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Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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PART - 3 (15TH FEBRUARY 2018)

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Held – No eye witnesses and entire case rests on circumstantial evidence – It is clear that duty is cast upon prosecution to prove circumstances relied upon and

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LAW SUMMARY
2018 (1)
JOURNAL SECTION

MAINTENANCE OF WIFE
{LEGALLY WEDDED WIFE Vs LIVE IN RELATIONSHIP}

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

Law must be static. If there is any chance of plural meanings in perception, it may cause hardship to the litigants. Legislation is an edifies where litigants have to reside comfortably. The Law has to serve the needs of People. But fortunately or unfortunately, the lawmakers are swinging towards ideology than perceptive ideas. Obviously, as a result lucidity phenomenon is missing in most of the statutes. One such cloudy field is— Maintenance of Wife.

Maintenance means financial support given by one person to another. So it is compassion between dependent and independent. In a civilized world, there is no room for ethical or moral eternity in litigations. Only room is Legal.

When we are codifying the law, we have to scrutinize the ethics, morality etc before codification and have to merge them into sections in the Statute. Otherwise, the litigants, who have to be followed Law of the land, have to be turned into stay birds. **Hence Law must be Static**.

Now coming to the topic of maintenance of wife: Except in **Domestic Violence Act,** in the remaining statutes a right of maintenance is given to legally wedded wife only.

To all Indians

S.125 Cr.P.C:

In S.125 Cr.P.C. under explanation (b) **wife** includes

a woman who has been divorced by, or

has obtained a divorce from, her husband and

has not remarried

Only legally wedded wife alone is entitled to seek divorce. The woman who is in live in relationship is not entitled to seek any remedy of divorce under any law. Hence the literal meaning of the word **wife** denoted in S.125 Cr.P.C is relating to the **legally wedded wife only**.

But for the sake of granting maintenance, obviously out of mercy & under special circumstances there are instances in granting maintenance to the women other than the legally wedded wife. But if it restricts to that particular case only, the legally wedded wife will survive in society. It is an honour to the legally wedded wife. She has to be protected to entitle her, to the statutory benefits.

Domestic Violence Act:

But under the Domestic Violence Act, 2005, in our little search, first in India, a statutory sanction has given to the live in relationship, which may dilute the word—legally wedded—in future course of times in Indian matrimonial law. The very definitions under Domestic Violence Act are in such way. They are:

S.2(a): aggrieved person: means **any woman** who is, or has been **in a domestic relationship** with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;

S.(f): domestic relationship: means a relationship between two persons who **live** or have, at any point of time, **lived together** in a shared house hold, when they are related by consanguinity, marriage, or **through relationship in the nature of marriage**, adoption or are family members living together as a joint family;

S.2(q): respondent: means any adult male person who is, or has been in a domestic relationship with the aggrieved person and against whom the aggrieved persons has sought any relief under this Act:

Provided that an aggrieved wife or female living **in relationship** in the nature of a marriage may also file a complaint **against a relative of the husband or the male partner**;

Thus, according to us, first time in India, a live in relationship has recognized as a **statutory right** to an Indian woman under Domestic Violence Act, 2005.

The live in relationship is nothing but a relationship to the people who are exceeding the limitations of sanctity word of Indian Family.

Most of the live in relationships will develop between a man and woman in a secret manner. The relatives of that man can't be penalized for the secret mistakes. But the Proviso U/S.2(q) of Domestic Violence Act permitting to initiate the complaint against

the relatives also. In our little search, we could not find out, any definition to the word **relative** in Domestic Violence Act.

On one hand it was established that the 498 A IPC is utilizing against the relatives of the husband un-necessarily. But on the other hand, without considering that experience, a new proviso has inserted U/S.2(q) in Domestic Violence Act in 2005. Thus the legislature are bringing the statutes in different form without considering the mis-use under existing law.

What is meant by **FAMILY** under Indian Law ?

In our little search, we could not find out the definition of Family in any Indian Statutes. According to us, Family means: A group of individuals who share **ties** of blood, marriage or adoption; There is no upper bound to the notions or meanings in dictionary definitions. We are of the view that we have to follow the legal meanings than the dictionary meanings, under Law. Law has it's own meaning coupled with impact on society.

Indian Family structure is bonded with a tie. Now that tie is loosing it's stiffness. The sacred Indian Family is losing it's value legally, in view of the changed circumstances. It is not out of place to submit that now days the legislature is floating towards the vote banks than the good or bad to the society. It may lead the Indian society in to plural relations as the Indian Parliament itself protecting them in some parts, by giving a different definition to the Domestic relationship.

Other side of the Coin: In the light of the statutory recognition of live in relationship under one statute in Indian Law, it may have an impact in future in other way, on the other existing law.

S.494/Bigamy : Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of xx xx xx

The offence of bigamy may dilute in view of the recognition of live in relationship in recent trend of Indian Law. When live in relationship is permitting, impliedly, under Indian Law, the aggressors may take shelter under it.

In recent times, the women who are in live relationship are also filing 498 A IPC cases.

Thus slowly the India Law is permitting the women other than legally wedded, in all aspects including maintenance.

Illegal relationship Vs live in relationship—What is the difference between them ?:

If a man had a relationship with other than the wife, all the days we are calling it as an illegal relationship. Now modern society is calling it as live in relationship. Through statutory sanction to the live in relationship, there is no room to call any relationship as an illegal relationship. If some protection is accorded to the live in relationship, it is nothing but permitting or continue the live in relationships in society with free of mind. They fight for their relationship by designating it as live in relationship.

Mistake of Law:

Mistake of law has no excuse, is the basic concept in law. In the presence of legally wedded wife, there is no room to any body, other than the legally wedded wife to claim statutory rights. But Indian Law is opening windows towards live in relationship. If statutory right is provided to the women, other than the legally wedded wife, it is nothing but inviting litigations in other form, which may damage the morality in the society.

If the Law is static, the people may wait for legality to their marriage. If it is not static, they may swing towards continue live in relationships, without opting for legal marriages. In such circumstances, the most hurter bird will be the women.

Parting with our discussion on this aspect, we are of the view that the law must be static. Legally wedded wife alone has to be permitted to the statutory benefits. One can not take advantage of their own wrongs by pleading ignorance of fact which resulting in to mistake of law in the matrimonial laws. The woman, who has relationship with an already married man, always pleads ignorance about the earlier marriage of that man. Otherwise there may not be any genesis to her, in creating the litigation. Permitting plural relations and applying sanctity through statutory benefits may cause damage to the future generations in all sectors. Though delinquency is curling into the society in new shadows of modern life, the law must be **static** to guide the same into a moral society.

One will realize their mistakes in the life, but belatedly in the last session of life. Autobiographies' are best examples to it. By that time, they may agree that, if the law is **static** during their early days, they may afraid to commit those mis-deeds. Thus experience vindicates that they committed mistakes under different colour of life. As in science, all colours will merge into white, in law we can prevent most of the mis-deeds and mistakes, if the law is in **static** condition. Prevention is better than cure is the ancient and standard proverb.

We may be wrong at some points. But our notion is, we have to give an honour to the word "**Legally wedded**", in Law. The term "**Legally**" must perfume its own identity with proud and honour in the society while tagging it with the word of "**wedded**". We are contributing this article only in the academic interest.

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74. In Laxman Tatyaba Kankate v. Taramati Harishchandra Dhatrak16, the Supreme Court considered the principles relating to exercise of discretion under Section 20 of the Specific Relief Act, 1963 and held:

19. It will also be useful to refer to the provisions of Section 20 of the Act which vests the court with a wide discretion either to decree the suit for specific performance or to decline the same. Reference in this regard can also be made to Bal Krishna v. Bhagwan Das, where this Court held as under: (SCC pp. 152-53, paras 13-14)

13. The compliance with the requirement of Section 16(c) is mandatory and in the absence of proof of the same that the plaintiff has been ready and willing to perform his part of the contract suit cannot succeed. The first requirement is that he must aver in plaint and thereafter prove those averments made in the plaint. The plaintiff's readiness and willingness must be in accordance with the terms of the agreement. The readiness and willingness of the plaintiff to perform the essential part of the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of the court.

14. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void.

20. Similar view was taken by this Court in Mohammadia Coop. Building Society Ltd. v. Lakshmi Srinivasa Coop. Building Society Ltd. where the Court reiterated the principle that jurisdiction of the court to grant specific performance is discretionary and the role of the plaintiff is one of the most important factor to be taken into consideration.

21. We may also notice that in Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son, this Court further cautioned that while exercising discretionary jurisdiction in terms of Section 20 of the Act, the court should meticulously consider all facts and circumstances of the case. The court is expected to take care to see that the process of the court is not used as an instrument of oppression giving an unfair advantage to the plaintiff as opposed to the defendant in the suit.(emphasis supplied)

75. Applying the above principles to the facts of this case, in my considered opinion,

upholding the decree of specific performance granted by the court below, in the light of the findings recorded by me supra, would not be proper and would result in giving an unfair advantage to the plaintiff over the defendants. The conduct of the plaintiff and the pleas raised by him having been proved to be false, also disentitle him to the discretionary relief of specific performance.

16. Having regard to the facts and circumstances of the case and the categoric admission of the 2nd defendant in the suit/ 2nd respondent herein, the judgments on which the learned counsel for 2nd respondent places reliance would not be helpful to the case of the 2nd respondent. It is of- course a settled proposition of law that the primary relief of specific performance need not be granted simply because the same is lawful to do so. At the same time, it is also a settled and well established principle of law that the said relief cannot be refused in an arbitrary, illegal, unreasonable and inequitable manner. In the instant case, knowing fully well about the existence of Ex.A3 sale agreement in favour of plaintiff, the 3rd defendant purchased the property by way of Ex.A8 sale deed. As observed supra, the defendants proceeded with the transaction pertaining to Ex.A8 sale deed despite Ex.A5 and A7 notices. By any stretch of imagination, it cannot be said that the 3rd defendant is a bonafide purchaser for valuable consideration to have the protection under the provisions of Specific Relief Act. The non- examination of the plaintiff herself, in the facts and circumstances of the case and in view of the active participation of the General Power of Attorney Holder of the plaintiff and in view of the Judgment of the Honble Apex Court in MAN KAUR (DEAD) BY LRS (3 supra), would not be fatal to the case of the plaintiff. In the considered opinion of this Court, the rejection of primary relief of specific relief of agreement of sale in favour of plaintiff is not only illegal, but also highly unreasonable. If these types of transactions covered by Ex.A8 are allowed to sustain, people will loose faith in the transactions and the rule of law. In the definite opinion of this Court, plaintiff not only pleaded, but also proved his readiness and willingness to perform his part of the contract and it is the defendants who went back from Ex.A3 agreement of sale and executed unreasonably Ex.A8 sale deed in favour of 3rd defendant. Therefore, all the issues are answered in favour of plaintiff and against the defendants and Ex.A8 sale deed executed in favour of 3rd defendant is to be declared as null and void.

17. For the aforesaid reasons, this Appeal Suit is allowed, decreeing the suit as prayed for. The judgment and decree dated 30.1.1997 passed in O.S.No.155 of 1988 on the file of Court of III Additional Subordinate Judge, Visakhapatnam is hereby set aside and Ex.A8 sale deed is declared as null and void and the Defendant No.2 is directed to register the suit schedule properties in favour of plaintiff, after receiving balance sale consideration and in the event of failure on his part, the sale deed shall be executed by the Court below in favour of plaintiff in respect of the suit schedule properties. As a sequel, the miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

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2018(1) L.S. 127

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

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

Tata Seshaiah ..Appellant

Vs.

Maruboyina Sankaramma & Ors., ..Respondents

SPECIFIC RELIEF ACT, Sec.41(h) - Trial Court dismissed Respondent's/ Plaintiff suit on finding that Appellants/ Defendants did not encroach upon respondents property but both appellants and respondents encroached the road margin and made construction and therefore, respondents cannot seek for mandatory injunction to stop construction by appellants - Whereas, Lower Appellate Court held that since appellants constructed house on road margin blocking passage to respondent's land from road, respondents deserve mandatory injunction.

Held – Lower appellate Court did not consider evidence on record touching aspect of respondent's encroachment - If verdict of first appellate court is vitiated by perverse finding due to non-consideration or misconsideration of material evidence on record, then High Court in Second Appeal can interfere with – Second Appeal is allowed by setting aside Judgment and decree passed by lower appellate Court.

S.A.No.11/2007 Date: 22-12-2017

Cases referred:

1.(2005) 10 SCC 38
2.(2007) 14 SCC 138
3.(2010) 12 SCC 740
4.AIR 1975 Allahabad 341
5.1988 (2) Law Summary 223
6.AIR 1969 AP 136
7.2011 SCC Online AP 778 = 2012 (2) ALD 692

Smt. M.Bhaskara Lakshmi, Advocate for Appellant.
Smt. K.Sesharajyam for Smt. Deepika Gadde, Advocate for Respondent No.1.
G.P. for Arbitration (AP), Advocate for Respondent No.3.

J U D G M E N T

This Second Appeal is preferred by the appellant/1st defendant in O.S.No.204 of 1991 aggrieved by the Judgment and Decree dated 15.07.2005 in A.S.No.2 of 1999 passed by the IV Additional District Judge, Nellore, whereby and whereunder the learned Judge allowed the appeal filed by the plaintiff and set aside the Judgment and Decree dated 03.11.1998 in O.S.No.204 of 1991 passed by the III Additional Junior Civil Judge, Nellore, filed for permanent and mandatory injunction.

2) The parties in this Second Appeal are referred as they were arrayed before the Trail Court.

3) The factual matrix of the case is thus:

a) The plaintiffs case is that she owns Ac.0-48 cents of wet land in Sy.No.571-1A of Brahmadevi village, Muthukur Mandal having purchased under Ex.A.1sale deed.

There was a road running from East to West towards Southern side of the land purchased by her. 1st defendant and his son i.e, 2nd defendant, who are residing jointly adjacent to the land of plaintiff, constructed a house in the road margin illegally. The defendants dug trenches adjacent to the road berm and also encroached into 2 Ankanams of plaintiffs land. When the husband of the plaintiff objected, defendants closed the drainage channel which was in existence since long time. The rain water from the land of plaintiff passes through that drainage channel and if it is closed, the rain water gets stored in the land of plaintiff and submerge the crop raised in the land and cause severe loss. The plaintiff and her husband approached the village Sarpanch Kaliki Ramana Reddy complaining the illegal acts of the defendants and when the village Sarpanch along with some other elders visited the spot on 01.06.1981, the defendants temporarily stopped the construction. However, the defendants were making hectic efforts to proceed with the construction.

Hence the suit.

b) As per the orders in I.A.No.206 of 1998, plaint was amended seeking the relief of mandatory injunction directing the defendants to remove the constructions made in the suit schedule site pending orders passed in I.A.No.374 of 1991.

c) Defendant No.1 filed written statement admitting that there was a road margin of 15 feet width and the drainage channel in the road margin used for passing water from the village to the fields. He denied that the defendants entered the road margin and closed the drainage channel and made preparations to construct a stone walled house. He also denied that defendants dug trenches and encroached into the land of plaintiff and closed the drainage channel, thereby giving scope for submergence of plaintiffs land and crops. It is contended that there was no such diminution of value of land of plaintiff with the alleged construction made by defendants, as the houses of defendants and others were in existence since past 20 years. It is submitted that defendants along with 59 others occupied the road margin adjoining the plaintiffs land and they raised their houses and that they were in uninterrupted possession and enjoyment of the properties. Due to heavy rains in 1984, the houses were damaged and all the persons dug trenches and raised stone walls and laid cement sheeted roofing to the houses. In the year 1989 and also in 1991, there was cyclone resulting in damage of the houses of the defendants and others. It is contended that the husband of the plaintiff intends to knock away 20 Ankanams house site of defendants and threatened 1st defendant to vacate the house to form layout for his land and sell the same as house plots by offering Rs.1,000/- to the 1st defendant. As the 1st defendant disagreed, the husband of plaintiff lodged a complaint with the police against the 1st defendant and on enquiry they found 1st defendant was in possession of the property since 20 years and hence taken no action. It is also contended that plaintiff encroached into 2 Ankanams house site of 1st defendant and making false claim against him. There was a way of 40 feet

x 20 feet to facilitate the movements of the vehicles from road to the land of plaintiff and hence there was no obstruction caused to the plaintiff.

d) After amendment of the plaint claiming relief of mandatory injunction, the 1st defendant filed additional written statement reiterating his earlier written statement and denied that defendants raised construction after filing of the suit.

e) Basing on the above pleadings, the Trail Court framed the following issues on 10.10.1991:

i) Whether the Plaintiff is entitled for permanent injunction?

ii) To what relief?

f) On 14.10.1998, the following additional issues were framed:

i) Whether the Plaintiffs are entitled to the Mandatory Injunction for removal of the defendants house?

ii) To what relief?

g) During trial, PWs.1 to 5 were examined and Exs.A.1 to A.10 were marked on behalf of plaintiff. DWs.1 and 2 were examined and Exs.B.1 to B.14 were marked on behalf of defendants. Exs.X1 to X7 were marked in the evidence of PW.4.

h) After hearing both sides and basing on the oral and documentary evidence, the Trial Court dismissed the suit.

i) Aggrieved, the plaintiff filed A.S.No.2 of 1999 before the IV Additional District Judge, Nellore and the said appeal was allowed decreeing the suit for perpetual and mandatory injunction for removal of the constructions made in the suit schedule site.

Hence the instant Second Appeal by defendant No.1.

4) While admitting the appeal, this Court framed the following substantial questions of law:

1) Is the court below right in granting relief of permanent injunction to the plaintiff when there is no evidence on record to show that the Appellant herein has encroached into the land of plaintiff and the evidence is that the plaintiff herself has encroached?

2) Is the Appellate Court right in giving a finding contrary to the pleadings and evidence?

3) Is the Appellate Court right in giving a finding that the constructions made by the Defendants are obstructing the ingress and aggress of the plaintiff to public pathway only basing on the pleadings when there is no evidence to establish the same?

4) Is the Appellate Court right in misconstruing the evidence on record both oral as well as documentary?

5) Is the Appellate Court right in ignoring the legal aspect that even assuming that the Defendants have raised unauthorized construction, the remedy for the plaintiff is under separate proceedings in appropriate forum and the civil court has no

jurisdiction?

5) Heard arguments of Smt. M.Bhaskara Lakshmi, learned Senior Counsel for appellant; Smt. K.Sesharajyam, learned Senior Counsel for Smt. Deepika Gadde, learned counsel for respondent No.1 and learned Government Pleader of Arbitration (Andhra Pradesh) for respondent No.3. Respondent No.2 is not necessary party in this appeal vide cause title. 6a) Fulminating the judgment of the first appellate Court, learned senior counsel Smt. M.Bhaskara Lakshmi would firstly argue that the judgment of the first appellate Court is perverse in the sense that it has not taken into consideration the evidence on record against the plaintiff. In expatiation, she would submit that the oral evidence of PW4 and Exs.X1 to X7 would clearly depict that apart from the defendants and others, the plaintiff herself has, encroached a portion of the road margin and constructed thatched house. When plaintiff herself is a trespasser, she has no moral or legal right to harp that defendants have trespassed and caused obstruction to her right of way to her land. In fact, the trial Court has given clear finding to the effect that plaintiff is a trespasser and therefore she does not deserve the equitable relief of injunction. However, the first appellate Court without considering the evidence on record as well as the finding of the trial Court, but only considering that defendants have constructed house on the berm of the road, granted injunction on erroneous appreciation of facts and evidence. Learned counsel cited the following decisions to canvass that the erroneous appreciation of facts and evidence by the appellate Court would amount to perversity which can be set right in the Second Appeal.

1.MANICKA POOSALI V. ANJALAI AMMAL (1)

2. ABDUL RAHEEM V. KARNATAKA ELECTRICITY BOARD (2)

3. DINESH KUMAR V. YUSUF ALI (3).

b) Secondly, with regard to obstruction allegedly caused by the house of defendants to approach to the land of the plaintiff, learned senior counsel would argue that since plaintiff herself is a trespasser as submitted earlier, she cannot harp against defendants about obstruction. Even assuming that there is some obstruction, still there is no total blockade, in view of the fact that there is a passage by the side of house of defendants to approach to the land of the plaintiff. The argument that public have right on every inch of public property will not come to the aid of plaintiff because she herself is a trespasser of road margin to some extent. She thus prayed to allow the appeal and set aside the judgment of the appellate Court.

7a) Per contra, while supporting the appellate Court judgment, learned senior counsel Smt. K.Sesharajyam would firstly argue that the admission of defendants coupled with the concurrent finding of both the Courts below is that the defendants constructed house on the road margin blocking the passage to the plaintiffs land from the road. The said concurrent finding of fact is suffice to grant mandatory

1.(2005) 10 SCC 38
2.(2007) 14 SCC 138
3.(2010) 12 SCC 740

injunction in favour of plaintiff as she is entitled to use every inch of public property. In that view, the Second Appeal is liable to be dismissed in limini as it does not involve any substantial question of law.

b) Secondly, she argued that it is preposterous to contend that plaintiff had encroached upon road margin. The evidence of PW4 in this regard is only a passing remark without any proof. On the other hand, his evidence would show that there is drainage between the land of plaintiff and house of defendants. That being so, the question of plaintiff crossing the drainage and encroaching the road margin does not arise. Further, in Ex.X3, the sentence to the effect plaintiffSankaramma herself occupied road margin was pen-written but not a typed one. The said sentence was only an interpolation without initials of the Deputy Executive Engineer. Hence, the authenticity of the said sentence is highly doubtful one. Therefore, the plea of encroachment by the plaintiff is not believable. She would further argue that when alleged encroachment made by the plaintiff is discarded, what will remain for consideration is whether the defendants constructed house on the road margin blocking the passage to the plaintiffs land or not. On this point, apart from the cogent evidence adduced by the plaintiff, the own admission of defendants is writ large. Defendants indeed constructed house in the road margin blocking passage to the land of the plaintiff. Merely because some passage is available abutting their house to approach to the plaintiffs land, that cannot be a ground to deny injunction to plaintiff. The public will have every right to use every inch of public property and that right is a natural right but not prescribed by easement. To buttress her argument, she relied upon the following judgments.

1. Mst. Bhagwanti v. Mst. Jiuti (4)

2. S Someswar Rao v. S.Tirupatamma (5)

3. Movva Butchamma v. Movva Venkateswararao (6).

c) She alternatively argued that even assuming that the plaintiff too encroached upon the road margin and made some constructions that will not disentitle her to get injunction. The authorities may take action against her for removal of encroachment made by the plaintiff in a separate proceedings. Thus, the learned senior counsel prayed to dismiss the Second Appeal.

8) Learned Government Pleader for Arbitration (AP) who appeared for third respondent argued that both the plaintiff as well as defendants encroached berm of the road passing between Brahmadevi and Pottempadu and made constructions and the same is evident from Ex.X7survey report of Assistant Engineer and also the evidence of PW4. In that view, one trespasser cannot maintain injunction against another trespasser. She submitted that Government was contemplating to take suitable action and thus prayed to pass suitable orders in the appeal.

4.AIR 1975 Allahabad 341
5.1988 (2) Law Summary 223
6.AIR 1969 AP 136

9) Substantial Questions 1 to 4: These questions can be taken up together as they relate to correctness of appreciation of facts and evidence made by first appellate Court. It is the argument of learned senior counsel for appellant that the Trial Court basing on the evidence on record, held, plaintiff has encroached road margin and made constructions. However, defendants did not encroach into plaintiffs property, but they too made constructions on the road margin and therefore, the plaintiff who is an encroacher, does not deserve mandatory injunction. However, the appellate Court on a wrong appreciation of facts and evidence held that since the defendants constructed the house blocking the passage from plaintiffs land to the main road, plaintiff deserved mandatory injunction. In the process, the lower appellate Court failed to consider the evidence on record showing that plaintiff also encroached upon the road margin to some extent and constructed a thatched house by the side of defendants house. When plaintiff herself is an encroacher, she cannot claim the equitable relief of injunction against the defendants. It is also her argument that when the finding of the lower appellate Court is vitiated due to non-consideration of crucial evidence on record, it can be said as perverse finding and the High Court in the Second Appeal can set at naught its judgment.

10) I have given my anxious consideration.

a) In Manicka Poosalis case (1 supra) the Apex Court referred its earlier judgment in Govindaraju v. Mariamman [(2005) 2 SCC 500] wherein it is held that the High Court while exercising its powers under Section 100 C.P.C. on re-appreciation of the evidence cannot set aside the findings of fact recorded by the first appellate Court unless the High Court comes to the conclusion that the findings recorded by the first appellate Court were perverse i.e. based on misreading of evidence or based on no evidence.

b) In Abdul Raheems case (2 supra) it was observed that consideration of irrelevant fact and non-consideration of relevant fact would give rise to substantial question of law. It was further observed that reversal of a finding of fact arrived at by the first appellate Court ignoring vital documents may also lead to a substantial question of law.

c) In Dinesh Kumars case (3 supra) the Apex Court observed that Second Appeal is maintainable basically on a substantial question of law and not on facts. However, if the High Court comes to the conclusion that the findings of fact recorded by the courts below are perverse being based on no evidence or based on irrelevant material, the appeal can be entertained and it is permissible for the Court to re-appreciate the evidence.

Thus, the substance of the above precedential jurisprudence is that if the verdict of the first appellate Court is vitiated by perverse finding due to non-consideration or misconsideration of the material evidence on record, the High Court in the Second Appeal can interfere with. It has now to be seen whether the judgment of the lower appellate Court is vitiated by perversity.

11) I have gone through both the judgments. The trial Court dismissed the plaintiffs suit

on the prime finding that defendants did not encroach upon plaintiffs property but both the plaintiff and defendants encroached the road margin and made construction and therefore, plaintiff cannot seek for mandatory injunction. Whereas, the lower appellate Court held that since the defendants constructed house on the road margin blocking the passage to the plaintiffs land from the road, plaintiff deserve mandatory injunction. In view of this dichotomy, it is pertinent to know:

i) Whether defendants have encroached upon plaintiffs property and also road margin causing obstruction to the plaintiff?

ii) Whether plaintiff has encroached upon the road margin and made construction?

12) In para-4 of the plaint it is pleaded that the defendants were intending to construct a house on the road margin and they have no right to make such unauthorized construction. They dug trenches on the Northern side encroaching 2 Ankanams of the land of the plaintiff. In para-4(a) it is pleaded that the defendants constructed asbestos sheet roofed house in the trenches dug before filing of the suit even after serving of the orders passed by the trial Court in I.A.No.374 of 1991. Thus, the plaintiff took a specific plea that defendants encroached upon the road berm and also her site in an extent of 2 Ankanams and made illegal construction of house towards South of her land. However, in the evidence of PW1, he did not depose about defendants encroaching into property of plaintiff. He only stated about their constructing house on the road margin. The plaintiff did not adduce any oral or documentary evidence to establish that the defendants encroached into 2 Ankanams of her land. Therefore, the trial Court rightly observed that the defendants have not encroached into the land of the plaintiff. Sofaras defendants constructing house on the road margin is concerned, the defendants themselves admitted in their pleadings and evidence that themselves and some others have occupied the road margin and raised thatched houses about 30 years back and when those huts were damaged, they constructed stone walls with asbestos roof.

13) Plaintiffs encroachment is concerned, though she vehemently denied, the evidence of PW4 and Exs.X3 and X7 would clearly show that plaintiff too encroached a portion of the road margin and raised thatched hut by the side of house of defendants. PW4 is the Executive Engineer, Panchayat Raj, Nellore. He produced Exs.X1 to X7 during his evidence and stated that the entire road margin was occupied by encroachers including the plaintiff. In the cross-examination he stated that there is a drainage lane between the land of plaintiff and house of defendants. Basing on the same, it was argued that when the drainage lane intervenes the land of plaintiff and road margin on which defendants constructed the house, the question of plaintiff encroaching the road margin by crossing the drainage lane does not arise. This argument is only partly correct. To the immediate North of road there is a road margin on which the defendants constructed the house. To the further North there exists the drainage and to the North of the drainage the land of plaintiff is situated. Therefore,

in the Northern direction, there is no scope for encroachment by the plaintiff as contended. However, the encroachment was made by the plaintiff on the Eastern side of the defendants house. In Ex.X7 letter addressed by Assistant Engineer, Mothkur to Deputy Executive Engineer he mentioned that by the side of defendants house plaintiff occupied road margin by constructing a thatched house including the site 10 meters x 5.3 meters. The Deputy Executive Engineer also inspected the road and submitted a letter to the Executive Engineer under Ex.X3 wherein he too mentioned that plaintiff herself occupied some portion of the road margin. Of course, he mentioned this fact in pen-written form. In view of similar report given by Assistant Engineer under Ex.X7, the authenticity of Ex.X3 can be accepted. Therefore, it is clear that plaintiff has also encroached a portion of the road margin and raised a hut. In fact the hut is visible in the photos filed by the plaintiff. Thus, both plaintiff and defendants are the encroachers of road margin.

14) The law relating to the right of the public on public roads and other public properties and also law relating to the status of encroachers of the roads is no more res integra. It is trite law that once it is a public road, passage or rasta, whole, every part of it and every inch of it retains its character as such. Then, the public will have right to pass through on every inch of public road, passage or rasta. Any person who has a house abutting to public road is entitled to access to the road and if any obstruction is made by any person, special damage can be presumed to be caused to such person and he will deserve injunction. An obstructionist cannot advance obdurate argument that even after his encroachment, some space is left for public to pass through. He cannot judge the method and manner as to how a public right shall be exercised (vide Mst.Bhagwantis case(4 supra); S.Someswar Raos case(5 supra) and Movva Butchammas case(6 supra)).

15) However, an encroacher of a public property stands on a different footing. Having encroached upon a portion of the public rasta, an encroacher cannot harp against another person that he encroached another part of public rasta and caused obstruction to him. It would amount to pot calling the kettle black. An encroacher also cannot maintain a suit for injunction against another encroacher for, the sine qua non for affording equitable relief of injunction is that the plaintiff must approach the Court with clean hands.

16) This Court in TALARI NAGESWAR RAO V. NAKKAL PUSHPAVATHI(7) reiterated the above legal point thus:

> Para-9The substantial question of law which is involved in the instant case arises for consideration is that admittedly the houses of the plaintiffs are situated in road margin which they are not supposed to occupy and construct the houses, can they seek the relief of mandatory injunction against the defendants 1 and 2, the appellants herein for removal of their houses which are also said to be situate in road margin. The learned first appellate Court expressed the view that if the houses of the plaintiffs

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are situate in road margin, any villager can approach the Gram Panchayat or the Court for removal of the said houses but the defendants cannot resist the suit filed by the plaintiffs since their houses are constructed encroaching the road margin.

Para-10 The said finding recorded by the learned first appellate Court, in my considered view, is totally erroneous and contrary to law. The plaintiffs who are guilty of constructing houses in road margin cannot maintain the suit against the defendants for the relief of mandatory injunction on the ground that the defendants' houses were built encroaching upon the road margin.

17) In the instant case, the plaintiff like defendants, occupied a portion of the road margin and raised a hut. In that view, she cannot make a complaint against them and seek for mandatory injunction. Unfortunately, the lower appellate Court did not consider the evidence on record touching the aspect of plaintiffs encroachment. Therefore, I am constrained to hold that its judgment is vitiated by perversity and hence liable to be set aside.

These questions are answered accordingly.

18) Substantial Question No.5: Learned counsel for appellant submitted that it is not her argument that Civil Court has no jurisdiction but her point is that when equally efficacious relief is available, the Court shall desist from granting injunction under Section 41(h) of Special Relief Act. In view of her submission, substantial question No.5 has become redundant. Sofaras the point of argument raised by her is concerned, learned counsel has not vivified as to the availability of the so-called equally efficacious relief to the plaintiff other than seeking for injunction in the suit. It is altogether a different aspect that plaintiff does not deserve injunction as she being an encroacher of the road margin. However, that has nothing to do with Section 41(h) of Specific Relief Act. So, the said argument cannot be accepted.

19) In the result, this Second Appeal is allowed by setting aside the judgment and decree passed by the lower appellate Court in A.S.No.2 of 1999. Consequently O.S.No.204 of 1991 on the file of III Additional Junior Civil Judge, Nellore, is dismissed. No costs.

20) Before parting it must be made clear that this judgment will not restrain the Government authorities to initiate appropriate proceedings to evict the concerned encroachers by following due process of law.

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

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2018(1) L.S. 136

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

D.N.Manimanjari ..Petitioner

Vs.

S.Virupaksheswara Rao ..Respondent

HINDU MARRIAGE ACT, Sec.13 – Challenging Lower Court's Order Petitioner/ Wife has filed instant revision contending that Respondent/Father is not entitled with visitation rights.

Held – Disputes between father and mother in relation to custody of children is expected to strike a just and proper balance on rights, requirements and sentiments - Order of Lower Court in allowing petition to extent of permitting father to see and interact with children once in a week, no way requires interference - Even when custody is retained with mother, right of father to see child at intervals cannot be ignored – Civil Revision Petition is dismissed.

Cases referred

1.1996 (3) ALD-816 (DB)
2.(1973)1 SCC 840
3.(2001)8 SCC 5
4.(2001)4 SCC 71
5.(2000)6 SCC 598

Smt. S. Vani, Advocate for the petitioner.
Ms. G. Sri Devi, Advocate for the Respondent.

CRP.No.6852/17 Date: 21-12-2017

O R D E R

The revision petitioner is no other the wife of the revision respondent. The O.P.No.1084 of 2013 was filed by the revision petitioner by name Smt. D.N. Manimanjari, advocate as per the revision cause title, against her husband by name S.Virupakshewara Rao, for divorce under Section 13 of Hindu Marriage Act and therein she also sought for permanent custody of the minor children i.e., Master S. Pradyumna born on 03.09.2003 and baby S.Pravalika born on 22.05.2006 and also sought for permanent alimony of Rs.25,00,000/- and Rs.50,000/- per month towards maintenance and education expenses of the 2 minor children and for costs.

The said divorce petition with custody petition, permanent alimony and maintenance reliefs was filed on 07.08.2013 and the same is under contest. She also filed it appears DVC.No.58 of 2014. In the pending DVC, Crl.M.P.No.1605 of 2014 filed by her husband under Section 21 of PWDV Act seeking visitation rights of the 2 children. On contest by order dated 24.03.2016, the learned IV Metropolitan Magistrate, Hyderabad, dismissed the petition while saying relationship not in dispute and the 2 children are staying with mother who are away to the petitioner and the 2 children were when interviewed as to willing to meet their father, they stated they are not interested and thereby they cannot be compelled to meet their father to consider his request for visitation rights, but for to decide in a custody petition in considering

the interest of the children and thereby without consent of children he cannot direct the children to visit their father. Leave about the correctness of the order and any appeal filed under Section 29 of PWDV Act against it or not, even from the very order that is not the be all and end all in considering any entitlement to custody and visitation rights or not. That order in DVC case was dated 24.03.2016. The father of the children filed in the main divorce-cum-custody-cum-permanent alimony and maintenance petition supra, I.A.No.534 of 2014 seeking visitation of rights of children on every Saturday and Sunday. It is in saying the mother of the children who is his wife not allowing him to see the children for the last one year which swindles the love and affection of the children towards him and vice versa and he is liking the children a lot and he is curious of seeing them a lot.

The counter filed in opposing by mother of the children with whom the children are is with the contest that he never tried to reach the children nor expressed love and affection and was arrogantly behaving with the children and even beating cruelly and threatening them with dire consequences and the son got disturbed and went in depression and was treated by psychiatrist and the children are very much afraid of the behaviour of the father and are reluctant to interact with their father on account of previous experience hence to dismiss the petition. From that contest by impugned order dated 06.10.2017, the learned Judge Family Court, Hyderabad, permitted the father of the children to see and interact on every Sunday between 10 AM and 12 Noon before the Secretary, District Legal Services Authority, City Civil Court, Hyderabad and with observations in support of that order that the main petition O.P.No.1084 of 2013 is under contest and evidence is in progress since coming for respondents evidence after petitioners evidence recorded and it may consume some more time for its disposal. The children are in the care and custody of the mother and the petitioner being the father of the children apart from natural guardian is also entitled to see and interact with the children to share love and affection and such interaction and sharing of love and affection would go long way for healthy growth and nourishment of children and it gives encouragement and motivation to the children besides acquire knowledge by sharing the love and affection of their father equally which is like the affection they are sharing with the mother and thereby entitled to that limited visiting rights. It is impugning the same, present CMA is filed by mother of the children with the contentions that the impugned order of the lower Court is unsustainable, contrary to law, even doctor advice the father of the children not to confront the child until get back to normalcy since in disturbed condition, it was not considered by the lower Court and the son is studying 9th class and daughter is studying 7th class. The father of the children never felt any responsibility in up bringing the 2 children and not even paid a single pie for the past 3 years and already in DVC case for the visitation rights sought, it was ended in dismissal. There was an order in DVC case exparte for payment of interim

maintenance and it is under execution and with great difficulty paid some time and stopped for past 3 months and when the visitation rights of the children application in I.A.No.534 of 2014 pending before the Court since past 2 years all of a sudden in allowing the same when the matter is in progress of trial is also contended as unsustainable that too even children are expressing their unwillingness as can be seen from the order in DVC case and the learned Judge of the Family Court did not even examined the children of their views before ordering the visitation rights and thereby the order is liable to be set aside.

The learned counsel for the revision petitioner, mother of the children, in support of the grounds urged in the revision reiterated the same impugning the order of the lower Court. Whereas the learned counsel for the revision respondent/father of the children supported the order of the lower Court in saying, but for no separate appeal, the lower Court itself should have been granted more time for spending with the children in providing the visitation rights and thereby there is nothing to interfere with the order of the lower Court and the CMA is liable to be dismissed.

Heard both sides and perused the material on record. Before coming to the facts, it is necessary to mention on the scope of law that custody is different from guardianship though custody can be continued with the guardian generally as held by a Division Bench of this Court in MOHD.SHAHARYARKHAN V. HUSSAIN KHAN(1) . In fact, the Apex Court in ROSY JACOB V. JACOB A.CHAKRAMAKKAL(2) at page 855 Para 15 observed as follows:

> 15. . The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings; so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

In Halsburys Laws of England the law pertaining to the custody of children has been stated at Para No.809 that

> "Wherein any proceedings before any Court, the custody or upbringing of a minor is in question, the Court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to

1.1996 (3) ALD-816 (DB)
2.(1973)1 SCC 840

that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other.

It is true in BIMLENDA KUMAR CHATTERJEE V. DIPA CHATTERJEE(3) the apex Court held that humanitarian approach is necessary for solving the disputes regarding custody and guardianship and it was held that even custody retained with mother, the right of father to see the child at intervals cannot be ignored.

In R.V.SRINATH PRASAD V. NANDAMURI JAYA KRISHNA(4) it was also held that since custody matters are sensitive issues involving emotions of parties concerned, the Courts have to strike a balance between the emotions and the welfare of minor, which is a matter of greater importance as held in JAI PRAKASH KHADRIA V. SHYAM SUNDER AGARWALLA(5).

The fact that in the pending DVC case, the visiting rights of the children sought by the father dismissed is not be all and end all for such an order is even prone to an appeal under Section 29 of DVC Act before the Court of Sessions and from the observation therein as referred supra of such visitation matter to be decided in the custody petition pending in the matrimonial lis and for the present children expressed unwillingness to go to the father not chosen to give visitation rights. Apart from even coming to the counter contentions in this petition before the lower Court of the son got disturbed and went in depression and needs treatment of Psychiatrist or children afraid of the so called psychic behaviour of the father and reluctant to interact from the alleged previous experience concerned, there is basically but for the averments including in the main divorce petition no any record of the father of the children is a psycho or sadist much less to appreciate any argument in this revision in this regard. It is also the duty of the mother to convince the children who are with her for a little while for few hours once in a week or so to go and spend with the father of the children as what is provided even from the order of the lower Court is to spend few hours before the Legal Services Authority and not even of taking away the children by the father to somewhere. Even from the grounds of the revision urged about the boy underwent treatment under Psychiatrist Dr. Lakshmi Pingali and counseled by Dr. Jayanthi at Roshini Counselling centre and that is not a ground to refuse once in a week few hours by the father to spend with the children to shower the love and affection. In fact the Apex Court in Bimlendra Kumar Chatterjee supra held that the Court has to adopt humanitarian approach necessary for solving the disputes regarding custody and guardianship. Even custody remained with the mother, right of the father to see the children at the intervals cannot be ignored and as per the Halsburys law of England referred supra the father and mother got equal right to shower their love and affection to the children and as held in Rosy Jacob supra the Court dealing with

3.(2001)8 SCC 5
4.(2001)4 SCC 71
5.(2000)6 SCC 598

custody and guardianship matters and the disputes between the father and mother in relation to the custody of the children is expected to strike a just and proper balance on the rights, requirements and sentiments.

Having regard to the above, the order of the lower Court in allowing the petition to the extent of permitting the father of the children to see and interact with the children on every Sunday between 10 AM and 12 Noon before the Secretary, District Legal Services Authority, City Civil Court, Hyderabad, no way requires interference, but for to cooperate even by the mother of the child to implement the order instead of driving the Family Court to implement with legal coercion by invoking the provisions of Sections 25, 26 and 40 to 45 of Guardians and Wards Act.

Accordingly and in the result, the Civil Revision Petition is dismissed.

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

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2018(1) L.S. 140

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

Jitendra Jewellers ..Appellant

Vs.

B.Venkateswara Rao & Anr., ..Respondents

CIVIL PROCEDURE CODE, Order VII Rule 11 – Aggrieved by rejection of Appellant's/Defendant counter-claim by both Trial Court and First Appellate Court in terms of Order VII Rule 11 CPC in a suit for recovery of possession, appellant has come up with present second appeal.

Held - Whenever defence to a suit can survive even if counter-claim goes, then Court will be entitled to invoke Order VII, Rule 11 CPC and reject counter-claim – But if defence to suit is so intertwined with counter-claim that rejection of counter-claim will have effect of killing defence to suit, then Court cannot invoke Order VII, Rule 11 of CPC to reject counter-claim – Instant case, defence to suit, depends for its survival upon counter-claim - Second appeal is allowed.

Cases referred:
1. 2007 (2) ALD 483

S.A.No.896/17 Date: 15-12-2017

2. Manu/DE/0769/2014
3. AIR 2003 MP 185

Mr V.S.R. Anjaneyulu, Advocate for Appellant.
Mr. P.R. Prasad, Advocate for Respondents.

J U D G M E N T

Aggrieved by the rejection of his counter-claim both by the Trial Court and by the First Appellate Court, in terms of Order VII, Rule 11 C.P.C., the defendant in a suit for recovery of possession has come up with the above second appeal.

2. Heard Mr. V.S.R. Anjaneyulu, learned counsel appearing for the appellant and Mr. P.R. Prasad, learned counsel appearing for the respondents.

3. The respondents filed a suit in O.S.No.145 of 2016 on the file of the II Additional Junior Civil Judge at Vijayawada, praying for eviction of the appellant herein from the suit schedule property and for future damages at the rate of Rs.40,000/- per month. The case of the respondents/ plaintiffs in the suit was that the suit schedule shop was taken on lease by the father of the appellant/defendant way back in December, 2003; that subsequently the defendant took over the shop from his father; that the defendant committed default in payment of rent from April, 2015 and that therefore after issuing a quit notice dated 23-12-2015, the respondents/plaintiffs were constrained to file the suit for eviction.

4. The appellant/defendant filed a written statement claiming that a lease agreement was entered into on 16-7-2005, in and by which, the lease was agreed to be extended for a period of 25 years and that therefore he was not liable to be evicted. In addition to setting up such a defence, the appellant/ defendant also made a counter-claim by seeking a decree for the relief of specific performance of the registration of the lease deed dated 16-7-2005. The appellant/ defendant admittedly valued the relief of specific performance made in his counter-claim and also paid Court Fee thereon.

5. Thereafter, the respondents/plaintiffs appear to have made a request to the Trial Court to reject the counter-claim in terms of Order VII, Rule 11 CPC. Accordingly, the Court below, by a judgment and decree dated 27-8-2016, rejected the counter-claim alone.

6. The said judgment and decree was taken on appeal in A.S.No.222 of 2016 by the defendant, but the Appellate Court dismissed the appeal. Hence, the defendant has come up with the above second appeal.

7. The one and only substantial question of law arising for consideration in the above second appeal is whether a counter-claim can be rejected in terms of Order VII, Rule 11 CPC, especially in the facts and circumstances of this case.

8. The power of the Court to reject a plaint cannot be in doubt and the parameters are well set out in Order VII, Rule 11 CPC. Order VIII, Rule 6-A(4) makes it clear that a counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. Therefore, the applicability of Order VII, Rule 11 CPC to counter-claims cannot

be ruled out in total. In fact, many High Courts have taken the view that Order VII, Rule 11 CPC s applicable to counter-claims also. This Court held so in ANANTA GAS SUPPLIERS V. UNION BANK OF INDIA(1) . The High Court of Delhi took the same view in KARAN MADAAN V. NAGESHWAR PANDEY(2) . In MOHAN LAL V. SAUKHI LAL(3) and the Madhya Pradesh High Court held that a counter-claim can be rejected under Order VII, Rule 11 CPC.

9. But one question which none of the Courts seem to have considered so far is as to the circumstances in which or the conditions under which a counter-claim can be rejected by applying the parameters of Order VII, Rule 11 CPC. If a counter-claim can be dissected into two portions, one comprising of the defence to the plaintiffs claim and another comprising of the counter-claim and the survival of one of which does not depend upon the other, it may be possible to apply Order VII, Rule 11 CPC with surgical precision. But where the defence to a suit and the counter- claim are joined in such a manner as Siamese twins, with inherent danger to the survival of the defence to the suit, upon the rejection of the counter-claim under Order VII, Rule 11 CPC, the Court would be doing something more than what a Court would normally do with respect to a plaint under Order VII, Rule 11 CPC.

10. It could be seen from Order VIII, Rule 6-A(1) CPC that it entitles a plaintiff to set up by way of counter-claim, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limit for delivering his defence has expired. This is irrespective of whether the counter-claim is in the nature of a claim for damages or not. Under sub-rule (2) of Rule 6-A of Order VIII CPC, the counter-claim is to have the same effect as a cross suit so as to enable the Court to pronounce a final judgment in the same suit both on the original claim and on the counter-claim. Therefore, the judgment and decree required to be delivered by the Court in a case where there is a counter-claim, is to be in common for both the claim and the counter-claim. In other words, there will be only one judgment and one decree and not two judgments and two decrees despite the fact that there are virtually two suits, one in the form of a suit and another in the form of a counter-claim.

11. Sub-rule (4) of Rule 6-A of Order VIII CPC states that the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. But it does not mean that it is no more a written statement. It is also a written statement to which Order VIII CPC applies, even while Order VII CPC is made applicable to a part of the same.

12. In fact, Rule 6-C of Order VIII CPC gives a right to the plaintiff to seek an order to exclude the counter-claim on the ground that the counter-claim ought not to be disposed of except by way of an independent suit.

13. Therefore, the counter-claim is not exactly the same as a plaint, despite having

1. 2007 (2) ALD 483
2. Manu/DE/0769/2014
3. AIR 2003 MP 185

the traits of a plaint, since the same is raised in a written statement. The scheme of Order VIII, Rules 6-A to 6-G CPC itself recognises the fact that there could be two different scenarios, one where the counter-claim could be inextricably intertwined with the defence and another where it is capable of being prosecuted as an independent suit (as provided in Order VIII, Rule 6-C, CPC).

14. Therefore, in addition to the parameters provided in Order VII, Rule 11 CPC, the Court may also have to examine while dealing with a prayer for rejection of the counter-claim, as to whether the rejection of the counter-claim would have the effect of striking off the defence or rendering the defendant defenceless.

15. It must be remembered that at the stage of invoking Order VII, Rule 11 CPC, the Court is not concerned with the merits of the claim. But while dealing with a written statement, the Court will certainly be considering the merits of the claim.

16. In the case on hand, the suit is one for eviction. The defence raised by the defendant is that he is entitled to have a lease deed executed and registered for a period of 25 years from 16-7-2005. The document accompanying the counter-claim appears to be an unstamped and unregistered document. If the counter-claim is taken up for trial, we do not know whether the said document will be allowed to be marked in evidence at all, in view of the recitals contained therein and the document not being duly stamped and registered. We do not even know whether the defendant can actually secure a decree directing the plaintiffs to execute and register a lease deed for a period of 25 years with effect from 16-7-2005, especially in the light of the limitations imposed by the Registration Act, 1908 to the registerability of a document executed several years ago.

17. But all the above are on the merits of the case. That the counter-claim raised is so weak and eventually can only be thrown out, may not be a ground to invoke Order VII, Rule 11 CPC, especially when the defence to the suit, depends for its survival upon the counter-claim.

18. Therefore, the substantial question of law raised in the above second appeal is answered to the following effect: (i) Wherever the defence to a suit can survive even if the counter-claim goes, then the Court will be entitled to invoke Order VII, Rule 11 CPC and reject the counter-claim. (ii) Wherever the defence to the suit is so intertwined with the counter-claim that the rejection of the counter-claim will have the effect of killing the defence to the suit, the Court cannot invoke Order VII, Rule 11 CPC to reject the counter- claim.

19. In the light of the above answer to the substantial question of law, the second appeal is allowed and the judgments and decrees of both the Courts below are set aside. The Court below may take up the trial of the suit and the counter-claim together and examine all questions including the admissibility of the document relied upon by the appellant/defendant, the effect of its not being stamped and registered etc., and dispose of the suit in accordance with law. The miscellaneous petitions, if

any, pending in this second appeal shall stand closed. No costs.

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2018(1) L.S. 144

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

Present:
The Hon'ble Dr.Justice
B. Sivasankara Rao

Mahabunnisa Begum ..Petitioner

Vs.

The State of Telangana & Ors., ..Respondents

CRIMINAL PROCEDURE CODE, Sec.302 r/w 24(8) – Aggrieved by Order passed by Magistrate in an application under Section 302 r/w 24(8) of Cr.P.C., where by Petitioner/de facto complainant was denied permission to prosecute through private Advocate, instant petition is preferred.

Held – Proviso to Section 24(8) of amended Act No.5 of 2009 Cr.P.C. seeks that Court may permit victim to engage an Advocate of his or her own choice to assist prosecution – Assisting prosecution does not merely mean assisting public prosecutor u/Sec.301 of Cr.P.C. but also to conduct prosecution independently - This proviso even extends in a Sessions Case – Dismissal Order of Lower Court is set aside and Criminal petition is allowed.

Cases referred
1. AIR 2016 SC 4369
2.AIR 2001 SC 1102
3.1999 7 SCC 467
4.2015 (2) ALT (Crl.) 216
5.AIR 1959 SC 375
6.Crl.P.No.5674 of 2015 dated 26.06.2015

Mr.J. Ravindra, Advocate for the petitioner.
Public Prosecutor for Respondent No.1
Mr.Mohd. Muzafferullah Khan, Advocate for the respondents No.3..

O R D E R

The petitioner is the defacto complainant in C.C.No.993 of 2104 pending on the file of XX Metropolitan Magistrate at Malkajgiri, Cyberabad. The respondent Nos.2 & 3 are the accused therein among other, A.1 is her husband. The C.C. is outcome of crime No.75 of 2010 from her report dated 24.02.2010 in all against 7 accused among whom A.2 and A.3 are parents in law, the 3rd respondent to the quash petition is her husbands brothers wife and the other 2 are sisters of her husband. The crime registered is for the offences punishable under Sections 498-A IPC and Sections 3 and 4 of Dowry Prohibition Act and after investigation police final report filed and taken cognizance by the learned Magistrate for the said offences. It is in the pending C.C., the defacto complainant filed Crl.M.P.No.505 of 2017 under Section 302 read with 24(8) amended Cr.P.C. to permit her to prosecute through private advocate. The accused persons opposed the same by filing counter and the

learned Magistrate dismissed the same by impugned order dated 24.07.2017.

2. The contentions impugning the said dismissal order in the present quash petition are that the said order is contrary to law and settled proposition and provisions and learned Magistrate ought to have permitted to prosecute the case and thereby the dismissal order is liable to be set aside. The learned counsel for the defacto complainant/petitioner herein reiterated the said contentions in seeking to set aside the dismissal order and allow the same. Whereas the learned counsel for respondent Nos.2 and 3 submits that the impugned order is within the judicial discretion exercised by the trial Court and that no way requires interference much less by exercising the inherent powers under section 482 Cr.P.C. and thereby sought for dismissal of the quash petition. The learned Public Prosecutor representing the 1st respondent-State sought for deciding the matter on own merits to abide.

3. Heard both sides and perused the material on record.

4. The petition averments in seeking permission reads that the prosecution examined PWs.1 to 4 and after closure of the prosecution evidence the accused was examined under Section 313 Cr.P.C, the accused later filed application under Section 294 Cr.P.C. to receive some documents which are copies of some private correspondence. The learned Public Prosecutor did not file counter in opposing, consequently the petition was allowed to receive the documents in defence evidence. Earlier she filed Crl.M.P.No.1961 of 2014 dated 29.09.2014 seeking to engage private advocate to assist the prosecution and the Court allowed the same only to assist the learned Additional Public Prosecutor including to file any written arguments vide order dated 08.09.2014. It is her averment that the learned PP is over burdened and is in-charge of 4 courts and unable to concentrate and it requires detailed cross-examination of the accused by her with reference to documents filed by accused also and because the learned PP who is in-charge for several courts is unable to concentrate, which causes prejudice to her for avoiding such prejudice and injury to her rights from the inability of learned PP to attend and concentrate with facts in thoroughness, it requires to permit her to engage a private advocate to conduct the prosecution and referred the expression of the Apex Court in DHARIWAL INDUSTRIES LIMITED VS. KISHORE WADHWANI AND OTHERS(1) where the Apex Court observed that Court got power to grant permission to defacto complainant to conduct prosecution independently as per Section 302 Cr.P.C. at any stage of the proceedings and thereby it is just to permit in so seeking.

5. The counter filed by the accused in opposing the same is with contest that all the allegations are false and the police mechanically filed the final report without proper investigation and court taken cognizance and framed the charges. The documents received are relevant for the purpose of case on behalf of accused by showing of such necessity, the Court considered to exhibit in defence, earlier the

1. AIR 2016 SC 4369

defacto complainant filed application only under section 301 Cr.P.C. that was allowed to assist the learned PP and to file written arguments if any and she cannot now because of accused filed 19 documents in seeking to receive that was allowed, seek permission to conduct prosecution through private advocate even there is learned APP allotted to the Court and what she contends of the APP is busy and in-charge of several Courts is not correct and the decision placed reliance of Dhariwal supra has no application and it is placing reliance by misreading by the defacto complainant, that too earlier filed only application under Section 301 Cr.P.C and once allowed again filing another application under Section 302 Cr.P.C by the present one to conduct prosecution through private advocate cannot be allowed. The learned PP on the behalf of the State filed counter saying the petition is not maintainable as earlier permission is accorded to assist learned APP and file written arguments thereby another petition to conduct case through private advocate cannot be allowed.

6. The impugned order of the learned Magistrate is with a view from the rival contentions supra that section 24(8) Cr.P.C amended proviso is applicable to High Court and District Courts but not to Magistrate courts. What section 302 Cr.P.C. provides the victim may be permitted to conduct prosecution is discretionary and earlier permission is accorded to assist learned APP under Section 301 Cr.P.C. and thereby she cannot step into the prosecution agency to conduct prosecution independently.

7. The expression of Apex Court in Dhariwal supra is on the scope of Sections 301 and 302 Cr.P.C and not on the scope Section 24(8) proviso of the amended Cr.P.C. It is observed therein mainly referring to the earlier Constitution Bench expression of the Apex Court in JK INTERNATIONAL VS. STATE(2) on the scope of section 302 Cr.P.C. of the Magistrate inquiring or trying the case may permit to conduct prosecution by any person other than police officer below the rank of Inspector, but no person other than Advocate General or Government Advocate or a PP or APP shall be entitled to do so without such permission and no police officer who investigated the case can be permitted for that purpose and a person conducting the prosecution may do so either personally or by a pleader and it also referred earlier expression of the Apex Court in SHIVKUMAR VS. HUKUM CHANEL(3) wherein also it was held that in the Magistrate Court anybody other than the police officers below the rank of Inspector and who conducted investigation can be permitted to conduct prosecution and once permission is granted to the person concerned, said person can appoint any private counsel on his behalf to conduct the prosecution. In fact referring to JK international and Shivkumar supra among several other expressions and on the scope of section 24(8) proviso of the amended Cr.P.C by Act No 5/2009, of the right of victim this Court in DELTA CAR PRIVATE LIMITED VS SANJEEV SHAH(4) held that defacto complainant a victim even in bail application can be permitted to come on

2.AIR 2001 SC 1102
3.1999 7 SCC 467
4.2015 (2) ALT (Crl.) 216

record as co-respondent either to assist the court or to assist the PP as the case may be and even from the wording of Section 24(8) proviso Cr.P.C for such power is available as it should not be forgotten the factum of victim who is put to injury physically or mentally suffering being the ultimate loser can not be prevented from knocking the doors of the Court or participating in the proceedings, including under the guise of there is a danger by biased representation from victims; as it is the victim put to pain, trouble and damage as a result of offence mainly and no amount of compensation even awarded can bring back the life or limb nor restore the actual pain or damage or injury suffered and though under the public policy it is primary duty of the State to conduct prosecution that is not the be all or end all, much less to prevent the victim to participate in the proceedings including to conduct prosecution. In fact the Four Judge Bench expression of the Apex Court in LEO ROY FREY VS. STATE OF PUNJAB(5) interpreted the word prosecute used in Article 20(2) of Constitution of India and at Para 10 of the expression it was observed that to prosecute means to seek, to obtain, to enforce or the like by legal process as to prosecute a right or claim in Court of law and otherwise to pursue by legal proceeding to redress or for punishment so to proceed judiciously to accuse of some crime or breach of law or pursue for redressal or punishment of crime or violation of law before legal Tribunal to prosecute a man.

8. Thus the word prosecution thereby means proceeding either by way of indictment or information in criminal Courts to put the offender upon trial. The proviso to section 24(8) of the amended Act No.5 of 2009 of Cr.P.C seeks that the Court may permit the victim to engage an advocate of his or her choice to assist the prosecution. Here to assist the prosecution does not mean mere assisting the Public Prosecutor under Section 301 Cr.P.C., but for conducting the prosecution itself by the victim or defacto complainant in person or through private advocate of his or her choice either under Section 24(8) proviso or under Section 302 Cr.P.C. as the case may be, but for to clarify further that irrespective of what is stated in Sections 225 & 226 Cr.P.C., even in a Sessions case, a victim can be permitted under Section 24(8) proviso of Cr.P.C. to conduct prosecution either independently or in addition to the public prosecutor by putting further questions in evidence during trial or in any enquiry or other proceedings including in any application to file counters or objections and participate.

9. It is in fact therefrom held by this Court in Delta Car case supra that defacto complainant and victim respectively are entitled to conduct prosecution and participate in the proceeding including either personally or by engaging advocate of his/ her choice.

10. It is also the need of the hour for the trial Courts to exercise the power, that too when APPs or Additional PPs or PPs not sufficiently available for each one to each Court so that the trial process cannot be

5.AIR 1959 SC 375

delayed thereby and also for one APP may not concentrate effectively by attending regularly cases in more than one Court that too their duties are not only to conduct prosecution but also to represent in bail applications, policy custody petitions and several other pre-trial proceedings during investigation of the cases.

11. Further relying on the expression even in a subsequent expression of this Court in GUDE BHAVANI SUJATHA VS. MUGGULLA SRINIVASA RAO(6) , it was held that either under Section 302 Cr.P.C or even under section 24(8) proviso of amended Cr.P.C Magistrate Court got power to permit the victim or the defacto complainant to conduct prosecution by participating in the proceeding by engaging private advocate.

12. Having regard to the above, the order of the learned Magistrate impugned herein dismissing the application saying Section 302 Cr.P.C is not applicable to the learned Magistrate is unsustainable so also in ignoring section 24(8) r/w Section 2(wa) of the amended Cr.P.C. which further recognizes the right of the victim and in ignoring the scope of Section 301 Cr.P.C. is only limited when compared to scope of Section 302 and Section 24(8) proviso r/w 2(wa) of Cr.P.C. and even permitting once under Section 301 Cr.P.C. is not a bar for later permitting under Section 302 or 24(8) proviso r/w 2(wa) Cr.P.C.

13. Having regard to the above, the Criminal Petition is allowed and the dismissal order of the lower Court is set aside and while conducting the prosecution by the State represented by APP of the accused witnesses, the defacto complainant-cum-victim is directed to be permitted by virtue of this order by the learned Magistrate to engage a private advocate and conduct prosecution by further examination of any witness in addition to what APP conducts if any. Needless to say any permitting of putting of questions and eliciting of answers will be within the scope of law and power of the Court including on relevancy and admissibility within the scope of Section 136 of Indian evidence Act in particular and on proof with reference to other provisions, including from the availability of the power under Section 165 of the Indian Evidence Act.

Consequently, miscellaneous petitions, if any shall stand closed.

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2018(1) L.S. 149

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

G. Hari Babu & Anr., ..Appellants

Vs.

K.Jayaram Reddy & Ors., ..Respondents

CIVIL PROCEDURE CODE, Order V and Order XX Rule 4 - Instant Appeal suit by Appellant/ Defendant challenges Judgment and Decree passed ex parte by Trial Court.

Held – Learned Judge of Trial Court in impugned Judgment, except saying that he perused contents of sworn affidavit and documents marked, did not make any endeavor to render Judgment in accordance with provisions of Order XX Rule 4 of CPC and also did not adhere to mandatory provisions of Order V of CPC relating to Rules with respect to Issue and Service of Summons – Appeal suit is allowed.

Cases referred:
1. (1999) 8 SCC 396
2. AIR 1974 AP Pg.1 (FB)
3. AIR 1957 AP Pg.1 (FB)

Mr.B.Venkaa Rama Rao, Advocae for the Appellants.

M/s.Indu Law Firm, for Respondent.

J U D G M E N T

The defendants, in O.S.No.125 of 2003 on the file of the II Additional District Judge, Ranga Reddy District at L.B.Nagar, Hyderabad, are the appellants in the present Appeal Suit, preferred under Section 96 of the Code of Civil Procedure (for brevity, 'CPC'). Heard Sri B.Venkat Rama Rao, learned counsel for the appellants, and Sri V.N.R.Prashanth, learned counsel for the respondents, apart from perusing the material available before this Court.

This Appeal Suit challenges the judgment and decree, dated 22.11.2004, passed by the learned II Additional District Judge, Ranga Reddy District at L.B.Nagar, Hyderabad in O.S.No.125 of 2003, instituted by the respondents herein, praying for cancellation of two sale deeds, in respect of the suit schedule property, bearing document Nos.9208/02 and 9209/02, dated 26.10.2002, and for a direction to the defendants to execute the deed of cancellation before the Sub-Registrar, Medchel. During the course of trial, on behalf of the plaintiffs, the first plaintiff was examined as P.W.1 and Exs.A1 to A3 were marked. The defendants-appellants herein remained ex parte. The learned II Additional District Judge decreed the suit ex parte on 22.11.2004. The present Appeal Suit, filed under Section 96 CPC by the defendants in the suit, challenges the validity and the legal sustainability of the said judgment and decree.

It is contended by the learned

counsel for the defendantsappellants herein that the judgment rendered by the learned II Additional District Judge is erroneous, contrary to law, weight of evidence and probabilities of the case and also not in conformity with the provisions of Order XX Rule 4 CPC; that the learned Judge grossly erred in decreeing the suit ex parte contrary to the provisions of Order V CPC. In order to bolster his submissions and contentions, the learned counsel placed reliance on the following judgments:

1. (1999) 8 SCC 396
2. AIR 1974 AP Pg.1 (FB)
3. AIR 1957 AP Pg.1 (FB)

On the contrary, it is vehemently contended by the learned counsel for the plaintiffs-respondents herein that the learned II Additional District Judge rendered the judgment strictly in accordance with law, as such, the same does not warrant any interference of this Court under Section 96 CPC. It is the further submission of the learned counsel that, only after effecting service of notice on the defendants, by way of publication in a daily newspaper, under the provisions of Order V Rule 20 CPC, the learned Judge decreed the suit. It is further submitted by the learned counsel that since the defendants-appellants herein did not contest the matter before the Court below, they cannot maintain the present Appeal Suit under Section 96 CPC.

In the above background, now the points that arise for consideration of this Court, in the present Appeal Suit, are as under:

1. Whether the judgment rendered by the Court below is in accordance with the provisions of Order XX Rule 4 CPC?

2. Whether the Court below adhered to the other provisions of Order V CPC before ordering substitute service under the provisions of Order V Rule 20 CPC?
3. Whether the judgment and decree rendered by the learned Additional District Judge are sustainable and tenable?

Point No.1:

In order to examine the issue as to whether the judgment rendered by the learned II Additional District Judge is in conformity with the provisions of Order XX Rule 4 CPC, it would be appropriate and apposite to refer to the said provision of law. Order XX CPC deals with the judgment and decree. Sub-Rule (1) of Rule 4 of Order XX CPC deals with the judgment of the Small Causes Courts and sub-rule (2) of the said rule deals with the judgments of other Courts. Sub-rule (2) of Rule 4 of Order XX CPC reads as under:

> "judgments other than in Small Cause Suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision".

In the instant case, the complaint of the defendantsappellants is that the judgment rendered by the learned II Additional District Judge is not in

consonance with the above referred provisions of law. In this context, it may be appropriate to extract the judgment rendered by the Court below which reads as under:

> "Heard the counsel for the petitioners. Perused the contents of sworn affidavit of P.W.1 and the documents which are marked as Exs.A1 to A3 on behalf of the plaintiffs. Suit filed by the plaintiff is hereby decreed as prayed for with costs and the sale deed bearing No.9208/02 and 9209/02 dated 26.10.2002 which are marked as Exs.A1 and A2 respectively are hereby cancelled. Written and pronounced by me in open Court on this the 22nd day of Nov.2004".

In this context, it may be apt to refer to the judgment cited by the learned counsel for the defendants-appellants in BALARAJ TANEJA & ANOTHER v. SUNIL MADAN & ANOTHER(1), wherein the Honourable Apex Court, while dealing with the provisions of Section 2 (9) and Order XX Rule 4 (2) CPC, held, at paragraph Nos.42 and 45, as under:

> 42. "Judgment" as defined in Section 2(9) of the Code of Civil Procedure means the statement given by the Judge of the grounds for a decree or order. What a judgment should contain is indicated in Order 20, Rule 4 (2) which says that a judgment: "shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."
>
> 45. Learned counsel for respondent No. 1 contended that the provisions of Order 20, Rule 1 (2) would apply only to contested cases as it is only in those cases that "the points for determination" as mentioned in this Rule will have to be indicated, and not in a case in which the written statement has not been filed by the defendants and the facts set out in the plaint are deemed to have been admitted. We do not agree. Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex-parte and is ultimately decided as an ex-parte case, or is a case in which the written statement is not filed and the Case is decided under Order 8 Rule 10, the Court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved".

In AZIZ AHMED KHAN v. I.A.PATEL(2) , a Full Bench of this Court, while dealing with an identical situation, at paragraph Nos.8 & 9, held as under:

> 8. "The irregularities committed by the trial court do not stop at that. The judgment that it has given does not conform to the provisions of Rule

1. (1999) 8 SCC 396

2. AIR 1974 AP Pg.1 (FB)

4 (2) of Order XX CPC at all. Whereas a judgment shall contain a concise statement of the case, the points for determination, and the decision thereon, we search in vain for any of these essentials in the impugned judgment. It is no judgment at all. The provisions of Rule 4 (2) have a set purpose. The form is designed to ensure that while pronouncing the orders or judgments. They should apply their minds to the facts of the case and the points at issue and give a reasoned judgment thereon so that not only their own conscience may be satisfied but also the litigants should have satisfaction that all their evidence has been evaluated and their contentions and arguments duly considered. This is of vital importance inasmuch as the whole edifice of confidence of the litigants in Courts is built upon the quality of judgments. The Courts, therefore, have to necessarily take care that their judgments conform to the provisions of law and are products of sound reasoning. In the instant case the judgment of the trial Court which we have extracted above is no judgment at all. The appeal must be allowed on that basis also".

9. "Then again the so-called judgment of the Court suffers from a further defect. It is based upon material which is inadmissible in evidence. In fact that is the main grievance of the defendants and the case has before this Full Bench for a pronouncement thereon as well. It is no doubt true that the proceedings against the defendant were set ex parte under Order IX, Rule 6 CPC after issues were framed in the case. But that does not mean that the defendant should suffer decree by mere reason of his absence. The fact that Rule 6 of Order IX CPC permits the proceedings to be set ex parte does not dispense with the proof of the case. The meaning of "ex parte" being "in the absence of" , all that follows from the order setting proceedings ex parte is that the proceedings which had to continue otherwise in the presence of the party may now be continued in his absence.

The absence of the defendants thus does not dispense with the responsibility of the plaintiff to prove his case to the satisfaction of the Court. He has to discharge his onus in the same way as he should have done in the presence of the defendant. He has to prove his case with the help of the material which is legal evidence. His burdan is in no way lightened by the absence of the defendant. In fact the responsibility of the Court also has increased as it has to reach its conclusions without the assistance of the defendant who, if present, would have raised all questions with regard to admissibility of evidence and cross-examined the witnesses and advanced arguments in his favour. The Court cannot pass a judgment in favour of the plaintiff unless the

suit is maintainable, the claim as set up is established by the material on record and the reliefs claimed can be lawfully granted".

In the case on hand, the learned II Additional District Judge, in the impugned judgment, except saying that he perused the contents of the sworn affidavit of P.W.1 and also the documents marked, did not make any endeavour to render the judgment in accordance with the provisions of Order XX Rule 4 CPC. The mode and manner adopted by the learned Judge, for decreeing the suit, is obviously not in conformity with the said provision of law but it is also contrary to the law laid down by the Honourable Apex Court and this Court in the above referred judgments. herefore, the impugned judgment and decree are liable to be set aside on the said ground. Accordingly, point No.1 is answered in favour of the defendants-appellants herein and against the plaintiffs.

Point No.2:

It is the submission of the learned counsel for the defendantsappellants herein that the learned Additional District Judge passed the impugned judgment without being preceded by proper compliance of the provisions of Order V Rules 19 & 20 CPC. In elaboration, it is further maintained by the learned counsel for the defendants-appellants herein that, without making any endeavour for due adherence to the provisions of Rules 19 & 20 CPC, the learned Judge decreed the suit ex parte. In the direction of fortifying the said contention, the learned counsel has placed on record the docket proceedings in O.S.No.125 of 2003. The suit was admittedly presented on 01.09.2003. From 03.11.2003, awaiting service of summons on the defendants, the Court adjourned the suit till 17.06.2004 and on 01.07.2004 the Court recorded that the defendants 1 and 2 were called absent and posted the case for steps on 02.07.2004. It is further evident from the said docket proceedings that on 02.07.2004 the Court allowed the substitute service petition by permitting the plaintiffs to publish the notice in 'Prajasakthi' daily newspaper of Hyderabad edition on 06.08.2004. Thereafter, on 06.08.2004, plaintiffs filed the publication before the Court and the matter was adjourned to 13.08.2004 and on 13.08.2004 the defendants 1 and 2 were set ex parte. Thereafter, the Court adjourned the matter from 25.08.2004 to 31.08.2004 and from 31.08.2004 to 26.10.2004 and from 28.10.2004 to 17.11.2004 and, eventually, on 22.11.2004 the Court heard the learned counsel for the plaintiffs and rendered the impugned judgment and decree.

Rule 17 of Order V CPC deals with the procedure when the defendant refuses to accept service or cannot be found. According to the said rule, where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time], and there is no agent empowered to accept service of the

summons on his behalf, or any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

Rule 19 of Order V CPC deals with examination of the serving officer which stipulates that where summons is returned under Rule 17 CPC, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

Rule 20 of Order V CPC, which is crucial for adjudication of the issue in the present Appeal Suit, in clear and vivid terms, Stipulates that where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit. Rule 20 (1A) of Order V CPC also mandates that such publication shall be made in a daily which has circulation in the relevant place. In the instant case, as correctly pointed out by the learned counsel for the appellants and as evident from the docket proceedings, the Court below did not make any exercise or endeavour to adhere to the above mandatory requirements of law.

In this context, it may be appropriate to refer to the judgment of a Full Bench of this Court in G.SHANMUKHI v. UTAKUR VENKATASRAMI REDDY AND ANOTHER (3), wherein this Court, at paragraph No.8, held as under:

> "Order 5 deals with the issue of summons to the defendant in order to apprise him of the nstitution of the suit against him so that he might appear and answer the claim. Rule 9 of that order prescribes direct service on the defendant or upon an agent empowered to accept service on his behalf. Sub-rule (3) thereof provides alternatively for service by registered post prepaid for acknowledgment. Rule 12 directs that wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in

3. AIR 1957 AP Pg.1 (FB)

which case service on such agent would be sufficient.

Rules 13 and 14 enact that summons may be served on a manager or agent of the Defendant who carries on any business or work for him, if the suit relates to such business or work, or an agent of the Defendant in charge of any immovable property, if the suit seeks a relief respecting it. In a case where, the Defendant is absent and has no agent empowered to accept service, service may also be made on any adult male member of the family of the Defendant who is residing with him, as provided by Rule 15.

The summons is either to be delivered or tendered to the Defendant, his agent or an adult member of his family. Where they refuse to sign an acknowledgment of service, the procedure to be followed is prescribed by Rule 17, while Rule 18 describes the procedure to be adopted when the summons has been actually served on any one of them. Then follows Rule 20 which provides for substituted service in these terms:

(1). Where the Court is satisfied that there is reason to believe that the Defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house (if any) in which the Defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(2). Service substituted by order of the Court shall be as effectual as if it had been made on the Defendant personally. It is manifest that these several modes of service attempt to reconcile the need for bringing home to the Defendant knowledge of the suit with the practical necessity of proceeding as early as possible with its trial. Where these rules of service are observed, there would generally be good reason for supposing that the Defendant became aware of the institution of the suit, though it does not necessarily follow that he actually did.

It is possible that even in a case of personal service or service upon an agent, etc., there may be mistaken identity, and the person served may not be the Defendant or his agent. The Defendant when he comes to know of the suit or the decree passed therein may in such a case approach the Court for relief under Order 9, Rule 13, Code of Civil Procedure (CPC), and point out that he has not been 'duly served. It is seen that in the case of substituted service, there are two conditions prescribed before it can be resorted to, viz., that the

Court must be satisfied either (1) that there is reason to believe that the Defendant is keeping out of the way for the purpose of avoiding service, or (2) that for any other reason the summons cannot be served in the ordinary way. The satisfaction of the Court in each of these cases is brought about by representations of the Plaintiff usually made by an affidavit. If, of course, the Defendant has been deliberately keeping out of the way and substituted service is ordered in such a case, it certainly would be 'due' service.

A party cannot close his eyes and complain that he is unable to see. But, if on the other hand the Defendant is not really keeping out of the way at all and the Court is only induced to believe that he is, by the one-sided representation of the Plaintiff, it is clear that the service that is then substituted cannot be regarded as "due" service. Therefore when the question arises as to whether in a particular case, substituted service obtained from the Court is or is not "due" service, it will have to be determined by ascertaining whether the representations made to the Court by the Plaintiff were not true, that is to say, whether the Defendant could be presumed in the circumstances, to have or had actual knowledge.

Of course, substituted service will not be directed unless the Court is satisfied as to the existence of one or the other conditions specified In the rule. But a mere note upon the record to that effect is not conclusive against the Defendant though in the absence of any other practicable alternative the Court must proceed upon the looting, for the time being, that the service is as effectual as personal service.

This effectuality is only for the purpose of enabling the Court to go on with the suit. But, its-effectuality against the Defendant depends solely on whether he really avoided service or whether as a matter of fact he came to know of the suit otherwise. These facts will have to be determined by the Court to which application is made to Bet aside an ex parte decree".

The material available on record, in clear and vivid terms, reveals that the Court below did not adhere to the mandatory provisions of Order V CPC. On this ground also the impugned judgment is liable to be set aside. Accordingly, point No.2 is also answered in favour of the defendants-appellants herein.

Point No.3:

In the result, the Appeal Suit is allowed, setting aside the judgment and decree, dated 22.11.2004, in O.S.No.125 of 2003, of 2007 passed by the learned II Additional District Judge, Ranga Reddy District at L.B.Nagar, Hyderabad and the said suit-O.S.No.125 of 2003 is remanded to the

Court below for fresh enquiry and for rendering judgment, in accordance with law, after giving opportunity to all the stakeholders.

As a sequel thereto, miscellaneous Petitions pending, if any, in this Appeal Suit, shall stand closed. There shall be no order as to costs.

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2018(1) L.S. 157

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

Present:
The Hon'ble Mr. Justice
D.V.S.S. Somayajulu

New India Assurance
Co. Ltd., ..Appellant

Vs.

Varsha Aqua Farm,
Sarvasidi, S.Rayavaram (M)
Visakha ..Respondent

INDIAN PARTNERSHIP ACT, 1932, Sec.69 - Appellant/ Insurance company preferred instant appeal against Judgment and Decree passed by Trial Court - Respondents were carrying business in prawn culture and entered into a contract with appellants for insuring crop of prawn in 10 tanks which were later affected and entire crop has died – Appellants denied entire claim and stated that respondents did not inform them of loss within time stipulated and there was non-disclosure of material facts as well.

Held –Respondents firm is not registered as on date of filing of suit and bar of section 69 of Indian Partnership Act, 1932 squarely applies as they were seeking to enforce a contract – Claim is deemed to have been abandoned in view of clause of which says that suit should be filed within 12 months – Appeal is allowed and suit filed stands dismissed.

Cases Referred:
1 2004(5) ALT 534
2 1998 (8) SCC 559
3 2004 (3) SCC 155
4 2007 (15) SCC 58
5 2016 (11) SCC 313
6 2000 (3) SCC 250
7 AIR 1998 SC 3085
8 2004(5) ALT 534

Mr.Kota Subba Rao, Advocate for the Appellant.
Mr.G.V. Gangadhar, Advocate for the Respondent.

J U D G M E N T

This is an appeal filed by the appellant/insurance company against the judgment and decree dated 15.07.2005 passed in O.S.No.2 of 1999 by the Senior Civil Judge, Tadepalligudem.

For the sake of convenience, as this is a first appeal, the parties are referred to as plaintiff and defendant.

The facts of the case, in brief, are that the plaintiff is a registered firm, which carries on business in prawn culture in Visakhapatnam District. The plaintiff entered into a contract with the defendant/insurance company for insuring their crop of prawn in 10 tanks for a sum of Rs.20,86,000/- . During the course of their business, the prawn in all the tanks got affected by disease and the entire crop died. The loss according to the plaintiff was to a tune of Rs.15,53,249.94 ps. The claim was submitted by the plaintiff but the same was repudiated by the Insurance Company on 14.11.1996. As the claim was repudiated, the plaintiff got issued a legal notice and filed the present suit claiming the said sum with interest. The defendants denied the entire claim including interest and stated that the plaintiff did not inform them of the loss within the time stipulated and also that there was non-disclosure of material facts etc. An additional written statement was also filed wherein it was pleaded that the disputed claim should have been made the subject matter of the suit within 12 calendar months from the date of disclaimer. As the same was not done, the claim is not maintainable and is deemed to be abandoned.

Based on the above pleadings, the Court framed the following four issues:

(a) whether the plaintiff is entitled to the suit amount.
(b) whether the plaintiff is not entitled to claim interest.
(c) to what relief.
(d) whether the claim is treated as abandoned as per the terms and conditions of the policy.

For the plaintiffs, three witnesses were examined and for the defendant one witness was examined. Exs.A.1 to A.19 were marked for the plaintiff, while Exs.B.1 to B.8 were marked for the defendant.

After a full trial, the Court granted a decree for Rs.6,62,989.34ps. along with interest at 18% p.a. from the cause of action till the date of decree and further interest at 11% p.a. till realisation. Proportionate costs were also awarded. Questioning the said judgment and decree, the present appeal is filed by the Insurance Company.

Heard Sri Kota Subba Rao, learned counsel for the appellant and Sri G.V.Gangadhar, learned counsel for the respondents.

The two essential questions that were argued during the course of hearing were (a) about the registration of the partnership firm during the pendency of the suit and the bar under Section 69 of the Indian Partnership Act, 1932 (for short 'the Act'); (b) whether the suit which is filed one day after the stipulated period is a "claim abandoned" under clause 15.

Issue (a): Section 69 of the Act is to the following effect:

69. Effect of non-registration:
(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing

as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm:

(2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of firms as partners in the firms.

The facts that are undisputed are that the suit was filed on 14.11.1997, whereas the registration of the firm as per Exs.A.1 and A.18 was on 15.07.1998. Admittedly, the registration of the firm was after the suit was instituted. The plaint that was filed was returned with an objection about the lack of registration on 19.11.1997. It appears that after the registration, the objection was complied with and the plaint was re-presented on 27.07.1998. The delay was also condoned and the suit was registered. The lower Court relied upon the judgement reported in SAMYUKTHA COTTON TRADING COMPANY V. BHEEMINENI VENKATA SUBBAIAH AND OTHERS1, wherein it was held by this Hon'ble Court that such a suit is not barred under the provisions of Section 69 of the Act. The Court held that subsequent registration would cure the initial defect. The lower Court, however, did not see the judgments reported in Delhi Development Authority V. Kochhar Construction Work and Another2, FIRM ASHOK TRADERS AND ANOTHER V. GURUMUKH DAS SALUJA AND OTHERS ETC.3. The later judgments on this subject are PURUSHOTTAM AND ANR. V. SHIVRAJ FINE ART LITHO WORKS AND ORS.4 and UMESH GOEL VS. HIMACHAL PRADESH COOPERATIVE GROUP HOUSING SOCIETY LTD.5, wherein the Hon'ble Supreme Court held that the registration of a firm after filing of the suit will not cure the initial defect. In Delhi Development Authority and Purushottam's cases (2 and 4 supra), the Hon'ble Supreme Court held that the defect was fatal and the plaint is "void ab initio".

M/S. HALDIRAM BHUJIAWALA & ANOTHER V. M/S. ANAND KUMAR DEEPAK KUMAR & ANOTHER 6 which appears to support the present respondent is a case of a passing off action in tort and a common law action. Hence, the Supreme Court held that non-registration was not a bar. SIMILARLY, RAPTAKOS BRETT & CO. LTD V. GANESH PROPERTY7 was a case of eviction under a lease and also the general law of the land. It was held that the suit was partly barred (for enforcing the contract) and partly not barred. The question is actually left undecided in that case, as not surviving for consideration. The relevant portion is at paras 30 and 31:

1 2004(5) ALT 534

2 1998 (8) SCC 559
3 2004 (3) SCC 155
4 2007 (15) SCC 58
5 2016 (11) SCC 313
6 2000 (3) SCC 250
7 AIR 1998 SC 3085

30. We, prima facie, find substance in what is contended by Dr. Singhvi for the respondent. It is obvious that even if the suit is filed by an unregistered partnership firm, against a third party and is treated to be incompetent as per Section 69 Subsection (2) of the Partnership Act, if pending the suit before a decree is obtained the plaintiff puts its house in order and gets itself registered the defect in the earlier filing which even though may result in treating the original suit as still born, would no longer survive if the suit is treated to be deemed to be instituted on the date on which registration is obtained. If such an approach is adopted, no real harm would be caused to either side. As rightly submitted by Dr. Singhvi that, Order 7 Rule 13 of the CPC would permit the filing of a fresh suit on the same cause of Action and if the earlier suit is permitted to be continued it would continue in the old number and the parties to the litigation would be able to get their claim adjudicated on merits earlier while on the other hand if such subsequent registration is not held to be of any avail, all that would happen is that a fresh suit can be filed immediately after such registration and then it will bear a new number of a subsequent year. That would further delay the adjudicatory process of the court as such a new suit would take years before it gets ready for trial and the parties will be further deprived of an opportunity to get their disputes adjudicated on merits at the earliest and the arrears of cases pending in the court would go on mounting. It is axiomatic to say that as a result of protracted litigation spread over tiers and tiers of court proceedings in hierarchy, the ultimate result before the highest court would leave both the parties completely frustrated and financially drained off. To borrow the analogy in an English poem with caption "death the leveller", with appropriate modifications, the situation emerging in such cases can be visualised as under : "upon final court's purple alter see how victor victim bleed". All these considerations in an appropriate case may require a re-look at the decision of the two member Bench of this Court in 1989 (3) SCC 476 : (AIR 1989 SC 1769) (supra). However, as we have noted earlier, on the facts of the present case, it is not necessary for us to express any final opinion on this question or to direct reference to a larger Bench for reconsidering the aforesaid decision. With these observations we bring down the curtains on this controversy. Point No. 2, therefore, is answered by observing that it is not necessary on the facts of the present case in the light of our decision on the first point to decide this point one way or the other. Point No. 2 is, therefore, left undecided as not surviving for consideration.

Point No. 3 :

31. As a result of the aforesaid discussion, it is held that the suit

as filed by the respondent was partly barred Under Section 69 Sub-section (2) of the Partnership Act but was partly not barred and consequently the decree passed by the Trial Court as confirmed by the High Court is held to have remained well sustained and calls for no interference in the present appeal.

These two cases are thus not applicable to the facts of this case. This case is a case for enforcing a 'contract' of insurance with the defendants. Hence, the lower Court committed an error in relying upon SAMYUKTHA COTTON TRADING COMPANY V. BHEEMINENI VENKATA SUBBAIAH AND OTHERS8, which relied on Raptakos Brett & Co. Ltd's case (7 supra). The facts in Raptakos Brett & Co. Ltd's case are clearly distinguishable and the judgment is clear. It was not an action to enforce a contract. The Court did not notice that SHREERAM FINANCE CORPORATION V. YASIN KHAN AND OTHERS9 is directly on the point. It was clearly held that a suit is not maintainable even if the firm is registered after the suit is filed. Therefore, this Court holds that as the action in this case is to enforce a right arising from a contract; the suit filed by the unregistered firm is void ab initio. Subsequent registration will not cure this initial and fatal defect in this case.

Issue (b): The second point urged is about the repudiation of the claim and the filing of the suit within 12 months there from.

Sri K.Subba Rao, learned counsel for the appellant relies upon clause 15 of Ex.B.1 and states that the claim is abandoned. The clause reads as follows:

> It is also hereby expressly agreed and declared that if the company shall disclaim liability to the insured for any claim hereunder and such claim shall not, within 12 calendar months from the date of such disclaimer have been made the subject matter of a suit in a court of law, then the claim, shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder." (emphasis supplied)

The third part of the clause states that a suit should be filed within 12 calendar months from the date of the disclaimer. Sri Subba Rao's contention is based on the literal and plain language of the clause, which states that the suit should be filed within 12 months from the date of the disclaimer. Admittedly, the date of the disclaimer is 14.11.1996-Ex.A.3. Therefore, the suit that is filed on 14.11.1997 is barred since according to Sri K.Subba Rao, the suit should be filed on or before 13.11. 1997.

The learned counsel for the respondent submits that the clause should be interpreted practically. He states that unless he is aware of the repudiation, the time does not begin as also the cause of action. Therefore, his interpretation is that

8 2004(5) ALT 534

9. AIR 1989 SC 1769= 1989 (3) SCC 476

only after he receives the letter of repudiation, he is entitled to file the claim. The lower Court also held that unless the letter dated 14.11.1996 is received by the defendant, it cannot be said that the claim is waived. Therefore, the Court held that the suit filed on 14.11.1997 cannot be treated as abandoned.

If the letter and spirit of clause is examined, it is clear to the effect that it should be filed within 12 calendar months from the 'date' of repudiation. This is the crux of the argument of the learned counsel. This is an agreed term of the contract and the Court cannot vary the same. The primary rule in the interpretation of contracts is the plain language interpretation which the learned counsel for appellant relies upon. He also argues that the integrity of the contract should be upheld and therefore, submits that the suit filed on 14.11.1997 is after the abandonment of the claim.

The validity of such clauses (which are popularly called "Scott vs. Avery" clause as per the leading case on the subject) which prescribe the period within which the claim is to be lodged have been upheld by the Hon'ble Supreme Court in a series of judgments starting from The VULCAN INSURANCE CO. LTD. V. MAHARAJ SINGH AND ANOTHER10 INCLUDING NATIONAL INSURANCE CO. LTD. V. SUJIR GANESH NAYAK AND CO. AND ANOTHER11, wherein section 28 of the Indian Contract Act, as amended, is also considered and such a claim was upheld. The relevant portion of the judgment wherein such clauses were upheld and the rationale for the existence of such clauses is explained is reproduced hereunder.

> 16. ..... If the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy, the benefits flowing from the policy shall stand extinguished and any subsequent action would be time barred. Such a clause would fall outside the scope of Section 28 of the Contract Act. This, in brief, seems to be the settled legal position. We may now apply it to the facts of this case.
>
> 19. ..... Such clauses are generally found in insurance contracts for the reason that undue delay in preferring a claim may open up possibilities of false claims which may be difficult of verification with reasonable exactitude since memories may have faded by then and even ground situation may have changed. Lapse of time in such cases may prove to be quite costly to the insurer and therefore it would not be surprising that the insurer would insist that if the claim is not made within a stipulated period, the right itself would stand extinguished. Such a clause would not be hit by Section 28 of the Contract. emphasis supplied)

10 (1976) 1 SCC 943

11 AIR 1997 SC 2049 = 1997 (4) SCC 366

This Court finds considerable strength in the submission of the learned counsel on this issue. Even if the plaintiff received the letter dated 14.11.1996, a few days later he still had ample time to file the suit. By filing the suit on 14.11.1997 the plaintiff has run foul of this clause. The clause is clear and admits of one interpretation only.

Therefore, this Court holds that the suit filed has to be dismissed on the ground (a) that the firm is not registered as on the date of filing of the suit and the bar of Section 69 of the Act squarely applies as they are seeking to enforce a contract. (b) the claim is deemed to have been abandoned in view of clause of which says that the suit should be filed within 12 months.

For both these reasons, the appeal is allowed. In view of the fact that only these issues are urged, nothing further survives for consideration. No order as to costs. Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

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2018(1) L.S. 163 (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

Southern Power Distribution Co. of A.P. Ltd., ..Petitioner

Vs.

Permanent Lok Adalat for Public Utility Services, Kadapa & Ors., ..Respondents

LEGAL SERVICES AUTHORITIES ACT, 1987 - Writ petitioner has challenged an award passed by permanent LokAdalat – Dispute as to who is lawfully wedded wife of deceased employee – Issue for consideration is whether permanent LokAdalat could have entertained a dispute of this nature.

Held – Status of a person cannot be adjudicated by permanent LokAdalat and it can be adjudicated only by Civil Court – Writ petition is allowed and award of permanent lokadalat is set aside.

Mr N.Siva Reddy, Advocate for Petitioner.
Mr. J.Anil Kumar, Advocate for Respondent No.1.
Mr. V.R. Reddy Kovvuri, Advocate for Respondents 2.

W.P.No.26410/17 Date: 5-12-2017

Mr.N.Nagaraju, Advocate for the Respondent No.3.

O R D E R

Challenging an award passed by the Permanent Lok Adalat, the Southern Power Distribution Company of Andhra Pradesh Limited, Proddatur, Kadapa District, has come up with the above writ petition.

2. Heard Mr. N.Siva Reddy, learned counsel for the petitioner, Mr. J.Anil Kumar, learned counsel for the 1st respondent and Mr. V.R. Reddy Kovvuri, learned counsel appearing for the respondents 2 and 3.

3. The 2nd respondent herein filed a petition before the Permanent Lok Adalat claiming that she is the legally wedded wife of one Ankanna, who worked as a Foreman in the petitioner-Company and died after retirement on 13-12-2011 and that she was not granted family pension on account of a claim made by the 3rd respondent, who was recognised as the only legally wedded wife of Ankanna. In the petition filed by the 2nd respondent before the Permanent Lok Adalat, she impleaded the 3rd respondent as well as the Company as parties. The Permanent Lok Adalat took the case on file as P.L.A.C.No.13 of 2017 and issued notices to the Company for appearance.

4. On the date fixed for the appearance, the petitionerCompany appeared before the Lok Adalat and raised a preliminary objection with regard to the maintainability of the petition. The petitioner also pointed out that the 2nd respondent earlier made an attempt in the year 2015 but her claim was rejected by the Permanent Lok Adalat way back on 19-8-2015. The petitioner-Company had been paying family pension to the 3rd respondent, ever since the death of the employee on 13-12-2011, since the 3rd respondent's name alone was mentioned by the employee in the pension papers.

5. However, without considering the objections relating to maintainability, the Permanent Lok Adalat passed an award holding that the 3rd respondent herein, who is the senior widow of the deceased employee, had voluntarily agreed to share Rs.15,000/- per month from out of the family pension payable to her and that the Company should therefore issued revised pension orders accordingly. Aggrieved by the said order, the Company is before us.

6. The main issue that arises for consideration in this writ petition is as to whether the Permanent Lok Adalat could have entertained a dispute of this nature at all.

7. Under the Legal Services Authorities Act, 1987, every State Authority is obliged under Section 22B(1) to establish Permanent Lok Adalats at such places and for exercising such jurisdiction in respect of one or more public utility services. The expression "public utility service" is defined in Section 22A(b) to mean any of the following:

> (i) transport service for the carriage of passengers or goods by air, road or water; (ii) postal, telegraph or

telephone service;

(iii) supply of power, light or water to the public by any establishment;

(iv) system of public conservancy or sanitation;

(v) service in hospital or dispensary;

(vi) insurance service.

8. Under Section 22C(1), any party to a dispute, may, before the dispute is brought before any Court, make an application to the Permanent Lok Adalat for the settlement of the dispute. But by the provisos thereto, the jurisdiction of the Permanent Lok Adalat is curtailed in respect of – (i) any matter relating to an offence not compoundable under any law and (ii) any matter where the value of the property in dispute exceeds Rs.10 lakhs.

9. The moment a dispute is brought before the Permanent Lok Adalat, the Permanent Lok Adalat is obliged to take the following steps for the resolution of the dispute:

(i) direct the parties to file written statements;

(ii) conduct conciliation proceedings so as to enable the parties to reach an amicable settlement;

(iii) formulate the terms of a possible settlement of the dispute, wherever elements of settlement exist;

(iv) decide the dispute, where the parties fail to reach an agreement.

10. Two provisions are worthy of being taken note of. They are – (i) Section 22C(8) and (ii) Section 22D. Section 22C(8) reads as follows:

"22C(8). Where the parties fail to reach at an agreement under sub-section (7), the Permanent Lok Adalat shall, if the dispute does not relate to any offence, decide the dispute."

11. Section 22D reads as follows: "22D. Procedure of Permanent Lok Adalat.—The Permanent Lok Adalat shall, while conducting conciliation proceedings or deciding a dispute on merit under this Act, be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice, and shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) and the Indian Evidence Act, 1872 (1 of 1872)."

12. Section 22E(1) makes every award of a Permanent Lok Adalat made either on merit or in terms of a settlement agreement, final and binding on the parties. Sub-section (2) of Section 22E declares that every award of the Permanent Lok Adalat shall be deemed to be a decree of a Civil Court. Sub-section (3) makes it clear that the award shall be by a majority of the persons constituting the Permanent Lok Adalat.

13. Sub-sections (7) and (8) of Section 22C, which enables the Permanent Lok Adalat to attempt at a settlement and thereafter to decide the dispute in the event

of failure of conciliation proceedings, read with Section 22D which empowers the Permanent Lok Adalat to decide a dispute on merits on the basis of principles of natural justice, objectivity, fair play and equity, make it clear that the Permanent Lok Adalat is entitled to adjudicate a dispute. This is further strengthened by the use of the expression "either on merit or in terms of a settlement agreement" in Section 22E(1). The view is further strengthened by Section 22E(3) which mandates the award to be by a majority. It is only in cases where an adjudication takes place that the question of majority and minority would arise.

14. Therefore, it is clear that the Permanent Lok Adalat has the power of adjudication. But such adjudication can be only in respect of a public utility service falling within the definition of the expression under Section 22A(b).

15. There is no doubt that the writ petitioner herein is engaged in the supply of power, so as to fall within the definition of the expression "public utility service" under Section 22A(iii). But the dispute on hand is not between a consumer of public utility service and the service provider. The dispute that went before the Permanent Lok Adalat was between two persons, each claiming to be the lawfully wedded wife of the deceased employee of the petitioner/ Company. Therefore, it was actually an industrial dispute or at the most a service dispute and not a dispute relating to the provision of "public utility service". Hence, the Permanent Lok Adalat could not have adjudicated this dispute.

16. The question as to who is the lawfully wedded wife of the deceased employee, is one of status. The status of a person cannot be adjudicated by the Permanent Lok Adalat. It can be adjudicated only by the Civil Court.

17. Moreover, the 2nd respondent appears to have already approached the Permanent Lok Adalat and got her petition dismissed in the year 2015. Under Section 22E(4), an award of the Permanent Lok Adalat is final. Therefore, the dismissal of the application in the first instance on 19-8-2015 has attained finality and the same dispute could not have been reopened once more.

18. In view of the above, the writ petition is allowed and the award of the Permanent Lok Adalat is set aside. It is open to the 2nd respondent to work out her remedies before the appropriate forum in a manner known to law. The miscellaneous petitions, if any, pending in this writ petition shall stand closed. No costs.

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2018(1) L.S. 167 (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. Praveen Kumar &
The Hon'ble Smt. Justice
Kongara Vijaya Lakshmi

Nasari Appanna ..Appellant

Vs.

The State of A.P., ..Respondent

INDIAN PENAL CODE, Secs. 302 & 498-A - Accused is husband of deceased – Case of prosecution is that after birth of children disputes arose between accused and deceased – Accused got addicted to alcohol – On the day of alleged offence, both accused and deceased went to forest for firewood and did not return – Later, dead body of deceased was found with severe injuries to cheeks, neck and head.

Held – No eye witnesses and entire case rests on circumstantial evidence – It is clear that duty is cast upon prosecution to prove circumstances relied upon and same should form a chain so as to connect accused with crime – Extra judicial confession are not proved by any legal evidence - Circumstances relied upon by prosecution are not proved and failed to establish case – Criminal appeal is allowed and Conviction and sentence recorded in impugned Judgment are set aside.

Cases referred:
1.AIR 2011 SC 1585
2.AIR 2012 SC 2600
3.AIR 2012 SC 2435

J U D G M E N T
(per the Honble Mr.Justice C.Praveen Kumar)

1) The appellant herein, sole accused in Sessions Case No.119 of 2011 on the file of the I Additional Sessions Judge at Vizianagaram, , who was tried for the offences punishable under Sections 302 and 498-A IPC. Vide judgment, dated 31.12.2011, in S.C.No.119 of 2011, the I Additional Sessions Judge, Vizianagaram, convicted the accused for the offence punishable under Section 498-A IPC and sentenced him to suffer rigorous imprisonment for a period of three years and to pay fine of Rs.1000/-, in default to suffer simple imprisonment for a period of three months, and also convicted for the offence punishable under Section 302 IPC and sentenced to suffer imprisonment for life and to pay a fine of Rs.5000/-, in default to suffer simple imprisonment for a period of one year.

2) The gravamen of the charge against the accused is that on 09.04.2011 at Bellanapeta village of Gurla Mandal, he is said to have caused the death of his wife Nasari Ramanamma (hereinafter referred to as the deceased) by stabbing her with a knife on the neck and head.

3) The facts, as unfolded from the evidence of the prosecution witnesses are as under:

The accused is the husband of the deceased. PWs.1 and 2 are the brothers of the deceased, while PW.3 is the minor son of the deceased. The marriage between the accused and the deceased took place about 17 years prior to the date of incident. After the marriage, the deceased joined the society of the accused and both of them started living together at Bellanapeta village. Out of wedlock, they blessed with two children. It is said that the accused looked after the deceased well till the birth of the children and thereafter disputes arose between them. The evidence of PW.1 goes to show that the accused got addicted to alcohol; was not caring the children and the deceased properly and was also not looking after the welfare of his family. The accused used to beat the deceased suspecting her fidelity. The deceased used to inform about the harassment caused to her by the accused to her parents. As per the evidence of PW.5, a panchayat was held with regard to harassment caused by the accused towards the deceased, in a drunken state. The accused and deceased attended the said panchayat, wherein the elders advised the accused to look after the deceased well. Thereafter, the deceased went to the house of the accused to lead a conjugal life. About 15 days prior to the date of incident, the deceased left the company of the accused and came to the house of PW.1 along with the children. She stayed there for a period of ten days. Later, she received a phone call from her brother-in-law stating that her presence is required for signing a bill for payment of house tax. On that, she went to the house of the accused along with the children. PW.3, who is the son of the deceased and accused, also went to the house of the accused along with his mother. His evidence is to the effect that on a Saturday about 3.00 p.m., the deceased and the accused together went to the forest for firewood. He was present in the house, as it was a holiday to his school. But, neither of them returned back to the house. He waited in the house till 8.00 p.m.; thereafter proceeded to the house of his junior paternal uncle (PW.4) and informed him about his parents not returning to the house. Hence, PW.4 went in search of the deceased and the accused. As there was no information about his parents, PW.3 claims to have slept alone in the house. On the next day morning, which was Sunday, PW.1 received a phone call from the brother of the accused that the deceased and accused went to get firewood but did not return. Then PWs.1, 2, Kornana Pydamma (LW.2) and others went to the house of the accused, and found PW.3 in the house of the accused. When questioned as to what happened, he is said to have told them that on the previous day, the accused and deceased went to the forest for firewood but did not return. Then PWs.1 and 2 went to the hill area in search of the accused and deceased. During the search, PW.2 found the dead body of the deceased, near a gedda and informed the same to PW.1. PW.1 and others noticed bleeding injuries on cheeks, neck and head of the deceased. On 10.04.2011 at 12.00 noon, PW.1 went to the police station and presented a report, which was marked as Ex.P.1. Basing on Ex.P1., a case in Crime No.30 of 2011 of Gurla Police Station, came to be registered under Sections 498-A and 302 IPC. Ex.P11 is the first information report, issued by PW.12-the Sub-Inspector of Police. The distance between the scene of offence and the police station is about 7 kms. After receiving the F.I.R., PW.13-the Circle

Inspector of Police took up further investigation. He along with PW.12 proceeded to the scene of offence and found the dead body lying in a streamlet (vagu) with injuries on face and head. He prepared an observation report in the presence of PWs.7 and 8. During the said proceedings, he seized M.Os.7 and 8 from the scene of offence and thereafter, recorded the statements of PWs.1 to 3 and others. He, then held inquest over the dead body of the deceased in the presence of PWs.7 to 9. During inquest, he seized M.Os.5 and 6 from the scene of offence. Ex.P4 is the inquest report. He also prepared a rough sketch, which is marked as Ex.P12, and also got photographed the scene of offence and the dead body. Ex.P2 is the bunch of photographs. Thereafter, he sent the body for postmortem examination. PW.10, the Civil Assistant Surgeon, Government Head Quarters Hospital, Vizianagaram, conducted autopsy over the dead body of the deceased on 11.04.2011 at about 11.45 a.m. Ex.P9 is the postmortem examination report. According to him, the cause of death was due to massive hemorrhage due to ante mortem injuries and time of death was about 36 to 48 hours prior to postmortem examination. PW.13 tried to apprehend the accused but he was found absconding from the village. On 19.04.2011, while he was present in Gurla police station, PWs.7 and 9 produced the accused along with extra-judicial confession statement of the accused recorded and reduced into writing by PW.7. The same was marked as Ex.P5. He took the accused into custody, interrogated him in the presence of PW.11 and recorded the confessional statement of the accused. Pursuant to the confession made by the accused, the weapon said to have been used in the commission of offence was recovered. The relevant portion of the confessional statement is marked as Ex.P7. After completing the investigation and after collecting all the reports from the concerned, PW.13 filed the charge sheet, before the Court of Judicial First Class Magistrate, Cheepurupalli, who, inturn, committed the case to Sessions Division, under Section 209 Cr.P.C. On committal, the same came to be numbered as S.C.No.119 of 2011.

4) On appearance, charges under Sections 302 and 498-A IPC were framed, read over and explained to the accused, to which the accused pleaded not guilty and claimed to be tried.

5) In support of its case, the prosecution examined PWs.1 to 13 and got marked Exs.P1 to P13 and MOs.1 to 10. After the closure of prosecution evidence, the accused was examined under Section 313 Cr.P.C., with reference to the incriminating circumstances appearing against him, in the evidence of the prosecution witnesses, to which he denied. No oral evidence was adduced on behalf of the accused but a portion of 161 Cr.P.C. statement of PW.4 was marked as Ex.D1.

6) After considering the entire material, including oral and documentary evidence available on record, more particularly the evidence of PWs.1 to 5, the Sessions Judge convicted the accused for the offences under Sections 302 and 498-A IPC. Challenging the same, the present appeal is filed.

7) Smt. G.Shobha, learned counsel appearing for the appellant strenuously contends that there is absolutely no material to connect the accused with the crime and

the circumstances relied upon by the prosecution do not form a chain of events so as to connect the accused with the crime. According to her, when the evidence of PW.3 discloses that the accused was brought to the house five days after the death of his mother, the extra judicial confession said to have been made before PWs.7 and 9 and the subsequent arrest and recovery made pursuant to the confession made by the accused are all false and un-believable. She would further submit that as per the evidence of PW.4, he proceeded in search of the accused and the deceased on receipt of information from PW.3 and at 3.00 a.m., found the dead body lying near Gedda. Immediately thereafter, he informed the same to Butchodu (LW.9) and Gompa Tata (LW.10). PW.5 in his evidence states that on receiving the information about the dead body, he informed the same to village Sarpanch, who inturn asked Ramana (brother of the accused) to inform the same to the parents of the deceased, who, inturn, informed the same to PW.1. Such being the position, she would contend that the first information report, which has been given on the next day, should have contained the fact of tracing the body of the deceased, on the previous night. But, the report only refers to the accused and deceased, leaving the house, which throws any amount of doubt on the case of the prosecution. It is further urged that when the oral evidence shows that the body was traced on the previous night, the inquest report reveals that the dead body was traced on 10.04.2011 at about 9.00 a.m. In view of the above aspects, she would contend that no reliance can be placed on the evidence of any of the prosecution witnesses and the alleged last seen, recovery of body and the extra judicial confession cannot be made a basis to convict the accused.

8) On the other hand, the learned Public Prosecutor would contend that the circumstances relied upon by the prosecution and more particularly, the evidence of PW.3 can be relied upon to convict the accused and as such the finding given by the trail Court warrants no interference.

9) As seen from the record, there are no eye witnesses to the incident and the entire case rests on circumstantial evidence.

10) In RUKIA BEGUM VS. STATE OF KARNATAKA (1) the Apex Court held as under:

> When a case is based on circumstantial evidence, the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. Circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence.

11) In Jagroop SINGH V. STATE OF PUNJAB(2) the Apex Court held as under:

> When the case of prosecution is based on circumstantial evidence, conviction is permissible only when all links in chain of events are

1.AIR 2011 SC 1585
2.AIR 2012 SC 2600

established beyond reasonable doubt and established circumstances are consistent only with hypothesis of guilt of accused and totally inconsistent with his innocence.

12) From the judgments of the Apex Court, referred to above, it is clear that a duty is cast upon the prosecution to prove the circumstances relied upon and the circumstances relied upon by the prosecution should form chain of events connecting the accused with the crime.

13) Since the case on hand is based on circumstantial evidence, we shall now peruse the evidence to find out as to whether the circumstances relied upon by the prosecution form a chain so as to connect the accused with the crime.

14) Before proceeding further, it would be useful to refer to the evidence of PW.3, a child witness. In his evidence, PW.3 deposed that the accused was not looking after the deceased well and also their welfare. He further deposed that the accused used to beat the deceased in a drunken state. According to him, his father did not give any money to his mother to maintain the family and his mother used to maintain them by attending the coolie work. It is his evidence that about 15 days prior to the death of his mother, she took PW.3 and others to the house of his maternal grandfather due to disputes between her and the accused. They stayed there for a period of ten days. On one day, the brother of the accused (LW4) informed the deceased over phone that house tax receipt was issued and she has to sign some papers. On that, the deceased returned to the house of the accused along with PW.3 and others. About 5 days thereafter on a Saturday at about 3.00 p.m., the accused and deceased together went to the forest, to get firewood. At that time, PW.3 was present in the house, as it was holiday to his school. As the accused and deceased did not return home, he waited till 8.00 p.m., went to the house of his junior paternal uncle and informed him about the same. On receiving the said information, Nasari Ramana (LW4) went in search of the deceased and accused. As there was no information, PW.3 slept. On the next day morning, PWs.1 and 2 came to the house and enquired about the accused and deceased. In the cross-examination, it has been elicited that about 5 days after the death of the deceased, the police brought the accused to the house. It would be useful to extract the same in the words spoken to by PW.3, which is as under:

> I stayed Bellanapeta for a period of ten days after death of my mother. Five days after the death of my mother, police brought my father to our house.

15) That being the evidence on record, it has to be seen whether the circumstances relied upon by the prosecution to connect the accused with the crime stand established.

16) The first circumstance relied upon by the prosecution is extra judicial confession made by the accused before PW.7. In his evidence, PW.7 categorically deposed that on 19.04.2011 at about 11.00 a.m., while himself and PW.9-Vice President were present at Rama Mandir in Kella Village, the accused came there and confessed about killing his wife and requested them to surrender him before the police. The

detailed confession of the accused, more particularly with regard to manner in which he killed the deceased, was reduced into writing and the signature of the accused was also taken. Ex.P5 is the said confession. Thereafter, PWs.7 and 9 took the accused to the police station and produced him before PW.13, the Inspector of Police.

17) The evidence on record, more particularly the evidence of PW.3, which has been referred to above, clearly shows that five days after the death of his mother (which would be on the intervening night of 9th or 10th April) the police brought the accused to the house of the accused. In view of the said admission of PW.3, a doubt arises as to how the accused would have made an extra judicial confession before PW.7 on 19.04.2011. As narrated earlier, the incident was on the intervening night of 9th or 10th April, 2011. PW.3 in his evidence admits that the accused was brought by police to the house of the accused within five days after the death of his mother, which means that the accused was in the custody of police within 5 days of the incident.

18) Further, it is not the case of the prosecution that, on suspicion, the accused was detained and later left off. Hence, the extra judicial confession made before PW.7 on 19.04.2011, reducing the confession into writing vide Ex.P5, the same containing the signature of accused, and they producing the accused before the police appear to be suspicious. Therefore, the arrest of the accused, by the police, the confession, recorded from him, and the confession leading to recovery are also doubtful. It is further brought to the notice of the court that the knife, which was said to have been recovered from the accused, contains blood, which is not of human origin.

19) At this stage, it is also to be noticed that there is any amount of doubt with regard to tracing of the dead body. PW.4 in his evidence categorically states that immediately after receiving the information from PW.3, about the accused and deceased not returning to the house, though it was late in the night, he along with others proceeded towards the hill area and claims to have seen the dead body at 3.00 a.m. Immediately, he informed PW.5 about tracing the dead body, who, inturn, asked Ramana (LW4-brother of the accused) to inform the same to the parents of the deceased apart from informing the same to the Sarpanch of the village. Therefore, the brother of the accused, who was informed by PW.5, was aware about tracing of the dead body by 3.00 a.m., on the intervening night of 9th or 10th April.

20) Though the brother of the accused (LW4) is aware about such information, he called PW.1 on telephone and informed only about the accused and deceased leaving the house on the previous day night and not returning to the house till late night. Pursuant to the information received, PWs.1 and 2 and others came to the house of the accused and enquired PW.3, who is said to have stated about his parents leaving the house on the previous day to collect fire wood. Basing on the said information, PWs.1 and 2 went in search of the accused and deceased and PW.2 claims to have found the dead body near Gedda.

21) The search and tracing the dead body on the next day is artificial for the reason that as per the evidence of PW.4, the dead body was traced in the hill area at 3.00

a.m., on the previous night. The said information was suppressed in Ex.P1, which was given on the next day. When the body was traced prior to lodging of the report, no reasons are forthcoming as to why it was suppressed.

22) It would be useful to refer to the relevant portion in Ex.P1- report, wherein it was mentioned as under:

> on 10.04.2011 morning at 7.00 a.m. PW.1 received a phone call from the brother-in-law of the deceased, informing him that the deceased and accused did not return to their house.

23) Hence, there arises any amount of doubt as to when the body was traced.

24) Yet, another anomaly, in the prosecution case, is that, as per the observation report, prepared at the scene of offence, which was brought on record as Ex.P3, on 10.04.2011, Sunday, at 12.15 p.m., the observation report of the scene was drafted in the presence of mediators. In the said observation report, which was prepared on 10.04.2011, the crime number was mentioned as Cr.No.30 of 2011. It was also mentioned in the observation report that the scene of offence is situated at a distance of 7 km., away towards South East of Gurla Police Station and 2 kms., away from Bellanapeta village towards southern side of the village. When the F.I.R., itself came to be registered at 12.00 noon and when the investigating officer proceeded towards the scene of offence only after receiving the copy of F.I.R., it is strange as to how he could be present at the scene of offence and prepare a panchanama by 12.15 p.m., after securing the mediators, more so, when the distance between the police station and scene of offence is 7 kms., with a muddy path way and not having any proper road. Even this circumstance creates some suspicion in the case of the prosecution.

25) The last circumstance, which is sought to be pressed into service, by the prosecution, is the theory of accused being last seen in the company of the deceased, on the previous day. PW.3 is the witness, who speaks about the theory of last seen. Even assuming that both of them left the house in the afternoon, there was sufficiently long gap between the time when both of them left the house and the body being traced. As per the evidence of PW.3, the deceased and accused left the house on Saturday at 3.00 p.m., and there is no concrete legal evidence to show as to when the body was found in a Gedda (hill area). Even assuming that the accused and deceased were last seen together on the previous day afternoon, that by itself cannot be a ground to convict the accused, in view of the manner in which the prosecution tried to build up its case, from stage to stage, creating suspicion in the mind of the Court.

26) From the above, we hold that the extra judicial confession, recovery of knife and cloths and tracing of the dead body, are not proved by any legal evidence.

27) In SAHADEVAN AND ANOTHER V. STATE OF TAMIL NADU(3) , while dealing with a case, which was based on extra judicial confession, last seen theory and recovery of kerosene bottle, the Apex Court held as under:

> Where the only circumstantial evidence taken resort to by the

prosecution is that the accused and deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. But this theory should be applied while taking into consideration eh case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

22. The principles which would make an extra-judicial confession, an admissible piece of evidence capable of forming the basis of conviction of an accused are as follow:

(i) The extra judicial confession is a weak evidence by itself. It has to be examined by the Court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) it should inspire confidence.

(iv) An extra judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.

28) Basing on the judgments (1 to 3 supra), and, in view of the findings arrived at, we feel that the circumstances relied upon by the prosecution are not proved and failed to establish its case.

29) Further, the evidence on record, more particularly the evidence of PWs.1 to 3 does not anywhere indicate that the accused harassed the deceased for money and property. Harassment, if any, was because of accused suspecting the fidelity of the deceased, which also remained unproved. In the absence of any legal evidence, to that effect, we feel that the ingredients, constituting an offence under Section 498-A IPC, are not made out.

30) For the aforesaid reasons, the Criminal Appeal is allowed. The conviction and sentence recorded against the appellant/ accused in the judgment, dated 31.12.2011 in S.C.No.119 of 2011 on the file of the I Additional Sessions Judge, Vizianagaram, for the offences punishable under Section 302 and 498-A IPC, are set aside. Consequently, the accused shall be set at liberty forthwith, if he is not required in any other case or crime. Miscellaneous petitions, if any, pending shall stands closed.

–X–

3.AIR 2012 SC 2435

2018 (1) L.S. 27 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

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

Danamma @ Suman
Surpur & Anr., ..Appellants
Vs.
Amar & Ors. ..Respondents

HINDU SUCCESSION ACT, 1956 and HINDU SUCCESSION (AMENDMENT) ACT, 2005 - Whether Appellants/ Daughters could be denied their share on ground that they were born prior to enactment of Hindu Succession Act, 1956 and therefore cannot be treated as coparceners – Whether with passing of Hindu Succession (Amendment) Act, 2005, appellants would become coparcener "by birth" in their "own right in same manner as son" and are therefore, entitled to equal shares as that of son?

Held – By virtue of Section 6 of the Act as amended, it is apparent that status conferred upon sons under old section to treat them as coparceners since birth also confers upon daughters as well since birth - In present case, suit for partition was filed in year 2002 and during pendency of this suit, u/Sec. 6 of Hindu Succession Act was amended as decree was passed by trial Court in year 2007 – Thus, rights of appellants got crystallised in year 2005 and this event should have been kept in mind by trial Court as well as High Court – Share will devolve upon Appellants/Daughters as well – Appeals are allowed and Judgment of High Court is set aside.

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

1. The appellants herein, two in number, are the daughters of one, Gurulingappa Savadi, propositus of a Hindu Joint Family. Apart from these two daughters, he had two sons, namely, Arunkumar and Vijay. Gurulingappa Savadi died in the year 2001 leaving behind the aforesaid two daughters, two sons and his widow, Sumitra. After his death, Amar, S/o Arunkumar filed the suit for partition and a separate possession of the suit property described at Schedule B to E in the plaint stating that the two sons and widow were in joint possession of the aforesaid properties as coparceners and properties mentioned in Schedule B was acquired out of the joint family nucleus in the name of Gurulingappa Savadi.

Case set up by him was that the appellants herein were not the coparceners in the said joint family as they were born prior to the enactment of Hindu Succession Act, 1956 (hereinafter referred to as the 'Act'). It was also pleaded that they were married daughters and at the time of their marriage they had received gold and money and had, hence, relinquished their share.

2. The appellants herein contested the suit by claiming that they were also entitled to share in the joint family properties, being

daughters of Gurulingappa Savadi and for the reason that he had died after coming into force the Act of 1950.

3. The trial court, while decreeing the suit held that the appellants were not entitled to any share as they were born prior to the enactment of the Act and, therefore, could not be considered as coparceners. The trial court also rejected the alternate contention that the appellants had acquired share in the said properties, in any case, after the amendment in the Act vide amendment Act of 2005. This view of the trial court has been upheld by the High Court in the impugned judgement dated January 25, 2012 thereby confirming the decree dated August 09, 2007 passed in the suit filed for partition.

4. In the aforesaid backdrop, the question of law which arises for consideration in this appeal is as to whether, the appellants, daughters of Gurulingappa Savadi, could be denied their share on the ground that they were born prior to the enactment of the Act and, therefore, cannot be treated as coparceners? Alternate question is as to whether, with the passing of Hindu Succession (Amendment) Act, 2005, the appellants would become coparcener "by birth" in their "own right in the same manner as the son" and are, therefore, entitled to equal share as that of a son?

5. Though, we have mentioned the gist of the lis involved in this case along with brief factual background in which it has arisen, some more facts which may be necessary for understanding the genesis of issue involved may also be recapitulated. We may start with the genealogy of the parties, it is as under: "

Guralingappa=Sumitra (Def.8)

Mahandanda (Def. 7)	Arunkumar @ Arun (Def.1) (dead)	=	Sarojini (Def.2)	Vijay (Def.5)	Danamma (Def. 6)

Sheetal (Def. 3)	Amar (Plff)	Triveni (Def. 4)

6. Respondent No. 1 herein (the plaintiff) filed the suit on July 01, 2002 claiming 1/15th share in the suit schedule properties. In the said suit, he mentioned the properties which needed partition.

7. The plaint schedule C compromised of the house properties belonging to the joint family. The plaint schedule D comprised of the shop properties belonging to the joint family. The plaint schedule E comprised of the machineries and movable belonging to the joint family. The plaintiff averred that the plaint schedule properties belonged to the joint family and that defendant no. 1, the father of the plaintiff was neglecting the

plaintiff and his siblings and sought partition of the suit schedule properties.

The plaintiff contended that all the suit schedule properties were the joint family properties. The plaintiff contended in para 5 of the plaint that the propositus, Guralingappa died 1 year prior to the filing of the suit. In para 7 of the plaint, the plaintiff contended that defendant no. 1 had 1/3rd share and defendant no. 5 and 8 had 1/3rd share each in the suit schedule properties. The plaintiff also contended that defendants 6 and 7 did not have any share in the suit schedule properties.

8. Defendant no. 1 (father of the plaintiff) and son of Guralingappa Savadi did not file any written statement. Defendant nos. 2, 3 and 4 filed their separate written statements supporting the claim of the plaintiff. Defendant no. 5 (respondent no. 5 herein and son of Guralingappa Savadi), however, contested the suit. He, inter alia, contended that after the death of Guralingappa, an oral partition took place between defendant no. 1, defendant no. 5 and others and in the said partition, defendant no. 1 was allotted certain properties and defendant no. 5 was allotted certain other properties and defendant no. 8, Sumitra, wife of Guralingappa Savadi was allotted certain other properties. Defendant 5 no. 5 further contended that defendant nos. 6 and 7 were not allotted any properties in the said alleged oral partition.

9. Defendant no. 5 further contended that one of the properties, namely, C.T.S. No. 774 and also certain other properties were not joint family properties.

10. The appellants claimed that they were also entitled to their share in the property. After framing the issues and recording the evidence, the trial court by its judgment and decree dated August 09, 2007 held that the suit schedule properties were joint family properties except CTS No. 774 (one of the house properties in plaint C schedule).

11. The trial court held that the plaintiff, defendant nos. 2 to 4 were entitled to 1/8th share in the joint family properties. The trial court further noted that defendant no. 8 (wife of Gurulingappa Savadi) died during the pendency of the suit intestate and her share devolved in favour of defendants no. 1 and 5 only and, therefore, defendant nos. 1 and 2 were entitled to 1/2 share in the said share. The trial court passed the following order: "The suit of the plaintiff is decreed holding that the plaintiff is entitled for partition and separate possession of his 1/8th share in the suit 'B', 'C' and 'D' schedule properties (except CTS No. 774) and also in respect of the Machinery's stated in the report of the commissioner. The commissioners report Ex. P16 which contains the list of machinery's to form part of the decree. 6 The defendants 2 to 4 are each entitled to a/8th share and the 5th defendant is entitled for 4/8 share in the above said properties."

12. The trial court, thus, denied any share to the appellants.

13. Aggrieved by the said judgment and decree of the trial court, the defendant nos. 6 and 7 filed an appeal bearing R.F.A. No. 322 of 2008 before the High Court seeking equal share as that of the sons of the propositus, namely, defendant nos. 1 and 5.

14. The High Court by its impugned judgment and order dated January 25, 2012 dismissed the appeal. Thereafter, on March 04, 2012 defendant nos. 6 and 7 filed a review petition bearing no. 1533 of 2012 before the High Court, which met the same fate.

15. We have heard the learned counsel for the parties. Whereas, the learned counsel for the appellants reiterated his submissions which were made before the High Court as well and noted above, learned counsel for the respondents refuted those submissions by relying upon the reason given by the High Court in the impugned judgment.

16. In the first instance, let us take note of the provisions of Section 6 of the Act, as it stood prior to its amendment by the Amendment Act, 2005. This provision reads as under:

> "6. Devolution of interest in coparcenary property.- When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act: Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.
>
> Explanation 1.- For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.
>
> Explanation 2.- Nothing contained in the proviso to this section shall be construed as enabling a person who had separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

17. No doubt, Explanation 1 to the aforesaid Section states that the interest of the deceased Mitakshara coparcenary property shall be deemed to be the share in the property that would have been allotted to him if the partition of the property had taken place immediately before his death, irrespective whether he was entitled to claim partition or not. This Explanation came up

for interpretation before this Court in Anar Devi & Ors. v. Parmeshwari Devi & Ors. (2006) 8 SCC 656 . The Court quoted, with approval, the following passage from the authoritative treatise of Mulla, Principles of Hindu Law, 17th Edn., Vol. II, p. 250 wherein the learned author made following remarks while interpreting Explanation 1 to Section 6:

> "...Explanation 1 defines the expression 'the interest of the deceased in Mitakshara coparcenary property' and incorporates into the subject the concept of a notional partition. It is essential to note that this notional partition is for the purpose of enabling succession to and computation of an interest, which was otherwise liable to devolve by survivorship and for the ascertainment of the shares in that interest of the relatives mentioned in Class I of the Schedule.
>
> Subject to such carving out of the interest of the deceased coparcener the other incidents of the coparcenary are left undisturbed and the coparcenary can continue without disruption. A statutory fiction which treats an imaginary state of affairs as real requires that the consequences and incidents of the putative state of affairs must flow from or accompany it as if the putative state of affairs had in fact existed and effect must be given to the inevitable corollaries of that state of affairs."

7. The learned author further stated that: "[T]he operation of the notional partition and its inevitable corollaries and incidents is to be only for the purposes of this section, namely, devolution of interest of the deceased in coparcenary property and would not bring about total disruption of the coparcenary as if there had in fact been a regular partition and severance of status among all the surviving coparceners."

8. According to the learned author, at pp. 253-54, the undivided interest "of the deceased coparcener for the purpose of giving effect to the rule laid down in the proviso, as already pointed out, is to be ascertained on the footing of a notional partition as of the date of his death.

The determination of that share must depend on the number of persons who would have been entitled to a share in the coparcenary property if a partition had in fact taken place immediately before his death and such person would have to be ascertained according to the law of joint family and partition. The rules of Hindu law on the subject in force at the time of the death of the coparcener must, therefore, govern the question of ascertainment of the persons who would 9 have been entitled to a share on the notional partition".

18. Thereafter the Court spelled out the manner in which the statutory fiction is to be construed by referring to certain judgments and summed up the position as follows:

> "11. Thus we hold that according to Section 6 of the Act when a coparcener dies leaving behind any female relative specified in Class I of the Schedule to the Act or male relative specified in that class claiming through such female relative, his undivided interest in the Mitakshara coparcenary property would not devolve upon the surviving coparcener, by survivorship but upon his heirs by intestate succession.

Explanation 1 to Section 6 of the Act provides a mechanism under which undivided interest of a deceased coparcener can be ascertained and i.e. that the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

It means for the purposes of finding out undivided interest of a deceased coparcener, a notional partition has to be assumed immediately before his death and the same shall devolve upon his heirs by succession which would obviously include the surviving coparcener who, apart from the devolution of the undivided interest of the deceased upon him by succession, would also be entitled to claim his undivided interest in the coparcenary property which he could have got in notional partition."

19. This case clearly negates the view taken by the High Court in the impugned judgment.

20. That apart, we are of the view that amendment to the aforesaid Section vide Amendment Act, 2005 clinches the issue, beyond any pale of doubt, in favour of the appellants. This amendment now confers upon the daughter of the coparcener as well the status of coparcener in her own right in the same manner as the son and gives same rights and liabilities in the coparcener properties as she would have had if it had been son. The amended provision reads as under:

> "6. Devolution of interest in coparcenary property.-
>
> (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,-
>
> (a) by birth become a coparcener in her own right the same manner as the son;
>
> (b) have the same rights in the coparcenery property as she would have had if she had been a son;
>
> (c) be subject to the same liabilities in respect of the said coparcenery property as that of a son, and any

reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenery property shall be deemed to have been divided as if a partition had taken place and,-

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation.-For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the Hindu

Succession (Amendment) Act, 2005 (39 of 2005), nothing contained in this sub-section shall affect-

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 (39 of 2005) had not been enacted.

Explanation.-For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005).

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation.-For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.]"

21. The effect of this amendment has been the subject matter of pronouncements by various High Courts, in particular, the issue as to whether the right would be conferred only upon the daughters who are born after September 9, 2005 when Act came into force or even to those daughters who were born earlier. Bombay High Court in Vaishali Satish Gonarkar v. Satish Keshorao Gonarkar AIR 2012 Bom 110 had taken the view that the provision cannot be made applicable to all daughters born even prior to the amendment, when the Legislature itself specified the posterior date from which the Act would come into force.

This view was contrary to the view taken by the same High Court in Sadashiv Sakharam Patil v. Chandrakant Gopal Desale 2011 (5) Bom CR 726 4. Matter was referred to the Full Bench and the judgment of the Full Bench is reported as Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari AIR 2014 Bom 151. The Full Bench held that clause (a) of sub-section (1) of Section 6 would be prospective in operation whereas clause (b) and (c) and other parts of sub-section (1) as well as sub-section (2) would be retroactive in operation.

It held that amended Section 6 applied to daughters born prior to June 17, 1956 (the date on which Hindu Succession Act came into force) or thereafter (between June 17, 1956 and September 8, 2005) provided they are alive on September 9, 2005 i.e. on the date when Amended Act, 2005 came into

force. Orissa, Karnataka and Delhi High Court have also held to the same effect (AIR 2008 Ori 133: Pravat Chandra Pattnaik v. Sarat Chandra Pattnaik; ILR 2007 Kar 4790: Sugalabai v. Gundappa A. Maradi and 197 (2013) DLT 154: Rakhi Gupta v. Zahoor Ahmad).

22. The controversy now stands settled with the authoritative pronouncement in the case of Prakash & Ors. v. Phulavati & Ors.(2016) 2 SCC 36 which has approved the view taken by the aforesaid High Courts as well as Full Bench of the Bombay High Court. Following discussion from the said judgment is relevant:

> "17. The text of the amendment itself clearly provides that the right conferred on a "daughter of a coparcener" is "on and from the commencement of the Hindu Succession (Amendment) Act, 2005". Section 6(3) talks of death after the amendment for its applicability. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective. [Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24, paras 22 to 27]
>
> In the present case, there is neither any express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect. Requirement of partition being registered can have no application to statutory notional partition on opening of succession as per unamended provision, having regard to nature of such partition which is by operation of law. The intent and effect of the amendment will be considered a little later. On this finding, the view of the High Court cannot be sustained.
>
> 18. The contention of the respondents that the amendment should be read as retrospective being a piece of social legislation cannot be accepted. Even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature. In the present case, the legislature has expressly made the amendment applicable on and from its commencement and only if death of the coparcener in question is after the amendment.
>
> Thus, no other interpretation is possible in view of the express language of the statute. The proviso keeping dispositions or alienations or partitions prior to 20-12-2004 unaffected can also not lead to the inference that the daughter could be a coparcener prior to the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent of coparcenary property which may be available when

the main provision is applicable. Similarly, Explanation has to be read harmoniously with the substantive provision of Section 6(5) by being limited to a transaction of partition effected after 20-12-2004. Notional partition, by its very nature, is not covered either under the proviso or under sub-section (5) or under the Explanation.

19. Interpretation of a provision depends on the text and the context. [RBI v. Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424, p. 450, para 33] Normal rule is to read the words of a statute in ordinary sense. In case of ambiguity, rational meaning has to be given. [Kehar Singh v. State (Delhi Admn.), (1988) 3 SCC 609 : 1988 SCC (Cri) 711] In case of apparent conflict, harmonious meaning to advance the object and intention of legislature has to be given. [District Mining Officerv. TISCO, (2001) 7 SCC 358]

20. There have been number of occasions when a proviso or an explanation came up for interpretation. Depending on the text, context and the purpose, different rules of interpretation have been applied. [S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591]

21. Normal rule is that a proviso excepts something out of the enactment which would otherwise be within the purview of the enactment but if the text, context or purpose so require a different rule may apply. Similarly, an explanation is to explain the meaning of words of the section but if the language or purpose so require, the explanation can be so interpreted. Rules of interpretation of statutes are useful servants but difficult masters. [Keshavji Ravji & Co. v. CIT, (1990) 2 SCC 231 : 1990 SCC (Tax) 268] Object of interpretation is to discover the intention of legislature.

22. In this background, we find that the proviso to Section 6(1) and sub-section (5) of Section 6 clearly intend to exclude the transactions referred to therein which may have taken place prior to 20-12-2004 on which date the Bill was introduced. Explanation cannot permit reopening of partitions which were valid when effected. Object of giving finality to transactions prior to 20-12-2004 is not to make the main provision retrospective in any manner.

The object is that by fake transactions available property at the introduction of the Bill is not taken away and remains available as and when right conferred by the statute becomes available and is to be enforced. Main provision of the amendment in Sections 6(1) and (3) is not in any manner intended to be affected but strengthened in this way. Settled principles governing such transactions relied upon by the appellants are not intended to be

done away with for period prior to 20-12-2004. In no case statutory notional partition even after 20-12-2004 could be covered by the Explanation or the proviso in question.

23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9-9-2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20-12-2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation."

23. The law relating to a joint Hindu family governed by the Mitakshara law has undergone unprecedented changes. The said changes have been brought forward to address the growing need to merit equal treatment to the nearest female relatives, namely daughters of a coparcener. The section stipulates that a daughter would be a coparcener from her birth, and would have the same rights and liabilities as that of a son. The daughter would hold property to which she is entitled as a coparcenary property, which would be construed as property being capable of being disposed of by her either by a will or any other testamentary disposition.

These changes have been sought to be made on the touchstone of equality, thus seeking to remove the perceived disability and prejudice to which a daughter was subjected. The fundamental changes brought forward about in the Hindu Succession Act, 1956 by amending it in 2005, are perhaps a realization of the immortal words of Roscoe Pound as appearing in his celebrated treaties, The Ideal Element in Law, that "the law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change."

24. Section 6, as amended, stipulates that on and from the commencement of the amended Act, 2005, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. It is apparent that the status conferred upon sons under the old section and the old Hindu Law was to treat them as coparceners since birth. The amended provision now statutorily recognizes the rights of coparceners of daughters as well since birth.

The section uses the words in the same manner as the son. It should therefore be apparent that both the sons and the daughters of a coparcener have been conferred the right of becoming coparceners by birth. It is the very factum of birth in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener become coparceners by virtue of birth. Devolution of coparcenary property is the later stage of and a consequence of death of a coparcener. The first stage of a coparcenary is obviously its creation as explained above, and as is well

recognized. One of the incidents of coparcenary is the right of a coparcener to seek a severance of status. Hence, the rights of coparceners emanate and flow from birth (now including daughters) as is evident from sub-s (1)(a) and (b).

25. Reference to the decision of this Court, in the case of State Bank of India v. Ghamandi Ram AIR 1969 SC 1330in essential to understand the incidents of coparceneryship as was always inherited in a Hindu Mitakshara coparcenary:

> "According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (See Mitakshara, Ch. I. 1-27).The incidents of coparcenership under the Mitakshara law are: first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties is common; secondly, that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property, conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors."

26. Hence, it is clear that the right to partition has not been abrogated. The right is inherent and can be availed of by any coparcener, now even a daughter who is a coparcener.

27. In the present case, no doubt, suit for partition was filed in the year 2002. However, during the pendency of this suit, Section 6 of the Act was amended as the decree was passed by the trial court only in the year 2007. Thus, the rights of the appellants got crystallised in the year 2005 and this event should have been kept in mind by the trial court as well as by the High Court. This Court in Ganduri Koteshwaramma & Anr. v. Chakiri Yanadi & Anr.8 held that the rights of daughters in coparcenary property as per the amended S. 6 are not lost merely because a preliminary decree has been passed in a partition suit. So far as partition suits are concerned, the partition becomes final only on the passing of a final decree. Where such situation arises, the preliminary decree would have to be amended taking into account the change in the law by the amendment of 2005.

28. On facts, there is no dispute that the property which was the subject matter of partition suit belongs to joint family and Gurulingappa Savadi was propositus of the said joint family property. In view of our

aforesaid discussion, in the said partition suit, share will devolve upon the appellants as well. Since, Savadi died leaving behind two sons, two daughters and a widow, both the appellants would be entitled to 1/5th 8 (2011) 9 SCC 788 19 share each in the said property. Plaintiff (respondent No.1) is son of Arun Kumar (defendant No.1). Since, Arun Kumar will have 1/5th share, it would be divided into five shares on partition i.e. between defendant No.1 Arun Kumar, his wife defendant No.2, his two daughters defendant Nos.3 and 4 and son/plaintiff (respondent No.1). In this manner, the plaintiff/respondent No.1 would be entitled to 1/25th share in the property.

29. The appeals are allowed in the aforesaid terms and decree of partition shall be drawn by the trial court accordingly.

No order as to costs.

–X–

2018 (1) L.S. 39 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Rohinton Fali Nariman &
The Hon'ble Mr.Justice
Navin Sinha

Authorized Officer, State
Bank of Travancore & Anr., ..Appellants
Vs.
Mathew K.C. ..Respondent

CONSTITUTION OF INDIA, Articles.141 & 226 - SARFAESI ACT, 2002, Sec.13(4) – Instant appeal assails interim Order passed in a Writ petition by High Court, staying further proceedings at stage of Section 13(4) of SARFAESI Act – Appeal against interim order has also been dismissed by Division Bench observing that counter affidavit having filed, it would be open for appellant to seek modification/variation of interim order.

Held – Writ petition ought not to be entertained if alternative statutory remedies are available - Discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in given facts of a case and in accordance with law – Writ petition ought not to have been entertained and interim order granted for mere asking without assigning special reasons, and that too without even granting an

opportunity to appellant to contest maintainability of writ petition – Impugned Orders are therefore contrary to law laid down by Supreme Court under Article 141 of Constitution and are unsustainable – Appeal is allowed.

J U D G M E N T

(per the Hon'ble Mr.Justice Navin Sinha)

1. Leave granted.

2. The present appeal assails an interim order dated 24.04.2015 passed in a writ petition under Article 226 of the Constitution, staying further proceedings at the stage of Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred as the 'SARFAESI Act'), on deposit of 1 Rs.3,50,000/-within two weeks. An appeal against the same has also been dismissed by the Division Bench observing that counter affidavit having been filed, it would be open for the Appellant Bank to seek clarification/modification/ variation of the interim order.

3. Shri H.P. Raval, learned Senior Counsel appearing for the Appellants, submits that the loan account of the Respondent was declared a Non-Performing Asset (NPA) on 28.12.2014. The outstanding dues of the Respondent on the date of the institution of the writ petition was Rs.41,82,560/-. Despite repeated notices, the Respondent failed and neglected to pay the dues. Statutory notice under Section 13(2) of the SARFAESI Act was issued to the Respondent on 21.01.2015. The objections under Section 13(3A) were considered, and rejection was communicated by the Appellant on 31.3.2015. Possession notice was then issued under Section 13(4) of the Act read with Rule 8 of The Security Interest (Enforcement) 2 Rules, 2002 (hereinafter referred to as 'the Rules') on 21.04.2015.

4. The SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by financial institutions, the remedy of appeal by the aggrieved under Section 17 before the Debt Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal under Section 18. The High Court ought not to have entertained the writ petition in view of the adequate alternate statutory remedies available to the Respondent.

The interim order was passed on the very first date, without an opportunity to the Appellant to file a reply. Reliance was placed on United Bank of India vs. Satyawati Tandon and others, 2010 (8) SCC 110, and General Manager, Sri Siddeshwara Cooperative Bank Limited and another vs. Ikbal and others, 2013 (10) SCC 83. The writ petition ought to have been dismissed at the threshold on the ground of maintainability. The Division Bench erred in declining to interfere with the same.

5. Shri Roy Abraham, learned Counsel for the Respondent, submitted that it was desirous to repay the loan, and merely sought regularisation of the loan account. The inability to service the loan was genuine, occasioned due to market fluctuations

causing huge loss in business, beyond the control of the Respondent.

The failure of the Bank to consider the request for regularisation of the loan account, the absence of a right to appeal under Section 17 against the order passed under Section 13(3A), the Respondent was left with no option but to prefer the writ application as the Respondent genuinely desired to discharge the loans. The collateral security offered included agricultural lands also, which had to be excluded under Section 31 of the SARFAESI Act. There had been violation of the principles of natural justice. A large number of similar writ applications are pending before the High Court preferred by the concerned borrowers, but the Bank has singled out the present Respondent alone for a challenge.

6. We have considered the submissions on behalf of the parties. Normally this Court in exercise of jurisdiction under Article 136 of the Constitution is loathe to interfere with an interim order passed in a pending proceeding before the High Court, except in special circumstances, to prevent manifest injustice or abuse of the process of the court. In the present case, the facts are not in dispute.

The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well defined exceptions as observed in Commissioner of Income Tax and Others vs. Chhabil Dass Agarwal, 2014 (1) SCC 603, as follows:

> "15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field.

Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

7. The pleadings in the writ petition are very bald and contain no statement that the grievances fell within any of the well defined exceptions. The allegation for violation of principles of natural justice is rhetorical,

without any details and the prejudice caused thereby. It harps only on a desire for regularisation of the loan account, even while the Respondent acknowledges its own inability to service the loan account for reasons attributable to it alone. The writ petition was filed in undue haste in March 2015 immediately after disposal of objections under Section 13(3A). The legislative scheme, in order to expedite the recovery proceedings, does not envisage grievance redressal procedure at this stage, by virtue of the explanation added to Section 17 of the Act, by Amendment Act 30 of 2004, as follows :-

> "Explanation.- For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including the borrower) to make an application to the Debts Recovery Tribunal under this sub-section."

8. The Section 13(4) notice along with possession notice under Rule 8 was issued on 21.04.2015. The remedy under Section 17 of the SARFAESI Act was now available to the Respondent if aggrieved. These developments were not brought on record or placed before the Court when the impugned interim order came to be passed on 24.04.2015. The writ petition was clearly not instituted bonafide, but patently to stall further action for recovery. There is no pleading why the remedy available under Section 17 of the Act before the Debt Recovery Tribunal was not efficacious and the compelling reasons for by-passing the same. Unfortunately, the High Court also did not dwell upon the same or record any special reasons for grant of interim relief by direction to deposit.

9. The statement of objects and reasons of the SARFAESI Act states that the banking and financial sector in the country was felt not to have a level playing field in comparison to other participants in the financial markets in the world. The financial institutions in India did not have the power to take possession of securities and sell them. The existing legal framework relating to commercial transactions had not kept pace with changing commercial practices and financial sector reforms resulting in tardy recovery of defaulting loans and mounting non-performing assets of banks and financial institutions.

The Narasimhan Committee I and II as also the Andhyarujina Committee constituted by the Central Government Act had suggested enactment of new legislation for securitisation and empowering banks and financial institutions to take possession of securities and sell them without court intervention which would enable them to realise long term assets, manage problems of liquidity, asset liability mismatches and improve recovery. The proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, (hereinafter referred to as 'the DRT Act') with passage

of time, had become synonymous with those before regular courts affecting expeditious adjudication. All these aspects have not been kept in mind and considered before passing the impugned order.

10. Even prior to the SARFAESI Act, considering the alternate remedy available under the DRT Act it was held in Punjab National Bank vs. O.C. Krishnan and others, (2001) 6 SCC 569, that :-

> "6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 9 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred.

Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

11. In Satyawati Tandon (supra), the High Court had restrained further proceedings under Section 13(4) of the Act. Upon a detailed consideration of the statutory scheme under the SARFAESI Act, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding :-

> "43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High

Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute. ***

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

12. In Union Bank of India and another vs. Panchanan Subudhi, 2010 (15) SCC 552, further proceedings under Section 13(4) were stayed in the writ jurisdiction subject to deposit of Rs.10,00,000/- leading this Court to observe as follows :

"7. In our view, the approach adopted by the High Court was clearly erroneous. When the respondent failed to abide by the terms of one-time settlement, there was no justification for the High Court to entertain the writ petition and that too by ignoring the fact that a statutory alternative remedy was available to the respondent under Section 17 of the Act."

13. The same view was reiterated in Kanaiyalal Lalchand Sachdev and others vs. State of Maharashtra and others, 2011 (2) SCC 782 observing:

"23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See Sadhana Lodh v. National Insurance Co. Ltd.;

Surya Dev Rai v. Ram Chander Rai and SBI v. Allied Chemical Laboratories.)"

14. In Ikbal (supra), it was observed that the action of the Bank under Section 13(4) of the 'SARFAESI Act' available to challenge by the aggrieved under Section 17 was an efficacious remedy and the institution directly under Article 226 was not sustainable, relying upon Satyawati Tandon (Supra), observing :

"27. No doubt an alternative remedy is not an absolute bar to the exercise of extraordinary jurisdiction under Article 226 but by now it is well settled that where a statute provides efficacious and adequate remedy, the High Court will do well in not entertaining a petition under Article 226. On misplaced considerations,

statutory procedures cannot be allowed to be circumvented.

***

28.....In our view, there was no justification whatsoever for the learned Single Judge to allow the borrower to bypass the efficacious remedy provided to him under Section 17 and invoke the extraordinary jurisdiction in his favour when he had disentitled himself for such relief by his conduct. The Single Judge was clearly in error in invoking his extraordinary jurisdiction under Article 226 in light of the peculiar facts indicated above. The Division Bench also erred in affirming the erroneous order of the Single Judge."

15. A similar view was taken in Punjab National Bank and another vs. Imperial Gift House and others, (2013) 14 SCC 622, observing:-

"3. Upon receipt of notice, the respondents filed representation under Section 13(3-A) of the Act, which was rejected. Thereafter, before any further action could be taken under Section 13(4) of the Act by the Bank, the writ petition was filed before the High Court.

4. In our view, the High Court was not justified in entertaining the writ petition against the notice issued under Section 13(2) of the Act and quashing the proceedings initiated by the Bank."

16. It is the solemn duty of the Court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of ex-parte interim orders can have a deleterious effect and it is not sufficient to say that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institutions are granted from public money generated at the tax payers expense.

Such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same. The caution required, as expressed in Satyawati Tandon (supra), has also not been kept in mind before passing the impugned interim order:-

"46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations

> towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation.

Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad, Whirlpool Corpn. v. Registrar of Trade Marks and Harbanslal Sahnia v. Indian Oil Corpn. Ltd. and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order."

17. The writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the Appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. The opinion of the Division Bench that the counter affidavit having subsequently been filed, stay/ modification could be sought of the interim order cannot be considered sufficient justification to have declined interference.

18. We cannot help but disapprove the approach of the High Court for reasons already noticed in Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. and Another, 1997 (6) SCC 450, observing :-

> "32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

19. The impugned orders are therefore contrary to the law laid down by this Court under Article 141 of the Constitution and unsustainable. They are therefore set aside and the appeal is allowed.

20. All questions of law and fact remain open for consideration in any application by the aggrieved before the statutory forum under the SARFAESI Act.

–X–

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