Regd.No.PRAKASAM/13/2018-20 R.N.I.No.APENG/2004/15906

Pages:1 to 68

Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

2019 Vol.(2) Date of Publication 15-6-2019 PART - 11

MODE OF CITATION: 2019 (2) L.S

LAW SUMMARY PUBLICATIONS

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PART - 11 (15TH JUNE 2019)

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Respondent contends that affidavit filed is absolutely silent about need to examine witness and reasons furnished in application are not genuine or correct.

Hon'ble Supreme Court in series of judgment as held that though Or.18, Rule 17-A of CPC has been deleted power to recall a witness is available u/Sec.151 CPC – Since power is being exercised u/Sec.151 CPC Hon'ble Supreme Court in K.K. Veluswamy Vs. N.Palani swamy 2011 (SC) Cases 275 has sounded a note of caution in manner of exercise of said power – Descrition to be exercised by Court u/Sec.151 CPC does not extend to grant any and every relief – Inherent power can only be exercised for rendering Justice and to do all things necessary to secure ends of justice – Hon'ble Supreme Court also stated that principles analogous to Or.47 CPC should be pleaded and set out with some certinity and not practice to fillup gaps in evidence by recalling evidence should be severely curtailed.

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Admittedly in this cases, construction was made after suit was dismissed and before appeal was allowed – Therefore there is power to compel defendants to act under Or.21 Rule 32(5) CPC which is in addition to other powers which are prescribed under Or.21, Rule 32(1)(2)(3)&(4) – In addition to all above, inherent powers of Court is also there to render justice between parties – While it is true that inherent power can be used to grant any and every order, still fact remains that inherent powers can be used for rendering justice in accordance with law.

In view of cases referred this Court is of opinion that this is a fit case where inherent power of Court must be used and should be used to undo wrong that was committed namely, construction of wall in plot "I J" and removal of gate – In this view of matter this Court of opinion that lower Court took a hyper technical view and disallowed application in peculiar facts and circumstances of case as construction was made after suit was dismissed and as decree holder have succeeded in appeal, inherent power of Court is being used to undo wrong – Impugned order, set aside – Judgment debtors are directed to remove wall in portion of "I J" in plaint schedule property and also gate constructed within 45 days from date of receipt of this order. **(A.P.)** ***58***

CIVIL PROCEDURE CODE, Or.21, Rules 5, 85 & 86 & Secs.148 & 151 – Auction purchaser in EP paid 25% of sale consideration amount and also deposited remaining 75%

of sale consideration and he has not deposited requisite amount for obtaining stamp paper for drafting sale certificate within period prescribed under Or.21 rule 85 but auction purchaser realized his mistake and later filed EA u/Secs.148 & 151 CPC requesting to permit him to deposit value of stamp paper for obtaining sale certificate and said petition was allowed by execution court - Considering procedural mistake as bona fide one execution court rightly allowed petition and permitted to deposit money for stamp duty and there is nothing wrong in said order - JDr assailed said order and filed present CRP.

Question "whether execution Court has power to extend time prescribed and Rule 84 and 85 CPC to deposit purchase money - Tone and terrorem of Or.21 Rules 84 & 85 and particularly Rule 86 CPC is such that they are mandatory in nature and therefore default committed by auction purchaser cannot be excused and set at right by Court by exercising its power u/Sec.148 or Sec.151 CPC.

Failure to deposit amount under Rule 85 of Or.21 CPC, automatically entails in cancellation of sale and Rule 86 mandates that the sale of property shall be conducted – There would not be any necessity to pass separate order setting aside sale on account of failure of bidder to deposit amount.

Execution Court not legally right in allowing petition filed by auction purchaser to permit him to deposit value of sale paper beyond period prescribed under Or.21, Rule 85 CPC and impugned order in EA is set aside. **(A.P.)** ***21***

(INDIAN) PENAL CODE, Secs.109 & 302 – Appeal against conviction – Accused No.1/ appellant was at instigation of accused nos.2 to 4 is said to have caused death of his wife/ deceased by setting her on fire – Accused nos.2 to 4 were acquitted by Sessions Court.

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(INDIAN) PENAL CODE, Secs.375, 417 & 420 – Revision against order of lower Court, where by, discharge petition preferred by petitioner was dismissed – Petitioner and complainant fell in love – Petitioner promised to marry complainant and had sexual relations with her – When petitioner was requested by complainant to marry her, petitioner necked her out by expressing that any one would give Rs.50 lakhs as dowry to him.

Held: Petitioner did not have an intention to marry any girl unless she is ready to give Rs.50 lakhs to him – Section 155(4) Cr.P.C. permits the police to investigate into non-cognizable offences also, if it is coupled with a cognizable offence – Criminal revision is partly allowed in so far as offence u/Sec.420 IPC - Criminal revision case in so far as offence u/ Sec.417 IPC stands dismissed. **(A.P.)** ***35***

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HOW TO DEAL WITH THE CASES UNDER SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989

By
Dr. T. Srinivasa Rao,
I Additional District and
Sessions Judge, Adilabad

"You shall not be partial to the poor nor honour the person of the mighty. But in righteousness you shall judge your neighbour"- Holy Bible

(I)INTRODUCTION:-

This is a social, beneficial and welfare legislation with the object of preventing commission of offences of atrocities against the members of the Scheduled Castes and Scheduled Tribes as the untouchability is abolished and its practices in any form is forbidden under Article 17 of the Constitution of India.

(II)OBJECTIVES OF THE ACT:

The objectives of this Act clearly emphasize the intention of the Government to deliver justice to these communities through proactive efforts enable them to live in the Society with dignity and self-esteem, without fear or violence or suppression from the dominant castes.

(1) The preamble of the Act also states that the Act is for preventing the commission of 'offence of atrocities against members of S.Cs and S.T.s.
(2) For providing Special Courts and exclusive Special Courts for trial of such offences as the same has to be completed within two months from the date of filing of charge sheet, as far as possible.
(3) For providing the relief and rehabilitation to the victims of such offences.
(4) For dealing with all the matters connected there with or incidental thereto.

(III) OBJECTIVES OF THE AMENDED ACT with effect from 26.1.2016.

The amendments in the POA Act were proposed to broadly cover five areas, namely,

i) Amendments to Chapter -II (Offences & Atrocities) to include new definitions, new offences, to replace existing sections and expanded the scope of presumptions:
ii) Institutional strengthening
iii) Appeals (New Section)
iv) Establishing Rights of Victims and witnesses (new chapter) .

The objective of amendments in the POA Act is to deliver members of SC's and ST's, a greater justice as well as be an enhanced deterrent to the offenders.

(IV) MAJOR CHANGES IN POST 2016 ACT:

Before its amendment on January 26, 2016, Section 3(2) (v) required evidence that the accused committed the crime with an intention to insult or "belittle" his victim, who belonged to a Scheduled caste or a Scheduled Tribe.

Post 2016, the particular Section was changed so that even mere knowledge on the part of the accused that his victim belonged to SC/ST community was enough proof to bring home the charge under the special law. In Asharfi Vs. State of U.P.,in Crl.Appeal No.1182 of 2015, dated 8.12.2017 (SC), observed as under:

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

The Apex Court concluded that since the rape was committed in 1995, over a decade before the provision was amended in 2016, the prosecution has to prove that he intended the crime as a means to belittle his victim. Mere proof of his knowledge that the victim was a person from the SC/ST community was not enough.

(V) PLACE WITHIN 'PUBLIC VIEW' employed in Section 3(1)(x) means:

The Madras High Court in Manimeglai vs State on 18 November, 2016 referred the following decision. Victor Paul and another vs. State [(2002) MLJ (Crl.) 202

with regard to the phraseology "public view'' employed in Section 3(1)(x) of SC/ST Act, a learned Judge of this Court observed as under:

"4. the word "public view" is not defined in the Act. The dictionary meaning of the word "public" is "open to the people as a whole". the dictionary meaning of the word "view" is vision or sight as from a particular position. Reading these two meanings together in the context of the words "public view", it only means that the public should have viewed the incident irrespective of the place where the offence is committed. The offence may be in a public place within "public view" or in any other place within "public view". In either

situation, the essential element that requires to be established is that it was in "public view". The word "public view" in the Section is preceded by the word "in any place within". Therefore, it is clear to my mind that insult or intimidation should be in a place within public view."

In Swaran Singh and others Vs. State reported in 2008(4)RCR (Cri) 74 (SC) also stated what is "public view" and according to the said decision, the public should be there and they should not be the relatives and friends of the complainant. The said ratio was also reiterated by Hon'ble, Delhi High Court in Kusum Latha Vs. State and others Crl.A.No.686/ 2012, dated 3.3.2016. The husband, sister of the complainant cannot be termed as independent witness. In Kusum Latha's case, it was stated that public view does not necessarily mean that large number of persons should be present to constitute "Public", and that even when one or two members hear and view the offending words being used, the offence would be made out, provided the other ingredients of the Section are satisfied.

(VI) PROOF OF SECTION 3(1)(x):

The Apex Court in Ms. Gayatri @ Apurna Singh vs State & Anr. Dt. 3 July, 2017, held that the following conditions are necessary to constitute an offence punishable under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989:-

1)The affected person should be a member of a scheduled caste or a scheduled tribe;
2)the offender should not be a member of a scheduled caste or a scheduled tribe; ;
3)there must be an intentional insult or intimidation with intent to humiliate a member of a scheduled caste or a scheduled tribe and
4)such insult or intimidation shouid have been made in any place within the public view.

Prior to 2016, there had to be an element of intention was necessary to attract SC/ST caste, i.e, racial prejudice, but now after 2016 amendment, mere knowledge of caste is enough to attract the offence.

(VII) FRAMING OF CHARGES WHEN IPC OFFENCES INVOLVE:

Under Section 221 Cr.P.C., a charge can be framed for the offence under Section 3(1)(xi) of the Act and in the alternative charge under Section 354 IPC, and there is no bar to frame an alternative charge, and conviction can be recorded when the main charge fails for some reason or the other, as per the decision reported in Kolli Satyanarayana @ Sattibabu Vs.State of A.P., 2009 (2) ALT (Crl) 49 (AP).

(VIII) PROOF OF CASTE OF VICTIM AND ACCUSED:

Under this Act, the prosecution has to establish beyond all reasonable doubt the caste of the victim that he belongs to SC/ST and the caste of the accused that he does not belong to SC or ST.

(IX) PRESUMPTIONS UNDER SECTION 8 OF THE ACT:

There are three presumptions under Section 8 of the Act, with regard to abetment, in connection with financial assistance to a person accused or suspected of commission of an offence under this Act.

Secondly, if a group of persons committed an offence under this Act, and the offence is sequel to any existing dispute regarding land or any other matter, itself be presumed that the offence was committed in furtherance of the common intention or in prosecution of the common object.

Lastly, if the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved.

(X) CONCLUSION:

This is a unique legislation which provides safeguards to the victim and witnesses besides rehabilitative justice to the victim. While dealing with these cases, the Court has to consider the evidence of victim of atrocity and other witnesses like any other witnesses and their version cannot be considered to be the gospel truth, because the broad principle is that the Prosecution has to prove its case beyond reasonable doubt applies equally to a case of atrocity and there can be no presumption that a victim would always tell the entire story truthfully. At the same time, a doubt by the Criminal Court should not be that of doubting Thomas, it should be a real and tangible doubt. A doubt regarding the veracity of the evidence of the witness should be a reasonable doubt and the evidence cannot be simply brushed aside on minor aspects as held in Mallappa Siddappa Alakanur and others Vs. State of Karnataka Crl.A.No.1055/2002, delivered by Hon'ble Court Supreme Court on 7.7.2009. That's why, it was held in Dayal Singh and others Vs. State of Uttaranchal reported in (2012) 8 SCC 263, that criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused. There it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the Judge. During the course of trial the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served. For truly attaining this object of a fair trial, the Court should leave no stone unturned to do justice and protect the interest of the society as well.

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2019(2) L.S. 21 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

G.Venkata Ramana Naidu ..Petitioner

Vs.

K.Venkata Ramana Reddy ..Respondent

CIVIL PROCEDURE CODE, Or.21, Rules 5, 85 & 86 & Secs.148 & 151 – Auction purchaser in EP paid 25% of sale consideration amount and also deposited remaining 75% of sale consideration and he has not deposited requisite amount for obtaining stamp paper for drafting sale certificate within period prescribed under Or.21 rule 85 but auction purchaser realized his mistake and later filed EA u/Secs.148 & 151 CPC requesting to permit him to deposit value of stamp paper for obtaining sale certificate and said petition was allowed by execution court - Considering procedural mistake as bona fide one execution court rightly allowed petition and permitted to deposit money for stamp duty and there is nothing wrong in said order - JDr assailed said order and filed present CRP.

Question "whether execution Court has power to extend time prescribed and Rule 84 and 85 CPC to deposit purchase money - Tone and terrorem of Or.21 Rules 84 & 85 and particularly Rule 86 CPC is such that they are mandatory in nature and therefore default committed by auction purchaser cannot be excused and set at right by Court by exercising its power u/Sec.148 or Sec.151 CPC.

Failure to deposit amount under Rule 85 of Or.21 CPC, automatically entails in cancellation of sale and Rule 86 mandates that the sale of property shall be conducted – There would not be any necessity to pass separate order setting aside sale on account of failure of bidder to deposit amount.

Execution Court not legally right in allowing petition filed by auction purchaser to permit him to deposit value of sale paper beyond period prescribed under Or.21, Rule 85 CPC and impugned order in EA is set aside.

Mr.V.Sudhakar Reddy, Advocate for the Petitioner.

Mr.T.D.Phani Kumar, Advocate for Mr.Harinath Reddy Soma, Advocate for the Respondent.

Mr.P.Durga Prasad, Advocate for the Respondent No.2.

O R D E R

Challenging the Civil Revision Petition at the instance of petitioner/4th Judgment Debtor is the order dated 10.10.2018 in E.A.No.94 of 2018 in E.P.No.20 of 2014 in O.S. No.114 of 2011 where under the learned V-Additional District

Judge, Tirupati allowed the petition filed by the petitioner/auction purchaser u/sec.151 of Civil Procedure Code (for short 'C.P.C.') to permit him to deposit the value of stamp papers for getting sale certificate beyond the time stipulated in Order 21, Rule 5 of C.P.C.

2. The factual Matrix of the case is thus;

(a) In E.P.No.20 of 2014, the 1st respondent herein was the third party/auction purchaser being the successful bidder in the auction conducted by the Execution Court. He paid 25% of the sale consideration amount on the date of auction itself i.e., on 16.08.2018 and also deposited the remaining 75% of the consideration on 23.08.2018. However, he has not deposited the requisite amount for obtaining stamp paper for drafting sale certificate within the period prescribed under Order 21, Rule 85 of C.P.C.

(b) The auction purchaser realized his mistake and later, he filed E.A.No.94 of 2018 u/sec.148 & Sec.151 of C.P.C., on 25.09.2018 requesting the Court to permit him to deposit the value for stamp paper for obtaining sale certificate and the said petition was allowed by the Execution Court which is filed and the said order is assailed by the petitioner/4th Judgment Debtor in the instant Civil Revision Petition.

3. Heard learned counsel for the petitioner, Sri V. Sudhakar Reddy and learned counsel for the 1st respondent, Sri T.D. Phani Kumar.

4. The contention of learned counsel for the petitioner Sri. V. Sudhakar Reddy is that under Order 21, Rule 85 of C.P.C., the auction purchaser is duty bound to deposit full purchase money which includes the value of stamp duty required for obtaining sale certificate within 15 days from the date of auction for sale. Though, the petitioner deposited the purchase money within 15 days, however, he failed to deposit the requisite money for obtaining stamp duty for drafting sale certificate within 15 days as prescribed under Rule 85 of CPC. Hence, in terms of Rule 86 of CPC, the sale has become null and void as Rule 86 of CPC mandates that consequent upon the default committed by the auction purchaser, the Court shall conduct a resale. In that view, he was strenuously argued, the Court has no power either u/s.148 or Sec.151 of CPC to extend time to deposit the worth of stamp duty into Court.

5. Hence, the impugned order is contrary to the tenets of law and liable to be struck for contra.

6. While admitting that the 1st respondent/ auction purchaser failed to deposit the money required for obtaining stamp duty, learned counsel would argue that he had diligently paid the entire purchaser money, but by mistake, which is bonafide one he failed to deposit the money for stamp duty. Hence, considering the said procedural mistake as a bonafide one, the Execution Court has rightly allowed the petition and permitted him to deposit the money for stamp duty and there is nothing wrong in the said order.

7. In the light of the above respective arguments, the question that follow for consideration is:

Whether the Execution Court has power to extend time prescribed under Rule 84 and Rule 85 of CPC

to deposit the purchase money?

8. To answer the above question , it is useful to extract Order 21 Rules 84, 85 and 86 of CPC.

> ***"Rule 84 of CPC: Deposit by purchaser and re-sale on default*** *;- (1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty five per cent on the amount of his purchase-money to the officer or other person conducting, the sale, and in default of such deposit, the property shall forthwith be re-sold.*
>
> (2) Where the decree-holder is the purchaser and is entitled to set-off the purchase-money under Rule 72, the Court may dispense with the requirements of this rule.
>
> **Rule 85 of CPC: Time for payment in full of purchase-money:-** The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property:
>
> Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under Rule 72.
>
> **Rule 86 of CPC: Procedure in default of payment:-** In default of payment within the period mentioned in the last proceeding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold."

9. A cumulative reading of the above three provisions makes it clear that an auction purchaser shall;

> *(i) pay/deposit immediately 25% of purchase money, failing which the auction fails and property shall be resold. However, if the Decree Holder is the auction purchaser, he is entitled to seek for set off the purchase money under Rule 72 of CPC and the Court may then dispense with the requirement of Rule 84 of CPC.*
>
> (ii) Under Rule 85 of CPC, the full amount of purchase money (i.e., the balance of 75%) shall be paid by the auction purchaser into Court before the Court closes on the 15th day from the sale of the property. Here also the benefit under Rule 72 of CPC accrues to the concerned person. As per Andhra Pradesh (Amendment), Rule 85 of C.P.C. the auction purchaser shall be bound to pay full amount of purchase money and stamp for certificate under Rule 94 of CPC before the Court closes on the 15th day from the

sale of the property.

10. Thus, Order 21 Rules 84 and 85 of CPC would conjointly tell us that 25% of the purchase money shall be paid on the date of auction and balance amount including the amount required for purchasing stamp duty for issuing sale certificate shall be deposited within 15 days from the date of sale.

11. The consequences of failure to follow the aforesaid mandate is narrated under Rule 86 of CPC. This rule tells us that in case of default, on the discretion of the Court, the deposited amount after defraying the expenses of the sale can be forfeited to the government and further the Court shall resell the property as the defaulting purchaser shall forfeit the claim on property or any part of the sum, for which it may subsequently be sold.

12. The tone and terrorem of Order 21 Rules 84 and 85 and particularly Rule 86 of CPC, is such that they are mandatory in nature and therefore the default committed by the auction purchaser cannot be excused and set at right by the Court by exercising its power under section 148 or section 151 of CPC.

13. We have a thicket of decisions in this regard:

(a) In ***Manilal Mohanlal Shah and others Vs. Sardar Sayed Ahmed Mahamad and others – AIR 1954 SC 349 = MANU/SC/0005/1954 ,*** the Apex Court observed thus;

"Having examined the language of the relevant rules and t h e judicial decisions bearing upon the subject we are of opinion that the pro visions of the rules requiring the deposit of 25 percent of the purchase-money immediately *on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non-compliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 percent of the purchase-money in the first instance and the balance within 15days. When there is no sale within the contemplation of these rules, there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the Court is bound to resell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. We hold, therefore, that in the circumstances of the present case there was no sale and the purchasers acquired, No rights at all."*

(b) In Thayyan Padayachi and others Vs. Veluswami and others –AIR 1961 Madras 407 = MANU/TN/0266/1961 in similar circumstances the Bombay High Court observed thus;

"It seems to me that Order 21, Rule 86 is quite clear on the point. It states that in default of payment within the period mentioned in Order 21, Rule 85, the court may, if it thinks fit, forfeit the deposit less the expenses of sale, to the government, and the rule proceeds to lay down that the property shall thereafter be re-sold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

This rule does not authorize the court to grant any extension of time for the payment of the balance of the purchase price. The only discretion that is available to the Court under this rule relates to the extent to which it is called upon to deal with the 25 per cent of the purchase price which had been deposited under Rule 84. In so far as that is concerned, the court may order its forfeiture after deducting the expenses of the sale."

14. Incidentally, the Madras High Court held that Section 148 of CPC will not come to the rescue of the petitioners therein because it relates to a case where a period is fixed or granted by the Court in its discretion for the doing of an act which is prescribed or allowed by the Code. In such an event, the Courts' discretion in enlarging the period is not fettered. But, in the case on hand, the period was not fixed or granted by the Court, but it was fixed by the Code itself. Thus, it makes a fundamental difference to the application of Sec.148 of CPC and the said provision will not apply.

15. (a) In **Uttamchand Milapchand Vs. Balkrishna Ramnath - AIR 1961 Bombay 224 = MANU/MH/0053/1961** referring to Manilal Mohanlal Shah and others case (supra 1), the Bombay High Court expressed the similar view holding thus;

In Para No.4 xxxx……In view of these observations of the Supreme Court it is clear that the pro visions of Order 21. Rule 85 as well as Rule 86 are mandatory in the sense that in the event of the auction purchaser failing to deposit the full purchase price within 15 days from the date of the auction sale the court will have no option but to order a re-sale of the property. This necessarily implies that the Court has no jurisdiction whatever to extend the time for the payment of the balance of the purchase price as fixed under Order 21 Rule 85 of the Code. Either the purchaser pays the price within 15 days of the sale or he does not. If he pays, the sale would be complete; if he does not pay then, as pointed out by the Supreme Court in the aforesaid decision, there is no sale at all and all the proceedings in respect of the auction sale would be a nullity. Applying the ratio of that decision to the facts of this case, it is clear that as auction purchaser, who is the applicant in the present revision application, failed to pay the full purchase price within 15 days of the auction sale, there was no sale at all in his favour and, therefore,

there was no question of any irregularity in such a sale being waived on account of the consent of the judgment-debtor to the time being extended in favour of the auction purchaser. Following upon the default in the payment of the purchase price as required under Order 21 Rule 85 the Court had straightaway to order resale of the property which the learned Judge in the court below has done in this case. Accordingly, in my opinion, the order passed by the learned Judge ordering re-sale of the property is perfectly valid."

(b) In **Nachhattar Singh and others Vs. Babu Khan and others – AIR 1972 P & H 204 = MANU/P11/0067/1972 and AIR 2003 HP 63 = MANU/HP/0042/2002** the High courts of Punjab and Haryana and Himachal Pradesh expressed similar view.

(c) In **Mudragada Suryanarayanamurthi Vs. Southern Agencies, Rajahmundry and another – AIR 1962 AP 271 = MANU/AP/0070/1962** this High Court has reiterated that the Rules 84, 85 and 86 are mandate in nature, it held thus;

"In Para No.4 xxxx…..The language of Rules 84, 85 and 86 is mandatory. Under Rule 84, twenty five percent of the amount of the purchase money shall be deposited immediately after the person is declared to be the purchaser and in default of such deposit, the property shall forthwith be re-sold. Similarly, under Rule 85, the full amount of the purchase money payable as well as the amount required for the general stamp for the certificate under Rule 84 shall be deposited into Court before the court closes on the fifteenth day from the date of the sale of the property. In default of payment within the period mentioned in Rule 85, the property shall be re-sold under Rule 86.

The payment mentioned in Rule 86, is, in our opinion, the payment of the amounts that are required to be deposited under Rule 85, including the full amount required for the general stamp for the sale certificate. That the "Payment" referred to in Rule 86 is not merely the payment of the full amount of the purchase money but refers also to the amount required for the general stamp for the certificate under rule 94 is clear also from Rule 87 as amended in Madras, Kerala and Andhra Pradesh which is as follows:

"Every re-sale of immovable property, in default of payment of the amounts mentioned in Rule 85 within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period herein before prescribed for the sale".

(d) In ***Dasarla Koteswaramma Vs Alla Venkayamma – 2009(5) ALD 237*** also similar views expressed and held thus;

"From this, it is clear that not only the balance of sale consideration but also the amount required for general stamp for the certificate under Rule 94 or the amount required for such

stamp shall be deposited before the expiry of 15th day. Admittedly that amount was not deposited before the stipulated time. When the petitioner wanted enlargement of the time, the trial court dismissed the E.A.

The failure to deposit the amount under Rule 85 of Order 21 CPC, automatically entails in cancellation of the sale and Rule 86 mandates that the resale of the property shall be conducted. There would not be any necessity to pass separate order setting aside the sale on account of failure of the bidder to deposit the amount".

16. In the light of aforesaid precedential jurisprudence, the Execution Court was not legally right In allowing the petition filed by the auction purchaser to deposit the value of stamp paper beyond the period prescribed under Order 21 Rule 85 of C.P.C.

17. In the result, this Civil Revision Petition is allowed and the impugned order in E.A.No.94 of 2018 in E.P. No.20 of 2014 in O.S.No.114 of 2011 is set aside and while setting aside the auction sale, the lower court is directed to conduct a fresh sale in accordance with law. No costs.

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

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2019(2) L.S. 27 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

Present:
The Hon'ble Mr.Acting Chief Justice C. Praveen Kumar &
The Hon'ble Mr. Justice M. Satyanarayana Murthy

Smt.Guduru Pakkiramma ..Petitioner
Vs.
The State of A.P., & Ors., ..Respondent

ANDHRA PRADESH PREVENTION OF DANGEROUS ACTIVITIES OF BOOT LEGGERS, DACOITS, DRUG OFFENDERS, GOONDAS, IMMORAL TRAFFIC OFFENDERS AND LAND GRABBERS ACT, 1986,Sec.3(2) r/w 3(1) – Writ petition seeking issuance of a writ of habeas corpus directing respondents to release detenu by declaring the detention order as illegal.

Held: In absence of a positive conclusion that activities of detenu are prejudicial to "public order"preventive detention laws cannot be made applicable – Grounds of detention and orders of detention reveal confused state of mind of detaining authority - Order of detention under challenge cannot be sustained and is liable to be set aside – Writ petition stands allowed by setting aside the order of detention passed by the Collector & District Magistrate.

WP.No.47074/18 Date:19-2-2019

Mr. T.Nagarjuna Reddy, Advocate for the Petitioner.

The Advocate General, Advocate for the Respondents.

O R D E R

(per the Hon'ble Mr.Acting Chief Justice C.Praveen Kumar)

The husband of the petitioner, by name Guduru Sanjeeva Rayudu@ Musalaiah S/o. Late Pedda Sanjanna, was subjected to preventive detention under section 3(2) read with 3(1) of the Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 (for short, 'The Act') under order dated 28.11.2018 of the Collector & District Magistrate, Kurnool District. His detention was approved by the Government vide G.O.Rt.No.2554, General Administration (SC.I) Department, dated 06.12.2018. Aggrieved thereby, the petitioner filed the present writ petition seeking issuance of a writ of habeas corpus directing the respondents to release the detenu, who is now lodged in Central Prison, Kadapa, by declaring the detention order dated 28.11.2018 and the consequential G.O.Rt.No.2555 dated 06.12.2018 as illegal, arbitrary and unconstitutional.

The record reflects that after the approval of the order of detention by the Government, the matter was referred to the Advisory Board under Section 10 of the Act. Thereupon, the Advisory Board reviewed the matter and submitted a report to the Government on 20.12.2018, under section 11(1) of the Act, opining that there was sufficient cause for the detention of the detenu. After consideration of the said report, the Government confirmed the detention of the petitioner's husband and directed that his detention shall be continued for a period of 12 months from the date of his detention, i.e., 30.11.2018, *vide* G.O.Rt.No.16, General Administration (SC.I) Department, dated 02.01.2019.

Since the confirmation was made during the pendency of the writ petition, the petitioner, by way of filing an amendment application, also laid a challenge to the confirmation G.O.

The order of detention refers to twelve crimes in which the detenu was alleged to have been involved. Out of them, five crimes were registered for the offences punishable under the Indian Penal Code and the remaining seven crimes were registered for the offences punishable under the Criminal Procedure code. The detenu was acquitted in the cases registered for the offences under the Indian Penal Code and insofar as the offences under the Code of Criminal Procedure, he was bound over by the concerned authority. In the year 2018, a rowdy sheet has been opened against the detenu on the file of Allagadda Rural Police Station on account of his notorious and hazardous activities. Having referred to the twelve crimes registered against the detenu, the detaining authority observed that the detenu has been motivating innocent youth towards committing of both property and bodily offences and due to his motivation, the common youth of Ahobilam, Allagadda and surrounding villages were involved in several offences and that the detenu, by maintaining

a gang and operating in the commission of offences armed with deadly weapons, has been causing branch of public peace and tranquility. The detenu and his henchmen have been damaging the public property and thereby, exhibiting highhanded behavior in the areas, affecting the public order. Thus, the detaining authority held that the detenu falls within the meaning of word 'Goonda' as defined under the Act and accordingly, passed the order of detention under challenge.

A counter-affidavit came to be filed by the 2nd respondent-Collector & District Magistrate, Kurnool, denying the averments made in the writ affidavit and supporting the order of detention.

Though various grounds are urged in the affidavit filed in support of the writ petition, Sri T. Niranjan Reddy, learned senior counsel appearing for the petitioner, would mainly contend that the order of detention came to be passed by the detaining authority in a confused state of mind and on stale grounds. To substantiate his contention, he has drawn the attention of this Court to the relevant portions of the order of detention and grounds of detention and pointed out that the detaining authority was not in a position to make up his mind as to whether the detention of the detenu is required in order to maintain 'law and order' or 'public order'. He further submits that the order of detention was based on stale incidents and therefore, it cannot be sustained.

On the other hand, the learned Special Government Pleader representing the learned Advocate General would submit that even if it is presumed, but not admitting, that the detaining authority was in a state of confusion as to whether the detention of the detenu is required on account of 'law and order' issue or to maintain 'public order', there is other material before the detaining authority, which is sufficient to show that the detention of the detenu is not illegal. He would further contend that if the detenu was not detained, he would have continued with his activities thereby disturbing the even tempo of life of the people.

It is to be noted that in the order of detention, the detaining authority, having referred to twelve crimes registered against the detenu, observed that the pro visions of IPC and CrPC are found insufficient in ordinary course to deal with the detenu since he is a habitual offender indulging repeatedly in dangerous "Goonda" activities adversely affecting public order and therefore, he would fall under the definition of "Goonda" under section 2(G) of the Act, however, in the grounds of detention, which were supplied to the detenu, the detaining authority observed as follows:

"Thus, the said Guduru Sanjeeva Rayudu @ Musalaiah, S/o Late Pedda Sanjanna, age 45 yrs is a potential criminal as seen from his criminal history. He is acting prejudicial to the public order. He has no respect towards law and is relapsing to recidivism creating panic in the minds of general public.

Hence, on the basis of the record placed before me, I am satisfied that you should be detained under A.P. PREVENTION OF DANGEROUS ACTIVITIES OF BOOT LEGGERS, DACOITS, DRUG-

OFFENDERS, GOONDAS, IMMORAL TRAFFIC OFFENDERS AND LAND in order to maintain Law and Order effectively with an iron hand and to keep peaceful atmosphere and ensure peaceful existence of the people in the limits of Allagadda Rural P.S. and Allagadda Town PS of Kurnool District, there is no other go to go except to book Gudur Sanjeeva Rayudu @ Musalaiah, S/o late Pedda Sanjanna, Age 45 yrs as detenue UNDER SECTION 2(G) OF THE A.P. PREVENTION OF DANGEROUS ACTIVITIES OF BOOT LEGGERS, DACOITS, DRUG OFFENDERS, GOONDAS, IMMORAL TRAFFIC OFFENDERS AND LAND GRABBERS ACT, 1986.

It is therefore, ordered that you shall be detained under section 2(G) of THE A.P. PREVENTION OF DANGEROUS ACTIVITIES OF BOOT LEGGERS, DACOITS, DRUG OFFENDERS, GOONDAS, IMMORAL TRAFFIC OFFENDERS AND LAND GRABBERS ACT, 1986 (Act 1 of 1986). To prevent you from acting in a manner prejudicial to the maintenance of public order."

As can be seen from the above observations, it is clear that the detaining authority was not in a position to make up his mind as to whether the activities of the detenu are affecting 'public order' or 'law and order'. Though, in the first and last paragraphs extracted above, the detaining authority held that the detenu has been acting prejudicial to the maintenance of public order and his detention was ordered to prevent him from acting in a manner prejudicial to the maintenance of public order, in the second paragraph, he said that the detenu should be detained under the Act in order to maintain 'law and order' and to keep peaceful atmosphere and ensure peaceful existence of the people. Thus, the order of detention lacks clarity as to whether on the ground of 'public order' or 'law and order', he detention of the detenu was necessitated. further, though the detaining authority stated that the detenu was necessitated. Further, though the detaining authority stated that the detenu is acting prejudicial to the public order, except citing stale incidents, such as, the detenu motivating Innocent youth towards committing of both property and bodily offences and by maintaining a gang, operating in the commission of offences armed with deadly weapons, causing breach of public peace and tranquility, the order of detention and the grounds of detention do not reveal relevant and justifiable grounds for ordering the detention of the detenu in order to maintain 'public order'. In the absence of a positive conclusion that the activities of the detenu are prejudicial to 'public order', preventive detention laws cannot be made applicable to 'law and order' issues.

The issue as regards satisfaction arrived at on grounds of 'public order' and 'public peace and law and order' and its consequences, came up for consideration before a Division Bench of the composite High Court for the States of Telangana and Andhra Pradesh in **Vasanthu Sumalatha v. State of Andhra Pradesh 2016 (1) ALT 738 (D.B.)** wherein, the Division Bench, having dealt with the expressions 'public order' and 'law and order ' in detail and having referred to the judgments of the

Supreme Court in **Commissioner of Police v. C.Anita [(2004) 7 SCC 467], Kuso Sah v State of Bihar [(1974) 1 SCC 185], Harpreet Kaur v. State of Maharashtra [(1992) 2 SCC 177], T.K. Gopal v. State of Karnataka [(2000) 6 SCC 138], State of Maharashtra v. Mohd, Yakub [(1980) 3 SCC 57], Ram Manohar Lohia v. The state of Bihar (AIR 1966 SC 740),** held as follows:

> "71. The detaining authority cannot wish away the fact that, in the grounds of detention, he has recorded his satisfaction of the need to detain the detenus as he apprehended their activities to be injurious to "public peace' and "law and order" neither of which are grounds for detaining a citizen, in preventive custody, under A.P. Act 1 of 1986. Even if the order and the grounds of detention are read together, the fact, that the detaining authority has recorded his satisfaction in the Orders of detention, as affecting "public order" and in the grounds of detention, as affecting "public peace" and "law and order", reflect his confused state of mind, and lack of clarity of thought in satisfying himself whether the detention should be on grounds of "public order" or "public peace and law and order". As noted herein above, "public order" has acquired a meaning distinct from "law and order" and, as the detaining authority is not empowered to detain citizens on grounds that their activities are injurious to "public peace and law and order", his subjective satisfaction is based on extraneous and irrelevant considerations invalidating the orders of detention."

In the light of the aforesaid judgment and having regard to the fact that the grounds of detention and the order of detention reveal confused state of mind of the detaining authority and lack of clarity of thought in satisfying himself whether the detention should be on the ground of 'public order' or 'law and order', and since the detaining authority is not empowered to order detention of a citizen on the ground that his activities are prejudicial to 'law and order', as noted earlier, we are of the considered opinion that his subject satisfaction came to be based on extraneous and irrelevant considerations, thereby in validating the order of detention under challenge.

For the foregoing discussion, this Court is of the considered opinion that the order of detention under challenge, which was consequently approved and confirmed by the Government, cannot be sustained and is liable to be set aside.

In the result, the writ petition is allowed by setting aside the order of detention dated 28.11.2018 passed by the Collector & District Magistrate, Kurnool District, approve d under G.O.Rt.No.2554, General Administration (SC.I) Department, dated 06.12.2018 and further confirmed under G.O.Rt.No.16, General Administration (SC.I) Department, dated 02.01.2019. The husband of the petitioner, by name Guduru Sanjeeva Rayudu @ Musalaiah S/o Late Pedda Sanjanna, shall be set at liberty forthwith unless his confinement is required in relation to any other case.

As a sequel, pending miscellaneous petitions if any, shall stand closed. No order as to costs.

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2019(2) L.S. 32 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Smt.Bandi Subbamma ..Petitioner
Vs.
Palle Maheswaraiah & Anr., ..Respondents

CIVIL PROCEDURE CODE, Or.XIII, Rule 3 – Civil Revision by petitioners that her objection for marking the documents was not considered by lower Court – Petition filed under order XII, Rule 3, CPC to reject documents as they were irrelevant and inadmissible in evidence was rejected by trial Court.

Held: Suit is of year 2013 and stage of the case is for arguments and documents were already marked in evidence – Since evidence has already been let in by parties, rejection of documents at this stage may lead to multiplicity of proceedings - Civil revision petition is disposed of directing trial Court to dispose of the matter expeditiously.

CRP.No.41/2019 Date: 15-3-2019

Mr.V.Dyumani, Advocate for the Petitioner.
Mr.G.Sraavan Kumar, Advocate for the Respondents.

O R D E R

This Civil Revision Petition is directed against the order passed by the learned III Additional District Judge, Kurnool at Nandyal vide docket order, dated 03.01.2019, passed in C.F.R.No.8169 of 2018 in O.S.No.23 of 2013.

2. The grievance of the petitioner is that her objection for marking the documents Exs.A-6 and A-9 was not considered in O.S.No.23 of 2013 on the file of the III Additional District Judge, Kurnool at Nandyal. The petitioner thereafter filed a petition under Order XIII Rule 3 C.P.C. to reject those documents as they are irrelevant and inadmissible in evidence. The said petition was rejected by the trial Court. Aggrieved by the impugned rejection by way of the docket order referred above, the present Civil Revision Petition is filed.

3. The argument of the learned counsel for the petitioner is that Order XIII Rule 3 CPC enables the Court to reject the documents at any stage of the suit if it considers those documents as irrelevant or otherwise inadmissible. The Petitioner's contention is that her petition was rejected at the threshold without enquiry.

4. At this juncture, it is appropriate to refer to the findings of the trial Court while rejecting the said application. The trial Court came to the conclusion that the documents – Exs.A-6 and A-9 were not

objected when filed along with the evidence affidavit of the plaintiff and once a document is admitted and marked. It cannot be demarked and rejected by the trial Court.

5. It is to be seen whether the grounds on which the trial Court has rejected the petition filed under Order XIII Rule 3 CPC is justifiable or n ot.

6. It is appropriate to refer to the provision under Order XIII Rule 3 CPC for better appreciation of the facts of this case. Order XIII Rule 3 CPC reads as under:-

> **"The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection."**

7. In this regard, the docket order of the trial Court cannot be found fault with for the reason that the documents were filed along with the evidence affidavit and when the same were being marked, no objection was raised by defendant No.2 i.e., petitioner herein. On the other hand, the petitioner h as cross examined PW-1 after marking those documents. Further, even in the cross examination, the same has not been brought out with regard to the objection raised by the learned counsel for the petitioner while marking the documents.

8. The submissions of the learned counsel for the petitioner are that the trial Court has lost sight of the endorsement made by the counsel for defendant No.2 on the evidence affidavit stating as under:

> ***"Received notice. Documents cannot be marked as per Section 33 of Evidence Act."***

In spite of the objection raised by the learned counsel for defendant No.2 as above, the trial Court has not rejected the documents. It is further argued that even though the endorsement was made by defendant No.2, the learned trial Court Judge had not looked into the same and allowed for marking of the documents in the evidence of the plaintiff. This contention cannot be accepted for the reason that even at a subsequent stage of trial, after the cross examination of PW.1 immediately, no petition was filed under Order XIII Rule 3 CPC. On the other hand, the petitioner contends that as per Section 33 of the Evidence Act, the documents ought to have been rejected.

9. At this juncture, it is appropriate to refer to Section 33 of the Evidence act, which reads as under:

> Section 33: Relevancy of certain evidence for proving. In subsequent proceeding, the truth of facts therein stated.-Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the ad verse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court

considers unreasonable: Provided – that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding. Explanation-A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

10. In fact, the learned counsel for the petitioner has argued that the provision under Section 33 of the Evidence Act would have been considered only in the petition under Order XIII Rule 3 CPC, and since the said petition was rejected, the question of going into merits under Section 33 of the Evidence Act in this petition does not arise at this stage.

11. Therefore, the submissions of the learned counsel for the petitioner seems to be that the very rejection order of the learned trial Court Judge is illegal on the ground that once the documents were marked as exhibits, they cannot be demarked.

12. In fact, the admitted facts are that the documents Exs.A-6 and A-9 were filed along with the chief affidavit of the plaintiff. The same were received in the evidence. The plaintiff was cross examined by the defence counsel. Thereafter, one of the defendants appears to have been examined in the matter and the suit was posted for arguments. At that stage, the present application has been filed for rejecting the documents Exs. A-6 and A-9.

13. It is still open to the Court to exercise its discretion under Order XIII Rule 3 CPC at any stage of the suit to reject any document which it considers irrelevant or otherwise inadmissible by recording the grounds of such rejection.

14. Admittedly, the documents Exs.A-6 and A-9 were marked in the evidence of the plaintiff. The suit is of the year 2013. The trial in the suit has almost come to an end. At that stage, the present application is filed by defendant No.2 for rejecting the two documents referred above. Even in the light of the provision under Order XIII Rule 3 CPC, the trial Court may, at any stage of the suit, reject any document which it considers irrelevant or otherwise inadmissible recording the grounds of such rejection. Now the situation is that the petitioner is asking the Court to reject the documents by invoking the provision under Order XIII Rule 3 CPC. Since the said provision is available to the Court for rejecting the documents whenever the Court Comes to a conclusion that those documents are irrelevant or otherwise inadmissible and since the documents have already been marked on the admission of the parties, the same cannot be demarked at this stage without considering the relevancy or otherwise.

15. The contention of the learned counsel for the petitioner that defendant No.2 had not given her consent for marking those documents by referring to the endorsement made on the chief evidence affidavit of the plaintiff cannot be accepted for the reason that defendant No.2 has cross

examined the plaintiff and nothing was elicited with regard to the objection raised by defendant No.2.

16. However, in the light of the facts and circumstances of this case, since the suit is of the year 2013 and the stage of the case is for arguments and the documents were already marked in the evidence, the trial Court can always look into those documents with regard to their relevancy and evidentiary value. It is also pertinent to note that since the evidence has already been let in by the parties, the rejection of the documents at this stage in the light of the provision under Order XIII Rule 3 CPC may lead to multiplicity of proceedings.

17. Therefore, to avoid multiplicity of proceedings, it is appropriate for the petitioner to proceed with the trial. The trial Court shall consider the evidentiary value of the documents which are already marked and pass appropriate orders.

18. The Civil Revision Petition is disposed of directing the trial Court to dispose of the matter expeditiously taking into consideration the evidentiary value of the documents – Exs.A-6 and a-9 along with other evidence and pass appropriate orders in accordance with law. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this Civil Revision Petition shall stand closed.

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2019(2) L.S. 35 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Kancharana Venkatesh ..Petitioner

Vs.

State of A.P., ..Respondents

INDIAN PENAL CODE, Secs.375, 417 & 420 – Revision against order of lower Court, where by, discharge petition preferred by petitioner was dismissed – Petitioner and complainant fell in love – Petitioner promised to marry complainant and had sexual relations with her – When petitioner was requested by complainant to marry her, petitioner necked her out by expressing that any one would give Rs.50 lakhs as dowry to him.

Held: Petitioner did not have an intention to marry any girl unless she is ready to give Rs.50 lakhs to him – Section 155(4) Cr.P.C. permits the police to investigate into non-cognizable offences also, if it is coupled with a cognizable offence – Criminal revision is partly allowed in so far as offence u/Sec.420 IPC - Criminal revision case in so far as offence u/Sec.417 IPC stands dismissed.

Mr.Raja Reddy Koneti, Advocate for the Petitoner.
PP for Respondent.

25 Crl.P.No.3550/18 Date: 13-3-2019

O R D E R

This revision is preferred questioning the order, dated 13.07.2018 passed in Crl.M.P.No.1466 of 2018 in C.C.No.105 of 2017 on the file of the court of Judicial Magistrate of First Class, Amudalavalasa, by virtue of which the lower court dismissed the petition, which was filed by the petitioner seeking for discharge of the petitioner.

2. Heard the counsel for the petitioner and the Public Prosecutor appearing for the respondent.

3. The facts of the case, as reflected in the statement of the de facto complainant, the copy of which is filed by the counsel for the petitioner, are that the petitioner and the complainant fell in love. The petitioner promised to marry the complainant and, as such, took her to several places like Kakinada and Vizag and had sexual relations with her. Six months back the petitioner secured a job in Canara Bank, Orissa. After securing the job also, he had sexual relations with the de facto complainant by threatening her that he would commit suicide, if she does not come to his place. When she requested the petitioner to marry her, he expressed that anyone would give Rs.50 lakhs as dowry to him at present and saying so, he necked her out from his room. She returned to the village and also deliberated in the presence of elders and the petitioner pleaded ignorance. The mother of the petitioner also abused the de facto complainant. Supporting the statement of the de facto complainant, the statements of her parents are also recorded.

4. The counsel for the petitioner, by relying on a judgment of the Supreme Court passed in Crl.A.No.1443 of 2018 between **DR. DHRUVARAM MURALIDHAR SONAR VS. THE STATE OF MAHARASHTRA & ORS.**, contends that there was consent on the part of the de facto complainant and hence, the sexual contacts between the de facto complainant and the petitioner cannot be termed as rape. Even the complaint does not make an allegation that she was raped by the petitioner. Her statement is only to the effect that after securing job and after continuing sexual relations with her, the petitioner refused to marry her saying that he would get Rs.50 lakhs of dowry, which she terms to be an act of cheating. The case was registered for the offences under Sections 417 and 420 IPC.

5. The counsel for the petitioner submits that Section 420 IPC does not get attracted as there is no inducement to deliver the property. For ready reference, Section 420 IPC is extracted hereunder, which reads as follows:

"Sec.420: Cheating and dishonestly inducing delivery of property:-

Whoever cheats and thereby dishonestly induces the person deceived to deliver the property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

6. The contention that Section 420 IPC does not get attracted to the facts of the case has to be accepted as there is absolutely no inducement made by the petitioner to deliver any property of the de facto complainant and there is absolutely no allegation attracting any of the ingredients of Section 420 IPC.

7. So far as Section 417 IPC is concerned, it prescribes punishment for cheating, which is defined under section 415 IPC, Section 415 reads as follows:

"Sec.415. Cheating:-

Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceive d to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat."

8. The facts of the case would reveal that the de facto complainant had sexual relations with the petitioner only on his promise to marry her. The Supreme Court in the afore cited judgment considered various judgments passed by it earlier and ultimately quashed the proceedings against the accused in the case dealt with by the Supreme Court, the facts of which are totally different from the facts of this case. Section 90 IPC defines consent, which reads as follows:

"90. Consent known to be given under fear or misconception:-

A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person, - if the consent is given by a person who, from unsoundness of mind, or intoxication is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child. – unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

9. The Supreme Court observed that if the consent is given by the complainant under misconception of fact, it is vitiated and consent for the purpose of Section 375 IPC, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. It also observed that whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances. Hence, consent, which is given under misconception of fact, is held not to be consent within the meaning of Section 90 IPC.

10. In **UDAY V. STATE OF KARNATAKA - (2003) 4 SCC 46** the Supreme Court dealt with a case where the prosecutrix, who was aged 19 years, had given consent to sexual intercourse with

the accused with whom she was deeply in love, on a promise that he would marry her on a later date. The complaint was lodged on failure of the accused to marry her. It was held that consent cannot be said to be given under a misconception of fact. In the said case, the prosecutrix was a grown up girl studying in a college. She was aware of the fact that since they belonged to different castes, marriage was not possible. In those circumstances, the court held that the girl has freely exercised a choice between resistance and assent and she must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. The caste consideration is an aspect, which may come as an objection from the families of the couple. But if the boy takes an objection based on the caste after having sexual relation with the girl, it cannot be treated on par with he failing to keep up his promise due to the caste consideration coming up as an issue from his family members.

11. Another ruling of the Supreme Court reported **DEELIP SINGH @ DILIPKUMAR V STATE OF BIHAR- (2005) 1 SCC 88** is a case for which promise of marriage had to fail due to the father of the accused taking him out of the village to thwart the bid to marry. In such circumstances, the court held that it is a breach of promise to marry rather than a case of false promise to marry, for which the accused is prima facie accountable for damages under civil law. It was further held that the accused did hold out the promise to marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy with him. But the court found that there was no evidence which gave rise to an inference beyond reasonable doubt, that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. It also observed that the statement of PW12 showed that later on the accused became ready to marry her but his father and others took him away from the village, which would indicate that the accused might have been prompted by a genuine intention to marry which did not materialize on account of the pressure exerted by his family elders.

12. The facts of this case do not match with the facts of any of the cases, which were discussed by the apex court in the above cited ruling. In this case, it is the petitioner, who went back on his promise, that too on a consideration that he would get Rs.50 lakhs of dowry if he marries anyone. From the said fact, there is a possibility of inferring that the petitioner did not have an intention n to marry any girl unless she is ready to give Rs.50 lakhs to him, which he did not disclose to the de facto complainant, at the time when he had sexual relations with her. Hence, prima facie, sufficient material, attracting the offences alleged under section 417 IPC, is available.

13. The counsel for the petitioner contends that Section 417 IPC, being non-cognizable offence, police do not have any power to investigate without the order of the Magistrate. Section 155(4) permits the police to investigate into non-cognizable offences also, if it is coupled with a

cognizable offence, the police registered the case for Sections 417 and 420 IPC, may be under a genuine belief that the facts of the case attracted Section 420 IPC. Merely because this court finds that the ingredients of Section 420 IPC, does not get attracted to the facts, after evaluating the material, it cannot be said that the investigation done by the police is vitiated.

14. In view of the above, this court opines that continuation of further proceedings against the petitioner, insofar as offence under Section 420 IPC is concerned, would be an abuse of process of law and that this is not a fit case to discharge the petitioner insofar as offence under section 417 IPC.

15. With the above observations, the Criminal Revision Case is partly allowed and the petitioner is discharged insofar as offence under section 420 IPC.

The Criminal Revision Case insofar as the offence under Section 417 IPC is concerned, is dismissed.

Interim order granted by this court by order, dated 07.02.2019, shall stand vacated.

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

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2019(2) L.S. 39 (A.P.)

IN THE HIGH COURT OF
ANDHRA PRADESH

Present:
The Hon'ble Mr.Acting Chief Justice
C. Praveen Kumar &
The Hon'ble Mr. Justice
M. Satyanarayana Murthy

Buaya Kurumala Kalvagadda Ramesh ..Appellant

Vs.

The State of A.P., ..Respondent

INDIAN PENAL CODE, Secs.109 & 302 – Appeal against conviction – Accused No.1/appellant was at instigation of accused nos.2 to 4 is said to have caused death of his wife/deceased by setting her on fire – Accused nos.2 to 4 were acquitted by Sessions Court.

Held: If dying declaration is excluded from consideration, there is no material to connect appellant with the crime – Contents of dying declaration show that deceased parents died but prosecution examined the mother of deceased as Pw.9 – Manner in which certificate of doctor was obtained, and not explaining as to how print out was taken in hospital and inconsistent answers given by the deceased, Court is of opinion that it is not safe to convict accused No.1 – Criminal appeal is allowed and conviction and sentence imposed against appellant/accused no.1. by sessions court is set aside.

J U D G M E N T

(per the Hon'ble Mr.Acting Chief Justice C. Praveen Kumar)

Originally accused Nos.1 to 4 in Sessions Case No.292 of 2011 on the file of Additional Sessions Judge, Hindupur, were tried for the offences punishable under sections 302 r/w 109 of Indian Penal Code (for short "I.P.C."). By its judgment dated 30.10.2012, the learned Additional Sessions Judge while acquitting accused Nos.2 to 4 for the offence punishable under sections 302 r/w 109 of IPC, found accused No.1 guilty for the offence punishable under section 302 of IPC and sentenced him to suffer rigorous imprisonment for life and to pay a fine of Rs.1000/-, in default, to suffer simple imprisonment for a period of six months. Challenging the same accused No.1 preferred the present Appeal.

The gravamen of the charges against the accused is that on 03.02.2009 at 8.00 p.m., accused No.1, at the instigation of accused Nos.2 to 4, is said to have caused the death of his wife Vadde Lakshmidevi (the deceased), by pouring kerosene and setting her on fire.

The facts as culled out from the evidence of prosecution witnesses are as under:-

Accused Nos.1, 2 and 4 are residents of Puttaparthi Town, whereas accused No.3 is a resident of Digu vapalli Thanda near Kodikanda Check Post. Accused Nos.2 to 4 are the friends of accused No.1. P.Ws. 1 and 2 are husband and wife and are known to deceased and accused No.1. P.W.4 is son of the owner of house, who let his house on rent to the deceased and accused No.1. PW.5 is the wife of PW.3, while PW.6 is owner of the hotel, who took the deceased to the hospital in an ambulance. PW.8 is the maternal uncle of the deceased and PW.9 is the mother of the deceased, while PW .10 is another daughter of PW.9, PW.11 is the son of PW.10. PWs.12 and 13 are the son and daughter of the deceased respectively.

The deceased was given in marriage to one Gangadhar of Bhathalapalli village and out of their wedlock PWs.12 and 13 were born. After the birth of PW.13, the husband of deceased deserted his wife and started living with some other lady. Later, the deceased started living at Yenumulapalli village along with her children. The deceased was doing cooli work and was also running a petty bunk. It is said that accused No.1 developed illegal intimacy with deceased and both of them started staying at Puttaparthy. After sometime, accused No.1 got addicted to vices and started harassing the deceased by demanding money.

On the date of incident, there was a galata between the accused No.1 and the deceased with regard to gold and cash. Accused Nos.2 to 4 claimed to have been present there at the time of incident, but however, after they left, accused No.1 beat the deceased, poured kerosene and set her on fire. Immediately thereafter, the injured was shifted to Community Health Centre, Penukonda, where PW.23- Dr. Tyagaraju, the Civil Assistant Surgeon, examined her at about 11.30 p.m. and issued Ex.P.15, the medical intimation. According to PW.21-

Judicial First Class Magistrate, Penukonda, on receipt of medical intimation (Ex.P.15), he proceeded to the Government Hospital and identified the deceased, Lakshmidevi and found her with burn injuries. After ascertaining the mental condition of the injured and after obtaining the necessary certification from the doctor, he recorded the statement of the injured. Ex.P.16 is the statement recorded by him, which commenced at 11.45 P.M. and concluded at 12.25 a.m.

On the same day at about 11.25 p.m., PW.22-Head Constable of Penukonda Police Station received Ex.P.15-Medical Intimation from the Government Hospital, Penukonda for recording the statement of injured. Immediately, he rushed to the Government Hospital and found the injured lying with burn injuries. After recording the statement, he said to have read over the contents of the statement to the injured, to which she admitted the same to be true and then obtained left hand thumb impression of the Injured. The statement recorded by him is placed on record as Ex.P.17. The said statement was said to have recorded by him from 11.40 p.m. to 12.10 a.m. He also obtained endorsement of the doctor with regard to the mental state of the injured which is placed on record as Ex.P.18. According to him, the injured was conscious and coherent while recording the statement. At about 2.30 a.m. he received the death intimation of the injured which is placed on record as Ex.P.19. Basing on the intimation, he sent Exs.P.17 to P.19 to Puttaparthy Urban Police Station on point of jurisdiction. Basing on the said statement, PW-24, the Inspector of Police, Puttaparthy Airport P.S., registered the same as a case in Crime No.12 of 2009 for the offence punishable under section 302 IPC. Ex.P-21 is the F.I.R. P.W.24 then proceeded to the scene of offence at about 8.00 a.m. and in the presence of Panchayatdars – PW-17 and PW-19, he seized (i) empty kerosene stove (ii) burnt hairs (iii) burnt blouse pieces (iv) burnt petty coat piece (light blue colour) (v) burnt rose colour saree pieces and (vi) one silver basin under the cover of Ex.P.22 the scene of offence observation Mahazar. He also prepared a rough sketch which is placed on record as Ex.P.23. He examined PWs. 1 to 3 and 5 and recorded their statements. From the scene of offence, PW.24 proceeded to the Government Hospital, Penukonda and found the dead body in the mortuary. In the presence of blood relations of the deceased, PW.20 conducted inquest over the body of the deceased from 10.00 am to 1.00 pm. During inquest, he examined PW.9, mother of the de ceased, and family members of the deceased. On 04.02.2009, PW.23 conducted autopsy over the dead body of the deceased and issued Ex.P.20- Post Mortem Examination Report opining that the cause of death was due to Neurogenic and Hypobolumic shock due to extensive burns. On 06.02.2009, while PW.24 was proceeding along with staff from Puttaparthy to Puttaparthy airport, on the way he found one person sitting on the bridge in from of Ujwala apartment main gate and on seeing them he tried to escape. Suspecting the said person, he apprehended and identified him as accused No.1 in this case. On questioning, he said to have confessed about the commission of offence. After completing

the formalities, he was produced before the Judicial First Class Magistrate, Penukonda seeking judicial remand.

After collecting all the necessary documents, a charge sheet was laid against all the accused for the offences punishable under sections 302, 109 r/w 34 IPC in the court of the Judicial Magistrate of First Class, Penukonda. The learned Magistrate took cognizance of the same for the offences punishable under sections 302, 109 r/w 34 IPC. On appearance of the accused, copies of documents relied by the prosecution were duly furnished to the accused and on considering the material on record, the learned Magistrate committed the case, under section 209 Cr.P.C., to the Court of Session, Sessions Division, Ananthapur, as the offence is punishable under section 302 of IPC, which is exclusively triable by the Court of Session, where it came to be numbered as Sessions case No.292 of 2011.

On appearance of all the accused and on hearing both sides and considering the material brought on record, charges as referred to above came to be framed, read over and explained to them to which the accused pleaded not guilty and claimed to be tried.

In order to substantiate its case, the prosecution examined PWs.1 to 24, and got marked Exs.P.1 to P.23 and M.Os.1 to 6. Out of the 24 witnesses examined by the prosecution, PWs.1 to 7, 14 to 19 did not support the prosecution case and they were declared hostile. After completing the prosecution evidence, the accused were examined under section 313 Cr.P.C. with reference to the incriminating circumstances appearing against them, in the evidence of the prosecution witnesses, to which they denied. No oral evidence was adduced on behalf of the accused except placing on record the contradiction in the evidence of PW.9 as Ex.D-1.

Basing on the two dying declarations recorded by the Head Constable and the learned Magistrate, the trial Court while acquitting accused Nos.2 to 4, convicted the accused No.1 and sentenced him as aforementioned. Challenging the said conviction and sentence, the present appeal came to be filed by the appellant accused No.1.

The main ground urged by the learned counsel for the appellant is that the two dying declarations, Exs.P.16 and P.17, are relied upon to convict the accused No.1, and that it is very difficult to believe as to how both the dying declarations same to be recorded at the same time when the oral evidence is otherwise. He further pleads that the contents of two dying declarations, one recorded by the Magistrate and the other recorded by the Head Constable, not only proved that the same are in violation of Rule 33 of Criminal Rules of Practice, but also indicates that the deceased was not in a fit state of min d to give statements.

On the other hand, the learned Public Prosecutor would contend that even if the dying declaration recorded by the Head Constable is eschewed from consideration, still, the dying declaration recorded by the learned Magistrate can be relied upon, since there is no animosity or ill-will for the learned Magistrate to speak falsehood against the accused. He further

submits that the contention of the learned counsel for the appellant with regard to taking out of a computerized statement in the laptop, must have been only for convenience and that no credence can be given to it.

The only point that arises for consideration is whether the evidence on record is sufficient to convict accused No.1 appellant for the offence punishable under section n 302 IPC?

As stated by us earlier, all the material witnesses viz PWs. 1 to 7, 14 to 19 did not support the case of prosecution and were declared hostile. The other witnesses, PWs.8 to 13 are the inquestdars, who took the injured to the hospital, and the blood relations of the deceased. They were examined to prove about the family life of the deceased and the alleged harassment by the accused. PW.8, a resident of Yenumulapalli village, in his evidence, deposed that there was a galata between the accused No.1 and the deceased, earlier to the incident in question, with regard to gold and cash and at that time accused Nos.2 to 4 were also present. After accused Nos.2 to 4 left the company of accused No.1, accused No.1 poured kerosene on the deceased and set her on fire with match-stick resulting in burn injuries. Immediately, he shifted the injured to the Government Hospital, Penukonda where she succumbed to death while undergoing treatment. Though in his evidence-in-chief, he stated as if he witnessed the incident, but the answers elicited in the cross-examination falsifies the same. In the Cross-examination, he admits that one Anand, C.I. of Police, came to his house on the following day and informed him about the said facts. Basing on the information given by the C.I. of Police, he disclosed about the incident to the police during his examination under section 161 Cr.P.C. Therefore, we feel that no credence can be given to the version of this witness.

PW.9 is the mother of the deceased. In her evidence, she deposed about the marriage of the deceased with one Gangadhar, who deserted her, as he developed illegal intimacy with some other woman. Since then, the deceased was staying with PW.9 along with her two children at Yenumulapalli Village. It is said that the deceased was eking out her livelihood by doing collie work and was maintaining her two children. She was also running a petty bunk. Subsequently, the deceased developed illegal intimacy with accused No.1 and both of them were staying near Puttaparthy Airport. It is her version that the deceased and accused No.1 happily lived together for some days and later disputes arose between them. Her evidence further discloses that on coming to know about the incident through police, herself and family members rushed to the Government Hospital, Penukonda and found the deceased dead due to burn injuries. According to her, accused No.1 poured kerosene on the deceased and set fire. However, in the cross examination, she admits that the police came to her at 1.30 a.m., on the date of incident and informed her that all the accused caused burn injuries to her daughter and she was taking treatment in a Government Hospital and asked her to go over to Penukonda. From the above evidence, it is clear that her

source of information with regard to the harassment of the deceased by the accused and the involvement of four persons in the commission of offence was only through police. Therefore, her evidence is only hearsay i.e., the Information furnished by police at 1.30 a.m., pursuant to which, she proceeded to the Hospital.

PW.10 is the sister of the deceased, who in her evidence, speaks about her sister developing illegal intimacy with accused No.1 and about accused No.1 pouring kerosene on the person of the deceased and setting fire, leading to her death. According to her, on receipt of information, she rushed to the hospital and found her sister dead. Though she deposed that it was accused No.1, who poured kerosene on the deceased, but she is neither an eye witness to the incident nor did the deceased inform her about the incident. Her evidence is also silent as to the source of her information.

PW.11 is the elder brother of the deceased. According to him, the deceased was given in marriage to one Gangadhar of Bathalapalli and out of their wedlock PWs.12 and 13 were born. After referring to the a vocation and the livelihood of the deceased, PW.11 deposed about the illegal intimacy of the deceased with accused No.1 and both of them living near Airport at Puttaparthy. It is said that the deceased was subjected to ill-treatment and harassment for want of money and subsequently accused No.1 poured kerosene and set her on fire resulting in burn injuries. On coming to k now about the same, he rushed to the Government Hospital, Penukonda and found his sister dead due to burn injuries. According to him, accused No.1 is responsible for the incident. But as stated by us in the earlier paragraphs, he has neither witnessed the incident nor did the deceased inform his as to how she received burn injuries. Therefore, his evidence as to the involvement of the accused in the commission of offence is only hearsay and in fact, the source of information for him, to speak about the involvement of accused no.1 in the commission of offence, was also not disclosed.

PWs. 12 and 13 are the children of the deceased, who are admittedly not eye witnesses to the incident, as they were in a hostel at that time. Both of them were brought to the house after the incident, where they were informed about the incident. These two witnesses speak about the deceased and accused No.1 coming to their school on Parents days and the relationship between accused No.1 and the deceased. From the evidence of these witnesses, referred to above, it is clear that none of them have seen the incident and no oral dying declaration was made to them by the deceased. The manner in which the incident took place came to their knowledge only through inmates. Therefore, we are of the view that the evidence of these witnesses is of no help to the prosecution to establish the guilt of the accused.

The next circumstance relied upon by the prosecution is the two dying declarations recorded by PWs.21 and 22 vide Exs.P.16 and P.17 respectively. It is to be noted here that a comment has been made stating that both the dying declarations could not have been recorded

at the same time by two different authorities, more so, when the evidence clearly discloses that each of them were present when the said dying declarations were recorded by each of the authorities. In order to appreciate the same, it is to be noted that immediately after admission of the deceased in Government Hospital, Penukonda, Ex.P1.15 – medical intimation came to be sent to the police as well as to the Magistrate for recording the dying declaration of the deceased. Pursuant to which, both the learned Magistrate as well as the Head Constable of Penukonda Police Station proceeded to the Hospital for recording the dying declaration. Ex.P.16, recorded by the Magistrate, shows that the recording of statement was commenced at 11.45 p.m., on 03.02.2009 and concluded at 12.25 a.m. on 04.02.2009. Ex.P.17, which is recorded by PW.22-Head Constable of Penukonda Police Station also shows that he commenced recording of the statement of the injured at 11.40 p.m. on 03.02.2009 and concluded at 12.10 a.m., on 04.02.2009.

If we see the evidence of PW.21, he deposed that he took all precautions before recording the statement of injured under Ex.P.16 and except himself, duty doctor, attender and duty nurse, none else were present while recording the statement, which according to him commenced at 11.45 p.m., and concluded at 12.25 a.m., on the intervening night of 03/04.02.2009. That being the position, it is difficult to believe as to how the Head Constable could have commenced recording the statement of the injured at 11.40 p.m., and concluded the same at 12.10 a.m., when the evidence of PW.21 clearly shows that except the persons referred to above none else were present.

On the other hand, if the evidence of PW.22-Head Constable is looked into, he, in his cross examination, admits that he started recording the dying declaration at 11.40 p.m. and concluded at 12.10 a.m. and that he, duty nurse, injured and duty doctor were alone present while recording the statement of injured, when the injured disclosed her identity as Vadde Lakshmidevi. From the evidences of PWs.21 and 22, it is evident that both of them commenced recording of dying declaration at the same time and concluded with a variance of five minutes. The evidence of PW.21 excludes the presence of PW.22, while the evidence of PW.22 excludes the evidence of PW.21, but the timings recorded on the two dying declarations are the same. Therefore, a doubt arises about the genuineness or otherwise of these two dying declarations.

At this stage, the learned Public Prosecutor would contend that even if the statement recorded by the Head Constable is eschewed for consideration, but still there remains the dying declaration recorded by the Magistrate, which can be believed to base a conviction. It is no doubt true that even if one dying declaration inspires confidence in the mind of the Court, the same can be based to convict the accused. In fact, nothing is suggested to the Magistrate to show that he has animosity or grudge or ill-will to speak falsehood against the accused. But, strangely, his evidence is not inspiring confidence to place

reliance on the said dying declaration for more than one reason. According to him, after being satisfied with regard to the mental condition of the deceased, and after the duty doctor certified the mental condition of the injured Lakshmidevi, he recorded the statement of the injured. In the cross examination, PW.21 admits that Ex.P.16 is a printed form and also admits how he took it from his laptop. It would be appropriate to extract the relevant portion, which reads as under :

"It is true that the injured Lakshmidevi stated before me her marriage has been performed 10 years ago, and she further stated before me that her parents are no more. It is true that Ex.P.16 is a printed Form. The witness volunteers he took print out from his laptop."

From the admission made by him, it is clear that he took the printed form from his laptop, on which doctor is said to have signed. On perusal of the said dying declaration, which is placed on record as Ex.P-16, the printed form reads as under:

"Present:P.B.V. Koteswara Rao

Judicial Magistrate of First Class, Penukonda

I received a requisition on 03.02.2009 at 11.35 mid-night from

Govt., Hospital, Penukonda to record the Dying Declaration of

Smt.Lakshmi Devi, w/o Ramesh, aged 26 years, resident of Puttaparthy Mandal, admitted in Govt., Hospital, Penukonda.

Then I immediately rushed to Govt., Hospital, along with my

attender. The patient is identified by the Duty Medical Officer

in Female Ward in Govt., Hospital, Penukonda.

Proceedings commenced at 11.45 p.m.

Q.1: What is your name?

Ans: Lakshmi Devi

Q.2: What is your husband's name?

Ans: Ramesh.

Q.3: Which is your place?

Ans: My place is Puttaparthy.

Q.4: When your marriage took place?

Ans: About 10 years back.

Q.5: How many children you are having?

Ans: One son, One daughter. Daughter aged 9 years, son aged 8 years. Daughter's name is Anjali and son's name is Balu.

Q.6: Are you having parents?

Ans: Both were died.

Q.7: Do you know who I am?

Ans: No

Q.8: I am Judge, Can you tell what has happened?

Ans: I can

Certification by the Duty Medical Officer.

The Patient is conscious, coherent and in a fit state of mind to give statement.

Sd/- xxxx 12, 10 a.m. 4.2.09

Name of the Doctor:
Designation : Civil Asst., Surgeon

Date: 4.2.09,

CAC Penukonda

I recorded the above preliminary question and answers and I am satisfied that the patient is conscious, coherent and in fit state of mind to give statement and the Duty Medical Officer certified the same.

My husband used to drink and beat me. He used to bring others to my house, to test that I am of good character or not. Unable to bear the torture of my husband, on 1st of this month I went to the house of my co-daughter-in-law. Today evening about 6.00 p.m. I came to Puttaparthy to take my clothes. When I was packing my clothes about 8.00 p.m. in the night, my husband came to me and asked me to give Rs.2,000/-. Along with him Pothulaiah and Babu also came to my house. I told that I was not having money. Then my husband caught hold of my tuft, threw me on the floor and hit my head to the floor. Poured kerosene from the stove in the house and lit me with mtch stick and left the house by closing the doors along with Pothulaiah and Babu. They went in the auto of Pothulaiah. He is harassing me for the past one year.

I recorded the statement of the deponent verbatim and read over the same and explained to her which she admitted as true and correct and I then obtained her LTI.

LTI of Lakshmi Devi

Certification of the Duty Doctor.

The patient is conscious, coherent and in a fit state of mind throughout the recording of the statement.

Sd/- xx xx 12.10 a.m. 4.2.09
Name of the Doctor: Dr. R. Thyagaraju
Designation: Civil Asst., Surgeon

Date:4.2.09, 12.25 a.m.

At the time of recording the proceedings, no one was present except the patient, myself, my attender, the Duty Doctor and the Duty Nurse.

Proceedings concluded at 12.25 a.m. on 4.2.09.

Sd/- P.V.B. Koteswara Rao
Judl.,Magistrate of First Class,
Penukonda.

After filling the contents in the printed form, the doctor is said to have signed. It is to be noted here that his (PW.21's) evidence is silent as to the presence of printer in the hospital. It is neither his case that he was carrying a printed form not it is his version that he had utilized the printer in the hospital for taking a print out. One does not know as to how he could obtain a print out from his

laptop in hospital. Apart from that, the endorsement of the duty doctor must be only after seeing the injured and on being satisfied with regard to her fit state of mind. But, the print out already has the certification of the doctor stating that "the patient is conscious, coherent and in a fit state of mind to give statement", under which the doctor signed. Therefore, there was nothing which a doctor had to verify before making endorsement. He only signed on such endorsement, which in our view, is not only contrary to the Rule 33 of the Criminal Rules of Practice, but the practice of this nature requires to be condemned. Doubt arises as to whether the doctor examined the patient and applied his mind or whether he simply signed on the print out taken by PW.21.

If this dying declaration is excluded from consideration, there is no other material to connect accused No.1 with the crime. There is one other reason to doubt the contents of the dying declaration and also to show that the deceased was not in fit state of mind to give statement. The contents of the dying declaration, recorded prior to the certification of Doctor, show that her husband name is Ramesh and that both her parents died, but the prosecution examined the mother of deceased as PW.9. It has come on record through the evidence of PW.9 and others that Ramesh is not her husband, but her paramour, while one Gangadhar is her husband and the two children were born through him. Therefore, taking into consideration the totality of the circumstances viz., the manner I n which the certificate of doctor was obtained, by taking a print out from laptop and not explaining as to how the print out was taken in the Hospital and the inconsistent answers given by the deceased, we feel that it may not be safe to convict accused No.1 basing on the sole dying declaration recorded by the Magistrate, since the other dying declaration recorded by the Head Constable cannot be accepted as no explanation is given as to how he could record the dying declaration between 11.40 p.m. and 12.10 a.m. when the Magistrate was present in the hospital at the same time recording the statement of the injured.

In the result, the Criminal Appeal is allowed and the conviction and sentence imposed against the appellant accused No.1 for the offence punishable under section 302 of IPC, in Session s Case No.292 of 2011 on the file of Additional Sessions Judge, Hindupur, by judgment dated 30.10.2012, are set aside. The appellant accused No.1 is acquitted and he shall be set at liberty forthwith, if he is not required in any other case. His bail bonds shall stand cancelled.

Consequently, miscellaneous applications pending if any, shall also stand closed.

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2019(2) L.S. 49 (A.P.)

IN THE HIGH COURT OF
ANDHRA PRADESH

Present:
The Hon'ble Mr.Acting Chief Justice
C. Praveen Kumar &
The Hon'ble Mr. Justice
M. Satyanarayana Murthy

Morigondi Sampourna ..Appellant
Vs.
State of AP., ..Respondent

INDIAN PENAL CODE, Sec.201 & 302 – CRIMINAL PROCEDURE CODE, Sec.374(2) – Assailing the conviction and sentence imposed by Sessions Court, appellant preferred instant criminal appeal.

Held: Motive is not established – Not proper to hold that accused No.1/ appellant guilty – Not probable to believe that accused No.1 who is a stranger and who has no prior acquaintance with Pw.15 would have gone to him and made extra judicial confession – Extra judicial confession statement cannot be made basis to confirm the conviction, when it is doubtful – Prosecution failed to establish the guilt of appellant / accused no.1 – Criminal appeal stands allowed and conviction and sentence imposed against appellant are set aside.

Mr.Y. Balaji, Advocate for the Appellant.
PP for Respondent.

Crl.A.No.939/12 Date: 26-2-2019

J U D G M E N T

(per the Hon'ble Mr.Acting Chief Justice C. Praveen Kumar)

Assailing the conviction and sentence imposed in Sessions Case No.25 of 2011 on the file of the VI Additional District and Sessions Judge (Fast Track Court), Markapur, Prakasam District, dated 13.07.2012, wherein accused No.1 was convicted for the offences punishable under Sections 302 and 201 of the Indian Penal Code (for short "I.P.C.") and sentenced her to undergo imprisonment for life and to pay a fine of Rs.1000/- in default, to suffer simple imprisonment for two months, and to undergo rigorous imprisonment for three years and to pay a fine of Rs.500/-, in default, to suffer simple imprisonment for one month, respectively, the present appeal came to be filed under Section 374(2) of Cr.P.C. by the appellant-accused No.1.

Originally two accused were tied on two charges – the first charge was under Section 302 r/w. Sec.34 of IPC and the second charge was under Section 201 r/ w. Sec.34 of IPC. While acquitting accused No.2 of both the charges, convicted accused No.1 as referred to above.

The substance of both the charges against accused Nos.1 and 2 is that on 07.09.2011 at 12.30 hours in Ekalavya Colony, Markapur, in the house of sister of accused No.1 both the accused caused the deceased boy Yanmani Venkata Siva Prasad, age d about 9 years, by throttling his neck and later poured kerosene over the body of the deceased and set him fire with a match stick to screen away the

evidence.

The facts as culled out from the evidence of prosecution wit nesses are as under:-

PW.1 is the father . PW.2 is the mother. PW.3 is the grand mother (mother of PW.2) and PW.4 is the neighbor of the deceased, who were examined to speak about the circumstances, relied upon by the prosecution. PW.1 who is the father of the deceased, in his evidence deposed that he is eking out his livelihood by doing coolie work. According to him, he used to go to coolie work at 6.00 A.M. in the morning and return home at 9.00 p.m. On the date of incident, at about 2.30 p.m. while he was attending his work, one Ramesh (not examined) telephoned to the water vehicle driver informing about the death of the deceased as he was set fire after pouring kerosene. Immediately PW.1 rushed to his house, situated in Ekalavya Colony, Markapur and noticed his son's dead body burnt to ashes in the middle rook of his house. He also observed gathering of all his neighbours at his house. On the same day at about 4.00 p.m. he lodged a report before PW.19. Sub-inspector of Police, Markapur Town Police Station, basing on which, PW.19 registered a case against PW.2 and accused No.1 in Crime No.152 of 2011 for the offences punishable under Sections 302, 201 r/w 34 of IPC and issued Ex.P-18 F.I.R. Further investigation in this case was taken up by PW.20 – the Inspector of Police, Markapur Circle. He proceeded to the scene of offence and in the presence of PW.15 – Makam Kotaiah. V.R.O. he prepared Ex.P.11 the scene of offence observation report. He noticed the dead body lying in supine position. He also noticed a green colour kerosene can, a match-box and half burnt mat. On which the dead body was lying. He also got photographed the scene of offence and prepared Ex P.19 the rough sketch of the scene of offence. As it was late in the evening, he returned to his office by posting a guard at the scene of offence. On the next day morning, he again visited the scene of offence and conducted inquest over the dead body of the deceased in the presence of mediators and blood relatives of the deceased. During inquest, he examined P.W.1, P.W.3, P.W.4 and others. All the witnesses unanimously opined that the deceased might have been killed by P.W.2, mother of the deceased or accused No.1 or paramour. After completing the inquest, he sent the dead body of the deceased to the Government Area Hospital, Markapur for autopsy. P.W.17 Dr.S. Ravindra Reddy, C.A.S. Government Area Hospital, Markapur, conducted autopsy over the dead body of the deceased and issued Exs.P.16 and P.17 preliminary and final post examination reports.

On 09.09.2011 at about 3.30 p.m., P.W.15 – Makam Kotaiah, along with accused No.1 came to the office of P.W.20 – Inspector of Police and disclosed that accused No.1 approached him at 12.00 Noon and made a confession admitting her guilt. After recording her confession, P.W.15 brought accused No.1 along with Ex.P-13 the extra judicial c onfession statement of accused No.1 recorded by him to the police station. In the presence of mediators, PW.20 interrogated the accused No.1 and cross-checked the contents of Ex.P-13, wherein

she reiterated the confession made by her before P.W.15, P.W.20 seized a black colour cell phone-M.O.1 from accused No.1. He also recorded the statement of P.W.15, who produced accused No.1 before him at 3.30 P.M. on 09.09.2011. On the same day at about 4.30 P.M. he received credible information about the movements of accused No.2. After securing the mediators, he proceeded to Rayavaram in their jeep, where a person was running away on seeing them. On suspicion, the said person was apprehended, who disclosed his name and identity as accused No.2. On interrogation, he is alleged to have confessed about the commission of offence. Basing on the confession of accused No.1 and 2. The name of P.W.2 was deleted from the array of accused. Further investigation was done by P.W.21 K.V.Raghavendra, Inspector of Police, Markapur Circle. After verifying the investigation done by P.W.20 and after receipt of RFSL report etc. which were placed on record as Exs.P-20 to P.23, PW.21 laid charge-sheet against accused Nos.1 and 2 before the court of the Additional Judicial Magistrate of First Class, Markapur, which was taken on file as PRC No.48 of 2011, who after complying with Section 207 Cr.P.C., committed the case to the Sessions Division under Section 209 of Cr.P.C. as the offence under section 302 of IPC is exclusively triable by Court of Session. On committal the same came to be numbered is Sessions Case No.25 of 2011.

Basing on the material available on record, charges under Sections 302 r/w 34 of IPC and Section 201 r/w 34 of IPC against accused Nos.1 and 2 were framed, read over and explained to them to which they pleaded not guilty and claimed to be tried.

To substantiate its case the prosecution examined PWs 1 to 21 and got marked Exs.P-1 to P.23 and M.Os. 1 to 5.

After the closure of prosecution evidence, the accused Nos.1 and 2 were examined under Section 313 Cr.P.C., with reference to the incriminating circumstances appearing against them, in the evidence of the prosecution witnesses to which they denied. But, however they did not adduce any oral or documentary evidence in support of their plea.

Out of 21 witnesses examined by the prosecution, PWs.2, 3, 4, 5, 6, 8, 9, 10 and 12 did not support the prosecution case and were declared hostile. Relying upon the evidence of PWs.1, 5, 7, 11 and 15 the learned VI Additional District and Sessions Judge, Markapur, while acquitting accused No.2 for the offences of which he was charged, convicted the accused No.1 for the offences punishable under Sections 302 and 201 of IPC and sentenced her as aforementioned. Challenging the same, the present appeal came to be filed by the appellant – accused No.1.

The main ground urged by Sri Y. Balaji, learned counsel for the appellant-accused No.1, is that there are no eye-witnesses to the incident and the circumstances relied upon by the prosecution do n ot form chain of events connecting the accused No.1 with the crime. According to him, all the material witnesses, including PW.2, the mother of

the deceased, did not support the prosecution case and were declared hostile. He further pleaded that there is absolutely no legal evidence on record to show that accused Nos.1 and 2 were present in the house of PWs.1 and 2 at the time of the incident. In so far as extra-judicial confession is concerned, the evidence of PW.15 cannot be considered, since he acted as panch witness in all the proceedings in this case, namely the scene of offence observation report, inquest report, arrest of accused and seizure of M.O.1.

On the other hand, learned Public Prosecutor appearing for the respondent – State while supporting the judgment of the trial Court would contend that the evidence brought on record, more particularly, the evidence of PW.5 and PW.7 is sufficient to convict the accused No.1. He took us through the evidence of PW.5 and PW.7 and pleaded that there is no reason or justification to disbelieve their evidence, more so, the evidence of PW.5 who is a child witness.

The point that arises for consideration in this appeal is whether the circumstances relied upon by the prosecution are proved and if proved whether they are sufficient to base the conviction of the accused No.1?

Admittedly there are no eye-witnesses to the incident and the case rests on the circumstantial evidence. It is to be seen whether the circumstantial evidences relied upon by the prosecution are sufficient to connect the accused No.1 with the crime.

The first circumstance relied upon by the prosecution is the alleged motive for commission of offence, namely, that accused Nos. I and 2 were seen while they were in compromising position by some of the witnesses, who in-turn informed about the same to PWs 1 and 2.

In order to prove the same, the prosecution mainly relied upon the evidence of PW.11 who in his evidence categorically stated that having noticed frequent visits of accused No.2 to the house of PWs.1 and 2 for the sake of accused No.1 and illicit intimacy between them, he is said to have admonished accused No.1 about ten days prior to the incident and also complained about the same to PW.2. According to PW.11, he requested PW.2 to send accused No.1 from the house as it is a residential area and such things are not permissible. The sister of accused No.1 (PW-2) promised him to send accused No,1 from her house shortly. However though PW.11 in his evidence-in-chief, spoke about accused Nos.1 and 2 indulging in sexual activity/maintaining illicit relationship, but in the cross-examination, he admits that had not seen accused Nos.1 and 2 participating in the sex and nobody complained to him about accused Nos. 1 and 2.

Further, PW.1 in his cross-examination admits that he never informed before the police or in Ex.P.1 about seeing accused Nos.1 and 2 in his house together ten days prior to the occurrence and about the assurance given by his wife to take care of accused No.1. On the other hand, he admits that accused No.1 used to stay with her husband and in-laws at Narasayapalem and that accused No.1 and

her husband did not obtain any divorce. He further admits that, till date, he is not aware as to the exact reason for the death of the deceased. Therefore, the motive which is sought to be established by the prosecution i.e., accused Nos.1 and 2 having illicit relationship and the incident in question took place due to PW.1 admonishing them is not established by any cogent material. More so, as PW.2 to whom PW.1 informed about the said illicit relationship did not support the prosecution case and she was treated hostile by the prosecution.

The next circumstance, which is sought to be relied upon by the prosecution, is the theory of accused being last seen with the deceased before the commission of offence. PW.1 who is the father of the deceased, in his evidence deposed, that since five months prior to the date of incident, accused No.1 was staying with them along with her daughter after undergoing operation. It is his evidence that by the time he rushed home, on receipt of information about death of the deceased, his wife-PW.2 and accused No.1 were present in the house, as PW.2 did not go to coolie work on that day. The reason given by PW.1 for his wife not attending the coolie work was to present a saree to accused No.1 while sending her to her in-laws house. The evidence-in-chief of PW-1 does not categorically establish the presence of accused No.2 in his house, but it only speaks about his wife-PW.2 and accused No.1 being present in the house. That is why, in the first information report and also in the inquest report, a suspicion was entertained against PW.2 and accused No.1. Having excluded PW.2 from the array of accused, one cannot conclusively say that it was accused No.1 who was responsible for the incident. Things would have been different had there been no other person except accused No.1 in the house. However, in the cross examination, P.W.1 admits that he never stated before the police during the course of investigation or in the Ex.P-1 about the presence of accused No.1 in the house, since five months prior to the occurrence of incident. He further admits that he never stated before the police or in Ex.P-1 about someone informing him about pouring of kerosene on his son and setting him on fire. He Further admits that, he did not state before the police about his wife—P.W.2 not attending the coolie work on that day as she planned to present a saree to accused No.1. He further admits that he did not state before the police, that he is suspecting the character of his wife. However, according to him, accused No.1 was staying in Narasayapalem with her in-laws.

P.W.2 who is the wife of P.W.1 and who was said to be present in the house at the time of incident, did not support the prosecution case and was declared hostile. Her evidence is totally different from what P.W.1 stated in his evidence. According to her, she was never in the house on that day and that she has gone to Markapur to purchase saree.

P.W.3, who is mother-in-law of P.W.1 and mother of P.W.2, also did not support the case of prosecution and was declared hostile. P.W.4 in his evidence speaks about flames emanating from the house of the deceased and on hearing the shouts of the women folk of the colony,

he came out and proceeded towards the house of P.W.1. He is said to have informed the relatives about the incident. He was also declared hostile and cross-examined by the prosecution.

P.W.5 is a child witness and a close associate of the deceased. He was aged about 9 years as on the date of giving evidence. After being satisfied with regard to mental fitness and capacity to understand the Court proceedings, the Court proceeded to record his evidence He, in his evidence deposed that he knew accused No.1 and the deceased and had played for sometime with the deceased on the day of incident. He had seen the deceased and his sister entering into their house and purchasing ice creams at about 1.30p.m. At about 2.30 p.m. on hearing galata near the house of deceased, rushed towards the said place and found the deceased being killed by some body by setting him on fire. He neither noticed the parents of the deceased nor spoke about the presence of accused Nos. 1 and 2 at the scene of offence. He was also declared hostile by the prosecution.

In so far as P.W.7 is concerned, she, in her evidence deposed that she has seen accused No.2 entering the house of deceased on date of incident. At about 1.00 p.m. she found smoke emanating from the house of the deceased. According to her, on seeing the flames, she came out of the house and found accused Nos.1 and 2 coming out from the house and proceeding in different directions. As her baby cried, she went inside the house and thereafter, through neighbours came to know that the deceased was being killed by accused Nos.1 and 2.

In the cross examination, she admits that she did not state before the police about noticing accused No.2 coming out of the house of the deceased along with accused No.1 and proceeding in different directions. She also did not state before the police about the acquaintance of accused No.1 with accused No.2. She further admits that she did not state before the police about noticing accused No.2 entering or coming out of the house. From the evidence of this witness, it is very clear that in the earlier statements, she never spoke about seeing of accused Nos.1 and 2 coming out of the house of the deceased and proceeding in different directions. Therefore, the evidence of this witness does not conclusively establish the presence of accused Nos.1 and 2 in the house at the time of incident.

The evidence of other witnesses relied upon by the prosecution are P.Ws.11 and 13. P.W.11 is a resident of Bommilingam village and he knew the deceased. P.Ws.1,2, accused No.1 and 2. In his evidence, he deposed about the frequent visits of accused No.2 to the house of P.Ws. 1 and 2 for the sake of accused No.1 and about P.W.1 informing him about illicit intimacy between accused Nos.1 and 2. He further requested P.W.2 to send away accused No.1 from her house saying that it was a residential area and such things are not permissible. According to him, accused No. 1 joined P.Ws. 1 and 2 and stayed there for a continuous period of five months prior to the occurrence of the incident. On hearing about the death of the deceased, he came and noticed the

dead body. He further states that, he did not observe the presence of the persons and that he does not know who killed the deceased and he was not in their colony during morning hours on that day. From the evidence-in-chief of this witness, it is clear that it is silent as to the presence of accused Nos.1 and 2 in the house of the deceased or seen them near the place of incident. He did not speak about witnessing accused Nos. 1 and 2 entering the house of the deceased. Therefore, his evidence, which was relied upon by the prosecution to prove the illicit intimacy between accused Nos.1 and 2 cannot be accepted as observed by us earlier.

PW.13 is the only other witness who was examined to speak the theory of accused being last seen in the company of the deceased. He in his evidence deposed that on 07.09.2011 at about 8.00 a.m. he along with accused No.2 went to the factory for attending packing work. At about 10.45 a.m. when he and his colleagues came out to have tea near the tea stall, accused No.2 received a telephone call. On receipt of the phone call, accused No.2 left towards Ekalavya Colony by saying that he will come and join later, but did not disclose anything. The evidence of this witness, in our view, does not establish any connection of accused No.1 with the incident proper. As per the evidence of this witness, he along with accused No.2 went to their factory at 8.00 a.m. where accused No.2 received a phone call and also as to the place where he went in Ekalavya Colony. Therefore, this evidence of PW.13 does not establish the theory of accused and deceased being last seen together alive soon before death. In fact, his evidence does not refer to the place where the deceased was at the time of the incident.

From the evidence of the witnesses referred to above, it can safely be concluded that they are wholly unreliable and based on such testimony, it may not be proper for us to hold accused No.1 guilty, more so, when the other circumstance, namely, motive is not established.

The only other circumstance left is the extra judicial confession made by accused No.1 before PW.15 PW.15 is no other than the village Revenue Officer of Markapur, who was working there since last four years. According to him on 09.09.2011 at about 11.00 a.m. accused No.1 is said to have approached him and made a confession n admitting her guilt, which came to be recorded under Ex.P-13 and thereafter, alongwith the accused No.1, a report was handed over to the police. It is to be noted that, though PW.15 in his evidence speaks about the extra judicial confession made by accused No.1, but however, his admissions in the cross-examination establish that he was a total stranger. It would be appropriate to extract the relevant admissions in the cross-examination, in his own words, which are as under:

> *"....I do not have prior acquaintance with A-1. In my service I did not help to A-1 and her family members personally any time. For the first time I came to know the identity of A-1 and about her relationship with deceased boy's*

family on 09.09.2011. I did not prepare any rough note. I directly recorded the confession of A.1. In four or five cases belonging to Markapur town P.S. I recorded extra judicial confession…."

From the admissions made by P.W.15. two things pop up, namely, accused No.1 was a stranger to PW.15 and secondly he was a stock witness of Markapur Town Police Station. Apart from that, even in the present case he acted as a mediator to the observation of scene of offence inquest report, panch for seizure of M.Os. 1 to 5 and also for arrest of the accused. Therefore, it is improbable to believe that accused No.1 who is a stranger and who has no prior acquaintance with P.W.15 would have gone to him and made an extra judicial confession admitting her guilt.

While dealing with the evidentiary value and reliability of extra judicial confession the Apex Court in **Vijay Shankar V. state of Haryana- (2015) 12 SCC 644** held as follows:

"18. Principles in respect of evidentiary value and reliability of extra-judicial confession have been summarized by this Court in **Sahadevan v. State of T.N.-(2012) 6 SCC 403** which reads as under:

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

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

(iii) It should inspire confidence.

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

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

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

The Apex Court, in **Kala v. State through Inspector of Police – AIR 2016 SC 3912** while discussing the law with regard to extra-judicial confession observed as follows:

"In **Sahadevan and Anr. V. State of Tamil Nadu (referred supra).** It has been observed that extra-judicial confession is weak piece of evidence. Before acting upon It the Court must ensure that the same inspires confidence and it is corroborated by other prosecution evidence. In **Balwinder Singh v. State of Punjab-1995 Supp (4) SCC 259**, it has been observed that extra-judicial confession requires great deal of care and caution before acceptance. There should be no suspicious circumstances surrounding it. It **Pakkirisamy v. State of Tamil Nadu - (1997) 8 SCC 158** it has been observed that there has to be independent corroboration for placing any reliance upon extra-judicial

confession. In **Kavita v. State of Tamil Nadu -(1998) 6 SCC 108** it has been observed that reliability of the same depends upon the veracity of the witnesses to whom it is made. Similar view has been expressed in **State of Rajasthan v. Raja Ram (2003) 8 SCC 180** in which this Court has further observed that witness must be unbiased and notevenremotely inimical to the accused. In **Alokenath Dutta v. State of West Bengal- (2007) 12 SCC 230** it has been observed that the main features of confession are required to be verified. In **Sansar Chand v. State of Rajasthan – (2010) 10 SCC 604** it has been observed that extra-judicial confession should be corroborated by some other material on record. In **Rameshbhai Chandubhai Rathod v. State of Gujarat - (2009) 5 SCC 740** it has been observed that in the case of retracted confession it is unsafe for the Court to rely on it. In **Vijay Shankar v. State of Haryana – (2015) as SCC 644** this Court has followed the decision in **Sahadevan's** case (supra)."

From the judgment in **Kala v. State through Inspector of Police (Supra),** it is clear that extra judicial confession is a weak type of evidence and it h as to be examined by the Courts with greater care and caution. However, if the extra-judicial confession is the basis for conviction, it should not suffer from any material discrepancies and inherent improbabilities. Further extra judicial confession statement alone cannot be made the basis to confirm the conviction, when it is doubtful or when it is surrounded by suspicious circumstances.

Therefore, in view of the guidelines laid down by the Apex Court in the judgments referred supra the extra judicial confession made before PW.15 – the Village Revenue Officer can be accepted, if it is found reliable. But in the instant case we find that it may not be safe to act on the alleged extra judicial confession made by accused No.1 before PW-15 for the reasons aforementioned. In fact, it is to be noted that, at a particular stage, PW-15 was also declared hostile by the prosecution and he was cross-examined. Viewed from any angle we do not find any reason to accept the evidence of PW.15 as an independent witness.

Having regard to the above discussion, we hold that the prosecution failed to establish the guilt of the appellant – accused No.1 for the offences punishable under Sections 302 and 201 of IPC, for which she was convicted and as such the judgment of the lower Court cannot be sustained and the same is liable to be set aside.

In the result, the Criminal Appeal is allowed and the conviction and sentence imposed against the appellant-accused No.1 – Morigondi Sampurna, w/o Venkateswarlu, for the offences punishable under sections 302 and 201 of IPC, in Sessions case No.25 of 2012 on the file of the VI Additional District and Sessions Judge (Fast Track Court), Markapur,

Prakasam District by judgment dated 13.07.2012 are set aside. The appellant-accused No.1 is acquitted and she shall be set at liberty forthwith, if she is not required in any other case.

Consequently, miscellaneous applications pending if any, shall also stand closed.

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2019(2) L.S. 58 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Valluru Samba Siva Rao & Anr., ..Petitioner

Vs.

Krishna Apartments Assn., & Ors., ..Respondents

CIVIL PROCEDURE CODE, Or.21 & Sec.151 – Suit is filed by decree holders as plaintiffs for an injunction restraining defendants for constructing a wall in area shown as "I J" in plaint plan and not to construct any gate – In interim period after suit was dismissed and before appeals were filed defendants constructed a wall and put up gate – It is also admitted fact that plaintiff did not seek amendment.

Admittedly in this cases, construction was made after suit was dismissed and before appeal was allowed – Therefore there is power to compel defendants to act under Or.21 Rule 32(5) CPC which is in addition to other powers which are prescribed under Or.21, Rule 32(1) (2)(3)&(4) – In addition to all above, inherent powers of Court is also there to render justice between parties – While it is true that inherent power can be used to grant any and every order, still fact remains that inherent powers can be used for rendering justice in accordance with law.

In view of cases referred this Court is of opinion that this is a fit case where inherent power of Court must be used and should be used to undo wrong that was committed namely, construction of wall in plot "I J" and removal of gate – In this view of matter this Court of opinion that lower Court took a hyper technical view and disallowed application in peculiar facts and circumstances of case as construction was made after suit was dismissed and as decree holder have succeeded in appeal, inherent power of Court is being used to undo wrong – Impugned order, set aside – Judgment debtors are directed to remove wall in portion of "I J" in plaint schedule property and also gate constructed within 45 days from date of receipt of this order.

Mr.A.Satyanarayana, Advocatef for the Petitioner.

Mr.T.S.Anand, Advocate for the Respondent.

CRP.No.4388/12 Date:10-4-2019

O R D E R

This revision petition is filed questioning the order dated 02.08.2012 in E.P.No.114 of 2011 in OS.No.1803 of 2003 passed by the Principal Junior Civil Judge, Vijayawada.

This case has a long chequered history. The suit OS No.1803 of 2003 is filed by the decree holders as plaintiffs for an injunction restraining the defendants from constructing a wall in the area shown as 'IJ' in the plaint plan and not to construct any gate. The suit was dismissed. Thereafter, an appeal bearing AS No.75 of 2008 was filed which was allowed on 06.01.2009. An injunction was granted in favour of the plaintiffs/decree holders restraining the defendants from making any construction in the area 'IJ' and from closing the gate. A second appeal SA No.53 of 2009 was filed against the order in AS No. 75 of 2009 but the same was dismissed on 10.06.2001.

In the interim period, after the suit was dismissed in the lower court and before the appeals were allowed in favour of the decree holders, the defendants constructed a wall and put up a gate. Therefore, EP No.114 of 2011 was filed for removal of the structures through the court Officer by way of restitution under Order 21 Rule 35 and Section 151 CPC. An affidavit was also filed in support of the said E.P. The said E.P. came to be dismissed on the ground that as the decree is only for an injunction, the prayer for remov al of the strucutes cannot be granted as there is no mandatory in junction. Questioning the same, the present civil revision petition is filed.

This Court has heard Sri Ambadipudi Satyanarayana, learned counsel for the revision petitioners and Sri T.S. Anand, learned counsel for the respondents.

Learned counsel for the petitioners argued that the construction was made subsequent to the dismissal of the suit OS No.1803 of 2003 on 23.04.2008. Thereafter, an appeal was filed and an injunction was granted in favour of the present petitioners/ decree holders/plaintiffs by reversing the trial Court's order. The order in the first appeal was confirmed as the second appeal was dismissed. The contention of the learned counsel for the petitioners is that the judgment of the trial Court has merged into the appellate Court decree and therefore, they are entitled to seek the removal of the constructions made subsequent to the suit. Counsel also point s out that in the interim period, when the matter was pending, an interim arrangement was also made for usage of the passage. He submits that if a decree is passed and a hindrance is caused, the power is vested in a Court of law to remove the hindrance. It is his contention that the judgments of the Court should be executed/implemented and that actual relief should be given to the decree holders.

In reply to this, learned counsel for the respondents submits that a suit for a permanent injunction only was filed seeking an order restraining the respondents from interfering in the passage etc. Counsel submits that the appeal has become in fructuous as the construction is already made and the decree holders did not seek an amendment of the plaint seeking

introduction of a prayer for a mandatory injunction. It is submitted that restitution cannot be ordered in a case like this as the situation existing on the date of the suit does not exist today. Counsel also points out that the application made is not correct and restitution can only be ordered if something was done pursuant to an order of the Court and if the said order/judgment is reversed/modified etc., in appeal. Counsel submits that for disobedience of an injunction the remedy is arrest/attachment etc., and nothing else can be claimed.

As far as legal issue is concerned, counsel for the petitioners relied upon the following six judgments. It is his contention that the power to order restitution is inherent in every Court and that the Court has to ensure that its orders are implemented. The judgments are:

(1) B. Gangadhar v. B.G. Rajalingam AIR 1996 SC 780

(2) Mrs. Kavita Trehan v. Balsara Hygiene Products Ltd. – AIR 1995 SC 441.

(3) State Government of A.P. v. M/s Manichchand Jeevraj and Co., Bombay - AIR 1973 AP 27

(4) GAngadhar v. Raghubar Dayal – AIR 1975 Allahabad 102.

(5) Kalabharati Advertising v. Hemant Vimalnath Narichania – (2010) 9 SCC 437.

The short and simple question therefore that arises in this case is, whether this Court can order removal of the structures that they have been erected subsequent to the dismissal of the suit and before the appeal was allowed? Incidentally, the question that arises is whether the application filed under Order 21 Rule 35 CPCV, is maintainable.

The facts that are not in dispute are that the initial suit for an injunction was dismissed on 24.03.2008. After the dismissal of the suit and during the pendency of the first appeal, the construction was made and a gate was put up. It is also an admitted fact that the plaintiff did not seek amendment. It is also clear that the first appeal was allowed, the judgment of the lower Court was reversed and an injunction was granted in favour of the decree holders/plaintiffs. The second appeal that is filed was also dismissed.

In a case of this nature, when more than one Court has held that the plaintiffs/ decree holders are entitled to an injunction as prayed for, the question is whether the Court is helpless or whether the Court can do something to restore the status quo ante that was existing on the date of the suit. It is also settled law that once a judgment is passed by appellate Court, the judgment of the first Court merges with the same. Therefore, when an attempt is made to thwart and to delay the legal process, the question that arises is should Court be a mute spectator or should the Court do something to grant the relief in execution?

It has been time and again held by the highest Courts of the land that the power and majesty of the Courts would depend upon the quick implementation of the orders. Admittedly, in this case, the construction was made after the suit was dismissed and before the appeal was

allowed. The normal procedure for execution for implementation of the order of injunction as per the respondent is provided for under order XXI Rule 32 CPC. Therefore, it is submitted by the learned counsel for the respondents that the only order that can be passed in a case like this is to order attachment to the property or by the detention in civil prison of the judgment debtors and nothing else. However, an examination of Order XXI Rule 32 CPC, reveals that Order XXI Rule 32(5) of CPC, is to the following effect.

> 32. Decree for specific performance for restitution of conjugal rights, or for an injunction.
>
> (5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Therefore, there is a power to compel the defendants to act under Order XXI Rule 32 (5) CPC, which is in addition to the other powers which are prescribed under Order XXI Rule 32 (1)(2)(3) and (4).

In addition to all the above, the inherent powers of the Court is also there to render justice between the parties. While it is true that inherent power cannot be used to grant any and every relief, still the fact remains that the inherent power can be used for rendering justice in accordance with law. As held by the Apex Court in the case of **K.K. Velusamy v. N. Palanisamy - 2011(11) SCC 275** inherent power extends to enabling the Court to do "what is right' and to undo "what is wrong". Ultimately, the inherent power is to be used to secure the ends of justice and to pre vent the abuse of process of Court. When the CPC is silent, the inherent power should and must be invoked.

The following extracts from para 12(a) and 12(b) of the judgment of the Hon'ble Supreme Court in **K.K. Velusamy's** case (6 supra) are very relevant here.

> 12(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is 'right' and und o what is 'wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

12(b) As the provisions of the Code are not exhaustive, Section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The

breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances. (emphasis supplied).

If this case is examined against the back drop of this legal position, it is clear that the construction was made after the suit was dismissed. Through out the period of the litigation, the decree holder had access to the site and there was no gate. The judgment debt ors cannot take advantage of the dismissal of the suit and now say that the judgments passed by the appellate Court as confirmed by the second appellate Court cannot be executed. Of all the judgments cited by the revision petitioner, this Court is of the opinion that **B. Gangadhar's** case (1 supra) has the closest applicability. The following passage from para 5 is relevant although the facts are a little different:

> "….If any obstruction is raised by putting up a construction pendent lite or prevents the passage or right to access to the property pendent lite, the plaintiff has been given right and the decree-holder is empowered to have it removed in execution without tortuous remedy of separate suit seeking mandatory injunction or for possession so as to a void delay in execution or frustration and thereby defeat the decree. The executing court, therefore, would be justified to order its removal of unlawful or illegal construction made pendent lite so that the decree for possession or eviction, as the case may be, effectually and completely executed and the delivery of possession is given to the decree holder expeditiously. Admittedly, pending suit the petitioner had constructed shops and inducted tenants in possession without permission of the court. The only course would be to decide the dispute in the execution proceedings and not by a separate suit."

In view of the cases referred to earlier this Court is of the opinion that this is a fit case whether the inherent power of the Court must be used and should be used to undo the wrong that was committed namely, the construction of the wall in the plot 'IJ' and the removal of the gate. This Court is also fortified in this view by a decision of a learned single Judge reported in **Cheni Chenchaiah v. Shaik Ali Saheb – AIR 1993 AP 292 = 1993(2) ALT 517.**

In this view of the matter, this Court is of the opinion that the lower Court took a hyper technical view and disallowed the application. In the peculiar facts and circumstances of the case, as the construction was made after the suit was dismissed and as the decree holders have succeeded in the appeal, the inherent power of the Court is being used to undo the wrong.

Hence, the impugned order is set aside. The judgment debtors are directed to remove the wall in the portion of 'IJ' in the plaint schedule property and also the gate constructed within a period of 45 days from the date of receipt of a copy of this order. If they fail to do so, the petitioner is at liberty to get the same removed and recover the costs and expenses from the

judgment debtors. If any obstruction is made by the judgment debtors at this stage for the removal of the constructions/gate, pursuant to this order, the decree holders are at liberty to approach the concerned jurisdictional police officer who is directed to give aid and assistance to the petitioners/ decree holders in removing the wall.

With these observations, the civil revision petition is allowed. No order as to costs.

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

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2019(2) L.S. 63 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Velugu Eswaramma & Anr., ..Petitioners

Vs.

Velugu Shoba Rani ..Respondent

CIVIL PROCEDURE CODE, Or.18, Rule 17, Sec.151 and Or.47 – One IA is filed to reopen matter and another IA filed to reopen the evidence for cross examination of Pw.1 – Both IAs are dismissed - Questioning the same present CRP filed.

CRP.No.7435&7439/17 Date: 28-3-2019

Petitioner contend that Court below committed an error in coming to conclusion that there are no grounds to reopen and recall witness PW.1 and further contended that Or.18, Rule 17 and CPC 151 are applicable to facts and circumstances of case and therefore the Court should have allowed application.

Respondent contends that affidavit filed is absolutely silent about need to examine witness and reasons furnished in application are not genuine or correct.

Hon'ble Supreme Court in series of judgment as held that though Or.18, Rule 17-A of CPC has been deleted power to recall a witness is available u/Sec.151 CPC – Since power is being exercised u/Sec.151 CPC Hon'ble Supreme Court in K.K. Veluswamy Vs. N.Palani swamy 2011 (SC) Cases 275 has sounded a note of caution in manner of exercise of said power – Descrition to be exercised by Court u/Sec.151 CPC does not extend to grant any and every relief – Inherent power can only be exercised for rendering Justice and to do all things necessary to secure ends of justice – Hon'ble Supreme Court also stated that principles analogous to Or.47 CPC should be pleaded and set out with some certinity and not practice to fillup gaps in evidence by recalling evidence should be severely curtailed.

Failure to cross examine witness on certain aspects by itself is not a ground enough to recall witness

for purpose of further cross examination - If this is allowed gap will be filledup – Entire branch of developed case law of highest Courts in country including Hon'ble Supreme Court of India, on failure to cross examine a witness etc., he will be set at naught, if every witness is recalled on such tenuous grounds – Grounds to reopen matter are also similar in this case – They are not enough to reopen case – For all these reasons High Court holds that both civil revision petitions do not have any merits what so ever – Therefore both civil revision petitions are dismissed.

Mr.Rajanikanth Jwala, Advocate for the Petitioners.
Mr.D.Sudarshan Reddy, Advocate for the Respondent.

C O M M O N O R D E R

Both these Civil Revision Petitions arise out of the same suit in O.S.No.20 of 2010 on the file of the Additional Senior Civil Judge, Kadapa.

I.A.No.483 of 2017 which w as filed to reopen the matter was dismissed on 27.01.2017. Questioning the same, CRP No.7435 of 2017 is filed.

I.A.No.484 of 2017 which was filed to reopen the evidence for cross-examination of PW-1 was dismissed on 24.08.2017. Questioning the same, CRP No.7439 of 2017 was filed.

With the consent of both the counsel the matters are taken up for hearing together. The arguments were essentially advanced in CRP No.7439 of 2017. This Court has heard Sri Jwala Rajanikanth, learned counsel for the revision petitioners and Sri Duddugunta Sudarshan Reddy, learned counsel for the respondent.

The contention of the learned counsel for the petitioners is that the Court below committed an error in coming to the conclusion that there are n o grounds to reopen or to recall the witness PW-1. It is his contention that the Court could have allowed the application and that the past mistakes of the revision petitioners could not have been considered as a ground for rejecting the present application. It is also his contention that Order XVIII Rule 17 and Section 151 of CPC are applicable to the facts and circumstances of the case and that therefore, the Court should have allowed the application. It is his further contention that the valuable right that is given to a party to cross-examine the witness has been taken away by this Order. Learned counsel relies upon the judgments of the Hon'ble Supreme Court reported in **Vadiraj Nagappa Vernekar (Ded) through LRs., v Shardchandra Prabhakar Gogate - (2009) 4 Supreme Court Cases 410, K.K. Velusamy v. N. Palanisamy - (2011) 11 Supreme Court Cases 275, and Ram Rati v Mange Ram (Dead) Through Legal Represe ntatives and others – (2016) 11 Supreme Court Cases 296.** He therefore prays the Revision Petitions should be allowed.

In response to this, learned counsel for the respondent relies on two judgments of the single judges of this court reported in **Cheerla @Cuddapah Naganna v Koya Naganna - 2008 (2) ALT 595 and Allumalla Kannam Naidu v Allumalla Simhachalam – AIR 2003 AP 239** to contend that the affidavit filed is absolutely silent about the need to re-examine the witness and the reasons furnished in the

application are not genuine or correct. Learned counsel and in fact points out that certain important legal aspects have to be brought out is the reason given in the application. He also points out that in fact number of adjournments was taken by the petitioners and the same is reproduced in the order. Therefore, learned counsel submits that the impugned orders do not suffer from any infirmity.

In both the cases the law relied upon by both the parties is very germane and relevant to the cases on hand. The Hon'ble Supreme Court of India clearly noticed the principles that are involved in an issue like this. The first judgment of the Hon'ble Supreme Court of India reported in **Vadiraj Naggappa Verenkar case (1 supra)** decided as follows:

> "25. In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said Rule is to enable the court, while trying a suit, to clarify and doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who h as already been examined.
>
> 26. As indicated buy the learned Single Judge, the evidence now being sought to be introduced by recalling the witness in question, as available at the time when the affidavit of evidence of the witness was prepared and affirmed. It is not as if certain new facts have been discovered subsequently which were not within the knowledge of the applicant when the affidavit evidence was prepared.
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> .....
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> .....
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> 31. Some of the principles akin to order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the court's discretion, if it deems fit, to allow such an application. In the present appeal, no such case has been made out." (Emphasis supplied).

The second judgment reported in **K.K. Velusamy case (2 supra)** it is held as follows:

> "9. Order 18 Rule 17 of the code enables the Court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 18 can be exercised by the court either o n its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined . (vide Dadiraj Nagappa Vernerkar v Sharadchandra

Prabhakar Gogate).

……..

……..

14……But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hand s on earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under Section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose.

…….

…….

19. We may add a word of caution. The power under section 151 or Order 18 Rule 17 of the code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it would ensure that the process does not become a protracting tactic" (Emphasis supplied).

The third judgment reported in **Ramrati case (3 supra)** contains the following paragraphs:

"9. The trial court, by order dated 18.12.2010, allowed the application filed by the respondent…"for further elaboration on the left out points by the parties….". The High Court, in the impugned order, endorsed the view taken by the trial court holding that: (Ram Rati case, SCC Online Del Para 6).

"6….reading the impugned order shows that the witness has been recalled, if available, for further elaboration on the left out points to both the parties."

…….

18. The settled legal position under Order 18 Rule 17 read with Section 151 CPC, being thus very clear, the impugned orders passed by the trial court as affirmed by the High Court to recall a witness at the instance of the respondent "for further elaboration on the left out points" is wholly impermissible in law.

19. In the above circumstances, the impugned order is set aside and the appeal is allowed."

In Addition, the judgements cited by the respondents clearly state that the power to recall a witness has to be judicially exercised in the facts and circumstances of the particular case. To the same effect the judgment of the single

judge of this court reported in **Allumalla Kannam Naidu case (5 cited)**.

The conclusions that are to be drawn from these five judgments, which were cited across the bar are-

(1) That although Order 18 Rule 17A of CPC has been deleted, it does not mean that there is no power at all in the Court to recall a witness for cross-examination.

(2) The inherent power that is available in the Court under Section 151 of CPC can be called into aid by a party for the purpose of recalling a witness.

(3) Since the power is being exercised under section 151 of CPC the court should be very careful and circumspect in recalling the witness only when it is absolutely necessary. Since there is no provision in the court covering the matter, the findings of the Hon'ble Supreme Court of India in para 12 of the judgment in **K.K. Velusamy (2supra)** are clear.

(4) That the application for recalling a witness should be drafted with care and caution and the principles analogous to Order 47 CPC should be applied for the purpose of recalling the witness.

The principles that can be deduced are that a person has discovered a new and important matter or evidence which despite the due diligence was not within his knowledge when the examination was done or the cross-examination was carried out and which could not be produced earlier or there is a mistake or error apparent on the face of the record or any other sufficient reason. In view of the language in Order 47 of CPC, the principle of *ejusdem generic* rule applies and the words 'sufficient reason' should be interpreted in the like manner. These are general examples being given and this is not an exhaustive list of reasons.

Against this backdrop of the three judgments of the Supreme court of India and two judgments of the High court of Andhra Pradesh, if the present matter is examined, the affidavit suffers from certain defects.

1) It is mentioned that the counsel could not by oversight cross-examined PW.1 on certain important "legal" aspects;

2) The counsel could not cross-examine the PW.1 about the entries in the pattadar passbook and title deed books (Exs.A.3 to A.5) and their mode of execution; and

3) Lastly, the counsel could not cross-examine PW.1 about the contentions raised in the written statement to disprove the plaintiff's contention.

The Hon'ble Supreme Court of India clearly stated that the grounds that should be raised in an application filed to recall of witness should be analogous to those mentioned in Order 47 of CPC when a review is sought. Therefore, the discovery of new or important evidence, which could not be produced earlier despite due diligence or a similar cause should be pleaded with clarity in the affidavit. In the Judgment reported in **Ram Rati Case (3 supra)** the application filed by the respondent to recall a witness was necessary "for further elaboration on the left out points." The Hon'ble Supreme Court of India in paragraph 18 of the judgment clearly held that recalling of a witness "for further elaboration on the left out points", is wholly impermissible in law. Learned single Judge of this Court in **Allumalla Kannam Naidu (5 supra)**

also held that the affidavit filed in support of the application in the case was not convincing, wherein, it is mentioned that certain important and crucial aspects were not cross-examined by the counsel.

In addition to this legal issue, this Court also noticed the dates on which the adjournments were sought and also notices that PW.1 was cross-examined on 21.03.2016, on 21.06.2016 and on 22.07.2016. Thus it can be seen that there was a clear gap of more than approximately three months in the first two dates and about a month's gap in the third date to cross-examine. The Cross-examination on 21.03.2016 is preceded by the filing of the chief-examination in February, 2016 and the actual chief-examination was done on 18.02.2016. Therefore, it is clear that the learned counsel had a lot of time to prepare and also to cross-examine the witness. Despite the long time gap that was available the petitioners felt that they could not cross-examine the witness, but they did not specify what was the issue that they discovered subsequently, which would entitle them to seek recall of the witness. A sweeping statement of the nature that the counsel could not cross-examine PW.1 about the contentions raised by the petitioners in the written statement, is in the opinion of this Court not acceptable at all. The affidavit is thus lacking in the required particulars/details, which would enable the Court to recall the witness. This court also cannot forget the fact that Order 18 Rule 17-A of CPC was deliberately deleted by the amendment of the CPC. Thereafter, in a series of judgments the Hon'ble Supreme Court India has held that although Order 18 Rule 17-A of CPC has been deleted the power to recall a witness is available under Section 151 of CPC. Since the power is being exercised under Section 151 of CPC the Hon'ble Supreme Court of India in **K.K. Velusamy case (2 supra)** judgment has sounded a note of caution in the manner of exercise of the said power. The discretion to be exercised by the Court under Section 151 of CPC does not extend to grant any and every relief. The inherent power can only be exercised for rendering justice and to do all things necessary to secure the ends of justice. While exercising the said power circumspection and care must be taken and the power should be sparingly used and particularly when the Court feels it is absolutely necessary to do so. Therefore, before any court is called upon to exercise its discretion to recall a witness the application should clearly meet the tests laid down in **Vadiraj Naggappa Vernekar Case (1 supra) and K.K. Velusamy case (2 supra).** The principles analogous to Order 47 CPC should be pleaded and set out with some certainty. The normal practice to fill up the gaps in the evidence by recalling the evidence should be severely curtailed.

Therefore, in conclusion, this court in these two civil revision petitions holds that the affidavit filed to recall the witness does not meet the standards laid down by the Hon'ble Supreme Court of India in the judgments. The failure to cross-examine the witness on certain aspects by itself is not a ground enough to recall the witness for the purpose of further cross-examination. If this is allowed the gaps will be filled up. The entire branch of developed case law of the highest courts in the country, including the Hon'ble Supreme Court of India, on the failure to cross-examine a witness etc., will be set at naught, if every witness is recalled on such tenuous grounds. The grounds to reopen the matter are also similar in this

case. They are not enough to reopen the case. For all these reasons, this Court holds that both the Civil Revision Petitions do not have any merits whatsoever.

Therefore, both the Civil Revision Petitions are dismissed. As the suit is of the year 2010, the lower Court is directed to proceed with the hearing of the suit on a priority and ensure that the trial is completed quickly. Requests for adjournments should be dealt with strictly. Every endeavour should be made to complete the trial and pronounce the judgment within six months from the date of receipt of a copy of this order. In the Circumstances, there shall be no order as to costs.

Consequently, the Miscellaneous Petitions, if any pending, shall also stand dismissed.

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2019(2) L.S. 69 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

Present:
The Hon'ble Mr. Acting Chief Justice C.Praveen Kumar

Sadhu Ramesh ..Petitioner

Vs.

K.Srinivasa Rao & Anr., ..Respondents

CIVIL PROCEDURE CODE, Or.13, Rule 3 & 6 – REGISTRATION ACT, Sec.17(1)(g) – STAMP ACT – Trial Court dismissed Application to demark document (Ex.A5) admitted in suit – Hence present revision.

Once a document is admitted in evidence rightly or wrongly with or without objection it is not permissible for Court including appellate or revisional Court to reject the same on the ground that it has not been duly stamped – Trial Court rightly dismissed Application for demarking the document – CRP, dismissed.

Mr.Sai Gangadhar Chamarty, Advocate the Petitioner.

Mr.V.S.R. Anjaneyulu, Advocate for Respondent.

O R D E R

1) The present Civil Revision Petition is filed under Article 227 of the Constitution of India aggrieved by the order dated 10.08.2018 in IA No.429 of 2018 in OS No.994 of 2013 on the file III Addl. Senior Civil Judge, Vijayawada, wherein and whereunder an application filed under Order 13 Rules 3 and 6 of the Code of Civil Procedure to demark Ex.A-5 i.e., receipt dated 05.09.2011, was dismissed.

2) The facts in issue are as under:

The plaintiff purchased the entire building bearing Dr.No.11-25-209 situated at Main Bazar, Vijayawada under a registered document bearing No.712/12 dated 03.02.2012 and possession was delivered to the plaintiff symbolically by permitting the defendant to continue to occupy and attaining the tenancy to plaintiff by directing defendant to remit the rents to the plaintiff. The said attainment of the tenancy was made in the presence of defendant by the owner of the property by name Sadhu Ramesh, who is the vendor

of the plaintiff. Though the attainment was effected in the month of February, 2012, it was found that the defendant had intentionally stopped paying the rents to the plaintiff. The defendant is aware about the lack of ownership of Sadhu Ramesh and even then the defendant had failed to deposit the arrears of rent to the plaintiff and the defendant became liable to pay the arrears of monthly rents corresponding to 14 months amounting to Rs.1,05,000/- i.e., starting from February, 2012 onwards @ Rs.7,500/- per month till the date of the termination i.e., upto April, 2013 and Rs.30,000/- as damages for the months of May and June 2013. Since the defendant failed to pay the rents, the plaintiff got issued a notice to the defendant to vacate and deliver the property. For which, the defendant got issued a reply denying the quantum of rent and refused to pay the rent. The vendor by name Sadhu Ramesh neither issued reply nor denied the contents therein. Hence, the plaintiff filed the suit. Both the defendants filed their respective written statements denying the averments in the plaint.

3) After completion of the trial, when the suit was posted for arguments, the second defendant/Sadhu Ramesh filed the impugned petition in IA No.429 of 2018 in OS No.994 of 2013 to demark Ex.A-5 receipt dated 05.09.2011 for want of stamp duty and registration.

4) The contents of the affidavit filed in support of the petition show that during the preparation of arguments, it was noticed that the alleged receipt which is in continuation of the registered sale-cum-G.P.A/. is a compulsory registerable document, in view of Section 17(1)(g) of Registration Act as amended by A.P. Act 4 of 1999. As observed earlier, the present suit is filed for eviction, in which the plaintiff's title is disputed. Since the alleged receipt evidencing delivery of possession it requires not only registration but also sufficiently stamped, as such it is inadmissible in evidence.

5) The first respondent/plaintiff filed counter denying the petition averments, and would contend that subsequent to the agreement of sale dated 03.09.2011, he even obtained registered sale deed on 03.02.2012. On the date of execution of agreement of sale, he paid an amount of Rs.5,81,000/-. The remaining amount of sale consideration i.e., Rs.5000/- was paid on 05.09.2011 under the receipt vide Ex.A-5, as such it has to be read together with the agreement of sale. It being a receipt, requires no stamp duty and penalty. Even otherwise, it is pleaded that the suit is not filed by him against the petitioner seeking any relief and that the petitioner himself got impleaded in the suit against whom no relief is sought, as such the document stated to be executed by him basing on which no relief is sought, demarking of the document marked on behalf of R-1, cannot be allowed. Hence, prayed to dismiss the petition. The second respondent/D-1 also filed counter contending that the alleged receipt is required to be stamped and registered.

6) After analyzing the material on record, the trial court dismissed the petition. Challenging the same, the present Revision came to be filed.

7) Learned counsel for the petitioners submits that the trial court ought to have

de-exhibited Ed.A-5 receipt dated 05.09.2011 as it was un-registered, insufficiently stamped and inadmissible in evidence.

8) Learned counsel for the respondent would submit that since Ex.A-5 receipt has to be read together with the agreement of sale it requires no stamp duty and penalty.

9) The main contention of the learned counsel for the petitioner, who was impleaded as defendant No.2 in the suit is that he never executed Ex.A-5 and though the said receipt is the continuation of Ex.A-1 i.e., registered sale-cum-General Power of Attorney dated 03.09.2011, it cannot be considered.

10) It is settled law that once the document is marked as Exhibit without objection, the party cannot raise objection at any stage of the suit, more particularly pleading the document is not sufficiently stamped and not registered.

11) In **Dokka Joganna Vs Upadrasta Chayadevi – 1997(5) ALT 628** while dealing with the scope and ambit of section 36 of the Indian Stamp Act, the Court held as under:

> "It has been held in a catena of decisions that once a document is admitted in evidence rightly or wrongly, with or without objection, it is not permissible for the Court including appellate or revisional Court to reject the same on the ground that it has not been duly stamped. (See **V.E.A. Annamalai Chettiar and Anr. v. S.V.V.S. Veerappa Chettiar and ors.,: Nalluru Basavaiah Naidu v. Takelia Venkatesivarlu, 1968 An.W.R. 211 and P. Rainana Reddi v. K. Rukminamma, 1956 An.W.R. 490 = 1956 ALT 22 (NRC) = AIR 1957 A.P. 1022).** In the light of the above settled proposition of law, the admissibility of the suit documents cannot be left open to be decided at a later stage, i.e., while rendering judgment taking into account other oral and documentary evidence that may be adduced by the parties to the suit".

12) In **Shyamlal Kumar Roy v. Susheel Kumar Agarwal – 2007(1) ALD page 38(SC)** the Apex Court observed that "Once a document has been marked as an exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, Section 36 of the Stamp Act comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to th trial court itself or to a court of appeal or revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same court or a court of superior jurisdiction".

13) The learned counsel for the petitioner relied upon the decisions reported in 2017(5) ALD 753, 2017(2) ALT 736, 2016(2) ALT 557, 2013 SCC Online AP 328, (2003) 8 SCC 752, (2001) 3 SCC 1 and AIR 1991 AP 31. Though the learned counsel relied on number of decisions, this Court is of the view that they do not come in the way of the petitioner and are not applicable to the present facts of the case.

14) It is clear from the impugned order that at the time of examination of PW.1 on 24.07.2017, it was mentioned that cross-examination of PW.1 was deferred at request, which means the petitioner was very much present at the time of marking the document and objection was not raised for marking of the document through PW.1. It has been held in catena of decisions that once a document is admitted in evidence with or without objection, it is not permissible for the Court including appellate or revisional Court to reject the same on the ground that it has not been duly stamped. Therefore, the trial court rightly dismissed the application for demarking the document holding that mere receiving and marking of document does not impose any penalty as to its admissibility.

15) Accordingly, the C.R.P. is dismissed. There shall be no order as to costs. Consequently, the miscellaneous petitions pending if any, shall stand closed.

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2019(2) L.S. 72 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Jakka Srinivasa Rao & Ors., ..Petitioners

Vs.

Javvaji Venkata Chalapathi Rao & Ors., ..Respondents

CIVIL PROCEDURE CODE, Sec.150 – Civil revision questioning the orders of lower Court whereby an application in IA to mark the deposition of a witness, which was recorded in another suit in year 1993 was allowed.

Held: Well settled Law that certain conditions are necessary to be satisfied before the evidence recorded in a previous judicial proceedings can be received in another judicial proceedings – Lower Court did not have any material to conclude that the issues involved in both the proceedings are same or all parties in the earlier suit had an opportunity of full and complete cross-examination of the witnesses whose deposition is sought to be marked – Or to show that witness was incapable of giving evidence because of any sickness or some other reason – Civil revision petition is allowed setting aside the order passed in IA by the lower Court.

Mr.Posani Venkateswarlu, Advocate for the Petitioner.

CRP.No.7339/18 Date: 23-4-2019

Mr.P.Durga Prasad, Advocate for the Respondents.

O R D E R

This Civil Revision Petition is filed questioning the Order, dated 01.10.2018, in I.A.No.562 of 2018 in O.S.No.23 of 2011, passed by the learned XIII Additional District Judge, Narasaraopet.

In O.S .No.23 of 2011 an application in I.A.No.562 of 2018 was filed under section 151 of C.P.C to mark the deposition of one Jakka Subba Rao, which was recorded in another suit in O.S.No.98 of 1993 on the file of Additional Senior Civil Judge, Narasarapet. The said application was opposed by the respondents, who are the plaintiffs in the suit. Ultimately by the impugned order the October, 2018 the Court permitted the receipt of the deposition recorded earlier in another suit in O.S.No.98 of 1993. Challenging the same the present Civil Revision Petition is filed.

This Court has heard Sri Posani Venkateswarlu, learned counsel for the revision petitioners and Sri P. Durga Prasad, learned counsel for the respondents.

Learned counsel for the revision petitioners very strongly objected to the application being allowed. He stressed that Section 33 of Indian Evidencee Act is an exception to the general rule of hearsay and argues that unless the conditions specified under Section 33 of the Evidence Act (in short "the Act") are vey strictly complied with, the deposition in another suit cannot be received as evidence in the present suit. He pointed out that the grounds raised by him, which are ground Nos.3, 4, 5 9, 11, 12 and 13 are the essential points that are being urged by him in the revision. It is his contention that without any proof and without the compliance of the essential conditions of Section 33 of the Act, the lower Court allowed the application. His further contention is that the matters in issue are not the same. The incapacity of the witness to give evidence is not proved and there was no cross-examination of the witness in the earlier suit and that, therefore, none of the essential ingredients under section 33 of the Act are fulfilled. Learned counsel for the petitioner also relied on the judgment s reported in **Dr.S.J. Vince v Bethany Chapel Trust and Ors.,-2010 (4) (AP) 106** , **Amarjit Kaur and ors., v. Kishan Chand 17 (1980) DLT 225** and **Sistla Venkata Sastri v. Zernini Venkatagopaludu 85 Ind. Cas.209 = Manu/TN/0849/1924** to contend that the lower Court committed an error.

In reply to this, learned counsel for the respondent submits that the lower court considered all the matters in coming to a conclusion that the evidence recorded in the earlier suit is admissible in evidence. Learned counsel relies upon para-11 of the impugned order and argues that the Court below noticed that the suit schedule property was common, the Advocate Commissioner, who was appointed to record the evidence, categorically stated that the witness was not responding to his questions and that the Court therefore had adequate material

to come to a conclusion that the said J. Subbarao, was incapable of giving evidence.

LEGAL BACKDROP:

As per the well settled law on the subject the following conditions are necessary to be satisfied before the evidence recorded in a previous judicial proceeding can be received in another judicial proceeding:

(1) The evidence must have been given in a judicial proceeding or before any person authorized by law to take evidence;

(2) That the first proceeding was between the same parties as in the second proceeding or between representatives in interest of the parties;

(3) That the party against whom the deposition is tendered had the full opportunity of cross-examining the deponent when the deposition was recorded;

(4) That the issues involved in both the proceedings are the same or are substantially the same;

(5) That the witness is incapable of being called at the subsequent proceeding on account of death, or incapability of giving evidence, or being kept out of the way by the other side, or an unreasonable amount of delay or expense etc.,

The Hon 'ble Apex Court in **Shashi Jena & Ors. V Khadal Swain & Anr.- (2004) 4 SCC 236** held as follows:

"8. From a bare perusal of the aforesaid provision, it would appear that evidence given by a witness in a judicial proceeding or before any person authorized to take it is admissible for the purpose of proving in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states in its evidence given in earlier judicial proceeding or earlier stage of the same judicial proceeding, but under proviso there are three pre-requisites for making the said evidence admissible in subsequent proceeding or later state of the same proceeding and they are (i) that the earlier proceeding was between the same parties; (ii) that the adverse party in the first proceeding had the right and opportunity to cross examine; and (iii) that the questions in issue in both the proceedings were substantially the same, and in the absence of any of the three pre-requisites afore-stated. Section 33 of the Act would not be attracted. This court had occasion to consider this question in the case of **V.M. Mathew v. V.S. Sharma and Ors. – (1995) 6 SCC 122: AOR 1996 SC 109**, in which it was laid down that in view of the second proviso, evidence of a witness in a previous pro ceding would be admissible under Section 33 of the Act only if the adverse party in the first proceeding had the right and opportunity to cross examine the witness. The Court observed thus at AIR pp. 110 and 111: (SCC p.125, para8).

"8. The adverse party referred in the proviso is the party in the previous proceeding against whom the evidence adduced therein was given against his interest. He had the right and opportunity to cross-examine the witness in the previous

proceeding…the proviso lays down the acid test that statement of a particular witness should have been tested by both parties by examination and cross-examination in order to make it admissible in the later proceeding." [emphasis added.]"

EVIDENCE:

If the present caser is examined against the backdrop of this legal position, the first and foremost fact that comes to the notice of this Court is that there is no documentary evidence before the Court for coming to the conclusion that the previous deposition is admissible as evidence. The present suit O.S.No.23 of 2011 is filed by J. Srinivasa Rao and J. Chinna Subba Rao. As J, Chinna Subba Rao died, his LRs were brought on record as plaintiffs 3 and 4. There are eight defendants:- five individual defendants, two proprietary firms (Defendants Nos.6 and 7) and a partnership firm (defendant No.8). The suit is filed for partition of the suit schedule property. The additional material papers filed by the learned counsel for the revision petitioners shows that the other suit O.S.,No.98 of 1993 was filed by Nagasarapu Siva Venkata Rangarao, Sanisetty Venkateswarlu, Garre Satyanarayana, Nerella Venkata Paparao and Penugonda Gandhi against the following defendants: 1) Jakka Subbarao, 2) Jakka Chinna Subbarao, 3) Javvaji Venkataappaiah, 4) Javvaji Venkata Chalapathirao, 5) Javvaji RAghava Rao, 6) Javvaji Lakshmi Chalapathi Rao, 7) Official Receiver, Guntur and four partnership firms as defendants 8 to 11. The said suit was filed for specific performance of a contract dated 21.12.1990. This plaint was not considered by the Trial Court.

Just like in a case of the res judicata etc., where the pleadings in the earlier and later suit are to be filed to enable the Court to come to a conclusion that the issue in both the matters are the same, in a case of this nature also that if the Court has to come to a conclusion that the issues involved in both the suits are same/ substantially the same and that the parties are same etc. Hence, there is a necessity for the court to consider the pleadings or other material etc., in both the suits to come to this conclusion. The court should also be convinced that the party, against whom the deposition is tendered, has had a full opportunity of cross-examining the defendants. For this the entire deposition of the witness must be filed and considered. Lastly, the Court should be convinced that the witness was "incapable" of giving evidence in the subsequent proceedings. The incapacity should not be temporary or momentary as it is when caused by the temporary weakness, illness etc. the Court should be clearly convinced on all these grounds and the party who wishes to file the deposition in the earlier suit should plead and prove these essential elements.

CONCLUSION:

In the case on hand the Trial Court did not have any material whatsoever to conclude (a) that the issues involved in both the proceedings are same or substantially the same; (b) that all the parties in the

earlier suit had an opportunity of full and complete cross-examination of the witness whose deposition n is sought to be marked; (c) that the witness was incapable of giving evidence because of his sickness or for some other similar reasons. As mentioned by this Court earlier, these are all the matters which have to be carefully assessed by the Court and proved by the petitioners. In fact, the affidavit filed in this case in support of the application to receive the deposition states that the witness is intentionally avoiding to give evidence (emphasis supplied), which clearly suggests that witness is conscious of what he is doing and is deliberately avoiding to give replies. In addition to this the counter filed also asserts that due to old age weakness and paralysis the witness was not giving evidence and the counter reiterates that he is not disabled.

In the light of the provisions of law, which clearly are not fulfilled, this Court is of the opinion that the Court below committed an error in passing the impugned order. The lower Court on the basis of some observations came to a conclusion that the proceedings between the parties are same and that the issues between the parties are substantially the same. This procedure is clearly wrong. The Advocate Commissioner returned the warrant unexecuted as the witness was not answering the questions, but the affidavit filed by the 1st defendant in IA No.562 of 2018 clearly states that the witness is intentionally avoiding to give evidence. This aspect was not considered by the Trial Court. Therefore, this Court is unable to accept the findings of the Court that the witness was actually "incapable" and not in a position to give evidence.

In that view of the matter, after hearing both the parties and considering the law on the subject, this Court is of the opinion that the Court below committed an error in passing the impugned order. Therefore, the Civil Revision Petition is allowed setting aside the Order, dated 01.10.2018, in IA No.562 of 2018 in O.S.No.23 of 2011, passed by the learned XIII Additional District Judge, Narasaraopet. There shall be no order as to costs.

Miscellaneous Petitions, if any, pending in this appeal, shall stand closed.

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LAW SUMMARY

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2017 & 2018 Yearly Digest

Printed, Published and owned by **Smt.Alapati Sunitha,**

Printed at: Law Summary Off-Set Printers,Santhapeta Ext., Ongole - 523001, Prakasam District. (AP)

Editor: **A.R.K. Murthy,** Advocate.