1997, decreeing the suit for the alternative relief of refund of the advance amount with interest and also awarded damages of Rs.10,000/-. This Appeal Suit assails the validity and legal sustainability of the said judgment and decree.

6. Heard Sri S.Ashok Anand Kumar, learned counsel for the plaintiff/ appellant herein, Sri G.Ramgopal, learned counsel for Respondent No.2 and Sri P.Sri Raghuram, learned Senior Counsel appearing for Respondent No.3.

7. The learned counsel for the appellant contends that the impugned judgment rendered by the learned Subordinate Judge is erroneous, contrary to law and not in consonance with the material available on record and that the Court below failed to consider the oral and documentary evidence available on record. It is the further submission of the learned counsel that the learned Subordinate Judge grossly erred in not taking into consideration the averments in the additional written statement filed by 2nd defendant and that the judgment is contrary to Order 12 Rule 6 of CPC. It is further contended that Ex.A3 did obligate only defendant, but not plaintiff to obtain certificates from the Municipality. It is also contended that since the plaintiff proved his readiness and willingness to perform his part of contract, the primary relief of execution of sale deed in favour of plaintiff should have been granted. In support of his case, the learned counsel takes the support of the judgments of the Honble Supreme Court in KARAM KAPAHI AND OTHERS v. LAL CHAND PUBLIC CHARITABLE TRUST AND ANOTHER(1) , PAYAL VISION LIMKITED v. RADHIKA CHOUDHARY (2), MAN KAUR (DEAD) BY LRS v. HARTAR SINGH SANGHA (3), KARAM KAPAHI & ORS v. M/S LAL CHAND PUBLIC CHARITABLE TRUST AND ANOTHER (4),

1.(2010) 4 SCC 753
2.(2012) 11 SCC 405
3.(2010) 10 SCC 512
4.(2010) 4 SCC 753

INDER SAIN BEDI (DEAD) BY LRS v. CHOPRA ELECTRICALS(5), VICE-CHAIRMAN, KENDRIYA VIDYALAYA SANGATHAN AND ANOTHER v. GIRIDHARILAL YADAV (6) and the Judgments of this Court in P.V.V.A.V. PRASAD v. SHAIAK MAHABOOB BASHA (7) and TASTE HOTELS (P) LTD., ONGOLE, PRAKASAM DISTRICT v. MEDISETTY JAYASRI AND ANOTHER (8).

8. The learned counsel appearing for 2nd defendant/2nd respondent herein strenuously contends that the plaintiff is liable to be non-suited on the ground that he failed to enter into witness box and that the GPA holder who represented the plaintiff throughout cannot be a substitute to the plaintiff to prove his case. It is the further submission of the learned counsel that the averments in the additional written statement filed by 2nd defendant/2nd respondent cannot be taken as admissions and the same being a conditional offer which the plaintiff failed to avail. It is further contended that the learned Subordinate Judge is perfectly justified in granting alternative relief having regard to the facts and circumstances of the case and the exercise of discretion by the learned Subordinate Judge is strictly in accordance with the provisions of Sections 16 and 20 of the Specific Relief Act. It is the further submission of the learned counsel that non-examination of 2nd defendant would be insignificant in view of the reason that the plaintiff also did not enter into witness box. It is further contended that since the trial Court already exercised its discretion and as the relief of specific performance is an equitable relief, no interference of this Court is warranted under Section 96 of CPC. It is also the submission of the learned counsel that in terms of the decree rendered by the Court below for refund of the amount, the 2nd respondent/2nd defendant had deposited the amount in the Court below. In support of his submissions/contentions, learned counsel places reliance on judgments of the Honble Apex Court in JANKI VASHDEO BHOJWANI AND ANOTHER v. INDUSIND BANK LTD. AND OTHERS (9), VIDHYADHAR v. MANIK RAO AND ANOTHER (10), WESTERN COALFIELDS LTD. v. M/S SWATI INDUSTRIES (11), JEEVAN DIESELS AND ELECTRICALS LTD. v. JASBIR SINGH CHADHA (HUF) AND ANOTHER(12) and the judgment of this Court in M.ALI BAIG AND OTHERS v. KOTTALA SANJEEVA REDDY AND OTHERS(13) .

9. It is contended by the learned counsel appearing for 3rd defendant/3rd respondent herein that the Court below is perfectly justified in granting alternative relief of refund of the amount as the plaintiff instituted the suit on 8.4.1988 i.e. after execution of Ex.A8 sale deed dated 29.3.1988, conveying the property in favour of 3rd defendant. It is also the submission of the learned counsel that without the knowledge of Ex.A3 Agreement of Sale in favour of plaintiff, 3rd defendant

5.(2004) 7 SCC 277
6.(2004) 6 SCC 325
7.2011 (1) ALD 296
8.2011 (5) ALD 508
9.AIR 2005 SC 439
10.(1999) 3 SCC 573
11.AIR 2003 Bombay 369
12.2010(6) ALD 119 (SC)
13.2014(3) ALD 449

purchased the property under the bonafide impression that there were no encumbrances on the property. It is also the submission of the learned counsel that since the plaintiff failed to prove the continuous readiness and willingness to perform his part of the contract, he is not entitled to the primary relief of execution of sale deed in his favour.

10. In the light of the above pleadings and submissions, the points that emerge for consideration of this Court under Section 96 of CPC are as follows:

(1) Whether the learned Subordinate Judge is justified in declining to grant the primary relief of specific performance of contract of sale by way of execution of sale deed in favour of plaintiff having regard to the facts and circumstances of the case and whether the same is in accordance with the provisions of Sections 16 and 20 of Specific Relief Act ?

(2) Whether the plaintiff proved his readiness and willingness to perform his part of the contract ?

(3) Whether the 3rd defendant is a bonafide purchaser for a valuable consideration?

11. The execution of Ex.A3 Agreement of Sale dated 26.4.1987 by the defendants 1 and 2 in favour of plaintiff, agreeing to sell the plaint schedule property for a total consideration of Rs.36,000/- and the factum of payment of advance amount of Rs.15,000/- on the date of agreement by the plaintiff are not in dispute. According to Ex.A3 Agreement of Sale dated 26.4.1987, it was agreed by the defendants that they would secure necessary documents for registration and they also agreed for payment of interest @ 2/- and they also agreed to handover the property to the plaintiff in the event of failure to do so. The time stipulated for execution of the document as per Ex.A3 was admittedly one month. On the ground that they could not secure the necessary documents, defendants 1 and 2 got issued Ex.A4 notice dated 11.1.1998, asking the plaintiff to receive back the advance amount of Rs.15,000/-. But the plaintiff by way of Ex.A5 reply demanded the defendants to perform their part of contract as per the recitals of Ex.A3 Agreement of Sale.

12. According to the plaintiff, on coming to know that defendants 1 and 2 were contemplating to sell the property in favour of third parties, he got issued Ex.A7 notice dated 29.3.1988. A perusal of the said Ex.A7 notice, in clear and vivid terms, discloses that the plaintiff asked the Joint Registrar not to register any transactions in respect of the subject property. Despite the said notice, Ex.A8 sale deed was executed on 29.3.1988 in favour of 3rd defendant. It is also significant to note that the 2nd defendant filed additional written statement after the death of his father (1st defendant) on 9.10.1996, categorically admitting execution of sale agreement and also expressed no objection to execute the sale deed in respect of the schedule properties. Admittedly, after receipt of Ex.A4 notice dated 11.1.1988, plaintiff by way of Ex.A5 reply, expressed his willingness and

readiness to perform his part of contract and asked the defendants 1 and 2 to get ready for execution within (10) days.

13. It is also important to note in this context that in the additional written statement, the 2nd defendant categorically stated that his father (1st defendant) executed sale deed as desired by 3rd defendant as she agreed to reap the consequences of such registration. In this context, the evidence of P.W.2, who attested Ex.A3 Agreement of Sale gains significance. In his evidence, P.W.2-Attestor of Ex.A3 categorically in clear terms stated that (30) minutes after execution of Ex.A3, he along with 1st defendant went to the suit site and informed the 3rd defendant about execution of Ex.A3 document and making a provision of 2 feet way. It is also clear from the evidence of P.W.2 that he is related to Defendants 1 and 3. It is also clear from the said evidence that he denied the suggestion that he never informed the 3rd defendant about the execution of Ex.A3. It is very much evident from the cross-examination of P.W.2 that nothing negative could be elicited by the defendants to discredit his testimony.

14. It is also significant to note that the 3rd defendant never entered into witness box to prove her case and to reject the case of the plaintiff that only with knowledge of execution of Ex.A3 agreement of sale, she purchased the property by way of Ex.A8 sale deed. It is also the submission of the learned counsel that Ex.A8 sale deed was not released by the registering authorities so far and the evidence of P.W.2 was not shattered. In the considered opinion of this Court, the admissions in the additional written statement made by 2nd defendant cannot be construed as a conditional offer to the plaintiff for performance of the contract. Admittedly, the document executed by defendants 1 and 2 in favour of 3rd defendant is under challenge in the suit. Having regard to the categoric admission made by the 2nd respondent/ 2nd defendant in the suit, the judgments cited by the learned counsel for 2nd respondent would not render any assistance to the case of the Respondents. In fact, the plea as to non-examination of plaintiff was never taken by the Respondents before the Court below nor the same fell for consideration.

15. Coming to the judgements cited by the learned Advocates.

(1) In KARAM KAPAHI (1 supra), the Hon'ble Supreme Court at paragraphs 37 to 48 held as under:

37. The principles behind Order 12 Rule 6 are to give the plaintiff a right to speedy judgment. Under this Rule either party may get rid of so much of the rival claims about which there is no controversy (see the dictum of Lord Jessel, the Master of Rolls, in Thorp v. Holdsworth [(1876) 3 Ch D 637] in Chancery Division at p.

640).

38. In this connection, it may be noted that Order 12 Rule 6 was amended by the Amendment Act of 1976. Prior to amendment the Rule read thus:

6. Judgment on admissions.Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.

39. In the 54th Law Commission Report, an amendment was suggested to enable the court to give a judgment not only on the application of a party but on its own motion. It is thus clear that the amendment was brought about to further the ends of justice and give these provisions a wider sweep by empowering the Judges to use it ex debito justitiae, a Latin term, meaning a debt of justice. In our opinion the thrust of the amendment is that in an appropriate case, a party, on the admission of the other party, can press for judgment, as a matter of legal right. However, the court always retains its discretion in the matter of pronouncing judgment.

40. If the provision of Order 12 Rule 1 is compared with Order 12 Rule 6, it becomes clear that the provision of Order 12 Rule 6 is wider inasmuch as the provision of Order 12 Rule 1 is limited to admission by pleading or otherwise in writing but in Order 12 Rule 6 the expression or otherwise is much wider in view of the words used therein, namely: admission of fact either in the pleading or otherwise, whether orally or in writing.

41. Keeping the width of this provision (i.e. Order 12 Rule 6) in mind this Court held that under this Rule admissions can be inferred from the facts and circumstances of the case (see Charanjit Lal Mehra v. Kamal Saroj Mahajan [(2005) 11 SCC 279] , SCC at p. 285, para 8). Admissions in answer to interrogatories are also covered under this Rule (see Mullas's Commentary on the Code, 16th Edn., Vol. II, p. 2177).

42. In Uttam Singh Duggal & Co. Ltd. v. United Bank of India [(2000) 7 SCC 120] this Court, while construing this provision, held that the Court should not unduly narrow down its application as the object is to enable a party to obtain speedy judgment.

This extract is taken from Karam Kapahi v. Lal Chand Public Charitable Trust, (2010) 4 SCC 753 : (2010) 2 SCC (Civ) 262 at page 766

43. In Uttam Singh Duggal case [(2000) 7 SCC 120] it was contended on behalf of the appellant, Uttam Singh Duggal, that:

(a) Admissions under Order 12 Rule 6 should only be those which are

made in the pleadings.

(b) The admissions would in any case have to be read along with the first proviso to Order 8 Rule 5(1) of the Code and the court may call upon the party relying on such admission to prove its case independently.

(c) The expression either in pleadings or otherwise should be interpreted ejusdem generis. (See para 11, p. 126-27 of the Report.) Almost similar contentions have been raised on behalf of the Club. In Uttam Singh[(2000) 7 SCC 120] those contentions were rejected and this Court opined no effort should be made to narrow down the ambit of Order 12 Rule 6.

44. In Uttam Singh [(2000) 7 SCC 120] this Court made a distinction between a suit just between the parties and a suit relating to the Specific Relief Act, 1963 where a declaration of status is given which not only binds the parties but also binds generations. The Court held that such a declaration may be given merely on admission (SCC para 16 at p. 128 of the Report). But in a situation like the present one where the controversy is between the parties on an admission of non-payment of rent, judgment can be rendered on admission by the court.

45. Order 12 Rule 6 of the Code has been very lucidly discussed and succinctly interpreted in a Division Bench judgment of the Madhya Pradesh High Court in Shikharchand v. Bari Bai [AIR 1974 MP 75] . G.P. Singh, J. (as His Lordship then was) in a concurring judgment explained the aforesaid Rule, if we may say so, very authoritatively at p. 79 of the Report. His Lordship held: (AIR para 19) I will only add a few words of my own. Rule 6 of Order 12 of the Code of Civil Procedure corresponds to Rule 5 of Order 32 of the Supreme Court Rules (English), now Rule 3 of Order 27, and is almost identically worded (see Annual Practice, 1965 Edn., Part I, p. 569). The Supreme Court Rule came up for consideration in Ellis v. Allen [(1914) 1 Ch 904 : (1911-13) All ER Rep 906] . In that case a suit was filed for ejectment, mesne profits and damages on the ground of breach of covenant against sub-letting. Lessee's solicitors wrote to the plaintiff's solicitors in which fact of breach of covenant was admitted and a case was sought to be made out for relief against forfeiture. This letter was used as an admission under Rule 5 and as there was no substance in the plea of relief against forfeiture, the suit was decreed for ejectment under that Rule. Sargant, J. rejected the argument that the Rule is confined to admissions made in pleadings or under Rules 1 to 4 in the same order (same as ours) and said:

The Rule applies wherever there is a clear admission of facts in the face

of which it is impossible for the party making it to succeed.

Rule 6 of Order 12, in my opinion, must bear the same construction as was put upon the corresponding English rule by Sargant, J. The words either on the pleadings or otherwise in Rule 6 enable us not only to see the admissions made in pleadings or under Rules 1 to 4 of the same order but also admissions made elsewhere during the trial.

46. This Court expresses its approval of the aforesaid interpretation of Order 12 Rule 6 by G.P. Singh, J. (as His Lordship then was). Mulla in his commentary on the Code has also relied on the ratio in Shikharchand [AIR 1974 MP 75] for explaining these provisions.

47. Therefore, in the instant case even though statement made by the Club in its petition under Section 114 of the Transfer of Property Act does not come within the definition of the word pleading under Order 6 Rule 1 of the Code, but in Order 12 Rule 6 of the Code, the word pleading has been suffixed by the expression or otherwise. Therefore, a wider interpretation of the word pleading is warranted in understanding the implication of this Rule. Thus the stand of the Club in its petition under Section 114 of the Transfer of Property Act can be considered by the Court in pronouncing the judgment on admission under Order 12 Rule 6 in view of clear words pleading or otherwise used therein especially when that petition was in the suit filed by the Trust.

48. However, the provision under Order 12 Rule 6 of the Code is enabling, discretionary and permissive and is neither mandatory nor it is peremptory since the word may has been used. But in a given situation, as in the instant case, the said provision can be applied in rendering the judgment.

(2) In PAYAL VISION LIMKITED (2 supra), the Hon'ble Supreme Court at paragraphs 7 and 8 held as under:

7. In a suit for recovery of possession from a tenant whose tenancy is not protected under the provisions of the Rent Control Act, all that is required to be established by the plaintiff landlord is the existence of the jural relationship of landlord and tenant between the parties and the termination of the tenancy either by lapse of time or by notice served by the landlord under Section 106 of the Transfer of Property Act. So long as these two aspects are not in dispute the court can pass a decree in terms of Order 12 Rule 6 CPC, which reads as under:

6. Judgment on admissions.(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the court may at any stage of the

suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced.

8. The above sufficiently empowers the court trying the suit to deliver judgment based on admissions whenever such admissions are sufficient for the grant of the relief prayed for. Whether or not there was an unequivocal and clear admission on either of the two aspects to which we have referred above and which are relevant to a suit for possession against a tenant is, therefore, the only question that falls for determination in this case and in every other case where the plaintiff seeks to invoke the powers of the court under Order 12 Rule 6 CPC and prays for passing of the decree on the basis of admission. Having said that we must add that whether or not there is a clear admission upon the two aspects noted above is a matter to be seen in the fact situation prevailing in each case. Admission made on the basis of pleadings in a given case cannot obviously be taken as an admission in a different fact situation. That precisely is the view taken by this Court in Jeevan Diesels & Electricals Ltd. [(2010) 6 SCC 601 : (2010) 2 SCC (Civ) 745] relied upon by the High Court where this Court has observed: (SCC p. 604, para 10)

10. Whether or not there is a clear, unambiguous admission by one party of the case of the other party is essentially a question of fact and the decision of this question depends on the facts of the case. The question, namely, whether there is a clear admission or not cannot be decided on the basis of a judicial precedent. Therefore, even though the principles in Karam Kapahi [(2010) 4 SCC 753 : (2010) 2 SCC (Civ) 262] may be unexceptionable they cannot be applied in the instant case in view of totally different fact situation.

(3) In MAN KAUR(DEAD)BY LRS (3 supra), the Hon'ble Apex Court at paragraphs 14 and 18, held as follows:

14. In Vidhyadhar and Manikrao :1999 (3) SCC 573, this Court reiterated the following well recognized legal position: "Where a party to the suit does not appear in the witness- box and state his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct."

18. We may now summarise for convenience, the position as to who

should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his `state of mind' or `conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his `bona fide' need and a purchaser seeking specific performance who has to show his `readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a

close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or `readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/ mother exclusively managing the affairs of a son/daughter living abroad.

(4) In KARAM KAPAHI & ORS (4 supra), the Hon'ble Apex Court, at paragraphs 45 and 46, held as follows:

> 45. Order 12 Rule 6 of the Code has been very lucidly discussed and succinctly interpreted in a Division Bench judgment of Madhya Pradesh High Court in the case of Shikharchand and others Vs. Mst. Bari Bai and others reported in AIR 1974 Madhya Pradesh. Justice G.P. Singh (as His Lordship then was) in a concurring judgment explained the aforesaid rule, if we may say so, very authoritatively at page 79 of the report. His Lordship held:- "... I will only add a few words of my own. Rule 6 of Order 12 of the Code of civil Procedure corresponds to Rule 5 of Order 32 of the Supreme Court Rules (English), now rule 3 of Order 27, and is almost identically worded (see Annual Practice 1965 edition Part I. p. 569). The Supreme Court Rule came up for consideration in Ellis v. Allen (1914) Ch 904. In that case a suit was filed for ejectment, mesne profits and damages on the ground of breach of covenant against sub-letting.
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> Lessee's solicitors wrote to the plaintiff's solicitors in which fact of breach of covenant was admitted and a case was sought to be made out for relief against forfeiture. This letter was used as an admission under rule 5 and as there was no substance in the plea of relief against forfeiture, the suit was decreed for ejectment under that rule. Sargant, J. rejected the argument that the rule is confined to admissions made in pleadings or under rules 1 to 4 in the same order (same as ours) and said:
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> "The rule applies wherever there is a clear admission of facts in the face of which it is impossible for the party making it to succeed."
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> Rule 6 of Order 12, in my opinion, must bear the same construction as was put upon the corresponding English rule by Sargent, J. The words "either on the pleadings or otherwise" in rule 6 enable us not only to see the admissions made in pleadings or under Rules 1 to 4 of the same order but also admissions made elsewhere during the trial." (Emphasis added)
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> 46. This Court expresses its approval of the aforesaid interpretation of Order 12 Rule 6 by Justice G.P. Singh (as His Lordship then was). Mulla in his commentary on the Code has also

relied on ratio in Shikharchand (supra) for explaining these provisions.

(5) In INDER SAIN BEDI (DEAD) BY LRS (5 supra), the Hon'ble Apex Court, at paragraph 10, held thus:

> 10. Shri D. A. Dave, learned senior counsel appearing for Appellant contended that the contents of documents Ex. D-1 and P-3 will govern the rights of the parties. Portion shown in green was not included in the two documents and did not form part of tenancy and the same is unauthorisedly occupied by the Respondent. The suit has been filed for the portion shown in red in the site plan Ex. P-2 which had been let out to the Respondent. In para 2 of the plaint, the Appellant has specifically pleaded that the Respondent had taken on rent from him a portion comprising of hall, 3 office-cum-store rooms, two mezzanine halls and toilet on the ground floor of the demised premises. In reply to this averment, Respondent in his written statement pleaded that the premises described in para 2 in the plaint as having been let out to the Respondent was substantially correct. This reply clearly amounts to admission of the allegations made in the corresponding paragraph of the plaint. That in view of this admission made by the Respondent, the High Court has gravely erred in recording a finding to the effect that the Appellant had let out the portion shown in green as well to the Respondent. That the High Court has built a new case for the Respondent, which was not even pleaded by him, in holding that on the expiry of period of licence the Respondent was taken as a tenant of the entire property of the Appellant which was in occupation of the Respondent. It was also contended that there was no registered instrument executed creating tenancy therefore tenancy will be deemed to be from month to month terminable with 15 days notice and the High Court has erred in holding to the contrary.

(6) In VICE-CHAIRMAN, KENDRIYA VIDYALAYA SANGATHAN AND ANOTHER (6 supra) the Hon'ble Apex Court, at paragraph 11, held as follows:

> 11. The admitted facts remain that the respondent is a permanent resident of Haryana. It further stands admitted that at the relevant time, Ahirs/Yadavs of Haryana were not treated as OBC. It further stands admitted that the respondent obtained a certificate showing that he was a resident of Rajasthan, which he was not. It is not disputed that a detailed enquiry was conducted by the District Magistrate, Kota, wherein the respondent had been given an opportunity of hearing. It is also not in dispute that he had given an opportunity to show cause as to why his appointment should not be cancelled not only by the appointing authority but also by the Appellate Authority. In terms of section 58 of

the evidence act, 1872 facts admitted need not be proved. It is also a well-settled principle of law that the principles of natural justice should not be stretched too far and the same cannot be put in a straitjacket formula. In Bar Council Of India v. High Court Of Kerala 2004 6 SCC 311 this Court has noticed that: (SCC p. 324, paras 49-50)

24. The principles of natural justice, it is well settled, cannot be put into a straitjacket formula. Its application will depend upon the facts and circumstances of each case. It is also well settled that if a party after having proper notice chose not to appear, he at later stage cannot be permitted to say that he had not been given a fair opportunity of hearing. The question had been considered by a Bench of this Court in Sohan Lal Gupta v. Asha Devi Gupta 2003 7 SCC 492 of which two of us (V.N Khare, C.J and Sinha, J.) are parties wherein upon noticing a large number of decisions it was held: (SCC p. 506, para 29)

29. The principles of natural justice, it is trite, cannot be put in a straitjacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby.

25. The principles of natural justice, it is well settled, must not be stretched too far.

(See also Mardia Chemicals Ltd. v. Union of India 2004 4 SCC 311 and Canara Bank v. Debasis Das 2003 4 SCC 557.) In Union of India v. Tulsiram Patel 1985 3 SCC 398 whereupon reliance has been placed by Mr Reddy, this Court held: (SCC p. 477, para 97)

97. Though the two rules of natural justice, namely, nemo judex in causa sua and audi alteram partem, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal straitjacket. They are not immutable but flexible. These rules can be adapted and modified by statutes and statutory rules and also by the constitution of the Tribunal which has to decide a particular matter and the rules by which such Tribunal is governed.

(7) In P.V.V.A.V. PRASAD (7 supra), this Court at paragraphs 17, 21 and 22, held as under:

17. In Nagindas Ramdas v. Dalpatram Ichharam @ Brijram and others5, the

principle laid down is that admissions, if true and clear, are by far the best proof of the facts admitted and the admissions in pleadings were opined to be admissible as judicial admissions under Section 58 of the Evidence Act, which stands on a higher footing than evidentiary admissions. The admissions in pleadings were held to be fully binding on the party and to constitute a waiver of proof. Such admissions were held to be capable of being made the foundation of the rights of the parties and incidentally, that was also a case seeking eviction under the Rent Control Act decided on such an admission.

21. Thus, a close consideration of the precedents cited by both the parties leads to the conclusion that a statement made in a pleading can be acted upon as an admission for the purposes of Order XII Rule 6 of the Code of Civil Procedure and irrespective of resorting to pronouncement of a judgment on the basis of the statement in the written statement of the respondent or not, the fact remains that the rights flowing out of the unregistered lease deed being the subject of a specific issue before the trial Court and a specific ground of appeal before the first appellate Court, the factum of expiry of the period of lease claimed by the respondent ought to have been taken into consideration by the first appellate Court as a subsequent event or circumstance having material bearing on the rights of the parties under adjudication. If so, therefore, the first appellate Court committed an error of law in not taking note of and acting upon the expiry of the period of lease by the end of September 2009 even according to the defence of the respondent in the written statement and irrespective of other considerations, when the lease stood determined by efflux of time, the first appellate Court should have moulded the relief to be granted in tune with the same.

22. Concerning the validity of notice to quit, the first appellate Court went into the oral and documentary evidence in detail and noted that PW.1 was ignorant whether the respondent was residing in the address mentioned in the postal acknowledgment under Ex.A.3, which specified that there was no such addressee in that door number and hence, returned to the sender. The first appellate Court, with reference to a decision of the Madras High Court, which dealt with in detail about service and tender of such communications with reference to the statutory presumption under Section 114 of the Evidence Act and the relevant provisions of the General Clauses Act, concluded that there was no valid tender of notice to quit. Sri C. Raghu, learned counsel for the respondent, has brought to notice the discrepancies in the addresses given in the notice to quit and the postal acknowledgments marked as

Exs.A.1 to A.3 respectively. In the absence of oral and documentary evidence probablising valid tender of notice to quit on the respondent, the requirement of Section 106 of the Transfer of Property Act cannot be considered to have been complied with as what has been relaxed by the statutory amendments by the Central Act 3 of 2003 amending Section 106 is the requirement concerning the period of notice, but not dispensing with the notice itself. It is true that sub-section 4 of Section 106 only requires tender of the notice to quit to the party concerned or sending of such notice to quit by post to the party and also permits affixture if tender or delivery is not practicable. But the said sub-section 4 cannot be considered as indicating the total absence of any necessity to prove a genuine attempt to serve such notice or a genuine tender of such notice, which was still not received by the party addressed. As the evidence on record in the suit coupled with the ignorance of PW.1 referred to by the first appellate Court is suggestive of the probable absence of a valid tender of notice to the respondent, the respondent could not have been entitled to suit reliefs on the basis of such notices to quit and this point is answered accordingly.

(8) In TASTE HOTELS (P) LTD., ONGOLE, PRAKASAM DISTRICT (8 supra), this Court at paragraphs 20 and 23 of the judgment, held as follows:

20. Now comes the necessity to understand the purport of the word 'admission' employed in Rule 6. This in fact, is the subject matter of interpretation by the Supreme Court in Uttam Singh Dugal and Company Ltd's case (3 supra), Karam Kapahi's case (4 supra), and the Delhi High Court in Parivar Seva Sansthan's case (5 supra). Their Lordships of the Supreme Court and the Delhi High Court in the judgments referred to above held that the admission need not be confined to the one in pleadings. In fact, the language of the provision itself suggests that it can be either in the pleadings or otherwise. Further, the admissions can be either oral or in writing. The words "orally or in writing" provide guidance to understand the idea succinctly. The admission in writing can be either in a written statement in that very suit, counters, or affidavits in the miscellaneous proceedings and in certain cases the admissions in the pleadings in other proceedings.

23. 20. If an oral statement or admission is made in the Court, the same shall form part of the record. The statement so recorded can certainly constitute the basis to render judgment under Rule 6 of Order XII Code of Civil Procedure.

16. Coming to the Judgments relied upon by the learned counsel for the 2nd respondent:

(9) In JANKI VASHDEO BHOJWANI AND

ANOTHER (9 supra), the Hon'ble Supreme Court at paragraph 13 held as under:

> Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to act on behalf of the principal. In our view the word acts employed in Order 3 Rules 1 and 2 CPC confines only to in respect of acts done by the power-of-attorney holder in exercise of power granted by the instrument. The term acts would not include deposing in place and instead of the principal. In other words, if the power-of- attorney holder has rendered some acts in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

(10) In VIDHYADHAR (10 supra), the Hon'ble Supreme Court at paragraph 17 held as under:

> Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross- examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v. Gurdial Singh [AIR 1927 PC 230 : 32 CWN 119] . This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh [AIR 1930 Lah 1 : ILR 11 Lah 142] and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh [AIR 1931 Bom 97 : 32 Bom LR 924] . The Madhya Pradesh High Court in Gulla Kharagjit Carpenterv. Narsingh Nandkishore Rawat [AIR 1970 MP 225 : 1970 MPLJ 586] also followed the Privy Council decision in Sardar Gurbakhsh Singh case [AIR 1927 PC 230 : 32 CWN 119] . The Allahabad High Court in Arjun Singh v. Virendra Nath [AIR 1971 All 29] held that if a party abstains from entering the witness-box, it would give rise to an adverse inference against him. Similarly, a Division Bench of the Punjab and Haryana High Court in Bhagwan Dass v. Bhishan Chand [AIR 1974 P&H 7] drew a presumption under Section 114 of the Evidence Act, 1872 against a party who did not enter the witness-box.

(11) In WESTERN COALFIELDS LTD. (supra 10), the Bombay High Court at paragraph 5 held as under:

> If one examines the pleadings particularly para 9 of the written statement which is in reply to para 6-D of the plaint, and paras 20 and 21 of the specific pleadings, the admissions given by the defendant is not absolute, but it is conditional

and it has been specifically stated that in terms of another contract, the said amount is already appropriated. Therefore, in these facts and circumstances, it cannot be said that there is an unqualified admission on the part of the defendant which would invite a decree against it for the said amount. The nature of admission made by the defendant cannot be held to be conclusive so as to invite an order under Rule 6 of Order 12, C.P.C. The nature of admission is such that it is only a statement of the case upon which the defendant intended to rely and would not operate as an estoppel against him as understood under Section 115 of the Evidence Act. As this admission made by the defendant is qualified, it is to be read as a whole while considering whether a decree can be passed against the defendant on such admission. As the admission is qualified and it is specifically pleaded that the said amount has been appropriated against another claim under contract between the parties, the Court should not have proceeded to pass the impugned order which would be discretionary. (Dudhnath Pande v. Sureshchandra Bhattasalli, AIR 1986 SC 1509). Therefore, in the facts and circumstances, the Court ought not to have passed the impugned order in the manner it has directed the defendant to deposit the amount in Court with a condition that on failure to deposit, the defendant will be liable to pay the interest on the said amount which was to be determined.

(12) In JEEVAN DIESELS AND ELECTRICALS LTD. (13 supra), the Hon'ble Supreme Court at paragraphs 16 to 22 held as under:

> 16. In this connection reference may be made to an old decision of the Court of Appeal between Gilbert v. Smith reported in 1875-76 (2) CD
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> 686. Dealing with the principles of Order XL, Rule 11, which was a similar provision in English Law, Lord Justice James held, "if there was anything clearly admitted upon which something ought to be done, the plaintiff might come to the Court at once to have that thing done, without any further delay or expense" (see page 687). Lord Justice Mellish expressing the same opinion made the position further clear by saying, "it must, however, be such an admission of facts as would shew that the plaintiff is clearly entitled to the order asked for". The learned Judge made it further clear by holding, "the rule was not meant to apply when there is any serious question of law to be argued. But if there is an admission on the pleading which clearly entitles the plaintiff to an order, then the intention was that he should not have to wait but might at once obtain any order" (see page 689).
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> 17. In another old decision of the Court of Appeal in the case of Hughes v. London, Edinburgh, and Glasgow Assurance Company (Limited) reported in 1891-92 8

TLR 81, similar principles were laid down by Lord Justice Lopes, wherein His Lordship held "judgment ought not to be signed upon admissions in a pleading or an affidavit, unless the admissions were clear and unequivocal". Both Lord Justice Esher and Lord Justice Fry concurred with the opinion of Lord Justice Lopes.

18. In yet another decision of the Court of Appeal in Landergan v. Feast reported in 1886-87 85 ltr 42, in an appeal from Chancery Division, Lord Justice Lindley and Lord Justice Lopes held that party is not entitled to apply under the aforesaid rule unless there is a clear admission that the money is due and recoverable in the action in which the admission is made.

19. The decision in Landergan (supra) was followed by the Division Bench of Calcutta High Court in Koramall Ramballav v. Mongilal Dalimchand reported in 23 CWN (1918-19) 1017. Chief Justice Sanderson, speaking for the Bench, accepted the formulation of Lord Justice Lopes and held that admission in Order 12, Rule 6 must be a "clear admission".

20. In the case of J.C. Galstaun v. E.D. Sassoon & Co., Ltd. reported in 27 CWN (1922-23) 783, a Bench of Calcutta High Court presided over by Hon'ble Justice Sir Asutosh Mookerjee sitting with Justice Rankin while construing the provisions of Order 12, Rule 6 of the Code followed the aforesaid decision in Hughes (supra) and also the view of Lord Justice Lopes in Landergan (supra) and held that these provisions are attracted "where the other party has made a plain admission entitling the former to succeed. This rule applies where there is a clear admission of the facts on the face of which it is impossible for the party making it to succeed". In saying so His Lordship quoted the observation of Justice Sargent in Ellis v. Allen (1914) 1 Ch. D. 904 {See page 787}.

21. Similar view has been expressed by Chief Justice Broadway in the case of Abdul Rahman and brothers v. Parbati Devi reported in AIR 1933 Lahore 403. The learned Chief Justice held that before a Court can act under Order 12, Rule 6, the admission must be clear and unambiguous.

22. For the reasons discussed above and in view of the facts of this case this Court cannot uphold the judgment of the High Court as well as of the Additional District Judge. Both the judgments of the High Court and of the Additional District Judge are set aside.

(13) In M.ALI BAIG (12 supra), this Court at paragraphs 73 to 75 held as under:

> 73. Under Section 20 of the Specific Relief Act, 1963, jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so. Where the terms of the contract or the conduct of the parties at the time of entering into the contract or other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant, the court may not decree specific performance. [see Clause (a) to sub-Section (2) of Section 20].

person other than the j.d. by virtue of a statutory provision, e.g. Section 50, C.P.C, it can be executed equally against the son who inherits the estate of his father as well as against one who was joint with the father and is brought on the record as his legal representative. A d.h. sought to execute a decree for permanent injunction obtained against the father in a joint Hindu family against his sons. It was held that the decree being passed against the father as a manager and representative of the joint family could be executed against his son who represented the joint family; that the son taking the joint family estate by survivorship was to be regarded as a 'person' who in law represented the estate of a deceased person within the meaning of the first part of the definition in Section (2) (11), C.P.C"(emphasis supplied)

21. In Basavant Dundappa v. Shidalingappa Sidaraddi ILR (1986) Karnataka 1959 relied on by the respondents, it was held that when an application had been filed by the decree-holder for execution and similar application was dismissed on the ground that it was not maintainable, another application for the same relief stands barred.

22. In Shivappa Basavantappa Devaravar v. Babajan 1999 (4) Kar. L.J. 293, relied on by respondents, where in a suit for permanent injunction, injunction was granted and was upheld by the first Appellate Court and second appeal was filed and the legal representatives of judgment-debtor wanted to prosecute the same, a single Bench applied the principle of the maxim “actio personalis maritur cum persona” and held that the legal representatives had no right to pursue the appeal. In our opinion, it cannot be said that single Bench has correctly appreciated the legal position as suit was based on title in the aforesaid decision. At the same time, the Single Judge has also observed that if the injunction had been obtained by plaintiff against the defendant and if plaintiff died, legal representatives would have been entitled to the benefit of injunction. In our opinion, the High Court has erred in dismissing the appeal. The said maxim had no application, thus the decision cannot be said to be laying down the correct proposition of law and is overruled.

23. Another decision which has been referred to is Abdul Kardar Haji Hiroli v. Mrs. Judaih Jacob Cohen 1969 BLR 749 in which the question arose about the executability of the decree containing covenants running with the land and the same was passed with the consent of the parties, the Court held that it was not executable against the third party and the purchaser of the land. The question does not arise for consideration as the present case is not the case of transfer or execution by or against the purchasers of the land.

24. Learned author Mulla in his Commentary on the Code of Civil Procedure (18th Edition) Vol I, while analyzing the provisions of Section 50 CPC has referred to various decisions of the High Courts (Sakarlal v. Parvatibai (1902) 26 Bom 283, Amritlal v. Kantilal AIR 1931 Bom 280, Ganesh v. Narayan AIR 1931 Bom 484, Dayasbhai v.

Bapalal (1902) 26 Bom 140, Vithal v. Sakharam (1899) 1 Bom LR 854, Jamsetji v. Hari Dayal (1908) 2 Bom 181, Chothy Theyyathan v. John Thomas AIR 1997 Ker 249, Krishnabai v. Savlaram AIR 1927 Bom 93, Kalpuri Ellamma v. Nellutla Venkata Lakshmi 2008 (72) All Ind Cas 669) with respect to the executability of decree for injunction and observed at pages 687-688 thus:

> "12. Decree for injunction.- An injunction obtained against a defendant, restraining him from obstructing plaintiff's ancient rights, may, on the death of the defendant, be enforced under this section, against his son as his legal representative, by procedure under O 21, r 32 (Sakarlal v. Parvatibai, (1902) 26 Bom 283; Amritlal v. Kantilal, AIR 1931 Bom 280 : (1931) 33 Bom LR 266. Code of Civil Procedure 1882, s 260). Similarly, a decree for an injunction against a manager and representative of a joint Hindu family can be enforced after his death against a son who represents the joint family (Ganesh v. Narayan, AIR 1931 Bom 484 : (1931) 55 Bom 709). But such an injunction cannot be enforced under this section against a purchaser of the property from the defendant, for an injunction does not run with the land. The remedy of the decree-holder is to bring a fresh suit for an injunction against the purchaser (Dayasbhai v. Bapalal, (1902) 26 Bom 140; Vithal v. Sakharam, (1899) 1 Bom LR 854; Jamsetji v. Hari Dayal, (1908) 32 Bom 181), when the decree is one restraining the owner of the property from blasting rocks in his property on a finding that such blasting would injuriously affect the adjacent property of the decree- holder. When once a decree is passed, it is obvious that the defendant in the suit, judgment-debtor, would be precluded from carrying on blasting operation in his property. To say that when he is succeeded by the others, they would not be bound by the restrain relating to the enjoyment of the particular property is to derogate from the principle of the public policy that there shall be no second litigation in respect of the same right and the same property. It cannot be the policy of law that every time an assignment of the decree schedule property take place, the decree- holder should institute a fresh suit against the assignee, so as to prevent them from disobeying the decree obtained by the decree-holder against the original owner of the property (Chothy Theyyathan v. John Thomas, AIR 1997 Ker 249. See notes to s 47, 'Representatives No. (6)-Purchaser of Property'). The Bombay High Court has held that an injunction can be enforced against a person who has purchased while execution proceedings are pending, by virtue of the doctrine of lis pendens (Krishnabai v. Savlaram, AIR 1927 Bom 93 : (1927) 51 Bom 37).

In execution of a decree for perpetual injunction, the liability of the legal

representatives of the judgment-debtors is limited to the extent of interference which was restrained through such decree. It is only such legal representatives who defy the decree that can be proceeded against (Kalpuri Ellamma v. Nellutla Venkata Lakshmi, 2008 (72) All Ind Cas 669)."

25. In K. Umma v. T.K. Karappan AIR 1989 Ker 133 the High Court of Kerala has observed that where a decree for injunction is obtained against a sole judgment-debtor, restraining him from obstructing the plaintiff in erecting a fence on the boundary of his property, the decree can be executed against the legal representatives of the judgment-debtor, if he dies.

26. In our considered opinion the right which had been adjudicated in the suit in the present matter and the findings which have been recorded as basis for grant of injunction as to the disputed property which is heritable and partible would enure not only to the benefit of the legal heir of decree-holders but also would bind the legal representatives of the judgment-debtor. It is apparent from section 50 CPC that when a judgment-debtor dies before the decree has been satisfied, it can be executed against legal representatives. Section 50 is not confined to a particular kind of decree. Decree for injunction can also be executed against legal representatives of the deceased judgment-debtor. The maxim "actio personalis moritur cum persona" is limited to certain class of cases as indicated by this Court in Girijanandini Devi v. Bijendra Narain Choudhary (supra) and when the right litigated upon is heritable, the decree would not normally abate and can be enforced by LRs. of decree-holder and against the judgment-debtor or his legal representatives. It would be against the public policy to ask the decree-holder to litigate once over again against the legal representatives of the judgment-debtor when the cause and injunction survives. No doubt, it is true that a decree for injunction normally does not run with the land. In the absence of statutory provisions it cannot be enforced. However, in view of the specific provisions contained in section 50 CPC, such a decree can be executed against legal representatives.

27. Resultantly, we allow the appeals, set aside the impugned order passed by the High Court and hold that the direction issued by the executing court that an undertaking be furnished by the legal representatives to abide by the decree is proper, failing which the executing court would proceed in a permissible mode in accordance with law to enforce the decree under the provisions of Order XXI Rule 32 CPC. No costs.

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2018 (1) L.S. 20 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
P.K. Agrawal &
The Hon'ble Mr.Justice
Abhay Manohar Sapre

Dineshbhai Chandubhai
Patel ..Appellant

Vs.

State of Gujarat & Ors., ..Respondents

CRIMINAL PROCEDURE CODE. Sec.482 – Appellants/Accused preferred instant appeal against impugned Judgment, whereby High Court partly allowed their application seeking quashing of FIR.

Held – In impugned Judgment, High court concluded that some part of FIR in question is bad in law because it does not disclose any cognizable offence against accused persons and only a part of FIR is good as it discloses a prima facie case against accused persons – In doing so, High court virtually decided all the issues arising out of the case - While examining whether factual contents of FIR disclose any prima facie cognizable offences or not, the High Court cannot act like an investigating agency nor can exercise powers like an appellate court.

J U D G M E N T

(per the Hon'ble Mr.Justice Abhay Manohar Sapre)

1) Leave granted.

2) These appeals are filed against the common final judgment and order dated 10.07.2017 passed by the High Court of Gujarat at Ahmedabad in Criminal Misc. Application (for quashing and set aside FIR/ Order) No. 16731 of 2016 with Crl. Misc. Appln. Nos. 13733, 14842/2016, SPCRA Nos. 4387, 4357, 4951/2016, Crl.Misc. Appln. No. 32440/2016 in Crl. Misc. Appln. No.16731/2016 whereby the Single Judge of the High Court partly allowed the application for quashing the FIR.

3) In order to appreciate the issues involved in this bunch of appeals, it is necessary to state few relevant facts. The facts are taken from the SLP paper books.

4) The dispute arising between the parties to this bunch of appeals essentially relates to a piece of land bearing Survey No. 96/ 3/2, Block No. 121, admeasuring 5281 sq. mts., Plot No. 71, admeasuring 3475 sq. mts. of Town Planning Scheme No. 36 (Althan), situated at village Althan, Taluka & city -Surat (hereinafter referred to as "the disputed land").

5) The disputed land was jointly owned by the members of one Rathore family, who according to them, belonged to Halpai caste.

6) Six members of the Rathore Family (hereinafter referred to as the Complainants)

filed one joint complaint to the Commissioner of Police, Surat on 25.04.2011 (Annexure-P-2) complaining therein that one person by name - Dineshbhai Chandubhai Patel in conspiracy with several other named persons jointly defrauded and deceived the complainants by taking advantage of their illiteracy, poverty and unawareness got executed bogus Power of Attorney with bogus signatures in relation to the disputed land. It was alleged that these persons again in furtherance with the conspiracy got the disputed land transferred in favour of several persons and illegally got the construction maps sanctioned to enable them to do construction over the disputed land.

7) In short and in substance, the grievance of the complainants was that the above named persons conspired together and snatched away from the complainants their aforementioned valuable land by committing fraud, cheating, deception, breach of trust etc. on them.

8) The complainants enclosed all disputed documents along with their complaint to show prima facie case alleged to have been committed by the above-named persons and prayed to the Commissioner of Police to investigate the entire case in relation to their land and bring the investigation to its logical end by first registering the FIR and then after holding a proper investigation, file the charge sheet in the competent Court against all those found involved in the case and prosecute them for the offences which they have allegedly committed and punish them under the Indian Penal Code and other related Acts.

9) This was followed by another complaint (Annexure P-6) filed with the Collector (SIT), Surat on 23.01.2012 against six named persons seeking therein the prosecution of those persons for having committed the alleged offences punishable under Sections 34, 114, 120-B , 420 ,465 ,468, 471 and 476 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") read with Sections 3, 7 and 11 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The complaint also set out the allegations with details alike the previous one with some new facts.

10) Yet another third complaint was filed with the Collector, District Disputes Redressal Forum, Surat (Annexure-P-13) on 07.10.2013 by one of the complainants against 8 named persons making more or less same allegations made in the first two complaints with more detailed facts seeking to prosecute them for the commission of offences named in the earlier complaints.

11) It is these three complaints which led to registration of the FIR (CR No.I.C.R. No. 90 of 2016) on 06.06.2016 with Khatodara Police Station, Surat giving rise to filing of several criminal applications, bail petitions etc. one after the other at the instances of the named accused persons and others alleged to be involved in the cases.

12) These cases were filed in the lower Court, the High Court and also in this Court one after the other during the last 4 years. The Courts passed several orders with observations made therein.

13) The present bunch of appeals arises

out of the criminal applications filed by the named accused persons in the aforementioned three complaints under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") in the Gujarat High Court seeking therein a prayer to quash the aforementioned FIR.

14) By impugned judgment dated 10.07.2017, the Single Judge of the High Court partly allowed the criminal applications and passed the following operative portion of the judgment contained in Para 88 which reads as under:

"(1) The First Information Report, so far as the offence punishable under Sections 406, 420, 120B of the Indian Penal Code and the Atrocities Act is concerned, is quashed. The investigation as regards the allegations of creating the two bogus power of attorneys and erasing of 73AA is concerned, shall be completed by the Commissioner of Police, Surat in accordance with law.

(2) The Commissioner is also directed to undertake the investigation as regards the persons, who had approached the land owners and had obtained the thumb impressions on the complaints addressed to the Commissioner of Police, Surat. To put it in other words, I direct the Commissioner to undertake proper investigation as regards the allegations of blackmailing and extortion leveled against the particular persons."

15) It is against this judgment, both parties, i.e., the complainants and the accused persons have felt aggrieved and filed these appeals.

16) So far as the accused persons are concerned, they have challenged that part of the order by which the High Court has dismissed their criminal applications and declined to quash the FIR in relation to some offences alleged against them. According to the accused persons, the High Court should have quashed the entire FIR instead of quashing part of it.

17) So far as the complainants are concerned, they have challenged that part of the judgment by which the High Court has quashed the FIR in relation to some offences. According to the Complainants, the High Court should have upheld the entire FIR as it being legal and proper, it should have been given full effect in accordance with law against the accused persons.

18) This is how, the entire controversy is now again raised before this Court in this bunch of appeals by way of special leave at the instance of the complainants and accused persons in their respective appeals.

19) Heard Mr. Mukul Rohtagi, Dr. A.M. Singhvi, Mr. Yatin Oza, Ms. Meenakshi Arora and Mr. Shamik Sanjanwala, learned senior counsel for the accused persons and Mr. Dushyant Dave and Mr. Harin P. Raval, learned senior counsel for the complainants.

20) Mr. Mukul Rohatgi, Dr. A.M. Singhvi, Mr. Yatin Oza and Ms. Meenakshi Arora, learned senior counsel appearing for the accused persons, in their respective appeals, strenuously contended that the

High Court had rightly quashed the FIR in part but erred in not proceeding to quash the FIR in full because in the light of the findings on which the FIR was quashed in part, nothing then remained for the investigating authorities to probe in the remaining FIR which was upheld.

21) It is this submission, which was elaborated by all the senior counsel by placing reliance on several documents, observations of the High Court made in the earlier round of litigation and in the impugned judgment with a view to show that the entire FIR is an abuse of legal process and caused harassment to the accused persons. It was urged that FIR does not make out any much less prima facie case against any of the accused persons as the parties having settled the matter in writing and the complainants having accepted the huge consideration from the accused persons, there does not arise any cause to the Complainants to now file such belated FIR against the accused persons in relation to the subject matter in question. According to the learned counsel, it is also barred.

22) In reply, learned senior counsel Mr. Dushyant Dave and Harin P. Rawal appearing for the complainants urged that the High Court should have dismissed the criminal applications filed by the accused persons and upheld the entire FIR as a whole for being probed as, according to them, the FIR did disclose prima facie cognizable offences against the accused persons named therein. It was urged that keeping in view the nature of the offences, the law of limitation does not apply as has been held by this Court in number of similar cases.

23) Learned counsel further urged that there was no justification much less legal justification on the part of the High Court to have quashed the FIR in part and hence the judgment to that extent deserves to be set aside.

24) It is this submission, which was elaborated by the learned senior counsel by placing reliance on several documents filed by them including placing reliance on the observations of the High Court in the earlier round of litigation and the impugned judgment and at the same time also denied the documents filed by the accused persons including their contents and correctness.

25) Having heard the learned counsel for the parties at length and on perusal of the record of the case, we are inclined to accept the submissions of the learned counsel appearing for the Complainants finding force therein whereas we do not find any merit in the submissions urged by the learned counsel appearing for the accused persons.

26) The law on the question as to when a registration of the FIR is challenged seeking its quashing by the accused under Article 226 of the Constitution or Section 482 of the Code and what are the powers of the High Court and how the High Court should deal with such question is fairly well settled.

27) This Court in State of West Bengal & Ors. vs. Swapan Kumar Guha & Ors. (AIR 1982 SC 949) had the occasion to deal with this issue. Y.V. Chandrachud, the

learned Chief Justice speaking for Three Judge Bench laid down the following principle:

"Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case. If on a consideration of the relevant materials, the Court is satisfied that an offence is disclosed, the Court will normally not interfere with the investigation into the offence and will generally allow the investigation in the offence to be completed for collecting materials for proving the offence. The condition precedent to the commencement of investigation under S.157 of the Code is that the F.I.R. must disclose, prima facie, that a cognizable offence has been committed. It is wrong to suppose that the police have an unfettered discretion to commence investigation under S.157 of the Code. Their right of inquiry is conditioned by the existence of reason to suspect the commission of a cognizable offence and they cannot, reasonably, have reason so to suspect unless the F.I.R., prima facie, discloses the commission of such offence. If that condition is satisfied, the investigation must go on. The Court has then no power to stop the investigation, for to do so would be to trench upon the lawful power of the police to investigate into cognizable offences."

28) Keeping in view the aforesaid principle of law, which was consistently followed by this Court in later years and on perusing the impugned judgment, we are constrained to observe that the High Court without any justifiable reason devoted 89 pages judgment (see-paper book) to examine the aforesaid question and then came to a conclusion that some part of the FIR in question is bad in law because it does not disclose any cognizable offence against any of the accused persons whereas only a part of the FIR is good which discloses a prima facie case against the accused persons and hence it needs further investigation to that extent in accordance with law.

29) In doing so, the High Court, in our view, virtually decided all the issues arising out of the case like an investigating authority or/and appellate authority decides, by little realizing that it was exercising its inherent jurisdiction under Section 482 of the Code at this stage.

30) The High Court, in our view, failed to see the extent of its jurisdiction, which it possess to exercise while examining the legality of any FIR complaining commission of several cognizable offences by accused persons. In order to examine as to whether the factual contents of the FIR disclose any prima facie cognizable offences or not, the High Court cannot act like an investigating agency and nor can exercise the powers like an appellate Court. The question, in our opinion, was required to be examined keeping in view the contents of the FIR and prima facie material, if any, requiring no proof.

31) At this stage, the High Court could not appreciate the evidence nor could draw its own inferences from the contents of the FIR and the material relied on. It was more so when the material relied on was disputed by the Complainants and visa-se-versa. In such a situation, it becomes the job of the investigating authority at such stage to probe and then of the Court to examine

the questions once the charge sheet is filed along with such material as to how far and to what extent reliance can be placed on such material.

32) In our considered opinion, once the Court finds that the FIR does disclose prima facie commission of any cognizable offence, it should stay its hand and allow the investigating machinery to step in to initiate the probe to unearth the crime in accordance with the procedure prescribed in the Code.

33) The very fact that the High Court in this case went into the minutest details in relation to every aspect of the case and devoted 89 pages judgment to quash the FIR in part lead us to draw a conclusion that the High Court had exceeded its powers while exercising its inherent jurisdiction under Section 482 of the Code. We cannot concur with such approach of the High Court.

34) The inherent powers of the High Court, which are obviously not defined being inherent in its very nature, cannot be stretched to any extent and nor can such powers be equated with the appellate powers of the High Court defined in the Code. The parameters laid down by this Court while exercising inherent powers must always be kept in mind else it would lead to committing the jurisdictional error in deciding the case. Such is the case here.

35) On perusal of the three complaints and the FIR mentioned above, we are of the considered view that the complaint and FIR, do disclose a prima facie commission of various cognizable offences alleged by the complainants against the accused persons and, therefore, the High Court instead of dismissing the application filed by the accused persons in part should have dismissed the application as a whole to uphold the entire FIR in question.

36) Learned counsel for the accused persons after the arguments were over filed brief note and placed reliance on 2 decisions of this Court reported in (2015) 11 SCC 730 and (2011) 3 SCC 351 in support of their contentions. We have perused the 2 decisions. In our view, both the decisions are distinguishable on facts, whereas the decision on which we have placed reliance is more on the point. It is for the reason that in the first place, the 2 decisions relied on by the learned counsel for the accused persons were the cases where a complaint was filed in the Court under Section 138 of the Negotiable Instruments Act and in other case under some sections of IPC. It is this complaint which was sought to be quashed by invoking the inherent jurisdiction under Section 482 of the Code. Such is not the case here. Secondly, the decision therefore turned on the facts involved in respective cases.

37) In the case at hand, the challenge is especially to registration of the FIR. This Court in Swapan Kumar Guha (supra) case examined the exercise of inherent powers of the High Court in the context of a challenge to an FIR. In our view, therefore, the law laid down in Swapan Kumar Guha (supra) is directly applicable to the facts of this case as against the law laid down in the two cited decisions.

38) In the light of foregoing discussion, it

is now necessary that the matter, which is subject matter of FIR in question, needs to be investigated in detail by the investigating authorities in accordance with procedure prescribed in the Code.

39) We have purposefully refrained from making any observation on the merits and also refrained from giving our reasoning on factual issues arising out of the case, else it may cause prejudice to the parties and also hamper the on-going investigating process undertaken by the police authorities.

40) Though learned senior counsel appearing for the parties argued the issues touching the merits of the case by referring to hundreds of documents but, in our view, it is wholly unnecessary to enter into the factual arena once we record a finding that a prima facie case is made out on reading the FIR including the documents enclosed therein. We, therefore, do not consider it necessary to go in detail of their submissions. Needless to say, all these submissions and unproved and disputed documents on which reliance was placed by the parties would be dealt with at a later stage as and when the occasion arises.

41) In view of foregoing discussion, the appeals filed by the complainants, i.e., criminal appeals @ S.L.P. (Crl.) Nos. 5476 & 5475 of 2017 are allowed. The impugned judgment is set aside. As a sequel to our order, the appeals filed by the accused persons, i.e., criminal appeals @ S.L.P.(Crl.) Nos. 5155, 5322, 5500 & 5867/2017 are dismissed.

42) As a consequence, the criminal applications filed by the accused persons under Section 482 of the Code out of which these appeals arise are dismissed.

43) Since the FIR is pending for quite some time, we direct the investigating authorities to complete the investigation of the case without any bias and prejudices strictly in accordance with law and proceed ahead expeditiously.

44) Before parting, we consider it proper to clarify that this order should not be construed as having decided any issue on merits either way. The investigating authorities would not, therefore, be influenced in any manner by any of the observations made by the lower Courts and the High Court in their respective orders while investigating the matter.

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