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Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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PART - 13 (15TH JULY 2018)

Table Of Contents

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NOMINAL - INDEX

SUBJECT - INDEX

(INDIAN) PENAL CODE, Sec.302 - Accused who were convicted for various offences by the trial Court filed appeals before the High Court, where in, appeals were allowed and all accused acquitted - Aggrieved thereby, State preferred instant appeal.

Held - The principle of 'Falsus in unofalsus in omnibus ' has not been accepted in our country - Even if some accused are acquitted on the ground that the evidence of a witness is unreliable, the other accused can still be convicted by relying on the evidence of the same witness – Appeal allowed accordingly. ***(S.C.)*** **70**

PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT - EVIDENCE ACT,Sec.63(2) - Appellant / writ petitioners and their predecessors in title claim to be in possession from last 80 years and a temple called Draupadi Temple is said to be in existence in property from several decades – Respondents disputed the appellant/writ petitioners title and possession over the property.

Held - Subject property constitutes public premises - Having failed before competent Civil Court, with regards title, it was not open to appellant to contend that respondents should have initiated proceedings before the competent Civil Court for eviction - Appellate court will not reassess material and seek to reach a conclusion different from one reached by the court below, if one reached by that court was reasonably possible on the material - Appellate court would, normally, not be justified in interfering with the exercise of discretion under appeal solely on the ground that, if it had considered the matter at the trial stage, it would have come to a contrary conclusion – Writ appeal stands dismissed. **(Hyd.) 250**

TRANSFER OF PROPERTY ACT, Sec.106 - Appeal preferred by Defendants/ Appellants against Judgment of Trial Court, where in Plaintiff/Respondent filed a suit for declaration of title, recovery of possession, recovery of arrears of rents – Plaintiff had purchased suit property and constructed a building comprising of two shops on ground floor - Municipal Council assessed tax for suit building in the name of the Narsoji/ Plaintiffs brother, on basis of mistaken representation made by tenants of plaintiff – Municipal Council refused to change the name - Tenants failed to pay rents - Plaintiff got issued notices terminating tenancy and claiming arrears of rents.

Held - Entries in revenue records, tax receipts are not proof of title - Plaintiff discharged the burden cast upon him by proving his title to the property - Plaintiff is entitled to a mandatory injunction to get his name mutated in the municipal records as the owner of the property – Appeal stands dismissed. **(Hyd.)** ***227***

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APPRECIATION OF EXPERT'S EVIDENCE

Y. SRINIVASA RAO,
M.A (English Litt.,)., B.Ed., LL.M,
Senior Civil Judge, Avanigadda, Krishna Dist.

Introductory:-

A person who is very knowledgeable about or skilful in a particular area is an '*Expert*'. The question is, whether who to *be a witness. The expression to be a witness was held to mean imparting knowledge in respect of the relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a Court or to a person holding an enquiry or investigation.* Admissible testimony relating to a professional, scientific, or technical subject is known as '*expert's evidence*'. The opinion of an Expert is only intended to enable the Court to form its opinion. It is curious to see that when the defendant is accused of purposefully changing the way of affixing his signature, in the case of KoyaLalithaKumari's case (infra), it was observed that no purpose would be achieved by securing his signature by Court now for sending it for comparison with his disputed signature in the suit document.

In fact, Expert evidence is based on formal and/or special study, training, or experience that imparts the competency to form an opinion upon matters associated with that subject. It is the duty of expert to present the necessary scientific or technical criteria to enable a court to test the accuracy of its own conclusions and to form its own independent judgment of the evidence. Expert evidence is used to assist the Court when the case before it involves matters on which it does not have the requisite technical or specialist knowledge. The role of an expert witness is to provide relevant and impartial evidence in their area of expertise. To find out the fact that when opinions of third person are relevant, it requires us to refer to section 45 to 51 of Indian Evidence Act,1872.

Expert Opinion:-*What a person thinks in respect of the existence or non-existence of fact is an 'opinion'. As a general rule the opinion or belief of third person is not relevant and admissible as the witnesses are allowed to state facts alone of what themselves saw or heard.But,anExpert is the person who specifically or specially skilled or practiced on any subject. It was held in***Bhavanam Siva Reddy and others Vs. BhavanamHanumantha Reddy and another, 2017 (4) ALT 682.** B. SIVA SANKARA RAO,j**.**

Duty of an expert:-Expert shall furnish to the Court necessary scientific criteria for testing the accuracy of his conclusions to enable the Court to form its own independent judgment

by application of such criteria to the facts proved in the case. ***See.*** **KoyaLalithaKumari and others Vs. PolinaNageswaraRao (Died) per L.Rs., 2016 (1) ALT 42.**

When opinions of third persons are relevant?

When an expert opinion is relevant isclearly illustrated in section 45 of Evidence Act.If the death of 'A' was caused by poison, the symptoms produced by the poison are relevant factors to form an opinion for expert. In such a case, opinion of experts as to the symptoms produced by the poison by which 'A' is supposed to have died, are relevant for the Court for an opinion under section 45 of Evidence Act. Further, whether a certain document is written by 'A'. Another document is produced, which is admitted to have been written by 'A'. Now, the opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant under section 45 of Evidence Act.

Under section 46 of Evidence Act, facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant. For instance, the question is, whether A was poisoned by a certain poison. The fact that other person, who are poisoned by that poison, exhibited certain symptoms. The symptoms that which experts affirm or deny to be the symptoms of that poison, is relevant under section 46 of Evidence Act.

Under section 47 of Evidence Act explains when the opinion as to handwriting are relevant. The question is, whether a given letter is in the handwriting of A, a merchant in London. B is a merchant in Calcutta, who has written letters, addressed to A and received letters puporting to be written by him. C is B's clerk whose duty it was to examine and file B's correspondence. D is B's broker to whom B habitually submitted the letters purpoerting to be written by A for the purpse of advising him thereon. The opinions of B,C, and D on the question whether the letter is in the handwriting of A are relevant under section 47 of Evidence Act, though neither B,C nor D ever saw A write.

Opinion as to digital signature is relevant under Section 47A of Evidence Act. According to this provision, when the Court has to form an opinion as to the digital signature of any person, the opinion of the Certifying Authority which has issued the Digital Signature Certificate is a relevant fact.

Under section 48 of Evidence Act, when the Court has to form an opinion as to the existence of any general custom or right, the opinions , as to the existence of such custom or right, of persons, who would be likely to know of its existence if it existed, are relevant. Similarly, under Section 49 of Evidence Act, opinions as to usages, tenets, etc are relevant. Section 50 of the Act provides that when the Court has to form an opinion as

to relationship of one person to another, the opinion, expressed by conduct, as to theexistence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact. the Proviso to section 50 says that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Dovorce Act, 1869 (4 of 1869), or in prosecutions under sections 494, 495, 497 or 498 of IPC. That too, under section 51 of Evidence Act, whenever the opinion of any living person is relevant, the ground on which such opinion is based are also relevant. An expert may give an account of experiments performed by him for the purpose of forming his opinion.

I have discussed till now the relevant provisions of Indian Evidence Act,1872 as to when opinions of third persons are relevant. A word about latest legal position as to appreciation of Expert's opinion is not out of place.

Appreciation of expert evidence:-

Experts opinion should be demonstrative*:- Experts opinion should be demonstrative and should be supported by convincing reasons Such opinions are often of no use to the court and often lead to the breaking of very important links of prosecution evidence which are led for the purpose of prosecution. It was further held in this case that In criminal cases pertaining to offences against human body, medical evidence has decisive role to play. See.* **Machindra Vs. SajjanGalphaRankhamb and others, 2018 (1) ALT(CRI.)(SC) 173 (D.B.).** PINAKI CHANDRA GHOSE and ROHINTON FALI NARIMAN,jj.

Age of ink:- In **Polana Jawaharlal Nehru Vs. MaddiralaPrabhakara Reddy,2017 (3) ALT 712.** *His LordshipHon'ble Sri Justice V.Ramasubramanian, j*, observed that i*t is an admitted fact that the science relating to forensic examination of handwriting, especially in relation to the fixation of the age of the ink, is not perfect.In cases of this nature, any reference of a document to the Handwriting Expert just for the purpose of finding out whether the ink was 5 years old or 3 years old at the time of institution of the suit, is not likely to bring any fruitful result.*

Sole evidence of a hand writing expert is not normally sufficient:- The Hon'ble Supreme Court in**S.P.S. Rathore Vs. C.B.I. and another, 2016 (3) ALT(CRI.)(SC) 307 (D.B.)**observed that expert evidence as to hand writing is only opinion evidence and it can never be conclusive. The opinion of a hand writing expert is also relevant, but not conclusive.

Some principles regarding 'Expert Opinion' are summed up from the recent ruling in *Kati MaheswaraRao Vs. UppatiLalitha and others, 2018 (2) ALT 594:-*

At any stage:- here is no bar for the Court at any stage of the case to obtain opinion of the expert for the purpose of arriving at a decision on the basis of the opinions of experts.

Court can compare signature:- The Court is entitled to make comparision of disputed and admitted signature for just conclusion but as a rule of prudence expert opinion can be obtained and also that the court can instruct a party to submit his writing or signature, enabling the court to compare and decide a case.

Discretion of the Court to sent a document:- It is the discretion of the Court to send a disputed document to an Handwriting expert so as to ascertain whether the signature or the thumb impression is forged one or not.

Procedure for obtaining expert opinion:- Section 45 of the Act does not provide any procedure for obtaining expert opinion.

Second expert opinion:- There is no prohibition under law for obtaining second expert opinion if either of the parties to the suit intends so. It is the duty of the Court to ascertain the truth or otherwise of the opinion submitted by the second handwriting expert at the time of deciding the main suit and not at the stage of trial. *But*, in 2010, in **S.Neelakantam Vs. MaharudraiahSwamy, 2010 (5) ALT 128**, it was then observed that when the first expert could not express any opinion on the reference made, sending the disputed document to another Expert for examination and opinion is not impermissible in law.

S*ending photographic copies:*- Not only original document can be sent for expert examination but photographic copies may also be sent for examination of handwriting expert.

Comparing handwriting by Court:- Even inspite of availability of expert evidence, the Court can also compare the signatures under section 73 of the Indian Evidence Act and opinion of the expert is only a guiding factor and it is for the court to examine the entire evidence on record including the evidence of handwriting expert and come to a just conclusion.

An opinion/report of a private expert:- Unless experts opinion/report is obtained on an application made to a Court in accordance with the procedure established by law and under the orders and supervision of the Court, an opinion/report of a private expert obtained by a party directly cannot be a part of the record of the Court and such an opinion/report privately obtained cannot be received in evidence and the expert who has given the same cannot be permitted to be examined as a witness. See. **VirothiTirupathiRao Vs. Kota Venu, 2016 (4) ALT 478.**M. SEETHARAMA MURTI,j

Private Handwriting Expert:- Whether the private handwriting expert is qualified or not, whtherhis report can be taken into consideration or not, all these aspects can be elicited during cross-examination by the defendnats.

Two aspects are required for comparision of the dipsuted signatures:- One is of contemporary relevancy to the extent possible. Another is the availability of originals.

See. *MekapthulaVenkateswarlu Vs. Rachabanti Krishna Murthy and others, 2018 (4) ALT 29*.

Contemporaneous signatures or the writings are not available:- Where the contemporaneous signatures or the writings are not available for the expert opinion, the disputed documents where it becomes inevitable can be called for. See. *DintakurthiNarayana Vs. RachuruBhaskaraRao, 2017 (5) ALT 411.*

Experts opinion Application filed three years after filing of suit:- Experts opinion Application filed three years after filing of suit and after examination of plaintiffs evidence to send suit promissory note to Expert for his opinion Dismissal of application by trial court is held sustainable as the Court itself is empowered to compare the disputed signature with admitted signatures of defendant. See. **PapiniRamulu Vs. A. Lavanya - 2012 (6) ALT 471.** B.N. RAO NALLA,j.

Quoting wrong provision:- Dismissal of application for expert opinion on the ground of quoting wrong provision is not legal. See. PalleChakrapani Vs. M.Prathap Reddy, *2017 (5) ALT 292.*

Signatures on vakalat and written statement are not contemporaneous:-Interpolations can be found with a naked eye and the Court can examine the document and record its finding subject to raising plea of material alterations in the written statement. But, the Court cannot order for examination of disputed signatures with the admitted signatures onvakalat and wrtitingstatement which are contemporaneous. See. PalleChakrapani Vs. M.Prathap Reddy, 2017 (5) ALT 292.

Genuineness of a document is in serious dispute*:- In such a case, it is desirable that such document is examined by an expert and an opinion given thereon to aid the Court to come to a right conclusion. See. PaboluPrameela Rani Vs. BogiPrasanthian another, 2017 (3) ALT 280.*

Principles drawn from the case of T.Rajalingam Vs. State of Telangana, See.*2017 (3) ALT (CRL) (AP) 203.*

*Determination of age ink:-*An expert opinion as to determine the age of writing can be possible and to admit is relevant. The expression that there is no scientific method available anywhere in the country or State, more particularly in the Forensic Science Department for scientific assessment of the age of handwriting to offer opinion is far from acceptance.

Time limit to send document to expert:- there is no time limit to file application in seeking to send the document containing a disputed signature or writing etc., to expert. See also. PoluruSreenivasauluVs.GajuluSravankumar, 2017 (2) ALT 414.

Futile exercise:-In the absence of the scientific expert, and on account of the impracticability involved, it would be only a futile exercise for sending scientific expert opinion. See. TakkellaRadhakrishna and others, Vs. GamiaineniNagaraju, *2017 (2) ALT 9.*

Medical evidence:-Medical evidence establishing that the deceased died because of gunshot injury. Evidence of witnesses cannot be disbelieved merely because they have deposed that they heard more than one shot as was held in *Jabar Singh Vs. State of Rajasthan, 1995 (1) ALT (CRL) (DN) 16*.

Expert's opinion is not conclusive:-An Expert is capable of arriving at conclusion even by taking note of the undisputed writing irrespective of time gap between the date of said writing and the date on which disputed document was signed - Further, opinion of Expert is not conclusive. Parties may raise objections to it. It was also held that refusal to send a disputed document to Expert's opinion merely on the ground that a contemporaneous document with admitted signature is not available is not legal.**See. Jonnalagadda Ravi Sankar Vs. Jakka Rama Krishna Rao and another**, **2013 (3) ALT 798.** L. NARASIMHA REDDY,j.

Expert's opinion can be taken as additional evidence:-Even the experts opinion is not final and conclusive Court can examine the disputed handwritings to come to a conclusion When handwritings are similar and identical and seems to be convincing in its nature even to a naked eye, the other evidence i.e., the expert opinion can be taken as additional evidence.**See. KhandavalliAmith Kumar Vs. State of A.P., 2012 (3) ALT(CRl.)(A.P) 263.** K.S. APPARAO,j. The rule is that Wherethere is no independent or direct evidence, presumption must be taken aid by the Court.

When a party denies his signature or thumb on document:- When a party denies his signature or thumb impression on a document, he should not be denied to obtain expert opinion merely on the ground of delay. Court may impose costs or pass any conditional order if Court feels that party's intention is to protract the litigation. See. **JalagadugulaEswaraRao and others v. Davala Surya Rao**, **2011 (1) ALT 652.** B. CHANDRA KUMAR,j.

No time be fixed for filing applications seeking expert opinion:- An application can be filed even at the stage of arguments if circumstances of case so demand - Discretion of Court to deal with such applications cannot be controlled by hard and fast rules. See. **Janachaitanya Housing Ltd. v. Divya Financiers, 2008 (3) ALT 409 (D.B.).** A. GOPAL REDDY and B. SESHASAYANA REDDY,jj.

When a document need not be sent for expert's opinion? :-If court can form an opinion on evidence adduced, document need not be sent to Expert for opinion. See. **Guru Govindu v. DevarapuVenkataramana, 2006 (5) ALT 17.** L. NARASIMHA REDDY,j.

Section 73 of Evidence Act :- *Courts to take assistance of experts section 73 of the evidence Act does bar the judge from ultimately deciding whether the signatures are forged or not still as a rule of prudence in disputed cases, it is always desirable that a Court should secure the opinion of quality handwriting expert on the subject After the opinion of the expert, is introduced into the evidence as required by law and the Court can come to a conclusion. See.* **Sakriya Krishna Bai (died) per LR. Vs. Syed Ismail (died) per LRs., 2018 (1) ALT 772.** D.V.S.S.SOMAYAJULU,j.

Section 73 of Evidence Act :-*The law is very clear by interpretation of scope of Section 73 of the Indian Evidence Act that the Court has no power to ask for writing or thumb impression of an accused of a crime before commencement of enquiry or trial. See.* **AmitKhetawat Vs. State of Telangana**, **2017 (3) ALT(CRI.)(A.P) 2.** B. SIVA SANKARA RAO,j

Section 73 of Evidence Act *:-* Section 73 of Evidence Act does not permit a Court to give a direction to the accused to give specimen writings for anticipated necessity for comparison in a proceeding which may later be instituted in the court. See.**State of Haryana Vs. Jagbir Singh and another - 2004 (1) ALT(D.N.)(SC) 2.1 (D.B.).** DORAISWAMY RAJU and AJIT PRAKASH SHAH,jj.

Spectrographs test*:- There is no provision in the Code or any other law, which empowers the police or a Criminal Court, to subject the accused to the test, either from the provisions of the Act of 1920 or Section 53 Cr.P.C. or Sections 73 and 165 of the Evidence Act to compel the accused to give his voice sample for the purpose of spectrographs test. See.* **AmitKhetawat Vs. State of Telangana, 2017 (3) ALT(CRI.)(A.P) 2.** B. SIVA SANKARA RAO,j.

Court generally being not an expert in comparison of signature and hand writings etc:- Though the court got power under Section 73 of Evidence Act and there is even other remedies to prove, the court generally being not an expert in comparison of signature and hand writings etc., with scientific expertise; take an experts opinion with reasons under Section 45 read with 51 of Evidence Act. See. **P. KusumaKumari Vs. State of A.P., 2016 (2) ALT(CRI.)(A.P) 476.** B. SIVA SANKARA RAO,j.

Expert opinion is an assistance to Court:- Before exercising powers under section 73 of Evidence Act to form an opinion by comparing the handwriting or signature of a party, it

would always be proper for the Court to take the assistance of Handwriting Expert to be in a better position to form an appropriate opinion. See. **MattaSriramamurthy Vs. ArepalliSrirama Murthy, 2015 (3) ALT 266.**R. KANTHA RAO,j.

Comparison by Court:- There is no legal bar to prevent the Court from comparing the disputed signatures with the admitted signatures under section 73 of Evidence Act**.** However, the Court, in doing so, must keep in mind the risk involved as the opinion formed by Court is susceptible to error especially when such exercise is being conducted by Court not conversant with the subject. See. **Chidara Uma MaheshwarRao Vs. MethukuJanardhan**, **2013 (6) ALT 806.**C.V. NAGARJUNA REDDY,j.

Comparison by Court:-In case of necessity, Court takes upon itself task of comparing signatures. Need not invariably send signatures for comparison to a handwriting expert Facts of case relevant to decide when and whether to send to handwriting expert section 73 provides for comparison by Court itself Absolutely, no legal bar preventing Court from comparing signatures or handwriting by its own eyes, however, must refrain from playing role of an expert Opinion of handwriting expert not immune from being fallible/liable to error, like that of any other witness. See. **Ajay Kumar Parmar Vs. State of Rajasthan, 2013 (2) SCJ 809 (D.B.).** DR. B.S. CHAUHAN and FAKKIR MOHAMED IBRAHIM KALIFULLA,jj.

At what stage, application for expert opinion is to be filed?:- If the dispute is as to execution of a document by one of the parties to the suit, the application to send the document to expert must be filed before the evidence of such party is closed. See. **PulapartiSankuntalaBai v. MygapulaRamanjaneyulu**, **2006 (3) ALT 607.**

Slight variation in the signature:-Though there is a slight variation in the signatures, it need not be given much weightage due to gap of eight years - Contention rejected. See.**G. Aravind Kumar v. Md. Sadat Ali (died) and another**, **2011 (5) ALT 574.**

Uncorroborates evidence of a hand writing:-Uncorroborates evidence of a hand writing expert is an extremely weak type of evidence and the same should not be relied upon either conviction or for acquittal. See. **S.P.S. Rathore Vs. C.B.I. and another, 2016 (3) ALT(CRI.)(SC) 307 (D.B.).** V. GOPALA GOWDA and R.K. AGRAWAL,jj. In another case O. Ravindranath Appellant Vs. State of A.P. rep. by the Inspector of Police, C.B.I., Visakhapatnam Respondent, **1995 (2) ALT(CRI.)(A.P) 157.** His Lordship Hon'ble Sri JusticeG. RADHAKRISHNA RAO,j. observed that Offence of fraud alleged to have been committed by clerks of a Bank. General notion that opinion of hand-writing expert is a weak type of evidence cannot be applied in such a case where opinion is corroborated by oral evidence.

Scientific investigation:-It is only the Government Security Press that can certify the date or period at which a particular stamp paper was printed.(Para 5). See. **RavaluruVenkataSubbamma v. RavaluruSomasekhar, 2009 (5) ALT 549.**

Expert opinion before trial:- Allowing of application for sending disputed documents for Expert's opinion before commencement of trial is not legal. See. **J.L. Babu v. S.Gowri Shankar and another, 2009 (5) ALT 415.**

Expert opinion at appellate stage:- Receiving of an Expert's opinion at appellate stage would amount to receiving additional evidence under Order 41, Rule 27, CPC. See. **V. Chidambara Reddy v. K. Govinda Reddy, 2008 (6) ALT 312.** P.S. NARAYANA,j.

Expert's opinion is important:-Where injuries are caused by firearms, opinion of ballistic expert is important. It was held by the Hon'ble Supreme Court in**Sukhwant Singh Vs. State of Punjab, 1995 (2) ALT(CRl.)(SC) 201 (D.B.)**. A.S. ANAND and FAIZAN UDDIN,jj.

Examination of mental condition of a Person:-Expert opinion obtained that appellant was normal - It cannot be said that appellant was deprived of his senses even temporarily. See.**Ram DeoChauhan alias Raj NathChauhan Vs. State of Assam, 2000 (2) ALT(CRl.)(SC) 142 (D.B.).** K.T. THOMAS and R.P. SETHI,jj.

Application seeking issue of commission to make scientific investigation:- Application seeking issue of commission to make scientific investigation of disputed and admitted signatures and send Expert opinion is maintainable even in execution proceedings. See. **TheetlaVijayudu v. GaddamLakshmidevi and others, 2005 (5) ALT 655.**P.S. NARAYANA,j.

Expert opinion in suit on pronote:- Where a defence is taken that signature was taken on a blank pronote and the pronote is fabricated, it would be just and proper exercise of discretion to send the document to Handwriting Expert for his opinion as regards the age of inks in signature and body of pronote. See. **PenumasthaRamachandraRaju v. Gaddam Raja Sekhar Reddy, 2005 (6) ALT 49.** P.S. NARAYANA,j.

Genuineness of documents. Modes of proof:-Expert evidence regarding handwriting is not the only mode by which genuineness of a document can be established. The requirement in Section 67 of the Act is only that the handwriting must be proved to be that of the person concerned. In order to prove the identity of the handwriting any mode not forbidden by law can be resorted to - Of course, two modes are indicated by law in Sections 45 and 47 of the Act. The former points expert opinion to be regarded as relevant evidence and the latter points opinion of any person acquainted with such handwriting to be regarded as relevant evidence. There can be other modes through which identity of handwriting can be established. See. **Gulzar Ali and others Vs. State of Himachal Pradesh, 1997 (6) ALT (DN) 8.2**. K.T. THOMAS and M.K. MUKHERJEE,jj

CONCLUSION:-

The opinion of an Expert is only intended to enable the Court to form its opinion. An Expert merely tenders evidence and does not decide the issue. No Court should mechanically without application of mind surrender its will and independence of judging properly the fact in issue to the judgment of an Expert. As the Court is not technically trained or qualified to indulge in comparison of signatures and thumb impressions and as any comparison with naked eye by Court may be unsafe to arrive at truth. When the opinion of expert will be more helpful to lead evidence by both parties and to come to appropriate conclusion by Court, then it is essential to send the disputed document to expert for opinion. However, as was held in M. Pentaiah Vs. B. Parameshwar, 2012 (6) ALT 650, Court need not refer every document to Expert's opinion on mere asking unless Court opines that the opinion of Expert is necessary. Further, it is ell-settled law that Courts can refrain from allowing applications made for sending disputed documents for Expert's opinion if the parties are not diligent enough and if there are no bona fides behind filing of such applications. The reason is such that Section 45 of Evidence Act does not cast an obligation on Courts to send a disputed document for Expert's opinion as a matter of course. It was laid down in Gowri Shankar Vs. J.L. Babu and another, 2012 (3) ALT 287. In fact, expert opinion is only opinion evidence to be considered in the light of other admissible evidence. It is also well-settled law that opinion of expert can be sought only by sending the signature of a party on a disputed document for comparison with the one on an undisputed document and not with the signature on a document executed subsequent to disputed document. Let me conclude this article highlighting the principle that when a party opts to file an application to send disputed document to Handwriting Expert for comparison, if the expert's opinnion is essential to reach just conclusion, it is essential to allow such application in the interests of justice as it would not cause any prejudice to either party and as it also helps the Court to make comparison itself. **The opinion of an expert is only relevant, but not conclusive.**

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Superintending Engineer (2nd defendant) stated in Ex.B1 that before the work entrusted to plaintiff was taken up, it was better to provide 200 mm thick compacted gravel base and one layer of metal work with 65 mm HBG at an estimate cost of Rs.7,00,000/- and requested for permission to undertake the additional work as special repairs programme. In Ex.B2 the Engineer-in-Chief while criticizing the 2nd defendant and his subordinate officers for entrusting the work without proper inspection, directed the 2nd defendant to close the contract and submit the estimate for scrutiny with the CBR values. So, at the outset, it can be stated that 2nd defendant also ultimately came to the conclusion that the contract work entrusted to the plaintiff could not be executed because of the devastating cyclone occurred on 07.05.1990.

10. It is to be noted that as per the correspondence among defendants, the original work cannot be commenced as planned without first undertaking special repairs to the road because the base of the road was totally damaged and therefore, the work entrusted to the plaintiff cannot be undertaken without first completing special repairs. Having regard to this factual position emanated from the pleadings and evidence, there is no demur that the contract was frustrated due to Vis Major.

11. Section 56 of the Indian Contract Act, 1872 deals with the Doctrine of Frustration. It reads thus:

> "56. **Agreement to do impossible act**—An agreement to do an act impossible in itself is void.
>
> **Contract to do act afterwards becoming impossible or unlawful**—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> **Compensation for loss through non-performance of act known to be impossible or unlawful.**—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

The first paragraph of Section 56 provides that an agreement to do an act impossible in itself is void. The 2nd paragraph provides a contract to do an act become unenforceable (a) if the contract is impossible or (b) for reasons of some events which the promisor could not prevent. It also provides it becomes unenforceable when the act becomes impossible or unlawful. The third paragraph places a liability on the promisor to compensate the promisee where the promisor knew, or with reasonable diligence might have known, and the promisee did not know that act of promise was impossible or unlawful.

12. The Apex Court in **Satyabrata Ghose vs. Mugneeram Bangur and Company (**AIR 1954 SC 44) observed as follows:

> "Para-9. The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and unless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.

13. The Doctrine of Frustration was well delineated in a recent decision of High Court of Madras in **Puravankara Projects Limited vs. Galaxy Properties Private Limited (**MANU/TN/0864/2018)as under:

"**Para-60**: The doctrine of frustration is really an aspect or law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and comes within the purview of Section 56 of Indian Contract Act. It would be incorrect to say that Section 56 applies only to cases of physical impossibility. Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The doctrine of frustration of the contract is applied on the subsequent impossibility of the agreement when it is found that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. When such an event or change of circumstances occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, court can pronounce the contract to be frustrated. For that purpose Court has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are only evidences. On the evidence Court has to conclude whether the changed circumstances destroyed altogether the basis of the object. When there is frustration, the dissolution of the contract occurs automatically. It does

not depend on the ground of repudiation or breach or on the choice or election of either of the parties. It depends on the effect of what has actually happened on the possibility of performing the contract.

Para-61: The doctrine of frustration comes into play when a contract becomes impossible of performance after it is made on account of circumstances beyond the control of the parties. It is a special case of discharge of the contract. In the event of frustration of contract, the contract comes to an end and future performance is excused on both sides. To attract Section 56 of the Indian Contract Act, the following conditions must be fulfilled. (1) There should be a valid and subsisting contract between the promisor and promisee. (2) there must be some part of the contract yet to be performed (3) the contract after it is entered, becomes impossible to be performed. (4) the impossibility is by reason of some event which the promisor could not prevent (5) the impossibility is not induced by the promisor or due to his negligence."

14. Applying the above precedential jurisprudence, it is clear in the instant case neither party had foreseen the impending devastating cyclone when they entered into contract. Further, the aftermath of cyclone was such that the original contract could not be fulfilled in its original form without undertaking the special repairs. Thus, as already discussed supra, the contract can be said to be frustrated within the meaning of Section 56 of Indian Contract Act.

This point is answered accordingly.

15. **POINT No.2**: What remains for determination is whether the defendants are liable to pay compensation to plaintiff for rescinding the contract vide Ex.B2. The vehement contention of the plaintiff is that he advanced monies for procuring material which he cannot get back and further, he suffered loss of estimated profit on execution of contract and therefore, he deserves compensation. It is to be noted that he will deserve if either the agreement takes care of the present situation or his case falls within the ambit of paragraph-3 of Section 56. Coming to Ex.A1, in spite of intensive study, I find no clause in the agreement speaking about the payment of compensation when either party fails to perform the contract on account of Vis Major or due to other reason. The contract is silent and therefore, we have to rest upon Section 56 of Contract Act. The third paragraph of Section 56 ordains, a promisor to pay the compensation to the promisee only in the circumstances when the promisor knows and promisee did not know that the performance of contract is impossible or unlawful. In such an instance the promisor must pay compensation to promisee for any loss sustained by him due to nonperformance.

16. In Firm of **Hussainbhoy Karimji vs. Haridas and others (**AIR 1928 Sindh 21) it was held thus:

"Para-23:…. The question whether compensation is payable or not

depends not merely on (i) whether it can in an abstract manner be said that the act agreed to be done is impossible (in itself) or unlawful, but upon (ii) the knowledge as to the act being impossible or unlawful, as well as the promisor using reasonable diligence in obtaining that knowledge; but this knowledge or absence of diligence must be coupled with (iii), the want of knowledge on the part of the promisee; and finally it depends also upon (iv), whether the promisor could have prevented that event which renders the act unlawful; in particular if the promisor knew, or with reasonable diligence might have known and the promisee did not know, that the act promised to be done was (or semble would become) impossible or unlawful, compensation must be made.

The real question that must be considered, when it has to be determined whether S.56 is applicable or not in any suit, except where the contract is sought to be specifically enforced, is not whether the contract was or became void, but whether the promisor has to make compensation for non-performance.

Anticipating the result of what I am about to say, I might add a fourth conclusion: that the substance of S. 56 (viz., the payment of compensation being excused) can only apply when there is no contract to the contrary, and that this is but stating in other words that S. 56 must be read (when possible) as an implied term in contracts."

17. In the instant case, since the contract was frustrated because of cyclone i.e. Vis Major and neither party can be attributed with the pre-knowledge of the said event, the defendants cannot be mulcted with compensation on the ground that the plaintiff incurred some expenditure and suffered damage. The law does not permit awarding compensation in such instance. So, on a conspectus of facts and evidence, I find no illegality or perversity in the judgment of the trial Court.

18. In the result, the appeal is dismissed by confirming the judgment of the trial Court in O.S.No.66 of 1993. No costs.

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

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2018(2) L.S. 227 (Hyd.)

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

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

G. Shyamlal ,,Appellant

Vs.

G. Ishwarji & Ors., ..Respondents

TRANSFER OF PROPERTY ACT, Sec.106 - Appeal preferred by Defendants/Appellants against Judgment of Trial Court, where in Plaintiff/Respondent filed a suit for declaration of title, recovery of possession, recovery of arrears of rents – Plaintiff had purchased suit property and constructed a building comprising of two shops on ground floor - Municipal Council assessed tax for suit building in the name of the Narsoji/Plaintiffs brother, on basis of mistaken representation made by tenants of plaintiff – Municipal Council refused to change the name - Tenants failed to pay rents - Plaintiff got issued notices terminating tenancy and claiming arrears of rents.

Held - Entries in revenue records, tax receipts are not proof of title - Plaintiff discharged the burden cast upon him by proving his title to the property - Plaintiff is entitled to a mandatory injunction to get his name mutated in the municipal records as the owner of the property – Appeal stands dismissed.

Mr.P. Venugopal, Advocate for the Appellant.
Mr.O. Manohar Reddy, V.N. Ansari, Advocates, Advocate for the Respondents.

J U D G M E N T

This appeal is filed against judgment and decree dated 29.01.1999 in OS.No.49 of 199 which is filed for a declaration of title, recovery of possession, recovery of arrears of rents etc., on the file of the District Judge, Nizamabad.

For the sake of convenience, the parties are referred to as they are arrayed in the suit.

The brief facts of the case are as follows:

The plaintiff and his elder brother Narsoji were native of Khajapur Village of Medak District. The plaintiff came over to Nizamabad and secured private employment in the year 1959. His brother Narsoji shifted to Nizamabad in the year 1964. On the advice of Narsoji, the plaintiff had purchased the plaint schedule site measuring 525 sq.yards from A.Rajaiah under a registered sale deed No.2187 of 1977 dated 27.04.1977 for a consideration of Rs.16,000/-. On the application made by the plaintiff, the then Gram Panchayat, Kamareddy granted permission to the plaintiff for construction of a shop and residential building in its proceedings No.63/1983/A3, dated 25.09.1983. The plaintiff constructed the front portion of the ground floor comprising

two shops. On up-gradation to Municipal Council, the Kamareddy Municipal Council assessed the tax for the suit building in the name of the Narsoji, on the basis of mistaken representation made by the tenant of the plaintiff. Coming to know of it, the plaintiff applied to the Municipality/defendant No.5 to change the name. Defendant No.5 refused to change the name in the records. Defendant No.4 is the son of Narsoji. The front portion shops were leased out to defendant Nos.1 and 2 on a monthly rent of Rs.1,500/-. The defendant paid rents upto the month of December, 1990. Defendant Nos. 1 and 2 failed to execute the lease deed and to pay rents from 01.01.1991. Then the plaintiff got issued notices to defendant Nos. 1 and 2. Thereafter, they inducted defendant No.3 into possession of the suit premises illegally. The plaintiff got issued notice under Section 106 of the Transfer of Property Act to defendant Nos.1 to 4 on 02.03.1993 terminating the tenancy and claiming arrears of rents. There was no response. Hence, the suit.

Defendant No.3 filed his written statement stating that the suit property was in the custody of defendant No.4 and he was looking after the affairs of the suit site and building. Defendant No.4 represented that he was one of the owners of the suit premises. Defendant No.3 verified from the Municipal Council, Kamareddy and found that the suit building stood in the name of the father of defendant No.4. Defendant No.3 entered into an agreement with defendant No.4 on 24.05.1990. Defendant No.3 established a hotel in the name and style of 'Udipi Hotel Sri Krishna Prasad' and the inaugural function was held on 29.09.1990. Defendant No.4 brought the plaintiff to the inaugural function. Since defendant No.4 was acting at the instance of the plaintiff, defendant No.3 presumed that the plaintiff and the defendant No.4 were the co-owners of the suit premises. Defendant No.3 paid rents to defendant No.4 upto the date of filing of the suit. The rents were paid with the consent of the plaintiff. The notice issued by the plaintiff under Section 106 of the Transfer of Property Act is not in conformity with the provisions of the Transfer of Property Act. The notice is illegal and cannot determine the lease. Defendant Nos.1 and 2 filed memo adopting the written statement of defendant No.3.

Defendant No.4 filed his written statement stating that the plaintiff and the father of defendant No.4 had opened a hotel in Nirmal and jointly ran that hotel till the year 1969. In or about the year 1973 Narsoji purchased an open plot measuring 525 sq.yards in Kamareddy from Angul Rajaiah S/o Laxmaiah, R/o Kamareddy. But before registration of the plot in his name, the mother of Narsoji expired. So registration could not be affected. Later, in the year 1977, Narsoji got the plot registered in the name of the plaintiff out of love and affection. The plaintiff neither paid the sale consideration nor met the expenses for registration of the sale deed. Defendant No.3 is in possession of the suit premises as the tenant of defendant No.4 paying rent to him. Narsoji got the property recorded in his name in the Gram Panchayat records. He was paying the property tax in respect of the suit property. Narsoji died in the year 1987. Defendant No.3 has been paying rent to defendant No.4. The plaintiff has no right

to claim any arrears of rent as he is not the owner of the suit building. The notice given by the plaintiff did not terminate the lease in favour of defendant No.3. The plaintiff is not entitled to the relief of declaration or for possession of other reliefs.

On the basis of the above pleadings, the lower Court framed the following issues for trial:

(1) Whether the plaintiff is entitled to declaration of title, recovery of possession over the scheduled property?

(2) Whether the plaintiff is entitled to recover arrears of rent of Rs.78,300/-?

(3) Whether the plaintiff is entitled to mandatory injunction in respect of the suit premises?

(4) Whether the plaintiff is not the owner and possessor of the scheduled property?

(5) Whether the schedule property was purchased by the father of the fourth defendant and latter he constructed mulgies in the year 1983 to 1985?

(6) Whether the defendant (third) is in possession of the suit property as a tenant?

On behalf of the plaintiff, PW.1 was examined and Exs.A.1 to A.15 were marked. For the defendants, four witnesses were examined and Exs.B.1 to B.71 were marked. After the trial and hearing the parties, the District Judge, Nizamabad passed the impugned judgment holding that the plaintiff is entitled to a decree as prayed for. The suit was thus decreed. It is this decree that is now challenged in the present appeal.

This Court has heard Sri P.Venugopal, learned counsel for the appellant and Sri O.Manohar Reddy and Sri V.N.Ansari, learned counsel for the respondents.

Learned counsel for the appellant/defendant 4 argued the matter and also submitted a written note along with the case law. The gist of the learned counsel's submission is that the plaintiff miserably failed to prove his title to the property. It is his contention that the burden cast upon the plaintiff was not discharged at all and that the plaintiff was not able to explain the passage of consideration under Ex.A.1. The learned counsel argued that the mere fact that a sale deed is in the name of the plaintiff will not enable him to get a declaration unless he proves that he actually paid the consideration. Learned counsel for the appellant/defendant No.4 also pointed the fact that the municipal taxes were paid over a period of time in the name of defendant No.4. The books of accounts that were exhibited show that appellant/defendant No.4 spent money for construction of the building and this further strengthens the case of the appellant/defendant No.4 that he is the actual owner of the premises in question. Learned counsel also argued that the suit filed is hopelessly barred by time and that under Section 3 of the Limitation Act, the Court has a duty to dismiss the suit on the ground of limitation.

In reply to this, the learned senior counsel Sri Ravinder Rao appearing for the plaintiff/ respondent has argued that the plaintiff's

case is proved by Ex.A.1-sale deed, which is a registered sale deed in the plaintiff's name. Learned senior counsel argued that Exs.A.1 to A.3, A.5, A.6 and A.13 to A.15, apart from the admissions made in the pleadings and the evidence, go to show that the defendants themselves recognize the title of the plaintiff. Learned counsel also argued that the admissions are sufficient evidence along with the title deed Ex.A.1 to prove the plaintiff's case for a declaration. The learned counsel also argued that it is the defendants who set up a plea of nominal nature of the sale deed and therefore, he argued that it is not for his clients to prove the "nature" of the sale deed-Ex.A.1. Learned counsel also argued that the suit is well within time for the relief sought and also argued that in the absence of pleading, the plea of limitation cannot be heard or considered.

This Court, after hearing the submissions of the learned counsels and their concentration on the issue of title, is of the opinion that issue Nos.4 and 5 are to be decided first since they form the crux of the arguments of the learned counsels. Both these issues relate to the title of the plaintiff to the suit property. If these issues are decided in favour of one of the party, all the other issues can be decided as a necessary corollary to this. Learned counsel for the appellant/defendant No.4 argued that Ex.A.1-sale deed by itself does not prove title of the plaintiff. It is his case that the property was purchased in the name of the plaintiff by father of defendant No.4/appellant out of love and affection. The expenditure for registration of the sale deed was not borne by the plaintiff. Learned counsel also argued that defendant No.4 acted as the owner of the property subsequent to the death of his father, leased out the same to the other defendants and the municipal tax was also assessed in the name of defendant No.4 as can be seen from the large number of municipal receipts, which are filed and marked as exhibits in the 'B' series. The rental receipts, which are filed by the appellant/defendant No.4, also show that he has been renting out the property to the tenants. The demand notices received from the municipality also strengthen the plaintiff's case. In addition, the learned counsel also pointed out that the account books filed by him as Ex.B.64 etc., show that the expenditure for the construction of the building was borne by the appellant/ defendant No.4 and his father. Learned counsel argued that nothing contrary to these documents has been filed and that therefore, the plaintiff failed to prove his title while the defendant proved his title and possession.

In reply thereto, learned counsel for the appellant submitted that the registered sale deed of 1997-Ex.A.12, the Gram Panchayat approvals by Exs.A.2 to A.3, the notices issued by the municipality to the plaintiff show the plaintiff's title, possession and enjoyment of the property. Learned counsel also pointed out that the admissions in the written statement are also enough to grant a decree in favour of the plaintiff.

This Court, on an examination of the pleadings, notices that defendant No.3, who is inducted as a tenant and has filed a written statement, wherein he pleaded as follows:

> "It was represented to this defendant by defendant No.4 that he too was one of the owners of the suit premises."

Similarly, he states that since defendant No.4 was acting at the instance of the plaintiff, the defendant presumed that the plaintiff and defendant No.4 are the co-owners of the suit schedule property. The learned senior counsel pointed out that the admission of tenant in a written statement filed in a Court deserves to be given due weight. As per the learned senior counsel, defendant No.3 admitted that the plaintiff has title to the property. But he presumed that he was a joint owner because of the fact that defendant No.4 dealt with the tenant.

Learned counsel also pointed out that in the written statement of the appellant/ defendant No.4 it was initially pleaded that his father purchased the property in the name of the plaintiff out of love and affection for his nephew. The learned counsel points out that in the cross-examination of PW.1, a suggestion was put to him, (when he was crossexamined, after being recalled as per order in IA.No.1494 of 1997) that the registration was affected in 1977 from "out of the joint family funds". Learned senior counsel pointed out that there is no consistency. The later suggestion clearly goes to show that the property according to the cross-examination was purchased from out of the joint family funds. The learned senior counsel also points out the following admissions in the cross-examination of DW.1:

> "I never obtained consent of the plaintiff in writing about the payment of rents to D.4. There is no evidence either orally or written to the effect that the plaintiff has consented for the transaction between me and D.4. It is a fact that except property receipts, there is no other record at the time of transaction that D.4 was the owner of the suit premises." Learned counsel also argued and pointed out that the present appellant was examined as DW.2 and when he was examined in chief on 13.11.1997, he deposed as follows:

> "In 1977 my father got the said plot registered in the name of plaintiff. My father paid sale consideration of Rs.9,600/- and he also borne the registration expenses in respect of the said plot. I do not know why my father got the said plot registered in the name of plaintiff."

The learned counsel argued that in the written statement the plea was taken that the sale deed was registered out of love and affection. But in the evidence, the witness says that he does not know why the property was registered in the name of the plaintiff. He also points out that Ex.A.1-sale deed, ex facie, shows that the consideration is Rs.16,000/- whereas, DW.1 deposed in the deposition that sale consideration of Rs.9,600/- was paid. Learned counsel also pointed out the cross-examination of the very same witness on 15.11.1997, wherein he deposed as follows:

> "The entire consideration for suit plot was paid in the year 1973 in October or November. As my father was not

> having money for registration charges of the suit site, hence he got it registered in 1977. There is no date for the payment of Rs.8100/- on one occasion and Rs.1,500/- on another occasion in Ex.B.63."

In view of this, the learned counsel for the respondents argued that the appellant/ defendant No.4 has come up with contradictory stands at different points of time. It is the appellant/defendant No.4, who raised the plea that the property was purchased nominally in the name of the plaintiff. Therefore, the learned senior counsel submits that a duty was cast upon defendant No.4 to discharge the burden. He points out that the burden is not discharged at all. Learned senior counsel also pointed out that to prove the nominal nature of the sale deed, the defendants have examined defendant No.3, who is an attestor to the sale deed- Ex.A.1. In the chief-examination itself, the witness deposes as follows:

> "As late Narsoji taken me to Registrar Office, hence I "thought" the suit property will be of Narsoji. The plaintiff used to come to Ramareddy when there were family functions."

Again in the cross-examination, on 19.11.1997, the witness clearly states that he does not know the contents of the said document. He also deposes that he was told that the consideration was paid, but he do not know on what date and how many days or months earlier to execution of document the consideration was paid. In the penultimate line of the cross-examination, he also states that there was no talk by him or discussion with late Narsoji regarding title of the suit house.

The learned senior counsel, therefore, argued that the appellant/defendant No.4 did not have any personal knowledge about Ex.A.4 and he took contradictory stands. Even the witness examined by them to prove their contention deposed that he had no knowledge about the title, or about the passage of sale consideration. Hence, the submission of learned senior counsel is that the defendants failed to prove their case.

In support of the plaintiff's case, the learned senior counsel points out that Ex.A.1–sale deed has been filed in original by the plaintiff. Learned counsel argues that a registered document carries a certain sanctity. He relies upon Section 114(e) of the Evidence Act and argues that there is a presumption that an Official act i.e the registration has been validly done. In addition, this Court notices that **Prem Singh and others v Birbal and others** (2006) 5 SCC 353)is the relevant case on this point wherein the Hon'ble Supreme Court held as follows:

> **"13.** There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption."

Learned counsel also argues that after the sale deed was obtained in 1977, the plaintiff applied to the Municipality seeking permission for construction and the same

was granted by Exs.A2 and A.3, which are of the year 1983. According to the learned counsel, Ex.A.4-income tax return also shows the rent paid as income. Exs.A.5 and A.6 are the applications made by the plaintiff for further construction in the year 1991-92 which are in the knowledge of defendant No.4. Learned counsel points out that appellant/defendant No.4 in his cross-examination on 15.11.1997 categorically admits as follows:

> "It is true that plaintiff has taken permission for construction of first floor on 11.02.1991. It is also a fact that in first floor some pillars are raised and after dispute started, the further construction work was stopped."

Learned counsel for the appellant argues that the various documents filed and the actions taken are in consonance with the ownership of the property and that therefore, the plaintiff has proved his case.

This Court, on an examination of the facts and considering the submissions, notices that Ex.A.1 is the registered sale deed in favour of the plaintiff. The subsequent actions of the plaintiff in applying the municipality, the admissions of the defendants as to "co-ownership" in the pleadings, that defendant No.4 was acting for the plaintiff, the admission of the appellant that the plaintiff applied for the municipal plan for the second floor in 1991 which is long after Ex.A.1 sale deed strengthens the case of the plaintiff. The plaintiff, in the facts and circumstances of the case, has proved that he is the lawful owner of the suit schedule property. The defendant has not discharged his burden. The tenant himself admits the plaintiff's title. The co-ownership set up by the defendant is clear from the pleadings. The plaintiff's case is that as he was living away, defendant No.4 looking after the property. As can be seen from the plaint, because defendant No.5-municipality wrongfully mutated the name of defendant No.4, the present litigation arose. Because of this wrongful mutation, a suit had to be filed against the tenant; the present appellant who setup a rival claim, against defendant No.5/Municipal Council, Kamareddy etc.

This Court, on a review of the entire evidence and documents, holds that the defendants were not able to discharge the burden cast upon them. The combined affect of admissions in the written statement, contradictory stands of the defendant about the consideration and the existence of Ex.A.1-sale deed and the applications for construction etc., is that the plaintiff is the owner of the property.

The other point that is urged by the learned counsel for the appellant is about the books of accounts, which are filed and marked in this case. These documents are filed to show that defendant No.4 spent some money for construction of the property. Exs.B.63 and 64 are the said documents. These two documents are supposedly account books, which are maintained by defendant No.4. However, the appellant admits in his cross-examination that other pages of the book are closed by pasting with gum. Similarly, in Ex.B.64 also pages 1 to 24 are closed with pins. No explanation is forthcoming why these documents are

closed with gum and pins. In addition, books of accounts, without supporting entries, cannot be relied upon as authentic evidence. The element of self-interest cannot be ruled out when a book of account is prepared. It is for this reason that the Courts insist on corroboration of entries by calling upon the party to file supporting entries for this corroboration. The entries by themselves cannot be treated as proof. In **Smt.Chandrakantaben & Another v Vadilal Bapalal Modi & Others (**AIR 1989 SC 1269)the Hon'ble Supreme Court clearly held that unless the entries in the account books are supported by evidence they cannot be relied upon. Even Section 34 of the Evidence Act says that the entries by themselves are not enough to fasten liability.

In the case on hand, these documents do not inspire confidence. Even otherwise, the appellant admits as follows:

'According to me, I spent Rs.1,87,000/- for said construction. I have not maintained any accounts for construction of rear portion.'

Therefore, this Court is of the opinion that entries in these documents cannot support the defendants case of proving his title to the property.

Learned senior counsel rightly pointed out that in para 12 of the impugned judgment, the lower Court has correctly considered the heading of the document also and came to a conclusion that if the account book is treated as correct, it shows that the account was maintained for the plaintiff. In addition, the learned senior counsel rightly pointed out that as per the settled law, the entries in the revenue records or municipal tax records cannot support the case of title. This Court does not seek to repeat the law on the subject. It is so well settled that entries in revenue records, tax receipts are not proof of title. The case of the plaintiff is that he has title but defendant No.5 wrongly assessed tax in the name of defendant No.4. This is why the suit is filed for a relief against defendant No.5 also.

Therefore, on a review of the facts and submissions made, this Court is of the opinion that the plaintiff discharged the burden cast upon him by proving his title to the property. Hence this Court upholds the findings of the Court below on issue Nos.4 and 5. As a consequence of these findings on issue Nos.4 and 5, the plaintiff is entitled to relief of declaration of title, recovery of possession of the suit schedule property, which is issue No.1. As a consequence to these decisions on issue Nos.4 and 5, the plaintiff is entitled to a mandatory injunction to get his name mutated in the municipal records as the owner of the property. Hence, issue 18 No.3 is also decided in favour of the plaintiff/ respondent No.1.

Issue Nos.2 and 6 were not really argued by the learned counsels and no serious dispute was raised on these two issues which also of a corollary to other issues. This Court upholds the findings on issue Nos.2 and 6 which are discussed in paragraphs 16 to 21 of the judgment in question.

PLEADING ON LIMITATION:-

The last point that survives for consideration is the question of limitation. Learned counsel for the appellant vehemently argued that the suit is barred by time. Learned counsel relied upon **Harijana Chinna Thippanna and another v Smt. Harijana Eramma (**2011 (5) ALD 53)and argued that even though a separate issue was not framed, still by virtue of Section 3 of the Limitation Act, the defendant is entitled to argue that the suit is barred by time. In addition to **Harijana Chinna thippanna's** case he also relies upon **A.Papa Rao and Others v The Jeypore Sugar Co. Ltd. and Others (**AIR 2003 Orissa 146)and also relies upon Articles 58 and 120 of the Limitation Act.

In reply thereto, learned counsel for the respondent pointed out that there is no pleading in the written statement about the two articles of the Limitation Act mentioned in the oral submissions. Para 5 of the written statement of the appellant is to the following effect: 'the contents of para 6 are not correct. The suit is not within time.'

The learned senior counsel appearing for the plaintiff/respondent relies upon judgment of the Hon'ble Supreme Court of India reported in **Narne Rama Murthy v Ravula Somasundaram and Others (**2005 (6) SCC 614)**.** He points out that in the said judgment, the Hon'ble Supreme Court held as follows:

"5. We also see no substance in the contention that the Suit was barred by limitation and that the Courts below should have decided the question of limitation. When limitation is the pure question of law and from the pleadings itself it becomes apparent that a suit is barred by limitation, then, of course, it is the duty of the Court to decide limitation at the outset even in the absence of a plea. However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved."

His contention, therefore, is that in this case, limitation is a mixed question of law and fact, that it is a matter of evidence and that there should be clear/sufficient pleadings on limitation, since it has the effect of throwing out the plaintiff's suit in its entirety.

This Court also notices the following two judgments in addition to the judgments cited by the learned senior counsel. **Kiritsinhji Bhagwatsinhji v Pharamroj Pirojshah Wadia (**AIR(Gujarat) 1970 284)and **Food Corporation of India and Others v Babulal Agrawal** (2004) 2 SCC 712)**.**

In **Kiritsinhji Bhagwatsinhji'**s case, the Hon'ble Gujarat High Court held as follows**:-**

> "…….It is true that Section 3 of the Limitation Act requires that although limitation has not been set up as a defence, every suit instituted after the period of limitation prescribed therefore by the First Schedule to the Limitation Act shall be dismissed. But, this cannot be taken to mean that when limitation has not been

specifically pleaded in the defence and the facts are not apparent on the face of the record, the Court is bound to speculate upon possible questions of limitation that may arise in the suit……."

In **Babulal Agrawal's** case, the Hon'ble Supreme Court held as follows:

"…….the learned counsel for the defendant appellant, however, relying upon Section 3 of the Limitation Act submits that it was the duty of the Court to see as to whether the suit was within limitation or not. A suit filed beyond limitation is liable to be dismissed even though limitation may not be set up as a defence. The above position as provided under the law cannot be disputed nor it has been disputed before us. But in all fairness it is always desirable that if the defendant would like to raise such an issue, he would better raise it in the pleadings so that the other party may also note the basis and the facts by reason of which suit is sought to be dismissed as threshold as to whether the suit is within limitation or not. There is always an office report on the limitation at the time of filing of the suit. But in case the Court does not prima facie find it to be beyond time at that stage, it would not be necessary to record any such finding on the point much less a detailed one. In such a situation at least at the appellate stage, if not earlier, it would be desired of the defendant to raise such a plea regarding limitation. In the present case except for making a passing reference in the list of dates/synopsis no such ground or question has been raised or framed on the point of limitation. It is quite often that question of limitation involves question of facts as well which are supposed to be raised and indicated by the defendant. The objecting party is not supposed to conveniently keep quiet till the matter reaches the Apex Court and wake up in a non-serious manner to argue that the Court failed in its duty in not dismissing the suit as barred by time……"

In line with these two judgments and in line with what is cited by the Hon'ble Supreme Court in **Narne Rama Murthy's case** (5 supra), this Court holds that sufficient and adequate pleading is necessary in cases where limitation is a mixed question of fact and law. Where from an ex facie reading of the pleading, it appears to the Court that the lis is barred by time then a pleading may not be necessary as the facts are clearly visible and clear to uphold the plea of limitation. But where the question of limitation is a mixed question of fact and law, where there is an issue about the applicable article of the Limitation Act to the facts of the case and the suit does not appear to be barred by limitation on the face of it, then adequate and proper pleading is necessary to show that the suit is barred by time. This is the correct interpretation of Section 3 of the Limitation Act in the view of this Court.

Coming to the facts of this case, the

pleading in para 5 of the appellants written statement is a very bald pleading bereft of any details whatsoever. The Hon'ble Supreme Court in **Babulal Agrawal's case (7 supra)** also held that such a pleading on limitation is not enough.

This Court, therefore, holds that the appellant/defendant No.4 cannot raise a plea of limitation or pursue the same without laying an adequate foundation for the same in his pleadings.

Even otherwise, on facts, this Court holds that the suit which is filed in June, 1993 is within time as the cause of action in the suit arises after defendant No.5 refused to change or mutate the name of the plaintiff and the tenant/defendants defaulted in payment of rents. These incidents occurred in 1991 and the suit that is filed in 1993 is in time.

For all these reasons, this Court holds that there are no merits in the appeal and the judgment and decree of the lower Court are confirmed in toto. The plaintiff/respondent in appeal is entitled to all the reliefs that he has prayed for in the plaint.

The appeal is, therefore, dismissed. In the circumstances of the case, no costs.

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

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2018(2) L.S. 237 (Hyd.)

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

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

Marripudi Narasimha Rao & Anr., ..Appellants

Vs.

Maripudi Chenchaiah & Ors., ..Respondents

EVIDENCE ACT, Sec.13 – Custom – illatom son-in-law.

Held - It is incumbent on party setting up a custom to allege and prove the custom on which he relies - It must be established inductively and not by a priori methods - No pleading no evidence - Neither the custom nor full facts which would establish rights of the illatom son-in-law in this case and in the community of the plaintiffs are pleaded or proved - None of the facts which are considered relevant under Section 13 of Indian Evidence Act are proved in this case in relation to custom - Appeal stands dismissed.

Mr.G. Pedda Babu, Advocate for the Appellants.
Mr.Y.V. Ravi Prasad, Advocate for the Respondents.

AS. No.1203/2001 &
TRAS. No. 804/2017 Date:25-6-2018

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

These first appeals are filed against common judgment dated 19.02.2001 in OS.No.52 of 1994 and OS.No.8 of 1998 on the file of the Court of the Additional Senior Civil Judge, Ongole. As these are first appeals, the parties are referred to as plaintiffs and defendants as in the lower Court only.

The brief facts of the cases are that:

OS.No.52 of 1994 is filed by the plaintiffs against defendant Nos.1 to 4 for partition of the plaint properties into 12 equal shares and for allotment and separate possession of five such shares to them, for future profits and also for costs of the suit.

OS.No.8 of 1998 is filed originally as OS.No.465 of 1994 on the file of the District Munsif Court, Ongole, by the plaintiffs for grant of permanent injunction restraining the defendants and their men and relatives from interfering with their peaceful possession and enjoyment of the plaint schedule properties therein and also for costs of the suit.

The averments in the suit OS.No.52 of 1994 are that the plaintiffs are a father and daughter. Defendant No.1 is the younger brother of the first plaintiff. Defendant Nos.3 and 4 are the sisters of the first plaintiff and defendant No.1. Defendant No.2 is the undivided son of defendant No.1. Sri Venkata Subbaiah, who is the father of the first plaintiff and defendant No.1, died about three (3) years prior to the suit. Their joint family owns the plaint 'A' schedule immovable properties and plaint 'B' schedule movable properties. The undivided 1/3rd share in the joint family property of late Sri Venkata Subbaiah devolved equally upon the first plaintiff and defendant Nos.1, 3 and 4. Thus, the plaintiffs became entitled to 5/12th share and the defendant Nos.1 and 2 together entitled to 5/12th share, while the defendant Nos.3 and 4 each are entitled to 1/12th share in the suit properties, consequent to the death of Sri Venkata Subbaiah.

The first plaintiff came to know that prior to the death of his father Sri Venkata Subbaiah, a fraudulent and nominal sale deed dated 16.01.1990 was brought into existence in respect of the western Ac.4.50 cents of land in item No.1 in respect of entire items 2 and 3 of the plaint schedule lands for Rs.99,500/- in favour of defendant No.2. Late Sri Venkata Subbaiah was very old and since two years prior to his death he was not mentally sound and was not in disposing state of mind. Neither the defendant No.2 nor his maternal grandfather Sri Venkaiah had the capacity to pay the huge sale consideration of Rs.99,500/- under the said sale deed to Sri late Venkata Subbaiah. The said sale transaction was kept secret as the entire suit property was joint in possession of the first plaintiff and the defendants and late Sri Venkata Subbaiah. The said sale transaction is null and void and is non-est in the eye of law. The said sale document is also not acted upon. The plaintiffs are entitled to ignore the said sale transaction. Hence, the suit was filed for partition.

Defendant No.1 in his written statement contended that the suit schedule properties

are not ancestral properties; that items 1 and 3 of the plaint 'A' schedule properties originally belong to Sri Idupulapati Chenchaiah, who died and that all his properties devolved upon his only daughter Smt. Audemma. On the death of Smt. Audemma intestate, all her properties devolved upon her two daughters namely Mahalakshmamma and Parvathamma and her only son Sri Venkata Subbaiah. Smt. Mahalakshmamma sold her 1/3rd share in item-1 of the plaint 'A' schedule property to him under a registered sale deed dated 02.05.1980 and Smt.Parvathamma sole her 1/3rd share in item-1 of plaint 'A' schedule property to defendant No.3 under a registered sale deed in the year 1990. Sri Murripaudi Venkata Subbaiah sold his 1/3rd share in items 1 and 3 and item-2, which was his self-acquired property to defendant No.2 under a registered sale deed dated 16.01.1990 and that all the suit properties are the self-acquired properties of himself and defendant Nos.2 and 3. Sri Venkata Subbaiah was hale and healthy and with sound mind till his death and that the documents executed by him are valid. The plaint 'B' schedule movable properties are not at all in existence. The plaintiffs have no share in the suit schedule properties and the plaintiffs have neither possession nor right over the suit schedule properties. The Court fee paid is not correct and the suit, which is not maintainable at all, may be dismissed with costs.

Defendant No.2 adopted the written statement of the defendant No.1.

Defendant No.3 in her written statement contended that the suit schedule immovable properties originally belonged to Sri Idupulapati Chenchaiah, who is her great-grandfather. Smt. Audemma, who is the only daughter of Smt. Late Chenchaiah became entitled to the entire properties after the death of Sri Chenchaiah. Smt. Audemma died intestate leaving behind her two daughters Smt. Mahalakshmamma and Smt. Parvathamma and a son Sri Venkata Subbaiah. Smt. Mahalakshmamma died issueless. Late Sri Venkata Subbaiah married Smt. Venkamma, who is the daughter of his sister Smt. Parvathamma. Subsequently, she (defendant No.3) was married to Sri Thirupathaiah, who is the son of Smt. Parvathamma, who was 25 years elder than her, that on account of the old age of her husband and her mother-in-law Smt. Parvathamma, she was looking after the agricultural operations of the schedule land. Smt. Parvathamma sold a portion of item-1 of plaint 'A' schedule property in her favour under a registered sale deed dated 25.01.1990. On the same day, defendant No.1 as guardian of his son, who is defendant No.2, sold a portion of item-1 of the plaint 'A' schedule property in her favour though the extents are separate, she has been enjoying the said extents as a single plot and that her father Sri Venkata Subbaiah sold his share in item No.3 of the plaint schedule house in favour her son. Ever since, she; her son and her husband have been in exclusive possession and enjoyment of the said house property by paying tax to the Gram Panchayat. From the beginning, the first plaintiff was hostile towards his parents, brother and sisters. The first plaintiff left the village long back to Piduguralla Village and other places by abandoning his right and share in the

properties of his father Sri Venkata Subbaiah. Prior to filing of the suit, the first plaintiff came to the suit village and began making false claims in the properties. When the first plaintiff and his brother-in-law tried to forcibly dispossess her from the plaint schedule properties, which have been exclusively belonging to her and her sons, she and her son filed OS.No.465 of 1994 (later numbered as OS.No.8 of 1998) on the file of the District Munsif Court, Ongole against the first plaintiff and others for grant of permanent injunction. The plaintiffs have no right to seek partition of item No.1 and a portion of house property under item-2 of the plaint 'A' schedule which have been in exclusive possession and enjoyment by her and her son and hence, the suit may be dismissed with costs. Defendant No.4 remained ex parte.

On the above pleadings, the following issues were settled for trial:

1. whether the plaintiffs are entitled for partition of plaint schedule properties into 12 equal shares and allot five such shares in their favour?

2. whether the first plaintiff abandoned his rights and shares in his father's properties?

The averments in OS.No.8 of 1998 (old OS.No.465 of 1994) on the file of the District Munsif Court, Ongole are virtually the same averments of the written statement filed by defendant No.3 in OS.No.52 of 1994. The plaintiffs therein filed the suit for grant of permanent injunction restraining the defendants and their men from interfering with the possession and enjoyment of the plaintiffs and the plaint schedule properties therein. The averments in the written statement of defendant No.1 are virtually the same averments in the plaintiff in OS.No.52 of 2004 filed by him and his daughter. A memo was filed on behalf of defendant Nos.2 and 4 adopting the written statement of defendant No.1.

On the above pleadings, the following issues were settled for trial:

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

(2) Whether the Court-fee paid is correct?

A joint memo was apparently filed in OS.No.8 of 1998 to try the said suit along with OS.No.52 of 1994 and to record the evidence in OS.No.52 of 1994. Therefore, the evidence in respect of both the suits were recorded in OS.No.52 of 1994.

In support of the claim of the plaintiffs in OS.No.52 of 1994, PWs.1 to 4 were examined and Exs.A.1 to A.7 were marked. On behalf of defendant Nos. 1 and 2, DWs.1 and 2 were examined and Exs.B.1 to B.12 were marked. The defendant No.4 in OS.No.52 of 1994 remained ex-parte.

The facts which are not in dispute in this case are the genealogy/relationship between the parties to the suit. Hence, the same is not being repeated.

This Court has heard Sri G.Pedda Babu, learned counsel for the appellants/plaintiffs in OS 52/94 and Sri Y.V.Ravi Prasad, learned counsel for the respondents.

The first plaintiff and his daughter (second plaintiff) filed the suit OS.No.52 of 1994 for partition of item 1 to 3 of the plaint 'A' schedule immovable properties and the 'B' schedule movable properties. They plead that the property should be divided into 12 shares and five such shares are to be allotted to them. As OS.No.52 of 1994 is the comprehensive suit, this Court proposes to take up the said suit first. Both in the lower Court and in the submissions before this Court, learned counsels also relied upon questions of title and partition first. Following the issues framed and the submissions made, this Court is of the opinion that issue No.1 in OS.No.52 of 1994 namely, "whether the plaintiffs are entitled to a partition as prayed for?" is the crucial issue in this entire lis and it should be decided first. The claim for partition is based upon the fact that the property in question is admittedly the property belonging to Idupulapati Chenchaiah. The claim of the plaintiffs is that Smt. Audemma's husband Sri Narsimham was an Illatom son-in-law of late Chenchaiah. Therefore, after the death of Sri Chenchaiah the property devolved upon the Illatom son-in-law of Sri Narasimham, who is father of the first plaintiff. The case of the plaintiffs is that the Venkata Subbaiah, S/o late Narasimham and the father of the plaintiff, got 1/3rd share which in turn devolved upon the present plaintiff and defendant Nos.1, 3 and others. Hence, the first plaintiff and second plaintiff together claim a 5/12th share in the properties.

Therefore, the first and foremost point to be determined is whether the Audemma succeeded to the properties or her husband acquired the properties as the illatom son-in-law.

The counsel for the appellants argued that the parties to the proceedings belong to the 'Kamma' community and that there is a custom of bringing in a boy as an illatom son in the absence of a natural born son. The learned counsel for the appellant argued that as per the said custom, N.Venkata Subbaiah was brought as an illatom son-in-law.

In reply thereto, the learned counsel for the respondents argued that there is no pleading at all of the existence of such a custom let alone evidence on the same and that the defendants do not agree that there is such a custom at all. Both the counsels referred to the extensive discussion in para 26 of the lower Court judgment, wherein case law and extracts from leading books were discussed in the impugned judgment. Both the learned counsels made submissions in this Court also about the existence/non existence of the custom and the taking of N.Venkata Subbaiah as illatom son-in-law.

Learned counsel for the respondents also strongly relied upon the judgment in **Bachhaj Nahar v. Nilima Mandal and Anohter (**2008 (17) SCC 491) and argued that there is no pleading about illatom son-in-law and that the lower Court mistakenly went into the issue of illatom son-in-law without adequate pleading.

On the other hand, the reply of the learned counsel for the appellants is that in the suit which is clubbed with OS.No.52 of 1994 namely OS.No.8 of 1998 there is adequate

pleading about the illatom son-in-law and this is the reason why the lower Court went into the question of illatom son-in-law.

This Court on an examination of the pleadings finds that in the plaint in OS.No.52 of 1994 there is absolutely no pleading about the "illatom" son-in-law. This is the more comprehensive case but there is no pleading about this "illatom" at all. The suit OS.No.465 of 1994, which is renumbered as OS.No.8 of 1998 is a mere suit for injunction filed by defendant No.3 in OS.No.52 of 1994. The succession by Audemma was clearly mentioned in the plaint in para 3(b). In that suit, the defendant had pleaded in paragraph 4 as follows: "By virtue of an oral arrangement which also amounts to an illatom arrangement" Venkata Subbaiah came as an illatom son-in-law. As per the appellants this pleading is sufficient in the facts and circumstances of the case. The learned counsel for the appellants argued that the pleading is enough and that both the parties were at issue on the issue of illatom son-in-law and that therefore, this Court has the jurisdiction to look into the same. He also relied upon **Syed Dastagir v. T.R.Gopalakrishnasetty (**AIR 1999 SC 3029) and argued that the pleadings cannot be treated as an expression of art and science and that the Court should look at the substance rather than content. The learned counsel for the appellants also argued that this Court is bound to look into the issue of the illatom son-ion-law. Despite the lack of pleading, both the parties, according to the appellants, introduced evidence.

For the plaintiffs in OS.No.52 of 1994, four (4) witnesses were examined as PWs.1 to 4. This Court notices that none of the witnesses deposed about the existence of such a custom particularly in the community to which the plaintiffs in OS.No.52 of 1994 belong. No caste elder or a senior citizen was examined to prove the existence of such a custom in the community to which the plaintiffs belong. In fact no evidence is given of the particular community to which the plaintiffs belong. No evidence of similar instances of "illatom son-in-law" were pleaded or proved. PW.1 is the grand son of Marripudi Narasimham @ Narasaiah, who supposedly came to the house of his father-in-law as illatom son-in-law. Obviously, PW.1 will not have personal knowledge of the said fact. He claims to have knowledge of the fact through his grand mother. PW.2 was examined to talk of the possession and enjoyment of the property. He was aged 35 years by the date he gave evidence. PW.3 is another person aged 45 years when gave evidence in 1999 and the 4th witness is the husband of the second plaintiff in OS.No.52 of 1994 who was aged 34 years when he gave evidence in the year 1999. Therefore, it is clear that none of them have any personal knowledge about the so called custom or of the fact whether Marripudi Narasimham came as an illatom son-in-law. Even if this Court examines the documentary evidence that is introduced, PW.1 the main witness merely marked Exs.A.1 to A.3. Ex.A.1 is a sale deed dated 16.01.1990 executed by the father of PW.1. EXs.A.2 and A.3 are the village accounts. The sale deed Ex.A.1 shows that Ac.4.50 cents was alienated by the father of the plaintiff. He clearly states that he has inherited the property by succession.

The contents of the sale deed do not speak of the "illatom" son-in-law at all. Exs.A.2 and A.3 are two village accounts, which are filed to prove the possession of Venkata Subbaiah, the father of PW.1. Both these documents are of November, 1994 i.e. after filing of the suit. The name of Audemma is also visible in this document. So therefore, neither Ex.A.2 nor Ex.A.3 which are revenue records would prove the fact that there was a custom of sonin- law being brought as illatom son-in-law. All other documents that are marked in 'A' series namely, Exs.A.4 to A.7 do not support the case of the son-in-law inheriting the entire property as he has come as an "illatom" son-in-law. Ex.A.4 is the decree and judgment in OS.No.156 of 1963 filed by Venkata Subbaiah against third parties and not against the present contestants. Similarly, Ex.A.5 is the decree and judgment in AS.No.79 of 1965 against the judgment and decree in OS.No.156 of 1963 (Ex.A.4). Learned counsel for the respondents also pointed out that Exs.A.4 and A.5 were not filed and marked through PW.1, but are in fact marked through PW.4, who is the husband of the second plaintiff in this suit OS.No.52 of 1994. He is defendant No.4 in the suit OS.No.8 of 1998, which is filed for injunction. He was examined as a witness after the defendants' witnesses were examined and his testimony, therefore, as per the learned counsel, will have to be scrutinized with care. On a perusal of the testimony, this Court is of the opinion that the evidence of PW.4 does not support the case of an illatom son-in-law. He does not speak of the existence of a "custom." He only speaks of what he supposedly heard from his grand father. The learned counsel for the respondents also rightly submitted that even if the theory of illatom son-in-law is taken as correct, there should be some documentary or other proof to show that the father of the plaintiff enjoyed the property as the son-in-law who was brought as an illatom son-in-law. The evidence on record shows that both Audemma and her husband Narasaiah (grand parents of first plaintiff PW.1) died long ago. The witness PW.1 when he was deposing in March 1999, in his cross-examination, clearly stated "Audemma and Narasaiah are no more. Audemma died about 25 years back. Narasaiah died prior to Audemma". Therefore, learned counsel agued that if the sonin- law was managing the property as the owner and illatom son-in-law, there would definitely be some documentary evidence like village accounts, mutation entries etc., to prove that the son-in-law inherited the properties and was enjoying the same. The witness could not produce any documents to show that his grand father Narasimham @ Narasaiah enjoyed these properties as the owner. In fact, he deposes that he does not even know the contents of Ex.A.3-adangal. Learned counsel also pointed out that even in the sale deed marked as Ex.A.1, there is no recital about the illatom son-in-law or through whom the vendor of Ex.A.1 got the property.

The learned counsel also points out that the property was divided into three different bits as pleaded in the written statements filed and each of the parties who inherited Ac.4.50 cents sold/transferred the same. Therefore, learned counsel submits that long prior to the dispute itself, the transfers were being effected without any query or question through registered sale deeds like Ex.A.1,

Exs.B.1, Ex.B.2 and Ex.B.16 (1980) etc., and the owners were issued pattadar pass books/title deed books (Exs.B.27 and 28). In addition, Ex.B.29–patta clearly shows that the name of Audemma is mutated in the revenue records.

This Court also notices that the sale deed Ex.A.1 which is mentioned in the plaint in OS.No.52 of 1994 is dated 16.01.1980. PW.1 in his chief-examination filed the registration extract of this document. In his cross-examination on 23.03.199, he clearly admits that he came to know about Ex.A.1 sale deed after its execution. He also states that "I did not raise any dispute with my father about this alienation". Therefore, the conduct of the plaintiff also clearly establishes that he was aware of the rights that his father had namely 1/3rd share inherited from his mother and that therefore, it is this reason why the plaintiff did not raise any dispute about the same. This Court finds substantial force in the submission that the delay makes it clear that the plaintiff was actually aware of what was happening and that therefore, he did not file this suit immediately after Ex.A.1. There is neither adequate pleading nor proof to show the existence of a custom more so in this case.

The practice of bringing a boy as an illatom son-in-law is a custom that is recognized in certain communities in certain parts of the State of Andhra Pradesh as can be seen from the decided cases which are cited and the texts relied upon in the lower Court. These judgments do show that the custom of an illatom son-in-law is accepted in "Kamma" and "Reddy" communities. As this has the effect of upsetting the normal line of succession and particularly as it is a custom confined to a few communities only, like any other custom the same should be pleaded with certainty in the case. There are a long line of cases which have held that the existence of a custom should be pleaded with certainty. Evidence should also be introduced of the said custom. A few relevant cases on illatom son-in law and custom are reproduced below.

In **G.Narayanappa and Others V. Govt. of Andhra Pradesh** (1992)1SCC 197)**,** the Hon'ble Supreme Court held as follows:

5. It has also been stated by Mayne that an illatom son-in-law has no right to claim partition with his father-in-law unless there is an express agreement or custom to that effect. An illatom son-in-law is not an adopted son in any sense. In N.R. Raghavachariar's Hindu Law, 8th Edition, in paragraph 176, it is stated that an illatom son-in-law loses no rights of inheritance in his natural family and the property he takes in the adoptive family is taken by his own relations to the exclusion of those of his adoptive father. The position, as set out in Mulla's Hindu law, 16th Edition is no different. Regarding the position of an illatom son-in-law it has been inter alia observed by Mulla at para 515 (page 534) as follows:

He does not lose his right of inheritance in his natural family. Neither he nor his descendants become coparceners in the family of adoption though on the death of the adopter he is entitled to the same rights and the same share as against any subsequently born natural son or a son

subsequently adopted in accordance with the ordinary law. He cannot claim a partition with the father-in-law and the incidence of a joint family, such for instance as right to take by survivorship, do not apply. In respect of the property or share that he may get he takes it as if it were his separate and self-acquired property.

13. Coming to the position in law, the discussion in the text books, which we have referred to in some detail earlier, makes it clear that although an illatom son-in-law has some rights similar to those of a natural son born after the adoption of the illatom son-inlaw, his rights are not identical to those of conferred by law on a son or an adopted son. To cite two main differences, he does not succeed to the properties of his father-in-law by survivorship, but only on account of custom or an agreement giving him a share in the property of his father-in-law. His position is not identical to that of an adopted son because he does not lose his rights in his natural family on being taken as an illatom son-in-law and continues to be entitled to a share in the property of his natural father. It is, therefore, difficult to regard an illatom sonin- law who has attained majority as a major son for the purposes of Section 4A of the Ceiling Act."

In **Harihar Prasad Singh and Others V. Balmiki Prasad Singh and Others (**AIR 1975 SC 733)**,** the Hon'ble Supreme Court of India held as follows:

> **"6.** Now on whom does the burden rest and what is the scope of the evidence that is admissible? The earliest decision on the question regarding proof of custom in variance of the general law is found in Ramalakshmi Ammal v. Sivanatha Perumal Sethuraya MANU/PR/0027/ 1872 to the effect:
>
> it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should Be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.
>
> This passage was quoted by this Court with approval in its decision in Pushpavathi Vijayaram v. P. Visweswar (AIR 1964 SC 118) and this Court went on further to observe:
>
> In dealing with a family custom, the same principle will have to be applied, though, of course, in the case of a family custom, instances in support of the custom may not be as many or as frequent as in the case of customs pertaining to a territory or to the community or to the character of any estate. In dealing with family customs, the consensus of opinion amongst the members of the family, the traditional belief entertained by them and acted upon by them their statements, and their conduct would all be relevant and it is only where the relevant evidence of such a

character appears to the Court to be sufficient that a specific family custom pleaded in a particular case would be held to be proved, vide Abdul Hussein Khan v. Bibil Sana MANU/PR/0125/1917.

In **Laxmibai (Dead) thr. L.Rs. and Other V. Bhagwantbuva (Dead) thr. L.Rs. and Others (**AIR 2013 SC 1204)**,** the Hon'ble Supreme Court of India held as follows:

> **"7.** Custom is an established practice at variance with the general law. A custom varying general law may be a general, local, tribal or family custom. A general custom includes a custom common to any considerable class of persons. A custom which is applicable to a locality, tribe, sect or a family is called a special custom.

Custom is a rule, which in a particular family, a particular class, community, or in a particular district, has owing to prolonged use, obtained the force of law. Custom has the effect of modifying general personal law, but it does not override statutory law, unless the custom is expressly saved by it.

Such custom must be ancient, uniform, certain, continuous and compulsory. No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy. He who relies upon custom varying general law, must plead and prove it. Custom must be established by clear and unambiguous evidence."

In **S. Sugunamma V. B. Padmamma and Others (**2017 (4) ALT 757)**,** a Bench of this Court held as follows:

> "19. As pointed out by the Supreme Court in G. Narayanappa v. Government of Andhra Pradesh (1) MANU/SC/0028/1992 : (1992) 1 SCC 197, an illatom son-in-law is a creature of custom. The Supreme Court quoted in the said decision, a passage from Mayne's Hindu Law, which records the fact that the custom of taking a person in illatom adoption prevailed among Reddy and Kamma castes in the Madras Presidency. But the rules that govern the rights of an illatom son-in-law, as culled out from various judicial decisions both by Mayne and by N.R. Raghavachariar are as follows:

(i) to constitute a person as illatom, a specific agreement is necessary,

(ii) after the death of the adopter, such a sonin- law is entitled to the full rights of a son even as against natural sons subsequently born or a son subsequently adopted in the usual manner,

(iii) an illatom son-in-law has no right to claim partition with his father-in-law unless there is an express agreement or custom to that effect,

(iv) an illatom son-in-law cannot be taken to be an adopted son,

(v) an illatom son-in-law will not lose the rights of inheritance in his natural family and similarly the property that he takes in

the adoptive family is taken by his own relations to the exclusion of those of his adoptive father,

(vi) neither he nor his descendants become coparceners in the family of adoption though on the death of the adopter he is entitled to the same rights and same share as against any subsequently born natural son or an adopted son,

(vii) the rights of an illatom son-in-law are not identical to those conferred by law on a son or an adopted son, and

(viii) an illatom son-in-law does not succeed to the properties of his father-in-law by survivorship, but only on account of custom or an agreement giving him a share in the property of his father-in-law."

In **Salekh Chand (Dead) by Lrs. V. Satya Gupta and Others (**2009 (2) ALT 22 (SC)**,** the Hon'ble Supreme Court held as follows:

> **6.** In Mookka Kone v. Ammakutti Ammal MANU/TN/0603/1927, it was held that where custom is set up to prove that it is at variance with the ordinary law, it has to be proved that it is not opposed to public policy and that it is ancient, invariable, continuous, notorious, not expressly forbidden by the legislature and not opposed to morality or public policy. It is not disputed that even under the old Hindu law, adoption during the lifetime of a male issue was specifically prohibited. In addition, I have observed that such an adoption even if made would be contrary to the concept of adoption and the purpose thereof, and unreasonable. Without entering into the arena of controversy whether there was such a custom, it can be said that even if there was such a custom, the same was not a valid custom."

It is incumbent on party setting up a custom to allege and prove the custom on which he relies. Custom cannot be extended by analogy. It must be established inductively and not by a priori methods. Custom cannot be a matter of theory but must always be a matter of fact and one custom cannot be deduced from another. It is a well established law that custom cannot be enlarged by parity of reasoning.

Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them; but the decision would not in that case be a satisfactory precedent if in any future suit between other parties fuller evidence with regard to the alleged custom should be forthcoming. A judgment relating to the existence of a custom is admissible to corroborate the evidence adduced to prove such custom in another case. Where, however a custom is repeatedly brought to the notice of the courts, the courts, may hold that the custom was introduced into law without the necessity of proof in each individual case.

Custom is a rule which in a particular family or a particular class or community or in a particular district has from long use,

obtained the force of law. Coming to the facts of the case P.W.1 did not speak any thing on the position either of a local custom or of a custom or usage by the community, P.W.2, Murari Lal claimed to be witness of the ceremony of adoption he was brother-in-law of Jagannath son of Pares Ram who is said to have adopted Chandra Bhan. This witness was 83 years old at the time of deposition in the Court. He did not speak a word either with regard to the local custom or the custom of the community. P.W.3 as observed by the lower appellate Court was only 43 years' old at the time of his deposition where as the adoption had taken place around 60 years back. He has, of course, spoken about the custom but that is not on his personal knowledge and this is only on the information given by P.W.2, Murari Lal. He himself did not speak of such a custom. The evidence of a plaintiff was thus insufficient to prove the usage or custom prevalent either in township of Hapur and around it or in the community of Vaish. The evidence of D.W.3 refers only to one instance. From his evidence it cannot be inferred that Om Prakash had adopted Munna Lal who was his real sister's son. As already pointed out above, the trial court found that the evidence of D.W.3 was not so clear and unambiguous as to lead to no other conclusion except that Munna Lal was son of real sister of Om Prakash. Besides, this solitary instance of adoption of his sister's son cannot amount to long usage, which has obtained the force of law. Mulla has categorically commented that where the evidence shows that the custom was not valid in numerous instances, the custom could not be held to be proved. A custom derives its force from the evidence from long usage having obtained the force of law.

All that is necessary to prove is that usage has been acted upon in practice for such a long period with such invariability as to show that it has, by consent, been submitted so as to establish governing rules of a particular locality or community.

A custom, in order to be binding must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom in order that it may be legal and binding, must have been used long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality. A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy, and such evidence may be safely acted on when it is supported by a public record of custom such as the Riwaj-iam or Manual of Customary Law.

In yet another decision reported in Hem Singh and Anr. v. Hakim Singh and Anr. MANU/SC/0105/1954 : [1955]1SCR44 , this Court observed that the custom recorded in the 'Riwaj-i-am' is in derogation of the general custom and those who set up such a custom must prove it by clear and unequivocal language. Similarly, when a

custom is against the written texts of the Hindu Law then, one who sets up such a custom must prove it by a clear and unequivocal language ……..”

Against this backdrop of settled law, if the present case is viewed and the evidence is weighed, this Court has to conclude that the pleading is absolutely bald and bereft of any details whatsoever. Neither the custom nor the full facts which would establish the rights of the illatom son-in-law in this case and in the community of the plaintiffs are pleaded or proved. None of the facts which are considered relevant under Section 13 of the Indian Evidence Act are proved in this case in relation to custom. Even the so called ‘oral agreement’ is not deposed about or proved by evidence.

In addition, this Court also notices a very recent judgment of Hon’ble Supreme Court of India reported in **Ratanlal @ Babulal Chunilal Samsuka v. Sundarabai Govardhandas Samsuka (**2018 (11) SCC 119)**,** wherein his Lordship Sri N.V.Ramana, speaking for the Bench held as follows:

> “As customs, when pleaded are mostly at variance with the general law, they should be strictly proved. Generally, there is a presumption that law prevails and when the claim of custom is against such general presumption, then, whoever sets up the plea of existence of any custom has to discharge the onus of proving it, with all its requisites to the satisfaction of the Court in a most clear and unambiguous manner. It should be noted that, there are many types of customs to name a few- general customs, local customs and tribal customs etc. and the burden of proof for establishing a type of custom depend on the type and the extent of usage. It must be shown that the alleged custom has the characteristics of a genuine custom viz., that it is accepted willfully as having force of law, and is not a mere practice more or less common. The acts required for the establishment of customary law ought to be plural, uniform and constant. (emphasis supplied)

In view of this latest judgment, the earlier reported judgments and the judgment cited by the counsel for the respondents, which is based on the salutary principle of ‘no pleading no evidence’ this court holds that the plaintiffs have failed to plead about the existence of a custom and prove the custom as required under law. Neither the pleadings nor the evidence in the case prove the existence of the custom or the actual factum of the son in law being an illatom son in law.

Hence, this Court holds that the finding of the lower Court on issue No.1 is correct. Neither the existence of the custom nor the “oral agreement” is spoken about or proved by any of the witnesses. There is absolutely no proof that the son in law was actually an illatom son in law. The plaintiffs’ case in OS.No.52 of 1994 is thus bound to fail and this Court confirms the finding that the plaintiffs are not entitled for a partition of ‘A’ schedule property.

So far as the other issues are concerned, neither of the learned counsels really argued on the same. This Court also finds that the Court fee paid is not correct. A fixed court fee is paid as if the plaintiff is in joint possession. PW.1 in his cross-examination on 223.03.1999 clearly admits as follows: "by the date of filing of the suit, the schedule properties were not in my possession. Witness volunteers that the schedule properties were in the possession of Chenchaiah". Therefore, in view of this categorical admission and the documents filed by the defendants, this Court holds that there is no 'joint possession' of the property. Hence, the Court fee is totally inadequate.

This Court concurs with all the findings of the Court below and holds that there are no grounds to interfere with the orders passed in OS.No.52 of 1994.

Further in view of the clear documents of title in the plaintiffs favour and their possession of the property as evidenced by the sale deeds, revenue records, pass book etc., the plaintiffs in OS.No.8 of 1998 have proved their possession and so they are entitled to a permanent injunction against the defendants therein. The learned counsels essentially argued about the suit OS.No.52 of 1994. The submissions both oral and written were in this suit only and both concentrated on the issue of title. The issues involved in the second suit for injunction were not touched upon. However on a review of the order passed by the lower Court in this suit, this Court finds that the same is a reasoned order passed after considering the facts, pleadings etc. This Court finds no reason to interfere with the findings on this suit also.

For all these reasons, this Court is of the opinion that there are no merits in these two appeals and both the appeals are, therefore, dismissed. In the circumstances, no order as to costs.

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

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2018(2) L.S. 250 (Hyd.)

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

Present:
The Hon'ble Acting Mr.Chief Justice Ramesh Ranganathan &
The Hon'ble Ms. Justice J. Uma Devi

P. Balakrishna & Ors., ..Appellants

Vs.

The Union of India & Anr., ..Respondents

PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT - EVIDENCE ACT,Sec.63(2) - Appellant / writ petitioners and their predecessors in title claim to be in possession from last 80 years and a temple called Draupadi Temple is said to be in existence in property from several

decades – Respondents disputed the appellant/writ petitioners title and possession over the property.

Held - Subject property constitutes public premises - Having failed before competent Civil Court, with regards title, it was not open to appellant to contend that respondents should have initiated proceedings before the competent Civil Court for eviction - Appellate court will not reassess material and seek to reach a conclusion different from one reached by the court below, if one reached by that court was reasonably possible on the material - Appellate court would, normally, not be justified in interfering with the exercise of discretion under appeal solely on the ground that, if it had considered the matter at the trial stage, it would have come to a contrary conclusion – Writ appeal stands dismissed.

Mr.B. Vijaysen Reddy, Advocate for the Appellants.

Mr.R.S. Murthy, Learned Standing Counsel for Railways, Advocate for the Respondents.

J U D G M E N T

(The Hon'ble Mr.Acting Chief Justice Ramesh Ranganathan)

This appeal is preferred, under Clause 15 of the Letters Patent, by the petitioners in W.P.No.12347 of 2007, aggrieved by the order of the Learned Single Judge dated 13.04.2018 dismissing the Writ Petition. The appellants herein had invoked the jurisdiction of this Court seeking a writ of certiorari to call for the records, and to set aside the order and decree in C.M.A.No.11 of 2005 dated 20.04.2007 passed by the Chief Judge, City Civil Court, Hyderabad confirming the proceedings of the Estates Officer and Additional Divisional Railway Manager, Hyderabad Division, South Central Railway, Secunderabad.

Facts, to the limited extent necessary, are that the appellant-writ petitioners and their predecessors in title claim to be in possession and enjoyment of an extent of 4876 square meters of land at Chilakalaguda, Bolakpura, Secunderabad for the last 80 years. A temple called Draupadi Temple is said to be in existence in the said property for the past several decades. When the 2nd respondent disputed the appellant-writ petitioners title and possession over the subject property, O.S.No.59 of 1967 was filed by them before the IV Additional Judge, City Civil Court, Hyderabad for declaration of title and for permanent injunction. The said Suit was dismissed on 30.10.1973. Aggrieved thereby, the appellant-writ petitioners filed C.C.C.A.No.27 of 1975 before the High Court which was dismissed on 12.04.1977. Aggrieved thereby the appellant filed L.P.A.No.191 of 1977 which was dismissed by a Division Bench of this Court on 12.08.1977.

Thereafter the appellant-writ petitioners filed O.S.No.3121 of 1982 before the 1st Assistant Judge, City Civil Court, Secunderabad seeking injunction. This Suit was also dismissed on 03.04.1989. Aggrieved thereby the appellant-writ petitioners filed A.S.No.127 of 1989 which was also

dismissed on 29.07.1994. Questioning the said judgment, they filed S.A.No.427 of 1994 and a Learned Single Judge of this Court by order dated 20.03.2003, while dismissing the Second Appeal, observed that it was open to the respondents to initiate proceedings to evict the appellant-writ petitioners in accordance with law.

Thereafter, the respondents invoked the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (the Act for short), and issued notices under Section 4 of the Act vide proceedings dated 18.08.2004 and 08.10.2004 respectively. As no reply was forthcoming, orders were passed under Section 5(1) of the Act, vide proceedings dated November, 2004, recording that, since the predecessors in title of the appellant-writ petitioners had refused to receive the notices, and the registered notice with acknowledgment due sent to them was also returned undelivered, the notices were published in newspapers; and the predecessors of the appellant-writ petitioners were directed to vacate the subject premises within 30 days from the date of publication of the order i.e. on or before 24.12.2004. Against the said order, the appellant-writ petitioners filed an appeal, in C.M.A. No.11 of 2005, under Section 9 of the Act before the Chief Judge, City Civil Court, Hyderabad who, by his order dated 20.04.2007, dismissed the appeal. Aggrieved thereby, the appellant- writ petitioners invoked the jurisdiction of this Court and, on W.P.No.12347 of 2007 being dismissed by order dated 13.04.2018, they have now invoked our jurisdiction under Clause 15 of the Letters Patent.

Before us Sri B.Vijaysen Reddy, Learned Counsel for the appellant-writ petitioners, would submit that the respondents should have been relegated to the remedy of filing a Civil Suit for eviction, instead of resorting to the summary proceedings under the Act; in a summary enquiry, the question of prescription of title, by adverse possession, cannot be examined; disputes regarding title are not confined only to ownership, but also cover long standing possession; as the appellants-writ petitioners have perfected their title by adverse possession, the question of limitation, in initiating proceedings for eviction, necessitates examination; the appellants-writ petitioners, and their predecessors in title, have been in long standing possession of the subject property, for the past several decades and, admittedly, from 1967 onwards; while the Suit filed by the appellants seeking injunction was no doubt dismissed, the question whether that would disentitle the appellants-writ petitioners from retaining possession, can only be examined in a duly constituted Suit for eviction, and not in summary proceedings under the Act; the very fact that the appellant-writ petitioners have been in long standing possession, admittedly from 1967 onwards, would necessitate an inference that they have perfected their title by adverse possession; since resort by the respondents, to the summary proceedings under the Act, violate the appellants-writ petitioners fundamental right under Article 14 of the Constitution of India, the order of the Learned Single Judge, and the orders impugned in the Writ Petition, are liable to be set aside; and the respondents should

be relegated to the remedy of filing a Civil Suit for eviction. Reliance is placed by the Learned Counsel, for the appellants-writ petitioners, on District Collector, Ranga Reddy District, Hyderabad v. K. Narasing Rao 1997 (4) ALT 428 (DB); and Government of A.P. v. Thummala Krishna Rao (AIR 1982 SC 1081).

On the other hand Sri R.S. Murthy, Learned Standing Counsel for the Railways, would submit that both the Writ Petition and the Writ Appeal, as filed, are an abuse of process of the Court; the appellant- writ petitioners have been resorting to one ruse or the other to remain in illegal possession of the subject property; the order passed by the appellate authority under the Act, and the order of the Learned Single Judge, are well-considered final orders which clearly show that the respondents were justified in invoking the summary proceedings under the Act to evict the appellant-writ petitioners; the appellant-writ petitioners claim of ownership was rejected by the Civil Court, and their Suit for injunction was also dismissed; as it has been held, in the Suits filed earlier, that the Railways have title over the subject land, resort to the provisions of the Act, to have the appellant-writ petitioners evicted from the subject land, is justified as these lands constitute public premises; the subject land is needed for the public purpose of expanding the Secunderabad Railway Station; and, since the appellant-writ petitioners are in illegal possession of the subject lands, the appeal is liable to be dismissed with exemplary costs.

As the appellants herein had dragged the respondents through two rounds of protracted litigation, before the latter invoked the provisions of the Act to have the appellants evicted from the subject property, and as some of the contentions now urged before us were considered earlier, it is necessary to note, in some detail, the contents of these orders before examining the submissions of Learned Counsel on either side.

Smt. Lakshmi Bai filed O.S.No.59 of 1967, in the Court of the IV Additional Judge, City Civil Court, Hyderabad, in forma pauperis seeking declaration and injunction. In the said Suit, the Trial Court settled the following issues (1) Whether the plaintiff was the owner of the suit land by virtue of the sale deed 03.01.1901? (2) Was the suit land part of plot No.224, Secunderabad Regimental Bazaar, Chilakalguda, and was it handed over to the Ex.Nizams State Guaranteed Railway on 6.2.1919? (3) To what relief? On issue No.1, the Trial Court observed that Ex.A1, on which the plaintiff placed reliance, was the original of Ex.A8; there was no mention of the name of the father-in-law of the plaintiff, nor the name of the plaintiff and her husband, in the said document; it was mentioned therein that the land was situated near Railway Police quarters, and the area was 17000 sq. yards; the case of the plaintiff was that she was in possession of land admeasuring 7000 sq. yards; at Column No.15 in the said document, the land was shown as Sarkari land (government land); this document did not help the case of the plaintiff, but in fact proved the case of the defendant that the

suit land was Railway Property; Ex.A2, the alleged sale deed dated 30th Theer 1310 Fasli, was on a one rupee stamp paper; this document required registration as per the Act prevailing then; as it was not registered, it could not be looked into; moreover, there was no mention of this document in the plaint or in Ex.A-4 notice or in Ex.A-3; execution of the document was also not proved; in such circumstances, the said document could not be looked into; the plaintiff, while giving evidence as PW.4, had stated that she gave an application, through Narayanaswamy, to the Railway Police for permission to perform Bhajans in the Drowpadi temple; if really she was the owner, there was no need for her to give such an application to the Railway authorities; the very fact that such an application was submitted, and the authorities had given her permission, was evident from Ex.A11 itself, which showed that the plaintiff had no right or any concern over the Suit land; the Suit land was the property of the Railways; the evidence of the plaintiff, and her witnesses, was contrary to the averments in the plaint; living in the temple, and performing pujas therein, did not confer any right or title over the Suit property on a portion of which the Drowpadhi temple was situated; the plaintiff had failed to show, by cogent evidence, how her father-in-law and his vendor came into possession, and on what date; she failed to prove that she had any subsisting title; the plaintiff did not plead adverse possession; her evidence, on a plea not raised by her in the pleadings, could not be looked into; the evidence of the plaintiff, that she took permission from the Railway Police through Sri Narayanaswamy for performing bhajans in the temple, showed that the plaintiff was a licensee; and she was thus estopped from questioning the right of the defendant over the Suit property to which she had no right and title. The Trial Court concluded that the plaintiff was not the owner of the Suit land. Issue No.1 was held against her.

On issue No.2, the Trial Court held that Ex.B2 to Ex.B4 were very old public documents, and had come from proper custody; on perusing the documents, it was clear that the then Nizam Government had handed over plot No.224 to the then Nizams State Guaranteed Railway; the Suit land was a part of plot No.224; the genuineness of the said documents could not be challenged; hence, it could not be said that it was the property of the plaintiff; even from Ex.B1, the blue print which had also come from proper custody wherein the suit land was shown, it was clear that the suit land was part of Plot No.224 over which the plaintiff had no right and title; her predecessors had illegally encroached on the said land; and the plaintiff was in illegal possession as a trespasser. The Trial Court concluded that, from the oral and documentary evidence, the Railway Authorities had fully proved their case; and taking all the facts and circumstances into consideration, it was clear that the Suit land was a part of Plot No.224, and the said property was handed over to the Ex.Nizam State Guaranteed Railways on 06.02.1919 by the then competent authority i.e the then Government. The Suit, filed by the plaintiff, was dismissed with costs.

Aggrieved thereby, the plaintiff in O.S.No.59 of 1967 filed C.C.C.A. No.27 of 1975. By order in CMP No.5856 of 1974 in CCCA (SR) No.10323 of 1974, (later numbered as CCCA No.27 of 1975), dated 30.09.1974, a Learned Single Judge of this Court directed the respondents not to evict the appellant-petitioner from the temple and the premises around it, but granted them liberty to put a fence around the disputed plot. In his final order, in C.C.C.A. No.27 of 1975 dated 12.04.1977, a Learned Single Judge of this Court held that the Learned Additional Judge had considered Exs.A2 and A3, and had observed that the description of the property and the boundaries of the property in Ex.A3, under which the property was conveyed to the husband of the plaintiff and to the plaintiff, did not tally with the description of the property in Ex.A2 under which the plaintiffs husband had acquired title; the Learned Additional Judge had also observed that Ex.A2 was not a registered document, and no value could be attached to it; the property conveyed under Ex.A2 was located in Bholakpur Village, Baghaat, Medak District, whereas the land conveyed under Ex.A3 to the plaintiff was situated behind the Railway Hospital; the Court below had rightly held that the plaintiff could not acquire any title to the plaint schedule property under Ex.A3; the oral evidence of PWs.1 to 4 was wholly unsatisfactory to establish title of the plaintiff to the suit land; PW3 had stated that he believed that the suit land belonged to the plaintiff on the strength that all of them resided in the suit schedule premises; he further admitted that he did not know whether Bala Krishnaiah, Laxmipathi and the plaintiff have been performing puja with the permission of the Railway authorities; he also admitted that, in the capacity of Pujari, Laxmipathi was residing in the suit land; apart from that he was also employed in the Railways; it was clear from Ex.A11 that permission was obtained from the Railway authorities to perform bhajan in the temple located in the suit land; and the Court below had rightly rejected the evidence of the plaintiff based on title.

The Learned Single Judge, thereafter, observed that the documentary evidence adduced in the case i.e Exs.B-1 to B-4 satisfactorily established the defendants title to the suit schedule property; Exs.B2 to B4 were very old public documents; they had been produced from proper custody; a perusal of these documents clearly showed that the then Nizams government had handed over plot No.224 to the Nizam State Guaranteed Railway on 06.02.1919; the evidence of DW.1 was that the original of Ex.A1 was not available, and that Ex.B-1 was taken from the blue print taken from the original by a mechanical process; Ex.B-1 was clearly admissible under Section 63(2) of the Evidence Act being a copy of a copy which was made by a mechanical process, which in itself ensured accuracy of such a copy; and, in the result, the appeal was liable to be dismissed. Aggrieved thereby, the appellant-plaintiff filed L.P.A.No.191 of 1977 and a Division Bench of this Court, by its order dated 12.08.1977, dismissed the L.P.A. holding that they agreed with the reasoning and conclusion of the Learned Single Judge.

Having fought a prolonged battle of around a decade claiming title over the subject property, albeit unsuccessfully, Smt. Lakshmi Bai, the plaintiff in O.S.No.59 of 1967, thereafter filed O.S.No.3121 of 1982 before the III Assistant Judge, City Civil Court, Secunderabad seeking perpetual injunction restraining the defendant (respondent herein) from taking forcible possession of the premises consisting of open land, the Droupadhi temple, Dharmashala and the rooms situated at Chilakalguda, Secunderabad. The plaintiff claimed that she was in continuous possession of the suit schedule property for the past more than 60 years; she had filed O.S.No.59 of 1967 on the file of the IV Additional Judge, City Civil Court, Hyderabad seeking declaration of title, over the suit schedule property, against the Railways; the said Suit was dismissed on 30.10.1973 for want of registration of the Suit document; the said judgment was confirmed in appeal, in C.C.C.A.No.27 of 1975, on 12.04.1977; even after dismissal of the Suit and the Appeal, she has been in continuous possession; while so, on 06.10.1982, the defendant, without prior notice, had entered into the property and had started demolishing the rooms, and a part of the house of the plaintiff; she had lodged a police complaint; and had, thereafter, filed the Suit. The Trial Court framed the following issue for trial i.e Whether the plaintiff was entitled for the injunction as prayed for?

In his judgment, in O.S.No.3121 of 1982 dated 03.04.1989, the Learned III Assistant Judge held that it was not in dispute that the plaintiff had lost in all the Courts with respect to the Suit for declaration filed by her earlier; the question which necessitated examination was whether, inspite of the judgments in the Suit, the CCCA and the LPA, the plaintiff was entitled for injunction as prayed for, on the pretext of a different cause of action on 06.10.1982, and by claiming adverse possession of the suit schedule property; the plaintiff had contended that she had not taken the ground of adverse possession in the earlier Suit and was, therefore, entitled to claim the same on the subsequent cause of action dated 06.10.1982; the plaintiff had pleaded that she was constrained to file the present Suit as she had perfected her title by adverse possession; and she was entitled for perpetual injunction on the cause of action dated 06.10.1982.

The Learned III Assistant Judge, thereafter, noted the contention of the defendant (i.e the respondent herein) that the subject matter of the present Suit had been agitated earlier by the plaintiff for declaration as well as for perpetual injunction; in view of dismissal of the Suit, as well as the Appeal, she had no right of ownership over the suit schedule property; the plaintiff was not entitled to agitate, on the same subject matter again, against the same defendant, as the matter had already been conclusively adjudicated with regards title and perpetual injunction; and, in the light of the conclusive judgments inter-parties, the defendant was entitled to initiate action over the suit schedule property.

The Learned III Assistant Judge observed

that the plaintiff had vehemently asserted that she had the right to file the Suit claiming adverse possession, on a different cause of action; cause of action enables a person to ask for a larger and wider relief than that to which he had limited his claim; he cannot, afterwards, seek to recover the balance by independent proceedings; under Order 2 Rule 2 CPC the plaintiff, while instituting the Suit, had to include the whole of the claim which she was entitled to make in respect of the cause of action; she may, however, relinquish any portion of her claim in order to bring the Suit within the jurisdiction of any Court; where the plaintiff omits to sue in respect of, or intentionally relinquishes any portion of, her claim, she shall not afterwards sue in respect of the portion so omitted or relinquished; the plaintiff had filed the earlier Suit for declaration contending that the subject property of the Suit was her property, and interference by the defendant be restrained; if she was claiming adverse possession, the plaintiff ought to have sought for the relief, either way, under the very same suit; the plaintiff had, however, claimed in the earlier Suit that she derived her title and ownership over the suit schedule property by virtue of a sale deed executed in 1901; now she was claiming adverse possession pleading that she was in continuous possession for the past 60 years over the suit schedule property; the sale deed had been taken into consideration, in adjudicating her claim of title over the suit schedule property, in the earlier Suit filed in the year 1967; the claim of adverse possession did not arise as she claimed to have purchased the subject property in the year 1901; she could claim by adverse possession only if she was in continuous possession of the defendants property for more than 30 years; under the circumstances, she ought to have raised the same contention, of holding the subject property by adverse possession, when she was agitating for declaration of her title over the suit schedule property in the earlier Suit; a wilful and intentional relinquishment of a particular right of title, while agitating for a declaration of title over the suit schedule property, as against which there was a conclusive judgment of the High Court, would disable the plaintiff from again agitating on a different cause of action on the ground of adverse possession; the matter was earlier agitated by the plaintiff asserting right of ownership over the suit schedule property and to declare the same; she had also prayed for perpetual injunction; the findings arrived in the earlier Suit were binding on both the plaintiff and the defendant; the plaintiffs contention, that the defendant ought to have acted in accordance with the due process of law ie they ought to have resorted to execution proceedings etc could not be a valid ground as there was no decree in favour of the defendant; it was the plaintiff who was declared as having no right over the suit schedule property; and the defendant was of the view that they were at liberty to initiate proceedings for taking possession of the subject property; and the plaintiff was not entitled for injunction as prayed for.

Aggrieved thereby, the plaintiff filed A.S.No.127 of 1989 before the Additional Chief Judge, City Civil Court, Secunderabad.

In its judgment dated 29.07.1994, the appellate Court observed that there was prior litigation between the parties; the very same plaintiff had filed a Suit against the very same defendant in O.S.No.59 of 1967 which ended in dismissal; against the said judgment and decree, the plaintiff had preferred an appeal in C.C.C.A.No.27 of 1975 on the file of the High Court which also ended in dismissal; against the judgment in CCCA No.27 of 1975, the plaintiff had preferred L.P.A.No.191 of 1977 which was also dismissed on 12.08.1977; undaunted by the series of defeats, in the hierarchy of Courts, the plaintiff had filed O.S.No.3121 of 1982 which also ended in dismissal; and the plaintiff had again filed the present Appeal to try her luck in the appellate Court.

The appellate Court observed that the suit schedule property was a vast extent of 7000 sq. yards; it was confirmed, in the prior proceedings, that it belonged to the defendant-Railways; in those proceedings the plaintiff had set up a sale deed allegedly executed by her husband in her favour; her husband claimed to have got it from a Patwari; in the earlier proceedings, the Court disbelieved the version of the plaintiff, and had categorically held that the property belonged to the Railways; in the present proceedings the advocate-commissioner, appointed by the Trial Court to note down the physical features, had submitted his report; as per the said report, in the entire extent of 7000 sq yards, there was only a house consisting of two rooms; the first room looked more like a verandah; the second room was divided by a wall creating a small enclosure; in the centre of the second room, was a raised platform made of white ceramic tiles with two steps on which there were a few idols of deities made of black granite stones; in the small enclosure, in the second room, there was a lithograph of a God within a wooden frame; in the earlier Suit, the plaintiff had claimed that it was a temple of Droupadhi; though there were some structures (the number of which was given as four in the report), they were dismantled; the Commissioner had observed that the entire western area of the premises could not be used because it was rocky, and the surface was uneven; if the observations made by the Commissioner were taken into consideration, it could not be held that the plaintiff was in possession of the entire extent of 7000 sq. yards; even in the judgment in O.S.No.59 of 1967, it was not held that the plaintiff was in possession of the entire extent of land of 7000 sq. yards; in the earlier Suit, the relief claimed by the plaintiff was for declaration and permanent injunction, both of which were rejected; the plaintiff was now asking the latter relief, which was also rejected in the earlier proceedings; the appellate Court could reject the plaintiffs claim if she had not approached the Court with clean hands; the relief claimed by the plaintiff in the earlier Suit was unholy; and an illegal claim was made by the plaintiff to grab railway property.

On the contention that no issue was framed, with regards possession of the property, in the earlier Suit, the appellate Court held that if no issue was framed with regards possession, and no finding was given, the

plaintiff could have agitated the same in the First Appeal and in the L.P.A; the points which were not raised therein could not be raised by way of another Suit; Order 2 Rule 2 CPC requires every Suit to include the whole of the claim which the plaintiff was entitled to make in respect of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court; the plaintiff had made the whole of the claim in the earlier Suit which ended in dismissal; the judgment in that Suit was confirmed in Appeal and in the L.P.A; the earlier Suit operated as res-judicata; the plaintiff had also not established her possession over the entire suit schedule property; even without reference to the question of res-judicata, the Suit must fail; the Court cannot extend its helping hand to those who approach the Court with unclean hands, since the relief of permanent injunction is purely discretionary; the Suit was barred by res-judicata; and the plaintiff was not entitled for permanent injunction.

Aggrieved thereby, Smt. Lakshmi Bai preferred Second Appeal No.427 of 1994 and a Learned Single Judge of this Court, in his judement dated 20.03.2003, observed that a perusal of the judgment in O.S.No.59 of 1967 revealed that there was no specific issue as to whether the plaintiff-appellant was entitled for injunction or not; in the said judgment, which was rendered on merits, an enquiry was conducted into the matter and, ultimately, it was held that the appellant-plaintiff was not entitled to declaration of title and, consequently, the Suit was dismissed; the said finding was confirmed in CCCA No.27 of 1975, and subsequently in L.P.A.No.191 of 1977 by the Division Bench by its order dated 12.08.1977; the Suit was filed on 29.10.1982; findings of fact, in the earlier Suit, were confirmed by the Division Bench; having regard to the findings as to title, especially against the true owner-respondent, no injunction was granted by the Civil Court; there were no merits in the Appeal; and no substantial question of law arose for consideration in the Second Appeal. The Second Appeal was dismissed, leaving it open to the respondent to initiate proceedings to evict the plaintiff-appellant in accordance with law.

Action was initiated by the respondents under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, and an order was passed by the Estates Officer in November, 2004 holding that, though there was deemed service of notice under Form A, the appellants herein, as encroachers, had not responded to the notice. The appellants herein were directed to vacate the premises within thirty days from the date of publication of the order i.e., on or before 24.12.2004.

Aggrieved thereby the appellant-writ petitioner carried the matter in appeal to the Chief Judge, City Civil Court, Hyderabad in C.M.A. No.11 of 2005. In his order dated 20.04.2007, the Learned Chief Judge noted the claim of the appellant that they had perfected their title over the schedule property, whether it was public premises or otherwise; the respondent-railways had contended that the property was a public premises; it was contended that the

disputed property belonged to his Exalted Higness The Nizam VII, and it was under the possession and control of the Nizams Guaranteed State Railways; one Sri Amrith had handed over the property, on behalf of HEH The Nizam, to Sri G.T. Walkar, the Divisional Engineer of N.G.S.R; the property vested in the Central Railways till 1966 when the South Central Railway was formed; it vested in the South Central Railway from 02.10.1966 onwards; the property has been in the possession, control and enjoyment of the Railways for the last century; the property fell in Town Survey No.2 B/A, Ward No.113, Hyderabad; and it was completely surrounded by other railway properties, and railway establishments, which prima facie established that the property belonged to the South Central Railway.

After taking note of the appellants contention that they, their predecessors in title, and their ancestors had purchased the schedule property from Sri Venkat Rao Patwari in 1901 under a sale deed, the Learned Chief Judge observed that O.S. No.59 of 1967 was dismissed on 30.10.1973 as the appellants had failed to prove their title for want of registration of the sale deed executed by Venkat Rao Patwari; CCCA No.27 of 1975 was dismissed by the High Court on 12.04.1994; the appellants had filed O.S. No.3121 of 1982 which was dismissed by the Trial Court on 03.04.1989; the appeal preferred thereagainst, in A.S. No.127 of 1989, was dismissed on 29.07.1994; S.A. No.427 of 1994 was dismissed by the High Court on 20.03.2003; and it was because the respondent could not evict the appellant, without following the due process of law, did they invoke the provisions of the Act, and eviction of the appellants was ordered.

The Learned Chief Judge noted the appellants contention that they had secured possession of the subject property from the owner Sri Venkat Rao Patwari in 1901; even assuming that the sale was invalid for want of registration, they were in continuous possession of the subject property with their predecessors from 1901 onwards, thereafter with the first appellant, and on her demise with the rest of the appellants; this long standing possession had resulted in perfection of their title over the schedule property; since they had perfected their title, the respondents, more or less, had lost their title to the property, and could not seek eviction; even if the respondent is the owner of the property, the appellants had perfected their title by adverse possession; and, therefore, the respondent could not invoke the provisions of the Act seeking their eviction. In this context the Learned Chief Judge observed that the appellants had claimed adverse possession as an alternative defence to their stand that they were the owners of the schedule property; such an alternative stand could not be taken as it was destructive of their main claim that they were the owners of the property; as they had claimed to be the owners of the property, the question of their exercising their right of adverse possession did not arise; one of the ingredients of adverse possession is the exercise of adverse title more or less to the knowledge of the true owner; the appellants were not entitled to urge on the

one hand that they were the true owners, and contend at the same time that they had exercised, or had been exercising, adverse title against the true owner; the appellants had to stand or fall on the strength of their case that they were the owners of the property; even assuming that the appellants were entitled to raise the claim that they had perfected their title by adverse possession, the question was against whom they had perfected their title; as they did not recognise the title of the first respondent or its predecessors or anybody else, the appellants could not claim to be in adverse possession as they had not recognised anybody as the true owner against whom they have been exercising adverse possession; in support of their claim of having perfected their title by adverse possession, the party asserting adverse possession must establish title and possession openly and continuously beyond the statutory period; the appellants had contended that they were in possession of the subject property for over a century; however, there was no proof in this regard; the appellants must establish not only possession but continuous possession to establish adverse possession; barring their claim, there was nothing to conclude that the appellants had been in continuous possession over the schedule property for any length of time, to consider the issue of adverse possession; and the appellants, who had failed in a series of lis, had also failed in establishing their continuous possession over the statutory period in justification of their claim to have perfected title by adverse possession over the schedule property. The appellants claim of having perfected their title by adverse possession was rejected.

The Learned Chief Judge, thereafter, observed that the material on record produced by the respondents contained the orders of HEH the Nizam VII in respect of the property in dispute; the respondents had established that the property belonged to the railways; the subject property had therefore become a public premises; the schedule property was also completely surrounded by railway property; it was open to the appellants to disprove the assumption that the property belonged to the railways; the appellants were not able to establish their stand, let alone dislodge the stand of the respondents; the respondents had established that the schedule property was a public premises; the appellants had failed to show their title to the schedule property or of their having perfected their title by adverse possession over the schedule property; the first appellant had approached the High Court, for redressal, after the order of the Estate Officer was passed; the High Court had suggested that the first appellant move the appellate Court for redressal; even assuming that the notice in Form A was not served on the appellants resulting in their remaining ex parte, the order, passed by the Estates Officer, was just and proper even on merits; and there were no merits in the appeal. The appeal was dismissed.

Aggrieved thereby, the appellants herein invoked the jurisdiction of this Court filing W.P. No.12347 of 2007. In the interim order, passed in W.P.M.P.No.15385 of 2007 in W.P.No.12347 of 2007 dated 14.06.2007,

the Learned Single Judge observed that the question whether it is open to the respondents to initiate proceedings under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, for summary eviction, required consideration in the main Writ Petition; till such time, it would be appropriate to maintain status-quo as to the nature and possession of the land in question; and, accordingly, there shall be a direction to both the parties to maintain status-quo obtaining as on that day as to the nature and possession of the land in question. This interim order was in force till W.P.No.12347 of 2007 was finally heard and dismissed by the order under appeal dated 13.04.2018.

In the order under appeal, the Learned Single Judge observed that, from the earlier proceedings, it was clear that the appellant-writ petitioner, and their predecessors in title, had restrained the respondents from taking steps for eviction under the guise of obtaining orders from Court, by filing some or other Suits and appeals; it is only after conclusion of the proceedings in the second round of litigation, i.e., after dismissal of S.A. No.427 of 1994 on 20.03.2003, had the respondents initiated proceedings under the Act for eviction of the petitioners; their contention that, by virtue of long standing possession, they had perfected their title over the subject property by adverse possession could not be countenanced; in fact the appellants-writ petitioners had restrained the respondents from taking effective measures to evict them; it was not open to them to turn around and submit that they had perfected their title by adverse possession; and persons, who had obtained interim orders from Courts, could not take advantage of the same or be allowed to contend that the respondents had not taken effective measures to evict them.

On the question whether there was a bonafide dispute of title over the subject property, between the appellants-writ petitioners and the respondents, the Learned Single Judge observed that the appellants-writ petitioners had already suffered defeat in two rounds of litigation before the Court; it was not open to them to contend that there was a bonafide dispute; their contention that the respondents could not resort to the provisions of the Act to evict them, since proceedings under the Act were summary in nature was not tenable; once a competent Civil Court has declared that the petitioners had no title over the subject property, and when the said order has attained finality, it is not open to the appellants-writ petitioners to contend that there is a bonafide dispute of title; the respondents had contended that the subject property was handed over to the Nizam State Railway on 06.02.1919, and thereafter to the Central Railways in 1966; with the reorganisation of the Railways in 1966, possession of the subject property vested with the South Central Railway, and was incorporated in the Town Survey Records in T.S. No.2 B/A in Ward No.113; this, clinchingly, established that the subject property belonged to the respondents; having failed before the competent Court with regards title, it was not open to the petitioners to contend that the respondents

should have initiated proceedings before the competent Civil Court for eviction; viewed from any angle the contention, that they had long standing possession over the subject property or that there was a bonafide dispute of title, was not tenable; and the judgments referred to by the Counsel were not applicable to the facts of the case.

The Learned Single Judge further observed that the summary remedy of eviction, as provided under the Act, could be resorted to by the Government against persons who were in unauthorised occupation of any land which is its property; the basic ingredient, and the pre- requisite condition, which is relevant and material, for invoking the provisions of the Act, is that the property, in respect of which the proceedings under the Act was invoked, should be Government property; the subject property was, originally, handed over to the erstwhile Nizam State Railways, and later vested with the South Central Railway; this has also been incorporated in the Town Survey records by the revenue department; these facts, coupled with the proceedings initiated by the appellants-writ petitioners themselves to declare that they were owners (which they failed to establish), would show that there was no valid dispute of title over the subject property, for which the summary procedure, as contemplated under the provisions of the Act, could not be invoked; the petitioners, having themselves invoked the jurisdiction of the competent Civil Court, had failed to establish that they had title over the subject property; having put forth their claim over the subject property through a sale deed of the year 1901, it was not open to them, after loosing the battle on title in a competent Civil Court, to project the theory of adverse possession; a person, who has set up title over a property based on a document, cannot canvass that he has perfected title by adverse possession, and more so the petitioners; in these circumstances it could not be said that there is a genuine dispute with regard to title over the subject property; there was no irregularity or illegality in the proceedings initiated by the respondents, under the provisions of the Act, to evict the petitioners from the subject property; and there were no merits in the Writ Petition. The Writ Petition was, accordingly, dismissed by the order under appeal dated 13.04.2018.

As noted hereinabove, the appellants have misused the judicial process to prevent the respondents from taking possession of their lands. In the first round, they sought declaration of title over the subject lands, and for grant of permanent injunction, filing O.S. No.59 of 1967. On the said suit being dismissed on 30.10.1973, they filed CCCA No.27 of 1975 before this Court which was dismissed on 12.04.1977. Against the said order they filed LPA No.191 of 1977 which was also dismissed, by a Division bench of this Court, on 12.08.1977. Having failed in their attempt to have their title over the subject lands declared by the Court, and for the respondents to be permanently injuncted from dispossessing them, the appellants herein started the second round of litigation filing O.S. No.3121 of 1982 seeking injunction against the respondents contending that they had perfected their title by adverse possession.

O.S.No.3121 of 1982 was dismissed on 03.04.1989. A.S. No.127 of 1989, preferred by the appellants thereagainst, was dismissed on 29.07.1974. Against the said judgment, the appellants herein filed S.A. No.427 of 1994 which was also dismissed on 20.03.2003. It is thus evident that for a period of more than 25 years, ever since they filed O.S. No. 59 of 1967 in the year 1967 till S.A. No.427 of 1994 was dismissed by this Court by its order dated 20.03.2003, the appellants herein have, by resort to the judicial process and on securing interim orders, successfully prevented the respondents from taking possession of their property in its entirety. It is only, thereafter, that the respondents were able to invoke the provisions of the Act by issuing notices, under Section 4 thereof, on 18.08.2004 and 08.10.2004 respectively, and an order was passed by the Estates Officer, under Section 5(1) of the Act, directing the appellants to vacate the subject premises on or before 24.12.2004.

Despite the order of the Estates Officer, the respondents were again thwarted in their efforts to take complete possession of the subject property, as the appellants have questioned the said order before the Chief Judge, City Civil Court, Hyderabad in C.M.A. No.11 of 2005 wherein, among other grounds, they contended that the respondents could not resort to the summary procedure under the Act, and they should be relegated to the remedy of filing a suit for eviction. On C.M.A. No.11 of 2005 being dismissed by the Chief Judge, City Civil Court, by his order dated 20.04.2007, the appellants invoked the jurisdiction of this Court filing W.P. No.12347 of 2007 and, as a result of the interim order passed therein, they have continued to retain possession of some portion of the subject land ever since 14.06.2007 when an interim order was passed in the said Writ Petition.

As the appellants claim that the summary remedy of eviction under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (the Act for short) should not be resorted to, it is necessary to take note of the relevant provisions of the Act which was enacted by Parliament to provide for the eviction of unauthorised occupants of public premises. Section 2(c) of the said Act defines premises to mean any land or any building or part of a building, and to include (i) the garden, grounds and outhouses, if any, appertaining to such building, or a part of a building, and (ii) any fittings affixed to such building, or part of a building, for the more beneficial enjoyment thereof. Section 2(e)(i) defines public premises to mean any premises belonging to, or taken on lease or requisitioned by, or on behalf of the Central Government. Section 4 relates to issue of notice to show-cause against the order of eviction and, under sub-section (1) thereof, if the Estates Officer has information that any person is in unauthorised occupation of any public premises, and that he should be evicted, the Estates Officer shall issue a notice in writing regarding the unauthorised occupation, calling upon the person concerned to show cause why an order of eviction should not be made. Section 4(1A) stipulates that if, the Estates Officer knows or has reason to believe that any person

is in unauthorised occupation of the public premises, then, without prejudice to the provisions of sub-section (1), he shall forthwith issue a notice in writing calling upon the person concerned to show cause why an order of eviction should not be made. Section 4 (1B) stipulates that any delay, in issuing the notice referred to in sub-section (1) and (1A), shall not vitiate the proceedings under the Act. Section 4(3) stipulates that the Estate Officer shall cause the notice to be served by having it affixed on the outer door or on some other conspicuous part of the public premises, and in such other manner as may be prescribed, whereupon the notice shall be deemed to have been duly given to all persons concerned.

Section 5 relates to eviction of unauthorised occupants and, under sub-section (1) thereof, if, after considering the cause if any shown by any person in pursuance of a notice under Section 4 and any evidence produced by him in support of the same and after personal hearing, if any, given under sub-clause (ii) of clause (b) of sub-section (2) of Section 4, the Estates Officer is satisfied that the public premises are in unauthorised occupation, he shall make an order of eviction, for reasons to be recorded therein, directing that the public premises shall be vacated, on such date as may be specified in the order by all persons who may be in occupation thereof or any part thereof, and cause a copy of the order to be affixed on the outer door or some other conspicuous part of the public premises. Section 5(2) stipulates that, if any person refuses or fails to comply with the order of eviction (on or before the date specified in the said order, the Estates Officer, or any other officer duly authorised by the Estates Officer, in this behalf may, after the date so specified, evict that person from, and take possession of, the public premises and may, for that purpose, use such force as may be necessary.

Section 5B of the Act relates to the order of demolition of the unauthorised construction, and Section 6 relates to disposal of property left on the public premises by the unauthorised occupants. Section 15 relates to the bar of jurisdiction and, thereunder, no Court shall have jurisdiction to entertain any Suit or proceeding in respect of (a) the eviction of any person who is in unauthorised occupation of any public premises, or (b) the removal of any building, structure or fixture or goods, cattle or other animal from any public premises under Section 5A, or (c) the demolition of any building or other structure made, or ordered to be made, under Section 5B.

Rule 7 of the Public Premises (Eviction of Unauthorised Occupants) Rules, 1971 (hereinafter called the Rules) prescribes the manner of taking possession of public premises. Rule 7(1) stipulates that, if any obstruction is offered, or is, in the opinion of the Estates Officer, likely to be offered (a) to the taking possession of any public premises; or (b) to the sealing of erection or work or of the public premises, under the said Act, the Estates Officer, or any other officer duly authorised by him in this behalf, may obtain necessary police

assistance. Rule 7(2) provides that where any public premises, of which possession is to be taken under the Act, is found locked, the Estates Officer, or any other officer duly authorised by him in this behalf, may either seal the premises or, in the presence of two witnesses, break open the locks or open or cause to be opened any door, gate or other barrier and enter the premises.

As noted hereinabove, the IV Additional Judge, City Civil Court, Hyderabad had, in his judgment in O.S. No.59 of 1967 dated 30.10.1973, held that the appellant did not have title over the subject property, and that the land vested in the railways; the appellant herein had no right or title; her predecessors had illegally encroached upon the subject land; and the appellant was in illegal possession as a trespasser. As the subject land, and the buildings in a part thereof, is premises within the meaning of Section 2(c), and as it belongs to the Railways (a part of the Central Government), the subject land and the structures thereupon constitute public premises under Section 2(e)(1) of the Act. The finding recorded by the IV Additional Chief Judge, City Civil Court, Hyderabad, in O.S. No.59 of 1967 dated 30.10.1973, that the appellants predecessors had illegally encroached upon the subject land, and the appellant is a trespasser, would show that they are in unauthorised occupation of a public premises and, consequently, the Estates Officer has the power to have such unauthorised occupants evicted by making an order under Section 5 of the Act, and to take possession of the public premises under Rule 7 of the Rules.

With regards the appellants claim of having perfected their title by long standing possession, it is evident, from the facts narrated hereinabove, that the appellants have resorted to one ruse or the other to somehow retain possession of certain extents of the subject land. It is not as if the appellants have raised this contention of adverse possession for the first time, after proceedings under the Act were initiated to evict them from the subject property. Though she did not raise the plea of adverse possession, the plaintiff sought to contend, in O.S.No.59 of 1967, that she had perfected her title by adverse possession. In his judgment, in O.S.No.59 of 1967 dated 30.10.1973, the IV Additional Judge, City Civil Court, Hyderabad held that the plaintiff did not plead adverse possession; her evidence, on a plea not raised by her in her pleadings, could not be looked into; the plaintiff had failed to show, by cogent evidence, how her father-in-law, and his vendor had come into possession, and on what date?; her predecessors had illegally encroached on the said land, and the appellant-plaintiff was in illegal possession as a trespasser.

Thereafter, in O.S. No.3121 of 1982, the appellants contended that they were in continuous possession of the suit schedule property for the past more than 60 years; even after dismissal of O.S. No.59 of 1967 and CCCA No.27 of 1975, they continued to remain in possession; and the respondents should, therefore, be injuncted from dispossessing them from the subject property. In his judgment, in O.S.No.3121

of 1982 dated 03.04.1989, the Learned III Assistant Judge observed that, under Order 2 Rule 2 CPC, the plaintiff, while instituting a suit, had to include the entire claim which she was entitled to make in respect of the cause of action; where the plaintiff omits to sue in respect of, or intentionally relinquishes any portion of, her claim she is not entitled there afterwards to sue in respect of the portion so omitted or relinquished; if she was claiming adverse possession, the appellant-plaintiff ought to have sought for the said relief in the very same Suit (i.e., O.S. No.59 of 1967); the appellant- plaintiff had contended, in O.S. No.59 of 1967, that she derived her title and ownership, over the suit schedule property, by virtue of a sale deed executed in 1901; having failed in the said Suit, she was now claiming adverse possession pleading that she was in continuous possession for the past 60 years; her claim of adverse possession did not arise, as she claimed to have purchased the subject property in the year 1901; she could claim by adverse possession only if she was in continuous possession of the defendants property for more than 30 years; she ought to have raised the said contention, of holding the subject property by adverse possession, when she was agitating her claim for declaration of her title over the suit schedule property in the earlier Suit (i.e. O.S. No.59 of 1967); a wilful and intentional relinquishment of a particular right of title, while agitating for a declaration of title over the suit schedule property, as against which there was a conclusive judgment of the High Court, would disable the plaintiff from again agitating on a different cause of action on the ground of adverse possession; and the findings arrived at, in the earlier Suit, were binding on the plaintiff and the defendants therein.

On the appellants claim, of having perfected title by adverse possession, the Additional Chief Judge, City Civil Court, Hyderabad, in his judgment in A.S. No.127 of 1989 dated 29.07.1994, observed that points, which were not raised in the earlier round of litigation, could not be raised by way of another Suit; Order 2 Rule 2 CPC requires every Suit to include the whole of the claim which the plaintiff was entitled to make in respect of the cause of action; the plaintiff had made the whole of the claim in the earlier Suit which ended in dismissal; the judgment in that Suit was confirmed in Appeal, and in the L.P.A; and the earlier Suit operated as res-judicata.

In C.M.A. No.11 of 2005, preferred against the order of eviction passed by the Estates Officer, the Learned Chief Judge observed that the appellants were claiming adverse possession as an alternative defence to their stand that they were the owners of the schedule property; such an alternative stand could not be taken as it was destructive of their main claim that they were the owners of the property; having claimed to be the owners of the property, the question of their exercising their right of adverse possession did not arise; one of the ingredients of adverse possession is the exercise of adverse title more or less to the knowledge of the true owner; the appellants were not entitled to urge on the one hand that they were the true owners,

and contend at the same time that they had exercised, or had been exercising, adverse title against the true owner; the appellants had to stand or fall on the strength of their case that they were the owners of the property; yet another question was against whom the appellants had perfected their title; as the appellants did not recognise the title of the first respondent or its predecessors or anybody else, they could not claim to be in adverse possession as they had not recognised anybody as the true owner against whom they have been exercising adverse possession; and the appellants had failed to establish their title over the suit schedule property, and of having perfected their title by adverse possession over the subject property. The appellants claim of having perfected their title by adverse possession was rejected.

On the certiorari jurisdiction of this Court being invoked, the Learned Single Judge, in his order in W.P.No.12347 of 2007 dated 13.04.2018, observed that the appellants had restrained the respondents from taking steps for eviction under the guise of obtaining orders from the Court, by filing some or other Suits and appeals; their contention that, by virtue of long standing possession, they had perfected their title over the subject property by adverse possession could not be countenanced; the appellants-writ petitioners had restrained the respondents from taking effective measures to evict them; it was not open to them to turn around, and submit that they had perfected their title by adverse possession; persons, who had obtained interim orders from Courts, could not take advantage of the same or be allowed to contend that the respondents had not taken effective measures to evict them; having put forth their claim over the subject property through a sale deed of the year 1901, it was not open to the appellants, after loosing the battle on title in a competent Civil Court, to project the theory of adverse possession; and a person, who has set up title over a property based on a document, could not canvass that he had perfected title by adverse possession.

As their claim in this regard has been repeatedly rejected by Courts/Tribunals, the appellants cannot now be heard to contend, in an intra-Court appeal under Clause 15 of the Letters Patent, that they have perfected their title by long standing possession. It is the internal working of the High court which splits it into different 'benches' and yet the court remains one. A letters patent appeal, as permitted under the Letters Patent, is normally an intra-court appeal whereunder the Letters Patent bench, sitting as a court of correction, corrects its own orders in the exercise of the same jurisdiction as was vested in the Single bench. (Baddula Lakshmaiah v. Sri Anjaneya Swami Temple (1996) 3 SCC 52 = [1996] 2 SCR 906). In the exercise of the jurisdiction under Clause 15 of the Letters Patent, the judgment under appeal cannot be faulted on the ground that an alternative view, which might commend itself to the appellate court, was not accepted by the Learned Single Judge. At least, such review is not open to an appellate court hearing appeals against orders made under Article 226 of the Constitution which is a discretionary remedy. Interference can only

be on an error of principle but not on re-evaluation of evidence; nor on the basis of preferential choice of alternatives. (Royal Laboratories v. Labour Court, Hyderabad (1984 (2) ALT 207).

The appellants claim to be in possession of the entire property, as referred to in the schedule to the plaint in O.S.No.59 of 1967, has been rejected in A.S.No.127 of 1989. Even in C.M.A. No.11 of 2005, the Chief Judge, City Civil Court, in his order dated 26.04.2007, has observed that the property vested in the South Central Railway from 02.10.1966; it was in the possession, control and enjoyment of the railways for the last century; the property fell in Town Survey No.2B/A, Ward No.113, Hyderabad; and it was completely surrounded by other railway properties and railway establishments. The contention urged, on behalf of the appellants, that the question of limitation in evicting the appellants, in view of their long standing possession, can only be examined in a duly constituted Civil Suit, and not in summary proceedings under the Act, is not tenable. As noted hereinabove, the appellants claim, of their having perfected their title by long standing possession, has been negatived in O.S.No.3121 of 1982, as affirmed in A.S.No.127 of 1989 and thereafter in S.A.No.427 of 1994. The appellants cannot again rake up the issue of adverse possession since the judgment in S.A.No.427 of 1994 dated 20.03.2003 has attained finality.

With regards the appellants claim to be in possession ever since 1967, i.e for the past fifty years, the Learned Single Judge has, in the order under appeal, observed that the appellants, and their predecessors in title, had restrained the respondents from taking steps for eviction under the guise of obtaining orders from Court, by filing some or the other suits and appeals; and it is only after the conclusion of proceedings in the second round of litigation i.e after dismissal of S.A.No.427 of 1994 on 20.03.2003, that the respondents had initiated proceedings under the Act for eviction of the appellants. As the period during which the appellants retained possession of the land, under the protection of the interim orders of Courts, cannot be taken into consideration in computing the statutory period of limitation for initiating eviction proceedings, it matters little that the appellants were in possession of a part of the subject land from 1967 onwards as they had, since O.S.No.59 of 1967 was filed by them till S.A.No.427 of 1994 was dismissed on 20.03.2003, dragged the respondents through two long and arduous rounds of litigation. Even after eviction proceedings under the Act was initiated by the respondents in 2004, the appellants have, by filing C.M.A.No.11 of 2005 against the eviction order dated 24.12.2004, and W.P.No.12347 of 2007 thereafter, have successfully prevented the respondents from evicting them.

In his order, in C.M.A.No.11 of 2005 dated 20.04.2007, the Learned Chief Judge observed that the party asserting adverse possession must establish title and possession openly and continuously beyond the statutory period; though they claimed to be in possession of the subject property

over a century, there was no proof adduced in this regard; the appellants must establish not only possession, but continuous possession to establish adverse possession; barring their claim, there was nothing to conclude that the appellants had been in continuous possession over the schedule property for any length of time, to consider the issue of adverse possession; and the appellants, who had failed in a series of lis, had also failed in establishing their continuous possession over the statutory period in justification of their claim to have perfected their title by adverse possession over the schedule property.

As noted hereinabove, the appellants have had the benefit of an interim order during the pendency of W.P.No.12347 of 2007 i.e from 14.06.2007 till 13.04.2018 when the Writ Petition was eventually dismissed. It is only if there is a bonafide dispute is the respondent disabled from availing the summary remedy under the Act. In the light of several orders passed by different Courts/ Tribunals in the earlier two rounds of litigation, all of which were held against the appellants, their contention that resort by the respondents, to the summary procedure under the Act, violates their fundamental rights under Article 14 of the Constitution of India, necessitates rejection. While affirming the judgment in O.S. No.3121 of 1982, the Learned Additional Chief Judge, City Civil Court, Secunderabad, in his judgment in A.S. No.127 of 1989 dated 29.07.1994, held that the appellants claim of being in possession of 7000 square yards of land was belied by the Advocate Commissioners report in O.S. No.3121 of 1982; and even in the earlier suit in O.S. No.59 of 1967, it was not held that the plaintiff was in possession of the entire extent of 7000 sq. yards.

The Learned Single Judge has, in the order under appeal, observed that there was no bonafide dispute of title over the subject property as the appellants had already suffered defeat in two rounds of litigation before the Court; the appellants had thwarted the repeated attempts of the respondent-Railway in taking possession, by obtaining interim orders from Courts; and they could not take advantage of the same or be allowed to contend that the respondents had not taken effective measures to evict them for the past several years. It is evident, therefore, that there is no bonafide dispute either regarding title of the respondent-railways to the subject property, or of the appellants having perfected their title by long standing possession. Resort to the summary remedy under the Act, to evict the appellants-encroachers who, by misusing the judicial process and because of the interim orders passed by Courts from time to time, have continued to illegally remain in possession of a part of the subject property, cannot be faulted. As it is evident that the railways own the subject property, and the appellants claim of title over the subject property, both on the basis of the sale deed of the year 1901 and of their having perfected their title by adverse possession, has been negatived, resort to the summary proceedings under the Act, by the respondent-Railways, is completely justified. In the absence of a bonafide dispute regarding title, and as it

is evident that the subject premises constitute public premises, resort to the summary remedy, under the provisions of the Act, by the respondent Railways, is in order.

Let us now examine whether the judgments relied on behalf of the appellants support their claim that, in the facts and circumstances of the present case, the summary remedy under the Act cannot be resorted to by the respondent-Railways. The question which arose for consideration before the Supreme Court, in Thummala Krishna Rao2, was whether the Government of A.P. could evict the respondents summarily in the exercise of their powers under the A.P. Land Encroachment Act. The dispute therein related to three plots of land in Habsiguda, Hyderabad which originally belonged to Nawab Zainuddin and, after his death, devolved on Nawab Habibuddin. Between the years 1932 and 1937, certain lands were acquired, by the Government of the Nizam of Hyderabad under the Hyderabad Land Acquisition Act, 1309 Fasli, for the benefit of the Osmania University which was then administered as a Department of the Government; the University acquired an independent legal status of its own under the Osmania University Revised Charter, 1947 promulgated by HEH the Nizam. The question whether the subject three plots were included in the acquisition, notified by the Nizam Government, became a bone of contention between the parties. While the Osmania University contended that these lands were included, and were acquired for its benefit, the owner Sri Nawab Habibuddin contended that the three plots were not acquired. Osmania University filed a suit against Nawab Habibuddin, claiming that these three plots of land were acquired by the Government, and sought his eviction. The suit was dismissed on the ground that one of the plots was not acquired by the Government and, though the other two plots were, the University had failed to prove its possession thereof within twelve years before the filing of the suit. In regard to the two plots, the Trial Court found that Nawab Habibuddin had encroached thereupon in the year 1942, which was more than twelve years before the filing of the suit.

Civil Appeal No. 61 of 1959 filed by Osmania University against that judgment was dismissed by the High Court, and the findings of the Trial Court were affirmed. The State Government was, however, not impleaded as a party to these proceedings. Thereafter the Osmania University addressed a letter to the State Government requesting it to take steps for the summary eviction of persons who were allegedly in unauthorised occupation of the three plots. The Tahsildar, acting under Section 7 of the Land Encroachment Act, 1905, issued a notice to Nawab Habibuddin to vacate the lands, and thereafter an order was passed evicting him from the subject lands. The appeal filed by Nawab Habibuddin was dismissed by the Collector, and the appeal against the decision of the Collector was dismissed by the Revenue Board. During the pendency of the appeal before the Revenue Board, the respondents purchased the plots from Nawab Habibuddin for valuable consideration and, on his death, they were

impleaded in the proceedings before the Revenue Board. The appeal preferred by the respondents, against the decision of the Revenue Board, to the Government was dismissed.

Aggrieved thereby the respondents filed a Writ Petition challenging the order by which they were evicted from the plots. A Learned Single Judge of this Court dismissed the Writ Petition holding that these questions could not be decided in an application under Article 226 of the Constitution of India, and the appropriate remedy was for the petitioners to file a Suit to establish their title; though the title of the Government was not admitted by the alleged encroacher, there was a finding by the Civil Court that there was encroachment by the alleged encroacher, and that was sufficient to entitle the Government to initiate action under the provisions of the Land Encroachment Act.

In appeal, a Division bench of this Court set aside the order, of the Learned Single Judge, holding that the question, whether the land belonged to Osmania University or not, had to be decided as and when the Government filed a suit for this purpose; even if the government is presumed to be the owner, the dispute, which related back to 1942, could not be dealt with in summary proceedings under Section 7 of the Land Encroachment Act, and the summary remedy could not be invoked unless there was an admitted encroachment or encroachment of a very recent origin, and such a remedy could not be availed in cases where complicated questions of title arose for decision.

It is in this context that the Supreme Court observed:

But Section 6 (1) which confers the power of summary eviction on the Government limits that power to cases in which a person is in unauthorised occupation of a land "for which he is liable to pay assessment under Section 3." Section 3, in turn, refers to unauthorised occupation of any land "which is the property of Government". If there is a bonafide dispute regarding the title of the Government to any property, the Government cannot take a unilateral decision in its own favour that, the property belongs to it, and on the basis of such decision take recourse to the summary remedy provided by Section 6 for evicting the person who is in possession of the property under a bona fide claim or title. In the instant case, there is unquestionably a genuine dispute between the State Government and the respondents as to whether the three plots of land were the subject-matter of acquisition proceedings taken by the then Government of Hyderabad and whether the Osmania University, f+or whose benefit the plots are alleged to have been acquired, had lost title to the property by operation of the law of limitation. The suit filed by the University was dismissed on the ground of limitation, inter alia, since Nawab Habibuddin was found to have encroached on the property more than twelve years before the date of the suit and the University was not in possession of the property at any time within that period. Having failed in the suit, the University activated the Government to evict the Nawab

and his transferees summarily, which seems to us impermissible. The respondents have a bona fide claim to litigate and they cannot be evicted save by the due process of law. The summary remedy prescribed by Section 6 is not the kind of legal process which is suited to an adjudication of complicated questions of title. That procedure is, therefore, not the due process of law for evicting the respondents.

The view of the Division Bench that the summary remedy provided for by S. 6 cannot be resorted to unless the alleged encroachment is of "a very recent origin", cannot be stretched too far. That was also the view taken by the learned single Judge himself in another case which is reported in Mehrunnissa Begum v. State of A. P., (1970) '1 Andh LT 88 which was affirmed by a Division Bench (1971) 1 Andh LT 292: (AIR 1971 Andh Pra 382). It is not the duration, short or long, of encroachment that is conclusive of the question whether the summary remedy prescribed by the Act can be put into operation for evicting a person. What is relevant for the decision of that question is more the nature of the property on which the encroachment is alleged to have been committed and the consideration whether the claim of the occupant is bona fide. Facts which raise a bona fide dispute of title between the Government and the occupant must be adjudicated upon by the ordinary courts of law. The Government cannot decide such questions unilaterally in its own favour and evict any person summarily on the basis of such decision. But duration of occupation is relevant in the sense that a person who is in occupation of a property openly for an appreciable length of time can he taken, prima facie, to have a bona fide claim to the property requiring an impartial adjudication according to the established procedure of law.

The conspectus of facts in the instant case justifies the view that the question as to the title to the three plots cannot appropriately be decided in a summary inquiry contemplated by Ss. 6 and 7 of the Act. The long possession of the respondents and their predecessor-in-title of these plots raises a genuine dispute between them and the Government on the question of title, remembering especially that the property, admittedly, belonged originally to the family of Nawab Habibuddin from whom the respondents claim to have purchased it. The question as to whether the title to the property came to be vested in the Government as a result of acquisition and the further question whether the Nawab encroached upon that property thereafter and perfected his title by adverse possession must be decided in a properly constituted suit. May be, that the Government may succeed in establishing its title to the property but, until that is done, the respondents cannot be evicted summarily.. (emphasis supplied).

The law declared by the Supreme Court, in Thummala Krishna Rao2, is that, if there is a bonafide dispute regarding its title to any property, the Government cannot take a unilateral decision in its own favour that the property belongs to it, and on the basis of such a decision take recourse to the

summary remedy, provided by Section 6 of the Land Encroachment Act, for evicting the person who is in possession of the property under a bona fide claim or title; if persons have a bona fide claim to litigate, they cannot be evicted save by the due process of law; the summary remedy, prescribed by Section 6 of the Land Encroachment Act, is not the kind of legal process which is suited to an adjudication of complicated questions of title; that procedure is, therefore, not the due process of law for evicting the respondents; it is not the duration, short or long, of the encroachment that is conclusive of the question whether the summary remedy prescribed by the Act can be put into operation for evicting a person; what is relevant, for the decision of that question, is more on the nature of the property on which the encroachment is alleged to have been committed, and the consideration whether the claim of the occupant is bona fide; facts, which raise a bona fide dispute of title between the Government and the occupant, must be adjudicated upon by ordinary Courts of law; the Government cannot decide such questions unilaterally in its own favour, and evict any person summarily on the basis of such a decision; and the duration of occupation is relevant in the sense that a person, who is in occupation of a property openly for an appreciable length of time, can be taken, prima facie, to have a bona fide claim to the property requiring an impartial adjudication according to the established procedure of law.

In K. Narasing Rao1, an extent of Ac.8.20 gts in Begumpet belonged to Lady Vicar-UI-Umra; after her death her son gifted the said land to Syed Bin Suleman Ahmed under a registered gift deed; Sri Syed Bin Suleman Ahmed sold the said land, under a registered sale deed, to Mohd. Akbar Azam who sold it to Sri Vengal Reddy, and his partner Sri Anand Rao, under a registered sale deed; Sri Anand Rao gifted his half share of Ac.4.10 gts of land to his daughter Smt. K. Susheela who entered into an agreement of sale with the petitioner to sell Ac.1.20 gts from out of the Ac.4.10 gts of land; pursuant thereto, possession of the subject land was delivered to the petitioner who, thus, came into possession of the land, and was in enjoyment of the same. On the ground that there was breach of the agreement of sale by Smt. K. Susheela, the petitioner filed a suit before the Learned I Assistant Judge, City Civil Court, Hyderabad for specific performance of the said agreement of sale. The suit was decreed and, pursuant thereto, the petitioners filed E.P. 14 of 1991 for execution of the sale deed. On 15.04.1991, the I Assistant Judge, City Civil Court, Hyderabad executed a registered sale deed in favour of the petitioner in so far as the land of Ac. 1.20 guntas was concerned. The petitioner thus claimed title and possession of the said land. Thereafter the petitioners divided the said land into plots, and sold them to others who were inducted into possession. They constructed residential houses, and were residing there with their families without interruption, paying property tax, non-agricultural land tax, water bills, electricity consumption charges, telephone bills etc. The petitioners names were entered in the

revenue records, and in the pahanies, showing that they were in possession of the land. The Mandal Revenue Officer, accompanied by the police, started measuring the land contending that it belonged to the Government, the petitioner was in unauthorised possession, and their buildings were liable to be demolished. Despite the petitioner presenting his title deeds, the appellants had allegedly acted high-handedly in demolishing the houses.

The petitioners filed W.P.No. 2366 of 1995 wherein an order of status quo was passed. It was contended, on behalf of the Government, that, as per the Revenue records, the land belonged to Paigh Sir Vicar- Ul-Umara and was under the direct control and superintendence of the Paigah Authorities upto 1950, and later under the control of the Court of Wards, which control continued even up-to-date; the land was acquired by the Land Acquisition Officer on the requisition of the Executive Engineer, P.W.D for construction of Secretariat Staff Quarters; physical possession of the land was handed over in 1964, and the staff quarters were also constructed; the petitioners never had any right or title over the land; in the suit for specific performance, neither the Court of Wards nor the Government was a defendant; and the construction made by the petitioner-respondent was in violation of the Hyderabad Municipal Corporation Act, as such construction was made without obtaining necessary sanction.

A Learned Single Judge of this Court observed that there were disputes regarding title and possession of the land in question, regarding identity of the land, regarding acquisition of the land, regarding control of the land by the Court of Wards till date, regarding demolition of the houses in question etc; and these disputes were in the nature of civil disputes which could be decided by the Civil Court alone, and not by the High Court under Article 226 of the Constitution of India. After so holding, the learned Single Judge examined the allegations and held that, admittedly in these cases, the summary remedy for eviction took place; whether the petitioner was in legal possession of the subject land or not, it was the bounden duty of the respondent-authorities to serve a show cause notice of demolition under Section 7 of the Land Encroachment Act before the actual demolition; when there was a bona fide dispute regarding the title of the Government to any property, the Government could not take a unilateral decision in its own favour that the property belongs to it and, on the basis of such decision, take recourse to the summary remedy for eviction as provided under Section 6 of the Land Encroachment Act for evicting the persons who were in possession of the said land under a bonafide claim of title; the summary remedy, prescribed by Section 6 of the Land Encroachment Act, was not the kind of legal process which was suited to an adjudication of complicated questions of title; and if the Government was so interested, it could move the Civil Court, and establish its right and title over the disputed land, and then proceed with eviction proceedings.

While agreeing with the view taken by the Learned Single Judge that proceedings under Article 226 of the Constitution were not suited for any adjudication into the title of any person in the property, the Division bench differed with the view taken by the learned Single Judge that Section 6 of the Land Encroachment Act was not available to the appellant for removal of the alleged encroachments upon a land, which satisfied the requirements under the A.P. Land Encroachment Act, 1905. Thereafter the Division bench observed:

This section does not speak either of the duration, short or long, of encroachment and indicate that for the decision whether any person should be summarily evicted rests with the Collector, Tahsildar or Deputy Tahsildar, as the case may be and on the decision of the question in respect of the nature of the property on which the encroachment is alleged to have been committed. What may finally be relevant in such a case in issue is whether some one is in occupation of a property bona fide and whether such possession is exercised by him openly. If such possession is exercised for an appreciable length of time, one can prima facie accept the bona fide of the claim, otherwise, the claim may not be deemed without there being adjudication to be bona fide .in our considered view, the primary concern will be to see whether there is a bona fide claim of title and there are reasonable grounds to prima facie hold that the title to the property is in dispute and as such the summary procedure for eviction should be avoided. Adverting to the facts of the case, what is seen is, a series of transactions in respect of the property without, however, any dispute as to the property being under the Court of Wards and an agreement for sale, which has taken to the Civil Court for a specific performance and allegedly decreed by the Court against the alleged vendor of the petitioner-respondents. Constructions are said to have come up, but there is no claim on behalf of the petitioner-respondents that they complied with the requirements of the various provisions of the Hyderabad Municipal Corporation Act. Unauthorised character of the occupation of the land is not displaced by the materials which are brought on the record of the instant proceeding and unauthorised construction is writ large, because provisions of the Hyderabad Municipal Corporation Act are not complied with. Relief, which this Court at such a juncture can grant will be only in the nature of interim injunction leaving the parties to seek their remedy before the appropriate civil Court. Learned single Judge, on the facts as stated above, has chosen to restrain the Government from evicting the petitioner-respondents and/or demolishing constructions by resorting to the summary procedure under Section 6 of the Act and asked the Government to seek adjudication of title and eviction in the Civil Court. The order, thus, has the effect of making the appellants to resign to the legal acts of the petitioner- respondents of coming up with the constructions upon the land, for which the appellants have a definite and bona fide claim. In our considered view, the best course, on the facts and in the circumstances of the case, would be to leave the dispute for adjudication by the

Civil Court without there being any such condition of injunction in favour of the petitioner-respondents, as injunction, if any, can always be granted by the Civil Court if the petitioner- respondents establish a prima facie case and show balance of convenience in their favour.. (emphasis supplied)

While modifying the directions issued by the Learned Single Judge to the extent the parties were granted liberty to move the Civil Court for adjudication of the dispute, and seek such remedy as it deemed fit and proper in accordance with law, the Division bench observed that the petitioner-respondent who had the benefit of the order of injunction, issued by the Learned Single Judge in proceedings under Article 226 of the Constitution of India, could move the Civil Court, if so advised.

The law declared by the Division Bench of this Court, in K. Narasing Rao1, on which heavy reliance is placed by Sri B.Vijaysen Reddy, Learned Counsel for the appellants, is what is relevant is whether some one is in occupation of a property bona fide, and whether such possession is exercised by him openly; if such possession is exercised for an appreciable length of time, one can prima facie accept the bona fides of the claim; otherwise the claim may not be deemed, without there being an adjudication, to be bona fide; and the primary concern is to see whether there is a bona fide claim of title, and there are reasonable grounds to, prima-facie, hold that the title to the property is in dispute, and as such the summary procedure for eviction should be avoided.

It is only if there is a bonafide dispute regarding title of the respondent-railways over the subject property can the summary remedy provided under the Act, for evicting the person in possession of the property under a bonafide claim or title, not be resorted to. The appellants claim of title over the subject property, of having purchased it under a sale deed in the year 1901, was negatived by the IV Additional Chief Judge, City Civil Court, Hyderabad in O.S. No.59 of 1967 dated 30.10.1973, which was affirmed by a Learned Single Judge of this Court in CCCA No.27 of 1975 dated 12.04.2007, and the Letters Patent Appeal preferred thereagainst was dismissed by a Division bench of this Court in LPA No.191 of 1977 dated 12.08.1977. As the order of the Division bench has attained finality, the respondents title over the subject property can no longer be disputed by the appellants herein.

The appellants claim that the respondents should, in view of their long standing possession, be directed to file a suit for eviction does not find support from either of the two judgments they have relied upon. In his order in W.P.No.12347 of 2007 dated 13.04.2018, the Learned Single Judge has also observed that this contention was not tenable; having failed before the competent Civil Court, with regards title, it was not open to the appellant to contend that the respondents should have initiated proceedings before the competent Civil Court for eviction; and, viewed from any angle, the contention that there was a bonafide dispute of title, was not tenable.

As the subject property constitutes public premises, resort to the remedy under the Act, in the absence of a bonafide dispute of title, or for any other valid reason, is in order. In fact the appellant had earlier contended that the respondents should file an execution petition seeking their eviction, and this contention was negatived by the III Assistant Judge, in O.S. No.3121 of 1982 dated 03.04.1989, holding that there was no decree against the respondent; it was the plaintiff who had sought a declaration of having a right over the suit schedule property, and in that view of the matter, the respondents had initiated proceedings to take possession of the subject property. The appellants claim that the respondents should be relegated to the remedy of filing a suit for eviction is wholly unjustified, and does not merit acceptance.

The Learned Single Judge, after elaborate examination of the contentions put forth by the appellants herein, has, for just and valid reasons, exercised his discretion not to interfere. An appeal against exercise of discretion is an appeal on principle. The appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below, if the one reached by that court was reasonably possible on the material. The appellate court would, normally, not be justified in interfering with the exercise of discretion under appeal solely on the ground that, if it had considered the matter at the trial stage, it would have come to a contrary conclusion. If the discretion has been exercised by the learned Single Judge reasonably, and in a judicious manner, the fact that the appellate court would have taken a different view may not justify interference with the learned Single Judges exercise of discretion. The appellate court would not interfere with the exercise of discretion by the learned Single Judge unless such exercise is found to be palpably incorrect or untenable or if the view taken by the Learned Single Judge is not a possible view. (Wander Ltd. v. Antox India (P) Ltd. (1990 Supp. SCC 727); Mohd. Mehtab Khan v. Khushnuma Ibrahim Khan (2013) 9 SCC 221 : (2013) 4 SCC (Civ) 285). In an intra-Court Appeal, under Clause 15 of the Letters Patent, interference with such an order, passed by the Learned Single Judge, would be wholly unjustified.

The Writ Appeal fails and is, accordingly, dismissed. The miscellaneous petitions, if any pending, shall also stand disposed of. No costs.

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2018 (2) L.S. 63 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

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

Kishan Rao ..Appellant

Vs.

Shankargouda ..Respondents

NEGOTIABLE INSTRUMENTS ACT, Secs.118, 138 and 139 – Appeal preferred against Judgment of High Court, where in, it set aside conviction imposed on accused/respondent.

Held - Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted - As soon as complainant discharges the burden to prove that instrument was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on accused - Presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability - A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists – Appeal stands allowed.

J U D G M EN T

(Per the Hon'ble Mr.Justice
Ashok Bhushan)

This appeal has been filed against the judgment and order of the High Court dated 18.03.2016 by which judgment, Criminal Revision Petition filed by the respondent-accused was allowed by setting aside the order of conviction and sentence recorded against the accused under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "Act 1881"). The parties shall be hereinafter referred to as described in the Magistrate's Court.

2. Brief facts of case are:

The appellant(complainant) and the respondent (accused) were known to each other and had good relations. Accused approached the complainant for a loan of L2,00,000/- for the purpose of his business expenses and promised to repay the same within one month. On 25.12.2005, complainant had paid sum of Rs. 2,00,000/- as a loan. For repayment of the loan accused issued post dated cheque dated 25.01.2006 in the name of complainant for the amount of Rs. 2,00,000/-. The cheque was presented for collection at Bank of Maharashtra Branch at Gulbarga which

could not be encashed due to insufficient funds. At the request of the accused the cheque was again represented on 01.03.2006 for collection which was returned on 02.03.2006 by the Bank with the endorsement "insufficient funds".

3. A notice was issued by the complainant demanding payment of Rs. 2,00,000/- which was received by the accused on 14.03.2006 to which reply was sent on 31.03.2006. A complaint was filed by the appellant alleging the offence under Section 138 of the Act, 1881. Cognizance was taken by the Magistrate. Accused stated not guilty of the offence, hence, trial proceeded. In order to prove the guilt, the complainant himself examined as PW.1 and examined two other witnesses PW.2 and Pw.3. He filed documentary evidence Exhs.P1 and P6, statement of the accused was recorded under Section 313 Cr.P.C. Thereafter, the case proceeded for defence evidence. Accused neither examined himself nor produced any evidence either oral or documentary. In the reply to the notice which was sent by the complainant, it was alleged that the said cheque was stolen by the complainant. The complainant was cross-examined by the defence. In the cross-examination defence denied accused's signatures on the cheque. The trial court rejected the defence of the accused that cheque was stolen by the complainant. The trial court drew presumption under Section 139 of the Act, 1881 against the accused. Accused failed to rebut the presumption by leading any evidence on his behalf. The offence having been found proved, the trial court convicted the accused under Section 138 of the Act, 1881 and sentenced him to pay a fine of Rs. 2,50,000/- and simple imprisonment for six months.

4. The appeal was filed by the accused against the said judgment. The Appellate Court considered the submissions of the parties and dismissed the appeal by affirming the order of conviction.

5. Criminal Revision was filed by the accused in the High Court. The High Court by the impugned judgment has allowed the revision by setting aside the conviction order. The High Court held that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. Complainant aggrieved by the judgment of the High Court has come in this appeal.

6. Learned counsel for the appellant submits that the offence having been proved before the trial court by leading evidence, the conviction was recorded by the trial court after appreciating both oral and documentary evidence led by the appellant which order was also affirmed by the Appellate Court. There was no jurisdiction in the High court to re-appreciate the evidence on record and come to the conclusion that accused has been able to raise a doubt regarding existence of the debt or liability of the accused. He submits that the High court in exercise of jurisdiction under Section 379/401 Cr.P.C. can interfere with the order of the conviction only when the findings recorded by the courts below are perverse and there was no evidence to prove the offence against the accused. It is submitted

that in exercise of the revisional jurisdiction the High Court cannot substitute its own opinion after re-appreciation of evidence.

7. It is submitted that the presumption under Section 139 was rightly drawn against the accused and accused failed to rebut the said presumption by leading evidence. There was no ground for setting aside the conviction order.

8. Although, the respondent was served but no one appeared at the time of hearing.

9. We have considered the submissions of the appellant and perused the records.

10. The trial court after considering the evidence on record has returned the finding that the cheque was issued by the accused which contained his signatures. Although, the complainant led oral as well as documentary evidence to prove his case, no evidence was led by the accused to rebut the presumption regarding existence of debt or liability of the accused.

11. This Court has time and again examined the scope of Section 397/401 Cr.P.C. and the ground for exercising the revisional jurisdiction by the High Court. In State of Kerala v. Puttumana Illath Jathavedan Namboodiri, 1999 (2) SCC 452, while considering the scope of the revisional jurisdiction of the High Court this Court has laid down the following:

"5.....In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. On scrutinizing the impugned judgment of the High Court from the aforesaid standpoint, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the respondent by reappreciating the oral evidence....."

12. Another judgment which has also been referred to and relied by the High Court is the judgment of this Court in Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke and others, 2015 (3) SCC 123. This Court held that the High Court in exercise of revisional jurisdiction shall not interfere with the order of the Magistrate unless it is perverse or wholly unreasonable or there is non-consideration of any relevant material, the order cannot be set aside merely on the ground that another view is possible. Following has been laid down in paragraph 14:

"14.....Unless the order passed by the

Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is possible. The Revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court under Sections 397 to 401 CrPC is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction."

13. In the above case also conviction of the accused was recorded, the High Court set aside the order of conviction by substituting its own view. This Court set aside the High Court's order holding that the High Court exceeded its jurisdiction in substituting its views and that too without any legal basis.

14. Now, we proceed to examine order of the High Court in the light of the law as laid down in the above mentioned cases. The High Court itself in paragraph 40 has given its reasons for setting aside the order of conviction, it has observed that though perception of a person differs from one another with regard to the acceptance of evidence on record but in its perception and consideration, the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. It is relevant to notice what has been said in paragraph 40 of the judgment which is to the following effect:

"40. In view of the above said "facts and circumstances, though perception of a person differs from one another with regard to the acceptance of evidence on record but in my perception and consideration, the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability particularly with reference to the alleged transaction dated 25.12.2005 as alleged by the complainant. Hence, in my opinion the High Court has full power to interfere with such judgment of the Trial Court as subject matter exactly falls within the parameters of Section 397 of the Code and also guidelines of the Apex Court as noted in the above said decisions. Therefore, I am of the considered opinion the Trial Court and the First Appellate Court have committed serious error in merely proceeding on the basis of the presumption under Section 139 of the Act and also on the basis that, the accused has not proved his defence with reference to the loss of cheque etc. Hence, I answered the point in the affirmative and proceeded to pass the following:

ORDER

The revision petition is hereby allowed. Consequently, the judgment and sentence

passed by the III-Addl. Civil Judge (Jr.Dn.) & JMFC, Kalaburagi in C.C.No.1362/2006 which is affirmed by Fast Track Court - 1 at Kalaburagi in Cr.A.No.46/2009 are hereby set aside. Consequently, the accused is acquitted of the charges levelled against him under Section 138 of N.I.Act. If any fine amount is deposited by the accused/ petitioner, the same is ordered to be refunded to him...."

15. The High Court has not returned any finding that order of conviction based on evidence on record suffers from any perversity or based on no material or there is other valid ground for exercise of revisional jurisdiction. There is no valid basis for the High Court to hold that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. The appellant has proved the issuance of cheque which contained signatures of the accused and on presentation of the cheque, the cheque was returned with endorsement "insufficient funds". Bank official was produced as one of the witnesses who proved that the cheque was not returned on the ground that it did not contain signatures of the accused rather it was returned due to insufficient funds. We are of the view that the judgment of High Court is liable to be set aside on this ground alone.

16. Even though judgment of the High Court is liable to be set aside on the ground that High Court exceeded its revisional jurisdiction, to satisfy ourselves with the merits of the case, we proceeded to examine as to whether there was any doubt with regard to the existence of the debt or liability of the accused.

17. Section 139 of the Act, 1881 provides for drawing the presumption in favour of holder. Section 139 is to the following effect:

"139. Presumption in favour of holder.- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

18. This Court in Kumar Exports v. Sharma Carpets, 2009 (2) SCC 513, had considered the provisions of Negotiable Instruments Act as well Evidence Act. Referring to Section 139, this Court laid down following in paragraphs 14, 15, 18 and 19:

"14. Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

15. Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable), and (3) "conclusive presumptions" (irrebuttable). The term "presumption" is used to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process

of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".

18. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."

19. This Court held that the accused may adduce evidence to rebut the presumption, but mere denial regarding existence of debt shall not serve any purpose. Following was held in paragraph 20:

"20....The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist..."

20. In the present case, the trial court as well as the Appellate Court having found

that cheque contained the signatures of the accused and it was given to the appellant to present in the Bank of the presumption under Section 139 was rightly raised which was not rebutted by the accused. The accused had not led any evidence to rebut the aforesaid presumption. The accused even did not come in the witness box to support his case. In the reply to the notice which was given by the appellant the accused took the defence that the cheque was stolen by the appellant. The said defence was rejected by the trial court after considering the evidence on record with regard to which no contrary view has also been expressed by the High Court.

21. Another judgment which needs to be looked into is Rangappa v. Sri Mohan, 2010 (11) SCC 441. A three Judge Bench of this Court had occasion to examine the presumption under Section 139 of the Act, 1881. This Court in the aforesaid case has held that in the event the accused is able to raise a probable defence which creates doubt with regard to the existence of a debt or liability, the presumption may fail. Following was laid down in paragraphs 26 and 27:

"26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat, (2008) 4 SCC 54, may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard or proof."

22. No evidence was led by the accused. The defence taken in the reply to the notice that cheque was stolen having been rejected by the two courts below, we do not see any basis for the High court coming to the conclusion that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. How the presumption under Section 139 can be rebutted on the

evidence of PW.1, himself has not been explained by the High court.

23. In view of the aforesaid discussion, we are of the view that the High Court committed error in setting aside the order of conviction in exercise of revisional jurisdiction. No sufficient ground has been mentioned by the High Court in its judgment to enable it to exercise its revisional jurisdiction for setting aside the conviction.

24. In the result, the appeal is allowed, judgment of the High Court is set aside and judgment of trial court as affirmed by the Appellate Court is restored.

--X--

2018 (2) L.S. 70 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr. Justice
S.A.Bobde &
The Hon'ble Mr.Justice
L. Nageswara Rao

State of Andhra Pradesh ..Appellants
Vs.
Pullagummi Kasi Reddy
Krishna Reddy @ Rama
Krishna Reddy & Ors., ..Respondents

INDIAN PENAL CODE, Sec.302 - Accused who were convicted for various offences by the trial Court filed appeals before the High Court, where in, appeals were allowed and all accused acquitted - Aggrieved thereby, State preferred instant appeal.

Crl.A.Nos.2089-2090/2009 Date:3-7-2018

Held - The principle of 'Falsus in unofalsus in omnibus ' has not been accepted in our country - Even if some accused are acquitted on the ground that the evidence of a witness is unreliable, the other accused can still be convicted by relying on the evidence of the same witness – Appeal allowed accordingly.

Mr.Aruna Singh, Guntur Prabhakar,Advocate for the Appellant.

Mr.G.N. Reddy, Advocate for the Respondents.

J U D G M E N T

(per the Hon'ble Mr.Justice L. Nageswara Rao)

There were two factions in Chindukur village, Gadivemula Police Station, Kurnool District, Andhra Pradesh. One faction was led by V. Venkateswara Reddy and the other by Sivarami Reddy (Deceased No.1). V. Venkateswara Reddy was murdered in July, 1992. In retaliation, persons belonging to V. Venkateswara Reddy's group murdered four supporters of Sivarami Reddy. On 11th October, 1994, Crime Nos. 92 and 93 of 1994 was registered in Gadivemula Police Station under Section 5 of the Explosive Substances Act, 1908 against persons of both groups. Sivarami Reddy (Deceased No.1) was released on conditional bail. One of the conditions for bail was that he had to attend Gadivemula Police Station every Sunday between 6.00 a.m. to 10.00 a.m.

2. On 30th October, 1994, Sivarami Reddy along with his supporters and two escort police constables left his residence at 9.00 a.m. in a jeep to mark his attendance at

Gadivemula Police Station. When the jeep was passing by the house of A-1 (wife of V. Venkateswara Reddy) a bullock cart was pushed across the road by A-2, A-3 and A-4 to stop the jeep. A-1 who was standing on the compound wall exhorted the other accused to hurl bombs and kill the deceased. A-5 to A-15 came out of the house of A-1 and rushed towards the jeep in which Sivarami Reddy and others were travelling. According to the prosecution, A-5 to A-7, A-9, A-11 to A-14 hurled country made bombs on the jeep. One bomb exploded on the face of Y. Ayyapu Reddy (Deceased No.2) who was driving the jeep. In an attempt to escape, Sivarami Reddy (Deceased No.1) started running while looking back and a bomb thrown by A-7 exploded on the head of Sivarami Reddy due to which he died on the spot. A-8, A-10, A-15 to A-37, A-42 to A-47 who were armed with hunting sickles and iron pipes attacked Rami Reddy (Deceased No.3) and hacked him to death. A-13, A-38 to A-41 chased Kambagiri Ramudu (Deceased No.4) armed with country made bombs. The bomb thrown by A-13 hit Kambagiri Ramudu on his back and the explosion caused his death on the spot. A. Ayyalanna (PW-1), N. Subrahmanyam, Y. Mudduleti Reddy, Sunka Raju, Balaraju (PW-6) and Janardhan Reddy (PW-7) and the escort police constable Gopal Rao received splinter injuries in the bomb blast. The prosecution version is that the escort constable Gopal Rao opened fire in the air due to which the accused fled. The Sub Inspector of Police, Gadivemula Police Station rushed to the spot on receiving information and recorded the statement of A. Ayyalanna(PW1) at 9:45 a.m. FIR No. 99/1994 was registered at 11.00 a.m. The police conducted the inquest between 12.30 p.m. and 3.30 p.m. and the FIR was sent to the Magistrate at 5:00 p.m. Thereafter, the bodies of all the four deceased were sent for Post Mortem on the same day. The explosives expert opined that the bombs used by the accused could endanger human life on explosion. A charge sheet was filed against the accused under Sections 147, 148, 302, 307, 324, 332 read with Section 149 of the Indian Penal Code, 1860 (for short 'the IPC') and Sections 3 and 4 of the Explosive Substances Act, 1908. 47 persons were shown as accused in the charge sheet. By mistake Vaddegittannagari Kothuru Subbarayudu was shown as A- 36 and A-42 due to which A-42 was deleted from the list of the accused. Vallapureddy Anasuyamma(A-1), Boya Shakunala Ramadu(A-2), Pashula Bheemanna(A-3), Boya Ayula Pullaiah(A-4) Bathula Satyanarayana Reddy(A-5), Bathula Aki Reddy(A-8), Murasinin Hanumantha Reddy(A- 24), Vadde Sambasivudu (A-43), Bathula Gopal Reddy(A- 44), Golla Peda Saibaba(A-45), Valapureddy Pratap Singh(A-46) and Kasideddi Krishna Reddy (A-47) were acquitted by the trial Court. Seema Govinda Reddy(A-6), Mulinti Telugu Sreemulu(A-7), Sura Sreedhar Reddy(A-9), Vadde Gunja Venkatasubbadu(A-10) Kasireddy Bhupal Reddy(A-11), Kasireddy Vasantha Kumar Reddy(A-12), Pullagummi Kasireddy Krishna Reddy(A-13), Bathula Pranamananda Reddy(A-14), Vadde Pallapu Jambula(A-15), Kondapuram Narayana Reddy(A-16), Bathula Sankar Reddy (A-17), Vade Malesh(A-18), Yedula Rami Reddy(A- 19), Perugu Pedda Venkateswarlu(A-20), Mulla Sha Hussaini(A-21), Mulla Moula Peera(A-22), Mulla Hassan Peera (A-23), Murasani Sudersana Reddy(A-25), Vade Hanumanna(A-26), Vadde Sindesudu(A-27), Vadde

Venkatesu(A-28), Vadde Gittannagari Chinna Subbarayudu(A-29), Vadde Rameshudu(A-30), Murasani Venkatswara Reddy(A-31), Golla Chinna Saibaba(A-32), Seema Chenchi Reddy(A-33), Telugu Sankaraiah(A-34), Vadde Gittannagari Kotturu Chinna Sabbadu(A-35), Vaddegittannagari Kothuru Subbarayudu (A-36), Bathula Venkateswara Reddy(A-37), Vadde Koppugadu @ Sreeramulu(A-38), Sura Papi Reddy (A-39), Vadde Pedda Venkateswarlu (A-40), Kasireddy Venkateswar Reddy (A- 41) were convicted by the trial Court under Section 302 read with Section 149 of the IPC and sentenced to life imprisonment. A-6, A-7, A-9, A-11 to A14 and A-38 to A-41 were also convicted under Section 3 and 5 of the Explosive Substances Act. The acquittal of A-1 to A-5, A-8, A-24 and A-43 to A-47 was not challenged by the State.

3. The accused who were convicted for various offences by the trial Court filed appeals before the High Court of Andhra Pradesh. The High Court allowed the appeals and acquitted all the accused. Aggrieved, the State has preferred the above appeal.

4. The trial Court held that A-1 was entitled to the benefit of doubt. The evidence relating to A-1 climbing over a 10 feet high wall and instigating the other accused to hurl bombs was found to be artificial by the trial Court. The alibi pleaded by her that she was not in the village on the date of incident as she was in Peddapadu village visiting her ailing sister's husband was accepted by the trial Court. A-2 to A-4 were also given the benefit of doubt and acquitted by the trial Court as no overt acts were attributed to them except placing a double bullock cart on the road. The finding recorded by the trial Court is to the effect that the sketches prepared by the investigating officer marked as Exhibit 20 and 25 clearly showed that there was no hinderance for the jeep to pass through the road in spite of the bullock cart being placed on the road. Similarly, A-5 was also acquitted as the trial Court accepted the evidence of DW-1 and held that he was not present in the village at the time of commission of the offence on 30th October, 1994. A-8 volunteered to be examined as DW-3. He was a practicing advocate at Kurnool. His version was that he was coming to the village from Kurnool and mid-way he was informed about the incident. On receipt of the said information, according to A-8, he returned to Kurnool. After examining the other evidence on record, the trial Court acquitted A-8 by giving him the benefit of doubt. A-24 who was the paid Secretary in a Cooperative Society pleaded that he was at Karimaddela village on 30th October 1994. He went to collect the debts due to the cooperative society. No specific overt acts had been attributed to him. The trial Court accepted the submission on behalf of A-24 regarding the propensity of the prosecution witnesses to implicate all persons belonging to the opposite group. A-43 to A-47 were also acquitted as their names did not find mention in the FIR and no specific overt act was attributed to them. While repelling the submissions of the defence that the prosecution version bristles with contradictions and improbabilities, the trial Court examined the evidence on record to convict the other accused. The evidence of PWs- 1, 6 and 7 who were injured eye-witnesses was relied upon by the trial Court. Minor contradictions in their evidence were ignored. The testimony of PWs- 2, 3 and 5 who were chance witnesses was also relied upon by the trial Court.

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