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(Founder : Late Sri G.S. GUPTA)

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PART - 10 (31ST MAY 2018)

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In instant case petitioner has stated in the complaint that respondent No.5, being a Public Servant, has given false evidence in different cases before various Courts and sought for initiation of criminal action for perjury against her – However there are no grounds to consider the request of petitioner for issuance of a Writ of Mandamus directing respondent Nos.1 to 4 to initiate appropriate action against respondent No.5 for committing offence of perjury - Accordingly, this writ petition is disposed of giving liberty to petitioner to approach appropriate Forum for redressal of her grievance. **(Hyd.) 69**

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--X--

CRITICAL STUDY ON SECTION 125 Cr.P.C. WITH REGARD TO ATTACHMENT OF MOVABLE OR IMMOVABLE PROPERTY - WHETHER REQUIRE AMENDMENT OR NOT:

By
G. KABARDHI,
IX ADDL. DISTRICT JUDGE, CHITTOOR

Though it appears the above title of the article appears to be very funny, simple and easy, but if we go through in depth it requires a debate. Normally the advocates or the Judicial Officers will consider if the maintenance is granted, if the husband fails to pay the maintenance usually the wife will file the petition to recover the maintenance by sending the husband to imprisonment under Section 125 (3) Cr.P.C.

We should not forget the proceedings under Sec.125 Cr.P.C. are quasi Civil and Criminal and it is a settled law. . If we carefully go through the proviso, the proviso will answer the question which is raised by me on this topic. But nobody will take care of those lines.

Section 125 (3) Cr.P.C.: "If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's (allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be) remaining unpaid after the execution of the warrant, to imprisonment for a term which may extent to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this Section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due".

Here, Section 125 (3) is very clear that **"issue warrant for levying the amount due in the manner provided for levying fines".** So, the Magistrate is having power to issue warrants for levying amount due in the manner provided for levying fines. Here, Section 421 Cr.P.C., speaks as to warrant for levying of fines.

Section 421 Cr.P.C.: **Warrant for levy of fine:** (1) When an offender has been sentenced to pay a fine, the court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may:-

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender,

(b) issue a warrant to the Collector of the District, authorizing him to realize the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter.

Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless, it has made an order for the payment of expenses or compensation out of the fine under Section357.

(2) The State Government may make rules regulating the manner in which warrants under Clause (a) of sub-section (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Court issues a warrant to the Collector under Clause (b) of sub-section (1), the Collector shall realize the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law:

422: **Effect of such warrant:**- A warrant issued under Clause (a) of sub-section (1) of Section 421 by any Court may be executed within the local jurisdiction of such court, and it shall authorise the attachment and sale of any such property outside such jurisdiction, when it is endorsed by the District Magistrate within whose local jurisdiction such property is found.

423: **Warrant for levy of fine issued by a Court in any territory to which this Code does not extent**:- Notwithstanding anything contained in this Code or in any other law for the time being in force, when an offender has been sentenced to pay a fine by a Criminal Court in any territory to which this Code does not extent and the Court passing

the sentence issued a warrant to the Collector of a District in the territories to which this Code extends, authorising him to realise the amount as if it were in arrear of land revenue, such warrant shall be deemed to be a warrant issued under Clause (b) of sub-section (1) of Section421 by a Court in the territories to which this Code extends, and the provisions of sub-section (3) of the said section as to the execution of such warrant shall apply accordingly".

Here, there is a provision in the section which empowers the Magistrate to send warrant to the District Collector and the District Collector in turn can recover the amount by taking steps by attaching the movable or immovable properties of the person and can realise the amount due under the warrant under Revenue Recovery Act. But the above process is only on papers, and throughout my service I never come across the District Collector executed the distress warrant issued by the Court. But if the same power confers to the Magistrate, as provided under Order 21 C.P.C. unlike civil court I can say the amount can be realized by attachment of movable or immovable properties of the husband within no time and without any difficulty.

So, many people might have think while reading this Article when there is simple remedy available to the wife to send her husband to the civil prison, so that immediate recovery will be made, why they have to take the other steps i.e.,issuance of distress warrant or for recovery of maintenance amount by attaching movable or immovable properties. But for example: The husband is having huge properties i.e., both movable and immovable properties but he does not want to pay any paise to the wife. The said wife is not interested to send her husband to imprisonment because of various reasons, out of love and affection or she may be a pious lady. Under those circumstances what is the remedy available for her?

(2) Some times the husband does not want to pay maintenance to the wife and he will abscond the jurisdiction. But the property stands in the name of her husband.

If necessary amendments are made to Section 125 Cr.P.C. she can realise the amount by seeking attachment of movable or immovable properties for realization of the maintenance amount. This is not a hypothetical question. This is the real problem where Hindu woman is facing. In those circumstances also the wife can realise the amount by attaching the movable or immovable properties.

So, in my humble view Section 125 (3) Cr.P.C. is need to be amended as the Magistrate who is dealing Sec. 125 Cr.P.C. is having power under civil law as the proceedings under Sec. 125 Cr.P.C. is quasi civil and criminal.

--X--

2018(2) L.S. 53 (D.B.) (Hyd.)

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

Present:
The Hon'ble Mr.Justice
C.V. Nagarjuna Reddy &
The Hon'ble Mr.Justice
D.V.S.S. Somayajulu

D. Muralidhar Rao ..Petitioner

Vs.

M/s. Srinivasa Constructions & Ors., ..Respondents

ARBITRATION ACT, Sec.8 - Civil Revision - Can a dispute be referred to Arbitration when there are third parties in suit who are not parties to arbitration agreement.

Held - There is a likelihood of conflicting decisions arising if cause of action is separated and decided by two different tribunals viz., Civil Court as far as third defendant is concerned and arbitrator as far as defendants 1 & 2 are concerned - To avoid such likelihood of conflicting decisions and to ensure that the lis is decided comprehensively among all parties, this Court is of the opinion that suit needs to be adjudicating on merits by civil court instead of by arbitrator - Lower Court committed an error in referring parties to arbitration, when a third party is included as a defendant in the suit – Civil Revision is allowed.

Mr.D. Madhava Rao, Advocate for petitioner.
Mr.K. Prabhakar, Advocate for Respondents.

J U D G M E N T

(per the Hon'ble Mr. Justice D.V.S.S. Somayajulu)

1. This Civil Revision Petition is filed under Article 227 of the Constitution of India against the order, dated 11.10.2017, passed in I.A.No.460 of 2016 in O.S.No.575 of 2016 by the XV Additional District Judge, Ranga Reddy District at Miyapur.

2. The said suit O.S.No.575 of 2016 is filed by one D. Muralidhar Rao against i) Sri Srinivasa Constructions, represented by its Managing Partner, Sri D. Papa Rao, ii) Sri D. Papa Rao and iii) Suyosha Health Care Private Ltd.

3. The brief averments of the plaint are that the plaintiff entered into an agreement with second defendant to develop a property measuring 1136.20 square yards in Madhapur Village on 17.08.2007. Later, another agreement dated 28.06.2009 was concluded between the plaintiff and the first defendant firm represented by the second defendant as 'Managing Partner' for development of the same property. The building was then constructed and the third defendant is in occupation of the building as a tenant.

4. The case of the plaintiff is that the two agreements dated 17.08.2007 and 28.06.2009 are not valid as they are not properly stamped or registered. The plaintiff also pleads that the lease deed executed in favour of the third defendant by the plaintiff

and the second defendant is also not valid, as it is not properly stamped and registered. Hence, the suit is filed for the following reliefs:

> a) Declaring defendant No.3 as the tenant of the plaintiff in respect of plaint schedule property consequentially direct defendant No.3 by mandatory injunction to pay rents to plaintiff.
>
> b) Direct defendant No.3 to pay the arrears with effect from 01.10.2015 to 30.04.2016 amounting to Rs.53,09,696/- being the arrears of rent and continue to pay future rents.
>
> c) To grant permanent injunction restraining the defendant Nos.1 & 2 or anyone else claiming through them not to interfere into the suit schedule property.
>
> d) To grant permanent injunction restraining the defendants 1 & 2 or anyone else claiming through them not to execute any nature of documents in respect of the suit schedule property.
>
> e) Allow costs of the suit.
>
> f) And pass other and further orders as this Hon'ble Court deems fit and proper."

5. After the suit was filed, the defendants 1 & 2 filed an application in I.A.No.460 of 2016 under Section 8 (1) of the Arbitration and Conciliation Act, 1996 (for brevity 'the Act') requesting the Court to refer the disputes spelt out in the plaint to arbitration, as per Clause 15 of the Development Agreement dated 17.08.2007. This application was resisted by the plaintiff/ revision petitioner on the ground that the agreement dated 17.08.2007 is not valid in law; that the reliefs claimed in the suit cannot be referred to arbitration; that the defendants 1 & 2 are not parties to the second agreement which contains the arbitration clause etc.

6. After considering the respective pleadings and hearing the parties, the lower Court passed the impugned order holding that the first agreement is not superseded by the second agreement; that the parties to the agreement are the same as the first defendant is a firm represented by the second defendant and therefore, it cannot be said that the parties are different. The trial Court ultimately referred the parties to arbitration, as per clause 15 of the Development Agreement dated 17.08.2007. It is this order that is now impugned in the appeal.

7. This Court has heard Sri D. Madhava Rao, learned counsel for the petitioner/ plaintiff and Sri K. Prabhakar, learned counsel for the respondents/defendants.

8. The learned counsel for the petitioner/ plaintiff argued that the second agreement supersedes the first agreement and that the second agreement does not contain an arbitration clause. Therefore, it is his contention that for any dispute arising under the second agreement dated 28.06.2009, it is only the Civil Court that has the

jurisdiction to entertain the same. He argued that under the second agreement, there are fundamental changes in the terms of the contract and that there is a novation and not merely a 'variation' of the earlier contract. He also points out that as the reliefs claimed in the suit are substantially against the third defendant who is not a party to the arbitration agreement, the dispute cannot be referred to an arbitrator.

9. In reply thereto, the learned counsel for the respondents/defendants argued that the earlier agreement is not superseded by the subsequent agreement and that both of them can be harmoniously read together. He argued that there are some variations in the terms, but not a 'novation' of the contract. He also argued that the reliefs claimed by the plaintiff/present revision petitioner can also be granted by the arbitrator who is a substitute for a Court. He vehemently argued that the impugned order is correct and is valid.

10. After hearing both the learned counsel and considering the submissions made and the evidence introduced, the following points arise for determination:

> i) What are the disputes that can be referred to arbitration and what are the reliefs that can be granted by an arbitrator?
>
> ii) Is there novation or an alteration to the earlier contract of 17.08.2007, in view of the subsequent agreement dated 28.06.2009?
>
> iii) Can a dispute be referred to the arbitration under Section 8 of the Arbitration Act, 1996 when there are third parties in the suit who are not parties to the arbitration agreement?

Re Point No.(i):

11. It is a fact that arbitration is an alternative dispute resolution mechanism chosen as an alternative forum to a civil Court. However, it is clear in view of the decided law on the subject that an arbitrator is not equal to a Court and does not have all the powers that are vested in a civil Court. Even as on date the powers of arbitrator can be circumscribed by the agreement between the parties. As an example, this Court notices Section 31 (7)(a) of the Act clearly stating that if there is a term in the contract prohibiting the award of interest, the arbitrator cannot award interest. Therefore, this Court holds that while an arbitrator is a substitute or alternative forum, he does not have all the powers of a civil Court. The Hon'ble Supreme Court of India in a judgment reported in **Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. (**2011 (5) SCC 532) spelt out that the following disputes are not capable of reference to arbitration. Para-22 of the judgment is reproduced here:

> **"22.** Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by

> arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/ dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

The well recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."

This was followed by **A. Ayyasamy** v**. A. Paramasivam (**2016 (10) SCC 386), in which para-9 is relevant, which is reproduced here:

> "9. …….. the Act does not make any provision excluding any category of disputes treating them as non-arbitrable. Notwithstanding the above, the Courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The Courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. Following categories of disputes are generally treated as non-arbitrable1:
>
> (i) patent, trademarks and copyright;
>
> (ii) anti-trust/competition laws;
>
> (iii) insolvency/winding up;
>
> (iv) bribery/corruption;
>
> (v) fraud;
>
> (vi) criminal matters. ……

12. On an examination of the plaint filed in this case and the prayers made therein, this Court is of the opinion that the prayers made/sought are not those that are prohibited by law from being referred to arbitration. Such prayers can be made even before an arbitrator. This point is accordingly answered.

Re Point No.(ii):

13. For an easy understanding, a tabular statement is given below setting out the important clauses of Exs.P.1 & P.2.

Sl. No.	**Particulars**	**Ex.P.1 agreement Dated 17.08.2007**	**Ex.P.2 agreement Dated 28.06.2009**
1.	Parties	a) D. Muralidhar Rao (Owner) b) D. Papa Rao (Developer)	a) D. Muralidhar Rao (owner) b) Srinivasa Constructions rep. by Managing Partner D. Papa Rao (Developer)
2.	Buildings	Ground + five floors	Ground + 4 floors
3.	Period	3 (three) years after permission from the concerned authorities	18 months from the date of handing over. Site to be handed over within 30 days
4.	Disputes	To be settled by Arbitration	NIL
5.		GPA to developer to sell	GPA after payment of goodwill only.
6.	Share	Ratio of sharing is 52.5 : 47.5	Ratio of sharing is 52.5 : 47.5
7.	Consideration over and above SHARE		Non-refundable good will of Rs.65 lakhs.
8.	Delay		Agreed penalty of Rs.3.50 lakhs per month for failure to deliver within 18 months.

14. Based on the clauses in the new agreement, the learned counsel for the revision petitioner argued that there is an altogether new contract i.e., a novation of the contract and not a mere alteration. The learned counsel for the respondents however argued that the overall purpose and intent remain the same; that in both the agreements the percentage of sharing (52.5 to 47.5) remain the same; but only a few terms are altered. He, therefore, argued that the first agreement and the arbitration clause are not changed or superseded.

15. This Court notices that there are certain very important and fundamental changes in the second agreement which in the opinion of the Court go to the root of the matter viz.,

a) The period of construction is reduced to 18 months from 36 months and a penalty/compensation clause is also included for delay of delivery.

b) The overall size of the building is changed from ground + five floors to ground + four floors.

c) In the second agreement, consideration is also specified in the form of non-refundable goodwill, apart from the built-up area.

d) The alternate dispute resolution to arbitration is eliminated.

e) The parties to the agreement are a partnership firm in place of an individual.

f) The second agreement does not say that the new agreement is entered into alter a few terms etc. The entire gamut of operations/obligations is again spelt out in the new agreement.

16. On a review of the clauses, this Court is of the opinion that the argument of the learned counsel for the revision petitioner/ plaintiff is correct and that there is a novation of the contract in view of the fundamental changes introduced in the size of the building, period of construction and the consideration payable. Referring to the doctrine of novation, the Supreme Court in **Chrisomar Corporation v. Mjr Steels Private Limited (**2017 (4) CCC 55 (SC) held as under:

> "33. It is clear that where parties to a contract agree to substitute a completely different contract for the first, or to rescind a contract, the performance under the original contract and/or rescinded contract comes to an end. When parties to a contract "alter" a contract, the question that has to be answered is as to whether the original contract is altered in such a manner that performance under it is at an end."

17. The Hon'ble Supreme Court of India also noticed and approved the judgment of the Calcutta High Court in **Juggilal Kamlapat v. N.V. Internationale Credit-En_Handels Vereeninging 'Rotter-dam' (**AIR 1955 Calcutta 65). This Court holds that the changes effected by Ex.P.2 are fundamental in nature and go to the root of the matter. Therefore, this Court has no

hesitation to hold that there is a novation and substitution of existing contract-Ex.P.1 with Ex.P.2- agreement. In this view of the matter, the finding of the lower Court that Ex.P.2 is only in continuation of Ex.P.1 is erroneous. The appellant allowed the building to be constructed and in fact he states that the tenant was inducted with his consent into the building. However, his contention is that the lease deed is not stamped/registered as per law and hence void. The point however remains that the second agreement was entered into after two years and also acted upon. The judgement in **Young Achievers v. IMS Learning Resources Private Limited** (2013) 10 SCC 535) is also relevant in this context. Paras 7 and 8 are reproduced here:

> "7. ……. The principle laid down is that if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it. . ……..
>
> 8. We may indicate that so far as the present case is concerned, parties have entered into a fresh contract contained in the Exit paper which does not even indicate any disputes arising under the original contract or about the settlement thereof, it is nothing but a pure and simple novation of the original contract by mutual consent. ……."
>
> Hence, this Court is of the opinion that the arbitration clause in the earlier Ex.P.1-agreement does not exist as Ex.P.2-agreement is a fresh agreement; which does not provide for arbitration.

Re Point No.(iii):

18. The last question that survives for consideration is whether an order under Section 8 of the Act could be passed directing the parties to go to arbitration, when the plaint includes reliefs and also parties who are not parties to the arbitration agreement. A reading of the record makes it clear that the third defendant in the suit viz., Suyosha Health Care Pvt. Ltd. is not a party to either Ex.P.1, agreement dated 17.08.2007 or the subsequent agreement dated 28.06.2009. The reliefs claimed in the suit are for a declaration that the third defendant is a tenant in the premises for a direction to pay the arrears of rent from 01.10.2015 onwards and also the future rents to the plaintiff, besides the relief of permanent injunction. Therefore, a reading of the plaint makes it clear that a substantial relief is claimed against the third defendant in the suit.

19. The plaintiff's case is that there is a breach committed by the defendants 1 & 2 and that on the basis of some untenable documents, construction of the building was carried out. It is also his alternative case that defendants 1 & 2 are collecting the entire rent for the building, instead of limiting it to the development to the share of 47.5%. The issues such as breach of contract and whether the third defendant could be inducted to the tenancy are the matters to be decided in the suit after a full-fledged

trial. The reliefs claimed against third defendant cannot be segregated and decided separately. The suit consists of reliefs which are claimed both against defendants 1 & 2 who are parties to the agreement and against third defendant who is not a party to the agreement.

20. The Hon'ble Supreme Court of India in **Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya (**AIR 2003 SC 2252) clearly held that the reliefs cannot be separated in a case like this. There is also a likelihood of conflicting decisions arising if the cause of action is separated and decided by two different tribunals viz., civil Court as far as the third defendant is concerned and the arbitrator as far as defendants 1 & 2 are concerned. To avoid such likelihood of conflicting decisions and to ensure that the lis is decided comprehensively among all the parties, this Court is of the opinion that the suit needs to be adjudicating on merits by the civil court instead of by the arbitrator. Therefore, this Court is of the opinion that the lower Court committed an error in referring the parties to arbitration, when a third party is included as a defendant in the suit. This point is answered accordingly.

21. For all the above reasons, this Court is of the opinion that the impugned order, dated 11.10.2017, passed in I.A.No.460 of 2016 in O.S.No.575 of 2016 by the XV Additional District Judge, Ranga Reddy District at Miyapur, is not sustainable and the same is set aside. Accordingly, the Civil Revision Petition is allowed. However, in the circumstances of the case, there shall be no order as to costs.

22. As a sequel to the disposal of the main revision, CRP MP No.8223 of 2017 shall stand disposed of as infructuous/

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2018(2) L.S. 60 (Hyd.)

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

Present:
The Hon'ble Dr.Justice
Shameem Akther

Subhodaya Digital
Entertainment Pvt.Ltd., ..Petitioner
Vs.
The State of Telanagana,
& Anr., ..Respondents

CRIMINAL PROCEDURE CODE, Sec.482 – INDIAN PENAL CODE, Secs.403 & 420 - COPYRIGHT ACT, Secs.63, 65 & 69 – Petitioner/Accused seeks to quash Criminal proceedings instituted against him.

Held - Power u/Sec.482 Cr.P.C. is required to be exercised sparingly, carefully and with great caution to prevent abuse of process of the Court or otherwise to secure the ends of justice - While exercising the power, Court has to ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to

pressurize accused - Impugned criminal proceedings are not invoked as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurize the accused - Continuation of proceedings is not abuse of process of law – Petition stands dismissed.

Mr.Mummaneni Srinivasa Rao, Advocate For the Petitioner.
R1, Public Prosecutor (TS), R3, S. Niranjan Reddy, Sr. counsel for Thoom Srinivas, Advocate For the Respondents.

J U D G M E N T

1. This Criminal Petition, under Section 482 of Cr.P.C., is filed by the petitioner-accused seeking to quash the proceedings in Crime No.46 of 2018 of Pet Basheerabad Police Station, Cyberabad, registered for the offences under Sections 403, 420 I.P.C. and Sections 69 and 63 r/w 65 of the Copyright Act, 1957.

2. Heard Sri Mummaneni Srinivasa Rao, learned counsel for the petitioner-accused, learned Public Prosecutor appearing for respondent No.1-State and Sri S. Niranjan Reddy, learned senior counsel representing Sri Thoom Srinivas, learned counsel for the 3rd respondent, apart from perusing the material available on record.

3. The learned counsel for the petitioner would submit that a false report is lodged by the 2nd respondent-*de facto* complainant who has no authority to do so. Basing on that, the impugned crime is registered and under investigation. As per the Copyright Act, the original owner has to give a complaint to the competent authority not to the police. The police has no power or authority to register the crime at the instance of the unauthorized person. The said fact is also proved based on the report dated 30.11.2015 submitted by the Deputy Superintendent of Police, Toopran Sub Division. As per the said report and the Act, any party aggrieved by any dispute in respect of broadcasting of cable network, ought to have filed complaint before the Telecom Distributor Settlement and Appellate Tribunal, New Delhi (TDSAT). As per Section 11 of the Cable Television Networks (Regulation) Act, 1995, the competent authority is the Commissioner of Police. The *de facto* complainant is not the aggrieved person and the original owner of the network is Star India, so it cannot be looked into. The petitioner is running a cable network having licence granted by Star India and the licence is valid upto 30.06.2018. Ultimately, the petitioner prayed to quash the impugned proceedings.

4. The contentions made on behalf of the 3rd respondent are as follows: The 3rd respondent is a broadcaster, whose broadcasting and reproduction rights are infringed by the petitioner. The 2nd respondent is the authorized representative of the 3rd respondent. The 2nd respondent filed criminal complaint against the petitioner in the subject crime and there is no infirmity in filing the criminal complaint by the 2nd respondent. As an abundant caution, the 3rd respondent filed an application in I.A. No.4 of 2018 to implead it in the Criminal

Petition. It is contended that the Star India Private Limited is a company incorporated under the provisions of the Companies Act, 1956, and it has registered office in Mumbai. The 3rd respondent is engaged in the business of broadcasting satellite television channels of various genres. The 3rd respondent owns the right, title, interest, etc., including broadcasting and reproduction right for the Star pay channels. The 3rd respondent has the requisite licence to do so, obtained from the Ministry of Information and Broadcasting. The business is being carried as per the Regulations of the Telecom Regulatory Authority of India Act, 1997. The petitioner-accused representing itself to be a Multi System Operator involved in the business of retransmission of signals of cable television channels through its network, approached the 3rd respondent-company seeking supply of Star pay channels for retransmitting them over its network and offered to pay the subscription fees to the 3rd respondent-company. The petitioner had fallen due huge amount. So a payment plan was given by the 3rd respondent to clear the outstanding amount pertaining to past period. The petitioner also executed a Memorandum of Understanding (MoU) in September, 2017, for high definition channels, wherein the petitioner agreed to pay fixed licence fee of Rs.0.50 lakhs per month for high definition channels. As expressly mentioned in the agreement, the 3rd respondent agreed to grant the petitioner the "Non-exclusive right to re-broadcast and re-transmit the channels during the Term via the Distribution System for Re-transmission to Subscribers within the Territory", subject to the petitioner scrupulously complying with the terms of the agreement including the clause pertaining to payment of applicable fixed licence fee of Rs.41.50 lakhs per month. The conditions of agreement are in tune with DAS Regulations. The rights granted to the petitioner are from 01.07.2017 to 30.06.2018. The petitioner committed default in making regular payment as agreed to the 3rd respondent. As per the terms and conditions of the agreement, the 3rd respondent had suspended the operation of the broadcasting rights of the petitioner after due notice in accordance with the Regulations after following due procedure. Thereafter the petitioner could not have lawfully transmitted/retransmitted the broadcasting signals with effect from 15.01.2018. In spite of notice of suspension of rights, the petitioner is indulging in transmission of the signals even after 15.01.2018 resorting to dishonest means. Having noticed the same and captured the signals, an authorization was given to the *de facto* complainant to lodge the report. The submissions made on behalf of the petitioner are unsustainable. The proceedings cannot be quashed as there is a *prima facie* case for the offences alleged and prayed to dismiss the petition.

5. In view of the contentions putforth by both sides, the point for determination is, whether the request of the petitioner can be acceded to?

6. The 2nd respondent-*de facto* complainant filed a report dated 20.01.2018 before the police stating that the local cable operator-Subhodaya Digital Entertainment Private Limited, Jeedimetla, Hyderabad (the petitioner herein), having their viewers base

in Hyderabad and elsewhere, has been illegally retransmitting and broadcasting Star Channel without any licence or authorization from the 3rd respondent through DTH STB's from his control room in Hyderabad city. Its constituted attorney nanavati and company advocates deputed an antipiracy consultant-Mr. Sarfaraz Sayyed (*de facto* complainant), who reached the location, captured and recorded the illegal broadcasting of Star channels over the local network by the petitioner. In the recording, contained in the disc produced along with the report, Star Plus channel is visible along with Finger print No.00111ECA. Thus, the petitioner indulged in transmitting/ retransmitting signals of Star pay channels by illegally demodulating signals from Direct to Home (DTH) Set Top Boxes (STB) and stealing the signals belonging to the 3rd respondent-company. The finger print number clearly shows that the local operators are stealing the signals provided by the 3rd respondent. Basing on the report, a case in Crime No.46 of 2018 was registered by Pet Basheerabad Police Station, Cyberabad, for the offences under Sections 403, 420 I.P.C. and Sections 69 and 63 r/w 65 of the Copyright Act.

7. As per the material placed before this Court, the petitioner committed default in making stipulated payment of Rs.41.50 lakhs per month to the 3rd respondent. The petitioner committed default in making payment of the stipulated licence fee of Rs.0.50 lakhs as per the MoU. There is record to show that the petitioner paid an amount of Rs.77,06,000/- as against the demand of Rs.3,64,05,119/-. As per the record, the agreement between the parties contains the method of payment and it elaborately spells out the consequences of non-payment of licence fee. Clause 19 of the Agreement provides that if the MSO defaults in payment of any fixed monthly licence fee on the due date, the broadcaster shall have the right to suspend delivery to MSO of all the channels after giving notice in accordance with law. It is not in dispute that the petitioner is not the licensee of the 3rd respondent. Further, there is no much dispute with regard to the agreement as well as the MoU entered into between the parties to the litigation. There is a procedure under Clauses 6.1 and 6.5 of the DAS Regulations to be followed by broadcaster for deactivating the supply of signals on failure of the Multi System Operator to make payment of the fixed monthly licence fee on the due date. The DAS Regulations further mandate publication of such notice in two leading local newspapers of the State in which the service provider is providing the services, out of which one notice shall be published in the newspaper in local language.

8. In the instant case, the petitioner committed default on multiple occasions in making payment of fixed licence fee on the due date. The 3rd respondent issued a notice to the petitioner on 12.12.2017 informing about the default of payment of monthly licence fee and the consequences. There is also record to show that the notice was published in the local newspaper and the deactivation and discontinuation of the signals was effected from 15.01.2018. There is also record to show that in spite of discontinuation of signals as stated supra, the petitioner resorted to alleged dishonest

means of procuring and providing signals belonging to 3rd respondent to its subscribers and thereupon the impugned written report was lodged with the police. On that, the police concerned registered the subject crime. The 2nd respondent, who is the authorized agent of the 3rd respondent, has right to lodge a report to the police and no infirmity can be found therein. As per the record, the 3rd respondent is the proper party to the proceedings. The implead application filed by the 3rd respondent is allowed today vide order inI.A. No.4 of 2018. 9. It is apt to refer the decision of the Hon'ble Supreme Court in **Inder Mohan Goswami and another v. State of Uttaranchal and others** (2007) 12 SCC 1), wherein it is observed that the power under Section 482 Cr.P.C. is required to be exercised sparingly, carefully and with great caution to prevent abuse of process of the Court or otherwise to secure the ends of justice. While exercising the power, the Court has to ensure that the criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurize the accused. The power should not be exercised to stifle a legitimate prosecution.

10. As per the records placed before this Court, the submission of the report dated 30.11.2015 by the Deputy Superintendent of Police, Toopran Sub Division, has no bearing over the facts and circumstances of the instant case. The allegation is that the petitioner has been dishonestly indulging in broadcasting of channels of the 3rd respondent, even after the discontinuation of signals with effect from 15.01.2018. There is no authority for the petitioner to do so. Such acts can be construed as infringement of copyrights of the 3rd respondent. It amounts to conversion of movable property belonging to respondent No.3 fraudulently with unlawful measures by the petitioner. The impugned criminal proceedings are not invoked as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurize the accused. The continuation of proceedings is not abuse of process of law. Further, in view of the circumstances of the case, it cannot be held that there are no sufficient grounds to register the impugned crime and proceed with the investigation of the case. The report lodged by the 2nd respondent reveals *prima facie* commission of a cognizable offence, for which the impugned crime is registered. Continuation of the impugned proceedings is not abuse of process of law. All the contentions raised on behalf of the petitioner do fail. The petition is devoid of merit and it is liable to be dismissed.

11. Accordingly, the Criminal Petition is dismissed. The interim stay granted on 08.02.2018 in I.A. No.2 of 2018 stands vacated. Miscellaneous petitions, if any pending in this Criminal Petition, shall stand closed.

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2018(2) L.S. 65 (Hyd.)

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

Present:
The Hon'ble Mr.Justice
S.V. Bhatt

Reshavani @ Reshavena Ailaiah ...Petitioner

Vs.

Macherla Chinna Narasaiah @ Narsinga Rao & Ors., ..Respondents

CIVIL PROCEDURE CODE, Order XXIII Rule 1 - Revision petitioner filed suit for perpetual injunction restraining respondents from interfering with possession and enjoyment of plaint schedule property – Suit is posted for trial and the evidence on plaintiffs side is recorded - Meanwhile, revision petitioner filed an I.A praying for withdrawing suit with liberty to file a fresh suit - Court below through order impugned rejected prayer to grant liberty to file fresh suit.

Held – Under Sub-Rule (3) of Rule 1 of Order XXIII, Court grants liberty to withdraw suit or part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim, on being satisfied that the suit fails for reason of some formal defect – When defect in the plaint constitutes sufficient ground for allowing the plaintiff to withdraw the suit with liberty to file fresh suit - This Court keeps in view the fallout under Sub- Rule 4 of Order XXIII of CPC, and exercises the discretion or jurisdiction to grant or refuse to grant leave under Sub Rule 3 - Affidavit filed by the petitioner discloses the formal defect in the suit - Impugned Order is set aside and liberty to file fresh suit is granted.

Mr.Challa Srinivasa Reddy, Advocate for Petitioner.

Ms.Nimmagadda Revathi, Advocate for Respondents.

O R D E R

Heard Mr.Challa Srinivasa Reddy for revision petitioner and Ms.Nimmagada Revathi for respondents.

The plaintiff in O.S. No.434 of 2010 in the Court of II Additional Junior Civil Judge is the revision petitioner. The revision petitioner filed suit for perpetual injunction restraining the respondents herein from interfering with revision petitioners possession and enjoyment of plaint schedule property. The respondents filed written statement and are contesting the suit. The suit is posted for trial and the evidence on plaintiffs side is recorded. The revision petitioner filed I.A. No.793 of 2017 under Order XXIII Rule 1 Sub-Rule 3 of Civil Procedure Code (for short CPC) praying for withdrawing the suit with liberty to file a fresh suit. The affidavit filed along with I.A. No.793 of 2017 refers to an incident happened on 20th July,2010 i.e. defendants trying to interfere with the possession and enjoyment of revision

petitioner and registration of Crime No.104 of 2010 in P.S. Choppadandi. The affidavit refers to respondents occupying the suit land in the year 2011. It is further averred with the changed circumstances, the revision petitioner is compelled to seek the comprehensive relief of declaration of title, together with recovery of possession of plaint schedule property. The plaint already filed needs amendment and the efforts of the revision petitioner for amendment were unsuccessful, hence, prefers to file separate suit for declaration of title and recovery of possession. Therefore, I.A.No.793 of 2017 was filed with a prayer to withdraw the suit by granting liberty to file fresh suit.

The respondents object to granting liberty to file fresh suit, and rely on dismissal of I.A. No.523 of 2017 filed by the revision petitioner under Order VI Rule 17 of CPC. The examination of witnesses is over, and no ground to grant permission to file a fresh suit is made out. The respondents state that the revision petitioner can be permitted to withdraw the suit but without leave to file fresh suit.

The Court below through the order impugned in the CRP rejected the prayer to grant liberty to file fresh suit. The Court below referred to the requirements of Order XXIII Rule 1 Sub-Rule 3 clause

(b) and held that the liberty now sought for is a deliberate attempt of the plaintiff. The Court below refers to the evidence of PWs 1 to 3 and that the revision petitioner has not mentioned the reasons for filing fresh suit except the allegations as made in the plaint. The lack of diligence in pursuing the present suit led to procrastination of the proceedings. Therefore, it is found by the learned trial Judge that no ground is made out for granting the liberty. Hence the C.R.P.

Mr.Srinivasa Reddy contends that the trial Court committed a serious illegality by refusing to grant liberty and the refusal is contrary to the discretion conferred on a Court by Order XXIII Rule 1(3). According to him, the reason for seeking liberty to file fresh suit is that the revision petitioner has no option except to suffer the alleged interference of respondents herein during the pendency of the suit, instead of proceeding with the trial, for working out comprehensive reliefs, liberty to file fresh suit was sought under order XXIII Rule 1 (3). The trial Court ought not to refer to evidence and then refuse the liberty to file fresh suit. According to him, the order if allowed to remain, amounts to shutting out remedy or relief to a litigant without adjudication by a Court of law. Once a suit for declaration of title and recovery of possession is filed, all the issues are comprehensively tried and no injustice is occasioned to respondents. He further contends that the only area the trial Court could have exercised its discretion in favour of respondents is to impose costs on the petitioner/plaintiff while granting liberty to withdraw the suit. He prays for setting aside the order and grant liberty to plaintiff to file

fresh suit.

Ms. Revathi, on the other hand, contends that the averments in affidavit filed in I.A.No.793 of 2017 are sufficient to refuse the liberty as the petitioner is very lax in prosecuting the suit inasmuch as the petitioner refers to alleged dispossession in 2011. After indulging in luxury litigation for seven years, now application is filed for withdrawing the suit and liberty to file fresh suit. She further contends that though a few aspects on the evidence are referred to by the trial Court, the trial Court did not express a view on the evidence but merely referred to the stage of the suit and declined the liberty to file fresh suit. She prays for dismissing the CRP.

I have perused the record and noted the rival submissions made by the counsel appearing for the parties. The point for consideration in the above circumstances is whether the petitioner is entitled for leave to file fresh suit for declaration of title and recovery of possession under Order XXIII Rule 1 Sub-Rule 3 of CPC?

The revision petitioner filed the suit for perpetual injunction assuming his prima facie title and possession, and seeking protection of possession from the trial court by way of injunction against respondents. The petitioner avers in the affidavit that the respondents in 2011 dispossessed the petitioner from the plaint schedule property. The steps taken by petitioner for amending the plaint to include prayer for declaration of title and recovery of possession were negatived. This Court is not examining the reasons for refusing the prayer for amendment, for the said order has become final and any how not subject matter of revision. Now the affidavit refers to necessity to file suit for declaration of title and recovery of possession. For the reasons already noted, the prayer to file fresh suit was rejected. Sub-Rules 3 and 4 of Order XXIII Rule 1 read thus:

(3) Where the court is satisfied,

a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim. (4) Where the plaintiff,

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

Under Sub-Rule (3) of Rule 1 of Order XXIII,

the Court grants liberty to withdraw the suit or part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim, on being satisfied that the suit fails for reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. The consequence of withdrawing the suit without liberty to file fresh suit is prescribed under Rule 1 Sub-Rule 4 viz. a party who withdraws the suit without leave of Court is precluded under Rule from instituting fresh suit in respect of such subject matter or such part of the claim. The Court while examining the case for granting liberty is satisfied that the formal defect fails the suit. The clause lays emphasis on the words formal defect.

The words formal defect in the normal parlance connote defects of various kinds not affecting the merits of the case. Thus a formal defect is a defect of form unrelated to the claim of plaintiff on merits. In other words, the expression formal defect means a defect of form and not a defect on the merits of the case.

Under Clause (b), the court is satisfied that there are sufficient grounds for allowing plaintiff to file fresh suit for the same subject matter or a part of claim. The thrust under clause (b) is on the words that the Court is satisfied that there are sufficient grounds for instituting a fresh suit for the same subject matter. The words sufficient grounds have to be given sufficiently wide meaning but not a restrictive meaning. What constitutes sufficient grounds has been left to judicial discretion of the Court and whether the grounds stated by the plaintiff merit acceptance as sufficient grounds to permit plaintiff to file a fresh suit after removing the defects in the pending suit. Defect in the plaint constitutes sufficient ground for allowing the plaintiff to withdraw the suit with liberty to file fresh suit. The expression sufficient grounds is given wider meaning, but not restricted meaning, so that the right of a party is not prejudicially affected and legal remedy denied without adjudication.

Therefore, the Court while examining whether the suit already filed fails by reason of formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, keeps the legal consequences i.e. shall be precluded from instituting fresh suit under Sub-Rule 4 and appropriate orders are passed. Further as stated above, Sub Rule 3 has two facets, namely, that the Court is required to be satisfied that the suit pending before fails by reason of some formal defect and the formal defect is understood and appreciated by taking note of the subsequent events that changed the frame of suit. Secondly that fresh grounds are available for allowing the plaintiff to institute fresh suit for the subject matter or part of a claim. The scheme of Sub-Rule 3 provides for exit from the contest because of formal defects in the suit. Hence, the Court judiciously applies its discretion both while giving permission to withdraw the suit with liberty to file fresh suit or refuse liberty. The factors which may

weigh with the Court to refuse granting leave to file fresh suit, ought not to be comprehensively stated but as illustration it can be stated that prejudice to defendant or prosecution of vexatious claims etc. are a few illustrations. Hence, this Court keeps in view the fallout under Sub- Rule 4 of Order XXIII of CPC, and exercises the discretion or jurisdiction to grant or refuse to grant leave under Sub Rule 3. In the case on hand, this Court is of the view that the affidavit filed by the petitioner herein discloses that the formal defect in the suit is unworkable prayer and secondly sufficient grounds are shown namely that the petitioner purchased plaint schedule from respondents herein and there is necessity for seeking declaration of title and the relief of recovery of possession. After considering the material on record and applying the discretion conferred on Court by Sub-Rule 3, this Court is of the view that the order impugned in the C.R.P. to the extent of not granting liberty warrants interference and accordingly the order impugned in the C.R.P. is set aside and liberty to file suit is granted.

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2018(2) L.S. 69 (Hyd.)

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

Present:
The Hon'ble Mr.Justice
Gudiseva Shyam Prasad

K. Amulya ..Petitioner

Vs.

The State of Telangana & Ors., ..Respondents

CRIMINAL PROCEDURE CODE, Secs.195 & 340 - Writ petition preferred by petitioner seeking a Writ of Mandamus directing respondent Nos.1 to 4 to initiate appropriate action against respondent No.5 for committing offence of perjury by giving false statements in writing before various Courts.

Held - Whenever it is brought to the notice of Court during proceedings that a false affidavit or a false document is filed before a Court, the Court on making an enquiry u/Sec.340 Cr.P.C. and on application of mind, whether it was expedient in the interest of justice that a complaint is to be filed against that person in exercise of powers u/Sec.195 Cr.P.C., after conducting such a preliminary enquiry for filing a complaint before the appropriate Court against such person in relation to offence committed by him.

27 W.P.No.34249/16 Dt:30-4-2018

In instant case petitioner has stated in the complaint that respondent No.5, being a Public Servant, has given false evidence in different cases before various Courts and sought for initiation of criminal action for perjury against her – However there are no grounds to consider the request of petitioner for issuance of a Writ of Mandamus directing respondent Nos.1 to 4 to initiate appropriate action against respondent No.5 for committing offence of perjury - Accordingly, this writ petition is disposed of giving liberty to petitioner to approach appropriate Forum for redressal of her grievance.

Cases Referred:
(2001) 9 SCC 742

Mr.P.S. Nagarajan, Advocate for the petitioners.
G.P. for Medical & Health Advocatefor the (R.1 to R.4).
Mr.Nazeer Khan, Advocate for (R.5).

O R D E R

This writ petition is filed by the petitioner seeking for a Writ of Mandamus directing respondent Nos.1 to 4 to initiate appropriate action against respondent No.5 for committing the offence of perjury by giving false statements in writing before various Courts.

The grievance of the petitioner is that respondent No.5 has given false evidence in different proceedings before various Courts, which are shown in para-9 of the affidavit filed in support of the writ petition. Briefly, the relief sought by the petitioner is for a direction to respondent Nos.1 to 4 to initiate appropriate action against respondent No.5 for committing the offence of perjury by giving false statements in writing before various Courts.

Heard learned counsel for the petitioner as well as the learned Assistant Government Pleader for Medical and Health appearing for respondent Nos.1 to 4 and the learned counsel appearing for respondent No.5. Perused the material on record.

The main question that falls for consideration in this writ petition is, whether the petitioner can maintain a writ petition seeking a direction to the official respondent Nos.1 to 4 to initiate appropriate action against unofficial respondent No.5 for the alleged offence of perjury committed by her.

The proceedings governing the offence of Perjury is defined under Section 195 Cr.P.C., which reads as under:

195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.

(1) No Court shall take cognizance-

(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub- clause (i) or sub- clause

(ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.

(2) Where a complaint has been made by a public servant under clause

(a) of sub- section (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint: Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of sub- section (1), the term" Court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section. (4) For the purposes of clause (b) of sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court in situate:

Provided that-

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.

The procedure to be followed in cases mentioned under Section 195 of Cr.P.C. is governed by Section 340 of Cr.P.C., which reads as under:

340. Procedure in cases mentioned in section 195 :--

(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub- section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non- bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub- section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub- section (4) of section 195.

(3) A complaint made under this section shall be signed,-

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court.

(4) In this section," Court" has the same meaning as in section 195.

From the above procedure laid down under Section 340 Cr.P.C., it is obvious that if an offence of Perjury appears to have been committed in relation to a proceeding in the Court in respect of a document produced or given in evidence in a proceeding in that Court, a preliminary enquiry is to be conducted and a finding is to be recorded to that effect. A complaint is to be made in writing and it has to be sent to a Magistrate of the First Class having jurisdiction.

From the above provision, it is clear that it is the Court, which has to refer the complaint to the Magistrate concerned having jurisdiction over the subject matter to consider the complaint of perjury.

Learned counsel for respondent No.5 has placed reliance on a judgment of the Apex Court in B.K. GUPTA v. DAMODAR H. BAJAJ (1) and submitted that if a false affidavit is given and false evidence is

1.(2001) 9 SCC 742

adduced in any proceeding before a Court, the procedure prescribed under Section 340 Cr.P.C. has to be followed.

It is appropriate to refer para-3 of the said judgment, which reads as under:

3. From the above, it follows that there are two conditions, on fulfillment of which a complaint can be filed against a person who has given a false affidavit or evidence in a proceeding before a court. The first condition being that a person has given a false affidavit in a proceeding before the court and, secondly, in the opinion of the court it is expedient in the interest of justice to make an inquiry against such a person in relation to the offence committed by him. It is no doubt true that the High Court has recorded a finding that the appellant has made a false statement on oath and has also used evidence known to be false and fabricated. On perusal of the record we do not find any material on record to show that there was any application of mind by the court that it was expedient in the interest of justice to make an inquiry and file a complaint against the appellant. We have also perused the judgment in Writ Petition No. 1442/1983 and the judgment does not show that the court applied its mind regarding the second condition as to whether it is expedient in the interest of justice to make an inquiry into the false evidence given by the appellant and a complaint is to be filed. In the absence of application of mind in regard to expediency for filing compliant against the appellant, the order passed by the High Court directing the Prothonotary and Senior Master of the High Court to file a complaint against the appellant was vitiated.

From the above judgment, it is obvious that whenever it is brought to the notice of the Court during the proceedings that a false affidavit or a false document is filed before a Court, the Court on making an enquiry under Section 340 Cr.P.C. and on application of mind, whether it was expedient in the interest of justice that a complaint is to be filed against that person in exercise of powers under Section 195 Cr.P.C., after conducting such a preliminary enquiry for filing a complaint before the appropriate Court against such person in relation to the offence committed by him.

In the instant case, the petitioner has stated in the complaint that respondent No.5, being a Public Servant, has given false evidence in different cases before various Courts and sought for initiation of criminal action for perjury against her under Sections 191, 193 and 199 of IPC. However, to initiate proceedings under the above Sections 191, 193 and 199 of IPC, the procedure to be followed is prescribed under Sections 340 and 195 of Cr.P.C.

In the light of the above facts and circumstances of the case, there are no grounds to consider the request of the petitioner for issuance of a Writ of Mandamus directing respondent Nos.1 to 4 to initiate appropriate action against respondent No.5 for committing the offence of perjury.

Accordingly, this writ petition is disposed of giving liberty to the petitioner to approach appropriate Forum for redressal of her grievance. No order as to costs.

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

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2018(2) L.S. 74 (Hyd.)

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

Present:
The Hon'ble Mr.Justice
C.V. Nagarjuna Reddy &
The Hon'ble Mr.Justice
Gudiseva Shyam Prasad

Tippa Srihari ..Petitioner

Vs.

State of A.P. & Ors., ..Respondents

CHILD PROTECTION AND CUSTODY ACT – Custody of Minors – Entrustment of custody of two minor children to Petitioner/Husband so as to be able to produce before Foreign Court.

Held – After twenty-four hours of custody following complaint made by Wife/Fourth Respondent, Petitioner was released on a condition not to visit his home for month – Court have summoned fourth Respondent and personally enquired with her whether she is also willing to travel to foreign along with minor children, but she has not shown any interest to accompany children in spite of fact that she was informed that petitioner is willing to provide for stay of herself and her children at his house exclusively without his presence – Conduct of fourth Respondent highly unreasonable – Petition stands allowed.

Mr.Prabhjit Jauhar, T. Anirudh Reddy, Advocates for or the Petitioner.
Mr.C.S. Suryaprakasha Rao, Special Government Pleader (AP), Advocate for the R1 to R3.
Mr.P. Jagadish Chandra Prasad, Advocate for the R4.

J U D G M E N T
(perr the Hon'ble Mr.Justice C.V.Nagarjuna Reddy)

1. The petitioner and respondent No.4 are man and wife. Their marriage was performed on 12.2.2009 in India. Even prior to his marriage with respondent No.4, the petitioner was living in United Kingdom (UK) since 2004. He has been working as Physiotherapy Team Manager with National Health Services, UK for the last fourteen years. After her marriage, respondent No.4 joined the company of the petitioner in UK in March, 2009 and acquired the permanent UK residency, i.e. Indefinite Leave to remain in UK, and till May 2017 respondent No.4 lived with the petitioner in UK. The couple were blessed with two male children, by name, Abhinav Tippa and Divit Tippa. The first son was born on 3.1.2011 and the second son was born on 7.7.2015. Both of them having been born in UK, they acquired UK citizenship by birth. The elder son was admitted in a school called

W.P.No.2888/18 Date:16-3-2018

Jellybabies Nursery and has studied Nursery and Pre-school during 2013-2015 and was admitted in Reception School in 2015-16 and Colmers Farm Primary School in 2016-17. There is no dispute about the aforementioned facts.

2. The marital life of the couple ran into rough whether with respondent No.4 giving a police complaint leading to registration of a criminal case against the petitioner on 13.5.2017 and the latter was arrested for the alleged domestic violence against respondent No.4 in the UK. The petitioner remained in judicial custody for 24 hours and was thereafter granted conditional bail with the restraint order that he shall not enter his home in UK for four weeks. During this period of four weeks, respondent No.4 has come down to India along with the two minor children on 28.5.2017. The petitioner filed a petition for divorce/dissolution of marriage on 5.7.2017 in a UK Court. Respondent No.4 has submitted herself to the jurisdiction of the Court and filed a reply in response to the divorce petition. The petitioner also filed a Wardship petition before the High Court of Justice, Family Division, UK under Child Protection and Custody Act, 1985. Vide its order dt.18.10.2017 the UK Court declared the two minor children as its wards with a direction to respondent No.4 to cause return of the minor children to the jurisdiction of England and Wales by 6.11.2017. On an another petition filed by the petitioner, the High Court of Justice, Family Division, vide order dt.18.12.2017 directed that both the minor children shall remain wards of the UK Court during their minority or until further order and also directed respondent No.4 to return the children forthwith to England & Wales within fourteen days of receipt of the said order. The Court has also rendered a finding that the two minor children were wrongfully removed from the jurisdiction of the UK Court which has exclusive jurisdiction in matters of parental responsibility over the child pursuant on articles 8 and 18 of Brussels II Regulation (BIIR).

3. After coming to India, respondent No.4 has filed G.W.O.P. No.92 of 2017 in the Court of the Additional District Judge, Madanapalle, inter alia to declare the petitioner as unfit to act as natural guardian and to declare respondent No.4 as legal guardian to the two minor children till the date of attaining their majority both personally as well as for their properties. As respondent No.4 has not responded to the orders passed by the UK Court to return the custody of the minor children to the Court, the petitioner has filed the present writ petition for habeas corpus directing the respondents to produce the two minor children in court to enable them to go back to the UK.

4. In response to the notice issued by this Court, respondent No.4 has filed a counter affidavit. She has inter alia stated that the UK Court has passed the orders after she left the country and therefore they do not bind her. She denied the allegation that she removed the two minor children from UK illegally. She averred that she purchased return tickets to go back to UK and that she was shocked to know that soon after her reaching India the petitioner has filed

the petition for divorce and other applications and added to the same, she has received threatening calls from the petitioner due to which she could not return to UK nor even cancelled the return tickets. She further averred that the UK Court has no jurisdiction to entertain the petitions and pass orders. That the petitioner wantonly with a mala fide intention did not obtain UK citizenship to respondent No.4 and that the petitioner has hypertension due to which she and her two children faced harassment in his hands, that the conduct of the petitioner has an impact on the life of the kids and that due to the rude behaviour and harassment meted out to respondent No.4 and her kids, they suffered without food before coming down to India and that with the help and support of Orphanage Home, Amirah Foundation and the Police Officials, she could return to India along with her minor children. That the petitioner has abused respondent No.4 as 'Bloody Indian' number of times and the domestic violence committed by the petitioner on herself and her children was taken on file by the Bournville Police Station. That the family of the petitioner attacked her family in India and her grand-father was seriously injured in such attack. That the petitioner used to beat her and the children in front of his friends and family gatherings and that as the writ petition is not maintainable, the same may be dismissed.

5. Mr. Prabhjit Jauhar, learned counsel for the petitioner, referred to the judgments in **Aviral Mittal v. State (**163 (2009) DLT 627)**, Shilpa Aggarwal v. Aviral Mittal** (2010) 1 SCC 591)**, Arathi Bandi v. Bandi Jagadrakshaka Rao** (2013) 15 SCC 790)**, V. Ravi Chandran (Dr.)(2) v. Union of India** (2010) 1 SCC 174)**, Sarita Sharma v. Sushil Sharma** (2000) 3 SCC 14)**, Surinder Kaur Sandhu v. Harbax Singh Sandhu** (1984) 3 SCC 698)**, Elizabeth Dinshaw v. Arvind Dinshaw** (1987) 1 SCC 42)**, Surya Vadanan v. State of Tamil Nadu** (2015) 5 SCC 450)**, Dhanwanti Joshi v. Madhav Unde** (1998) 1 SCC 112)**, Nithya Anand Raghavan v. State (NCT of Delhi)** (2017) 8 SCC 454)**,** and **K.G. v. State of Delhi (**245(2017) DLT 1)**,** and submitted that the two minor children were born in the UK, that they are UK citizens, that the elder child has spent in school for four years before he was abruptly withdrawn by respondent No.4 and surreptitiously taken to India, that the child has enjoyed the schooling as evident from the photographs filed along with the writ petition, that the entire family having made UK their habitat, the removal of the children from the UK immensely affects their future and that the same is not in their best interest. Terming the allegation of harassment made by respondent No.4 as wholly baseless, the learned counsel has drawn our attention to the material filed by respondent No.4 before this Court showing that the Police have closed the criminal complaint made by respondent No.4 against the petitioner on 13.05.2017, that the conduct of respondent No.4 in filing the criminal complaint leading to the petitioner's police custody for twenty-four hours and barring his visit to his own home for one month, prompted the petitioner to file an application for divorce and that if she is willing the join the company of the petitioner, he will unconditionally withdraw the said petition and also the guardianship petitions filed by him in the UK Court.

6. Mr. P. Jagadishchandra Prasad, learned counsel for respondent No.4, submitted that due to the harassment meted out to and humiliation suffered by respondent No.4 and her two minor children at the hands of the petitioner, the former had no option other than coming away from UK and that the children were admitted in a school in Madanapalle and they are presently studying there. He has further submitted that in **Nithya Anand Raghavan** (10 supra) the Supreme Court has disagreed with the conclusions drawn in **Surya Vadanan** (8 supra) laying down the "first strike" principle that weightage should be given to the order of the foreign court which has jurisdiction, and held that best interest and welfare of the children is of paramount importance and that if handing over of the children to the foreign court's jurisdiction would harm their best interest and welfare, the Court would not direct their return to the place falling within the jurisdiction of the foreign court. That if without applying the principles laid down in the said case, the two minor children, who are happily placed in the company of respondent No.4 and her parents, are entrusted to the foreign court's jurisdiction, the same is not in their best interest and welfare.

7. We have carefully considered the respective submissions of the learned counsel for the parties with reference to the case law referred to above. Before we proceed further, we would like to place on record as to what transpired during the hearing of this writ petition. In pursuance of the notice issued by this Court, the petitioner and respondent No.4 along with the two minor children appeared before the Court on 14.02.2018. On being counselled, the petitioner and respondent No.4 have agreed to discuss with each other and iron out their differences. The case was accordingly adjourned to 15.02.2018. On the next date of hearing, we have counselled the petitioner and respondent No.4 for nearly one hour and we have explained to them the futility of the litigation, enormous loss they suffer and the serious mental conflict which the two minor children would suffer if they continue to fight. With great difficulty, we were able to persuade the couple to stay in a hotel along with the two minor children for a week. We have accordingly adjourned the case to 22.02.2018. On the adjourned date, both the counsel, to our disappointment, informed that the parties have not stayed together as agreed by them and requested for an adjournment to address their arguments on merits. Accordingly, the case was posted to 08.03.2018, on which date we have heard the arguments and reserved the judgment.

8. The custody of minor children presents considerable difficulty in adjudication by the Courts apart from raising delicate issues, especially when the spouses are Non-Resident Indians (NRIs). The case law on the subject needs to be carefully analysed and understood based on the facts of each case. The earliest case involving disputes between NRI spouses was dealt with by the Apex Court in **Surender Kaur Sandhu** (6 supra). The spouses who are Indians got married in Faridkot and thereafter moved to England. They remained Indian citizens but their baby boy born within one year of marriage in England was a British citizen. A case of attempt to murder his wife was

registered against the husband and he was convicted and sentenced for the said offence. On his wife's intervention, he was let out on probation. After his release on probation, the husband removed the child from England and brought to India. On the date on which the husband removed the child, the wife secured an order from the UK Court declaring the minor child as the ward of the Court. An initial attempt of the wife to take the custody of the child by filing a petition under Section 97 of the Code of Criminal Procedure, 1973, before the jurisdictional Magistrate having failed, she secured another order from the foreign court to handover the custody of the child to the mother. The wife thereafter filed a writ in the High Court of Punjab and Haryana seeking production and custody of the child. The said writ petition was dismissed on the ground that the mother's status in England was that of a foreigner, that she was a factory worker and she had no relatives in England, as opposed to the father, who was living in an affluent atmosphere with his parents and in a welcoming environment. It applied the triple principles of 'welfare of the child', 'comity of courts', and 'jurisdiction of the State which has most intimate contact with the issues arising in the case', in deciding the case. The following portion of the judgment is apposite for reproduction:

"10**. ...** The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of his custody. The modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses. (See International Shoe Company v. State of Washington [90 L Ed 95 (1945) : 326 US 310] which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case.) It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make

their living in England, where they gave birth to this unfortunate boy."

9. In **Elizabeth Dinshaw** (7 supra), the Supreme Court was guided by the factors such as the longer time spent by the child in the USA in which the child was born and became American citizen and also the fact that the child has not taken roots in India and who was still not accustomed and acclimatized to the conditions and environment obtaining in the place of his origin in the United States of America. The Supreme Court also took note of the fact that the child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he has already put the child in some school in Pune.

10. In **Aviral Mittal** (1 supra), the facts are almost identical to that in the present case. There also the parents were permanent residents of UK. A girl child was born to them in England. The child has British Passport. After the couple travelled to India, the wife refused to travel back to UK along with the child. The husband initiated proceedings before the High Court of Justice, Family Division, UK, seeking an order that the minor be made a ward of the Court. An interim order to that effect was passed by the UK Court. As the wife did not comply with the direction of the UK Court, the husband filed a habeas corpus writ petition in the Delhi High Court. The Delhi High Court has allowed the writ petition taking into consideration the interests of the child as paramount and applying the doctrine of intimate connection and also the theory of comity of nations and comity of the courts. The wife filed an appeal before the Supreme Court. Affirming the judgment of the Delhi High Court, the Supreme Court, apart from the welfare of the child, has given due weight to the wardship order passed by the UK Court. The Supreme Court has construed the order of the English Court as not intending to separate the child from the mother until a final decision was taken with regard to the custody of the child. It further observed that the ultimate decision in that regard has to be left to the English Courts having regard to the nationality of the child and the fact that both the parents had worked for gain in the UK and had also acquired permanent residents status in the UK. The Supreme Court also upheld the observation of the High Court that as held in **Surender Kaur Sandhu** (6 supra) the English Courts which had the most intimate contact with the issue in question have to decide the same.

11. In **V. Ravi Chandran** (4 supra), the husband, an American citizen, married a lady who is a native of Tirupati. A son was born to them in the US. Pending dissolution of the marriage between the parties, a consent order granting joint custody of the child to both the parties was passed. Post dissolution of the marriage, the Family Court in USA passed a consent order laying down conditions for joint custody and upbringing of the minor child. The wife brought the child to India in June 2017 and started living with her parents in Chennai. On a petition filed by the husband, the Family Court has modified the order granting temporary and sole custody of the minor child. The Court further directed the wife to return the child

immediately to the father, apart from issuing nonbailable warrants against the wife. The husband came down to India and filed a petition for habeas corpus in the Supreme Court for production of the minor child and for a direction to handover the child to him. On considering the judgment of the Court of Appeal in **L (Minors) in re** (1974) 1 All ER 913 (CA)**, Dhanwanti Joshi** (9 supra), **McKee v. McKee (**1951 AC 352)apart from other judgments, the Supreme Court discussed the legal proposition as under:

> "29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of _custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child. The indication given in McKee v. McKee [1951 AC 352 : (1951) 1 All ER 942 (PC)] that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in L (Minors), In re [(1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)] and the said view has been approved by this Court in Dhanwanti Joshi [(1998) 1 SCC 112] . Similar view taken by the Court of Appeal in H. (Infants), In re [(1966) 1 WLR 381 (Ch & CA) : (1966) 1 All ER 886 (CA)] has been approved by this Court in Elizabeth Dinshaw [(1987) 1 SCC 42 : 1987 SCC (Cri) 13]."

While holding that on the facts of the case elaborate enquiry need not be held by it, the Supreme Court further held as under:

"32. Admittedly, Adithya is an American citizen, born and brought up in the United States of America. He has spent his initial years there. The natural habitat of Adithya is in the United States of America. As a matter of fact, keeping in view the welfare and happiness of the child and in his best interests, the parties have obtained a series of consent orders concerning his custody/ parenting rights, maintenance, etc. from the competent courts of jurisdiction in America. Initially, on 18-4- 2005, a consent order governing the issues of custody and guardianship of minor Adithya was passed by the New York State Supreme Court whereunder the court granted joint custody of the child to the petitioner and Respondent 6 and it was stipulated in the order to keep the other party informed about the whereabouts of the child. In a separation agreement entered into between the parties on 28-7-2005, the consent order dated 18-4-2005 regarding custody of minor son Adithya continued.

33. In 8-9-2005 order whereby the marriage between the petitioner and Respondent 6 was dissolved by the New York State Supreme Court, again the child custody order dated 18-4-2005 was incorporated. Then the petitioner and Respondent 6 agreed for modification of the custody order and, accordingly, the Family Court of the State of New York on 18-6-2007 ordered that the parties shall share joint legal and physical custody of the minor Adithya and, in this regard, a comprehensive arrangement in respect of the custody of the child has been made.

34. The fact that all orders concerning the custody of the minor child Adithya have been passed by the American courts by consent of the parties shows that the objections raised by Respondent 6 in the counter-affidavit about deprivation of basic rights of the child by the petitioner in the past; failure of the petitioner to give medication to the child; denial of education to the minor child; deprivation of stable environment to the minor child; and child abuse are hollow and without any substance. The objection raised by Respondent 6 in the counter-affidavit that the American courts which passed the order/decree had no jurisdiction and being inconsistent with Indian laws cannot be executed in India also prima facie does not seem to have any merit since despite the fact that Respondent 6 has been staying in India for more than two years, she has not pursued any legal proceeding for the sole custody of the minor Adithya or for declaration that the orders passed by the American courts concerning the custody of minor child Adithya are null and void and without jurisdiction. Rather it transpires from the counter-affidavit that initially Respondent 6 initiated the proceedings under the Guardians and Wards Act, 1890 but later on withdrew the same.

In the aforementioned judgment, the Supreme Court once again reiterated the principles of the closest concern, most intimate contact with the issues arising in the case, natural habitat of the minor child,

best interest of the child and comity of Courts. The Supreme Court eventually directed the child to be taken to the USA from where he was removed to enable the parties to establish their right in the native State of the child, i.e., USA.

12. **Surya Vadanan** (8 supra) is also a case where the spouses were of Indian origin and later the husband became a citizen of UK. They got married in India and had two daughters in UK. The wife also became a British citizen and had a British passport. After matrimonial disputes arose between them, the wife returned to India with her two daughters and filed a petition under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 seeking divorce in the Family Court, Coimbatore. The husband has filed a petition in the High Court of Justice. The said Court has passed an order making the children wards of the court during their minority or until further orders of the court and the wife was directed to return the children to the jurisdiction of the foreign court. As the wife did not comply with the order of the UK Court, the husband filed a writ of habeas corpus in the Madras High Court. The writ having been dismissed by the High Court, the husband has carried the matter to the Supreme Court. The Supreme Court applied the principles of (i) "the first strike", i.e., the UK Court has passed effective and substantial order declaring the children of the parties as wards of that court, (ii) the comity of courts and (iii) the best interest and welfare of the child. It also held that the "most intimate contact" doctrine and the "closest concern" laid down in **Surinder Kaur Sandhu** (6 supra) are very much alive and cannot be ignored only because their application might be uncomfortable in certain situations. The Court also reiterated that the best interest and welfare of the child are of paramount importance which shall also be kept in mind by the courts while adjudicating the disputes.

13. A three-Judge Bench of the Supreme Court struck a different note in **Nithya Anand Raghavan** (10 supra). In that case, the couple married on 30.11.2006 at Chennai and shifted to UK in early 2007. Disputes between the spouses arose. The wife has conceived in December 2008, came to New Delhi in June 2009 and stayed with her parents and she gave birth to a girl child – Nethra on 07.08.2009 at Delhi. After the husband arrived in India, the couple went back to UK in March, 2010 and following certain unsavoury events, the wife and the daughter returned to India in August 2010. After exchange of legal correspondence, the wife and her daughter went back to London in December, 2011, and in January 2012 the daughter was admitted in a nursery school in UK. In December, 2012, the child was granted UK citizenship and the husband was also granted UK citizenship in January 2013. They bought a home in UK to which they shifted their family. In September, 2013 the child was admitted in a primary school in UK and she was around four years old. In July, 2014 the wife returned to India along with her daughter, she again returned to UK along with the child, between late 2014 and early 2015 the child became ill and was diagnosed with cardiac disorder. On 02.07.2015 the wife returned to India with her daughter due to the alleged violent behaviour of her husband. On 16.12.2015,

the wife filed a complaint against the husband at the CAW Cell, New Delhi, and in spite of the notices to the husband and her parents, neither of them appeared. The husband filed a custody/wardship petition on 08.01.2016 in UK to seek return of the child. On 23.1.2016 he has also filed habeas corpus petition in Delhi High Court which was allowed on 08.07.2016. The wife carried the case to the Supreme Court. The Supreme Court heavily relied upon its earlier judgment in **Dhanwanti Joshi** (9 supra), which in turn referred to **Mckee** (13 supra) where the Privy Council held that the order of foreign court would yield to the welfare of the child and that the comity of courts demanded not its enforcement, but its grave consideration. While taking note of the fact that India is not a signatory to the Hague Convention of 1980, on "Civil Aspects of International Child Abduction", inter alia held as under:

> "40. ... As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign court if any as only one of the factors and not get fixated therewith. In either situation—be it a summary inquiry or an elaborate inquiry—the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new

environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We are in respectful agreement with the aforementioned exposition.

The Supreme Court also relied upon the judgment in **V. Ravi Chandran** (4 supra) and inter alia held that the role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court. It has held that the High Court while dealing with the petition for issuance of habeas corpus concerning a minor child in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position discussed therein. It has further added that the decision of the Court, in each case, must depend on the totality of the facts and circumstances of the case brought before it while considering the welfare of the child which is of paramount consideration and that the order of the foreign Court must yield to the welfare of the child and the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. It has further observed that the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised. The Supreme Court has disapproved paragraph 56 (a) to (d) in **Surya Vadanan** (8 supra) which reads as follows:

"56. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:

(a) The nature and effect of the interim or interlocutory order passed by the foreign court.

(b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.

(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. [Arathi Bandi v. Bandi Jagadrakshaka Rao, (2013) 15 SCC 790 : (2014) 5 SCC (Civ) 475]

In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

(d) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry."

As regards (a) to (c) of paragraph 56 above, the Supreme Court termed the same as tending to drift away from the exposition in **Dhanwanti Joshi** (9 supra) and **V. Ravi Chandran** (4 supra) and with regard to clause (d), the Court disagreed with the same. For better appreciation, paragraphs 62, 63 and 66 of the report are extracted hereinbelow.

"62**.** As regards clauses (a) to (c) above, the same, in our view, with due respect, tend to drift away from the exposition in Dhanwanti Joshi case [Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112] , which has been quoted with approval by a three-Judge Bench of this Court in V. Ravi Chandran (2) [V. Ravi Chandran (2) v. Union of India, (2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44]. In that, the nature of inquiry suggested therein inevitably recognises giving primacy to the order of the foreign court on the issue of custody of the minor. That has been explicitly negated in Dhanwanti Joshi case [Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112]. For, whether it is a case of a summary inquiry or an elaborate inquiry, the paramount consideration is the interests and welfare of the child. Further, a pre-existing order of a foreign court can be reckoned only as one of the factor to be taken into consideration. We have elaborated on this aspect in the earlier part of this judgment.

63**.** As regards the fourth factor noted in clause (d) of para 56, Surya Vadanan case [Surya Vadanan v. State of T.N., (2015) 5 SCC 450 : (2015) 3 SCC (Civ) 94] , we respectfully disagree with the same. The first part gives weightage to the "first strike" principle. As noted earlier, it is not relevant as to which party first approached the court or so to say "first strike" referred to in para 52 of the judgment. Even the analogy given in para 54 regarding extrapolating that principle to the courts in India, if an order is passed by the Indian Court is inapposite. For, the Indian Courts are strictly governed by the provisions of the Guardians and Wards Act, 1890, as applicable to the issue of custody of the minor within its jurisdiction.

…

66**.** The invocation of first strike principle as a decisive factor, in our opinion, would undermine and whittle down the wholesome principle of the duty of the court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance. If the Court is convinced in that regard, the fact that there is already an order passed by a foreign

court in existence may not be so significant as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration. The interests and welfare of the child are of paramount consideration. The principle of comity of courts as observed in Dhanwanti Joshi case [Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112], in relation to non-Convention countries is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration. While considering that aspect, the court may reckon the fact that the child was abducted from his or her country of habitual residence but the court's overriding consideration must be the child's welfare."

Finally the Supreme Court in **Nithya Anand Raghavan** (10 supra), concluded as under:

> "**69.** We once again reiterate that the exposition in Dhanwanti Joshi [Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112] is a good law and has been quoted with approval by a three-Judge Bench of this Court in V. Ravi Chandran (2) [V. Ravi Chandran (2) v. Union of India, (2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44] . We approve the view taken in Dhanwanti Joshi [Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112], inter alia, in para 33 that so far as non-Convention countries are concerned, the law is that the court in the country to which the child is removed while considering the question must bear in mind the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration. The summary jurisdiction to return the child be exercised in cases where the child had been removed from its native land and removed to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, for these are all acts which could psychologically disturb the child. Again the summary jurisdiction be exercised only if the court to which the child has been removed is moved promptly and quickly. The overriding consideration must be the interests and welfare of the child."

14. The essence of the judgment in **Nithya Anand Raghavan** (10 supra) is that the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child, etc., cannot override the consideration of the best interest and the welfare of the child, and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child.

15. We will be leaving the discussion

incomplete if we do not refer to the painstaking judgment of a Division Bench of the Delhi High Court in **K.G.** (11 supra). The facts in the said case and the present case are somewhat similar. The couple in that case lived in USA. In that case also the minor child was born in USA and has automatically become a citizen of the USA. The husband has acquired the USA citizenship in 2005 and holds American Passport. The wife acquired permanent residentship and also applied for American citizenship. They made USA their domicile. They spent most of their time in USA except during their short visits to India. A baby girl was born to them on 15.02.2014 in USA. The child was being taken care of by her parents and her paternal grand-parents. The child joined pre-school in July 2016. On 25.12.2015 the couple along with the minor child came to India for a short trip and they were scheduled to return to Chicago on 07.1.2017. Eleven hours before their departure, the wife and the daughter went missing. The wife has then filed a petition under Section 13(1) of the Hindu Marriage Act, seeking dissolution of marriage on the ground of cruelty, along with an application under Section 26 of the said Act seeking a restraint order against the husband from taking away the child from the jurisdiction of Indian Courts. The husband moved an emergency petition for temporary sole allocation of parental responsibilities and parenting time in his favour, or in the alternative, an emergency order of protection for possession of his minor daughter before the Circuit Court of Cool Country, Illinois, USA on 09.01.2017. A notice of emergency motion was served by e-mail upon the wife informing her of the proposed hearing on 13.01.2017. On 11.1.2017, the Patiala House Family Court issued a fresh notice to the husband and passed an ex parte order restraining the husband from removing the minor child from the jurisdiction of the court. On 13.01.2017 the Circuit Court of Cook County passed interim order which reads as follows.

> "1) The child M G born on Feb 15, 2014, in Chicago, Illinois and having resided in Chicago solely for her entire life (specifically at 360 East Randolph Street, Chicago, IL 60601) is also a US citizen.
>
> 2) The child is a habitual resident of the state of Illinois, United States of America having never resided anywhere else. Illinois is the home state of the child pursuant to the Uniform Child Custody Jurisdiction Enforcement Act.
>
> 3) K G is the natural father of the minor child and granted interim sole custody of the minor child. Child is to be immediately returned to the residence located in Cook County, Illinois, USA by Respondent.
>
> 4) The Cook County, Illinois Court having personal and subject matter jurisdiction over the parties and matter.
>
> 5) All further issues regarding visitation, child support are reserved until further Order of Court."

As the wife did not comply with the said

order of the Circuit Court of Cook County, the husband has filed habeas corpus petition in Delhi High Court for production of his minor daughter and her return to the USA. After elaborate and extensive consideration of the entire case law, the Delhi High Court applied the principles laid down in **Surinder Kaur Sandhu** (6 supra), **Aviral Mttal** (1 supra), **Shilpa Aggarwal** (2 supra), **V. Ravi Chandran** (4 supra) and **Nithya Anand Raghavan** (10 supra), and concluded that the Courts in US seem to be most appropriate to decide the issue of custody of the child considering that it has the most intimate contact with the parties and the child. Turning on the allegations made by the wife against the husband, the High Court while opining that it does not have to return any finding on the averments or counter averments of the warring parents of the child, it has examined whether there are any such compelling reasons disclosed by the wife so as to persuade the Court not to direct return of the child to her place of nationality and the environment where she was brought up, and held that in its considered view, her going back to the environment – so as to be able to live with both her parents – though not at the same time, would be in her best interest. In the process, the High Court adverted to the photographs filed by the husband along with the petition to show that the child was having a healthy and normal upbringing while she was in USA and seen enjoying the love, care and company of her parents and others including the children of her age. The High Court therefore observed that there was no reason why she should be allowed to be uprooted from the environment in which she was naturally growing up and to be retained in an environment where she would not have the love, care and attention of her father and parental grandparents, apart from her peers, teachers and other care givers who were till recently with her. The High Court further held that the decision by the wife to stay away from USA clearly deprived the child the love and affection that she is entitled to receive from her father, her parental grandparents, the care and learning that she was getting from her Nanny and her instructors; and the love, companionship and joy that she was deriving from her peers at pre-school. The High Court further held that the expression "best interest of child" as used by the Supreme Court in the decisions referred by it, is wide in its connotation and the same cannot be read as being only the love and care of the primary care giver, i.e., the mother in the case of an infant, or a child who is only a few years old. The Court has referred to the definition of "best interest of the child" in Section 2(9) of the Juvenile Justice (Care & Protection) Act, 2015, as to mean "the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development." The High Court also took note of the provisions of the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20.11.1989, which was ratified by the Government of India on 11.12.1992 and reproduced the relevant paragraphs from the said preamble which read as under:

> "Convinced that the family, as the fundamental group of society and the

natural environment for the growth and wellbeing of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

xx x x x x x x x x

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

x x x x x x x x x x

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,"

The High Court also referred to the relevant Articles of the Convention, which read as under:

"Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life."

Article 7

1. The child shall be registered immediately

after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to reestablishing speedily his or her identity.

Article 9:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

x x x x x x x x x x

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 10:

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms

of others and are consistent with the other rights recognized in the present Convention.

Article 18:

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible."

Article 20:

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."

The High Court also referred to the Resolution passed by the Government of India, Ministry of Human Resource Development, vide Resolution No.6-15/98-C.W., dated 09.02.2004 framing the "National Charter for Children, 2003" and extracted the preamble to the Charter which reads as under:

"Whereas we affirm that the best interest of children must be protected through combined action of the State, civil society, communities and families in their obligations in fulfilling children's basic needs.

Whereas we also affirm that while State, Society, Community and Family have obligations towards children, these must be viewed in the context of intrinsic and attendant duties of children, and inculcating in children a sound sense of values directed towards preserving and strengthening the Family, Society and the Nation.

x x x x x x x x x x

Underlying this Charter is our intent to secure for every child its inherent right to be a child and enjoy a healthy and happy childhood, to address the root causes that

negate the healthy growth and development of children, and to awaken the conscience of the community in the wider societal context to protect children from all forms of abuse, while strengthening the family, society and the Nation."

The High Court finally concluded as under:

> 138. Thus, best welfare of the child, normally, would lie in living with both his/her parents in a happy, loving and caring environment, where the parents contribute to the upbringing of the child in all spheres of life, and the child receives emotional, social, physical and material support - to name a few. In a vitiated marriage, unfortunately, there is bound to be impairment of some of the inputs which are, ideally, essential for the best interest of the child. Then the challenge posed before the Court would be to determine and arrive at an arrangement, which offers the best possible solution in the facts and circumstances of a given case, to achieve the best interest of the child.
>
> 139. In the light of the aforesaid, we are more than convinced that respondent No. 2 should, in the best interest of the minor child M, return to USA along with the child, so that she can be in her natural environment; receive the love, care and attention of her father as well - apart from her grandparents, resume her school and be with her teachers and peers. Pertinently, respondent No. 2 is able-bodied, educated, accustomed to living in Chicago, USA, was gainfully employed and had an income before she came to India in December 2016 and, thus, she should not have any difficulty in finding her feet in USA. She knows the systems prevalent in that country, and adjustment for her in that environment would certainly not be an issue. Accordingly, we direct respondent No. 2 to return to USA with the minor child M. However, this direction is conditional on the conditions laid down hereinafter.
>
> 140. Respondent No. 2 has raised certain issues which need to be addressed, so that when she returns to USA, she and the minor child do not find themselves to be in a hostile or disadvantageous environment. There can be no doubt that the return of respondent No. 2 with the minor child should be at the expense of the petitioner; their initial stay in Chicago, USA, should also be entirely funded and taken care of by the petitioner by providing a separate furnished accommodation (with all basic amenities & facilities such as water, electricity, internet connection, etc.) for the two of them in the vicinity of the matrimonial home of the parties, wherein they have lived till December 2016. Thus, it should be the obligation of the petitioner to provide reasonable accommodation sufficient to cater to the needs of respondent No. 2 and the minor child. Since respondent No. 2 came to India in December 2016 and would, therefore, not have retained her job, the petitioner should

also meet all the expenses of respondent No. 2 and the minor child, including the expenses towards their food, clothing and shelter, at least for the initial period of six months, or till such time as respondent No. 2 finds a suitable job for herself. Even after respondent No. 2 were to find a job, it should be the responsibility of the petitioner to meet the expenses of the minor daughter M, including the expenses towards her schooling, other extra-curricular activities, transportation, Attendant/Nanny and the like, which even earlier were being borne by the petitioner. The petitioner should also arrange a vehicle, so that respondent No. 2 is able to move around to attend to her chores and responsibilities."

16. A Division Bench of this Court in **Sobhan Kodali v. The State of Telangana** (judgment dt.8.2.2018 in W.P. No.36945 of 2017) placing heavy reliance on the Delhi High Court Judgment in **K.G.** (11 supra), allowed the writ petition filed by the husband for handing over the custody of his two minor children, who are US citizens, by wife, in terms of the order of the jurisdictional US court.

17. We shall now consider whether any circumstances exist in the present case, suggesting that entrustment of custody of the two minor children to the petitioner so as to be able to produce before the UK Court, are against their welfare and best interest, which the law laid down as discussed above, would override all other doctrines, concepts and considerations.

18. Undisputedly both the minor children are British citizens. The petitioner is also a British citizen and respondent No.4 acquired permanent UK residency, i.e, Indefinite Leave to remain in UK. The petitioner is a Physiotherapy Team Manager with National Health Services, UK. For the last fourteen years he has been working there. As stated hereinbefore, the elder son Mr. Abhinav Tippa studied preschool, nursery and primary school for four years till May, 2017 in UK, and he was removed and brought to Madanapalli, a moderate town in Chittoor District of the State of Andhra Pradesh in India. Being the citizen of the UK, having spent most of his life after his birth in UK, the Court in UK has the most intimate contact/connect with the said child. More importantly, while the child was firmly grounded in UK, he has not taken his roots in India as he is made to live here only for the last nine months. That the child had been enjoying his life in UK is evident from the photographs filed by the petitioner, the authenticity of which is not disputed by respondent No.2. The photographs taken in various schools in which he studied show that he has gelled himself well with the native students and the teachers. These photographs include the Child Graduation Photos and show his playing with the co-children in the school and enacting a play on the stage and so on and so forth. It is seen from these photographs that the child was absolutely enjoying his school environment and the company of his peers and teachers. Though it is not our intention to belittle the educational standards and

environment in a town like Madanapalli, we have no reason to think that the standards of amenities, the environment, social togetherness, exposure to various dimensions of life etc., there are in no way comparable with that in the UK. It would be a great pity if such a boy is forcibly deprived of access to such environment and standards of life in the UK.

19. As regards the second child, having been born on 7.7.2015, he will be completing three years by 7.7.2018 whereafter he may be ripe to be joined in Nursery. When his brother could enjoy the environment in the UK, we do not find any reason why this boy also would not relish the life in the UK. Whatever applies to his brother would equally apply to him as well. Hence, we have no reason to entrust his custody to his mother, especially when the ultimate decision on custody and guardianship of the two minor children will be taken by the Court in UK, which has the exclusive jurisdiction to take the decision as the children happened to be the UK citizens.

20. No doubt, respondent No.2 has levelled serious allegations against the petitioner and expressed apprehension about the safety of the children if they stay with the petitioner. From the pleadings of the parties and the material filed by them, it could be seen that after twenty-four hours of custody following a complaint made by respondent No.4, the petitioner was released subject to his being barred to visit his home for a month. The communication dt.13.10.2017 sent by the UK Police to the petitioner, a copy of which has been filed by respondent No.4 herself, would show that latter's complaint was investigated by the Police and they have opined that no further action is needed in the matter. During the hearing, learned counsel for respondent No.4 fairly admitted that in the course of investigation, the UK Police have talked to respondent No.4 on phone and ascertained her views on the complaint before it was formally closed. Respondent No.4 has filed a copy of the report of an agency called 'GP' wherein it was stated that on 24.3.2017 respondent No.4 revealed to the representative of the said agency, as under:

> "* Physical abuse has occurred, including father pushing her down the stairs from top to bottom, father pulling her around the house by her ponytail, father banging her head off the wall, father scratching mothers arms until they bled, father hitting her across the face and marking her, father hitting her with a wooden spoon.
>
> * Emotional abuse has occurred, father has not spoken to mother for a period of a few moths. He is angry and shouts and screams at 6 year old Abhinav.
>
> * Mum wants to flee to India but father has hidden the boy's passports. Mum will not flee without the children. Mum does not have a British passport and so dad has said that if she leaves he will tell the police that she is kidnapping the

children. *Mum said that when dad gets angry he shouts and screams in Abhinav's face. I asked mum directly if dad physically hurts Abhinav. She looked down and said, "it's just terrible""

21. While we do not propose to render conclusive findings on the correctness or otherwise of the allegations made by respondent No.4, what is quite apparent is that she has not even claimed that for the alleged injuries sustained by her on account of her being pushed on the stairs from top to bottom, her head being banged against a wall, her arms being scratched until they bled, hit across her face and also being hit with a wooden spoon, she has not got herself treated in any hospital either as in patient or outpatient. Even during our interaction with her in the presence of the petitioner, except making a vague allegation of the physical assault by her husband, she has not given the details of such assaults. She has not informed us that she has received bodily injuries and visited the hospitals for treatment. Significantly, when a question was put to respondent No.4 by the person belonging to the aforementioned agency as to whether the petitioner physically hurts Abhinav Tippa, she looked down and said "it is just terrible". This answer looks evasive. All that she has mentioned in pargraph 7 of the counter affidavit filed in this case is that the petitioner himself has admitted before the UK Police that he is having hyper tension, with that herself and the children had faced harassment, and that if the kids are allowed to stay with him it will have impact on their life.

22. At one place she has stated that the petitioner not only beat her, but also the kids. This statement remained unsubstantiated. Along with the counter affidavit, respondent No.4 has filed photograph of an elderly person receiving an injury to his hand. In paragraph 8 of the counter affidavit she has stated that when the petitioner's family attacked her family members in India and her grandfather was seriously injured. No further details have been given as to who had attacked them and when the attack took place and whether any Police report was given. These stray incidents are not sufficient for this Court to form an opinion that the life and safety of respondent No.4 or the two minor children could be endangered if they travel to UK.

23. Though the petitioner is a Team Manager in Physiotherapy, National Health Services, UK, he has stayed back in India for more than six weeks in pursing this writ petition. This shows his commitment towards his children. We have no reason to believe that he intends to take his two children to UK with a view to cause harm to their interests. Ordinarily, no father would resort to such heinous acts and the facts of this case in particular do not warrant any such conclusion. On a holistic consideration of the entire case, we are thoroughly satisfied that all the criteria, such as comity of courts, orders of foreign court having jurisdiction over the matter regarding custody of the children, citizenship of the petitioner and the children, intimate connect, and above

all, welfare and best interest of the minor children are satisfied by the petitioner.

24. One final aspect to be discussed is whether any arrangement needs to be made to facilitate respondent No.4 to go and stay with her children in UK. During the hearing, we have asked the counsel for the petitioner whether his client is willing to bear the expenditure for the travel and stay of respondent No.4 along with the children in UK. The petitioner readily conveyed his willingness by even offering to allow his wife along with the children to stay in his house and himself staying elsewhere. We have summoned respondent No.4 and personally enquired with her whether she is also willing to travel to UK along with the minor children, but she has not shown any interest to accompany the children in spite of the fact that she was informed that the petitioner is willing to provide for stay of herself and her children at his house exclusively without his presence. We find this conduct of respondent No.4 very unreasonable.

25. We are conscious of the fact that by allowing the writ petition, we will be separating the minor children from the company of respondent No.4, but unfortunately she took an adamant posture that she would not like to visit UK, and rather continue to live in India. However, for this reason, we do not intend to deprive respondent No.4 of facility of her travelling to UK and visit her children should she feel so in future. Therefore, to facilitate this, we direct the petitioner to deposit Rs.5,00,000 (Rupees Five Lakhs only) in the Bank Account of respondent No.4 as a condition for taking the custody of his two minor children for being taken to UK and handedover to the jurisdictional Court. Proof of such deposit shall be shown to respondent No.2, who shall thereupon direct the Police concerned to take the custody of the two minor children along with passports and other travel documents of the children from respondent No.4 and handover the same to the petitioner. The petitioner shall not have any claim for the sum of Rs.5,00,000/- (Rupees Five Lakhs only), whether respondent No.4 utilises the same in connection with her visit to UK or not.

26. Subject to the above directions, the writ petition is allowed. As a sequel to disposal of the writ petition, I.A. No.1 of 2018 shall stand disposed of as infructuous.

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2018 (2) L.S. 17 (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

State by Lokayuktha Police ..Appellant
Vs.
H. Srinivas ..Respondent

CRIMINAL PROCEDURE CODE, Secs.139 & 154 – PREVENTION OF CORRUPTION ACT, Sec. 13 – POLICE ACT, 1861,Sec. 44 – High Court quashed proceedings instituted against Accused/ Respondents on ground that preliminary report conducted by police was done without any entries made in Station Diary.

Held – Absence of entries in General Diary concerning preliminary enquiry would not be per se illegal – As concept of maintaining General Diary has its origin under Section 44 of Act as applicable to States, which makes it obligation for concerned Police Officer to maintain General Diary, but such non-maintenance may not be rendering whole prosecution illegal – Appeal stands allowed and Order of High Court is set aside - Appeal,allowed.

Crl.A.No.775/2018 etc., Date:18-5-2018

J U D G M E N T

(Per the Hon'ble Mr.Justice N.V. Ramana)

1. Leave granted.

2. These appeals are filed against the common order passed by the High Court of Karnataka at Bengaluru, in Writ Petition No (s). 21782, 38450, 38451 and 38498 of 2014, and Criminal Petition No. 7166 of 2015, wherein the High Court has quashed the proceedings instituted against the accused respondents.

3. There are two separate and distinct crimes alleged to have been committed by the different individuals. Therefore, we would like to note both set of facts so as to understand the issue at hand.

4. The first set of facts pertain to Crime No. 103/2013 registered under Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988 [**PC Act**] against one H. Srinivas (respondent in SLP (Crl.) No. 5391/2017). On 25.10.2013, Police Inspector, Karnataka Lokayuktha, Davanagere Division, submitted a Source Report against the Respondent/accused, who was working as Assistant Engineer, Jagaluru Pattana Panchayat, Davangere District, for having acquired disproportionate assets against his known source of income. It may be relevant to extract a part of the source report as under-

It is hereby stated that AE Sri. H. Srinivasa, Assistant Engineer, Town Panchayath, Jagaluru has earned only Rs. 17,25,000 from known source and his disproportionate asset is Rs. 24,54,30000 and the

Percentage of Disproportionate asset is 142.27%. Presently AE residing at Jagaluru Town, J.C.R. Extension in the first floor of Khasim Miyya's (owner of Grocery) house. **This source report is submitted in order to file out more details about additional property details, gold, silver, and lockers in the person's house, (2) and Assistant Engineer office, Town Panchayath, Jagaluru and (3) Smt. Gowramma's sister Smt. Umadevi's house at J.C.R. Extension**.

(**emphasis supplied**)

It is said that the aforesaid report was prepared basing on a secret information, received from an informant. The Superintendent of Police endorsed taking action against the respondent under Section 13(1)(e), 13(2) of PC Act. Thereafter, the Deputy Superintendent of Police, Karnataka Lokayuktha, Davanagere registered Crime No. 103/2013 u/Sec. 13(1)(e) r/w. Section 13(2) of the PC Act, dated 29.10.2013, against the Respondent herein. In the column No. 3(d) of the FIR, General Diary reference entry No and time is noted as **'04 11:30 AM**'. The State herein has not disputed the fact that there was no entry in the General Diary, during the conduction of the preliminary enquiry. It may not be out of context to note that after completion of the investigation, a Final Report was prepared and filed before the appropriate court. Aggrieved by the manner in which the police have conducted the investigation, the respondent herein, filed a Criminal Petition No. 7166 of 2015, before the Karnataka High Court.

5. The second set of facts reveals that on 21.07.2011, the Karnataka Lokayuktha Police, basing on a confidential information about amassing of the disproportionate assets by one C. Mrutyunjayaswamy (respondent in **SLP (Crl.) No. 5606/2017**), who was working as Secretary to Government, PWD, Vikas Saudha, Bengaluru, prepared a Source Report recommending investigation into the assets of the aforesaid accused. Superintendent of Police, Karnataka Lokayuktha, City Division, Bengaluru by Order No. LOK/ INV(G)SP/CITY/01/2011, dated 21/07/2011 ordered his deputy to register a FIR. On the same date, a FIR being Crime No. 28/ 2011 was registered accordingly. On 2223.07.2011, the investigating team searched the office, residence, bank lockers and other places of the contesting respondents in this appeal [arising out of **SLP (Crl.) No. 560609/ 2017**]. On 07.05.2013, final Report was prepared after completion of the investigation, wherein disproportionate assets were observed. Being aggrieved C. Mruthyunjayaswamy filed a Writ Petition No. 21782 of 2014, before the High Court of Karnataka, seeking quashing of the preliminary investigation report dated 21.07.2011 submitted by the Police Inspector of Lokayuktha and consequently the FIR dated 21.07.2011 filed by the deputy Superintendent of Police, Karnataka Lokayuktha Police in Crime No. 28 of 2011 and all the subsequent proceedings on the file of the XXIII Addl. City Civil and Special Judge, Bangalore (CCH No. 23). Dr. H.M. Hema (wife of C. Mrutyunjayaswamy) filed a writ petition being W.P. No. 38450 of 2014, seeking inter alia quashing of the seizure proceedings in

respect of passbooks and also freezing of the accounts etc. One Smt. Sowbagyamma (motherinlaw of C. Mrutyunjayaswamy) filed W.P. No. 38451 of 2014 seeking inter alia quashing of the seizure proceedings in respect of passbooks and against freezing of certain bank accounts. One H.M. Prabhu (brotherinlaw of C. Mrutyunjayaswamy) filed W.P. No. 38498 of 2014 seeking inter alia quashing of the seizure proceedings.

6. The main contention raised by the respondents herein, before the High Court as well as this Court, is that the preliminary enquiry and the consequent Source Report filed by the Officer were done without entering the same in the General Diary, which according to them was mandatory and noncompliance of the same resulted in vitiating the entire proceeding.

7. The High Court clubbed all the cases as discussed above and framed common questions of law, which are

a. Whether there could be a preliminary enquiry conducted by the Police as to whether a cognizable offence had been committed, even in the absence of a complaint, or even prior to the registration of an FIR?

b. Whether Complainant could also act as the investigating Officer?

c. Whether an illegal search and seizure would be fatal to the case of the prosecution?

8. By the impugned order the High Court quashed the FIR on the main grounds as under

i. That the preliminary report conducted by the police was done without any entries made in the Station Diaryas to the conduction of the preliminary enquiry.

ii. Reliance was placed on the **Case of Lalitha Kumari,** (2014) 2 SCC 1, paragraph 120.7 and 120.8, to come to a conclusion that it is mandatory to make entries in the Station Diary and failure of the same would be fatal for the prosecution.

iii. That any proceedings conducted after such alleged illegality would be rendered nonest in the eyes of law and consequently are liable to be quashed accordingly.

9. Aggrieved by the judgment of the High Court, which prematurely terminated the proceedings at the threshold without allowing a fullfledged trial, the State of Karnataka and other authorities are in appeal before this Court.

10. Mr. Devadatt Kamat, learned AAG, appearing on behalf of the State has contended that

i. That the impugned order is completely cryptic and without reasoning.

ii. That the conclusion reached in Para 120.8 of **Lalitha Kumari Case** (Supra), needs to be read in context of earlier discussion, wherein it is clear that for lodging an FIR, entry in the General Diary is not a precondition.

iii. Defect/irregularity in investigation cannot result in quashing of the proceedings.

iv. That the Lodging of the FIR is not a precondition for initiation of criminal proceedings.

v. He has placed reliance on catena of judgments, wherein this Court has stamped its approval for conduction of such preliminary enquiry in corruption cases, for safeguarding the interest of the government servants from unwarranted prosecutions.

vi. The consideration provided by the High Court in the Criminal Petition No. 7166 of 2015 (concerning the case of H. Srinivas) is highly insufficient and would clearly reflect non-application of mind.

11. On the other hand, Mr. Siddharth Luthra, learned senior counsel appearing on behalf of respondent (**H. Srinivas**), has drawn our attention to the fact that the **Lalitha Kumari Case** (Supra), was a declaratory judgment. This Court has time and again emphasised the significance of Station Diary entry for conduction of the preliminary enquiry thereby requiring the strict adherence to the conclusions reached in the **Lalitha Kumari Case** (Supra). He argued that in the present case, the illegality goes to the root of the matter thereby mandating the quashing of the FIR on a pure question of law. We may note that the other respondents have not advanced any arguments concerning the third issue.

12. Heard the arguments advanced by the learned counsels appearing on behalf of the parties and perused the material available on record. At the outset, we are in agreement with the contention of the appellant-State that the consideration provided to the **Criminal Petition No. 7166 of 2015**, is highly insufficient, which in other cases may have itself mandated a remand for non-application of facts. We refrain from taking such an approach, as lot of time has already been wasted in unnecessary litigation and therefore, we deem it appropriate that we put a quietus this issue herein without remanding the aforesaid case back to the High Court for proper consideration.

13. As both sides have placed excessive reliance on the case of **Lalitha Kumari Case** (Supra), it would be appropriate for us to discuss certain nuances of this case in detail. This Court therein, having noticed certain contradictory judgments concerning the interpretation of Section 154 of CrPC, referred the matter to a larger Bench for providing a mechanism under the criminal justice system imbued with due process.

14. In the aforesaid case, this Court while repelling the contention by the learned ASG appearing for the State of Chhattisgarh that recording of the first information under Section 154 in the "book" is subsequent to the entry in the General Diary, held that the concept of General Diary does not flow from the Section 154 of CrPC, 1973 and the same conclusion would be apparent from the departure made in the present Section 154 of CrPC when compared with Section 139 of the Code of Criminal Procedure, 1861. It may be relevant to extract some paragraphs, which may have bearing on the case concerned-

64. The General Diary is a record of all important transactions/events taking place in a police station, including departure and

arrival of police staff, handing over or taking over of charge, arrest of a person, details of law and order duties, visit of senior officers, etc. It is in this context that gist or substance of each FIR being registered in the police station is also mentioned in the General Diary since registration of FIR also happens to be a very important event in the police station. Since General Diary is a record that is maintained chronologically on day-to-day basis (on each day, starting with new number 1), the General Diary entry reference is also mentioned simultaneously in the FIR book, while FIR number is mentioned in the General Diary entry since both of these are prepared simultaneously.

65. It is relevant to point out that FIR book is maintained with its number given on an annual basis. This means that each FIR has a unique annual number given to it. This is on similar lines as the case numbers given in courts. Due to this reason, it is possible to keep a strict control and track over the registration of FIRs by the supervisory police officers and by the courts, wherever necessary. Copy of each FIR is sent to the superior officers and to the Judicial Magistrate concerned.

66. On the other hand, General Diary contains a huge number of other details of the proceedings of each day. Copy of General Diary is not sent to the Judicial Magistrate having jurisdiction over the police station, though its copy is sent to a superior police officer. Thus, it is not possible to keep strict control of each and every FIR recorded in the General Diary by the superior police officers and/or the court in view of enormous amount of other details mentioned therein and the numbers changing every day.

67. The signature of the complainant is obtained in the FIR book as and when the complaint is given to the police station. On the other hand, there is no such requirement of obtaining signature of the complainant in the General Diary. Moreover, at times, the complaint given may consist of large number of pages, in which case it is only the gist of the complaint which is to be recorded in the General Diary and not the full complaint. This does not fit in with the suggestion that what is recorded in the General Diary should be considered to be the fulfilment/compliance with the requirement of Section 154 of registration of FIR. In fact, the usual practice is to record the complete complaint in the FIR book (or annex it with the FIR form) but record only about one or two paragraphs (gist of the information) in the General Diary.

...

70. If at all, there is any inconsistency in the provisions of Section 154 of the Code and Section 44 of the Police Act, 1861, with regard to the fact as to whether the FIR is to be registered in the FIR book or in the General Diary, the provisions of Section 154 of the Code will prevail and the provisions of Section 44 of the Police Act, 1861 (or similar provisions of the respective corresponding Police Act or Rules in other respective States) shall be void to the extent of the repugnancy. **Thus, FIR is to be recorded in the FIR book, as mandated under Section 154 of the Code, and it is not correct to state that**

information will be first recorded in the General Diary and only after preliminary inquiry, if required, the information will be registered as FIR.

(Emphasis supplied)

15. On the aspect of the preliminary enquiry the court discussed as under-

115. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.

...

117. In the context of offences relating to corruption, this Court in P. Sirajuddin [P. Sirajuddin v . State of Madras , (1970) 1 SCC 595 : 1970 SCC (Cri) 240] expressed the need for a preliminary inquiry before proceeding against public servants.

(**Emphasis supplied**)

16. Thereafter this Court concluded in the following manner-

Conclusion/ Directions

120. In view of the aforesaid discussion, we hold:

...

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/ laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The

fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

(**Emphasis supplied**)

17. In light of the discussion above, the absence of entries in the General Diary concerning the preliminary enquiry would not be per se illegal. Our attention is not drawn to any bar under any provision of CrPC barring investigating authority to investigate into matter, which may for some justifiable ground, not found to have been entered in the General Diary right after receiving the Confidential Information. It may not be out of context to mention that nothing found in the **paragraph 120.8** of the **Lalitha Kumari Case** (Supra), justifies the conclusion reached by the High Court by placing a skewed and literal reading of the conclusions reached by the Bench therein. It is well settled that judgments are not legislations, they have to be read in the context and background discussions [refer **Smt. Kesar Devi v. Union of India & Ors.**, (2003) 7 SCC 427].

18. As the concept of maintaining General Diary has its origin under the Section 44 of Police Act of 1861 as applicable to States, which makes it an obligation for the concerned Police Officer to maintain a General Diary, but such non-maintenance per se may not be rendering the whole prosecution illegal. However, on the other hand, we are aware of the fact that such non-maintenance of General Diary may have consequences on the merits of the case, which is a matter of trial. Moreover, we are also aware of the fact that the explanation of the genesis of a criminal case, in some cases, plays an important role in establishing the prosecution's case. With this background discussion we must observe that the binding conclusions reached in the **paragraph 120.8** of **Lalitha Kumari Case** (Supra) is an obligation of best efforts for the concerned officer to record all events concerning an enquiry. If the Officer has not recorded, then it is for the trial court to weigh the effect of the same for reasons provided therein. A court under a writ jurisdiction or under the inherent jurisdiction of the High Court is ill equipped to answer such questions of facts. The treatment provided by the High Court in converting a mixed question of law and fact concerning the merits of the case, into a pure question of law may not be proper in light of settled jurisprudence.

19. Our conclusion herein is strengthened by the fact that CrPC itself has differentiated between irregularity and illegality. The obligation of maintenance of General Diary is part of course of conduct of the concerned officer, which may not itself have any bearing on the criminal trial unless some grave prejudice going to the root of matter is

shown to exist at the time of the trial. (**Union of India and Ors. v. T. Nathamuni**, (2014) 16 SCC 285) Conspicuous absence of any provision under CrPC concerning the omissions and errors during investigation also bolsters the conclusion reached herein. (**Niranjan Singh and Ors. V. State of Uttar Pradesh**, AIR 1957 SC 142)

20. Moreover, the requirement of the preliminary enquiry is well established by judicial precedents as a check on mushrooming false prosecution against public servants by persons who misuse the process of law for their personal vengeance. Such preliminary check would be beneficial and has been continuously approved by catena of judgments of this Court. [refer to **P. Sirajuddin Case**, (1970) 1 SCC 595, **Lalitha Kumari Case** (Supra)]. In light of the discussion, we cannot sustain the reasoning provided by the High Court on this aspect.

21. Therefore, we allow these appeals and, accordingly, set aside the order of the High Court. Before we part it may be noted that we have not expressed any views on merits of the case and the trial court is to proceed expeditiously uninfluenced by any observations made herein.

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2018 (2) L.S. 24 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

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

Sanjay Kumar Sinha ..Petitioner
Vs.
Asha Kumari & Another ..Respondents

HINDU MARRIAGE ACT, 1955, Secs.13 & 24 - CRIMINAL PROCEDURE CODE, Sec.125 – Maintenance - Divorce petition was filed by husband - During pendency of the petition, wife filed application u/Sec.24 - Family Court awarded maintenance of Rs. 8000 to wife, Rs. 4000 to minor child and Rs. 2500 towards litigation expenses- Respondent wife had also filed an application under Section 125 in Family Court - Family Court allowed application and awarded Rs. 4000 per month to wife and Rs. 2000 per month to daughter towards maintenance and Rs. 5000 towards litigation expenses – Challenged – Held - Consequent upon passing of the maintenance order under Section 24 by Family Court, the order passed under Section 125 stands superseded and now no longer holds the field - Appeal disposed off.

C.A.No.3658/18 Date:09-4-2018

J U D G M E N T

(per the Hon'ble Mr.Justice

. Leave granted.

2. This appeal is filed by the husband against the final judgment and order dated 27.10.2016 passed by the High Court of Judicature at Patna in CMJC No.965/2016 whereby the High Court dismissed the application filed by the appellant herein and upheld the order dated 15.07.2016 passed by the Principal †Judge, Family Court, Begusarai in Divorce Case No.42 of 2010.

3. Few facts need to be mentioned to appreciate the short issue involved in the appeal.

4. The dispute is between the husband and wife. The appellant is the husband whereas the respondent is the wife.

5. The appellant (husband) has filed the divorce petition under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act") against the respondent (wife) being Divorce Case No. 42/2010 before the Principal Judge, Family Court, Bagusarai. It is pending for its final disposal.

6. The respondent (wife) filed an application under Section 24 of the Act in the aforesaid Divorce petition and claimed from the appellant (husband) pendente lite monthly maintenance for herself and her daughter. The appellant contested it.

7. By order dated 15.07.2016, the Family Judge awarded Rs.8000/- per month to the wife and Rs.4000/- per month to her minor daughter towards the maintenance and Rs.2500/- per month towards the litigation expenses.

8. It may be mentioned here that the respondent (wife) had also filed one application under Section 125of the Criminal Procedure Code, 1973 (hereinafter referred to as "Cr.P.C") seeking maintenance before the Principal Judge, Family Court, Samastipur. By order dated 03.01.2011, the Family Judge allowed the application and awarded Rs.4000/- per month to the wife (petitioner therein) and Rs.2000/- per month to the daughter towards the maintenance and Rs.5000/- towards the litigation expenses.

9. The appellant (husband) felt aggrieved by the order dated 15.07.2016 by the Family Judge and filed civil miscellaneous application in the High Court at Patna. By impugned order, the Single Judge upheld the order dated 15.07.2016 of the Family Judge, Begusarai and dismissed the application filed by the appellant herein, which has given rise to filing of the present appeal by way of special leave before this Court by the husband.

10. Heard Mr. Abhishek Vikas, learned counsel for the appellant and Mr. Ranjit Kumar Sharma, learned counsel for the respondents.

11. Having heard learned counsel for the parties and on perusal of the record of the

case, we are inclined to dispose of the appeal finally as under:

12. First, the Family Court shall decide the main Divorce Case No. 42/2010 preferably within 6 months on merits.

13. Second, consequent upon passing of the maintenance order dated 15.07.2016 under Section 24 of the Act by the Family Court, the order passed by the Family Court, Samastipur under Section 125 of Cr.P.C. stands superseded and now no longer holds the field. Indeed, this fact was conceded by the learned counsel appearing for the respondent (wife).

14. Third, the appellant (husband) shall, during pendency of main divorce case, continue to pay in cash a sum of Rs.8000/- p.m. (Rs.6000/- to the wife and Rs.2000/- to the daughter) and for the balanced sum, i.e., Rs.4000/- p.m., the appellant would furnish security.

15. Fourth, depending upon the outcome of the main case, appropriate orders towards permanent maintenance and its arrears be also passed.

16. Fifth, the arrears towards monthly maintenance be paid by the appellant to the respondent (wife) within one month from the date of this order, if any, at the rate fixed by this Court above.

17. Sixth, payment of monthly maintenance amount, as fixed by this Court, be paid on 1st of every month by the appellant to the respondent.

18. Seventh, security for the balance amount (at the rate of Rs.4000/- per month) be furnished within one month to the satisfaction of the Family Judge after calculating the monthly maintenance and arrears liability.

19. Parties are at liberty to adduce evidence on the issue of grant of permanent maintenance in the main case.

20. Parties are also granted liberty to mediate and settle the issue amicably by appearing before the Family Court and if the issue is not settled amicably, the Family Court would decide it on merits, as directed above.

21. We have not expressed any opinion on the merits of the issue and, therefore, the Family Court will decide the case, without being influenced by our order, only on the basis of pleadings and evidence adduced by the parties in the main case.

22. With these directions, the appeal stands disposed of.

--X--

2018 (2) L.S. 27 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

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

Auto Cars ..Appellant
Vs.
Trimurti Cargo Movers
Pvt. Ltd. & Ors., ..Respondents

CIVIL PROCEDURE CODE, Or.V, Rules 1, 5 and 20 - Order IX, Rule 13 - Section 27- Setting aside of ex parte decree - On ground of non-service of proper summons.

Held - Service of summons on defendants without mentioning therein a specific day, date, year and time cannot be held as summons duly served upon the defendant - Such summons and service effected pursuant thereto cannot be held to be in conformity with Sec.27 read with format Appendix B - Appeal stands allowed.

J U D G M E N T
(per the Hon'ble Mr.Justice
Abhay Manohar Sapre)

1.Leave granted.

2. This appeal is filed against the final judgment and order dated 24.04.2017 passed by the High Court at Calcutta in A.P.O. No.200 of 2017 in C.S. No.15/14 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein and affirmed the order dated 18.08.2016 passed by the Single Judge of the High Court in GA No.766 of 2016, in consequence, affirmed the exparte decree dated 09.02.2015 in C.S. No.15 of 2014.

3. The controversy involved in the appeal lies in a narrow compass. However, few facts need mention infra to appreciate the controversy.

4. The appellant is defendant No.1 whereas respondent No.1 is the plaintiff and respondent Nos. 2 and 3 are defendant Nos.2 and 3 in the civil suit out of which this appeal arises.

5. The plaintiff (respondent No.1) filed a civil suit being C.S. No 15 of 2014 in the High Court at Calcutta on its original side against the defendants (appellant and respondent Nos.2 and 3) for recovery of Rs.1,43,18,537/- on 13.01.2014. The suit was based on some commercial dealings exchanged between the parties in relation to services and supply of goods etc.

6. It is, however, not necessary for the disposal of this appeal to refer in detail the facts on which the suit was founded to claim the amount in question from the defendants.

7. The summons of the suit was initially sent to the defendants at their place of business mentioned in the cause title of

the plaint, which was shown at Aurangabad (MH). Since the defendants were not being served with the ordinary mode of service, the plaintiff sought permission to serve them with the substituted service by way of publication under Order V Rule 20 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code"). The permission was granted to the plaintiff.

8. The summons dated 17.11.2014 was accordingly published in the Times of India (Pune Edition) and Dainik Bhaskar(Aurangabad Edition) on 25.11.2014. The summons, which was published in papers, reads as under:

"Advertisement

The Times of India, Tuesday, Nov. 25, 2014

C.S. No.15 of 2014

IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction

Original Side

M/s. Trimurti Cargo Movers Pvt. Ltd. a company incorporated under the Companies Act, 1956 having its registered office at 157-C, Lelin Sarani, Kolkata-700013, Police Station Tal Totlla within the aforesaid jurisdiction and branch office at 305, Shivam Chamber, S.V. Road, Goregaon, Mumbai-400062.

.....Plaintiff

Versus

1. M/s Auto Cars, a registered partnership firm having its office at Adalat Road, Aurangabad-4310001 outside the aforesaid jurisdiction and branch office at 39-A, Harish Mukherjee Road, Kolkata-700025.

2. Mr. Venugopal Dhoot, Partner of M/s. Auto Cars of Adalat Road, Aurangabad-4310001 outside the aforesaid jurisdiction.
.....

Defendants

To,

1. Mr. Venugopal Dhoot, Partner of M/s. Auto Cars of Adalat Road, Aurangabad-4310001.

2. Mr. Raj Kumar Dhoot, Partner of M/s. Auto Cars of Adalat Road, Aurangabad-4310001

Dear Sir,

Notices hereby given under Order V Rule 20 of the Code of Civil Procedure, 1908 that the plaintiff above named had filed a suit against you before this Hon'ble High Court at Calcutta on or about 13.01.2014 inter alia praying for leave under Clause 12 of the Letters Patent, 1865 and claims and reliefs:

(a) A decree of Rs.1,63,34,537/- against the defendant as pleaded in paragraph 14 above;

(b) Interest at the rate of Rs.25% per annum;

(c) Interim interest and interest upon judgment on the aforesaid decreetal amount until realization;

(d) Receiver;

(e) Injunction;

(f) Attachment;

(g) Costs;

(h) Such further or other relief(s)

You are hereby required to cause an appearance to be entered for you in the office of the Registrar of this Court within 15 days from the service upon you by way of publication of this summons, exclusive of the day of such service and are summoned to appear before this Court in person or by an advocate of the court to answer the plaintiffs' claim on the day the case is set down for hearing, upon which date you must be prepared to produce all your witnesses or power upon which you intend to rely in support of your case.

You are hereby required to take notice that in default of your causing an appearance to the so entered the suit will be liable to be heard and determent in your absence.

Witness: Mrs. Manjula Chellur, The Chief Justice, At Calcutta aforesaid the 13th day of November, 2014.

Arka Kumar Ghosh

Master

17/11/14

(Santosh Kumar Ray)

Plaintiffs' Advocate on Record

Kiran Shankar Roy Road

2nd Floor, Room No.707,

Kolkata-700001

9. The defendants did not appear in the case, as directed in the summons, therefore, the Court placed the defendants ex-parte and proceeded to decide the suit on merits in their absence and eventually on 09.02.2015 passed an ex-parte decree against the defendants for a sum of Rs.1,43,18,537/- together with simple interest @ 12% p.a. from 01.05.2013 till the date of payment.

10. On coming to know of passing of the decree against them, the defendants filed an application under Order IX Rule 13 of the Code on 08.03.2016 before the Court (GA No. 766/2016) praying therein for setting aside the ex-parte decree inter alia on the ground that the summons of the suit was not duly served on them, therefore, they had no knowledge of filing of the suit by

the plaintiff against them. The defendants also contended that their place of business is at Aurangabad whereas the summons in question was published in the daily newspaper, Times of India at Pune. The defendants, therefore, contended that due to this reason a case for setting aside of the ex-parte decree, as contemplated under Order IX Rule 13 of the Code, is made out and hence the ex-parte decree dated 09.02.2015 passed in Civil Suit No.15/2014 be set aside and the defendants be permitted to contest the suit on merits.

11. The plaintiff filed their reply and contested the application filed by the defendants. According to the plaintiff, there was no illegality or irregularity in the service of the summons on the defendants and since despite service of the summons made pursuant to the publication in the newspapers, the defendants failed to appear in the suit, therefore, they were not entitled to seek any indulgence nor entitled to seek setting aside of the decree under Order IX Rule 13 of the Code.

12. The Single Judge, by judgment dated 18.08.2016, dismissed the application filed by the defendants holding that the summons were duly served on them. The defendants felt aggrieved and filed appeal before the Division Bench of the High Court. By impugned judgment, the Division Bench dismissed the appeal and affirmed the judgment of the Single Judge.

13. The appellant (defendant No.1) felt aggrieved by the judgment of the Division Bench and filed the present appeal by way of special leave before this Court.

14. Heard Mr. Shekhar Naphade, learned senior counsel, for the appellant, Mr. S. Chakraborty, learned counsel for respondent No.1 and Mr. Shashibhushan P. Adgaonkar, learned counsel for respondent Nos.2 & 3.

15. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal and while setting aside the impugned judgment allow the application filed by the defendants under Order IX Rule 13 of the Code and, in consequence, set aside the ex parte decree 09.02.2015 passed in Civil Suit No. 15/2014 and restore the suit on its file for being tried on merits in accordance with law.

16. In our considered view, the issue involved in the appeal is required to be examined keeping in view Section 27, Appendix-B appended to the Code read with Order V Rule 20(3) and Order IX Rule 13 of the Code.

17. Section 27 of the Code deals with issuance of the summons to defendants. It says that where a suit has been instituted, summons may be issued to the defendant to appear and answer the claim and may be served in the “manner prescribed on such day” not beyond thirty days from the date of the institution of the suit.

18. The format of the summons, which is used for effecting service on the defendant,

is prescribed in Appendix-B, Process No.I. So far as Calcutta is concerned, the State has amended the format of the summons as Process No.IA. These formats are appended to the Code and read as under:

"APPENDIX B

PROCESS

No.1

SUMMONS FOR DISPOSAL OF SUIT (O.V, r. 1 and r.5)

(Title)

To

.....

[Name, description and place of residence.]

Whereas..... ...has instituted a suit against you for ..... you are hereby summoned to appear in this Court in person or by a pleader duly instructed (and able to answer all material questions relating to the suit, or who shall be accompanied by some person, able to answer all such questions, on the ..... day of ..... 19.../20....., at .....O'clock in the ..... noon, to answer the claim; and as the day fixed, for your appearance is appointed for the final disposal of the suit, you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

Given under my hand and the seal of the Court, that ..... Day of..... 19..../20.....

Judge.

Notice-1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit,to avoid execution of the decree, which may be against your person or property, or both."

"Calcutta- After Form No.1, insert the following Form, namely:-

"No. 1A

SUMMONS TO DEFENDANT FOR ASCERTAINMENT

WHETHER THE SUIT WILL BE CONTESTED

(O.V, rr. 1 and 5)

(Title)

To .....

[Name, description and place of residence.]

WHEREAS ..... has instituted suit against you for ..... you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating the suit on the day of ..... 19.../20...., at O'clock in the ..... noon in order that on that day you may inform the Court whether you will or will not contest the claim either in whole or in part and in order that in the event of your deciding to contest the claim either in whole or in part, directions may be given to you as to the date upon which your written statement is to be filed and the witness or witnesses upon whose evidence you intend to rely in support of your defence are to be produced and also the document or documents upon which you intend to relay.

Take notice that, in default of your appearance on the day before mentioned the suit will be heard and determined in your absence and take further notice that in the event of your admitting the claim either in whole or in part the Court will forthwith pass judgment in accordance with such admissions.

Given under my hand and the seal of the Court this day of ..... 19...../20..... . Judge.

Notice- If you admit the claim either in whole or in part you should come prepared to pay into Court the money due by virtue of such admission together with the costs of the suit to avoid execution of any decree which may be passed against your person or property, or both." (w.e.f. 25-8-1927)"

19. The aforementioned format of Process No.I is uniformly prescribed for effecting service of summons which are issued under Order V Rules 1 and 5 of the Code. It is, however, noticed that so far as State of UP (Allahabad) is concerned, it has prescribed a special format of the summons for service under Order V Rule 20 whereas so far as Calcutta is concerned, it has not specifically prescribed any special format for effecting service under Order V Rule 20 of the Code on the defendant but has prescribed a special format for effecting service under Order V Rules 1 and 5 of the Code.

20. Since no specific format is prescribed for effecting service of the summons under Order V Rule 20 of the Code by Calcutta except prescribing a special format for effecting service under Order V Rules 1 and 5 of the Code, the format prescribed for service of summons under Order V Rules I and 5 of the Code is also used for issuance of summons for effecting service under Order V Rule 20 of the Code.

21. In the format prescribed in the Appendix-B Process No.I or No.IA (which is applicable to the case at hand because the suit in question originates from Calcutta), we find that there is a specific column in the summons where a "day, date, year and time" for defendant's appearance is required to be mentioned.

22. In other words, the legislature while prescribing the format of summons in the Code has provided one column where the Court is required to mention a specific "day,

date, year and time" for the defendant's appearance in the Court to enable him to answer the suit filed against him/her. This is also the requirement prescribed under Section 27 of the Code as is clear from the words occurring therein "and may be served in the manner prescribed on such day".

23. Order V Rule 20(3) provides that when the service is effected by way of publication by the orders of the Court, the Court has to fix "time" for the appearance of the defendant, as the case may require. In our opinion, this does not dispense with the requirement of mentioning the actual day, date, year and time for defendant's appearance in the Court because it is prescribed in format.

24. The expression "time" has to be read harmoniously and in juxtaposition with the requirement prescribed under Section 27 read with statutory format Process IA of Appendix-B appended to the Code.

25. Indeed, mentioning of the specific "day, date, year and time" in the summons is a statutory requirement prescribed in law (Code) and, therefore, it cannot be said to be an empty formality. It is essentially meant and for the benefit of the defendant because it enables the defendant to know the exact date, time and the place to appear in the particular Court in answer to the suit filed by the plaintiff against him.

26. If the specific day, date, year and the time for defendant's appearance in the Court concerned is not mentioned in the summons though validly served on the defendant by any mode of service prescribed under Order V, it will not be possible for him/her to attend the Court for want of any fixed date given for his/her appearance.

27. The object behind sending the summons is essentially threefold- First, it is to apprise the defendant about the filing of a case by the plaintiff against him; Second, to serve the defendant with the copy of the plaint filed against him; and Third, to inform the defendant about actual day, date, year, time and the particular Court so that he is able to appear in the Court on the date fixed for his/her appearance in the said case and answer the suit either personally or through his lawyer.

28. Now coming to the facts of the case, we find that the summons dated 17.11.2014, which was sought to be served on the defendants by publication published on 25.11.2014 in the Times of India and Dainik Bhaskar did not comply with the requirement of Section 27 read with Appendix-B (process) No.I and IA.

29. In other words, the summons dated 17.11.2004 published in the papers (Times of India and Dainik Bhaskar) had material infirmity therein, which rendered the summons so also the service made on the defendants bad in law.

30. The material infirmity in the summons was that it did not mention any specific day, date, year and time for the defendants' appearance in the Court. This being the requirement of Section 27 read with Order V Rule 20(3) and Process-IA of Appendix-B, it was mandatory for the Court to mention

the specific working day, date, year and time in the columns meant for such filling. It would have enabled the defendants to appear before the Court on the date so fixed therein. It is a settled rule of interpretation that when the legislature provides a particular thing to be done in a particular manner then such thing has to be done in the same prescribed manner and in no other manner.

31. What was, however, mentioned in the summons in question was that the defendants should appear before the Registrar of the Court within 15 days from the service of publication of this summons on them exclusive of the day of such service of the summons and are summoned to appear before this Court in person or through advocate to answer the plaintiff's claim on the day the case is set down for hearing upon which date you(defendants) must be prepared to produce all your witness and all your documents in your possession or power upon which you intend to rely in support of your case. The summons then also mentioned that you (defendants) are hereby required to take notice that in default of your causing an appearance to be so entered, the suit will be liable to be heard and determined in your absence.

32. The aforesaid wording in the summons insofar as it pertains to giving 15 days' time without mentioning a specific day, date, year and time is not in conformity with the requirements of Section 27 read with Appendix B.

33. In the light of the foregoing discussions, service of summons on the defendants without mentioning therein a specific day, date, year and time cannot be held as "summons duly served" on the defendants within the meaning of Order IX Rule 13 of the Code. In other words, such summons and the service effected pursuant thereto cannot be held to be in conformity with Section 27 read with the statutory format prescribed in Appendix B Process (I and IA) and Order 5 Rule 20(3) of the Code.

34. It is for this reason, we are of the considered opinion that the appellant (defendant No.1) was able to make out a ground contemplated under Order IX Rule 13 of the Code for setting aside the ex parte decree.

35. Once the appellant (defendant No.1) is able to show that "summons were not duly served on him" as prescribed under Section 27 read with Appendix B Process IA and Order V Rule 20(3) of the Code then it is one of the grounds for setting aside the ex parte decree under Order IX Rule 13 of the Code. In our view, the appellant (defendant No.1) is able to make out the ground.

36. In view of the foregoing discussion, we need not consider any other ground though raised by the appellant (defendant No.1) in support of their case because the aforesaid ground which we have dealt with though not raised by the appellant in the Courts below but being a pure question of law and going to the root of the matter affecting the very jurisdiction of the Court could be allowed to be raised in this Court for doing substantial justice.

37. Before parting, we consider it apposite

to remind ourselves with the apt observations of a learned Judge - Vivian Bose, J., which His Lordship made while dealing with the scope of Order IX in a leading case of Sangram Singh vs. Election Tribunal (AIR 1955 SC 425).

38. The learned Judge speaking for the Bench in his distinctive style of writing reminded the Courts to keep the following observations in mind while deciding the rights of the parties which reads as under:

"A code of procedure must be regarded as such. It is procedure something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

39. In the light of the foregoing discussion, the appeal succeeds and is allowed. The judgments of the Single Judge and Division Bench are set aside. The appellant's (defendant No.1) application filed under Order IX Rule 13 of the Code (GA No. 766/2016) is allowed. As a consequence, the ex parte decree dated 09.02.2015 passed in C.S. No. 15/2014 is set aside. The civil suit is restored to its original file.

40. Parties to appear before the concerned Court on 05.03.2018 to enable the Court to decide the suit. The appellant (defendant No.1) will be granted an opportunity to file the written statement. The Court will ensure disposal of the suit on merits in accordance with law within a year as an outer limit.

41. It was, however, brought to our notice that during the pendency of this appeal, the appellant was asked to deposit a sum of Rs.47.50 lakhs which they have deposited. Now that the suit is restored to its original file for its decision on merits, we make it clear that the deposit and withdrawal of Rs.47.50 lakhs would be subject to the final result of the suit.

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2018 (2) L.S. 36 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:

The Hon'ble Mr.Chief Justice of India Dipak Misra &
The Hon'ble Mr.Justice A.M.Khanwilkar &
The Hon'ble Dr.Justice D.Y.Chandrachud

Chhotanben & Anr., ..Appellants
Vs.
Kiritbhai Jalkrushnabhai Thakkar & Ors., ..Respondents

CIVIL PROCEDURE CODE, Or.VII, Rule 11 - INDIAN EVIDENCE ACT, Secs.67 & 71- Rejection of plaint- FACTORS TO BE CONSIDERED - In order to consider Order VII, Rule 11, Court has to look into the averments in plaint and the same can be exercised by Trial Court at any stage of suit - Averments in the written statement are immaterial and it is the duty of Court to scrutinize the averments of plaint- Appeal stands allowed.

J U D G M E N T

(per the Hon'ble Mr.Justice A.M.Khanwilkar)

1. This appeal, by special leave, takes exception to the judgment and order dated 13th January, 2017 of the High Court of Gujarat at Ahmedabad in Civil Revision Application No.76 of 2016.

2. The appellants filed a suit for declaration and permanent injunction on 18th October, 2013, against the respondents before the Principal Senior Civil Court, Anand, being Regular Civil Suit No.166 of 2015 (Old No. Special Civil Suit No.193 of 2013). The frame of the subject suit is on the assertion that the appellants and original defendant Nos.1 & 2 were in joint ownership and possession of an ancestral property inherited by them from their predecessor (father), deceased Bawamiya Kamaluddin Saiyed, bearing Survey No.113/1+2, area H.1-37-59 Ara, Akar Rs.15-81 paise. That land is old tenure agricultural land situated at Mouje Village, Hadgud Taluka and District Anand. The said ancestral, joint, undivided land was jointly possessed and used and enjoyed by the appellants (plaintiffs) and original defendant Nos.1 & 2 (predecessors of respondent Nos.2 to 15), after the demise of their father Bawamiya Kamaluddin Saiyed, being in his straight line of heirs. The names of Jahangirmiya Bawamiya Kamaluddin Saiyed and Hussainmiya Bawamiya Kamaluddin Saiyed (original defendant Nos.1 & 2 respectively) came to be recorded in the record of rights along with the names of the appellants and since that time, all of them were jointly in possession and usage of the undivided land. The appellants assert that they have half (1/2) share, rights, powers, possession and usage rights in the property. It is their case that without their knowledge the original defendant Nos.1 & 2 transferred the said land after forging their (appellants) signatures. The appellants were not aware about the said transaction effected vide registered sale deed No.4425 dated 18th October, 1996, which they came to

know from their community members, immediately whereafter they made enquiry in the office of Sub Registrar at Anand. It was revealed to them that the land has already been transferred by a registered sale deed dated 18th October, 1996 in favour of defendant Nos.4, 5 and 6 (Anilbhai Jaikrishnabhai Jerajani, Kiritbhai Jaikrishnabhai Thakkar and Kekanbhai Jaikrishnabhai Thakkar, respectively). They promptly applied for a certified copy of the registered sale deed. They were also informed that Jaikrishnabhai Prabhudas Thakkar had expired and, therefore, the defendant Nos.3 to 6 received the land as heirs. It is then asserted that from the registered sale deed, they came to know that their thumb impressions were obtained as witnesses in the presence of Bhikhansha Pirasha Divan. They asserted that they had never signed or gave their thumb impressions upon any such deed, in any manner, in front of any witness. It is then stated that some person has been fraudulently involved for putting thumb impressions on the sale deed. They have asserted that the thumb impressions on the sale deed did not belong to them and that they were ready and willing to prove that fact by providing their genuine thumb impressions in front of officers. It may be relevant to reproduce paragraph 4 of the plaint which reads thus:

"4. The paragraph no.1 property is jointly owned, co-shared, jointly used and possessed by the applicants and respondents nos.1 and 2. The respondents nos.1 and 2 do not have any rights to sell the property on their own. In case if the respondents nos.1 and 2 have the willingness to sell the property, they are required to obtain our consent. This was very well in the knowledge of the respondents nos.1 and 2 yet they have entered into a sale deed for the property in an illegal manner. But the actual possession and usage of the suit property is jointly undertaken by us. Before two days, the applicants meet the respondents and asked them not to hinder, harass, etc. as to these rights on the land. We asked the respondents to partition our half part, provide actual possession of the land, yet the respondents did not consider this request. On the contrary it was stated by them that the respondents nos.2 to 6 shall sell the property to someone else, the courts are open and we can take steps whatever we can."

3. In paragraph 6 of the plaint, the appellants have stated about the cause of action for filing the suit in the following words:

> "6. The cause as to the filing of the suit, as mentioned under the above mentioned paragraph pertains to the fact that the respondents nos.1 and 2 without the knowledge of the applicants, while keeping the applicant in dark, removed the name of the applicants from the record of rights and entered into a registered sale deed no.4425 dated 18.10.1996 without the knowledge of the applicants. Upon getting the above mentioned knowledge, the applicants meet the respondents personally before two days and requested them

to cancel the sale deed and hand over the clear, marketable and actual vacant possession of the property to the applicants. Yet the respondents did not consider the request and mentioned that the courts are open for us thereby asking us the applicants to do whatever we wished to do. Therefore the present issue has arise at the village Hadgud without the jurisdiction of the honourable court."

4. As mentioned above, the suit came to be filed for declaration and permanent injunction and for the following reliefs:

"a) The honourable court be pleased to declare that the property mentioned under the paragraph no.1 being situated at Mouje village Hadgud, Taluka and district Anand, survey no.113/1+2, area heacter 1-37-59 Ara, Akar Rs. 15-81 paisa old tenure agricultural land is ancestral property of the applicants and thereby the applicants have undivided ½ (half) part, share, interest and right in the property and a partition of the land be undertaken in a judicial manner and the actual possession, usage, etc. be provided to the applicants in the interest of justice.

b) The honourable court be pleased to declare that the Mouje village Hadgud, Taluka and district Anand, survey no. 113/1+2, area Heacter 1-37-59 Ara, akar Rs. 15-81 Paise old tenure agricultural land is ancestral, joint, undivided, jointly possessed and used property of the applicants and the respondents nos.1 and 2 and thereby the respondents nos.1 and 2 solely do not have the rights and powers to sell or interference in the title of the property and further declare that the registered sale deed no.4425 dated 18.10.1996 in the favour of the respondents nos.4 and 6 is null and void, void ab-initio, cancelled, false and frivolous and thereby the honourable court be kind enough to declare in the interest of justice that the respondents nos.3 to 6 do not receive any kind of rights-powers as to the land on the basis of this particular sale deed.

c) The honourable court be pleased to pass a permanent injunction order against the respondents and in the favour of the applicants such that, neither the respondents nor through their agents, servants, persons, etc. sell, mortgage, charge, lien, etc. the or construct, etc. upon the property mentioned under the paragraph no.1 and situated at the Mouje village Hadgud, Taluka and district Anand, survey no. 113/1+2, area Heacter 1-37-59 Ara, akar Rs. 15-81 Paise old tenure agricultural.

d) The honourable court be pleased to pass a permanent injunction order against the respondents and in the favour of the applicants such that, neither the respondents nor through their agents, servants, persons, etc. interfere, obstruct, hinder, etc. the ancestral, joint, undivided possession, usage, etc. of the applicants upon the property mentioned under the paragraph no.1 and situated at the Mouje village Hadgud, Taluka and district Anand, survey no. 113/1+2, area Heacter 1-37-59

Ara, Akar Rs.15-81 Paise old tenure agricultural.

e) The honourable court be pleased to pass a permanent injunction order against the respondents and in the favour of the applicants such that, neither the respondents nor through their agents, servants, persons, etc. would alter the record of rights entries for the property mentioned under the paragraph no.1 and situated at the Mouje village Hadgud, Taluka and district Anand, survey no. 113/1+2, area Heacter 1-37-59 Ara, Akar Rs.15-81 Paise old tenure agricultural.

f) The honourable court be pleased to pass an appropriate order found proper and efficacious by the honourable court.

g) The honourable court be pleased to order the respondents to provide for the cost as the suit."

5. After filing of the suit, an application was filed on 19th November, 2014 under Orders XIII and XVI of the Code of Civil Procedure, 1908 (for short "CPC") read with Sections 67 and 71 of the Evidence Act for directions to defendant Nos.3 to 6 to produce before the Court, the original deed executed by the original defendant Nos.1 & 2 in respect of the suit land and to obtain the admitted thumb impressions of the appellants and send it for scientific examination and comparison of the thumb impressions by a Handwriting Expert to unravel the truth. The original defendant Nos.4 to 6 filed reply to the said application on 3rd February, 2015, to oppose the same. Thereafter, the defendant No.5 (respondent No.1) on 17th April, 2015 filed an application under Order VII Rule 11(d) for rejection of the plaint on the ground that the suit was barred by limitation having been filed after 17 years. The appellants filed reply to the said application. Both the applications under Order XIII Rule 16 and under Order VII Rule 11(d), were disposed of by the 4th Additional District Judge, Anand on 20th January, 2016 by separate orders. As regards the application filed by the plaintiffs (appellants), the Court allowed the same by passing the following order:

"O R D E R

The application is hereby allowed.

The defendants are directed to produce registered sale deed no.4425 dt.18/10/1996 in the court and further the register civil court is directed to take specimen thumb impression of the plaintiffs as per rules and further such sale deed along with the specimen of thumb impressions of the plaintiffs be sent to thumb impression of the witnesses in such sale deed are of the plaintiffs or not.

Further the thumb impression expert is directed to submit his report within period of 30 days after receiving the documents."

6. As regards the application filed by defendant No.5 (respondent No.1) for rejection of the plaint, the said application was dismissed by the Trial Court on the same day i.e. 20th January, 2016. The Trial

Court opined that the contention urged by defendant No.5 (respondent No.1) for rejection of the plaint was not tenable as the factum of suit being barred by limitation was a triable issue, considering the averments in the plaint. The Trial Court observed thus:

"3. I have given my thoughtful consideration to the submission made by the learned advocate for both the parties. The plaintiffs have filed this suit to set aside in registered sale deed no.4425 dt. 18/10/1996. And this suit has been filed on 18/10/2013. And the contention of the Ld. Advocate for defendant no.5 that the suit has been filed after delay of almost 17 years and hence the suit is prima faciely barred by law of limitation and other submissions of the Ld. Advocate of defendant no. 5 that the plaintiffs do not have prima facie case, it cannot be considered at this stage because whether there is delay of almost 17 years in filling this suit or not and whether it is barred by law of limitation or not, it is subject matter of trial and moreover, the other submissions of Ld. Advocate for defendant no.5 regarding no prima facie case in favour of plaintiff also cannot be considered as these are also the subject matter of trial which can be decided only after taking the evidence. Moreover, at the time of deciding the application under order 7 rule 11 the Court has to just look into the averments made in plaint only and the plea or defense raised by defendant cannot be taken into account at the stage of deciding the application under Order 7 Rule 11 and here in this case merely looking to the pleading in the plaint it does not come out that the suit barred by law of limitation. Moreover, I am of humble view the case law cited by Ld. Advocate for plaintiffs reported as 2015 (1) GLH 1, fully support to the case in hand. Moreover, I am of humble view that, the case cited by Ld. Advocate for defendant reported in 2015(2) GLH 355 and 2013 (1) GLR 398, does not support in the present case as the factual position of these cases and present case are different."

7. Respondent No.1 carried the matter before the High Court by way of a Civil Revision Application No.76/2016 against the order passed by the Trial Court dismissing his application under Order VII Rule 11(d) of CPC for rejection of the plaint. The High Court allowed the application under Order VII Rule 11(d) of CPC filed by respondent No.1 (defendant No.5) and reversed the decision of the Trial Court on the finding that the suit was barred by limitation. For so holding, the High Court in the impugned judgment observed thus:

"18. This Court notices that the plaintiffs are the sisters and defendants No.1 and 2 in the suit of the year 2013 have chosen not to file written statement. Thereby the original defendants No.1 and 2 who are sellers have not made their stand clear. Strong possibility cannot be ruled out that the plaintiffs after about 20 years of the registered sale deed has chosen to bring a collusive suit. It is true that only detail of the plaint shall be examined at the stage of considering application under Order VII Rule 11 of CPC. From a bare reading of

the plaint, it is clearly indicative that the registered sale deed has been effected in the year 1996 where the plaintiffs have affixed their thumb impression as witnesses in the very document and the same came to be challenged in the year 2013. The reason is not very far to fetch. With the phenomenal increase in the land price in the State of Gujarat, such litigations by some of the family members are sponsored litigations by other unscrupulous elements are so often initiated. It is not at all difficult to engineer the same and upset many equations of the purchasers who have enjoyed the title and peaceful possession for many years. Attempt is made to question the registered sale deed on the ground that these were the ancestral property and 7/12 Form reflected the name of the revisionist and other defendants. Revenue entry has also been mutated soon after the registered sale deed in favour of the revisionist and other defendants in the year 1997. The mutation order of village form has been effected on the basis of such registered sale deed on 21st January, 1997. Copy of which has been issued on 31st March, 1997. For such inexplicable delay plaintiffs ought to have brought on record substantiating the documents. However, the documents which have been brought also point out that the plaintiffs' suit is barred by law of limitation for having been preferred after expiry of three years period. It is to be noted that even during the course, when revenue authority mutated the names of present revisionist and other respondents, no objection came to be raised and it is almost after 18 years, such objections have surfaced."

8. The aforementioned decision of the High Court is the subject matter of this appeal at the instance of the appellants (plaintiffs). According to the appellants, the High Court committed manifest error in being swayed away by the fact that the suit was filed after about 17 years. It has proceeded on the basis of assumptions and surmises and not in consonance with the limited sphere of consideration at the threshold stage for examining the application for rejection of the plaint in terms of Order VII Rule 11(d) of CPC. It has not even bothered to analyse the relevant averments in the plaint which, it is well settled, has to be read as a whole and has also not adverted to the reasons recorded by the Trial Court that the factum of suit being barred by limitation was a triable issue in the facts of the present case.

9. The respondents, on the other hand, would contend that there is no infirmity in the view expressed by the High Court and being a possible view coupled with the fact that the suit instituted by the appellants appears to be a collusive suit, no interference in exercise of jurisdiction under Article 136 of the Constitution, is warranted. According to the contesting respondents, it is unlikely that the appellants who are sisters of original defendant Nos.1 & 2, would not have any knowledge about the transaction effected vide registered sale deed and especially, when defendant Nos.3 to 6 were in possession of the land for such a long time, which fact is reinforced from the mutation

entries recorded in 1997 and including the conversion of the land from agricultural to non-agricultural use. According to the contesting respondents, this appeal ought to be dismissed.

10. We have heard Mr. Purvish Jitendra Malkan, learned counsel for the appellants and Mr. Gaurav Agrawal, learned counsel for the contesting respondents.

11. After having cogitated over the averments in the plaint and the reasons recorded by the Trial Court as well as the High Court, we have no manner of doubt that the High Court committed manifest error in reversing the view taken by the Trial Court that the factum of suit being barred by limitation, was a triable issue in the fact situation of the present case. We say so because the appellants (plaintiffs) have asserted that until 2013 they had no knowledge whatsoever about the execution of the registered sale deed concerning their ancestral property. Further, they have denied the thumb impressions on the registered sale deed as belonging to them and have alleged forgery and impersonation. In the context of totality of averments in the plaint and the reliefs claimed, which of the Articles from amongst Articles 56, 58, 59, 65 or 110 or any other Article of the Limitation Act will apply to the facts of the present case, may have to be considered at the appropriate stage.

12. What is relevant for answering the matter in issue in the context of the application under Order VII Rule 11(d), is to examine the averments in the plaint. The plaint is required to be read as a whole. The defence available to the defendants or the plea taken by them in the written statement or any application filed by them, cannot be the basis to decide the application under Order VII Rule 11(d). Only the averments in the plaint are germane. It is common ground that the registered sale deed is dated 18th October, 1996. The limitation to challenge the registered sale deed ordinarily would start running from the date on which the sale deed was registered. However, the specific case of the appellants (plaintiffs) is that until 2013 they had no knowledge whatsoever regarding execution of such sale deed by their brothers - original defendant Nos.1 & 2, in favour of Jaikrishnabhai Prabhudas Thakkar or defendant Nos.3 to 6. They acquired that knowledge on 26.12.2012 and immediately took steps to obtain a certified copy of the registered sale deed and on receipt thereof they realised the fraud played on them by their brothers concerning the ancestral property and two days prior to the filing of the suit, had approached their brothers (original defendant Nos.1 & 2) calling upon them to stop interfering with their possession and to partition the property and provide exclusive possession of half (1/2) portion of the land so designated towards their share. However, when they realized that the original defendant Nos.1 & 2 would not pay any heed to their request, they had no other option but to approach the court of law and filed the subject suit within two days therefrom. According to the appellants, the suit has been filed within time after acquiring the knowledge about the execution of the

registered sale deed. In this context, the Trial Court opined that it was a triable issue and declined to accept the application filed by respondent No.1 (defendant No.5) for rejection of the plaint under Order VII Rule 11(d). That view commends to us.

13. The High Court on the other hand, has considered the matter on the basis of conjectures and surmises and not even bothered to analyse the averments in the plaint, although it has passed a speaking order running into 19 paragraphs. It has attempted to answer the issue in one paragraph which has been reproduced hitherto (in paragraph 7). The approach of the Trial Court, on the other hand, was consistent with the settled legal position expounded in Saleem Bhai and Others Vs. State of Maharashtra and Others (2003) 1 SCC 557), Mayar (H.K.) Ltd. and Others Vs. Owners & Parties, Vessel M.V. Fortune Express and Others (2006) 3 SCC 100) and also T. Arivandandam Vs. T.V. Satyapal and Another (1977) 4 SCC 467).

14. These decisions have been noted in the case of Church of Christ Charitable Trust and Educational Charitable Society Vs. Ponniamman Educational Trust, (2012) 8 SCC 706) where this Court, in paragraph 11, observed thus:

"11. This position was explained by this Court in Saleem Bhai v. State of Maharashtra, in which, while considering Order 7 Rule 11 of the Code, it was held as under: (SCC p. 560, para 9)

"9. A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit—before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court."

It is clear that in order to consider Order 7 Rule 11, the court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinise the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. These principles have been reiterated in Raptakos Brett & Co. Ltd. v. Ganesh Property and Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express."

15. The High Court has adverted to the case of Church of Christ Charitable Trust and Educational Charitable Society (supra), which had occasion to consider the correctness of the view taken by the High Court in ordering rejection of the plaint in part, against one defendant, on the ground that it did not disclose any cause of action qua that defendant. The High Court has also noted the decision relied upon by the contesting respondents in the case of Mayur (H.K.) Ltd. and Ors. (supra), which has restated the settled legal position about the scope of power of the Court to reject the plaint under Order VII Rule 11(d) of CPC.

16. In the present case, we find that the appellants (plaintiffs) have asserted that the suit was filed immediately after getting knowledge about the fraudulent sale deed executed by original defendant Nos.1 & 2 by keeping them in the dark about such execution and within two days from the refusal by the original defendant Nos.1 & 2 to refrain from obstructing the peaceful enjoyment of use and possession of the ancestral property of the appellants. We affirm the view taken by the Trial Court that the issue regarding the suit being barred by limitation in the facts of the present case, is a triable issue and for which reason the plaint cannot be rejected at the threshold in exercise of the power under Order VII Rule 11(d).

17. In the above conspectus, we have no hesitation in reversing the view taken by the High Court and restoring the order of the Trial Court rejecting the application (Exh.21) filed by respondent No.1 (defendant No.5) under Order VII Rule 11(d). Consequently, the plaint will get restored to its original number on the file of the IVth Additional Civil Judge, Anand, for being proceeded further in accordance with law. We may additionally clarify that the Trial Court shall give effect to the order passed below Exh.17 dated 20th January, 2016, reproduced in paragraph 5 above, and take it to its logical end, if the same has remained unchallenged at the instance of any one of the defendants. Subject to that, the said order must be taken to its logical end in accordance with law.

18. Accordingly, this appeal succeeds and is allowed in the above terms, with no order as to costs.

--X--

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