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Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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PART - 5 (15TH MARCH 2018)

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Held - Non-joinder or mis-joinder of parties has to be taken at or before settlement of issues and otherwise it would be deemed waived same, however, is not a bar for non-taking of plea regarding non-joinder of necessary party since same is fatal to very maintainability of the suit - Where defendant wants to contest that certain properties, which are liable for partition not included, the defendant is entitled by filing a written statement schedule in asking to consider those properties also for partition - There is nothing in law to permit any party to amend pleadings of opposite party contrary to the very wording of Order VI Rule 17 C.P.C.

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3. While admitting the instant appeal, this Court framed the following substantial questions of law:

1) Whether the lower Appellate Court ought to have seen, once the I.P proceedings are annulled under Sections 43 and 45 of the Act, no subsequent proceedings can be entertained much less an application to set aside the annulment proceedings?

2) Whether the lower Appellate Court ought to have seen that the annulment under Section 37 is complete and property is not vested in any other person and on such annulment the rights over the property stand restored or reverted to the applicant who applied for insolvency?

4. Heard arguments of Sri C.Nageswara Rao, learned Senior Counsel for Smt. K.Aruna, learned counsel for appellants and Sri Bodduluri Srinivas Rao, learned counsel for Smt.G.Jhansi, learned counsel for respondent No.2. Respondent No.1 died vide cause title. Though notice to respondent No.3 was served, there is no representation.

5a) Fulminating the order of the lower appellate Court, learned senior counsel Sri C.Nageswara Rao appearing for appellants would argue when once the Insolvency Court by exercising its power under Section 43 of the Act, annulled the adjudication earlier made by it under Section 28, it will have no power to set aside the annulment on the application of a third party as it did in I.A.No.5660 of 1989. The only remedy for the debtor against whom annulment order was passed is to file a fresh insolvency petition with the leave of the Court under Section 10(2) of the Act. Contrary to it, the Court on the application filed by Raja Gopal Rao, a third party auction purchaser, set aside the annulment in I.A.No.5660 of 1989. Hence, the said order is nonest in the eye of law and annulment shall be deemed to be in force.

b) Nextly, he would argue when the annulment is in force consequences would follow under Section 37 of the Act and thereby, the schedule property which was sold in auction by the Official Receiver to Raja Gopal Rao would revert back to the insolvent—Sridhar Rao, as the Court while passing the annulment order, did not make any specific order that the auction sale shall hold good and the property be retained by the auction purchaser. In that view, the sale deeds (Exs.B1 and B2) subsequently executed by the legal heirs of the un-discharged insolvent in favour of the appellants are valid and the appellants get clear title on the property. To buttress his arguments, he relied upon the following decisions.

1. Arora Enterprises Limited vs. Indubhushan Obhan (1997) 5 SCC 366)

2. Tukaram Ramchandra Mane vs. Rajaram Bapu Lakule (1998) 4 SCC 317)

3. Babu Ram vs. Indrapal Singh (1998) 6 SCC 358 = AIR 1998 SC 3021 = 1998(6) Supreme To-day 441)

c) Finally, he argued the auction was held in 1980 and annulment order was passed in 1981 and thereafter, petition to set aside the annulment was filed by the auction purchaser with a delay of 8 years and in the meanwhile, the appellants have purchased the property in a private sale. Due to inordinate delay also, the auction

purchaser do not deserve any relief. Without considering all these aspects the lower appellate Court erroneously allowed the appeal.

6. Per contra, while supporting the impugned judgment, learned counsel for 2nd respondent would firstly argue that the consequences of annulment have been clearly laid down in Section 37 of the Act as per which, the auction sale held by the Court or Official Receiver will be valid and the auctioned property will not revert back to the insolvent. Therefore, the auction purchaser will get absolute title on the said property. In the instant case, Raja Gopal Rao—auction purchaser discharged the debts covered by the auction sale and deposited the balance amount and also stamp duty and there was no delay on his part. However, the Official Receiver postponed the registration of the sale deed on the ground that clearance from Urban Land Ceiling authorities has to be obtained. In the meanwhile, the annulment order was passed by the Insolvency Court. Having come to know it, the auction purchaser filed I.A.No.5660 of 1989 to set aside the annulment and I.A.No.5661 of 1989 to direct the Official Receiver to execute the sale deed. Learned counsel vehemently argued under Section 4 of the Act, the Insolvency Court has wide powers to pass necessary orders to do complete justice and accordingly, the Insolvency Court allowed both the applications. In the entire process there was no delay, muchless wilful delay, on the part of auction purchaser. Pending the above proceedings, the appellants have clandestinely purchased the schedule property in collusion with the legal heirs of insolvent. It was only a private sale which is void and hit by Section 37 of the Act, because, the property was already sold in auction long back and thereby the said property do not revert back to the insolvent or his legal heirs. Consequently, they have no right to execute the sale deeds in favour of appellants. Having known about the collusive sale the auction purchaser filed I.A.No.5079 of 1991 to deliver the property. Though the Insolvency Court erroneously dismissed the said petition, the lower appellate Court rightly allowed the appeal. He relied upon the following decisions to buttress his argument that auction sale is not hit by annulment.

1. Wazirey vs. Mathura Prasad (AIR 1939 Oudh 55)

2. Nizam Khan vs. Hukam Chand (AIR 1941 Lahore 316)

He thus prayed to dismiss the appeal.

7. **Substantial Question No.2**: Admitted facts are that in I.P.No.56 of 1975 N.Sridhar Rao was adjudicated as Insolvent under Section 27 r/w 28 of the Act vide Ex.A2 dated 21.09.1978. In the adjudication order the Court while appointing Official Receiver to administer his estate, directed him to apply for discharge within one year. Consequent to adjudication the properties including the schedule property of the insolvent vested in the Official Receiver. Ex.A3—sale list would show the Official Receiver sold the schedule property in public auction on 18.01.1980 and A.V.Raja Gopal Rao—1st petitioner purchased schedule property in the auction subject to two mortgages. The adjudication was annulled under Section 43 by the Insolvency Court by its order dated 07.03.1981 since the

insolvent did not apply for discharge. Thereupon, A.V.Raja Gopal Rao filed I.A.No.5660 of 1989 to set aside annulment order and I.A.No.5661 of 1989 to direct the Official Receiver to execute registered sale deed in his favour pursuant to the auction sale and both the petitions were allowed by the Insolvency Court on 26.06.1990 vide Exs.A6 and A7. Pursuant to aforesaid orders, the Official Receiver executed Ex.A8—sale deed dated 22.08.1991 in favour of A.V.Raja Gopal Rao. While so, Sridhar Rao the un-discharged insolvent died on 27.10.1983 and the appellants purchased the schedule property from his legal heirs under Exs.B1 and B2—sale deeds dated 07.12.1987.

In this back drop, the crux of the case is whether the sale deed obtained by A.V.Raja Gopal Rao in an auction held by the Official Receiver is legally valid or the sale deeds obtained by the appellants in a private sale are valid. The answer to this question has relevance to the substantial questions framed by this Court. In this context Sections 10, 27, 28, 37 and 43 of the Act are germane for discussion.

8 a) Section 10 lays down the conditions on which the debtor may present an insolvency petition. Section 10(2) lays down that when once adjudication has been annulled owing to the failure of debtor to apply for discharge, or due to his failure to prosecute an application for the discharge, he shall not be entitled to present a fresh insolvency petition without the leave of the Court.

b) Section 27 says that the Court while making an order of adjudication shall specify in such order the period within which the debtor shall apply for his discharge. Under sub-Section (27), the Court, if sufficient cause is shown, has power to extend the period within which the debtor shall apply for his discharge.

c) Section 28 speaks of effect of an order of adjudication. In substance, on the making of the order of adjudication, the whole of the property of the insolvent shall vest in the Court or in receiver and shall become divisible among the Creditors and thereafter, no Creditor shall, during the pendency of the insolvency proceedings, have a remedy against the property of the insolvent or commence any suit or other legal proceedings except with the leave of the Court. Further, all property which was acquired by or devolved on the insolvent after the date of the order of adjudication and before his discharge, except the property exempted under sub-section(5), shall forthwith vest in the Court or receiver, which can be dealt with under sub-section(2). The order of adjudication shall relate back to, and take effect from the date of the presentation of the petition on which it is made.

d) Pursuant to the direction under Section 27, if the debtor fails to apply for discharge, the Court can annul the adjudication under Section 43. This Section lays down that if the debtor either does not apply for discharge within the period specified by the Court or does not appear on the day fixed for hearing his application for discharge, the Court may annul the order of adjudication or make such other order as it may think fit and if the adjudication is so annulled, the provisions of Section 37 shall apply.

e) Then Section 37 speaks of consequences

of annulment which is pertinent in this case. This Section reads thus:

"Section 37. Proceedings on annulment.—

(1) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts therefore done, by the Court or receiver, **shall be valid**; but, subject as aforesaid, the property of the debtor, who was adjudged insolvent, shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare.

(2) Notice of every order annulling an adjudication shall be published in the Official Gazette and in such other manner as may be prescribed."

f) A close scrutiny of this Section would show, the sub-section (1) contains two limbs. The first limb would manifest that despite an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts therefore done, by the Court or receiver, shall be valid. The second limb lays down that subject to the first limb, the property of the debtor, who was adjudged insolvent, shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions as the Court may, by order in writing, declare. Therefore, under first limb, all the acts done by the Court or the receiver prior to the annulment, such as sales, dispositions of the property and payments duly made, shall hold good and they are valid and they will not be set at naught on the annulment order passed by the Court. Subject to the validity of the aforesaid acts done under first limb, the remaining properties of the debtor shall vest either in the person whom the Court may appoint or in default of any such appointment, shall revert to the debtor to the extent of his right on such condition as the Court may, by order in writing declare. Thus, if the Court or receiver dealt with any of the properties of the insolvent between adjudication and annulment, such transactions shall stand valid irrespective of subsequent annulment of adjudication. The remaining properties are concerned, they vest in such person depending on the order of the Court and if no such order is passed, such property shall revert to the debtor to the extent of his right on such conditions as the Court may by order in writing, declare. The above are the consequences of annulment of adjudication.

This legal position is discussed in many cases.

9 a) In **Wazirey**'s case (4 supra), it was held thus:

"The annulment of the adjudication under the conditions defined under Section 43, Provincial Insolvency Act, is intended as a punishment to the insolvent and cannot be used in his favour. The protection conferred on him by reason of adjudication is withdrawn but it does not necessarily follow that he is to get back from the control of the Court his assets. Where therefore insolvent's property is sold by receiver with the sanction of the insolvency Court before the order of adjudication was annulled, the receiver has power to execute the sale

deed even after the annulment."

b) In **Nizam Khan**'s case (5 supra), on a creditor's petition, one Mehndi Khan was adjudicated as insolvent on 07.10.1936 and he was directed to apply for discharge within one year. On 12.01.1937, the official receiver filed a petition, in which he asserted that the alienation in question amounted to a fraudulent preference of the creditors in whose favour it had been made and he requested the Court to annul the transfer under Section 54. While-so, the insolvent had applied for discharge but on 09.2.1938, when the matter came up for hearing, he was absent and the Court thereupon annulled the adjudication under Section 43 of the Act but at the same time directed that his estate should continue to vest in the official receiver for the benefit of the creditors and the proceedings initiated under Section 53 should be continued. The transferees of the property effected by the proceedings under Section 53 contended that on annulment, proceedings under Section 53 could not be continued. Referring the various decisions, the Court ultimately held that the insolvency Court continues to have jurisdiction in this matter, the official receiver being the proper person to take control of any remaining estate where an adjudication is annulled under Section 43.

The above decision would thus show that with the annulment of the adjudication under Section 43, the properties would not automatically revert back to the insolvent as sought to contend by counsel for appellants in the instant case. On the other hand, the sales and dispositions already made by the Court or the receiver shall stand valid and in respect of the other properties, the Court order will prevail. Even the citations of the Apex Court relied upon by the appellants would in fact, more or less confirm the same position.

c) In **Arora Enterprises Limited**'s case (1 supra), the Apex Court no doubt held that the effect of annulling the adjudication is to wipe out the effect of insolvency and to vest the property retrospectively in the insolvent. However, it should be noted that from the facts of the said case, it does not appear that the disputed property was already sold in auction either by the insolvency Court or by the receiver between adjudication and annulment. The facts would also do not disclose whether the insolvency court while annulling the adjudication passed any specific order in terms of Section 37 to the effect that the property be retained by the official receiver. In the absence of either prior sale or a specific order by the Insolvency Court, naturally the property will revert back to the insolvent with retrospective effect and there is no demur in it. This appears to be one of such cases.

d) In **Tukaram Ramchandra Mane**'s case (2 supra), the insolvent at first executed mortgage by conditional sale dated 22.01.1962 in favour of the appellants/ creditor. Thereafter on 08.01.1963, he executed a regular sale deed in favour of appellant/creditor. While-so, one of the creditors of the insolvent filed an insolvency petition against the insolvent and he himself also filed an insolvency application. The court adjudicated him as insolvent on 08.01.1965. In an application filed by official receiver, the Court declared that the sale deed dated 08.01.1963 was a collusive one. While-so, by an order dated 26.06.1971,

the Insolvency Court passed order of annulment. Subsequently, the undischarged insolvent filed Civil Suit 62/76 for redemption of mortgage on the ground that the subsequent sale deed executed by him was held to be sham. He also filed a petition under Maharashtra Debt Relief Act, 1975 for the relief of extinguishment of the mortgage debt. The appellant contested the suit and the said petition but they were allowed and debt was wiped out. The appellant went to the Supreme Court, wherein his main contention is that with the annulment of adjudication under Section 43, the sale deed executed by the insolvent revived and therefore, the debtor-creditor relationship was no more in existence and hence the question of debt being wiped out under Debt Relief Act does not arise. This argument was not found favour with the Apex Court which observed thus:

> "Para 13: xx xx xx….We are afraid, the argument is not quite correct. In the instant case, the effect of the declaration (that the sale is collusive) was that the property vested in the Receiver because the order of appointment of Receiver was very much there. If no order was passed by the Court directing the property to continue to vest in the Receiver or if there was no other order passed by the Court directing the property to vest in any other person, the third result contemplated by said clause (1) is that it would revert back to the debtor. That means it would vest back in the debtor. The incident of vesting is not mentioned in the order because there is no order passed in that behalf. It could be, therefore, legitimately argued that it would vest in the debtor entirely."

The Apex Court dismissed the appeal.

e) Thus the ratio in the above decision is to the effect that the sales, dispositions and acts done by the Insolvency Court or the receiver shall stand valid despite the subsequent annulment of the adjudication. In that view, the declaratory order passed by the Insolvency Court prior to the annulment to the effect that the sale deed was a sham, stood valid despite subsequent annulment.

f) In **Babu Ram**'s case (3 supra), the Apex Court observed thus:

> "Para 35: Summarising the legal position, the position is as follows. In the case of an annulment under Section 37 read with Section 43 of the Act, where the property is not vested in any other person and no conditions are imposed by the Insolvency Court, the property and rights of the insolvent stand restored or reverted to him with retrospective effect from the date of the filing of the insolvency petition and the insolvency gets wiped out altogether. All acts done by the undischarged insolvent between the date of the insolvency petition and the date of annulment get retrospectively validated. However, all sales and dispositions of property and payments duly made and all acts theretofore done by the Court or Receiver, will remain valid."

It was clearly held that the effect of Section 37 r/w Section 43 is that where the property was not vested in any other person and no condition was imposed by the Insolvency Court, the property and rights of the insolvent stand restored or reverted to him with retrospective effect from the date of the filing of the insolvency petition and the insolvency gets wiped out altogether. However, all sales and dispositions of property and payments duly made and all acts theretofore done by the Court or Receiver, will remain valid. Therefore, the dispositions and sales held by the Court or receiver before the annulment shall remain valid.

g) Applying the above precedential jurisprudence on the effect of Section 37 r/w Section 43 of the Act, it is clear that the in the instant case, auction sale held by the official receiver in favour of A.V. Raja Gopal Rao stood valid despite the subsequent annulment of the adjudication. Merely because the registered sale deed was executed by the official receiver sometime later, will not vitiate the auction sale in view of the clear legislative mandate "shall be valid" employed in Section 37(1) of the Act. Registration is only a consequential act. Further, in view of Section 47 of the Registration Act, 1908, the registration shall relate back to the date of auction. In that view, Exs.B.1 and B.2—sale deeds obtained by the appellants are not legally valid for the reason that as discussed supra, even though annulment order was passed, the auction sale conducted by the official receiver stood valid and the schedule property did not revert back to the undischarged insolvent as contended by the appellants. Hence neither himself, nor his LRs could have executed sale deeds in favour of appellants. Thus, substantial question No.2 is answered accordingly against the appellants.

10. **Substantial Question No.2**: The auction purchaser—A.V. Raja Gopal Rao filed I.A.No.5660/1989 to set aside the annulment order dated 07.03.1981 and I.A.No.5661/1989 to direct the official receiver to execute the sale deed in his favour and both the petitions were allowed on 26.06.1990. I.A.No.5660/1989 is concerned, in my view, the said order is bad at law because neither Section 43 nor any other provision of the Act empowered Insolvency Court to set aside the annulment on the request of a third party. The remedy against annulment is provided to the debtor in Section 10(2) of the Act. Hence the order in I.A.No.5660/1989 cannot be sustained. Sofaras order in I.A.No.5661/1989 is concerned, the same is well within the powers of the Court in terms of Section 37 of the Act which says that despite the annulment, the sale held by the Court or official receiver shall be valid. Therefore, the Court was well within its power to direct the official receiver to execute sale deed in favour of A.V.Raja Gopal Rao. Accordingly, this substantial question is answered.

11. In the result, this Second Appeal is dismissed confirming the judgment and decree dated 04.06.2007 passed by the first Appellate Court in A.S.No.7 of 2004. No costs.

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

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2018(1) L.S. 234

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

The A.P. State Civil Supplies Corpn.,Ltd. ..Appellant

Vs.

M/s. Kesarimol Promod Kumar ..Respondent

CIVIL PROCEDURE CODE, Sec.34 - INTEREST ACT,Sec.3(b) – Issue was on question of interest - Respondent/ Plaintiff supplied material to Appellant/ Defendant for which payment was not made completely – Suit was filed for recovery of the balance sum along with interest - No clause in the understanding between parties for payment of interest - Appellant / Defendant preferred instant appeal against the judgment and decree of Trial Court where in it ultimately passed a decree holding that Respondent/Plaintiff was entitled to interest till the date of the decree.

Held - Law is very well settled that in absence of any contract for payment of interest, interest can be demanded as per Sec.3 (b) of the Interest Act, 1978 - Where the contract is silent about the interest, legal mandate as per settled law on this subject is that a party should demand the principal along with interest through a written notice and then Court is empowered to grant interest from date mentioned in the notice - Court has discretion to award interest at a rate it considers just and equitable more so U/sec.34 CPC - Lower Court did not commit any error in awarding interest – Appeal stands dismissed.

Mr.S. Satyanarayana Prasad, Learned Senior Counsel appearing for C. Sindhu Kumari, Learned Co., Advocates for the Appellant.

Mr.C.V. Mohan Reddy, Advocate for the Respondent.

J U D G M E N T

1. This appeal is filed by the defendant against the judgment and decree dated 03.11.2003 in O.S.No.1573 of 2001 passed by the VII Senior Civil Judge, City Civil Court, Hyderabad.

2. For the sake of convenience, the parties are referred to as the plaintiff and the defendant only.

3. The suit O.S.No.1573 of 2001 out of which the present appeal arises, which is a suit filed by the plaintiff against the defendant (present appellant) for recovery of money with interest and costs. The lower Court conducted the trial, in which PW.1 was examined for the plaintiff; Exs.A.1 to A.25 were marked. DWs.1 to 5 were examined for the defendants and Exs.B.1 to B.15 were marked. The lower Court ultimately passed a decree holding that the plaintiff is entitled to a part of the claim with interest from 15.06.2001 till the date

The Andhra Pradesh State Civil Supplies Vs. M/s. Kesarimol Promod Kumar 235 of the decree. In the lower Court, the first issue was on the question of interest. The findings on this issue are the subject matter of this appeal. Other issues were not really raised or argued.

4. This Court has heard Sri S. Satyanarayana Prasad, learned senior counsel appearing for Ms. C. Sindhu Kumari, learned counsel for the appellant/defendant and Sri C.V. Mohan Reddy, learned counsel for the respondent/plaintiff on the question of award of interest.

5. The learned senior counsel appearing for the appellant/ defendant argued that the lower Court erred in granting interest from the date of the notice till the date of the decree. He also argued that there is no legal or factual basis for awarding interest as prayed for. In reply thereto, the learned counsel for the respondent/plaintiff argued that the award of interest is perfectly valid and as per the law of land including the Interest Act, 1978.

6. The facts which are necessary to decide this issue are in a narrow compass. The plaintiff supplied material to the defendant for which the payment was not made completely. Therefore, the suit is filed for recovery of the balance sum along with interest. Admittedly, there is no clause in the understanding between the parties for payment of interest.

7. The law is very well settled that in the absence of any contract for payment of interest, interest can be demanded as per Section 3 (b) of the Interest Act, 1978. This section of the law caters to a situation where the contract is silent about the interest. In such a case, the legal mandate as per settled law on this subject is that a party should demand the principal along with interest through a written notice and then the Court is empowered to grant interest from the date mentioned in the notice. In this case, admittedly, interest was demanded by a notice dated 15.06.2001. Therefore, in line with the judgment of the Honble Supreme Court of India reported in B.V. Radha Krishna v. Sponge Iron India Ltd. (AIR 1997 SC 1324), this Court feels that the lower Court did not commit any error in awarding interest from 15.06.2001. In B.V. Radha Krishnas case also, the Honble Supreme Court considered the provisions of the Interest Act, 1978. In a constitution bench decision reported in Secretary, Irrigation Department, Government of Orissa v. G.C. Roy (AIR 1992 SC 732), the Honble Supreme Court of India held as follows: 47. (i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, C.P.C., and there is no reason or principle to hold otherwise in the case of arbitrator. This principle of law although enunciated in a case under the Arbitration Act is valid for all claims for interest.

8. As far as the rate of interest is concerned, as per the provisions of the Interest Act,

1978, interest rates prevailing have to be proved. In this case, admittedly, there is no clear evidence to prove the prevalent rate of interest. However, a Full Bench of this Court in a case reported in A.P.S.R.T.C. v. B. Vijaya (2002 (4) ALT 525) held that after a review of the law that the Court has the discretion to award interest at a rate it considers just and equitable more so under Section 34 CPC. In a case reported in Sri Srinivasa Co. v. Firm, V.D.H.A. Setti (AIR 1985 AP 21), a learned single Judge of this Court also held that awarding 12% interest is reasonable.

9. Considering the time that has already elapsed and to bring a quietus to this small issue, this Court follows these two decisions and holds that as the transaction is a commercial transaction of the year 2000 to 2001 interest @ 12% can be awarded. This is a decision for this case also. It is made clear that for all claims for interest under the Interest Act, a notice demanding interest is mandatory. Some evidence of the prevalent interest rates is necessary for the Court to award interest. Interest rates are fluctuating. Hence, evidence is necessary to prove the same. The judgment in Sri Srinivasa Co.s case (4 supra) is also apt for this finding.

10. For all the above reasons, this Court holds that award of interest at 12% from the date of the notice till the decree and thereafter @ 6% is correct.

11. In the result, the appeal is dismissed and the judgment and decree dated 03.11.2003 in O.S.No.1573 of 2001 passed by the VII Senior Civil Judge, City Civil Court, Hyderabad are confirmed. However, there shall be no order as to costs. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

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2018(1) L.S. 236

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

Motamarri Murali Mohan Rao ..Appellant

Vs.

Motammmari Ramachandra Rao & Ors., ..Respondents

CIVIL PROCEDURE CODE, Or.1 Rules 9 and 13, Or.VI Rule 17 and Sec.141 - Aggrieved by Order of Court below in allowing review application, Petitioner/2nd Defendant preferred instant revision – Petitioner contended that they can ask for amendment of pleadings of plaintiff including in schedule, to avoid multiplicity of proceedings.

Held - Non-joinder or mis-joinder of parties has to be taken at or before settlement of issues and otherwise it would be deemed waived same, however, is not a bar for non-taking of plea regarding non-joinder of necessary party since same is fatal to very

C.R.P.No.226/2018 Date: 28-2-2018

maintainability of the suit - Where defendant wants to contest that certain properties, which are liable for partition not included, the defendant is entitled by filing a written statement schedule in asking to consider those properties also for partition - There is nothing in law to permit any party to amend pleadings of opposite party contrary to the very wording of Order VI Rule 17 C.P.C.

Revision is disposed of and there is nothing to interfere against review order of trial Court, but defendant if suit is based on joint possession by payment of fixed court fee can show in the written statement schedule in seeking for inclusion of property also as part of the properties liable for partition.

Mr.Naga Praveen Vankayalapati, Advocate for the Petitioner.
R1, Party in person, for the Respondents.

J U D G M E N T

1. This revision is filed by the petitioner/ defendant No.2, aggrieved by the order dated 07.11.2017 in I.A.No.1037 of 2017 in I.A.No.305 of 2016 in O.S.No.85 of 2011 on the file of the learned Senior Civil Judge, Chirala, Prakasam District.

2. Heard the learned counsel for the revision petitioner/defendant No.2 and respondent No.1/plaintiff, party-inperson. Respondent Nos.2 to 4 did not choose to appear. Perused the grounds of revision and the impugned order of the lower Court dated 07.11.2017 in allowing the review application in I.A.No.1037 of 2017 reviewing the order in I.A.No.305 of 2016 in the pending suit O.S.No.85 of 2011 filed for partition.

3. The grounds of the revision are that the impugned order of the Court below in allowing the review application instead of dismissal is unsustainable, contrary to law and in ignorance of the scope of the nature of the suit for partition between co-sharers, where even the defendants can ask for amendment of the pleadings of the plaintiff including in schedule, to avoid multiplicity of proceedings and had it been properly considered, the review petition should have been dismissed for the order in I.A.No.305 of 2016 sought for review no way requires review in inclusion of the item of the property in the plaint schedule that is raised to include in the written statement and thereby, sought for setting aside the order of the lower Court.

4. The learned counsel for the revision petitioner/defendant No.2 in support of the revision contentions placed reliance upon the expression of the Single Judge of this Court in **Prathipati Murlidhararao @ Nehru v. Prathipati Venkataratnam Gandhi and others (**2016(6) ALD 501)and the expression of the Division Bench of the Madras High Court in **Solavaiammal W/ o Ettiappa Goundar v. Ezhumalai Goundar (**2011(5) LW 859).

5. The thumb rule in a suit for partition that all the necessary parties are to be impleaded and all the properties liable for partition are to be included, can no way be in dispute. Even Order I Rules 9 and 13 C.P.C. from the combined reading clearly

speak that, though any objection regarding non-joinder or mis-joinder of parties has to be taken at or before settlement of issues and otherwise it would be deemed waived same, however, is not a bar for non-taking of the plea regarding non-joinder of necessary party since same is fatal to the very maintainability of the suit. Leave about Order I Rule 10(2) C.P.C. enables Court to implead any necessary or proper party to a suit at any stage of the proceedings and which expression of suit includes even appeal or other proceeding including from the very wording of Section 141 C.P.C, however, that analogy of inclusion or deletion of parties or transposition of parties within the power of the Court under Order I Rule 10 or under Order XXII Rule 10 or under Sections 51 or 146 C.P.C. is not available for amendment of the pleadings of the parties, for the amendment of the pleadings are only governed by Order VI Rule 17 C.P.C. The very wording of Order VI Rule 17 C.P.C. enables the own pleadings to amend or alter and not of opposite parties more particularly from the wording 'the Court may …….allow either party…….his pleadings'. For more clarity same is reproduced herein:-

"The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

6. Leave about the due diligence clause, after commencement of trial for amendment of pleadings, it must be shown the amendment is necessary and to avoid multiplicity of proceedings, the amendment is and cannot as per the settled law to the prejudice of the opposite party or party not before the Court without adding that party and without opportunity that too.

7. Once such is the scope of law, coming to decide the applicability or not of the two expressions placed reliance to the case on hand; from the settled law, in a partition suit, the defendants, who are entitled to share either as co-owners or as co-sharers as the case may be are at par in status with plaintiff is different from allowing the opposite party to intrude into and to 4 seek there from amendment of the pleading of that opposite party, that too, when Order VI Rule 17 C.P.C. from its very wording supra has been permitting to do so and further, it is not a case to invoke Section 151 C.P.C. of exercise of inherent power for such a recourse when it cannot be said same is to prevent any abuse of process or to subserve the ends of justice, more particularly, when the age old practice in vogue, in such partition suits, where the defendant wants to contest that certain properties, which are liable for partition not included, the defendant is entitled by filing a written statement schedule in asking to consider those properties also for partition. It is so that ultimately in passing a preliminary decree for partition of the

properties, if at all those are also liable for partition, provided the persons in whose name that property stands must be added as party to the suit with opportunity to contest and then only to add as part of the preliminary decree schedule by describing the written statement schedule also if at all liable for partition. Once that is the effective and proper course available, leave about any counter claim can be made by defendants. Such counter claim is even claimed not required for inclusion of those parties in the suit for partition based on joint possession once it is a fixed court fee, irrespective of the extent and value of the properties involved, but for required where the suit for partition sought is not based on joint possession and requires payment of advoleram court fee for the defendant to 5 include any properties he has to pay court fee thereon with a counter claim.

8. By keeping these principles in mind, the settled law and the age old and settled practice in vogue, it is not possible to say at the instance of the defendant from his seeking amendment of the plaint schedule for inclusion. Thereby, the conclusion arrived in **Prathipati Murlidhararao @ Nehru (**supra) is confined to its own facts and not a precedent to follow that too when the very wording of Order VI Rule 17 C.P.C. supra not considered to say therefrom as hit by *sub-silentio*. Needless to discuss on the same further, even coming to the Division Bench expression of the Madras High Court, it was in answering a reference from the conflicting expressions of the two single Judges of that Court, it was observed therein stating each case depends on own facts. What the learned Single Judge of this Court placed reliance of the expression of the Apex Court in **S.Satnam Singh and others v. Surender Kaur (2009(2) SCC 562)** concerned even, it was a case, where, as per the settled law in a contest raised by the defendant in his written statement by inclusion of some more properties, that were not included in the plaint schedule by the plaintiff, these were ordered to be included in the preliminary decree schedule since also liable for partition. Once that is the proper recourse available and that expression is also reiterates the practice in vogue, there is nothing in law to permit any party to amend the pleadings of the opposite party contrary to the very wording of Order VI Rule 17 C.P.C.

9. Having regard to the above, the revision is disposed of for there is nothing to interfere in the revision against the review order of the trial Court, but for, clarifying that the defendant if the suit is based on joint possession by payment of fixed court fee can show in the written statement schedule in seeking for inclusion of the property also as part of the properties liable for partition in the preliminary decree, that too by adding of the son of the plaintiff in whose name that property stands as co-plaintiff or codefendant by the Court. If the suit is not based on joint possession and not by payment of fixed court fee, to claim in the written statement shall be as a counter claim and by payment of court fee thereon, leave about power of the Court to insist for payment of any deficit court fee is available under Sections 11 and 15 of the A.P.Court Fees Act till pronouncement of judgment for the reason the Court till then no way *functus officio*.

10. Pending miscellaneous petitions, if any, shall stand closed.

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2018(1) L.S. 240

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

Present:
The Hon'ble Mrs. Justice T.Rajani

Nelaturi Chandra Sekhar ..Appellant

Vs.

State, S.D.P. ..Respondent

(INDIAN) PENAL CODE, Sec.304-B - INDIAN EVIDENCE ACT,Sec.113-B - Appellant / A1 preferred instant appeal assailing Judgment of Trial Court - Deceased/Wife was alleged to have committed suicide due to harassment by the appellant.

Held - Proximity between death of deceased and harassment by appellant is clinching aspect, which would prove guilt of accused - Material evidence, suffers from several inconsistencies and is not sufficient to invoke the presumption adumbrated U/sec.113-B of Indian Evidence Act, in order to throw the burden on the appellant - Hence, impugned judgment is not sustainable and the same is liable to be set aside - Appeal is allowed.

Mr.Venkateswarlu Nimmagadda Reddy, Advocate for the Appellant.

Public Prosecutor (AP), Advocate for the Respondent.

Crl.No.6/2011 Date:22-2-2018

J U D G M E N T

Impugning the judgment dated 05.01.2011 passed in Sessions Case No.391 of 2009 by the III Additional Sessions Judge, Guntur, the appellant, who is accused No.1, comes before this court, by way of this appeal.

For the benefit of better understanding, the facts, briefly, need to be stated.

The complaint was filed against the appellant and six others, by the father of the deceased, who is the wife of the present appellant, stating that the deceased worked as Assistant Professor in the department of Botany, Nagarjuna University. She was married to appellant on 22.05.2008 with the presentation of Rs.4,00,000/- of cash, 30 tulas of Gold and Rs.40,000/- as Adapaduchu lanchanam. A week before the marriage, Rs.2,20,000/- was given to A-4 and A-7 and the balance was given on the date of marriage. Appellant, A-1, left the deceased at the house of the de facto complainant and returned to Guntur. He has been postponing the taking of the deceased to Guntur. P.W.6, who is brother of the deceased, on 14.06.2008, took the deceased to Guntur and left her at the house of the appellant. From the date of marriage, all the accused suspected the fidelity of the deceased and proclaimed that they incurred Rs.5,00,000/- for the marriage and if the appellant would have married with another woman, he would have got higher dowry and that they were demanding the deceased to resign from the job and bring additional dowry of Rs.5,00,000/- from her parents. Deceased was informing to her father, her brother and brother-in-law and

others about harassment, over the phone and they were consoling the deceased to remain with patience. She also informed the harassment to her colleagues working in the University, who also gave similar advice. 20 days prior to 19.07.2008 deceased and the appellant shifted their residence to Flat No.205, Satya Sai Towers, Nagarampalem, Guntur. Even there also the appellant has been demanding to bring additional dowry of Rs.5,00,000/-. On 18.07.2008, deceased phoned to the de facto complainant, that she was not able to live with the appellant due to the torture and that the de facto complainant informed her that they would be coming to Guntur on the next day to talk to the appellant. On 19.07.2008, again, the appellant quarreled with the deceased, who, being not able to bear the torture, consumed pesticide poison and became unconscious. The appellant took her to Sri Sai Hospital and admitted her and the appellant informed the same to de facto complainant. The deceased is alleged to have committed suicide due to harassment by the appellant.

The trial Court, in the process of appreciating the evidence, sieved the evidence and took the view that there exists a benefit of doubt for accused Nos.2 to 7 and acquitted them, but, considering that the evidence was sufficient to prove the guilt of the appellant, convicted him for the offence punishable under Section 304-B IPC and sentenced him to undergo rigorous imprisonment for a period of seven years and further to pay a fine of Rs.1,000/- and in default of payment of fine, to undergo simple imprisonment for a period of one month.

Assailing the said judgment, present appeal is preferred on the grounds that the prosecution has failed to establish the charge; the Court below erred in placing reliance on the evidence of prosecution witnesses P.Ws.1, 6 and 7, which is self contradictory and is at variance with Ex.P.1 and the statements recorded by the Tahsildar; the Court below did not appreciate that the witnesses are hearsay; the Court below ought to have seen that the accused No.1 never received any dowry; that there was no payment of dowry; there was no demand for additional dowry and that there was no harassment in pursuance of the alleged demand, leading the deceased to commit suicide; there was enormous delay in lodging the FIR, which itself demonstrates that it was brought into existence subsequently, after due deliberations.

Heard the learned counsel for the appellant and the learned Public Prosecutor and perused the material placed on record.

The learned counsel for the appellant brings out the inconsistency between the complaint and the evidence of P.Ws.1, 6 and 7 and he contends that their evidence stands to be out-and-out improvement, from their statements and also the complaint. He also contends that the witnesses, who are neighbours and are supposed to be aware of the harassment, if any, by the appellant, did not speak about such harassment. He contends that it was the appellant, who admitted the deceased in the hospital. He further contends that the deceased was suffering from Thyroid problem and that the same is evidenced by the tablets, which were seized from the scene of offence and

that the Court below ought to have assumed that the suicide of the deceased is due to Thyroid problem. From the above submissions and the material placed on record, the following points can be framed for consideration of this Court.

i) Whether the evidence of the prosecution witnesses would suffice to prove the guilt of the accused for the offence punishable under Section 304-B IPC.

ii) Whether the judgment of the trial Court is sustainable.

iii) To what result.

It would be beneficial to extract Section 304-B IPC at the out set, for the sake of ready reference.

[304B. Dowry death.

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called dowry death, and such husband or relative shall be deemed to have caused her death.

The Court below has rightly observed that giving of the dowry at the time of marriage would not be relevant for assessing the guilt of the accused for the offence under Section 304-B IPC, as the said fact is not one of the ingredients of Section 304-B and the ingredient of Section 304-B is harassment with a demand of dowry soon before the death of the deceased. The proximity between death of the deceased and the harassment by the appellant is the clinching aspect, which would prove the guilt of the accused. The complaint, which was given by P.W.1, who is the father of the deceased, can be looked into, to prima facie understand whether there was any such proximity between the above two aspects. The complaint shows that the marriage took place on 22.05.2008 and the death of the deceased occurred on 19.07.2008.

After marriage, the deceased joined the appellant at Guntur. Every day she used to tell the de facto complainant, that since next day of marriage the appellant has been behaving peculiarly, with terrible suspicion and torturing her mentally. After first night, the appellant left the deceased in their house and went away. After the marriage he stayed separately for about 15 days. At least, when the deceased phoned to him, he used to keep quiet, without talking to her and would simply disconnect the phone call. The deceased used to say that he used to put her to such type of mental torture even from the next day of their marriage, whenever the de facto complainant phoned to her. Later, when the deceased asked the appellant over phone, to see a house at Guntur for their residence, he asked her to reside at her maternal aunts house in Vijayawada.

Later, when the de facto complainant telephoned to the appellant he said that he could not find the house and said that for some time she will reside with him, in

his room itself. On 14th June, she was taken to the house of the appellant, along with some articles and left her in the room. Every day the deceased used to tell the de facto complainant, over phone, that since the next minute of her joining, the appellant used to say that he incurred a loss of forty seven lakhs by marrying her; she is looking at other male persons and he will get another marriage by deserting her. Her colleagues and classmates used to call him as HERO but he became ZERO after marrying her and he will desert her within one or two months and said that you have to make their own arrangements or otherwise bring some more amount, so also resign to her job. Saying as such, he used to torture her daily and sometimes he makes her to feel afraid, without coming to the house till mid-night and some times he wakes up in the mid-nights and sits alone and put her in fear. When the de facto complainant told that they would come and talk to him, she did not accept and asked them not to come and to wait for some more days. She further informed over phone that whenever the appellant takes her outside, he says that she is looking at others and giving cuttings to male persons and thus talks with her terribly, after their return to the house. He also used to threaten her, by saying that he knows the S.P. and Sub-Collector and he can do anything to her and if she tells the same to her people, he will see her end and since two days he increased his torture and saying that he will desert her. On 18.07.2008, in the evening, he says that, the said information was given to him over phone and on that he told her that they will start on the next day morning. But on the next day morning, the fateful incident occurred.

After appreciating the contents of Ex.P.1, complaint, the observations of the Apex Court are apt to be remembered in the ruling reported in between SHARAD BIRDHICHAND SARDA VS. STATE OF MAHARASHTRA , the Apex Court observed and held that:

All the persons to whom the oral statements are said to have been made by Manju when she visited Beed for the last time, are close relatives and friends of the deceased. In view of the close relationship and affection any person in the position of the witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that this is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatrated against the supposed murderer and, therefore, the Court has to examine such evidence with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it, they would be guided by a spirit of revenge or nemesis against the accused person and in this process certain facts which may not or could not have been stated may be imagined to have been stated unconsciously by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it.

The acquittal of accused Nos.2 to 7 on the ground that the evidence, which brought forthwith allegations against A-2 to A-7, is not supported by the contents of the

complaint and hence, they are entitled to benefit of doubt would support the correctness of the observations of the Apex Court. With the alertness of the said observations, the complaint given by the de facto complainant needs to be understood.

The report, first of all, shows that the harassment of the appellant was there from the next day of the marriage and she has been constantly informing about the same to the de facto complainant and also to others. But the deceased did not feel the necessity of the intervention of the de facto complainant and she stopped and asked him to wait for some more days. She kept on complaining against the appellant, before and after she expressed that they can wait for some more time. One improvement that is made by the P.Ws.1, 6 and 7, is with regard to the demanding of the additional dowry of Rs.5,00,000/-. All the three of them admitted that they did not state about the said fact when their statements were recorded by the Police, the same does not find place in the complaint also. The cross examination of the P.W.6 brings out that the expenses of the marriage were also borne by the accused. He says that the entire marriage expenses were born by the appellant, A-1.

The suggestion given by to P.W.7 is also that he met the marriage expenses. The above admitted fact would definitely throw some doubt, with regard to the demand of additional dowry by the appellant. The evidence also shows that A-1 complied with the customary requirements like giving blackbeads and mangalasuthram to the deceased. The same can be evidenced in the cross examination of P.W.6, wherein he admitted the same.

P.W.7, who is the co-brother of the appellant strangely, denies the suggestion that A-1 himself met the marriage expenses, though the P.W.6 admits the same. There lies the tendency of P.W.7 to be more loyal to the cause, than P.Ws.1 and 6 and that would also lead to a belief that he would possibly exaggerate things. He is the person who received the phone call from the appellant, informing about consumption of poison by the deceased. The harassment that is reported by the deceased allegedly on 18.07.2008 is not in any manner graver than the harassment that she allegedly reported earlier. With all the said harassment, as the evidence of P.Ws.1, 6 and 7 reflects, she had the stamina to refuse the proposal made by them, to come and visit her. With the above background, her sudden request to P.Ws.1, 6 and 7, on 18.07.2008, to come to Guntur, is not believable. The cross examination of P.W.1 shows that he was not personally present when A-1 demanded additional dowry of Rs.5,00,000/- from the deceased and he never went to Guntur to see the deceased and did not personally witness any demand made by A-1 for dowry or for any other harassment.

It is only through the deceased, that he came to know about the same. The payment of Rs.40,000/- towards lanchanam and Adapaduchu lanchanam is pointed out as an omission in the statement of the P.W.1. So also the demand of additional dowry. He also did not choose to state to any

elders or mediators, about the dispute. All that the above would imply is that the magnitude of harassment, if any, was not to the extent of driving P.W.1 and others to intervene in the matter. Evidence of P.Ws.1, 6 and 7 with regard to the harassment is only that they were informed about the same by the deceased and they never witnessed any harassment personally. In the light of the above facts, the evidence of the neighbours, who were examined as P.Ws.3 and 5 becomes material. P.Ws.2 and 4 were declared hostile. P.Ws.3 and 5, who were not declared as hostile, did not support the case of the prosecution. P.W.3 states that he does not know the family life of the deceased but they were going together from the flat in the morning. His cross examination shows that the deceased and the appellant joined in the flat just one week prior to the incident. It also came in the cross examination that he did not see A-1 and the deceased quarrelling. He further stated that the deceased was leading reserved life and not meeting others. P.W.5 further goes a step ahead and says that A-1 and the deceased were living happily.

The evidence of the neighbours would show that the appellant took the deceased to the hospital, by carrying her to the ground floor. The evidence of P.W.5 shows that after joining the deceased in the hospital, A-1 came to the apartment and searched if there was any empty poison bottle in the premises. That part of his evidence would show that A-1 was not present when the deceased consumed the poison and that he was not even certain whether she consumed poison or not.

The evidence of P.W.8, who was the person working in the department of Botany, speaks about the calls made by the de facto complainant to him, to enquire about the welfare of the deceased in her married life. In the beginning, the deceased was happy about her married life, but according to his version, he gradually found her dull. The fact that the de facto complainant used to enquire with P.W.8 about the welfare would imply that he took P.W.8 into confidence and that he was confident that the welfare of the deceased would be known to P.W.8. But P.W.8 does not speak about any information that is passed on to him by the deceased. The reason for the dullness cannot be inferred to be the harassment of the deceased, as was done by the Court below, unless the harassment is independently proved. P.W.8 instructed the women colleagues of the deceased to enquire about her dullness and as to what had happened, but later they did not state anything. However, in the cross examination, he stated that he did not personally enquire about family life of the deceased, by going to her house. He used to enquire about her welfare, from the time she joined in the department. His evidence with regard to the deceased being dull, is an omission in his statement and he admits the same. So also his asking women colleague to enquire about the dullness of the deceased. Hence, his evidence becomes unreliable.

P.W.9 is another colleague of the deceased. But nothing comes out from his evidence. He stated that the deceased did not inform him about her family life and he does not have personal knowledge about the payment

of dowry though he heard that dowry was paid.

The evidence of P.W.10 is that of the Doctor who speaks about the condition of the deceased. After consumption of poison she went into coma and that explains the reason for not recording the statement of the deceased.

The evidence of P.W.11, who is the Paster who performed the marriage of the deceased, would also strengthen the already existing doubts with regard to the monitory greed of the appellant, as he says that the fee given to him was both by the bride and the bridegroom. It shows that the appellant did not make any effort to throw any financial burden on the family of the deceased with regard to the performance of the marriage.

P.W.12 is a mediator for marriage. The facts elicited in the cross examination would support the suggestion given to P.Ws.1, 6 and 7, that two alliances, which were fixed for the deceased were cancelled. It was elicited in his cross examination that after he left from the hotel to where A-1 is requested to come, for the purpose of fixing alliance and where P.W.6 was present, P.W.6 told him that he knew the proposal of A-1 already but it was rejected by him. When he enquired with A-1, he told that his marriage was settled with the sister of P.W.6 but he told him that P.W.6 phoned to him three or four days ago and enquired about any other proposals, as his sisters marriage is not settled. When he phoned to A-1 to bring to his notice, he informed that the alliance was fixed with the sister of P.W.6. The above facts do not however clarify anything, concerning the issues involved in this case.

P.Ws.13 and 14, who are witnesses for the inquest panchnama were also declared as hostile. P.W.15 who is witness for the scene of offence panchanam, also turned hostile. But, however, nothing material comes out from the evidence of other witnesses.

But the material evidence, which is of P.Ws.1, 6 and 7, suffers from several inconsistencies and is not sufficient to invoke the presumption adumbrated under Section 113-B of Indian Evidence Act, in order to throw the burden on the appellant. Hence, in view of the above, this Court is of the view that the impugned judgment is not sustainable and the same is liable to be set aside.

In the result, this appeal is allowed by setting aside the impugned judgment dated 05.01.2011 passed in S.C. No.391 of 2009 by the III Additional Sessions Judge, Guntur.

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2018(1) L.S. 247

J U D G M E N T

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

V. Kalavathi & Ors., ..Appellant
Vs.
T.R. Srinivasan & Ors., ..Respondents

(INDIAN) CONTRACT ACT, Sec.51 - INCOME TAX ACT, Sec.230A - Suit for specific performance – Defendants had approached plaintiff and expressed their willingness to sell plaint schedule property and plaintiff agreed to purchase the same - Defendants failed to procure necessary documents so as to enable plaintiff to get the sale deed registered in their favour.

Held - Plaintiff is not in breach and is entitled to specific performance of the contract of sale - Registration of the sale deed within 90 days was not possible due to defendants alone - Plaintiff is entitled to a decree for specific performance – Appeal stands allowed.

Mr..V. Hari Haran, Ch. A.B. Satyanarayana, Advocates, for the Appellants.
Mr.P.S. Venkatesh, Sarang Afzalpurkar, Advocates, N. Raghavan, G.P. for Appeals, Advocate for the Respondents

A.S.Nos.498/2005 Date:19-2-2018

These two appeals arise out of the decree and judgment dated 07.03.2005 in OS.No.319 of 1996 on the file of the I Additional Senior Civil Judge, Ranga Reddy District.

As these are first appeals, the parties are referred to as they are in the lower Court itself. The brief facts of the case are as follows:

The defendants Nos.1 to 3 had approached the plaintiff and expressed their willingness to sell the plaint schedule property and the plaintiff agreed to purchase the same for consideration of Rs.4,25,000/- per acre. Pursuant to the same, the defendants 1 to 3 have executed an agreement of sale dated 21.07.1995. On the date of agreement of sale, the plaintiff had paid Rs.4,25,000/- to defendants 1 to 3 as a part of the sale consideration. On the date of agreement of sale, the defendants 1 to 3 have delivered the vacant and peaceful possession of the plaint schedule property to the plaintiff. Pursuant to the same, the plaintiff had constructed an out- house and also invested Rs.1,15,000/- for development. As per the agreement of sale, the time fixed for registration of sale deed was 90 days from the date of its execution. As per clause (3) of the agreement of sale, it was declared by the defendants that the plaint schedule property is free from all encumbrances and any kind of litigation. The plaintiff, as a measure of abundant caution, had issued paper notice in the daily News Paper Eenadu

dated 30.07.1995 calling for objections from the third parties. In response to paper notice, the plaintiff had received registered letters from V. Mallesh, V. Srinivas, V. Krishna, V. Venkata Swamy and V. Jagan, all are residents of Yapral Village, Ranga Reddy District informing the plaintiff that the suit for partition in respect of the plaint schedule property vide OS.No.212 of 1994 is pending on the file of the Principal Senior Civil Judge, Ranga Reddy District. The plaintiff then issued a legal notice to the defendants 1 to 3 through his counsel calling upon them to furnish the copies of papers pertaining to OS.No.212 of 1994 on the file of the Principal Senior Civil Judge, Ranga Reddy District. The defendants 1 to 3 having received the said notice, failed to reply, till a reminder notice was issued on 05.10.1995. The defendants 1 to 3 failed to procure necessary documents along with Income Tax Clearance Certificate, so as to enable the plaintiff to get the sale deed registered in their favour. As per clause (10) of the agreement of sale, the defendants 1 to 3 had to conduct joint survey of the land to ascertain the actual extent of land for payment of balance sale consideration. The defendants 1 to 3 failed to conduct the joint survey of the above said lands. The plaintiff had got the land surveyed on 20.10.1995 through M/s. Veeaar Architects and Engineers and it was revealed that the defendants 1 to 3 are in actual physical possession of Acs.4.02 guntas of land, as against Acs.4.20 guntas mentioned in Pahanies. The sale consideration is thus proportionately reduced from Rs.19,12,500/- to Rs.17,21,250/-. The defendants, instead of procuring necessary documents for the purpose of registration, delayed the same. Despite several oral requests made by the plaintiff to the defendants to procure the documents for the purpose of registration, the defendants failed to do so and so the plaintiff got issued notice dated 18.05.1996 demanding registration of a sale deed. The plaintiff, as per the terms of agreement of sale, is ready with the balance sale consideration and in proof of the same, he filed a bankers certificate confirming the availability of Rs.20,00,000/- as short term fixed deposit in plaintiffs bank account. The defendants 1 to 3 failed to execute the sale deed and are avoiding the registration. Finding no other alternative remedy, the plaintiff was constrained to file the present suit.

The first defendant filed a written statement which was adopted by the defendants 2 and 3 and the brief averments of the written statement are as follows:

The suit filed by the plaintiff is neither maintainable in law nor on facts. The plaintiff has not come to Court with clean hands. The plaintiff has committed breach of contract since beginning. Therefore, he cannot enforce the agreement of sale dated 21.07.1995. The agreement of sale dated 21.07.1995 is automatically cancelled due to the deeds of the plaintiff. In terms of clause (12) of the agreement of sale dated 21.07.1995, which reads that in the event of non- payment of balance sale consideration amount on or before 90 days being the date fixed for registration from

the date of the agreement, the agreement stands cancelled automatically without notice. Thus by this clause, the agreement stood cancelled automatically by the 91st day as the plaintiff was never ready and willing to perform his part of contract. The defendants are ready to pay back the amount with deduction of 25% received towards penalty in terms of clause (12) of the agreement of sale. It is a fact that time fixed for registration of sale deed is 90 days from the date of its execution. The defendants categorically explained the existence of suit filed for partition in OS.No.212 of 1994 on the file of the Principal Senior Civil Judge, Ranga Reddy District. The plaintiff, on getting the clearance of the title, had gone ahead with the paper notice and expressed that he received a letter from V.Mallesh, Srinu and others. The defendants got issued reply notice through their advocate on 28.09.1995 refuting the allegations. In the said notice, the defendants have cautioned to register the agreement of sale according to the terms of agreement of sale in clause (12) of it. They have also stated that they are ready to honour the terms of agreement of sale. Therefore, the plaintiff is a person who committed breach of contract and so he does not deserve any relief and the suit is liable to be dismissed. The plaintiff has no intention to perform his part of contract and got issued unwarranted notices. The suit is not valued properly and the Court fee paid is not sufficient. Finally, they prayed for dismissal of the suit.

The defendants 4 to 6 being proforma parties have not filed written statements.

On the basis of above pleadings, the following issues were framed:

(1) whether the plaintiff is entitled for the relief of specific performance of the suit agreement of sale dated 21.07.1995 as prayed for?

(2) whether the plaintiff is entitled for damages of Rs.4,25,000/- from D.1 toD.3 as prayed for?

(3) whether the plaintiff is entitled for interest at the rate of 36% p.a. on the sum of Rs. 4,25,000/- paid under suit agreement as prayed for?

(4) whether the court fee paid is correct?

(5) to what relief?

During the pendency of suit, the sole plaintiff died and his wife came on record as his sole legal representative. She was examined as PW.1, Austin Paul Michel was examined as PW.2, Y.Balreddy as PW.3 and Y.Narasimha Reddy was examined as PW.4. They marked documents as Exs.A.1 to A.32. The contesting defendants 1 to 3 examined the second defendant as DW.1; Mr. Ajaymaru as DW.2; K.Hanumanth Rao as DW.3 and marked EXs.B.1 to B.3 documents.

After trial, the lower Court passed the judgment and decree dated 07.03.2005, which is now impugned in the present

appeals. The lower Court partly decreed the suit directing the defendants to execute the sale deed in respect of Ac.1.00 of land only, which is delineated in blue colour in the plan appended to Ex.A.1. The rest of the claim was dismissed. The suit against defendants 4 to 6 was also dismissed. Against the said judgment and decree, the present appeals are filed.

AS.No.521 of 2005 is filed by the plaintiff, who is dissatisfied with the order and wants a decree for specific performance for the entire extent of land. AS.No.498 of 2005 is filed by the defendants 1, 2 and 3 in the suit, who are dissatisfied with the decree granted and want the entire suit to be rejected.

As both the appeals are from the same judgment, the matters were heard together with the consent of the learned counsels. The lead was taken in AS.No.521 of 2005 by Sri V.Hari Haran and Ch.A.B.Satyanarayana appearing for the appellant. The learned counsel for the respondent Sri P.S.Venkatesh and Sri N.Raghavan, Government Pleader for Appeals replied to the case. Since this is a suit for specific performance, the first issue that was framed in the lower Court was taken up and argued by both the counsels. This Court also agreed with this procedure as this is the critical and most important issue to be decided, namely, whether the plaintiff is entitled to a relief of specific performance for the suit agreement of sale dated 21.07.1995.

The facts leading to the suit are not really in dispute. After the agreement-Ex.A.1 was concluded, the plaintiff issued a public notice which lead to claims from third parties. According to the plaintiff, he was unaware of the claim of the third parties which relates to the suit OS.No.212 of 1994. According to the defendants, the plaintiff was fully aware of the said suit. Later, after an exchange of few notices and reply notices, the suit was filed for specific performance and other reliefs.

Since this is a suit for specific performance and as per the settled law on the subject, which was relied upon by both the learned counsels, the plaintiff will have to prove that he was ready and willing to get the sale deed executed while the defendants will also have to show that their conduct is blemishless for the suit to be dismissed. The mutual obligations assumed under the agreement of sale and their order of performance are also important and need to be examined.

In the opinion of this Court, the terms and conditions of the agreement of sale-(Ex.A.1) are of crucial importance in this case.

The total sale consideration agreed upon as is ex facie visible from page 3 of Ex.A.1 is Rs.19,12,500/- @ Rs.4,25,000/- per acre and the total extent is Acs.4.20 guntas. The advance paid which was acknowledged in Ex.A.1 is Rs.4,25,000/-.

The critical clauses bearing numbers 2, 3, 4, 5, 6, 7, 10, 11, 12, 13 and 14 of the

agreement of sale (Ex.A.1) dated 21.07.1995, which are necessary for adjudication of the case are reproduced here:

Clause (2) The balance sale consideration amount of Rs.14,87,500/- (Rs. Fourteen Lakhs eighty Seven thousand five hundred only) is payable on or before 90 days by the VENDEE to the VENDOR being the date and time fixed for registration of the sale deed.

Clause (3) The VENDOR hereby declare and covenants with the VENDEE that the sale of the scheduled property in favour of the VENDEE is free from all charges, mortgage, lien, agreement or agreements of sale, litigation or any kind of encumbrances of whatsoever nature and that the VENDOR undertakes to indemnify the VENDEE against any tenable rival claims.

Clause (4) As on this day of this deed the VENDOR has delivered the vacant and peaceful possession of the scheduled property to the VENDEE as is where is the condition for his absolute use and development.

Clause (5) The VENDOR shall sign all necessary applications and other papers reasonably required for obtaining necessary permission and clearance that may be required for conveyance of the scheduled property.

Clause (6) The VENDOR shall obtain necessary documents from the competent authority required for the purpose of registration and as a mutually agreed shall handover the same to one Mr.P.B.Maru S/o B.Maru, Hindu, aged about 69 years, Occ:agriculturist, R/o S.No.154, of Yapral Village, Malkajgiri Mandal, R.R.District.

Clause (7) If either of the parties violate the terms and conditions of the agreement of the sale either of the parties are at liberty to enforce specific performance of the contract in the court of law.

Clause (10) Though the possession of the schedule property has been delivered by the VENDOR to the VENDEE, where as the VENDOR undertakes to conduct a survey of the schedule mentioned land at his own cost on or before 18/8/95 in the presence of the VENDEE to determine the actual quantum of the land for the purpose of the payment of balance sale consideration.

Clause (11) In case the VENDOR fails to conduct a survey of the schedule mentioned land on or before 18/8/95, then the VENDOR agrees to accept the survey conducted by the VENDEE in annexure 1 as true and correct and shall accept the sale consideration accordingly.

Clause (12) In the event of the non payment of balance sale consideration amount on or before 90 days being the date fixed for registration from the date of this agreement, then the agreement stands cancelled automatically without notice. However, the

VENDOR shall repay the sale consideration received as advance back to the VENDEE by deducting 25% of the same towards penalty within one month thereafter.

Clause (13) In case the VENDOR fails to pay the advance amount received within one month to the VENDEE from the date of the termination of this agreement, then the VENDEE shall hold the proportionate portion of the scheduled land to the extent of the total advance consideration paid for which the VENDOR has agreed for the same which is delineated in the site plan marked in blue colour being acre 1.00 guntas.

Clause (14) That the VENDOR shall execute and register the sale deed or deeds either in favour of the purchaser, his nominee or nominees after receipt of the entire balance of the sale consideration as and when called upon to do so by the VENDEE on or before 90 days of this agreement In this case, as there are allegations and counter allegations of breach being committed by the other party and as the agreement in the case is a document of critical importance, the terms of the agreement are being considered at the very outset since the evaluation of the actions of the parties vis a vis the terms of Ex.A.1 would have a bearing on the issue: whether there was a breach and if so, who committed a breach. The date of agreement is 21.07.1995. The date fixed for the registration is 90 days from the date of the agreement i.e. 21.10.1995. Thus the registration had to be completed on or before 21.10.1995 as per Ex.A.1. As per clause (2) also, the balance sale consideration is payable before 90 days by the Vendee to the Vendor being the date and time fixed for the registration. Therefore, the agreement makes it clear that the 90 days period is the period fixed or the upper limit fixed for the registration of the sale deed.

Clause (3) contains a declaration that the property is free from all encumbrances or litigations.

Clause (4) clearly states that the Vendor has delivered vacant possession of the property to the Vendee on as is where is condition for his absolute use. Clauses 5 and 6 say that the Vendor shall sign all necessary applications and papers to secure the necessary statutory permissions.

Clause (6) says that the Vendor shall obtain necessary documents from the competent authority required for the purpose of registration.

Clauses (10) and (11) talk of the survey to be conducted by the Vendor on or before 18.08.1995. It is mentioned that the survey will be conducted by the Vendor on or before 18.08.1995 or in the alternative, he will accept the survey conducted by the Vendee in Annexure-I as true and correct. Clause (12) also makes it clear that in the event of non-payment of the balance sale consideration on or before 90 days, the agreement shall stand cancelled automatically, but the Vendor shall repay the sale consideration after deducting 25%. The learned senior

counsel appearing for the plaintiff/appellant argued that a plain language interpretation is the first and foremost canon of interpretation of the documents. It is his contention that a plain language interpretation of this document leads to the following conclusions.

(a) that 90 days is fixed for the purpose of registration of the document. The words for the registration of the sale deed according to the learned senior counsel occurs in clauses (2), clause (5) (for conveyance), clause (6), clause (12) and clause (14) of Ex.A.1.

(b) It is the submission of the learned counsel that 90 days period that was fixed was the period for the registration of the sale deed itself. It is therefore, his contention that the conduct of both the parties should be examined to see in the facts and circumstances of the case as to who is in breach in this case and whether due to the conduct of the parties; the 90 days period could be adhered to or not. The learned senior counsel drew the attention of this Court to Section 230A of the Income Tax Act, 1963 which clearly mandates that in case of a transaction of more than Rs.5,00,000/-, permission of the Income Tax Department is necessary. He points out that in this case or in any other case, without the permission under Section 230A of the Income Tax Act, the sub-registrar would not have registered the sale deed. Therefore, it is the contention of the learned senior counsel that it was incumbent upon the defendants/Vendors to obtain the necessary permission from the competent authority for the purpose of registration and hand them over to a designated person P.B.Maru. It is the contention of the learned senior counsel that clauses (5) and (6) were specifically incorporated because both the parties were aware that unless the permission under Section 230A of the Income tax Act was obtained, registration would not be concluded. Permission will only be granted when the Vendors file the necessary application before the Income Tax authorities. According to him, this was a pre-condition for the registration of the sale deed and that is the reason why clause (6) is so clearly worded as follows:- Vendor shall obtain necessary documents from the competent authority for the purpose of registration and hand them over to a designated person also. Similarly, he points out that in clause (5), it is mentioned that the Vendor shall sign all papers required for obtaining permissions and clearances for conveyance. Even in the written statement filed, it is admitted (para 9 page 7) that it is mandatory to obtain the income tax clearance. As per him, it is admitted that this permission was not even applied for; let alone obtained. Learned counsel points out that DW.1 clearly admitted in his cross-examination on 04.10.2004 that the income tax permission was not obtained. As per him, both as per the Income Tax Act and the relevant clauses of Ex.A.1, the entire burden to obtain this mandatory permission lies on the Vendor/defendant only. It is the submission of the learned counsel for the appellant that his client can be called upon to pay the balance sale on

or before 90 days, which is the date fixed for registration, if the Vendors were ready for registration. As per him, without the actual measurement of the land and without the Section 230A clearance, the property can never be ready for conveyance/ registration. As per him that the survey was not done as required by 18.08.1995 and the plaintiffs opted for their survey on 20.10.1995, which is final. As far as the Income Tax Clearance is concerned, the learned counsel stresses the fact that no application was filed at all to obtain the same. He relies upon sections 51 and 52 of the Indian Contract Act, which are as follows:

51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

52. Order of performance of reciprocal promises.Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires. He argued that the sequence of obligations and their order of performance as per the very nature of the transaction are as follows:

(1) measurement of the land by Vendor by 18.08.1995 (Clause 10).

(2) In case of Vendors failure; survey by the purchasers (Clause 11).

(3) With the price determined by the result of the survey; filing of application before the authorities to secure permission for conveyance of the land with draft sale deed or agreement of sale copy. (Clause 5).

(4) Delivery of the said permission to Sri P.B.Maru (Clause 6)

(5) Payment of balance sale consideration as determined by the survey and the registration on or before 90 days from 21.07.1995 i.e. by 21.10.1995. This, according to the learned counsel, is the order in which the obligations were to be performed. Therefore, he contends that plaintiff was not in breach at all. He relies upon the following case law to prove that the sequence or order of performance cannot be fixed but has to depend on the terms and conditions agreed upon. Nathulal v. Phoolchand (1969 (3) SCC 120), P.D'Souza v. Shondrilo Naidu (2004 (6) SCC 649) and also Saradamani Kandappan v. S. Rajalakshmi and others (2011 (12) SCC 18). He also relies upon Shantha Bai Prabhu Vs. Shahul Hameed (MANU/KA/0489/1990) and the case of G. Janobai v. V.N. Devadoss (LAWS (MAD) 2012 3 29) to show that the burden of securing permission under Section 230A lies fully on the Vendor/defendants only. In reply to this, the learned counsel for the respondents in this appeal agrees that (a) the plaintiff was never ready and willing to perform his part of the agreement.

(b) that he was aware of the pendency of the suit OS.No.212 of 1994 and he used the pendency of the case as an excuse to avoid payment of the balance sale consideration. (c) that the plaintiff did not have the balance sale consideration ready. (d) that the agreement was automatically terminated after the expiry of 90 days (clause 12). (e) that the payment of the balance sale consideration was not contingent upon the Income Tax Clearance etc. In view of the submissions made and to decide Issue No.1, this Court will now discuss the points raised: (1) OS.No.212 of 1994: This was a suit that was pending by the date of Ex.A.1 agreement. Soon after Ex.A.1 agreement; the plaintiffs issued Ex.A.4 public notice inviting objections. The plaintiffs received objections vide Exs.A.5; A.6 and A.7, wherein the pendency of suit OS.No.212 of 1994 was mentioned. The plaintiffs then sent Ex.A.5 notice (dated 09.08.1995) and a reminder dated 09.10.1995 (Ex.A.11) to which a reply dated 28.09.1995 (Ex.A.12) was issued by the defendants. This was back dated and posted as per the plaintiffs reply dated 21.10.1995 (Ex.A.13).

The case of the plaintiff/appellant is that he came to know about OS.No.212 of 1994 after Ex.A.1 agreement. The case of the defendants is that on the date of Ex.A.1 itself, they told the plaintiff of the pending litigation. PW.1 admits this fact while PWs.2 and 3 (attestors to Ex.A.1) and PW.4 (another attesting witness) deny that at the time of Ex.A.1, there was a discussion about OS.No.212 of 1994. In reply, DW.1 speaks about this in his chief- examination but agrees in his cross-examination as follows: I do not know whether pendency of OS.No.212 of 1994 was mentioned in the agreement or not. He also agrees that OS.No.212 of 1994 was the only reason for the dispute between the parties and that the suit was also dismissed on 27.09.2003.

On a review of this matter of OS.No.212 of 1994; this Court finds that:

(a) there is no explanation why clause (3) was so drafted stating that there are no litigations pending if OS.No.212 of 1994 was actually discussed.

(b) the admission of PW.1 is not very convincing and the fact that she was not present when Ex.A.1 was signed is clear.

(c) the defendants in their written statement stated that they have merely informed the plaintiff about the suit OS.No.212 of 1994, but DW.2 also stated that the copies of papers in OS.No.212 of 1994 were handed over. This is an improvement both over the pleading and the deposition of DW.1.

(d) the oral evidence is also contrary to the terms of a written contract and so the bar under Section 92 of the Evidence Act will apply as the evidence is being given to vary the terms of a written document. This is impermissible legally.

(e) calling upon the plaintiff to pay the balance consideration is not correct in view of the issue regarding permission under Section 230A of the Income Tax Act, and

the survey being not completed, irrespective of pendency of OS.No.212 of 1994.

2. READINESS: The case of the plaintiff is that he had the necessary resources to pay the balance sale consideration. He filed Ex.A.27 certificate along with the plaint. It is a certificate dated 20.06.1996 showing that Rs.20,00,000/- is in fixed deposit in the name of the deceased-plaintiff since 18.06.1995. Both the main witnesses spoke of the readiness to take the sale deed. The lower Court however held that the plaintiff was not ready with the consideration since two other sale deeds were obtained on 18.09.1996 and so there was no cash with the plaintiff. The lower Court failed to notice that Exs.B.2 and B.3 are not in the name of the plaintiff, but are in the name of the plaintiffs son and a firm. No evidence is available to show that the funds under Ex.A.27 were actually used for Exs.B.2 and B.3. It is also clear that certified copies of Exs.B.2 and B.3 were obtained in July, 2004 and after that the plaintiffs witnesses were examined. No question was put about Exs.B.2 and B.3 nor were they confronted with these documents. Therefore, this Court is of the opinion that the finding of the lower Court on the issue of readiness (availability of funds) is wrong. There is no evidence to show that Ex.A.27 funds were actually used up for acquiring Exs.B.2 and Ex.B3 property. Hence, the finding of the lower Court is wrong in this matter.

3. WILLINGNESS: This is the intention and the conduct of the plaintiff to take the registered sale deed. The actions of the plaintiff are to be analysed. The agreement was concluded on 21.07.1995. The publication (Ex.A.4) was made on 30.07.1995. The first notice was given on 09.08.1995 (Ex.A.8) followed by Ex.A.11 dated 05.10.1995 and Ex.A.13 dated 21.10.1995. The survey of the land was conducted on 20.10.1995 (Ex.A.17). The certificate (Ex.A.27) shows that Rs.20,00,000/- were available from 18.06.1995 to 20.06.1996 (date of certificate). The suit was filed on 26.06.1996 for specific performance. Therefore, this Court holds that the plaintiffs intention/ willingness cannot really be doubted. A. Kanthamani v. Nasreen Ahmeds case (2017 (4) SCC 654) relied on by the appellant is relevant here.

In contradiction to this, the essential prerequisite for registration of the sale deed was the statutory clearance as per Clauses (5) and (6). This was never ever applied for or obtained by the defendants. The survey, which was to be conducted by 18.08.1995, was not conducted and the plaintiff got the survey done on 20.10.1995. Therefore, when the conduct of the plaintiff, vis a vis, the defendants is examined, this Court finds that the conduct of the plaintiff is blameless in the circumstances and the conduct of the defendants is blameworthy. The clauses and the clear language of Ex.A.1 make it clear that registration of the sale deed within 90 days is the crux of the matter. The plaintiff could not be called upon to be ready for registration unless the clearance under Section 230A of the Income Tax Act was obtained and the survey was done.

This Court is of the opinion that the sequence of performance of obligations is determined by the agreement which emphasizes the registration of the sale deed as the end result to be completed in 90 days. Asking the plaintiff to pay the balance sale consideration when the end objective registration within 90 days cannot be achieved is an exercise in futility only. The counsel for appellant rightly relies upon Bishambhar Nath Agarwal v. Kishan Chand and Other (AIR 1998 Allahabad 195) for this proposition and Saradamanis case (3 supra) (paragraphs 48 to 50).

4. AUTOMATIC TERMINATION AFTER 90 DAYS: The contention of the learned counsel for the defendants is that after 90 days, the contract is automatically terminated. (Clause 12). This Court is of the opinion that the same is not correct. This clause is to be read with all the other clauses in the agreement and cannot be read in isolation. This Court holds that termination for failure to pay the balance consideration will only arise when all the reciprocal obligations are fulfilled and still the plaintiff fails to pay the consideration. Clause 4, which says that property was given for the absolute use of the Vendee also militates against this theory of automatic termination. In addition, the defendants did not also refund the advance paid after deducting 25%.

The learned counsel for respondents/ defendants relied upon the following case law Ratinavathi and another v. Kavita Ganashamdas (2015 (5) SCC 223), Dharmabiri Rana v. Pramod Kumar Sharma (D) thr. L.Rs and others (2017 (12) Scale 696) and Saradamanis case (3 supra) to argue that the plaintiff committed breach and is not entitled to a decree of specific performance. This Court finds that the terms of the contract in Saradamanis case (3 supra) case are different. Clauses 4 and 6 are totally different from the present case. The repeated use of the words for registration of the sale deed make it clear that this was the end objective in this case plus there was a pre-condition for registration namely Section 230A in this case.

Basing on Ratinavathi's case (7 supra) the learned counsel argued that time is the essence of the contract as per para 36 of this judgment. He also argued that on the failure of the contract, parties must be relegated to their original position (para 59). He therefore, submits that the decree for Ac.1.00 granted by the lower Court should be set aside and that parties should be relegated to the pre-Ex.A.1 position. The learned counsel for appellant argues that a reading of the present terms make it clear that time was not the essence and that there were mutual obligation which had to be fulfilled. If these were fulfilled, he argues that then the time clause can be looked into. He relies on Saradamanis case (3 supra) case to argue that unlike in the present case, there were no mutually dependant obligations for the payment of the balance sale consideration. He in fact states that defendants did not disclose the encumbrance on litigation on the property.

The last case i.e. Dharmabiri Ranas case (8 supra) does not apply to the facts of the present case, which has its own distinct terms and obligation.

On a review of all the case law and the facts, this Court finds that in view of the express clauses in Ex.A.1, the defendant committed a breach by not obtaining the Section 230A permission, which would have facilitated the registration. This obligation is independent of the Vendees obligations. To get the sale deed ready for registration, this permission along with the survey should have been completed. Thus, this Court holds that registration of the sale deed within 90 days was just not possible in this case due to the defendants alone.

As per Section 51 of the Indian Contract Act, the plaintiff was not bound to perform his part; as the defendants failed to perform their part of the obligation.

Hence, this Court holds that the plaintiff is not in breach and is entitled to specific performance of the contract of sale as his conduct vis a vis the agreed clause of Ex.A.1 is in line with the settled case law on the subject. Issue No.1 is decided in favour of the plaintiff and against the defendants.

The counsel for plaintiff also pointed out that the lower Court granted a decree of specific performance for Ac.1.00 guntas only based on a wrong interpretation of clause (13). This Court finds force in the submission. Clause (13) says that the Vendee shall HOLD the proportionate portion of land of Acs.1.00 guntas, if the Vendor does not refund the advance paid less than 25%. The lower Court wrongly granted a decree for specific performance for Ac.1.00 guntas. This clause is a clause for providing security in the form of land up to Ac.1.00 guntas in case of the Vendors failure to refund the advance. This finding is therefore reversed.

In conclusion, it is held that the plaintiff is entitled to a decree for specific performance for the entire 4 acres 1.82 guntas as per Ex.A.17 survey plan. The balance sale consideration shall be deposited within four (4) weeks from this date. If the defendants do not execute a sale deed within two (2) weeks of the said deposit; the plaintiff is at liberty to approach the lower Court for execution of the sale deed. After the execution of the sale deed; the defendants are at liberty to withdraw the amount. In view of these findings, the alternative reliefs covered by Issue Nos.2 and 3 for refund of advance with interest do not survive for consideration. As far as Issue No.4 is concerned, it is on the issue of payment of Court fee. As the sale consideration is reduced based on the survey of the land; the Court concurs with the finding of the lower Court on the issue of Court fee.

(Issue 4).

Thus, in conclusion, AS.No.521 of 2005 is allowed and AS.No.498 of 2005 is dismissed. No order as to costs.

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

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2018(1) L.S. 259

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

Present:
The Hon'ble Mr. Justice Sanjay Kumar &
The Hon'ble Mr. Justice M.Seetharama Murti

Md. Vahed Miya ..Appellant

Vs.

The State of A.P., ..Respondent

(INDIAN) PENAL CODE, Secs.302, 307 & 498-A - Prosecutions case rested essentially upon the dying declarations – Appellant/ Accused was held guilty for murdering of his wife/deceased by Trial Court.

Held - Inconsistencies in dying declarations, in the absence of any direct evidence as to the incident, would necessitate benefit of doubt being extended to accused - There is no independent corroborative evidence - In these circumstances, Court necessarily has to extend the benefit of doubt to the accused - Appeal is accordingly allowed, acquitting appellant by setting aside the judgment of Trial Court.

Crl.No.1274/2012 Date:16-2-2018

Mr.Ammaji Nettem, (Legal Aid Counsel), Advocate for the Appellant.

Public Prosecutor, Advocate for the Respondent.

J U D G M E N T

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

This appeal under Section 374(2) CrPC is directed against the judgment dated 08.12.2011 passed by the Principal Sessions Court, Medak at Sangareddy, in Sessions Case No.563 of 2008. By the said judgment, the Sessions Court convicted the appellant-A1 under Section 302 IPC holding him guilty of murdering his wife, Sulthana Begum, but acquitted him of the charge under Section 498-A IPC. He was sentenced to undergo imprisonment for life along with payment of fine of Rs.10,000/- and in default, to suffer rigorous imprisonment for six months. A2, the mother of the appellant-A1, died and the case against her abated. A3, the son of the appellant-A1 through his first wife, was acquitted of the charges under Section 498-A and 302 IPC.

The prosecutions case was as follows: On 17.12.2006, the Assistant Sub-Inspector of Police, R.C.Puram (P.W.11), was instructed by the Sub-Inspector of Police, R.C.Puram (P.W.13), to record the statement of Sulthana Begum, who was admitted in the burns ward at Osmania General Hospital, Hyderabad, having suffered burn injuries. P.W.11 went to the hospital and upon the Duty Doctor identifying Sulthana Begum,

he recorded her statement (Ex.P9) at 8.00 P.M. on that day and obtained her right thumb impressions therein. Upon receipt of Ex.P9 from P.W.11, at 11.00 P.M. on the same day, P.W.13 registered a case in Crime No.441 of 2006 under Sections 307 and 498-A IPC. Ex.P2 is the FIR. On 18.12.2006, P.W.13 himself visited the Osmania General Hospital, Hyderabad, and recorded the statement of Sulthana Begum, apart from the statements of P.Ws.1 to 5 and Modin Bee (L.W.5). He then visited the scene of the offence and recorded the statements of P.W.6 and the neighbours, G.Anjamma (L.W.8) and Balamani @ Swaroopa (L.W.10). He secured the presence of P.Ws.7 and 8 and conducted the scene of the offence panchanama in their presence. He also seized a kerosene bottle (M.O.1). Ex.P13 is the scene of the offence panchanama along with the rough sketch. On 20.12.2006 at about 8.00 A.M., P.W.13 received intimation of the death of Sulthana Begum and altered the provision of law to Section 302 IPC. Ex.P14 is the alteration memo. He then handed over the case diary to the Circle Inspector of Police (P.W.12). Thereupon, P.W.12 took up investigation in the case. He again orally examined the witnesses but did not record their statements as they were already recorded. He conducted an inquest over the body of the deceased in the presence of Shaik Khasim (L.W.13) and Raheemunnisa (L.W.14). Ex.P10 is the inquest report. He then sent the body for post-mortem examination. Ex.P11 is the post-mortem examination report certifying that death was caused by burns. He arrested A1 and A2 on 05.01.2007. A3 was arrested on 16.03.2007. After conclusion of the investigation, he laid the charge sheet against the three accused.

As per the charge sheet, the case of the prosecution, while replicating the contents of the statement recorded in Ex.P9, was that Sulthana Begum was the third wife of the appellant-A1 and was staying with him and A2, his mother. The second marriage of the appellant-A1 was not disclosed at the time he married Sulthana Begum. However, when the appellant-A1 received provident fund amount of Rs.30,000/- from Shapurnagar factory, where he worked earlier, the second wife of the accused came to him and took Rs.10,000/-. She started staying with the accused but Sulthana Begum did not allow her to do so. Due to the quarrels between them, the second wife left the house. Later, the step-son of Sulthana Begum - A3, the son of the appellant-A1 through his first wife, came and started staying in the house. There were frequent quarrels between Sulthana Begum and A1 to A3. On 16.12.2006 at about 6.00 P.M., a quarrel took place between Sulthana Begum, on the one hand, and A2 and A3, on the other, in the presence of A1 and A3 became furious and told A1 to kill Sulthana Begum. Thereupon, A1 beat Sulthana Begum mercilessly, poured kerosene over her and set her on fire.

The charges framed by the Sessions Court against the three accused read as under:

CHARGE No.1:

That you A1 to A3 on 16th day of December, 2006 at 1800 hours at Nethajinagar Bandlaguda being husband, mother-in-law and brother-in-law of the deceased Sulthana Begum, w/o Vaheed Miya, aged 25 years, subjected the such woman to cruelty due to matrimonial disputes, and thereby you committed an offence punishable under section 498-A IPC and within my cognizance.

CHARGE No.2:

That, you A1 to A3 on the same day time and place mentioned supra, committed murder by intentionally (or knowingly) causing the death of wife of A1 of you viz. Sulthana Begum, aged 25 years by beating her and pouring Kerosene on her and setting fire to her body, that you thereby committed an offence punishable under section 302 of Indian Penal Code and within my cognizance.

All the accused denied the charges and claimed to be tried. Thereupon, the prosecution examined 15 witnesses and marked in evidence 16 exhibits. M.O.1 was also marked. The defence did not choose to adduce any evidence. Upon considering the evidence, oral and documentary, the Sessions Court passed the judgment as aforestated, leading to this appeal by A1.

Significantly, the record reflects that P.Ws.1, 2 and 3, the siblings of Sulthana Begum, turned hostile and did not support the prosecutions case. They all stated that their sister had committed suicide. P.Ws.4 and 5, cousin brothers of the deceased, also turned hostile and said the same. P.W.6, a resident of the same locality, also turned hostile and claimed that he had no knowledge of the affairs of the family of the accused or the death of the deceased. P.Ws.7 and 8, witnesses to the scene of the offence panchanama, also turned hostile. P.Ws.9 and 10, witnesses to the alleged confession panchanama, also did not support the prosecutions case and turned hostile. P.Ws.11, 12 and 13, police officials, spoke of the various steps taken by them during the course of the investigation. P.W.14, an Assistant Professor in Osmania General Hospital, Hyderabad, stated that he conducted the autopsy over the body of the deceased and confirmed that Ex.P11 was the post- mortem examination report furnished by him. He confirmed that the burns were to the extent of 80%. P.W.15, the learned II Metropolitan Magistrate for Railways at Secunderabad at the relevant time, stated that he received a requisition from the Station House Officer, Afzalgunj Police Station, on 17.12.2006 at 4.30 A.M. to record the statement of Sulthana Begum who was admitted in the burns ward of Osmania General Hospital, Hyderabad. He then proceeded to the burns ward of the said hospital where he identified the patient with the help of the Duty Doctor. After putting preliminary questions to her to understand her fitness to give a statement, he opined that she was conscious, coherent and capable of giving a statement and proceeded to record it. He also obtained the endorsement of the Duty Doctor to the effect

that the patient was in a fit state of mind to give the statement. He obtained her right toe impressions therein as her thumbs were burnt. He then obtained the endorsement of the Duty Doctor that the patient was coherent and fit throughout the recording of the statement. He confirmed that Ex.P15 was the requisition received by him and Ex.P16 was the dying declaration of the deceased.

As practically all the prosecution witnesses turned hostile, the prosecutions case rested essentially upon the dying declarations, Exs.P9 and P16. The Sessions Court convicted the appellant-A1 relying upon the same.

In this regard, it may be noted that P.W.11 admitted that he did not obtain certification of the Duty Doctor that Sulthana Begum was in a fit state of mind to give a statement before he recorded Ex.P9. This statement was recorded by P.W.11 on 17.12.2006 at 8.00 P.M.

The requisition (Ex.P15) given by the Sub-Inspector of Police, Afzalgunj Police Station, to P.W.15 bears out that Medico-Legal Case No.48281, IP No.44341 of ABC Ward of Osmania General Hospital, Hyderabad, finds mention therein. The requisition stated to the effect that one patient, by name Sultana W/o. Vahed, was admitted in ABC ward of Osmania General Hospital, Hyderabad, on 16.12.2006 at 11.40 P.M. and she was alleged to have set fire to herself on 16.12.2006 at 7.30 P.M. at her residence and received 82% injuries. The Duty Doctor was stated to have advised recording of her dying declaration. This document bears the endorsement that it was received by P.W.15 on 17.12.2006 at 4.30 P.M. As P.W.15 recorded the dying declaration at 5.00 A.M., the mentioning of the time on the requisition (Ex.P.15) as 4.30 P.M. is obviously a mistake and it should be read as 4.30 A.M. In effect, Ex.P16 dying declaration was much earlier in point of time to Ex.P9 dying declaration, recorded by P.W.11.

Ex.P16 dying declaration reflects that the Duty Doctor certified at 5.00 A.M. on 17.12.2006 that the patient was conscious, coherent and in a fit state to give the dying declaration. It also records that P.W.15 asked the deceased her name and whether she knew Telugu and he then informed her that he was a Magistrate and that he had come to record her statement. From her replies to these questions, P.W.15 recorded the opinion that the patient was conscious, coherent and capable of making the statement and that she was in a fit condition to give the statement.

P.W.15 then asked her as to how she got burnt. In response, she stated thus: My husband returned home drunk at 6.00 P.M. that night and beat me. I then called my elder brother on the phone and asked him to come. When I returned home, my husband, Vahed, my husbands first wifes son, Mohammed, beat me severely. I received injury on my leg. Keeping me in the house, my husband poured kerosene over me and set me on fire. Due to the

flames, I raised cries. Someone came and poured a bowl of water on me. Meanwhile, my brothers and my relations came and brought me to the hospital in an auto. My husband and his first wifes son are responsible for my burning. They only burnt me.

P.W.15 then asked her as to how many years it was since her marriage and she replied that it was 1 years since she got married. She also stated that she had no children and that the first wife of her husband had expired but there were three children. P.W.15 then asked her as to how her husband used to look after her earlier and she replied that even earlier he used to beat and torture her and he used to drink heavily. She added that there were no disputes as to dowry.

Thereafter, the Duty Doctor certified at 5.25 A.M. that the patient was conscious, coherent and in a fit state of mind throughout the recording of the statement. The right toe marks of Sulthana Begum find place in both pages of Ex.P16.

Now, a look at Ex.P9 dying declaration. This statement was recorded by P.W.11 at 8.00 P.M. on 17.12.2006. On each page, the right thumb impression of Sulthana Begum is stated to have been obtained by him. Perusal of Ex.P9 statement reflects that it is much more detailed than Ex.P16. More pertinent to note, the version recorded therein is entirely different from that reflected in Ex.P16 dying declaration. Sulthana Begum is stated to have said that she was the second wife of the appellant-A1. Significantly, she did not mention the other second wife at all, who finds mention in the charge sheet. As to the events on the fateful evening of 16.12.2006, she said that her husband woke up at 4.00 P.M. and she made tea and after giving it to him, she also had some. She then told him that it was 4.00 P.M. and asked him whether he was going to work. He replied that he would not be going for work. She threatened to call her elder brother and her husband said that he would break her legs if she went out. Mohammed (A3) asked her as to why she was bothered whether her husband went to work or not. She asked him why he was interfering and when she went near him, he hit her and she hit him back. Thereupon, her husband also hit her and continued to beat her. Her mother-in-law (A2) went away muttering as to why they did not kill her. Then, both of them beat her severely and her husband went into the house and got a kerosene oil bottle and poured it over her. Mohammed stood at the gate. Her husband lit a matchstick, threw it on her and ran away. She cried out fire fire. One man came and poured water on her and put out the flames and she fell down. A tenant, who lives in their house and whose name might be Swaroopa, came there and asked whether there was no one. The basthi people then came there and scolded her husband and her mother-in-law and informed her aunt, Modin Bee (L.W.5), who came and called her brothers.

Surprisingly, P.W.11 claimed that he secured the right thumb impression of Sulthana

Begum on each page of Ex.P9. When P.W.15 noted at 5.00 A.M. on that day that her thumbs were burnt and that was the reason why he took her right toe impressions on Ex.P16, it is inexplicable as to how her thumb impressions could have been taken by P.W.11 in the night. Further, it is patent that apart from being far more detailed when compared to Ex.P16, the version put forth by Sulthana Begum, as recorded in Ex.P9, completely differed. In one, she said that her husband was drunk but not in the other. In fact, as per Ex.P9, he woke up at 4.00 P.M. and had the tea made by her. As per Ex.P16 dying declaration, the incident is stated to have occurred within the house, whereas Ex.P9 dying declaration speaks to the effect that Sulthana Begum was burnt outside the house. The scene of the offence panchanama and sketch also bear out that the offence was committed in the compound outside the house. However, no steps were taken by the police to examine the inside of the house to ascertain whether there was any indication of the deceased having been burnt inside the house and having run out thereafter.

Ms.Ammaji Nettem, learned counsel for the appellant-A1, would submit that in the light of the discrepancies in the two dying declarations, no credence can be given to either of them. She would point out that P.W.13 admitted in his deposition that he also recorded the statement of the deceased on 18.12.2006 but, for reasons unknown, the said statement was not produced. She would also point out that Ex.P12 First Information Report was only registered at 11.00 P.M. on 17.12.2006, despite the fact that a Medico Legal Case was registered long prior thereto, leading to Ex.P15 requisition being given to P.W.15 at 4.30 A.M. and recording of Ex.P16 dying declaration at 5.00 A.M. itself on that day. She would contend that the delay in the registration of the FIR leads to doubt in as much as Ex.P15 requisition recorded that it was a case of suicide. In the light of the aforestated circumstances, the learned counsel would submit that the conviction of the appellant-A1, resting solely upon Exs.P9 and P16 dying declarations, cannot be sustained. She relied upon case law to support her argument.

In STATE OF ANDHRA PRADESH V/s. P.KHAJA HUSSAIN (2010 (1) ALD (Crl.) 397 (SC), the Supreme Court held that in case of multiplicity of dying declarations, such declarations should be consistent on material facts. In SUNDARAPALLI SATYANARAYANA @ SATTIBABU V/s. STATE OF ANDHRA PRADESH (2011 (1) ALD (Crl.) 641 (AP), this Court, relying upon P.KHAJA HUSSAIN1, observed that inconsistencies in multiple statements of the deceased may become glaring contradictions and held, on facts, that differences in the narrative in the two dying declarations in that case were flagrant, leading to a circumstance where it would not be safe to convict on the strength thereof.

In KONIKINENI RAMA KOTESWARA RAO V/s. STATE OF ANDHRA PRADESH (2016 (1) ALD (Crl.) 634), a Division Bench of this Court observed that the statement recorded

from a seriously injured person partakes the character of a dying declaration if he dies thereafter and law attaches enormous importance to a dying declaration, as the presumption is always that a dying declaration reveals the true state of affairs. In this scenario, it was held that suppression of a dying declaration would have a serious impact upon the case of the prosecution. The Division Bench opined that there is no other alternative but to draw an inference that had the suppressed dying declaration recorded from the deceased been made part of the record, it would not have supported the case of the prosecution.

More recently, in HARIJANA NARASIMHA V/s. THE STATE OF ANDHRA PRADESH (Crl.A.No.34 of 2012 decided on 14.12.2017), a Division Bench of this Court, relying on SUDHAKAR V/s. STATE OF MAHARASHTRA (2012) 7 SCC 569) and RAJU DEVADE V/s. STATE OF MAHARASHTRA (AIR 2016 SC 3209), opined that inconsistencies in dying declarations, in the absence of any direct evidence as to the incident, would necessitate the benefit of doubt being extended to the accused. In SUDHAKAR5 and RAJU DEVADE6, the Supreme Court held to the effect that in the case of multiple dying declarations which were at variance with each other, the test of common prudence is to examine which of the dying declarations is corroborated by evidence and each dying declaration would have to be considered independently on its own merits, so as to appreciate its evidentiary value. The Supreme Court held that it was the duty of the Court to consider each such dying declaration in the correct perspective and satisfy itself as to which one of them reflects the true state of affairs.

Be it noted that, in P.MANI V/s. STATE OF T.N. (2006) 3 SCC 161), the Supreme Court affirmed that though a conviction could be recorded on the basis of a dying declaration alone, it must be found to be wholly reliable and in a case where suspicion could be raised as regards the correctness of the dying declaration, the Court would have to look for corroborative evidence before acting upon such a dying declaration.

In the present case, Ex.P15 requisition reflects that the police treated Sulthana Begums death as a suicide, but Ex.P16 dying declaration, recorded by P.W.15 pursuant thereto, was to the contrary. The case built up by the prosecution, as reflected in the charge sheet, finds no mention in either of the two dying declarations. There is no mention of an existing second wife, whereby Sulthana Begum would become the third wife. There is also no mention of the second wife having returned, leading to quarrels between her and the deceased. None of the prosecution witnesses, including the immediate family and other family members of the deceased, supported the prosecutions case. They all spoke in one voice of the deceased having committed suicide. Further, no explanation has been offered by the prosecution to account for the variations in time leading to delayed registration of the FIR. The glaring

inconsistency in Ex.P16 dying declaration is as to the place where the incident occurred. As per this dying declaration, the deceased was set on fire inside the house but this is not the prosecutions case at all. No evidence whatsoever was gathered by the police as to the possibility of the incident having occurred within the house.

Coming to Ex.P9 dying declaration, it was recorded by P.W.11 but without even obtaining certification from the Duty Doctor as to the mental status of the deceased and her fitness to give such a statement. P.W.11 also did not record any opinion to the effect that he satisfied himself as to the mental fitness of the deceased to give such a statement. The circumstance of the right thumb impressions of Sulthana Begum being obtained therein, as already stated supra, also adds a dubious character to it. That apart, when the version recorded by P.W.11 therein is at complete variance with the version given by the deceased herself to P.W.15, as recorded in Ex.P16, corroboration by independent evidence becomes essential. Significantly, Modin Bee (L.W.5), the aunt of the deceased, who was first summoned as per Ex.P9 dying declaration, was not even examined. Similarly, Balamani @ Swaroopa (L.W.10), who also finds mention therein as one of the first persons to arrive upon the scene, was not examined.

To compound matters further, the prosecution, for reasons best known to it, did not even produce the statement of the deceased recorded by P.W.13 on 18.12.2006.

Taken cumulatively these factors render nugatory the evidentiary value of Exs.P9 and P16 dying declarations. The inconsistencies and contradictions therein completely demolish the prosecutions case. There is no independent corroborative evidence to support either of the versions recorded in Ex.P9 and Ex.P16. In such circumstances, this Court necessarily has to extend the benefit of doubt to the appellant-A1. The conviction of the appellant-A1, resting solely upon Exs.P9 and P16 dying declarations, therefore cannot be sustained.

The appeal is accordingly allowed, setting aside the judgment dated 08.12.2011 in Sessions Case No.563 of 2008 on the file of the Principal Sessions Court, Medak at Sanga Reddy, and acquitting the appellant-A1 of the charge under Section 302 IPC. He shall be set at liberty forthwith, if not required in relation to any other case. Fine amount, if any, paid by him shall also be refunded.

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11. The subsequent decision of a Bench of three judges of this Court in **HDFC Bank Limited** v **Reshma** (supra) involved an agreement of hypothecation. The Tribunal held the financier of the vehicle to jointly and severally liable together with the owner on the ground that it was under an obligation to ensure that the borrower had not neglected to get the vehicle insured. The High Court had dismissed the appeal filed by the **Bank** against the order of the Tribunal holding it liable together with the owner. In the appeal before this Court, Justice Dipak Misra (as the learned Chief Justice then was) adverted during the course of the judgment to the principles laid down by this Court in several earlier decisions, including of this Court (Mohan Benefit (P) Ltd. v. Kachraji Raymalji, (1997) 9 SCC 103 : 1997 SCC (Cri) 610; Rajasthan SRTC v. Kailash Nath Kothari, (1997) 7 SCC 481 ; National Insurance Co. Ltd. v. Deepa Devi, (2008) 1 SCC 414 : (2008) 1 SCC (Civ) 270 : (2008) 1 SCC (Cri) 209; Mukesh K. Tripathi v. LIC : (2004) 8 SCC 387 : 2004 SCC (L&S) 1128, Ramesh Mehta v. Sanwal Chand Singhvi (2004) 5 SCC 409, State of Maharashtra v. Indian Medical Assn. (2002) 1 SCC 589 : 5 SCEC 217, Pandey & Co. Builders (P) Ltd. v. State of Bihar (2007) 1 SCC 467 and placed reliance on Kailash Nath Kothari [Rajasthan SRTC v. Kailash Nath Kothari, (1997) 7 SCC 481, National Insurance Co. Ltd. v. Durdadahya Kumar Samal : (1988) 1 ACC 204 : (1988) 2 TAC 25 (Ori) and Bhavnagar Municipality v. Bachubhai Arjanbhai : 1995 SCC OnLine Guj 167 : AIR 1996 Guj 51; Godavari Finance Co. v. Degala Satyanarayanamma, (2008) 5 SCC 107 : (2008) 2 SCC (Cri) 531; Pushpa v. Shakuntala, (2011) 2 SCC 240 : (2011) 1 SCC (Civ) 399 : (2011) 1 SCC (Cri) 682; T.V. Jose [(2001) 8 SCC 748 : 2002 SCC (Cri) 94] , SCC p. 51, para 10; U.P. SRTC v. Kulsum, (2011) 8 SCC 142 : (2011) 4 SCC (Civ) 66 : (2011) 3 SCC (Cri) 376; Purnya Kala Devi v. State of Assam, (2014) 14 SCC 142 : (2015) 1 SCC (Cri) 304 : (2015) 1 SCC (Civ) 251.").

Noticing that the case before the court involved a hypothecation agreement, this Court held:

"22. In the present case, as the facts have been unfurled, the appellant Bank had financed the owner for purchase of the vehicle and the owner had entered into a hypothecation agreement with the Bank. The borrower had the initial obligation to insure the vehicle, but without insurance he plied the vehicle on the road and the accident took place. Had the vehicle been insured, the insurance company would have been liable and not the owner. There is no cavil over the fact that the vehicle was the subject of an agreement of hypothecation and was in possession and control of Respondent 2."(id at page 693)

Since the Second respondent was in control and possession of the vehicle this Court held that the High Court was in error in fastening the liability on the financier. The failure of the Second respondent to effect full payment for obtaining an insurance cover was neither known to the financier nor was there any collusion on its part. Consequently, the High Court was held to be in error in fastening liability on the financier.

12. The consistent thread of reasoning which emerges from the above decisions is that in view of the definition of the expression 'owner' in Section 2(30), it is the person in whose name the motor vehicle stands registered who, for the purposes of the Act, would be treated as the 'owner'. However, where a person is a minor, the guardian of the minor would be treated as the owner. Where a motor vehicle is subject to an agreement of hire purchase, lease or hypothecation, the person in possession of the vehicle under that agreement is treated as the owner. In a situation such as the present where the registered owner has purported to transfer the vehicle but continues to be reflected in the records of the registering authority as the owner of the vehicle, he would not stand absolved of liability. Parliament has consciously introduced the definition of the expression 'owner' in Section 2(30), making a departure from the provisions of Section 2(19) in the earlier Act of 1939. The principle underlying the provisions of Section 2(30) is that the victim of a motor accident or, in the case of a death, the legal heirs of the deceased victim should not be left in a state of uncertainty. A claimant for compensation ought not to be burdened with following a trail of successive transfers, which are not registered with the registering authority. To hold otherwise would be to defeat the salutary object and purpose of the Act. Hence, the interpretation to be placed must facilitate the fulfilment of the object of the law. In the present case, the First respondent was the 'owner' of the vehicle involved in the accident within the meaning of Section 2(30). The liability to pay compensation stands fastened upon him. Admittedly, the vehicle was uninsured. The High Court has proceeded upon a misconstruction of the judgments of this Court in **Reshma** and **Purnya Kala Devi**.

13. The submission of the Petitioner is that a failure to intimate the transfer will only result in a fine under Section 50(3) but will not invalidate the transfer of the vehicle. In **Dr T V Jose**, this Court observed that there can be transfer of title by payment of consideration and delivery of the car. But for the purposes of the Act, the person whose name is reflected in the records of the registering authority is the owner. The owner within the meaning of Section 2(30) is liable to compensate. The mandate of the law must be fulfilled.

14. For the above reasons we allow the appeal and direct that the liability to compensate the claimants in terms of the judgment of the Tribunal will stand fastened upon the First respondent. The judgment of the High Court is set aside. In the circumstances of the case, there shall be no order as to costs.

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2018 (1) L.S. 69 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

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

Bar Council of India
& Ors., ..Appellants

Vs.

A.K. Balaji & Ors., ..Respondents

ADVOCATES ACT, Secs.17, 29 & 33 – Civil Appeal - Whether foreign law firms/lawyers are permitted to practice law in India.

Held - Practice of law includes litigation as well as non litigation - Advocates enrolled with the Bar Council alone are entitled to practice law - Provisions of the Advocates Act does not allow foreign law firms or foreign lawyers to practice profession of law in India – Regulations of Advocates Act applies to individuals and firms/ Companies also.

J U D G M E N T
(per the Hon'ble Mr.Justice
Adarsh Kumar Goel)

1. The issue involved in this batch of matters is whether foreign law firms/lawyers are permitted to practice in India. Reference needs to be made to two leading matters. Civil Appeal Nos.7875-79 of 2015 have been filed by the Bar Council of India against the Judgment of Madras High Court dated 21st February, 2012 in A.K. Balaji versus The Government of India (AIR 2012 Mad 124). Civil Appeal No.8028 of 2015 has been filed by Global Indian Lawyers against the judgment of Bombay High Court dated 16th December, 2009 in Lawyers Collective versus Bar Council of India (2010 (2) Mah LJ 726).

2. The Madras High Court held as follows:

"63. After giving our anxious consideration to the matter, both on facts and on law, we come to the following conclusion :-

(i) Foreign law firms or foreign lawyers cannot practice the profession of law in India either on the litigation or non-litigation side, unless they fulfil the requirement of the Advocates Act, 1961 and the Bar Council of India Rules.

(ii) However, there is no bar either in the Act or the Rules for the foreign law firms or foreign lawyers to visit India for a temporary period on a "fly in and fly out" basis, for the purpose of giving legal advise to their clients in India regarding foreign law or their own system of law and on diverse international legal issues.

(iii) Moreover, having regard to the aim and object of the International Commercial Arbitration introduced in the Arbitration and Conciliation Act, 1996, foreign lawyers cannot be debarred to come to India and

conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration.

(iv) The B.P.O. Companies providing wide range of customised and integrated services and functions to its customers like word-processing, secretarial support, transcription services, proof-reading services, travel desk support services, etc. do not come within the purview of the Advocates Act, 1961 or the Bar Council of India Rules. However, in the event of any complaint made against these B.P.O. Companies violating the provisions of the Act, the Bar Council of India may take appropriate action against such erring companies."

3. The Bombay High Court, on the other hand, concluded as follows:

"60. For all the aforesaid reasons, we hold that in the facts of the present case, the RBI was not justified in granting permission to the foreign law firms to open liaison offices in India under Section 29 of the 1973 Act. We further hold that the expressions ' to practise the profession of law' in Section 29 of the 1961 Act is wide enough to cover the persons practising in litigious matters as well as persons practising in non litigious matters and, therefore, to practise in non litigious matters in India, the respondent Nos. 12 to 14 were bound to follow the provisions contained in the 1961 Act. The petition is disposed of accordingly with no order as to costs."

4. When the matter against the judgment of the Madras High Court came up for hearing before this Court on 4th July, 2012, following interim order was passed :

"In the meanwhile, it is clarified that Reserve Bank of India shall not grant any permission to the foreign law firms to open liaison offices in India under Section 29 of the Foreign Exchange Regulation Act, 1973. It is also clarified that the expression "to practice the profession of law" under Section 29 of the Advocates Act, 1961 covers the persons practicing litigious matters as well as non-litigious matters other than contemplated in para 63(ii) of the impugned order and, therefore, to practice in non-litigious matters in India the foreign law firms, by whatever name called or described, shall be bound to follow the provisions contained in the Advocates Act, 1961."

The said order has thereafter continued and is still in force.

5. In Civil Appeal Nos.7875-7879 of 2015, writ petition was filed before the Madras High Court by one A.K. Balaji, Advocate. Apart from official respondents, 32 law firms of U.K., U.S.A., France and Australia have been impleaded as respondents 9 to 40. Prayer in the writ petition is to take action against the original respondents 9 to 40 or any other foreign law firms or foreign lawyers illegally practicing the profession of law in India and direct them to refrain from having any illegal practice on the litigation side and in the field of commercial transactions in any manner whatsoever.

PLEADINGS

6. Averments in the petition are that the writ petitioner was an advocate enrolled

with the Bar Council of Tamil Nadu. To practice law in India, a person has to be Indian citizen and should possess degree in law from a recognized University in India. Nationals of other countries could be admitted as advocates in India only if citizens of India are permitted to practice in such other countries. Foreign degree of law from a University outside India requires recognition by the Bar Council of India. The Indian advocates are not allowed to practice in U.K., U.S.A., Australia and other foreign nations except on fulfilling onerous restrictions like qualifying tests, experience, work permit. Foreign lawyers cannot be allowed to practice in India without reciprocity.

7. Under the Advocates Act (the Act), a foreigner is not entitled to practice in India in view of bar contained in Section 29. However, under the guise of LPOs (Legal Process Outsourcing), conducting seminars and arbitrations, foreign lawyers are visiting India on Visitor Visa and practicing illegally. They also violate tax and immigration laws. They have also opened their offices in India for practice in the fields of mergers, take-overs, acquisitions, amalgamations, etc. Disciplinary jurisdiction of the Bar Council extends only to advocates enrolled under the Act. In India, the legal profession is considered as a noble profession to serve the society and not treated as a business but the foreign law firms treat the profession as trade and business venture to earn money. Indian lawyers are prohibited from advertising, canvassing and solicit work but foreign law firms are advertising through websites and canvass and solicit work by assuring results. Many accountancy and management firms are also employing graduates and thus rendering legal services.

8. The stand of the Union of India initially was that if foreign law firms are not allowed to take part in negotiations, settling of documents and arbitrations in India, it will obstruct the aim of making India a hub of international arbitration. Many arbitrations with Indian Judges as arbitrators and Indian lawyers are held outside India where foreign and Indian law firms advise their clients. Barring the entry of foreign law firms for arbitrations in India will result in many arbitrations shifting to Singapore, Paris and London, contrary to the declared policy of the Government and against national interest. However, its final stand in affidavits dated 19th April, 2011 and 17th November, 2011 was different as recorded in Para 3 of the High Court Judgment as follows :

"3. The first respondent Union of India filed four counter affidavits on 19.08.2010, 24.11.2010, 19.04.2011 and 17.11.2011. In one of the counter affidavits, it is stated that the Bar Council of India, which has been established under the Advocates Act, 1961, regulates the advocates who are on the "Rolls", but law firms as such are not required to register themselves before any statutory authority, nor do they require any permission to engage in nonlitigation practice. Exploiting this loophole, many accountancy and management firms are employing law graduates who are rendering legal services, which is contrary to the provisions of the Advocates Act. It is stated that the Government of India along with the Bar Council of India is considering this issue and is trying to formulate a regulatory

framework in this regard. The 1st respondent in his counter warns that if the foreign law firms are not allowed to take part in negotiations, settling up documents and arbitrations in India, it will have a counter productive effect on the aim of the government to make India a hub of International Arbitration. In this connection, it is stated that many arbitrations with Indian Judges and Lawyers as Arbitrators are held outside India, where both foreign and Indian Law Firms advise their clients. If foreign law firms are denied entry to deal with arbitrations in India, then India will lose many of the arbitrations to Singapore, Paris and London. It will be contrary to the declared policy of the government and against the national interest. In the counter affidavit filed on 19.04.2011, it is stated that a proposal to consider an amendment to Section 29 of the Advocates Act, 1961 permitting foreign law firms to practice law in India in non litigious matters on a reciprocity basis with foreign countries is under consultation with the Bar Council of India. Finally, in the counter filed on 17.11.2011, it is stated that the Government of India has decided to support the stand of the Bar Council of India that the provisions of the Advocates Act, 1961 would apply with equal force to both litigious and non-litigious practice of law, and it is only persons enrolled under Section 24 of the Act, who can practice before the Indian Courts."

(emphasis added)

9. In this Court, stand of the Union of India is that presently it is waiting for the Bar Council of India to frame rules on the subject. However, it can frame rules under Section 49A at any stage.

10. Stand of the Bar Council of India before the High Court is that even non litigious practice is included in the practice of law which can be done only by advocates enrolled under the Act. Reliance was placed on the judgment of the Bombay High Court in Lawyers Collective (supra). Further reference was made to Sections 24 and 29 of the Act. Section 47(2) read with Section 49(1)(e) provides for recognition of qualifications of foreigners being recognized for practice. It was submitted that practice of foreign lawyers in India should be subject to regulatory powers of the Bar Council.

11. Stand of the foreign law firms, inter alia, is that there is no bar to a company carrying on consultancy/support services in the field of protection and management of intellectual, business and industrial proprietary rights, carrying out market service and market research, publication of reports, journals etc. A person not appearing before Courts or Tribunals and not giving legal advice cannot be said to be practice of law. The ninth respondent stated that it was a part of group of companies and not a law firm and was duly registered under the Indian Companies Act, 1956. The tenth respondent, another foreign law firm, submitted that there is no violation of law in giving advice on foreign law. Even Indian lawyers are permitted to practice outside India and issue of reciprocity is a policy matter to be decided by the Government of India. It does not have a law office in India and does not give advice on Indian laws. In England, foreign lawyers are free to advice on their own system of

law without nationality requirement or qualification of England. The eleventh respondent is an American law firm and submitted that it advises clients on international legal issues from different countries. Indian clients are given advice through Indian lawyers and law firms which are enrolled with the Bar Council. There is no discrimination in U.S. against Indian citizens practicing law. Indian lawyers travel to US on temporary basis for consultation on Indian law issues.

12. The Act and the Bar Council Rules govern practice of Indian law and not foreign law. Participation in seminars and conferences does not constitute practice in law. The fourteenth respondent denied the existence of its office in India and that it was practicing Indian law. It also took the same stand as Respondent No.11 that regulatory framework for advocates did not govern practice of foreign law. It denied that it is operating a Legal Process Outsourcing office (LPOs) in India. Its lawyers fly in and fly out of India on need basis to advice clients on international transactions. To the extent Indian law is involved, such matters are addressed by Indian lawyers. If the foreign law firms are prevented from advice on foreign law, the transaction cost of Indian clients for consultation on foreign law will increase. Other foreign law firms have also taken more or less similar stand. Fifteenth respondent stated that it is a Business Process Outsourcing (BPO) company providing wide range of customized and integrated services and functions. The sixteenth respondent also stated that it has no office in India and is only rendering services other than practice of Indian law. The eighteenth respondent stated that it does not have any office in India and does not practice law in India. It only advises on non Indian law. Respondent Nos.19, 26, 39 and 40 stated that they are limited law partnerships under Laws of England. They do not have any law office in India. Respondents Nos.20, 21, 24, 25, 27, 28, 30, 31, 32, 33, 34 and 38 also stated that they do not have any office in India and do not practice Indian law. Indian lawyers cannot advice on foreign laws and the requirement of Indian litigants in regard is met by foreign lawyers. Its lawyers fly in and fly out of India on need basis to advise the clients on international transactions. To the extent Indian law is involved such matters are addressed by Indian lawyers.

13. The respondent No.22 stated that it is an international law firm but does not have any office in India. It advises clients on laws other than Indian laws. Its India Practice Group advises clients on commercial matters involving an "Indian Element" relating to mergers, acquisitions, capital markets, projects, energy and infrastructure, etc. from an international legal perspective and it does not amount to practice in Indian law. Respondent No.23 stated that it is only advising on matters of English, European Union and Hong Kong laws. It has working relationships with leading law firms in major jurisdictions and instructs appropriate local law firms to provide local law advice. Respondent No.29 stated that it is a limited law partnership registered in England and Wales and does not have office in India. It does not represent parties in Indian courts

nor advises on Indian law. Respondent No.35 stated that it does not maintain any office in India and its expertise in international law. 36th Respondent stated that it does not practice Indian law and has no office in India nor it operates any LPO. Its lawyers fly in and fly out on need basis to advise clients on international transactions or matters involving Australian laws or international Benches to which there is an Indian component. Working of Indian laws is entrusted to Indian lawyers. The 37th Respondent denied that it has any office in India or is running LPO in India. It only advises with respect to regulatory laws other than Indian law.

FINDINGS

14. The High Court upheld the plea of the foreign law firms to the effect that there was no bar to such firms taking part in negotiations, settling of documents and conducting arbitrations in India. There was no bar to carrying on consultancy/support services in the field of protection and management of intellectual, business and industrial proprietary rights, carrying out market survey and research, publication of reports, journals etc. without rendering any legal advice. This could not be treated as practice of law in India. Referring to Section 2(1)(f) of the Arbitration and Conciliation Act, 1996 (the Arbitration Act), it was observed that if in international commercial arbitration, India is chosen as the seat of arbitration, the foreign contracting party is bound to seek assistance from lawyers of their own country on the contract. There could be no prohibition for such foreign lawyers to advise their clients on the foreign law.

15. Judgment of the Bombay High Court in Lawyers Collective (supra) was distinguished on the ground that setting up of law offices for litigious and non litigious matters was different but if a foreign law firm without establishing any liaison office in India offers advice to their clients on foreign law, there was no legal bar to do so.

16. The Bombay High Court in its judgment observed:

"44. It appears that before approaching RBI, these foreign law firms had approached the Foreign Investment Promotion Board (FIPB for short) a High Powered body established under the New Industrial Policy seeking their approval in the matter. The FIPB had rejected the proposal submitted by the foreign law firms. Thereafter, these law firms sought approval from RBI and RBI granted the approval in spite of the rejection of FIPB. Though specific grievance to that effect is made in the petition, the RBI has chosen not to deal with those grievances in its affidavit in reply. Thus, in the present case, apparently, the stand taken by RBI & FIPB are mutually contradictory.

45. In any event, the fundamental question to be considered herein is, whether the foreign law firms namely respondent Nos. 12 to 14 by opening liaison offices in India could carry on the practise in non litigious matters without being enrolled as Advocates under the 1961 Act ?

46. Before dealing with the rival contentions on the above question, we may quote Sections 29, 30, 33 and 35 of the 1961 Act, which read thus:

29. Advocates to be the only recognised class of persons entitled to practice law. - Subject to the provisions of this Act and any rules made there under, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates. (not brought into force so far)

30. Right of advocates to practise. -Subject to provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends,

(i) in all Courts including the Supreme Court;

(ii) before any tribunal or person legally authorized to take evidence;

(iii) before any other authority or person before whom such advocate by or under any law for the time being in force entitled to practise.

33. Advocates alone entitled to practise. -Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practice in any Court or before any authority or person unless he is enrolled as an advocate under this Act.

35. Punishment of advocates for misconduct - (1) Where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee.

(1-A) The State Bar Council may, either of its own motion or on application made to it by any person interested, withdraw a proceeding pending before its disciplinary committee and direct the inquiry to be made by any other disciplinary committee of that State Bar Council.

(2) The disciplinary committee of a State Bar Council [***] shall fix a date for the hearing of the case and shall cause a notice thereof to be given to the advocate concerned and to the Advocate-General of the State.

(3) The disciplinary committee of a State Bar Council after giving the advocate concerned and the Advocate-General an opportunity of being heard, may make any of the following orders, namely:

(a) dismiss the complaint or, where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed;

(b) reprimand the advocate;

(c) suspend the advocate from practice or such period as it may deem fit;

(d) remove the name of the advocate from the State roll of advocates.

(4) Where an advocate is suspended from practice under Clause (c) of Sub-section (3), he shall, during the period of suspension, be debarred from practising in any Court or before any authority or person in India.

(5) Where any notice is issued to the Advocate-General under Subsection (2), the Advocate-General may appear before the disciplinary committee of the State Bar Council either in person or through any advocate appearing on his behalf. Explanation-In this section, (Section 37 and Section 38), the expressions "Advocate-General" and "Advocate-General of the State" shall, in relation to the Union territory of Delhi, mean the Additional Solicitor General of India.

47. The argument of the foreign law firms is that Section 29 of the 1961 Act is declaratory in nature and the said section merely specifies the persons who are entitled to practise the profession of law. According to the respondent Nos. 12 to 14, the expression 'entitled to practise the profession of law' in Section 29 of the 1961 Act does not specify the field in which the profession of law could be practised. It is Section 33 of the 1961 Act which provides that advocates alone are entitled to practise in any Court or before any authority or person. Therefore, according to respondent Nos. 12 to 14 the 1961 Act applies to persons practising as advocates before any Court / authority and not to persons practising in non litigious matters. The question, therefore, to be considered is, whether the 1961 Act applies only to persons practising in litigious matters, that is, practising before Court and other authorities ?

48. In the statements of Objects & Reasons for enacting the 1961 Act, it is stated that the main object of the Act is to establish All India Bar Council and a common roll of advocates and Advocate on the common roll having a right to practise in any part of the country and in any Court, including the Supreme Court. Thus, from the Statement of Objects and Reasons, it is seen that the 1961 Act is intended to apply to (one) persons practising the profession of law in any part of the country and (two) persons practising the profession of law in any Court including the Supreme Court. Thus, from the statement of objects and reasons it is evident that the 1961 Act is intended to apply not only to the persons practising before the Courts but it is also intended to apply to persons who are practising in non litigious matters outside the Court.

49. Apart from the above, Section 29 of the 1961 Act specifically provides is that from the appointed day, there shall be only one class of persons entitled to practice the profession of law, namely Advocates. It is apparent that prior to the 1961 Act there were different classes of persons entitled to practise the profession of law and from the appointed day all these class of persons practising the profession of law, would form one class, namely, advocates. Thus, Section 29 of the 1961 Act clearly provides that from

the appointed day only advocates are entitled to practise the profession of law whether before any Court / authority or outside the Court by way of practise in non litigious matters.

50. Section 33 of the 1961 Act is a prohibitory section in the sense that it debars any person from appearing before any Court or authority unless he is enrolled as an advocate under the 1961 Act. The bar contained in Section 33 of the 1961 Act has nothing to do with the persons entitled to be enrolled as advocates under Section 29 of the 1961 Act. A person enrolled as an advocate under Section 29 of the 1961 Act, may or may not be desirous of appearing before the Courts. He may be interested in practising only in non litigious matters. Therefore, the bar under Section 33 from appearing in any Court (except when permitted by Court under Section 32 of the 1961 Act or any other Act) unless enrolled as an advocate does not bar a person from being enrolled as an advocate under Section 29 of the 1961 Act for practising the profession of law in non litigious matters. The Apex Court in the case of Ex-Capt. Harish Uppal (supra) has held that the right to practise is the genus of which the right to appear and conduct cases in the Court may be a specie. Therefore, the fact that Section 33 of the 1961 Act provides that advocates alone are entitled to practice before any Court / authority it cannot be inferred that the 1961 Act applies only to persons practising in litigious matters and would not apply to person practising in non litigious matters.

51. It was contended that the 1961 Act does not contain any penal provisions for breaches committed by a person practicing in non-litigious matter and, therefore, the 1961 Act cannot apply to persons practising in non-litigious matters. There is no merit in this contention, because, Section 35 of the 1961 Act provides punishment to an advocate who is found to be guilty of professional or other misconduct. The fact that Section 45 of the 1961 Act provides imprisonment for persons illegally practicing in Courts and before other authorities, it cannot be said that the 1961 Act does not contain provisions to deal with the persons found guilty of misconduct while practising in non litigious matters. Once it is held that the persons entitled to practice the profession of law under the 1961 Act covers the persons practising the profession of law in litigious matters as well as non-litigious matters, then, the penal provisions contained in Section 35 of the 1961 Act would apply not only to persons practising in litigious matter, but would also apply to persons practising the profession of law in non-litigious matters. The very object of the 1961 Act and the Rules framed by the Bar Council of India are to ensure that the persons practising the profession of law whether in litigious matters or in non litigious matters, maintain high standards in professional conduct and etiquette and, therefore, it cannot be said that the persons practising in non litigious matters are not governed by the 1961 Act.

52. Strong reliance was placed by the counsel for the respondent No. 12 on the decision of the Apex Court in the case of O.N. Mohindroo (supra) in support of his

contention that the 1961 Act applies only to persons practising the profession of law before Courts / Tribunals / other authorities. It is true that the Apex Court in the above case has held that the 1961 Act is enacted by the Parliament in exercise of its powers under entry 77 and 78 in List I of the Seventh Schedule to the Constitution. However, the fact that entry 77 and 78 in List I refers to the persons practising before the Supreme Court and the High Courts, it cannot be said that the 1961 Act is restricted to the persons practising only before the Supreme Court and High Courts. Practising the profession of law involves a larger concept whereas, practising before the Courts is only a part of that concept. If the literal construction put forth by the respondents is accepted then, the Parliament under entry 77 & 78 in List I of the Seventh Schedule to make legislation only in respect of the advocates practicing before the Supreme Court / High Courts and the Parliament cannot legislate under that entry in respect of advocates practising before the District Courts/ Magistrate's Courts / other Courts / Tribunals / authorities and consequently, the 1961 Act to the extent it applies to advocates practising in Courts other than the High Courts and Supreme Court would be ultra vires the Constitution. Such a narrow construction is unwarranted because, once the Parliament invokes its power to legislate on advocates practising the profession of law, then the entire field relating to advocates would be open to the Parliament to legislate and accordingly the 1961 Act has been enacted to cover the entire field. In any event, the question as to whether the persons practicing the profession of law exclusively in non-litigious matters are covered under the 1961 Act, or not was not an issue directly or indirectly considered by the Apex Court in the case of O.N. Mohindroo (supra). Therefore, the decision of the Apex Court in the above case does not support the case of the contesting respondents.

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55. It was contended by the counsel for Union of India that if it is held that the 1961 Act applies to persons practising in non-litigious matters, then no bureaucrat would be able to draft or give any opinion in non-litigious matters without being enrolled as an advocate. There is no merit in the above argument, because, there is a distinction between a bureaucrat drafting or giving opinion, during the course of his employment and a law firm or an advocate drafting or giving opinion to the clients on professional basis. Moreover, a bureaucrat drafting documents or giving opinion is answerable to his superiors, whereas, a law firm or an individual engaged in non litigious matters, that is, drafting documents / giving opinion or rendering any other legal assistance are answerable to none. To avoid such anomaly, the 1961 Act has been enacted so as to cover all persons practising the profession of law be it in litigious matters or in non-litigious matters within the purview of the 1961 Act.

56. The argument that the 1961 Act and the Bar Councils constituted there under have limited role to play has been time and

again negatived by the Apex Court. Recently, the Apex Court in the case of Bar Council of India v. Board of Management, Dayanand College of Law reported in MANU/SC/5219/ 2006 : (2007) 2 SCC 202 held thus:

It may not be correct to say that the Bar Council of India is totally unconcerned with the legal education, though primarily legal education may also be within the province of the universities. But, as the apex professional body, the Bar Council of India is concerned with the standards of the legal profession and the equipment of those who seek entry into that profession. The Bar Council of India is also thus concerned with the legal education in the country. Therefore, instead of taking a pendantic view of the situation, the State Government and the recommending authority are expected to ensure that the requirement set down by the Bar Council of India is also complied with.

Thus, when efforts are being made to see that the legal profession stand tall in this fast changing world, it would be improper to hold that the 1961 Act and the Bar Council constituted there under have limited role to play in the field relating to practising the profession of law.

57. It is not in dispute that once a person is enrolled as an advocate, he is entitled to practise the profession of law in litigious matters as well as non-litigious matters. If the argument of the respondents that the 1961 Act is restricted to the persons practising the profession of law in litigious matters is accepted, then an advocate found guilty of misconduct in performing his duties while practising in non-litigious matters cannot be punished under the 1961 Act. Similarly, where an advocate who is debarred for professional misconduct can merrily carry on the practise in nonlitigious matters on the ground that the 1961 Act is not applicable to the persons practising the profession of law in non litigious matters. Such an argument which defeats the object of the 1961 Act cannot be accepted.

58. It may be noted that Rule 6(1) in Chapter III Part VI of the Bar Council of India Rules framed under Section 49(1) (ah) of the 1961 Act provides that an advocate whose name has been removed by an order of the Supreme Court or a High Court or the Bar Council as the case may be, shall not be entitled to practise the profession of law either before the Court and authorities mentioned under Section 30 of the 1961 Act, or in chambers, or otherwise. The above rule clearly shows that the chamber practise, namely, practise in non litigious matters is also within the purview of the 1961 Act.

59. Counsel for the Union of India had argued that the Central Government is actively considering the issue relating to the foreign law firms practising the profession of law in India. Since the said issue is pending before the Central Government for more than 15 years, we direct the Central Government to take appropriate decision in the matter as expeditiously as possible. Till then, the 1961 Act as enacted would prevail, that is, the persons practising the profession of law whether in litigious matters or non litigious matters would be governed

by the 1961 Act and the Bar Councils framed there under, apart from the powers of the Court to take appropriate action against advocates who are found guilty of professional misconduct.

60. For all the aforesaid reasons, we hold that in the facts of the present case, the RBI was not justified in granting permission to the foreign law firms to open liaison offices in India under Section 29 of the 1973 Act. We further hold that the expressions ' to practise the profession of law' in Section 29 of the 1961 Act is wide enough to cover the persons practising in litigious matters as well as persons practising in non litigious matters and, therefore, to practise in non litigious matters in India, the respondent Nos. 12 to 14 were bound to follow the provisions contained in the 1961 Act. The petition is disposed of accordingly with no order as to costs."

17. The Madras High Court agreed with the above view as follows:

"44. As noticed above, the facts of the case before the Bombay High Court were that the respondents which were foreign law firms practising the profession of law in US/ UK sought permission to open their liaison office in India and render legal assistance to another person in all litigious and non-litigious matters. The Bombay High Court, therefore, rightly held that establishing liaison office in India by the foreign law firm and rendering liaisoning activities in all forms cannot be permitted since such activities are opposed to the provisions of the Advocates Act and the Bar Council of India Rules. We do not differ from the view taken by the Bombay High Court on this aspect."

18. The Madras High Court after above observation proceeded to consider the matter as follows:

"45. However, the issue which falls for consideration before this Court is as to whether a foreign law firm, without establishing any liaison office in India visiting India for the purpose of offering legal advice to their clients in India on foreign law, is prohibited under the provisions of the Advocates Act. In other words, the question here is, whether a foreign lawyer visiting India for a temporary period to advise his client on foreign law can be barred under the provisions of the Advocates Act. This issue was neither raised nor answered by the Bombay High Court in the aforesaid judgment."

19. It was held :

"51. We find force in the submission made by the learned counsel appearing for the foreign law firms that if foreign law firms are not allowed to take part in negotiations, for settling up documents and conduct arbitrations in India, it will have a counter productive effect on the aim of the Government to make India a hub of International Arbitration. According to the learned counsel, many arbitrations with Indian Judges and Lawyers as Arbitrators are held outside India, where both foreign and Indian law firms advise their clients. If foreign law firms are denied entry to deal with arbitrations in India, then India will lose

many of the arbitrations to foreign countries. It will be contrary to the declared policy of the Government and against the national interest. Some of the companies have been carrying on consultancy/support services in the field of protection and management of intellectual, business and industrial proprietary rights, carrying out market surveys and market research and publication of reports, journals, etc. without rendering any legal service, including advice in the form of opinion, but they do not appear before any courts or tribunals anywhere in India. Such activities cannot at all be considered as practising law in India. It has not been controverted that in England, foreign lawyers are free to advice on their own system of law or on English Law or any other system of law without any nationality requirement or need to be qualified in England.

52. Before enacting the Arbitration and Conciliation Act, 1996 the Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration have proposed amendments to the Act to make it more responsive to contemporary requirements. It was also recognised that the economic reforms in India may not fully become effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune with such reforms. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The Arbitration and Conciliation Act is, therefore, consolidated and amended to the law relating to domestic and international commercial arbitration as well as for the enforcement of foreign arbitral award. The Act was enacted as a measure of fulfilling India's obligations under the International Treaties and Conventions. On account of the growth in the international trade and commerce and also on account of long delays occurring in the disposal of suits and appeals in courts, there has been tremendous movement towards the resolution of disputes through alternative forum of arbitrators.

53. Section 2(1)(f) of the Act defines the term "International Commercial Arbitration" as under:-

(f) International Commercial Arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country.

54. From the above definition, it is manifestly clear that any arbitration matter between

the parties to the arbitration agreement shall be called an "international commercial arbitration" if the matter relates to the disputes, which may or may not be contractual, but where at least one of the parties habitually resides abroad whether a national of that country or not. The New York Convention will apply to an arbitration agreement if it has a foreign element or flavour involving international trade and commerce, even though such an agreement does not lead to a foreign award.

55. International arbitration is growing big time in India and in almost all the countries across the globe. India is a signatory to the World Trade Agreement, which has opened up the gates for many international business establishments based in different parts of the world to come and set up their respective businesses in India.

56. Large number of Indian Companies have been reaching out to foreign destinations by mergers, acquisition or direct investments. As per the data released by the Reserve Bank of India during 2009, the total out ward investment from India excluding that which was made by Banks, had increased 29.6% to U.S. Dollar 17.4 billion in 2007-08 and India is ranked third in global foreign direct investment. Overseas investments in joint ventures and wholly owned subsidiaries have been recognized as important avenues by Indian Entrepreneurs in terms of foreign exchange earning like dividend, loyalty, etc. India is the 7th largest, the second most populated country and the fourth largest economy in the world. Various economic reforms brought about have made India grow rapidly in the Asia-Pacific Region, and the Indian Private Sector has offered considerable scope for foreign direct investment, joint-venture and collaborations. Undoubtedly, these cross-border transactions and investments would give bigger opportunities for members of the legal fraternity, in order to better equip themselves to face the challenges. It is common knowledge that in the recent past, parties conducting International Commercial Arbitrations have chosen India as their destination. The arbitration law in India is modelled on the lines of the UNCITRAL Model Law of Arbitration and makes a few departures from the principles enshrined therein. The Arbitration and Conciliation Act 1996, provides for international commercial arbitration where at least one of the parties is not an Indian National or Body corporate incorporated in India or a foreign Government.

57. Institutional Arbitration has been defined to be an arbitration conducted by an arbitral institution in accordance with the rules of the institution. The Indian Council of Arbitration is one such body. It is reported that in several cases of International Commercial Arbitration, foreign contracting party prefers to arbitrate in India and several reasons have been stated to choose India as the seat of arbitration. Therefore, when there is liberalization of economic policies, throwing the doors open to foreign investments, it cannot be denied that disputes and differences are bound to arise in such International contracts. When one of the contracting party is a foreign entity and there is a binding arbitration agreement

between the parties and India is chosen as the seat of arbitration, it is but natural that the foreign contracting party would seek the assistance of their own solicitors or lawyers to advice them on the impact of the laws of their country on the said contract, and they may accompany their clients to visit India for the purpose of the Arbitration. Therefore, if a party to an International Commercial Arbitration engages a foreign lawyer and if such lawyers come to India to advice their clients on the foreign law, we see there could be no prohibition for such foreign lawyers to advise their clients on foreign law in India in the course of a International Commercial transaction or an International Commercial Arbitration or matters akin thereto. Therefore, to advocate a proposition that foreign lawyers or foreign law firms cannot come into India to advice their clients on foreign law would be a far fetched and dangerous proposition and in our opinion, would be to take a step backward, when India is becoming a preferred seat for arbitration in International Commercial Arbitrations. It cannot be denied that we have a comprehensive and progressive legal frame work to support International Arbitration and the 1996 Act, provides for maximum judicial support of arbitration and minimal intervention. That apart, it is not in all cases, a foreign company conducting an International Commercial Arbitration in India would solicit the assistance of their foreign lawyers. The legal expertise available in India is of International standard and such foreign companies would not hesitate to avail the services of Indian lawyers. Therefore, the need to make India as a preferred seat for International Commercial Arbitration would benefit the economy of the country.

58. The Supreme Court in a recent decision in Vodafone International Holdings B.V. vs. Union of India and another, SLP(C) No.26529 of 2010, dated 20.01.2012, observed that every strategic foreign direct investment coming to India, as an investment destination should be seen in a holistic manner. The Supreme Court observed that the question involved in the said case was of considerable public importance, especially on Foreign Direct Investment, which is indispensable for a growing economy like India. Therefore, we should not lose site of the fact that in the overall economic growth of the country, International Commercial Arbitration would play a vital part. The learned counsel appearing for the foreign law firms have taken a definite stand that the clients whom they represent do not have offices in India, they do not advise their foreign clients on matters concerning Indian Law, but they fly in and fly out of India, only to advise and hand-hold their clients on foreign laws. The foreign law firms, who are the private respondents in this writ petition, have accepted the legal position that the term “practice” would include both litigation as well as non-litigation work, which is better known as chamber practice. Therefore, rendering advice to a client would also be encompassed in the term “practice”.

59. As noticed above, Section 2(a) of the Advocates Act defines ‘Advocate’ to mean an advocate entered in any roll under the provisions of the Act. In terms of Section

17(1) of the Act, every State Bar Council shall prepare and maintain a roll of Advocates, in which shall be entered the names and addresses of (a) all persons who were entered as an Advocate on the roll of any High Court under the Indian Bar Council Act, 1926, immediately before the appointed date and (b) all other persons admitted to be Advocates on the roll of the State Bar Council under the Act on or after the appointed date. In terms of Section 24(1) of the Act, subject to the provisions of the Act and the Rules made thereunder, a person shall be qualified to be admitted as an advocate on a state roll if he fulfils the conditions (a) a citizen of India, (b) has completed 21 years of age and (c) obtained a degree in Law. The proviso to Section 24(1)(a) states that subject to the other provisions of the Act, a National of any other country may be admitted as an Advocate on a State roll, if a citizen of India, duly qualified is permitted to practice law in that other country. In terms of Section 47(1) of the Act, where any country specified by the Central Government by notification prevents citizens of India practicing the profession of Law or subjects them to unfair discrimination in that country, no subject of any such country shall be entitled to practice the profession of Law in India. In terms of Sub-Section (2) of Section 47, subject to the provision of Sub-Section (1), the Bar Council of India may prescribe conditions, if any, subject to which foreign qualifications in law obtained by persons other than citizens of India shall be recognized for the purpose of admission as an Advocate under the Act. Thus, Section 47 deals with reciprocity. As per the statement of objects and reasons of the Advocates Act, it was a law enacted to provide one class of legal practitioners, specifying the academic and professional qualifications necessary for enrolling as a practitioner of Indian Law, and only Indian citizens with a Law Degree from a recognized Indian University could enrol as Advocates under the Act. The exceptions are provided under the proviso to Section 24(1)(a), Section 24(1)(c)(iv) and Section 47(2). In the light of the scheme of the Act, if a lawyer from a foreign law firm visits India to advice his client on matters relating to the law which is applicable to their country, for which purpose he "flies in and flies out" of India, there could not be a bar for such services rendered by such foreign law firm/foreign lawyer.

60. We are persuaded to observe so, since there may be several transactions in which an Indian company or a person of Indian origin may enter into transaction with a foreign company, and the laws applicable to such transaction are the laws of the said foreign country. There may be a necessity to seek legal advice on the manner in which the foreign law would be applied to the said transaction, for which purpose if a lawyer from a foreign law firm is permitted to fly into India and fly out advising their client on the foreign law, it cannot be stated to be prohibited. The corollary would be that such foreign law firm shall not be entitled to do any form of practice of Indian Law either directly or indirectly. The private respondents herein, namely the foreign law firms, have accepted that there is express prohibition for a foreign lawyer or a foreign

law firm to practice Indian Law. It is pointed out that if an interpretation is given to prohibit practice of foreign law by a foreign law firms within India, it would result in a manifestly absurd situation wherein only Indian citizens with Indian Law degree who are enrolled as an advocate under the Advocates Act could practice foreign law, when the fact remains that foreign laws are not taught at graduate level in Indian Law schools, except Comparative Law Degree Courses at the Master's level.

61. As noticed above, the Government of India, in their counter affidavit dated 19.08.2010, have stated that the contention raised by the petitioner that foreign law firms should not be allowed to take part in negotiating settlements, settling up documents and arbitrations will be counter productive, as International Arbitration will be confined to a single country. It is further pointed out that many arbitrations are held outside India with Indian Judges and Lawyers as Arbitrators where both foreign and Indian Law firms advise their clients. It has been further stated if foreign law firms are denied permission to deal with arbitration in India, then we would lose many arbitrations to other countries and this is contrary to the declared policy of the Government and will be against the National interest, especially when the Government wants India to be a hub of International Arbitration

62. At this juncture, it is necessary to note yet another submission made by the Government of India in their counter. It has been stated that law firms as such or not required to register themselves or require permission to engage in non-litigation practice and that Indian law firms elsewhere are operating in a free environment without any curbs or regulations. It is further submitted that the oversight of the Bar Council on non-litigation activities of such law firms was virtually nil till now, and exploiting this loop hole, many accountancy and management firms are employing law graduates, who are rendering legal services, which is contrary to the Advocates Act. Therefore, the concern of the Government of India as expressed in the counter affidavit requires to be addressed by the Bar Council of India. Further, it is seen that the Government in consultation with the Bar Council of India proposes to commission a study as to the nature of activities of LPOs, and an appropriate decision would be taken in consultation with the Bar Council of India."

RIVAL CONTENTIONS

20. Shri C.U. Singh, learned senior counsel for the Bar Council of India submitted that Advocates enrolled with the Bar Council of India are the only recognized class of persons entitled to practice law in India. Unless any other law so permits, no person can practice before any 'Court, authority or person' other than an Advocate enrolled under the Act. In particular cases, the 'Court, authority or person' may permit a person other than an advocate enrolled under the Act to appear before him. It was submitted that the expression "practice profession of law" covered not only appearance before the Court but also opinion work which is also known as chamber practice. The Ethics

prescribed by the Bar Council of India covered not only conduct in appearing before Court or authority but also in dealing with the clients including giving legal opinion, drafting or participation in law conference. If a person practices before any 'Court, authority or person' illegally, is liable to punishment for imprisonment which may extend to six months. Thus, the view taken by the Madras High Court that visit by a foreign lawyer on fly in and fly out basis to give advice on foreign law or to conduct arbitration in international commercial arbitrations was erroneous. Reference has also been made to definition of the term 'advocate' under Section 2(a) of the Act. Section 6 lays down functions of the Bar Council including admission of persons as advocates, safeguarding rights, privileges and interests of advocates. Section 17 lays down that every State Bar Council shall prepare a roll of advocates and no person can be enrolled in more than one State Bar Council. Section 24 lays down qualifications for admission on the roll of a State Bar council. The qualifications include the citizenship of India, unless a person is national of a country where citizens of India are permitted to practice. One is required to have the prescribed qualification from India or out of India if such degree is recognized by the Bar Council of India, being a Barrister called to the Bar before 31st December, 1976, passing of articled clerks examination or any other examination specified by the Bombay or Calcutta High Court or obtaining foreign qualification recognized by the Bar Council of India are also the prescribed qualifications. It was submitted that even in other jurisdictions, persons other than those enrolled with the concerned Bar Council are not allowed to practice. Even short term running of legal service is subject to regulatory regime.

21. Learned counsel for the foreign law firms S/Shri Arvind Datar, Sajjan Poovayya, Dushyant Dave, learned senior counsel and Mr. Nakul Dewan, learned counsel supported the direction of the Madras High Court permitting foreign lawyers to render legal services on fly in and fly out basis and also with reference to international commercial arbitrations. It was submitted that Bar Council could come into picture only in respect of advocates enrolled with it. It is only with reference to appearance before the Courts or other authorities or persons that the regulatory regime of the Bar Council may apply but with regard to non litigation/ advisory work even those not enrolled as advocates under the Advocates Act are not debarred. It was also submitted by Shri Dewan that Advocates Act applies only to individuals and not to law firms. Provision for reciprocity applies only for enrolment under the Advocates Act and not for casual legal services on fly in and fly out basis or in connection with international commercial arbitration. Foreign lawyers are regulated by the disciplinary regime applicable to them and only their Bar Councils could take action with regard to their working in India also. Practice of law in India did not cover advising on foreign law. Thus, if by a pre-determined invitation, a foreign lawyer visited India to advise on a foreign law, there is no bar against doing so.

22. Certain decisions have been cited at

the Bar to which reference may be made. In Roel versus New York County Lawyers Association (3 N.Y.2d 224 (1957), the Court of Appeals of the State of New York dealt with a case where a Mexican citizen and lawyer, who was not a citizen of the United States nor a member of the New York Bar, maintained his office in New York and advised members of the public on Mexican law. He did not give any advice as to New York law. The majority held that this was not permissible. It was observed:

"To allow a Mexican lawyer to arrange the institution of divorce proceedings for a New York resident in a Mexican court, without allowing him to tell the client that the divorce might be invalid (Querze v. Querze, 290 N.Y. 13) or that it might adversely affect estate or other property rights or status in this State (Matter of Rathscheck, 300 N.Y. 346), is to give utterly inadequate protection to him (See 70 Harv.L.Rev. 1112-1113). Nor are we in anywise persuaded by the argument in the brief of the Association of the Bar that there is any difference between the right of a Mexican lawyer to act and advise the public in divorce matters and the right (3 N.Y.2d 232) of foreign lawyers generally to act an advise with respect to foreign law. … …

The complex problem posed by the activities of foreign attorneys here is a long-standing one. It may well be that foreign attorneys should be licensed to deal with clients in matters exclusively concerning foreign law, but that is solely within the province of the Legislature. Our courts are given much control over the lawyers admitted to the Bar of our State; we have no control, however, over those professing to be foreign law experts.

We see no substance in appellant's claim that section 270 of the Penal Law when applied to him deprives him of liberty and property without due process of law, in that the statute as so construed is unreasonable and serves no public purpose."

23. The minority view, on the other hand, held that:

"In this century when the United States has become the creditor nation of the world and when the ramifications of our industrial, commercial, financial and recreational lives extend to every corner of the global, it is especially improbable that the Legislature intended to preclude the giving of legal advice in this State to our citizens concerning these far-flung enterprises by trained lawyers from abroad who are equipped to give accurate information and opinions regarding them. The customary residential requirements for admission to the Bar would in themselves often preclude their becoming admitted to our Bar. … …

The omission of the Legislature to enact statutes licensing or regulating the conduct of foreign lawyers in practicing purely foreign law in this State, does not indicate that such conduct is prohibited by sections 270 and 271 of the Penal Law, but merely that the Legislature has not seen fit to subject them to regulation. Whatever the merits of such proposed legislation, it is not for us to enact it. If foreign lawyers came under

section 270 and 271 of the Penal Law, it would stifle their activities to the detriment of the large and increasing number of our nationals who engage in transactions in foreign countries, inasmuch as it would be impossible for most of them to be admitted to practice in this State."

24. In Appell versus Reiner (43 N.J. 313 (1964); 204 A.2d 146), the Supreme Court of New Jersey dealt with a case of New York lawyer, who was not admitted to the New Jersey Bar, giving legal services to New Jersey residents in a matter involving the extension of credit and the compromise of claims held by New York and New Jersey creditors. The Chancery Division held that the New York lawyer could not advice in respect of New Jersey creditors. The Supreme Court of New Jersey held:-

"The Chancery Division correctly delineated the generally controlling principle that legal services to be furnished to New Jersey residents relating to New Jersey matters may be furnished only by New Jersey counsel. We nevertheless recognize that there are unusual situations in which a strict adherence to such a thesis is not in the public interest. In this connection recognition must be given to the numerous multi-state transactions arising in modern times. This is particularly true of our State, situated as it is in the midst of the financial and manufacturing center of the nation. An inflexible observance of the generally controlling doctrine may well occasion a result detrimental to the public interest, and it follows that there may be instances justifying such exceptional treatment warranting the ignoring of state lines. This is such a situation. Under the peculiar facts here present, having in mind the nature of the services to be rendered, the inseparability of the New York and New Jersey transactions, and the substantial nature of the New York claim, we conclude that plaintiff's agreement to furnish services in New Jersey was not illegal and contrary to public policy.

It must be remembered that we are not here concerned with any participated by plaintiff in a court proceeding. What is involved is the rendering of advice and assistance in obtaining extensions of credit and compromises of indebtedness. … …"

25. Again, there was a dissenting view as follows:

"… …Regulation of the interests of the public and the bar requires a rule of general application. In cases such as we have here, the only fair and workable rule is one which recognizes that the client's matter is primarily a New Jersey one and calls for the engagement of a member of our bar for the legal services to be rendered here. And, in that connection, in the interest of interstate amity, if an out-ofstate attorney renders legal services in New Jersey which are a minor or incidental part of a total problem which has its principal and primary aspects in his state, he should be allowed to recover in our courts for the work done in this jurisdiction."

26. Mr. Poovayya referred to Rules of the Indian Council of Arbitration which could

apply only if there was an agreement between the parties that the arbitration was to be in accordance with the Rules of the Indian Council of Arbitration. Rule 45 laid down that parties have no right to be represented by lawyers unless the arbitral tribunal considers it necessary and allows.

27. Referring to the Arbitration Act, it was submitted that international commercial arbitration is defined under Section 2(f) which covers arbitration relating to disputes where one of the parties is a national or habitual resident of a country other than India or a body corporate incorporated outside India or an association of body of individuals whose management and control is exercised in a country other than India or a Government of a foreign country. In such cases, parties may agree to have an arbitrator of any nationality, to any language to be used in arbitration proceedings, to any place of arbitration. Section 28(b) permits Arbitral Tribunal to decide disputes in accordance with rules of law applicable to the substance of the dispute as agreed by the parties. The arbitrator has to give equal opportunity to the parties to present their case (Section 18). Parties can agree on the procedure to be followed (Section 19). Section 34(2)(a)(iii) provides that an award may be set aside, inter-alia, on the ground that the party was unable to present its case in the arbitration proceedings. Procedure for presenting case of a party before the arbitrator may be governed by agreement or by the procedural rules.

28. Shri Dushyant Dave referred to rules of certain Arbitration Institutions to the effect that the parties are free to be represented by an outside lawyer. It was submitted that by way of Convention in international commercial arbitrations, there cannot be any compulsion to engage only a local lawyer. Section 48(1)(b) of the Arbitration Act provides that enforcement of a foreign award can be refused if the parties were unable to present their case. The New York Convention Awards are governed by the First Schedule to the Act. Article-II provides for recognition of an arbitration agreement between the parties. Article-V(1)(b) provides that if the party against whom the award is invoked was not given proper notice or could not present his case, the award cannot be enforced. Section 53 of the Arbitration Act refers to Geneva Convention Awards which is regulated by the Second Schedule to the Act containing similar provisions.

29. Mr. Dave submitted that the Special Leave Petition arising out of the Delhi High Court order is on the question whether London Court of International Arbitration could use the expression “COURT” had become infructuous as the respondent had closed its working in India. He, however, referred the following:

I) Handbook of ICC Arbitration – Commentary, Precedents, Materials – Second Edition (Michael W. Buhler and Thomas H. Webster)

Article 21(4): “The parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisers.”

The authors’ comment is as follows:

"In an ICC arbitration, parties have the right to be represented by the persons of their choice. A distinction should however be made between "authorized representatives" and "advisors". Usually, the parties have attorneys represent them in the arbitration. Thus, an attorney may have both capacities, but this may not always be the case. As an adviser, he or she would not need a power of attorney. On the other hand, as a representative of a party, he or she might need a power of attorney. In arbitration. The major centres of arbitration do not appear to have restrictions on the right of lawyers from other countries to argue cases in those countries, with the possible exception of California."

The footnote 31 is as follows:

"See Birbower, Montabano, Condon & Frank, P.C. v. The Superior Court of Santa Clara, 949 P.2d 1 (Cal. 1998); see also Holtzmann and Donovan, "United States Country Report" in ICCA Handbook, Supp. 28 (Paulsson edn, 1999). The California Rules of Court were modified in 2004 in order to permit any US qualified lawyer to represent a party in an arbitration (r.966). However, it remains unclear whether lawyers admitted to foreign bars can represent parties in national or international arbitration."

II) Arbitration of Commercial Disputes – International and English Law and Practice (Andrew Tweeddale and Keren Tweeddale).

Representation of the parties

10.15. The right to legal representation at trial has existed both in the common law and in international treaties for centuries (See, for example, art 42 of the Statute of the International Court of Justice which states: '1. The parties shall be represented by agents. 2. They may have the assistance of counsel or advocates before the Court. 3. The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.' See also art 37 of the Hague Convention 1899 which states: 'The parties have the right to appoint delegates or special agents to attend the Tribunal, for the purpose of serving as intermediaries between them and the Tribunal. They are further authorized to retain, for the defense of their rights and interests before the Tribunal, counsel or advocates appointed by them for this purpose.'). However, the right to legal representation is not absolute. The parties may agree to dispense with legal representation (Henry Bath & Son Ltd. v. Birgby Products [1962] Lloyd's Rep 389; and see also the English Arbitration Act 1996, s 36.). Furthermore, some rules of arbitration prohibit the use of legal representation (The arbitration rules of the Australian Football league, for example, limit legal representation.). In international commercial arbitrations it is generally accepted that the parties may choose their own advocate without necessarily choosing one qualified at the seat of the arbitration (See, for example, In the matter of an Arbitration between Lawler, Matusky and Skelly, Engineers and the Attorney General of Barbados (No.320 of 1981) 22 August 1983 where the High Court of Barbados

held that there was a 'common law right of everyone who is sui juris to appoint an agent for any purpose'. The court held that this included the right to appoint a representative to appear as advocate on a party's behalf in a commercial arbitration.). However, in a few recent cases that principle has been challenged (In the matter of an Arbitration between Builders Federal (Hong Kong) Ltd. and Joseph Gartner & Co., and Turner (East Asia) Pte Ltd (No. 90 of 1987) (1988) 2 MLJ 280 the Malaysian Judicial Commissioner Chan Sek Keong ruled that the respondents, who were a foreign company, could not select a counsel from their own country because Singapore's Legal Profession Act operated as a bar to foreign lawyers from representing their clients in international arbitrations in Singapore. However, in June 2004 Singapore finally amended its Legal Profession Act to eliminate this restriction on representation by foreign lawyers in arbitrations in Singapore. See also Birbrower, Montabano, Condon & Frank v. Superior Court of Santa Clara County, 1998 Cal LEXIS 2, 1998 WL 1346 (Cal 1/5/98) where the court held that a New York lawyer representing a client in a Californian arbitration was not qualified to act for his client because he was not called to the Californian bar and therefore not entitled to recover his fees. The court, however, stated that this principle would not apply to an international commercial arbitration.)." III) Redfern and Hunter on International Arbitration "In general, the parties may also be represented by engineers, or commercial men, for the purpose of putting forward the oral submissions, and even for the examination of witnesses. It is not uncommon, where a case involves technical issues, for an engineer or other professional man to be part of the team of advocates representing a party at a hearing, although it is more usual for such technical experts to be called as witnesses in order that their opinions and submissions may be tested by cross-examination. However, it may sometimes be convenient and save time if technical experts address the arbitral tribunal directly as party representatives (Both the UNCITRAL RULES (Art4) and the LCIA Rules (Art18) make it clear that parties are entitled to be represented by non-lawyers.).

The Supreme Court of California held in 1998 that representing a party in an arbitration without its seat in California was 'engaging in the practice of law' in that state. It followed that a New York lawyer, not a member of the Californian Bar, was not qualified to represent his client in a Californian arbitration; and was thus unable to recover his fee when he sued for it (Birbrower, Montabane, Condon Frank v. The Superior Court of Santa Clara County, 1998 Cal Lexis2; 1998 WL 1346 (Cal 1/5/98)). Fortunately the court stated that the rule did not apply in international arbitration. IN England there is not, and never has been, any danger of a similar situation arising (i.e. that only a member of the local bar should be entitled to represent a party in a judicial or quasi-judicial proceeding.). A party to an arbitration may, in theory, be represented by his plumber, his dentist, or anyone else of his choosing, although the choice usually falls on a lawyer or specialist

claims consultant in the relevant industry (English Arbitration Act, 1996, s 36. This reaffirms the previous common law position.)."

IV) LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA) RULES (2014)

Article 18 – Legal Representatives

"18.1 Any party may be represented in the arbitration by one or more authorized legal representatives appearing by name before the Arbitral Tribunal.

18.2 Until the Arbitral Tribunal's formation, the Registrar may request from any party: (i) written proof of the authority granted by that party to any legal representative designated in its Request or Response; and (ii) written confirmation of the names and addresses of all such party's legal representatives in the arbitration. After its formation, at any time, the arbitral Tribunal may order any party to provide similar proof or confirmation in any form considers appropriate."

V) CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSIN (CIETAC) ARBITRATION RULES.

Article 22 – Representation

"A party may be represented by its authorized Chinese and/or foreign representative(s) in handling matters relating to the arbitration. In such a case, a Power of Attorney shall be forwarded to the Arbitration Court by the party or its authorized representative(s)."

VI) ARBITRATION RULES, MEDIATION RULES OF INTERNATIONAL CHAMBER OF COMMERCE.

ARTICLE 26 – Hearings

"4. The parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisers."

VII) COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES OF AMERICAN ARBITRATION ASSOCIATION

R-26. Representation

"Any party may participate without representation (pro se), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given."

VIII) ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC)

Party Representatives

"23.1 Any party may be represented by legal practitioners or any other authorized

representatives. The Registrar and/or the Tribunal may require proof of authority of any party representatives.

23.2 After the constitution of the Tribunal, any change or addition by a party to its representatives shall be promptly communicated in writing to the parties, the Tribunal and the Registrar."

IX) RULES OF INTERNATIONAL COMMERCIAL ARBITRATION BY INDIAN COUNCIL OF ARBITRATION

20. Party Representation and assistance "At the hearing, a party shall be entitled to appear through Attorney, Advocate or a duly authorized Advisor or Representative or in person, subject to such proof of authority to the satisfaction of the Registrar or the Tribunal."

30. Shri C.U. Singh, learned senior counsel, by way of rejoinder, opposed the submissions of learned counsel appearing for the foreign law firms. He submitted that the stand of the Central Government finally was to support the stand of the Bar Council of India. The argument that participation of foreign lawyers will be in the interest of the country was raised by the foreign law firms only as shown from para 51 of the Madras High Court judgment. He submitted that the arbitrator was also an 'authority' before whom only advocates enrolled in India alone could appear. The arbitrator could record evidence and summon witnesses through Court(Section 27). Rules of Arbitration Institutions have to be in conformity with the law of the land. He also submitted that the rules framed by the Bar Council of India under Section 49 define the practice of law so as to cover even giving of opinion.

31. Shri Singh further pointed out that Ethics for the profession as applicable in India are different from the Ethics applicable in other countries. In this regard, it was submitted that Rule 36 in Part VI, Chapter II of the BCI Rules prohibits direct or indirect advertising by advocates, or solicitation by any means whatsoever. Rule 18 bars an advocate from fomenting litigation. In Bar Council of Maharashtra versus M.V. Dabholkar (1976) 2 SCC 291), this Court held that advertising was a serious professional misconduct for an advocate. As against this, in USA Rule 7.3 of the American Bar Association Rules bars only in-person or live telephonic solicitation of clients, but expressly permits lawyer-to-lawyer solicitation, as well as client solicitation by written, recorded or electronic communication, unless the target of solicitation has made known to the lawyer his desire not to be solicited, or the solicitation involved coercion, duress or harassment. The US Supreme Court, inter alia, in Zauderer versus Office of Disciplinary Counsel (471 US 626 (1985)and in Shapero versus Kentucky Bar Association (486 US 466)struck down disciplinary actions against lawyers for soliciting clients through print advertisements or hoardings. In UK, Solicitors Regulation Authority(SRA) is a regulatory body established under the Legal Services Act, 2007. Chapter 8 of the SRA Handbook permits publicity of the law firm but prohibits solicitations.

32. In India, with regard to Contingency

fees, Rule 20 in Part VI, Chapter II of the BCI Rules bars an advocate from stipulating a fee contingent on the results of the litigation or from agreeing to share the proceeds thereof. Rule 21 prohibits practices akin to champerty or maintenance, and prohibits an advocate from buying or trafficking in or stipulating or agreeing to receive any share or interest in an actionable claim. In USA Rule 1.5 (c) of the ABA Rules permits lawyers to charge contingency fees, except in certain specified cases like criminal defence, etc. Fee-splitting arrangements between lawyers from different firms are also permitted with some restrictions. In U.K., Section 58 of the Courts and Legal Services Act, 1990 permits "conditional fee agreements" except in criminal proceedings and family law matters and Section 58AA permits "damages-based fee agreements", all of which entitle legal practitioners to a share of the "winnings".

33. In India, there are no rules framed by the Bar Council on the subject 'sale of law practice'. In U.S.A., Rule 1.17 permits law firms or lawyers having private practice to sell their practice including the goodwill. In U.K., SRA Guidelines permit sale of practice as a going concern or acquisition of a practice which is closing down.

34. In India, senior advocates are barred from interacting directly with clients, and are not permitted to draft pleadings or affidavits, correspond on behalf of clients, or to appear in court unassisted by an advocate (Part VI, Chapter I of the Bar Council of India Rules). In U.S.A., no such distinction or designations are made. In U.K., there appear to be no restrictions on Queen's Counsel (QCs) similar to the ones imposed by the Bar Council in India. QCs are permitted to join law firms as partners.

35. In India, funding of litigation by advocates is not explicitly prohibited, but a conjoint reading of Rule 18 (fomenting litigation), Rule 20 (contingency fees), Rule 21 (share or interest in an actionable claim) and Rule 22 (participating in bids in execution, etc.) would strongly suggest that advocates in India cannot fund litigation on behalf of their clients. There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation. In U.S.A., lawyers are permitted to fund the entire litigation and take their fee as a percentage of the proceeds if they win the case. Third Party Litigation Funding/Legal Financing agreements are not prohibited. In U.K., Section 58B of the Courts and Legal Services Act, 1990 permits litigation funding agreements between legal service providers and litigants or clients, and also permits third party Litigation Funding or Legal Financing agreements, whereby the third party can get a share of the damages or "winnings".

36. In India, partnerships with non-lawyers for conducting legal practice is not permitted. In U.K., Section 66 of the Courts and Legal Services Act, 1990 expressly permits solicitors and barristers to enter into partnerships with non-solicitors and non-barristers.

37. We have considered the rival submissions. Questions for consideration mainly arise out of directions in para 63 of the Madras High Court judgment which have already been quoted in the beginning of this judgment. viz. :

(i) Whether the expression 'practise the profession of law' includes only litigation practice or non-litigation practice also;

(ii) Whether such practice by foreign law firms or foreign lawyers is permissible without fulfilling the requirements of Advocates Act and the Bar Council of India Rules;

(iii) If not, whether there is a bar for the said law firms or lawyers to visit India on 'fly in and fly out' basis for giving legal advice regarding foreign law on diverse international legal issues;

(iv) Whether there is no bar to foreign law firms and lawyers from conducting arbitration proceedings and disputes arising out of contracts relating to international commercial arbitration;

(v) Whether BPO companies providing integrated services are not covered by the Advocates Act or the Bar Council of India rules.

RE : (i)

38. In Pravin C. Shah versus K.A. Mohd. Ali (2001) 8 SCC 650), it was observed that right to practice is genus of which right to appear and conduct cases is specie. It was observed:

".....The right of the advocate to practise envelopes a lot of acts to be performed by him in discharge of his professional duties. Apart form appearing in the courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions etc. ....."

In Ex. Capt. Harish Uppal versus Union of India (2003) 2 SCC 45), same view was reiterated.

39. Ethics of the legal profession apply not only when an advocate appears before the Court. The same also apply to regulate practice outside the Court. Adhering to such Ethics is integral to the administration of justice. The professional standards laid down from time to time are required to be followed. Thus, we uphold the view that practice of law includes litigation as well as non litigation.

RE : (ii)

40. We have already held that practicing of law includes not only appearance in courts but also giving of opinion, drafting of instruments, participation in conferences involving legal discussion. These are parts of non-litigation practice which is part of practice of law. Scheme in Chapter-IV of the Advocates Act makes it clear that advocates enrolled with the Bar Council

alone are entitled to practice law, except as otherwise provided in any other law. All others can appear only with the permission of the court, authority or person before whom the proceedings are pending. Regulatory mechanism for conduct of advocates applies to non-litigation work also. The prohibition applicable to any person in India, other than advocate enrolled under the Advocates Act, certainly applies to any foreigner also.

RE : (iii)

41. Visit of any foreign lawyer on fly in and fly out basis may amount to practice of law if it is on regular basis. A casual visit for giving advice may not be covered by the expression 'practice'. Whether a particular visit is casual or frequent so as to amount to practice is a question of fact to be determined from situation to situation. Bar Council of India or Union of India are at liberty to make appropriate rules in this regard. We may, however, make it clear that the contention that the Advocates Act applies only if a person is practicing Indian law cannot be accepted. Conversely, plea that a foreign lawyer is entitled to practice foreign law in India without subjecting himself to the regulatory mechanism of the Bar Council of India Rules can also be not accepted. We do not find any merit in the contention that the Advocates Act does not deal with companies or firms and only individuals. If prohibition applies to an individual, it equally applies to group of individuals or juridical persons.

RE: (iv)

42. It is not possible to hold that there is absolutely no bar to a foreign lawyer for conducting arbitrations in India. If the matter is governed by particular rules of an institution or if the matter otherwise falls under Section 32 or 33, there is no bar to conduct such proceedings in prescribed manner. If the matter is governed by an international commercial arbitration agreement, conduct of proceedings may fall under Section 32 or 33 read with the provisions of the Arbitration Act. Even in such cases, Code of Conduct, if any, applicable to the legal profession in India has to be followed. It is for the Bar Council of India or Central Government to make a specific provision in this regard, if considered appropriate.

RE: (v)

43. The BPO companies providing range of customized and integrated services and functions to its customers may not violate the provisions of the Advocates Act, only if the activities in pith and substance do not amount to practice of law. The manner in which they are styled may not be conclusive. As already explained, if their services do not directly or indirectly amount to practice of law, the Advocates Act may not apply. This is a matter which may have to be dealt with on case to case basis having regard to a fact situation.

44. In view of above, we uphold the view of the Bombay High Court and Madras High Court in para 63 (i) of the judgment to the effect that foreign law firms/companies or foreign lawyers cannot practice profession of law in India either in the litigation or in

non-litigation side. We, however, modify the direction of the Madras High Court in Para 63(ii) that there was no bar for the foreign law firms or foreign lawyers to visit India for a temporary period on a "fly in and fly out" basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues. We hold that the expression "fly in and fly out" will only cover a casual visit not amounting to "practice". In case of a dispute whether a foreign lawyer was limiting himself to "fly in and fly out" on casual basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues or whether in substance he was doing practice which is prohibited can be determined by the Bar Council of India. However, the Bar Council of India or Union of India will be at liberty to make appropriate Rules in this regard including extending Code of Ethics being applicable even to such cases.

45. We also modify the direction in Para 63 (iii) that foreign lawyers cannot be debarred from coming to India to conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration. We hold that there is no absolute right of the foreign lawyer to conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration. If the Rules of Institutional Arbitration apply or the matter is covered by the provisions of the Arbitration Act, foreign lawyers may not be debarred from conducting arbitration proceedings arising out of international commercial arbitration in view of Sections 32 and 33 of the Advocates Act. However, they will be governed by code of conduct applicable to the legal profession in India. Bar Council of India or the Union of India are at liberty to frame rules in this regard.

46. We also modify the direction of the Madras High Court in Para 63(iv) that the B.P.O. Companies providing wide range of customized and integrated services and functions to its customers like word processing, secretarial support, transcription services, proof reading services, travel desk support services, etc. do not come within the purview of the Advocates Act, 1961 or the Bar Council of India Rules. We hold that mere label of such services cannot be treated as conclusive. If in pith and substance the services amount to practice of law, the provisions of the Advocates Act will apply and foreign law firms or foreign lawyers will not be allowed to do so.

The Civil Appeals are disposed of accordingly.

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2018 (1) L.S. 98 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
N.V. Ramana &
The Hon'ble Mr.Justice
S.Abdul Nazeer

Rajendra Rajoriya ..Appellant
Vs.
Jagat Narain Thapak
& Anr., ..Respondents

(INDIAN) PENAL CODE, Secs.120-B, 420, 467, 468, 471 and 506 – SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, Sec.3 - Legality of remand order passed by the Sessions Court and the order of the learned Magistrate taking cognizance thereafter.

Held - Sessions Court Order should have been construed only as a remand order for further enquiry - Learned Magistrate of Trial Court was expected to apply his independent mind while taking cognizance but observed that Sessions court has already made out a prima facie case - High Court clearly misconstrued Lower Court order and proceeded on an erroneous footing - Appeal is allowed and complaint be considered by trial court afresh - Impugned judgment is set aside.

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

1. Leave granted.

2. In this criminal appeal the judgment dated 08.07.2014, passed by the High Court of Madhya Pradesh, bench at Gwalior in Criminal Revision No. 104/2013 is impugned.

3. Appellant herein filed a complaint before the jurisdictional police station under Sections 420, 467, 468, 471,120B, 506 of Indian Penal Code, 1860 [hereinafter referred as 'IPC' for brevity] and under Section 3 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 on the allegations that one Smt. Vidhyabai and others sold the disputed land to respondent no. 1 and got the appellant's property mutated by committing fraud and forgery. It was further alleged that the respondents had threatened the appellant with dire consequence and swore at them with filthy language intended to belittle his caste/tribe. It may be noted that the concerned police station did not take any action on the aforesaid complaint.

4. Aggrieved by the inaction of the police, the appellant approached the Jurisdictional Magistrate, Gwalior, with the same set of facts under Section 200 of Cr.P.C.

5. The Judicial Magistrate, 1st Class, Gwalior, by Order dated 21.04.2012, dismissed the aforesaid criminal complaint on the footing that there was no sufficient proof on record provided by the appellant/

complainant to prove that he belongs to Scheduled Caste or Scheduled Tribe and the dispute between the parties had trappings of civil nature.

6. Aggrieved by the aforesaid dismissal of criminal complaint, appellant approached Addl. District and Sessions Judge [hereinafter referred as 'Sessions Court' for brevity] in Criminal Revision No. 242/2012. The Sessions Court, by the order dated 07.12.2012, held that the complainant belonged to Jatav community which is a Scheduled Caste. Further the Sessions Court observed that the facts narrated portray that the respondent no. 1 in conspiracy with others had transferred the land belonging to the appellant in an illegal manner. Thereafter, concluded that the lower court did not appreciate the facts as well as the law in a proper manner and remanded the case in the following manner: -

This revision is allowed and order dated 21.04.2012 passed by Court is set aside and case is remanded back with a direction that if necessary after a further enquiry keeping in view the findings given in this order, proper order be passed with regard to registration of complaint and to summon the respondents and for that directed the parties to remain present before the Court below on 20.12.2012.

(Emphasis supplied)

7. On remand of the case, Judicial Magistrate, vide order dated 23.01.2013, while taking cognizance of the aforesaid offences under Section 420, 467, 471, 120-B of IPC and 3(1)(4) of SC/ST Act, registered the complaint as Criminal Case No. 1576/2013 and on 23-02-2013, learned Magistrate noted as under-

...the court is required to prima facie decide question of initiating proceeding arises or not. It is pertinent that in this case learned Revisional Court has prima facie already found sufficient ground for initiating proceeding against non-applicants.

(emphasis supplied)

8. In the meanwhile, aggrieved by the remand order dated 07.12.2012 passed by the Sessions Court and the order of the Magistrate, dated 23.01.2013, taking cognizance, the respondent filed revision before the High Court being Criminal Revision No. 104/2013. By the impugned judgment dated 08.07.2014, the High Court allowed the revision petition and quashed the complaint on the reason that the revisonal court could not have taken cognizance on 23.01.2013 as the same was in violation of Section 398 of Cr.P.C.

9. We have heard learned counsels appearing on behalf of both the parties.

10. The questions that fall for consideration are in regard to the legality of the remand order passed by the Sessions Court and the order of the learned Magistrate taking cognizance thereafter. As the High Court has dealt with the validity of both the orders, we would like to take up the same in seriatum starting with legality of the remand order.

11. The respondent contends that the learned Sessions Judge could not have observed on merits as it amounted to taking cognizance of the matter. Such contentions although seems attractive, but must be rejected for reason that the revisional court only had provided reasons for ordering further enquiry under Section 398 of Cr.P.C and the observations provided on merit cannot be said to have an effect of taking cognizance in this case.

12. At the outset, before we decide the legality of the remand order, we are required to determine the scope of criminal revision under Section 397 read with Section 398 of Cr.P.C. It would be appropriate to reproduce Sections 397 and 398 of Cr.P.C herein.

Section 397. Calling for records to exercise powers of revision.

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order,- recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record. Explanation- All Magistrates whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub- section and of section 398.

Section 398. Power to order inquiry.

On examining any record under section 397 or otherwise, the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrates subordinate to him to make, and the Chief Judicial Magistrate may himself make or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203 of Sub-Section (4) of section 204 or into the case of any person accused of an offence who has been discharged:

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.

A perusal of the aforesaid provisions portray that the revisionary power is exercised either by the Sessions Court or by the High Court and a dismissal of the complaint by the Magistrate under Section 203 of Cr.P.C may be assailed in a criminal revision under Section 397 of Cr.P.C. The ambit of revisional jurisdiction is well settled. Section 397 of Cr.P.C empowers the Sessions Judge to call for and examine the record of any proceeding before any subordinate criminal court situate within its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any

finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such subordinate Court.

13. The extent of the revisionary powers inter alia, is provided under Section 399 read with Section 401 of Cr.P.C. It is clear from the aforesaid provisions that Section 398 has to be read along with other Sections which are equally applicable to the revision petitions filed before the Sessions Court. Section 398 only deals with a distinct power to direct further inquiry, whereas Section 397 read with Section 399 and Section 401 confers power on the revisionary authority to examine correctness, legality or propriety of any findings, sentence or order. The powers of the revisionary court have to be cumulatively understood in consonance with Sections 398, 399 and 401 of Cr.P.C.

14. We may note that the High Court, in the impugned judgment, came to an erroneous conclusion that the Sessions Court had itself taken cognizance of the matter which may be reproduced as under-

"On bare perusal of this provision it is clear that the impugned order cannot be passed under Section 398 of the Code. The word 'may direct' has been used by the legislation in this provision. It gives wide discretion to the court to order further enquiry. Sessions Court has no power to take cognizance of the offence, assess the offence and reach its own conclusion whether there is ground for proceeding with complaint or not and further to direct a Magistrate with regard to registration of a complaint on finding a prima facie case".

15. On a perusal of the Sessions Court judgment (quoted supra), we are of the opinion that the Sessions Court did not pass an order taking cognizance. The Sessions Court order should have been construed only as a remand order for further enquiry. The observations made by the Sessions Court were only justification for a remand and the same did not amount to taking cognizance. In view of the above, the High Court clearly misconstrued the Sessions Court order and proceeded on an erroneous footing. On the other hand, the revisional court was also in error to the extent of influencing the Magistrate Court to keep the findings of Sessions Court in mind, while considering the case on remand. The misconception created before the High Court was due to the fact that the remand order provided discretion for the trial court to conduct further enquiry and thereafter consider issuing process. The High Court in the case at hand without appreciating the dichotomy between taking cognizance and issuing summons, quashed the complaint itself on wrong interpretation of law. In the light of the above, the impugned order of the High court cannot be sustained in the eyes of law.

16. Now coming to the second aspect as to the legality of the order of the learned Magistrate taking cognizance of the matter. The standard required by the Magistrate while taking cognizance is well settled by this court in catena of judgments. In Subramanian Swamy vs. Manmohan Singh & Another, (2012) 3 SCC 64, this Court explained the meaning of the word

'cognizance' holding that "...In legal parlance cognizance is taking judicial notice by the court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter judicially". We may note that the Magistrate while taking cognizance has to satisfy himself about the satisfactory grounds to proceed with the complaint and at this stage the consideration should not be whether there is sufficient ground for conviction. It may not be out of context to note that at the stage of taking cognizance, the Magistrate is also not required to record elaborate reasons but the order should reflect independent application of mind by the Magistrate to the material placed before him.

17. On a perusal of the order of the learned Magistrate taking cognizance, it is apparent that the learned Magistrate observes that the Sessions court has already made out a prima facie case. Such finding would be difficult to sustain as the revisional court only observed certain aspects in furtherance of remanding the matter. Such observations could not have been made by the Magistrate as he was expected to apply his independent mind while taking cognizance. In the case on hand, we recognize the limitation on the appellate forum to review subjective satisfaction of the Magistrate while taking cognizance, but such independent satisfaction unless reflected in the order would make it difficult to be sustained. There is no dispute that Justice should not only be done, but should manifestly and undoubtedly be seen to be done. It is wrought in our constitutional tradition that we imbibe both substantive fairness as well as procedural fairness under our criminal justice system, in the sense of according procedural fairness, in the making of decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.

18. On a different note, we may note that the Magistrates across India have been guided on number of occasions by concrete precedents of this Court to exercise utmost caution while applying their judicious mind in this regard. Unfortunately, we may note that number of cases which are brought before us reflects otherwise.

19. Our attention was drawn to the fact that a civil court subsequently declared the sale deed executed by Smt. Vidhyabai and others in favour of Jagat Narain Thapak as null and void. Further we are apprised of observations made by the Sessions Court on the merits of the case. But we are not inclined to go into those issues.

20. In view of the above, the appeal is allowed and the impugned judgment is set aside. Accordingly, the complaint be considered by trial court afresh. Before parting with this case, we may clarify that the trial court is directed to proceed with the case uninfluenced by any observations made by this Court for the purpose of deciding the instant appeal.

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