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Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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PART - 14 (31ST JULY 2018)

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Held - Not only visual appearance of two marks is different, they even relate to different products and manner in which they are traded, it is difficult to imagine that an average man of ordinary intelligence would associate goods of appellant as that of the respondent - No question of confusion or deception - Appeals are allowed and Order of Deputy Registrar granting registration in favour of the appellant is hereby restored**.**

(S.C.) ***90***

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APPOINTMENT OF RECEIVER

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

Introductory:-

The court may appoint a receiver in a variety of circumstances. A Court will never appoint a receiver merely on the ground that it will do no harm. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc. The Court has to appoint a Receiver only when it is found that such an appointment is just and convenient to do so. The receiver is an officer of the court in all cases. The receiver must act fairly and impartially.It is not possible to give a detailed description of what a court appointed receiver does because of the many different circumstances for which they may be appointed. A receiver may be instructed by the court to manage a business, to collect rents, to sell assets or just ensure that property is preserved pending resolution of a dispute.The receiver may apply to the court for directions at any time for his/her duties. The court will generally grant remuneration to the receiver that is reasonable and proportionate after taking into account. The court may order the receiver to prepare and serve accounts.

Definition of 'Receiver':-
The word 'Receiver' has been defined by Kerr as follows:- "A receiver in an action is an impartial person appointed by the Court to collect and receive, pending the proceedings, the rents, issues and profits of land, or personal estate, which it does not seem reasonable to the Court that cither party should collect or receive, or for enabling the same to be distributed among the persons entitled." (Kerr on the Law and Practice as to Receivers appointed by the High Courts of Justice or order of Court, Twelfth Edition, Walton and Sarson, Special Edition for India, N. M. Tripathi& Co. (1932) P. L). See.

KrishnaswamyChetty v. C. ThangaveluChetty, AIR 1955 Mad 430.

Two classes of receivers can be appointed by Courts:-Two classes of receivers can be appointed by Courts, viz., (a) under the statutes and (b) under the Civil Procedure Code, the Specific Relief Act and the Original Side Rules of the High Court. See. KrishnaswamyChetty's case (supra).

Appointment of receiver by Court under statutes:-Several statutes in India like the Provincial Insolvency Act (5 of 1920) (Sections 20, 57, 59 and 68), the Presidency Towns Insolvency Act (3 of 1909) (Section 16) the Transfer of Property Act (4 of 1882) (Section 69-A), the Trustees' and Mortgagees' Powers Act (28 of 1866) (Sections 12 to 19) and the Indian Companies Act (7 of 1913) (Sections 118, 119, 129 and 277E) authorise Courts for appointing receivers under the particular circumstances set out therein. ...''

Appointment of receiver by Court underthe Civil Procedure Code, the Specific Relief Act and the Original Side Rules of the High Court:-

The second class of Receivers arc included in these in which appointment is made to preserve the property pending litigation to decide the rights of parties. The powers to appoint a Receiver in such cases are comprised in the Civil Procedure Code of 1908 (Sections 51, 94 and Order 40), the Specific Relief Act of 1877 (Section 44), and the Original Side Rules of High Courts relating to Receivers.''

Panchsadachar:-

In *KrishnaswamyChetty v. C. ThangaveluChetty, AIR 1955 Mad 430***,** five principles which were described as the "panchsadachar' of our Courts exercising equity jurisdiction in appointing receivers.

(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute: it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised-for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding *: — 'Mathusri v. Mathusri, 19 Mad 120 (PC) (Z5); — 'Sivagnanathammal v. ArunachallamPillai', 21 Mad LJ 821 (Z6); —'Habibullah v. Abtiakallah', AIR 1918 Cal 882 (27); — 'Tirath Singh v. ShromaniGurudwaraPrabandhak Committee', AIR 1931 Lah 688 (28); —'Ghanasham v. Moraba', 18 Bom 474 (7.9); —'JagatTariniDasi v. NabagopalChaki', 34 Cal 305 (Z10); — 'Sivaji Raja Sahib v. Aiswariyanandaji', AIR 1915 Mad 926 (Z11); — 'PrasannoMoyi Devi v. BeniMadbabRai', 5 All 556 (Z12); — 'SidheswariDabi v. AbhayeswariDahi', 15 Cal 818 (213); — 'ShromaniGurudwaraPrabandhak Committee, Amritsar v. Dharam Das', AIR 1925 Lah 349 (Z14); — 'BhupendraNath v. ManoharMukerjee', AIR 1024 Cal 456 (Z15).*

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit. *— 'Dhumi v. NawabSajjad All Khan', AIR 192.3 Uh 623 (Z16); — 'Firm of Raghubir Singh' Jaswant v. Narinjan Singh', AIR 1923 Lah 48 (217); — 'Siaram Das v. Mohabir Das', 27 Cal 279 (Z18); —*

'MahammadKasim v. NagarajaMoopanar', AIR 1928-Mad 813 (Z19); — 'BanwarilalChowdhury v. Motilal', AIR 1922 Pat 493 (220).

(3) Not only must the plaintiff show a case of adverse and conflicting claims to property,

but, he must show some emergency or danger or loss demanding immediate action and of his own right, he must be reasonably clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm. — *"ManghanmalTarachand v. .Mikanbai', AIR 1933 Sind 231 (221); — 'Bidurramji v. Keshoramji', AIR 1939 Oudh 31 (Z22); — 'Sheoambar Ban v. Mohan Ban', AIR 1941 Oudh 328 (223).*

(4) An order appointing a receiver will not be. made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through, fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio', that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a Court with jurisdiction to appoint a receiver. — *'Nilambar Das v. MabalBehari', AIR 1927 Pat 220 (Z24); — 'AlkamaBibi v. Syed IstakHussain', AIR 1925 Cal 970 (Z25~.); — 'MathuriaDebya v. Shibdayal Singh', 14 Cal WN 252 (Z26); — 'Bhubaneswar Prasad v. Rajeshwar Prasad', AIR 1948 Pat 195 (Z27). Otherwise a receiver should not be appointed in supersession of a bone fide possessor of property in controversy and bona fides have to be presumed until the contrary is established or can be indubitably inferred.*

(5) The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc.*"*

I have discussed till now the meaning of 'Receiver', two classes of receivers can be

appointed by Courts, five principles which can be described as '*PanchSadachar*' for appointment of a receiver. A word about latest legal position on the subject matter is not out of place.

As was pointed out by the **Hon'ble Division Bench in S. Saleema Bi Vs. S. Pyari Begum and another, 2000 (3) ALT(SC) 1 (D.B.)**, the Receiver can only be appointed when it is just and convenient and also when there is a prima facie case in favour of the plaintiff and the case calls for taking of urgent measure like appointment of a Receiver. In **M/s. Sherali Khan Mohamed Manekia Vs. State of Maharashtra and others, 2015 (3) SCJ 722 (D.B.)**. KURIAN JOSEPH and M.Y. EQBAL,jj., it was held that ordinarily, functions of receiver come to an end with final decision of the case Even thereafter, the Court has discretion to take further assistance of the Receiver.

In **AjmeeraRaghavulu Vs. GugulothRupla (died) by his L.R., GugulothRangamma and another, 2012 (4) ALT 382.**C.V. NAGARJUNA REDDY,j, it was held that power of Agent to Government under Rule 42 of A.P. Agency Rules, 1924 to appoint a Receiver in a suit suomotu even without an application by aparty for that purpose be exercised in a very discreet and judicious manner and for the reasons to be recorded.(Para 6).
Appointment of Receiver in partition suit:-When there is no allegation of acts of waste of property in possession of defendant and when no relief is sought by plaintiff for mesne profits, appointment of receiver in partition suit is erroneous.(Paras 4 and 6). See.**Meda Baby Reddy v. Smt. AkulaJyothi and another - 2010 (1) ALT 629 (D.B.).** V.V.S. RAO and B.N. RAO NALLA,jj. In **KarumanchiPadmapriya and others v. ChirasaniRatnakumari and others, 2008 (2) ALT 188,** it was held that in a partition action, normally appointment of receiver shall not be resorted to without considering the entire facts and circumstances.

Appointment of Receiver to manage the property:-Appointment of Receiver to manage certain property in the absence of any allegation that party in possession is indulging in acts of waste or damage being caused to the property is not legal.(Para 18). See.**Mohd. Tajuddin v. Smt. Muneerunnisa Begum and other, 2010 (1) ALT 197.**B.S. REDDY,j.
Pendency of any proceedings in Court in relation to arbitration proceedings would be a pre-condition for the exercise of power by Civil Court under the Second Schedule of the Act.:- The Hon'ble Apex Court in *M/s. Sant Ram & Company vs. State of Rajasthan and others, 1997 (1) ALT(SC) 1,* it was held that in view of clause (b) of Section 41 the Court has been given power of passing orders in respect of any of the matters set out in Second Schedule for the purpose of and in relation to any proceedings before the Court. The Second Schedule of the Arbitration Act inter alia includes 'interim injunction' and the 'appointment of receiver'. (Para 3) To avail the remedy under the provisions of the Code of Civil Procedure, when an application for injunction under Section 41(b) read

with Schedule is filed, the Court shall have, pending proceedings for the purpose of and in relation to the arbitration proceedings availed through the process of the Court, the same power of making orders in respect of any matters set out in the Second Schedule as it has for the purpose of and in relation to any proceedings before the Court. (Para 4)
It is obvious from sub-section (1) of Section 146,Cr.P.C that the Magistrate is give power to attach the subject of dispute "until the competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof".See. **Dharam Pal & others. Vs. Smt. Ramshri& others,1993 (1) ALT(CRI.)(SC) 299 (D.B.).** R.M. SAHAI and P.B. SAWANT,jj.

In **P. Perraju and Others Vs. Central Bank of India, 1979 (2) ALT(NRC) 87 (D.B.).** K. MADHAVA REDDY and MADHAVA RAO,jj, it was held that Receiver can be appointed of the properties directed to be sold under a simple mortgage decree. Sub-rule 2 of rule 1 of Order 40 does not prevent a Receiver from dispossessing a party to a proceeding. It only restricts his power to dispossess a person other than a party to the suit whom a party to the suit himself could not have dispossessed. While the Court may in exercise of the powers conferred on it under Or. 40 Rule 1 (a), (b), (c), (d) confer on the Receiver the authority to take possession and manage the properties and realise the rents etc., that power of the Court does extend so as to enable it to direct the removal of any person from the possession or custody of the property "whom any party to the suit has not a present right so to remove."

In **C. Venkataswami Vs. C. Kotayya, 1959 (1) ALT 725 (D.B.),** A. SRINIVASACHARI and P. CHANDRA REDDY,jj, the words of Order 40 Ruler C. P. C. make it abundantly clear that the court would be justified in appointing a Receiver where it is satisfied that it would be 'just and convenient'. The provisions of the English Law corresponding to this rule were to be found in Section 25 of the Judicature Act of 1873 and now Section 45 of the Judicature Act of 1915. The words therein were 'just or convenient'. But even in England these words were interpreted to mean 'just and convenient'. What is required is that the Court should not merely exercise the power vested in it under this rule in an arbitrary or unregulated manner but according to legal principles after a consideration of the whole of the circumstances of the case and the court has a complete discretion in this matter. Where, therefore, the words used are 'just and convenient' it cannot be said that it is only in the case where there is an application by the plaintiff for the relief that a Receiver could be appointed. The words 'appoint a Receiver of any property' are also significant.

Conclusion:-

As was held by the Hon'ble Supreme Court in Parmanand Patel (Dead) by LR. and another Vs. Sudha A. Chowgule and others, 2009 (5) SCJ 550 (D.B.),Court has to appoint a Receiver only when it is found that such an appointment is just and convenient to do so. It is well-settled law that a Receiver cannot be appointed in respect of agricultural lands

especially in a dispute between family members. (Ref. BollareddyBrahmananda Reddy and another v. BollareddySeethayamma @ Seethamma, 2006 (6) ALT 207). , But, in ChundruSrinivasaRao Vs. ChundruVenkataRao, 1992 (2) ALT 733, it was observed that appointment of receiver in partition suit-Not barred in all types of cases-Suit filed by sons against father for partition alleging that their father is no providing anything to them for their livelihood-In such circumstances of the case, normal rule that no receiver can be appointed in cases of partition may be deviated. In*KallamMangamma Vs. K. Brahma Reddy, 1989 (1) ALT 331*,the HOn'ble Single Judge pointed out thatOr. 40 Rule 1 CPC, application by plaintiff co-owner for appointment of receiver to schedule property on ground that defendant co-sharer in possession is not taking proper care-Can be ordered. *The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit.*

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2018(2) L.S. 279 (Hyd.)

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

Present:
The Hon'ble Mr.Justice
T. Sunil Chowdary

Radhi Raney & Anr., ..Appellant
Vs.
Nanki Feroze ..Respondent

A.P. BUILDINGS (LEASE, RENT & EVICTION) CONTROL ACT, Sec.22 - Civil Revision Petition challenging order passed by Trial Court, wherein Order of Additional Rent Controller, ordering eviction of the petitioners from schedule premises and handover the vacant physical possession of the same to the respondent, was confirmed.

Held - It is settled principle of law that the revisional Court shall not lightly interfere with the findings recorded by the authorities below, more particularly, on a concurrent finding of fact - Rent Control Appellate Authority is the fact finding final authority and findings recorded by the authorities are supported by oral and documentary evidence - There is no illegality or irregularity or impropriety in the orders passed by the authorities below, warranting interference of this Court by exercising jurisdiction u/Sec.22 - Civil Revision Petition lacks merits and is liable to be dismissed.

C.R.P.No.6465/2016 Date: 18-7-2018

J U D G M E N T

1. This Civil Revision Petition is filed by the petitioners-tenants under Section 22 of the A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960 (for short, 'the Act'), challenging the order dated 16.08.2016 passed in R.A.No.176 of 2013 on the file of the Chief Judge, City Small Causes Court, Hyderabad, wherein and whereby the order dated 31.07.2013 passed in R.C.No.69 of 2011 on the file of the Additional Rent Controller, Secunderabad ordering eviction of the petitioners herein from the petition schedule premises and handover the vacant physical possession of the same to the respondent, was confirmed.

2. The facts leading to the filing of the present Civil Revision Petition, in nutshell, are as follows:

3. The respondent is the absolute owner of the petition schedule premises–Plot bearing No.009, situated in ground floor of the building bearing Municipal No.1-8-161 to 164/6 (old No.142/C), Innovation Residency, P.G. Road, Secunderabad. The respondent let out the petition schedule premises to the petitioners in the year 2002 on a monthly rent of Rs.4,000/-. The respondent filed R.C.69 of 2011 on the following grounds: (1) The petitioners are having alternative accommodation {Section 10(2)(v)}; (2) the petitioners committed wilful default in payment of rent for a period of 37 months, commencing from June 2008 {Section 10(2)(i)}; and (3) the respondent is a widow and aged about 75 years {Section 10- C (1) (a) and (c)}.

4. The petitioners filed counter denying the material averments made in the petition, inter alia contending that the petition is not maintainable either on facts or in law. However, the petitioners admitted the jural relationship of tenants and landlord between them and the respondent.

5. To substantiate the stand, the respondent herself examined as P.W.1 and got marked Exs.P.1 to P.28. To dislodge the case of the respondent, second petitioner examined herself as R.W.1 and got marked Exs.R.1 to R.20.

6. Basing on the oral, documentary evidence and other material available on record, the Rent Control Court allowed the petition holding that the petitioners committed wilful default in payment of rent, the petitioners are having alternative accommodation and that the respondent, who is a widow and senior citizen, is entitled to recover immediate possession of the petition schedule premises. Feeling aggrieved by the order of the Rent Control Court dated 31.07.2013, the petitioners preferred R.A.No.176 of 2013 on the file of the Chief Judge, City Small Causes Court, Hyderabad. The appellate authority, after re-appreciating the oral and documentary evidence available on record, without being influenced by the findings recorded by the Rent Control Court, arrived at a conclusion that the respondent is entitled to the reliefs sought for. Hence the present Civil Revision Petition by the petitioners-tenants.

7. Sri R.A.Achuthanand, learned counsel for the petitioners strenuously submitted that the findings recorded by the authorities below are perverse and hence they are liable to be set aside. **Per contra**, Sri Mohammed Imran Khan, learned counsel for the respondent submitted that the authorities below considered the oral and documentary evidence available on record in the light of the provisions of the Act and arrived at a just and reasonable conclusion; therefore, it is a fit case to dismiss this Civil Revision Petition. He further submitted that this Court shall not lightly interfere with the concurrent finding of fact recorded by the authorities below.

8. In order to appreciate the rival contentions, this court is placing reliance on the following decision:

Hindustan Petroleum Corporation Limited vs. Dilbahar Singh (2014 (9) SCALE 657) wherein the Hon'ble apex Court held at Para No.45 as under:

45. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the First Appellate Court/First Appellate Authority because on re-appreciation of the evidence, its view is different from the Court/Authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the Court/ Authority below is according to law and does not suffer from any error of law. A finding of fact recorded by Court/Authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or

is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to re-appreciate or re-assess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity.

9. Let me consider the facts of the case on hand in the light of the above legal principle.

10. The learned counsel for the petitioners submitted that the finding of the authorities below that the petitioners are having alternative accommodation and hence they are liable to vacate the petition schedule premises, is without any basis. The respondent has taken a specific plea in Para No.7 of the petition that the petitioners are having a residential house at Kachiguda. In para No.10 of the counter, the petitioners have simply denied the pleading, as to the alternative accommodation, made in the petition. The petitioners have not specifically denied in the counter that they are having a house at Kachiguda. It is needless to say that the petitioners have to specifically deny the material fact pleaded by the respondent; otherwise, by necessary implication, it would certainly amount to admission of the same. In such circumstances, the Court can safely arrive at a conclusion that the petitioners are having alternative accommodation by the time of filing of the R.C. by the respondent.

11. The first petitioner is the mother and second petitioner is the daughter. In order to appreciate the contention of the petitioners, it is apposite to extract hereunder relevant portion of the cross examination of R.W.1–second petitioner:

> "… … It is true that, my mother has a house at Kachiguda, bearing premises No.3-2-48 & 49. It is true that it is a residential property. It is true that, I carry out business at Koti, Hyderabad. It is true that the Kachiguda premises is much closer to my shop at Koti, than the petition schedule premises."

12. Basing on the above admission made by the second petitioner in the cross examination, this court can safely arrive at a conclusion that first petitioner is having own house at Kachiguda. It is not the case of the petitioners that somebody occupied the said house. As seen from the testimony of R.W.1, she has been carrying on business at Koti, Hyderabad. Her testimony

further reveals that their own house is very nearer to Koti when compared to the petition schedule premises.

13. The learned counsel for the petitioners submitted that both the petitioners are joint tenants and merely because the first petitioner is having a residential house that itself is not a valid ground to order eviction of the second petitioner from the petition schedule premises. To substantiate the argument, the learned counsel for the petitioners has drawn the attention of this court to the following judgments:

Satyanaraya10
na v. Moizuddin Khan (2005 (4) ALD 249), wherein this Court held at para No.17 as follows:

17. I find that the additional accommodation acquired by the tenant prior to attornment of lease and prior to execution of the rental deed cannot be taken into consideration and cannot form the basis for ordering eviction of the tenant.

B.R. Mehta vs. Smt. Atma Devi (1987 (2) RLR 701), wherein the Hon'ble apex Court held at Para No.4 as follows:

> 4. … ... There was no law according to which the husband and the wife could be deemed to be one person. Therefore, where proviso (h) required that the tenant himself should acquire vacant possession of another residence before he can become liable to eviction, the effect of its language cannot be whittled down by arguing that proviso (h) would apply even if it is not the tenant himself but his wife or his other relation were to acquire such other residence. Therefore, as a general proposition of law, the acquisition of other residence must be by the tenant himself before proviso (h) to sub-section (1) of S.14 of the Act would apply.

14. In **Satyanarayana** case (2nd cited supra), the landlord filed a petition for eviction of the tenant on the ground that the wife of the tenant is having own house. In the instant case, the second petitioner is an unmarried daughter of the first petitioner aged about 63 years and both of them are joint tenants. Under Hindu law, an unmarried daughter is a dependent on the parents. The material placed before the court clinchingly establishes that from the year 2002 onwards both petitioners have been residing together in the petition schedule premises as tenants. Viewed from this angle, the second petitioner is a dependent on the first petitioner. In such circumstances, the second petitioner legitimately entitled to stay in the house of the first petitioner being an unmarried daughter. Therefore, the principle enunciated in **Satyanarayana** case is not applicable to the facts of the case on hand.

15. In **B.R. Mehta** case (3rd cited supra) the landlord filed an eviction petition against the tenant on the ground that his wife was provided with a government residential quarter. The Hon'ble apex Court held that the house allotted to the wife for discharging of her official duties as a government employee, cannot be treated as her own

house and hence eviction petition filed against the husband on the ground of availability of alternative accommodation cannot be ordered. Therefore, I am of the considered view that the decisions relied upon by the learned counsel for the petitioners are no way helpful to the petitioners on this aspect.

16. In the light of the foregoing discussion, I have no hesitation to hold that the petitioners are having alternative accommodation. The Rent Control Court as well as the Rent Control Appellate Authority have considered the material available on record in right perspective and arrived at a conclusion that the petitioners are having an alternative accommodation for their residential purpose. I am fully endorsing with the findings recorded by the authorities below on this aspect.

17. The second contention of the learned counsel for the petitioners is that the respondent herself refused to receive the rent; therefore, the petition is liable to be dismissed. Per contra, the learned counsel for the respondent submitted that the petitioners have not tendered the admitted rent; therefore, the respondent is justified in refusing to receive the same.

18. It is needless to say that exchange of notices between the parties is the genesis of civil litigation. To put it in a different way, sowing of seed of litigation commences by issuance of a legal notice. The issuance of reply notice and approaching of an appropriate forum are nothing but supplying all the necessary components to grow the seed as a tree. The edifice of civil suit is based on pleadings, which is the bedrock. The pleas taken by the parties, in legal notice and reply notice, are integral part of the pleadings, which are eventually binding on the respective parties. The respondent got issued legal notice dated 17.5.2008 under Section 106 of Transfer of Property Act, under the original of Ex.R.1, directing the petitioners to vacate the petition schedule premises**.** In the said notice, the respondent clearly mentioned the rent of the petition schedule premises as Rs.4,500/- per month. The petitioners got issued reply notice dated 26.6.2008, under the original of Ex.R.3, taking a specific plea that the rent of the petition schedule premises is only Rs.2,600/- per month, which includes the maintenance charges of Rs.600/- per month. From the initial stage of the litigation, there is a dispute between the parties with regard to the quantum of rent.

19. The respondent filed O.S.No.609 of 2008 on the file of the Junior Civil Judge, City Civil Court, Secunderabad against the petitioners for eviction and recovery of arrears of rent at Rs.4,500/- per month. The civil Court dismissed the said suit by giving a specific finding that the rent of the petition schedule premises is only Rs.2,000/- per month. Ex.P.1 is the certified copy of decree and judgment in O.S.No.609 of 2008. For one reason or the other, the respondent did not choose to file appeal challenging the finding of the civil Court. Thereafter, the petitioners filed R.C.No.117 of 2009 against the respondent under Section 8 of the Act seeking permission of the Rent Control Court to deposit the admitted rent. Ex.P.2 is the certified copy of the petition and Ex.P.6 is

the certified copy of the order in R.C.No.117 of 2009. A perusal of Ex.P.6 reveals that the Rent Control Court after affording reasonable opportunity to both parties dismissed the petition. Challenging the order passed in R.C.No.117 of 2009, the petitioners preferred R.A. No.153 of 2012 on the file of the Chief Judge, City Small Causes Court, Hyderabad, and the same was dismissed on merits. A perusal of the record reveals that both parties approached different fora to ventilate their grievances. Of course, both parties were unsuccessful in achieving their respective goals.

20. In the backdrop of the factual scenario, the crucial question that falls for consideration is what the exact rent of the petition schedule premises is. The respondent has taken a plea in the suit as well as in the present R.C. that the rent of the petition schedule premises is Rs.4,500/- per month. On the other hand, the petitioners have taken a specific stand that the monthly rent for the petition schedule premises is Rs.2,600/-, which includes maintenance charges of Rs.600/-. It is to be seen whether the petitioners have offered the admitted rent and the respondent is justified in refusing the same.

21. To substantiate the argument, the learned counsel for the petitioners has drawn the attention of this court to the judgment of Rajasthan High Court in **Shri Banshilal v. Shri Pyarelal (**1989 (1) RCR 409). As per the principle enunciated in this case, rent does not include the amount paid towards furniture. He further relied on the judgment of the Hon'ble apex Court in **Manali Ramakrishna Mudaliar v. State of Madras (**AIR 1971 SC 989) wherein the Hon'ble apex Court held that electric charges cannot form part of rent.

22. At the earliest point of time, the petitioners have taken a specific plea in Ex.R.3 reply notice that the rent of the petition schedule premises is Rs.2,600/- per month. The material available on record falls short to establish that the rent of the petition schedule premises is Rs.4,500/- per month as claimed by the respondent. In the counter, the petitioners have taken a specific plea that the rent of the petition schedule premises was enhanced to Rs.2,000/- from Rs.1,000/- per month. The petitioners used to pay Rs.600/- per month towards maintenance charges to the society. As per the pleadings in the counter, the petitioners have to pay Rs.2,600/- per month to the respondent.

23. The respondent filed O.S.No.609 of 2008 wherein the petitioners filed written statement by taking a specific plea that they used to pay an amount of Rs.2,000/- per month towards rent to the respondent and Rs.600/- towards maintenance charges to the society. It is not in dispute that in R.C. No.117 of 2009, second petitioner examined herself as P.W.1. It is not out of place to extract hereunder the relevant portion of the cross examination of P.W.1:

"It is true that, I have to pay a sum of Rs.2,600/- every month to the respondent..... It is true, I admit that I have to pay Rs.600/- for maintenance every month."

24. A perusal of the above portion clearly

reveals that second petitioner made an admission on oath, which is binding on her. The admission made by second petitioner is substantial piece of evidence. Therefore, I have no hesitation to hold that the petitioners have to pay an amount of Rs.2,600/- per month to the respondent towards rent and maintenance charges.

25. The learned counsel for the petitioners submitted that the monthly rent of the petition schedule premises, even as per the finding recorded in O.S.No.609 of 2008, is Rs.2,000/- and not Rs.2,600/-. A perusal of the judgment in O.S.No.609 of 2008 clearly reveals that the civil Court has given a specific finding that the rent is Rs.2,000/- per month. There is no quarrel with regard to the proposition of law submitted by the learned counsel for the petitioners that the finding recorded by the civil Court is binding on the Rent Control Court. The finding recorded in O.S.No.609 of 2008 is only with regard to the rent. Since the 'maintenance charges' was not the subject matter in O.S.No.609 of 2008, no specific finding was given by the civil Court on that point. In such circumstances, the rigour of the principle of res judicata, as enunciated under Section 11 of CPC, is not applicable to the facts of the case on hand so far as the issue of maintenance charges is concerned. Therefore, I am of the considered view that the Rent Control Court has not committed any mistake in considering the maintenance charges also in order to arrive at a conclusion on the point as to whether the petitioners committed wilful default in payment of the rent.

26. A perusal of Exs.R.7, R.8, R.9 to R.19 and R.20 clearly shows that the petitioners made attempts to pay the rent at the rate of Rs.2,000/- per month to the respondent for the months of June 2008 to September 2008, which the respondent refused. It is not the case of the petitioners that they sent money order or demand draft for Rs.2,600/- per month to the respondent. The core point that falls for consideration is whether the refusal of rent of Rs.2,000/- per month by the respondent itself legally prevent or estop her from taking the plea that the petitioners committed wilful default in payment of the rent. Admittedly, the petitioners have not paid the maintenance charges of Rs.600/- per month to the society. On the other hand, the testimony of R.W.1 clearly reveals that the respondent used to pay maintenance charges to the society every month for all these years. Whether the act of the petitioners in sending rent at Rs.2,000/- per month to the respondent will fall outside the purview of wilful default, as enumerated under Clause (i) of Sub-section (2) of Section 10 of the Act, is to be considered by this Court.

27. The learned counsel for the respondent submitted that the petitioners have not taken any steps to pay the rent even after the dismissal of R.A.No.153 of 2012. He further submitted that if really the petitioners had the intention to pay the rent, why they did not file an application under Section 11(3) of the Act in R.C.No.69 of 2011? The record clearly shows that the petitioners did not pay any amount during the pendency of the proceedings.

28. At this juncture, let me consider whether the word "rent" encompasses in it the

maintenance and other incidental charges or not. The word "rent" is not defined under the Act. One has to fall back to Section 105 of the Transfer of Property Act to ascertain what are the components covered under the word "rent". In order to appreciate the rival contentions, this Court is placing reliance on the following decisions:

Karnani Properties Ltd. V. Augustin (AIR 1957 SC 309), wherein the Hon'ble apex Court held at para No.9 as follows:

> 9. If, as already indicated, the term it, "rent" is comprehensive enough to include all payments agreed by the tenant to be paid to his landlord for the use and occupation not only of the building and its appurtenances but also of furnishings, electric installations and other amenities agreed between the parties to be provided by and at the cost of the land-lord, the conclusion is irresistible that all that is included in the term "rent" is within the purview of the Act and the Rent Controller and other authorities had the power to control the same.

Sewa International Fasions v. Suman Kathpalia (AIR 2000 Delhi 69), wherein the Delhi High Court held at para Nos.6 to 8 as follows:

> 6. In order to appreciate the contention of the learned counsel appearing for the parties, it is necessary to ascertain as to what constitutes rent. The expression 'rent' is not defined under the Delhi Rent Control Act. However, as to what constitutes rent could be found out from the provisions of Section 105 of the Transfer of Property Act wherein the word 'rent' is defined. It states that money, shares, services or other thing to be so rendered is called the 'rent'. Thus, apart from the money which is paid as rent, if any service is rendered and any payment is made in respect of the same, the same is also to be included within the definition of 'rent'. … … .
>
> 7. The question, therefore, which arises for my consideration, at this stage is whether payment agreed to be paid by the petitioner to the respondents towards maintenance charges could be included within the ambit of the expression 'rent'. Counsel for the petitioner states that the same cannot be included as under the lease deed what would constitute rent was specified which excluded the maintenance charges. I, however, cannot agree with the learned counsel appearing for the petitioner for the simple reason that under clause (1) of the said lease deed, the parties agreed to pay a particular sum towards the use and occupation of the building which is inclusive of all taxes, rates and charges, but exclusive of the maintenance charges which were also required to be paid by the petitioner to the respondents in accordance with the stipulations in the lease deed. As it is disclosed from the records, the petitioner was paying a sum of Rs.538/- to the

respondents towards the maintenance charges in respect of the aforesaid premises. Those maintenance charges were payable for the use and occupation of the premises and for the amenities provided by the landlord.

8. It is an established proposition of law that rent includes not only what is originally described as rent in agreement between a landlord and tenant but also those payment which is made for the amenities provided by the landlord under the agreement between him and the tenant. The payment made towards the maintenance charges of the premises rented out and also for providing amenities to the tenant would also come within the expression 'rent' as rent includes all payments agreed to be paid by the tenant to his landlord for the use and occupation not only of the building but also of furnishing, electric installations and other amenities.

29. As per the principle enunciated in the cases cited supra, rent includes the maintenance charges and all the payments agreed to be paid by tenant for use and occupation of the petition schedule premises. Thus, the admitted rent is Rs.2,600/- per month and the respondent is justified in refusing to receive Rs.2,000/- as offered by the petitioners. The material placed before the Court clinchingly establishes that the petitioners committed wilful default in payment of the rent at the rate of Rs.2,600/- per month for a period of 37 months commencing from June 2008.

30. The Rent Control Court as well as the Appellate Authority have considered, in various proceedings between the parties, and arrived at the conclusion that the rent of the petition schedule premises is Rs.2,600/- per month. The finding recorded by the authorities below that the petitioners committed default in payment of the rent for a period of 37 months with effect from June 2008 is supported by oral and documentary evidence available on record. I am fully endorsing the finding recorded by the authorities below on this aspect.

31. The learned counsel for the petitioners submitted that establishment of 'bona fide requirement' on the part of the landlord/ landlady is sine qua non even if the petition is filed under Section 10-C(1)(a) and (c) of the Act. He further submitted that Section 14-D of the Delhi Rent Control Act is pari materia to Section 10-C(1) of the Act.

32. To substantiate the argument, the learned counsel for the petitioners has drawn the attention of this court to the following decision:

M/s. Rahabhar Productions Pvt. Ltd v. Rajendrra K. Tandon (AIR 1998 SC 1639), wherein the Hon'ble apex Court held at para Nos.28 and 34 as follows:

28. In Surjit Singh Kalra vs. Union of India, (1991) 2 SCC 87, a Three-Judge Bench of this Court laid down as under:-

> "20. The tenant of course is entitled to raise all relevant contentions as

against the claim of the classified landlords. The fact that there is no reference to the word bona fide requirement in Section 14-B to 14-D does not absolve the landlord from proving that his requirement is bona fide or the tenant must be a bona fide one. There is also enough indication in support of this construction from the title of Section 25-B which states "special procedure for the disposal of applications for eviction on the ground of bona fide requirement."

34. The decision in Surjit Singh Kalra's case (supra) was considered by this Court in Anand Swaroop Vohra vs. Bhim Sen Bahri and another, (1994) 5 SCC 372 and was followed explaining, in the process, an earlier decision in Narain Kahmman vs. Pradumar Kumar Jain, (1985) 1 SCC 1, by observing that under Section 14A, the right to recover immediate possession can be exercised by the landlord as soon as he is served with a notice to vacate the government accommodation allotted to him. In such proceedings, the landlord, in view of the language employed in that Section, has not to show that the premises are required for his own residence. On the contrary, the right available to a landlord under Section 14B to 14D is dependent upon the requirement to show that the premises shall be occupied by the landlord for his own residence. The Court did not, therefore, digress from the view propounded in Surjit Singh Kalra's case (supra) that while the landlord has to show and establish his bona fide need, the tenant can plead and prove that the premises were not bona fide required by the landlord.

33. As per the principle enunciated in the case cited supra, the landlord has to prove that the premises in question is required for his/her bona fide purpose. The crucial question that falls for consideration is whether Section 10-C(1) of the Act is pari materia to Section 14-D of the Delhi Rent Control Act or not. The Legislature in its wisdom and foresight amended the Act, by Act 17 of 2005, introducing Sections 10A to 10C, and facilitated certain categories of landlords/landladies to evict the tenants without resorting to Section 10 of the old Act. The Court has to interpret the provisions of the Act to achieve the avowed object for which the Act was enacted. The Court has to keep in mind the underlying object of the Act while interpreting each and every provision by letter and spirit. Under Section 10(3)(a) of the Act, the landlord is not entitled to evict the tenant without proving the bona fide requirement. The word 'bona fide requirement' is not found place in Sections 10-A to 10-C of the Act. The Legislature intentionally did not use the word, 'bona fide requirement' as contemplated under Section 10 of the Act. If the landlord is forced to prove bona fide requirement, as contemplated under Section 18 10(3)(a) of the Act, the purpose of Act 17 of 2005 will be defeated or frustrated. The Court shall not interpret the provisions of the Act to negate the very object of the enactment. On the other hand, the Court has to interpret the provisions of an Act in such a way to achieve its object. If the intention of the Legislature is that the landlord has to prove the bona fide requirement, the same might have been reflected in Sections 10-A or 10-

C of the Act. Non-mentioning of the word 'bona fide requirement' in Sections 10-A or 10-C of the Act clearly indicates the intention of the Legislature that a person who files petition under Sections 10-A to 10-C of the Act need not prove the bona fide requirement.

34. In order to appreciate the contention of the learned counsel for the petitioners, it is apposite to refer relevant provisions of the Act and Delhi Rent Control Act, which reads as follows:

Delhi Rent Control Act – 14D. Right to recover immediate possession of premises to accrue to a widow. -	A.P. Rent Control Act – 10-C. Right to recover immediate possession of premises to accrue to a widow: -
(1) Where the landlord is a widow and the premises let out by her, or by her husband, are required by her for her own residence, she may apply to the Controller for recovering the immediate possession of such premises. (2) Where the landlord referred to in sub-section (1) has let out more than one premises, it shall be open to her to make an application under that sub-section in respect of any one of the premises chosen by her.	(1) Where the landlord is - a) A widow and the premises let out by her, or by her husband; b) X x x x x x c) A person who is of the age of sixty five years or more and the premises let out by him, or her; **Explanation II**: The right to recover possession under this section shall be exercisable only once in respect of each for residential and for nonresidential use

Sub-section (1) of Section 14-D of the Delhi Rent Control Act is similar to Clause (a) to Sub-section (1) of Section 10-C of the Act. Both these provisions enable the landlady, who is a widow, to file application under Section 14-D(1) of the Delhi Rent Control Act or Section 10-C(1)(a) of the Act, as the case may be.

35. Sub-section (2) of Section 14-D of the Delhi Rent Control Act is, to certain extent, similar to Explanation II to Sub-section (1)

of Section 10-C of the Act. As per the provisions of the A.P. Rent Control Act, the landlord can exercise the right to recover possession only once in respect of each residential and nonresidential premises. Under the Delhi Rent Control Act, if the landlord has number of houses, he can exercise the option under Section 14-D in respect of one building only. When compared to Delhi Rent Control Act, the A.P. Rent Control Act is more beneficial to the landlords. Sub-section (2) of Section 14-D of the Delhi Rent Control Act is not mutatis mutandis to Explanation II to Subsection (1) of Section 10-C of the Act. In order to appreciate the contention of the learned counsel for the petitioners, it is not out of place to extract hereunder the relevant Sub-sections of Section 25B of the Delhi Rent Control Act:

(4) The tenant on whom the summons is duly served (whether in the ordinary way or by registered post) in the form specified in the Third Schedule shall not contest the prayer for eviction from the premises unless he files an affidavit stating the grounds on which he seeks to contest the application for eviction and obtains leave from the Controller as hereinafter provided; and in default of his appearance in pursuance of the summons or his obtaining such leave, the statement made by the landlord in the application for eviction shall be deemed to be admitted by the tenant and the applicant shall be entitled to an order for eviction on the ground aforesaid.

(6) Where leave is granted to the tenant to contest the application, the Controller shall commence the hearing of the application as early as practicable.

(8) No appeal or second appeal shall lie against an order for the recovery of possession of any premises made by the Controller in accordance with the procedure specified in this section.

36. A perusal of the above Sub-sections clearly indicates that the tenant is not entitled to contest the petition filed by the landlord under Section 14 or Sections 14-A to 14-D of the Delhi Rent Control Act without obtaining leave. The Rent Control Court may or may not grant leave to the tenant to contest the matter. If the Rent Control Court satisfies that the leave petition does not disclose any cause much less valid cause, the same is liable to be dismissed. No appeal lies against the order passed by the Rent Control Court in view of Sub-section (8) of Section 25-B of the Delhi Rent Control Act. However, the aggrieved tenant can prefer revision against the order of the Rent Control Court. Suffice it to say, the scope of appeal is wider than the revision. In certain circumstances only, the revisional Court can interfere with the impugned order and set aside the same. In an appeal, the appellate Court can reappraise the oral and documentary evidence afresh and arrive to its own conclusion. Section 25-B of the Delhi Rent Control Act, in one way, safeguards the interests of the landlord. Under the A.P. Rent Control Act, there is no such provision corresponding to Section 25-B of the Delhi Rent Control Act. There is no clause in Section 14-D of the Delhi Rent Control Act enabling the landlords, who crossed the age of 65 years, to file the petition under

a special category unlike in Section 10-C(1)(c) of the Act. Whether the petition is filed under Section 10(2) of the old Act or Sections 10-A to 10-C of the amended Act, the Rent Control Court has to follow the same procedure. There is no provision under the A.P. Rent Control Act to resort to summary trial even though the petition is filed under Sections 10-A to 10-C of the Act. Taking into consideration the provisions of both the Acts, this Court is of the considered view that Section 10-C(1) of the Act is not pari materia to Section 14-D of the Delhi Rent Control Act.

37. The learned counsel for the petitioners further submitted that by the time of letting out the petition schedule premises the respondent is a widow, therefore, she is not legally entitled to file the petition taking aid of Section 10-C of the Act. It is not in dispute that the respondent let out the petition schedule premises to the petitioners in the year 2002. Sections 10-A to 10-C of the Act came into force with effect from 28.5.2005. Had it been the intention of the Legislature, it might have articulated Section 10-C in such a manner excluding landlady, who lost her husband, on or before 27.5.2005, from its purview. A perusal of Section 10-C(1)(a) of the Act clearly demonstrates that the landlady must be a widow by the time of filing of petition under Section 10-C(1)(a) of the Act. Whether the landlady is a widow or not by the time of entering into rental agreement, has no relevancy, in view of the language employed in Section 10-C of the Act.

38. The learned counsel for the petitioners submitted that the respondent, being a widow, by the time of letting out the premises to the petitioners, has expressly waived her right to file petition under Section 10-C of the Act. In order to resolve the issue, this court is placing reliance on the following decision:

Krishna Bahadur v. Purna Theatre (2004) 8 SCC 229), wherein the Hon'ble apex Court held at para No.10 as follows:

> 10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.

39. The material available on record clearly reveals that by the time of entering into rental agreement between the respondent and the petitioners, no statutory right was accrued in favour of the respondent. Waiver pre-supposes the vesting of a right. When there was no right in favour of the respondent, by the time she entered into the rental agreement with the petitioners in the year 2002, the question of waiver does not arise. The statutory right was accrued in favour of the respondent on 28.5.2005 when Section 10-C of the Act came into force. It is not the case of the petitioners that the respondent by her conduct waived her statutory right on or after 28.5.2005. It is easy to swallow the submission made by

the learned counsel for the petitioners in this regard but it is highly difficult to digest the same in view of settled legal provisions and principles. By no stretch of imagination, it can be presumed that the respondent waived her right at any point of time. Therefore, I am of the considered view that the submission of the learned counsel for the petitioners has no legs to stand either on facts or in law.

40. The learned counsel for the respondent submitted that the respondent has taken a specific plea in the petition that she is a widow. The second petitioner, as R.W.1, in the cross examination categorically admitted that the respondent is a widow. By the time of filing of R.C.No.69 of 2001 in the year 2011, the respondent was aged about 78 years. The petitioners are not disputing the age of the respondent. The respondent has satisfied the basic ingredients of Section 10-C (1) (a) and (c) of the Act.

41. By the time of filing of the petition, the respondent was aged about 78 years. By this time the respondent may be aged about 85 years. The respondent approached different fora from 2008 onwards in order to get back the petition schedule premises. This is a classic case which clearly demonstrates the plight of the landladies in general, widow-landladies in particular, who crossed the age of 65 years. The respondent let out the premises to the petitioners, who are her relatives. The relationship, however close and strong, is not an exception to lead to litigation in view of the worth and value of the premises. The respondent let out the premises to the petitioners, with a fond hope, that they being ladies and relatives will help her in old age, in day to day affairs. But the petitioners forced the respondent to move from pillar to pole i.e., civil Court and Rent Control Court in order to secure the petition schedule premises, thereby to enjoy the same with her children and grand children at the fag end of her life. The first petitioner who is also aged about 85 years equally fought the legal battle with the respondent taking aid of her daughter, who is aged about 63 years. The Legislature, taking into consideration the scenario prevailing in the society, visualised the plight of the widows and senior citizens introduced Act 17 of 2005 with an avowed object in order to wipe off their tears.

42. The learned counsel for the petitioners submitted that the respondent is having another apartment, therefore, she is not required the petition schedule premises. The evidence on record clearly reveals that the respondent is having another apartment adjacent to the petition schedule premises. In the petition itself, she categorically stated that she wants to convert two apartments into one and stay along with her children and grandchildren. She further stated that the petition schedule premises is required for her personal use as well as to provide accommodation to her children and grand children. In **M/s.Rahabhar Productions Pvt. Ltd** (8th cited supra) case, the Hon'ble apex Court held at para No.40 as follows:

40. We have also examined the facts set out by the appellant in his affidavit filed before the Rent Controller for leave to defend the present proceedings. The pleas, in our

opinion, do not disentitle the landlord from recovering possession of the premises in question particularly when the respondent has clearly set out in his petition that although he owned one more house, he wanted this particular premises for his own need. The choice, and, sufficient reasons in support thereof, having thus been indicated by the respondent, the plea of the appellant about alternative accommodation being available to the landlord cannot be sustained.

43. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, the submission made by the learned counsel for the petitioners is not sustainable in law.

44. Before parting with the order, keeping in view the backdrop of factual scenario, this Court is forced to observe that it is a matter of common knowledge that persons who crossed 80 years generally feel more comfort if they stay along with their children and grand children under the same roof. Unfortunately, in this case, the respondent was deprived of staying along with her children and grandchildren for want of sufficient and proper accommodation though she is the absolute owner of the petition schedule premises. If she is not in a position to enjoy the premises as she wished, at the fag end of her life, the very purpose of acquiring the property is meaningless. The respondent might have taken lot of pains in order to acquire the property by spending huge amounts. Unfortunately, the respondent was forced to pay maintenance charges of Rs.600/- to the society from 2008 onwards in respect of the petition schedule premises, which is being enjoyed by the petitioners even without paying the rent. If this type of tenants are allowed to squat on the premises, the dual object of the Rent Control Act will be frustrated. In view of the factual scenario prevailing in the society, the landlords are forced to keep the premises vacant or idle instead of letting out to the tenants who will squat on the premises for years together even without paying rent by taking shelter under various provisions of the Tenancy Laws and procrastinating the proceedings as far as possible by approaching different fora, by taking different pleas, sometimes may be false and frivolous. It appears that wise people always prefer to stay in rented premises.

45. It is settled principle of law that the revisional Court shall not lightly interfere with the findings recorded by the authorities below, more particularly, on a concurrent finding of fact. The Rent Control Appellate Authority is the fact finding final authority. The findings recorded by the authorities below are supported by oral and documentary evidence. The authorities have given reasons much less cogent and valid reasons to their findings. Viewed from any angle, I am unable to accede to the contention of the learned counsel for the petitioners that the findings recorded by the authorities below are perverse either on factual or legal aspects. There is no illegality or irregularity or impropriety in the orders passed by the authorities below, warranting interference of this Court by exercising jurisdiction under Section 22 of the Act.

46. For the foregoing discussion, this Court

is of the considered view that the Civil Revision Petition lacks merits and bona fides and is liable to be dismissed.

47. In the result, the Civil Revision Petition is dismissed. The petitioners are directed to vacate and handover vacant possession of the petition schedule property to the respondent within a period of three months from today. No order as to costs. Consequently, miscellaneous petitions, if any pending in this Civil Revision Petition shall stand closed.

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2018(2) L.S. 294 (Hyd.) (D.B.)

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

Present:
The Hon'ble Mr.Justice
V. Ramasubramanian &
The Hon'ble Ms.Justice
J. Umadevi

Tiebeam Technologies
India Pvt.Ltd. ..Appellant

Vs.

The State of Telangana,
& Ors., ..Respondents

URBAN LAND (CEILING & REGULATION) ACT - Petitioner preferred instant writ petition, challenging an order passed by Competent Authority under the Urban Land Ceiling Act, directing Deputy Director to make corrections in the revenue records and to deliver possession of the lands originally declared as surplus under the Urban Land (Ceiling and Regulation) Act.

Held - It is true that possession of the surplus lands can be taken by the competent authority only in a manner prescribed by sub-sections (5) and (6) of Section 10 of the Act after following the procedure prescribed - All proceedings including those under Sections 10 (5) and 10 (6) had gone, the claim that possession was taken should also go - Writ petition is allowed and the impugned order is set aside.

J U D G M E N T

(per the Hon'ble Mr.Justice Ramasubramanian)

1. The petitioner has come up with the above writ petition, challenging an order passed by the Competent Authority under the Urban Land Ceiling Act, directing the Deputy Director to make corrections in the revenue records and to deliver possession of the lands originally declared as surplus under the Urban Land (Ceiling and Regulation) Act, 1976, (ULC Act) to the erstwhile owners, who filed declarations under the Act.

2. We have heard Mr. B. Vijaysen Reddy, learned counsel appearing for the petitioner, the learned Government Pleader for Revenue (Telangana), Mr. T. Surya Satish, learned counsel appearing for the respondents 7 to 12 and Mr. A. Venkatesh, learned counsel

appearing for the 13th respondent.

3. The pleadings with which the petitioner has come up with the above writ petition, in brief, are as follows:

i) the petitioner company purchased land of a total extent of Ac.4.26 guntas in Survey Nos.56, 57 and 59 of Madinaguda village, Serilingampalli Mandal, Ranga Reddy District, under 11 different sale deeds, respectively dated 28-02-1998, 16- 03-1998, 17-07-1998, 18-07-1998, 18-07-1998, 31-07-1998, 31-07-1998, 15-04-1999, 15-04-1999, 29-10-1999 and 29- 10-1999;

ii) that the writ petitioner's vendors purchased the said land, under 7 different sale deeds, respectively dated 29-04-1993, 24-01-1998, 23-03-1992, 12-05-1993, 14-07-1993, 14-07- 1993 and 18-05-1998, from a lady by name Hari Kaur Pershad;

iii) that the previous owner Hari Kaur Pershad and her joint pattedar Mrs. Champa Devi earlier filed a statement under Section 6 (1) of the ULC Act, in respect of the lands that they held in Survey Nos.54/B, 55, 56, 57, 59, 60 and 64 of Madinaguda village;

iv) that after conducting an enquiry, the Competent Authority (Urban Land Ceiling) issued a draft statement under Section 8 (1) of the ULC Act, declaring an area of 1,18,790.6 sq.mtrs. as surplus;

v) that a notice under Section 8 (3) of the ULC Act was issued, objections were filed on 24-07-1985, final statement under Section 9 of the ULC Act was issued on 20-08-1985 and the declarations under Sections 10 (1) and 10 (3) of the ULC Act were issued and a consequential orders were passed under Section 10 (6) of the Act;

vi) that by a Panchanama dated 20-06-1998, it was recorded as though possession was taken;

vii) that the ULC proceedings became the subject matter of several rounds of litigation and every order passed by the Competent Authority was set aside by the Appellate Authority and the matter got remanded at least thrice;

viii) that by successive orders of remand and re-enquiry, the ULC proceedings were kept alive and burning until the Act was repealed and the Repeal Act was adapted by the State of Andhra Pradesh on 27-03-2008;

ix) that thereafter persons claiming to be the family members of the original owner Hari Kaur Pershad filed an application on 14-08-2008 for redelivery of possession;

x) that by the order dated 09-11-2010, the Competent Authority (ULC) directed redelivery to the legal heirs of the persons who originally filed declarations under Section 6 (1) of the ULC Act (namely the descendants of the Pershad family); and

xi) that since the petitioner purchased the property in question from persons to whom Hari Kaur Pershad herself had alienated the same, the question of redelivery to the original owners would not arise and that therefore, the petitioner was compelled to

file the writ petition challenging the order dated 09-11-2010.

4. The grounds on which the petitioner challenges the impugned order are:

i) that as against an order dated 06-11-2006 passed under Section 8 (4) of the ULC Act, two sets of appeals came to be filed, one by persons claiming to be protected tenants in respect of Survey Nos.54 and 55 and another by the petitioner herein in respect of the lands in Survey Nos.56, 57, 59, 60 and 64 and the appeals were allowed in the very presence of those who filed declarations under Section 6 (1) of the Act and hence, they cannot today seek delivery of the property;

ii) that in the order dated 18-01-2007 passed by the Chief Commissioner of Land Administration (Appellate Authority under the Urban Land Ceiling Act) under Section 33 of the Urban Land Ceiling Act, it was clearly recorded that the petitioner herein filed a separate declaration claiming exemption in terms of G.O.Ms.No.733, Revenue (UC.I) Department, dated 31-10-1988 and that the same was accepted by the Appellate Authority in the previous round of proceedings;

iii) that the 13th respondent, who now claims title to the lands, by virtue of an unregistered sale deed dated 15-04-2006, cannot claim any right as the property had already been sold to the petitioner; and

iv) that the very claim that possession was taken from the protected tenant on 20-06-1988, shows that the lands in Survey Nos.56, 57, 59, 60 and 64 could not have been covered by those proceedings, in view of the fact that the protected tenant claimed a right only over the lands in Survey Nos.54 and 55 and that therefore, the direction issued under the impugned order to hand over possession to the legal heirs of the original owner is unlawful.

5. The respondents 7 to 12 are persons in whose favour the impugned order has been passed, but they claim to have sold the land in question to the 13th respondent and hence, the case is contested seriously, only by the 13th respondent.

6. The 13th respondent has filed a counter affidavit contending, inter alia, that the final statement under Section 8 (4) of the ULC Act was challenged by way of statutory appeals by two sets of persons, namely (1) the protected tenant and his legal heirs in respect of the lands in Survey Nos.54 and 55 and (2) by the petitioner herein in respect of the lands in survey nos. 56, 57, 59, 60 and 64; that as against the very same impugned order, the legal heirs of the protected tenant and those who purchased the lands from them filed W.P.No.29293 of 2010 and got an interim order; that the said interim order was restricted only to the lands in Survey Nos.54 and 55; that therefore, the Competent Authority (ULC), by proceedings dated 21- 06-2013 directed the District Collector to restore the entries and to deliver possession; that in compliance of the said directions, the District Collector issued instructions on 10-01-2014 following which possession was handed over to the 13th respondent on 04-02-2014; that possession has now become the subject

matter of the dispute between the parties in separate proceedings in two suits O.S.Nos.71 of 2014 and 809 of 2015 and that therefore, nothing survives for adjudication in the above writ petition.

7. We have carefully considered the rival contentions.

8. Before proceeding further, we must bring on record one development that took place about six months before the final hearing of the writ petition. The prayer with which the writ petitioner originally came up with the above writ petition comprised of two parts, namely (i) to set aside the order of the Competent Authority under the ULC Act dated 09-11-2010 in so far as it related to the land in Survey Nos.56, 57 and 59 and (ii) to direct the respondents to deliver physical possession of the said land to the petitioner.

9. But later, the petitioner filed a WPMP.No.2464 of 2017 seeking to withdraw the second part of the prayer, which related to delivery of physical possession. The main reason why the writ petitioner sought to withdraw prayer (b) relating to possession, was that the order impugned in the writ petition was non est in the eye of law and that the petitioner was always in physical possession of the land and that the question as to possession has become the subject matter of dispute in two independent civil suits and that therefore, the petitioner cannot be taken to have been dispossessed at any point of time. On these grounds, the writ petitioner sought to withdraw the prayer for a direction to the respondents to deliver physical possession.

10. The application for withdrawal of relief (b) was stoutly opposed by the 13th respondent on the ground that after having stated on oath in the last line of the para 6 of the affidavit in support of the writ petition that possession was taken on 20-06-1998 and after having raked up a serious dispute before the Civil Court as to who is in possession, the writ petitioner should not be allowed to withdraw prayer (b), as the same would pave the way for multiplication of litigation before the Civil Court.

11. However, we allowed WPMP.No.2464 of 2017 on the ground that an application for amendment stands on a different footing than an application for giving up a relief. We pointed out that giving up of a relief would not tantamount to erasing any of the averments contained in the affidavit. So long as no liberty is sought to come up with a fresh proceeding, a prayer for withdrawal of a relief cannot be rejected. Therefore, we allowed the application by order dated 14-09-2017. As a consequence, the writ petition now contains only one prayer and the same relates to the validity of the order dated 09-11-2010 passed by the Competent Authority under the ULC Act, who is the 3rd respondent herein.

12. The main contention of Mr. B. Vijaysen Reddy, learned counsel for the petitioner is that once it is found that the lands never vested with the Government under Section 10 (3) of the ULC Act and no proceeding under Section 10 (5) of the Act for surrendering possession was validly initiated, the impugned order directing redelivery and mutation in the records

became redundant. In this connection, the learned counsel relied upon a decision of the Division Bench of this Court **Dasamma v. Bharani Mutually Aided Cooperative Housing Society Ltd**. (2014 (5) ALT 678) and the decision of the Supreme Court in **State of Utter Pradesh v. Hari Ram** (2013) 4 SCC 280).

13. It is true that the possession of the surplus lands can be taken by the competent authority only in a manner prescribed by sub-sections (5) and (6) of Section 10 of the Act after following the procedure prescribed by the previous sub-sections. The manner in which possession is said to have been taken and the person from whom the possession is said to have been taken, are all not reflected clearly from the records placed before us. Though Mr. A. Venkatesh, learned counsel appearing for the 13th respondent, relied upon the entries in the Inward Register to show that a notice under Section 10 (5) was issued on 04-08-1997 and an order under section 10 (6) was passed on 23-05-1998, these notices were obviously issued in the name of Champa Devi and Hari Kaur Pershad, one of whom was already dead. The petitioner had also purchased the land in question, under 8 different sale deeds of the years 1998 and 1999 from persons who purchased the lands from the original owners in the years 1990 to 1993. The Competent Authority under the ULC was fully aware the claim made by the petitioner to have purchased and to be in possession of the land, since the petitioner herein also filed appeals against the final statement under Section 9 of the Act.

14. As pointed out by the Division Bench of this Court in **Dasamma,** in the absence of any notice under Section 10 (5) and Section 10 (6) of the Act, to parties entitled to the said notice, possession cannot be said to have been taken.

15. In **Hari Ram**, the Supreme Court pointed out the distinction between de jure possession and de facto possession. Paragraphs 35, 36 and 37 of the said decision read as follows:

> "35. If de facto possession has already passed on to the State Government by the two deeming provisions under sub-section (3) to Section 10, there is no necessity of using the expression "where any land is vested" under sub- section (5) to Section 10. Surrendering or transfer of possession under sub-section (3) to Section 10 can be voluntary so that the person may get the compensation as provided under Section 11 of the Act early. Once there is no voluntary surrender or delivery of possession, necessarily the State Government has to issue notice in writing under subsection (5) to Section 10 to surrender or deliver possession. Subsection (5) of Section 10 visualizes a situation of surrendering and delivering possession, peacefully while sub-section (6) of Section 10 contemplates a situation of forceful dispossession.

36. The Act provides for forceful dispossession but only when a person

refuses or fails to comply with an order under sub-section (5) of Section 10. Sub-section (6) to Section 10 again speaks of "possession" which says, if any person refuses or fails to comply with the order made under subsection (5), the competent authority may take possession of the vacant land to be given to the State Government and for that purpose, force - as may be necessary - can be used. Sub-section (6), therefore, contemplates a situation of a person refusing or fails to comply with the order under subsection (5), in the event of which the competent authority may take possession by use of force. Forcible dispossession of the land, therefore, is being resorted only in a situation which falls under sub-section (6) and not under sub-section (5) to Section 10. Sub-sections (5) and (6), therefore, take care of both the situations, i.e. taking possession by giving notice that is "peaceful dispossession" and on failure to surrender or give delivery of possession under Section 10(5), than "forceful dispossession" under subsection (6) of Section 10.

39. Above-mentioned directives make it clear that sub-section (3) takes in only de jure possession and not de facto possession, therefore, if the land owner is not surrendering possession voluntarily under sub-section (3) of Section 10, or surrendering or delivering possession after notice, under Section 10(5) or dispossession by use of force, it cannot be said that the State Government has taken possession of the vacant land….."

16. According to the Competent Authority under the ULC, possession was taken on 20-06-1998. But after 20-06-1988, the entire proceedings were tossed between the Competent Authority and the Appellate Authority under the ULC Act several times. As seen from the order of the Chief Commissioner of Land Administration dated 18-01-2007, two sets of appeals were filed as against the entire proceedings including the final statement under Section 9 and the possession notice under Section 10 (6) dated 20- 06-1998. One set of appeals was by the legal heirs of the protected tenant in respect of the lands in Survey Nos.54 and 55. Another appeal was by the petitioner herein (it must be pointed out at this stage that the petitioner was formerly known as The Beam Technologies India Private Limited and was later renamed as Solix Systems Private Limited and now known as Tiebeam Technologies India Private Limited). The appeals were allowed by the order dated 18-01-2007 by the Chief Commissioner of Land Administration. In the said order, the Chief Commissioner of Land Administration pointed out the following sequence of events:

i) The petitioner herein filed an appeal in the year 2001. The appeal was allowed on 21-04-2003 and the matter remanded back to the competent authority, to re-compute the holdings, after duly giving the benefit of exemption under G.O.Ms.No.733, Revenue, dated 31-10-1988;

ii) The Competent Authority again passed revised orders on 03- 05-2005 under Section 8(4) of the Act. As against the said order, a fresh appeal was filed and the same was allowed by the Appellate Authority by a fresh order dated 02-03-2006 and the matter

again remanded back;

iii) The competent authority passed a fresh order on 06-11-2006, which was challenged by the petitioner herein once more before the Appellate Authority and the Appellate Authority passed a fresh order dated 18-01-2007 once again remanding the matter back to the Competent Authority; and

iv) when the proceedings were pending before the Competent Authority, the Repeal Act was notified in the State of Andhra Pradesh on 27-03-2008.

17. Therefore, it is clear that the steps taken under Sections 10 (5) and 10 (6) of the Act did not stand and they were set aside. Once they had been set aside, no one can rely upon the alleged possession taken on 20-06-1998. If all proceedings including those under Sections 10 (5) and 10 (6) had gone, the claim that possession was taken should also go. If no one can fall back upon the taking over of possession on 20-06-1998, the question of redelivery of possession by the order impugned in the writ petition would not arise.

18. Having settled the question of validity of the impugned order directing redelivery, we shall now take the claim of the 13th respondent that they have been put in possession by order dated 05-02-2014. We do not know how far the 13th respondent can rely upon the redelivery. When the original proceedings by which possession was allegedly taken over on 20-06-1998, did not survive in view of the successive orders passed by the Appellate Authority, first on 21-04-2003, then on 02-03-2006, later on 06-11-2006 and finally on 18-01-2007, before the Act itself got repealed, the question of the competent authority directing the revenue officials to hand over possession and the revenue officials acting on the same, would not arise. The order dated 05-02-2014 is a structure whose very foundation was shallow. Therefore, the 13th respondent cannot rely upon the said proceeding.

19. More over the claim of the 13th respondent to title is little sketchy. According to the 13th respondent, they purchased the land in question in Survey Nos.56, 57, 59 and 64, from the original owner through their G.P.A. holder under a sale deed dated 15-04-2006. According to the writ petitioner, this sale deed was an unregistered document. The 13th respondent does not deny the same. But the 13th respondent claims that this sale deed was validated by the District Registrar on 02-04-2011.

20. But the 13th respondent has not placed before us either the sale deed or the alleged validation. On the contrary, the writ petitioner has produced a Ratification Deed dated 22-12-2014 executed by the family members of the original owner in favour of the 13th respondent and 2 others. This ratification deed is a registered document. It is stated in the ratification deed that the sale deed dated 15-04-2006 was registered on 02-04-2011. There is no way an unregistered sale deed can be ratified after 5 years. In fact in the proceedings before the Chief Commissioner of Land Administration (Appellate Authority under the ULC Act),

5. The appeals filed by the Respondents/ Accused were allowed. The High Court acquitted all the Accused by reversing the ©1
judgment of the Trial Court. The entire incident was disbelieved by the High Court as the prosecution version was found to be improbable. The High Court found many contradictions and discrepancies in the evidence of the eye witnesses. After referring to the law laid down by this Court on appreciation of evidence, the High Court held that the evidence of PWs-1, 6 and 7 cannot be relied upon as they belong to the faction of deceased No.1 and were closely related to the deceased. The High Court further held that the evidence of all the eye-witnesses cannot be accepted as they made an attempt to rope in number of persons belong to the opposite faction. PWs-1, 6 and 7 were found to be unreliable witnesses as the allegations made by them against A-1 to A-5, A-8, A-24 and A-43 to A-47 were found to be false even by the trial Court. PWs- 2, 3 and 5 were dubbed as interested witnesses by the High Court and their presence at the spot was also doubted. According to the High Court, PWs-2, 3 and 5 were planted witnesses. The High Court further observed that a number of persons belonging to the faction of the accused were implicated after consultations. As the credibility of the above witnesses was doubted by the High Court, all the Respondents/Accused were acquitted by the High Court.

6. It is necessary to mention that the Respondents/Accused (30 in number) presently before us are, A-6, A-9 to A-19, A-21 to A-23, A-25 to A-31, A-33 to A- 38 and A-40 to A-41. It is also relevant to note that we are not concerned with A-1 to A-5 A-8, A-24 and A-43 to A-47 who were acquitted by the trial Court and whose acquittal has become final. A-7, A-20, A-32 and A-39 died during the pendency of this Appeal. I.A. No. 33287/2018 was filed before us bringing on record that Murasani Sudersana Reddy (A-25) was a minor at the time of the incident and the said fact was not noticed before the Courts below. The counsel for the Appellant- State took time to seek instructions and it was submitted that the details submitted by the Senior Counsel for the Respondents were correct.

7. The admitted facts of this case are that Chindukur is a faction ridden village. There were two factions, one headed by the husband of A-1 and other by deceased No.1 Sivarami Reddy. The husband of A-1 was murdered in July, 1992. On the same day, 4 supporters of deceased No.1 were killed. Apart from others, cases under the Explosive Substances Act were registered a few days prior to the date of the incident against both sides. Apprehending violence, two policemen were posted in the village. The deceased No.1 had to report at Gadivemula Police Station on every Sunday between 6.00 a.m. to 10.00 a.m. The deceased No.1 had to necessarily cross the house of A-1 which is situated besides the only road which leads to the police station. The incident occurred right opposite the house of A-1. Four people died in the incident. The medical evidence on record shows that three of them died due to explosion of bombs on their bodies. The

fourth (Deceased No.3) died due to injuries caused by sickles and iron pipes. It would be relevant to refer to the injuries received by the four deceased.

Injuries on the dead body of D-1:

1. Head:- Total disintegration of the upper half of the head with complete loss of upper skull vault upto upper lips. Eye balls are absent. Brain is entirely lost. Charring of tissues with black discoloration of the remaining face.

2. Chest: Multiple, about a hundred or more small, about 1/4 cm tattooed abrasions extending over entire right side of chest and upper abdomen right side. Right upper arm splinter abrasions of the entire right upper arm. Lacerations about 1 cm diameter over middle of the right upper arm in front, burn of the entire dorsal and medical aspect of right forearm and yellowish discolouration. Burn of the thump, index and middle fingers over the dorsal aspect with yellowing.

3. Laceration of left hand 3 cm x 2 cm x 1 cm over the dorsum. Burn of the left forearm dorsal aspect 8 cm x 3 cm. Abrasions four in number small _ cm square area front of right thigh with tattooing. Abrasions of lower left thigh in front four in number small _ cm square area with tattooing.

Internal examination:

Subcutaneous fat is yellow muscles are pale. Heart: Pericardium empty. Heart is pale and empty. Lungs: Both lungs are collapsed, left lung is pale, right lung upper lobe is congested. About 50 ml of blood in right plural cavity, left plural cavity is empty. Liver is pale cut Section pale. Spleen is pale. Both kidneys are pale, No blood is in the abdominal cavity. Structures are not injured, no fractures of long bones noted.

The deceased would appear to have died of multiple injuries mainly the head leading to hemorrhage and shock and death. Time of death 6 to 8 hours prior to post mortem."

Injuries on the dead body of D-2:

"External injuries:

Head:

1. contusion 3 cm x 2 cm x 1 cm over the left side of scalp with laceration 1 cm long over the swelling.

2. Laceration of right cheek 2 cm x _ cm x _ cm with tattooing. Entire face is charred and disfigured.

3. Laceration left side of forehead 1 cm circular with tattooing

4. Laceration over bridge of the nose 1 cm x _ cm.

5. Charred burn of entire back of neck.

Chest and abdomen: Anterior(front) aspect of chest is burnt with blackish discoloration. Laceration front of chest 5 cm x 4 cm square in the upper middle aspect with tattooing.

Laceration 2 cm x 1 cm x _ cm over right

infra claviular area.

Abrasion with black discoloration 15 cm x 15 cm over the right scapular and supra scapular area.

Burn with charring of right infrascapular area15 cm x 10 cm

Peripheral limbs:

Laceration 1 cm diameter with charring of margins over right upper arm. Burn 3 cm circular over back of right upper arm. Laceration 3 cm x 1 cm lower left upper arm. Laceration 2 cm x 2 cm with irregular margins front of left upper arm. Laceration 2 cm x _ cm with irregular margins with burns marks over lateral aspect of left upper arm. Laceration 2 cm x 1 cm left upper forearm with tattooing. Laceration 1 cm x 1 cm lower forearm left with black staining. Blackish soot staining of entire front and side of both lower limbs. Burn with loss of skin of right calf 4 cm x 2 cm. Burn of upper right thigh in front thigh in front 4 cm x 3 cm. Burn of left calf lateral aspect 3 cm x 1 cm.

Internal:

1. Fracture of skull about 7 cm long extending from centre to the left side over parietal bone crack fracture.

2. Contusion of subcutaneous tissues over the fracture site.

3. Brain contusion of the entire cortex of the brain on both sides over parietal and occipitalareas.

4. Pericardium empty, Heart empty.

5. Right lung congested.

6. About 100 ml of blood in right plural cavity.

7. Stomach about 400 ml of digested for.

8. Liver pale

9. Kidney are pale, and bladder is empty.

Opinion as to cause of death:

The deceased would appear to have died of Head injury and multiple burns of the body leading to death about 6-8 hours prior to the Post Mortem"

Injuries on the dead body of D-4:

"External injuries:

1. A burst out laceration injury on the back of the body of size 17 _" x 14 _" horizontal involving entire left side and extending on to the right side upto 7" away from right posterior axillary line. Upper border extending to just above the left supra scapular border. Lower border extending upto 3" above the waistline. Left side of injury extending on to the left anterior axillary line. Skin at the edge is torn into irregular flaps with yellow staining of under surface of skin flaps here and there. Left para vertebral muscle missing in the wound except 3" size muscle flap at the lower end of the wound. The upper end of this muscle flap is irregular torn and the muscle surface

is charred. Left half of the vertebral column is seen with ribs corresponding to the wound missing. Right sided paravertabral muscle present in its entire length but blackened. Left scapula with its lower 2/3rd missing is exposed at the upper side of the wound. Floor of the wound is irregularly lacerated with blackened. Lacerated organs like left lung, heart spleen, stomach, left kidney are lying exposed in the floor of the wound. Intestinal coils are also seen in the floor of the wound. Darkened liquid blood is preset in the floor of the wound seven _" size nails are found in the floor of the wound. The shirt corresponding to the wound is torn on the back.

2. Yellow staining and blackened of kin of size 8" x 3" present on the lower end of arm, elbow and upper end of forearm of left side on the exposed black aspect. In this area hair is lost. At the periphery of this area is singed. 3/4th size nail is found on the lower end of arm piercing the skin.

3. Contusion of size _" x _" are present along the front border of nose. Blue in colour.

4. Left upper central incisor broken near gingival margin with blood staining of the gingival margin. The distal fragment missing.

Internal examination :

Thorox: Bony cage: All ribs on left side except upper two are missing. Right side lower 3 ribs are fractured anteriorly 1st away from the sternum. Posteriorly all right side ribs are intact. Lower 2/3rd of left scapula missing.

Lungs: Left lung lacerated posteriorly in its entire length.

Heart: Entire posterior wall of the heat lacerated exposing the chambers of the heart.

Abdomen: Stomach: A tear of size 2 _" x _" over posterior wall of the stomach, stomach empty. Intestines lying exposed in the floor of the wound.

Spleen: Lacerated on its entire posterior surface and lying detached in the wound.

Liver: Posterior surface of the left lobe of liver lacerated.

Kidneys: Left kidney lacerated posteriorly. Right kidney normal.

Opinion as to cause of death:

The deceased would appear to have died of injuries to vital organs due to bomb blast."

Cause of death of D-3:

15 incised injuries including amputation of the right forearm on the lower 3rd with both bones cut and the hand separated.

Opinion as to cause of death:

"The deceased would appear to have died on multiple injuries and due to fracture of skull and due to shock and hemorrhage 6- 8 hours prior to post mortem."

8. Ms. Prerna Singh, learned counsel for the Appellant-State criticized the judgment

a. The incident happened in the faction ridden Chindukur village, right outside the house of Accused No. 1 who is the wife of a slain leader of a warring group.

b. There was prior animosity between the two factions and motive of the crime was to do away with Sivarami Reddy (Deceased No. 1) who was the leader of the opposite faction.

c. There was no delay in lodging the FIR. The oral evidence of all the prosecution witnesses is consistent in material particulars except for some minor contradictions and inconsistencies. The High Court erred in highlighting the minor contradictions and ignoring the consistent testimony of the injured eyewitnesses.

d. The occular evidence of the eye witnesses is corroborated by the medical and forensic evidence on record.

e. In faction ridden villages, even if some independent or impartial witnesses were present at or near the scene of the incident they are not likely to volunteer to give evidence and it is only the relatives who would be willing to tender evidence.

f. The High Court was wrong in discarding the evidence of the eyewitnesses on the ground that they were interested and partisan.

g. Even if the evidence of the eyewitnesses was disbelieved qua some accused, it can still be relied upon to convict the other

h. The High Court ought not to have interfered with the well-reasoned judgment of the Trial Court.

i. The entire approach of the High Court appears to be focused on minor contradictions oblivious to the fact that four people were killed in broad daylight on 30.10.1994.

j. The judgment of the High Court is perverse and deserves to be set aside.

9. Shri Basant, learned Senior Counsel for the Respondent- Accused submits that the judgment of the High Court warrants no interference for the following reasons:

a. Every accused is presumed to be innocent unless proven guilty. This presumption is further strengthened by a finding of acquittal arrived by a Court.

b. Though the Privy Council in ***Sheo Swarup v. King Emperor, AIR 1934 PC 227*** held that there was no real distinction between appeal against acquittal and an appeal against a conviction, it was submitted that the approach of this Court has been qualitatively different in cases of appeals against acquittal.

c. It is submitted that this Court should be slow in interfering with the judgment of acquittal of the High Court, if the view of the High Court is a possible one. The judgment of the High Court ought not be set aside unless it is perverse.

d. On merits, it was submitted that the entire genesis of the case is extremely doubtful. As per the FIR, A-1 was the mastermind of the attack and on her instigation the other accused attacked the deceased. This version was disbelieved by the Trial Court and A-1's plea of alibi was accepted. A-2 to A-5, A-8, A-24, A-43 to A-47 were also acquitted by the trial Court. This finding has attained finality as the Appellant- State has not chosen to file an appeal against the acquittal of A-1 and thus the whole incident as deposed by the eyewitnesses is riddled with uncertainty and is highly doubtful. In such a situation, the benefit of the doubt should accrue to the accused. It is not safe to convict any of the Respondents/Accused.

e. All the eyewitness put forth by the prosecution are members of the opposite faction. The credibility of the witnesses is also suspect as they are accused in several cases filed by the Respondents. There is a clear motive to falsely rope in the Respondent/Accused. The evidence of partisan witnesses merits acceptance only after a careful scrutiny of the same.

f. Finally, it was urged that this Court should take a compassionate view of the fact that the incident took place a long time ago and the Respondent/Accused have suffered the agony of trial for almost 25 years.

10. After hearing both the parties, we undertook the exercise of examining the evidence on record. On a thorough scrutiny of the evidence of PWs-1 to 7, we are of the opinion that the High Court has committed an error in eschewing their testimonies in toto. The evidence of PWs-1, 6 and 7 was found to be unreliable and unbelievable by the High Court on the ground that they implicated several persons belonging to the opposite faction. Reliance was placed by the High Court on the observations of the Trial Court while acquitting A-1 to A5, A-8, A-24, A-43 to A-47. The High Court held that the evidence of eye witnesses cannot be relied upon for convicting the other accused.

11. The principle of 'Falsus in uno falsus in omnibus ' has not been accepted in our country. (See_***Bhagwan Jagannath Markad v. State of Maharashtra, (2016) 10 SCC 537***])_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. (See_***Gangadhar Behera v. State of Orissa, (2002) 8 SCC 381***])_Minor contradictions and omissions in the evidence of a witness are to be ignored if there is a ring of truth in the testimony of a witness. (See_***State of U.P. v. Dan Singh, (1997) 3 SCC 747***])_The High Court was oblivious to this settled position of law. The High Court highlighted the minor inconsistencies and omissions in the evidence of PWs- 1 to 3 and PW-5 to 7 to disbelieve them. The High Court wrongly refused to believe the eye witnesses on the ground that they attempted to implicate as many persons as possible by making omnibus allegations. The High Court further erred in holding that PW-1, 6 and 7, who were the eye witnesses travelling in the jeep with the deceased, were not speaking the truth as they were close relatives and supporters of Deceased

No. 1. The rejection of the evidence of PW-2, 3 and 5 by the High Court on the ground that they did not attribute specific overt acts to each accused is also erroneous.

12. Undoubtedly, a horrendous crime was committed in a village in which four persons lost their lives. There is no dispute that the deceased and the accused belonged to opposite factions. There is also no doubt about the situs of the crime. A-1 to A-5, A-8, A-24 and A-43 to A-47 were acquitted by the Trial Court. There is no appeal against their acquittal. The question that remains for our consideration is whether there is evidence on record to convict the other accused.

13. All the eyewitnesses including PW-4 who turned hostile have consistently spoken about the attack on Sivarami Reddy (Deceased No.1) and his supporters on 30.10.1994. PW-1, Ayyalanna gave a vivid description of the incident. He deposed that A-5 to A-15 came from the side of the house of A-1 armed with hunting sickles and bombs. They surrounded the jeep and hurled bombs on the jeep. One bomb hit the driver Ayyappu Reddy (Deceased No.2) who fell down and he was dragged to the back of the jeep by A-10 and A-15. A-7 hurled a bomb on Sivarami Reddy when he was running. The bomb exploded on the face of Sivarami Reddy who fell down and died on the spot. According to him, A-16 to A-37 surrounded Rami Reddy, Deceased No.3 while he was running away and hacked him to death by hunting sickles and iron pipes. Kambagiri Ramudu, Deceased No.4 was chased by A-13, A- 20, A-38, A-39 and A-41. A-13 threw a bomb which hit on the back of Kambagiri Ramudu and exploded. He also died on the spot. We are not dealing with the version of PW-1 regarding the involvement of A-1 to A-5, A-8, A-24, A-43 to A-47 as they have been acquitted by the Trial Court which has become final. PW-2, K.Venkata Reddy corroborated the evidence of PW-1 in respect of the occurrence. He voluntarily deposed that A-18 to A-20 were carrying sickles, A-16, A-21, A-22 and A-26 were carrying iron pipes, A-24 was carrying a stick and A-17, A-23, A-25, A-27, A-29 to A-37 were armed with bombs. As per his deposition, Rami Reddy was attacked by all the above accused i.e. A- 16 to A-37 and he was hacked indiscriminately. He categorically stated that Rami Reddy was hacked with iron pipes, hunting sickles and sticks. He stated that no bomb was hurled on Rami Reddy. PW-3, PW-5, PW-6 and PW-7 deposed on the same lines as PW-1 in respect of the involvement of A-6, A-9 to A-19, A-21 to A-23, A-25 to A-31, A-33 to A-38 and A-40 to A-41.

14. Admittedly, there are two factions in the village and the deceased belong to rival groups. There is no dispute about the history of murder of persons belonging to either side before the incident on 30.10.1994. The oral evidence in cases of faction fights has to be scrutinized carefully in view of the tendency of implication of innocent persons belonging to the opposite group. After the acquittal of some of the accused and the death of some accused during the pendency of case before the Courts, we have before us A-6, A-9 to A-19, A-21 to A-23, A-25 to A-31, A-33 to A-38 and A-40 to A-41. We proceed to deal with the point regarding

the involvement of the Accused/Respondents before us to decide whether they are guilty of the offence punishable under Section 302 I.P.C. A-38, A-40 and A-41 were named by PW-6 and no specific overt act has been attributed to them. They are entitled to the benefit of doubt which was given by the High Court and we uphold the same. A-6, A-9, A-11, A-12 and A-14 were armed with country made bombs. There is nothing further stated by any of the witnesses regarding their involvement in the offence. No specific over act has been attributed to them. We concur with the judgment of the High Court that they are also entitled for the benefit of doubt and entitled to be acquitted. PW-1, PW-3, PW-5 to PW-7 have in one voice deposed that A-13 hurled bomb on Kambagiri Ramudu due to which he died on the spot. The medical evidence is in conformity with the occular testimonies of all the eyewitnesses. On a detailed consideration of the evidence on record, we hold A-13 guilty of an offence punishable under Section 302 I.P.C. for causing the death of Kambagiri Ramudu (Deceased No.4). A-10 was armed with a sickle and A-15 was armed with a country-made bomb. There is no evidence about their using the weapons They had dragged Ayyappu Reddy (Deceased No.2) to the back of the jeep. None of the eyewitnesses spoke about any attack made by A-10 and A- 15 on Ayyappu Reddy after he was dragged to the back of the jeep. As no specific role has been attributed to A-10 and A-15 regarding any attack on any of the deceased, we do not see any reason to interfere with their acquittal. A- 16 to A-37, according to the evidence of the eyewitnesses, were armed with hunting sickles, iron pipes and bombs. They attacked Rami Reddy (Deceased No.3) and hacked him indiscriminately. PW-1, PW-3, PW-5 to PW-7 deposed that all of them were having sickles and iron pipes. PW-2 volunteered to state in his evidence that A-17, A-23, A-25, A-27, A-29 to A-37 were armed with bombs. A-16, A-18, A- 24 and A-26 were armed with iron pipes and sticks. He categorically stated in his evidence that Rami Reddy did not receive any injury by the bomb and that he was hacked with iron pipes, hunting sickles and sticks. A perusal of the injury certificate of Rami Reddy would disclose that the following injuries were found on his body:-

"On the body of a male aged about 60 yeas moderately built and moderately nourished and the following injuries are found:

1. There is amputation of right forearm on the lower 3rd with both bones are cut and the hand is separated.

2. An incised injury of about 1" x _" fracture of frontal bone on the right side.

3. An incised injury of about 4" x 2" x bone deep on the right side of face.

4. An incised injury of about 2" x 1" x fracture mandible in the middle.

5. An incised injury of about 2" x _" x middle deep 1" lateral to the right eye.

6. An incised injury of about 3" x 2" x fracture of right humeral head.

7. An incised injury of about 1" _" x muscle deep on the upper and of right scapula.

8. An incised injury of about 8" x _" x facture scapula vertically placed on the right side.

9. An incised injury of about 1" x _" x skin deep _" below the right eye.

10. An incised injury of about _" x _" x skin deep on the front side of upper part of right shoulder.

11. There is tattooing present over the abdomen and lower limbs with splinters.

12. An incised injury of about _" x _" x skin deep on the left side of nose.

13. An abrasion of 2" x 2" in size on the left knee.

14. An abrasion of about 3" x 2" in size on the right knee.

15. An incised injury of about 6" x _" x bone deep on the occipital region with fracture.

All the injuries are ante mortem in nature.

Opinion as to cause of death:

The deceased would appear to have died on multiple injuries and due to fracture of skull and due to shock and hemorrhage 6-8 hours prior to post mortem."

15. As stated above PW-1, PW-3, PW-5 to PW-7 have deposed that all the Accused i.e. A-16 to A-37 attacked Rami Reddy and hacked him with iron pipes and hunting sickles. In view of the deposition of PW-2 who came forward to state that A-17, A-23, A-25, A-27, A-29 to A-37 were armed with bombs and that Rami Reddy's death was not caused by any bomb would disclose that the said accused who were carrying bombs are not responsible for the death of Rami Reddy. The injury certificate issued by PW-18 is in tune also impugned with the evidence of PW-2. There are 11 incisions on the body of Rami Reddy which were caused by hunting sickles and iron pipes. Except some splinter injury over the abdomen and his leg, there is no serious injury caused to Rami Reddy by a bomb. Several bombs were thrown during the attack which could have caused the splinter injuries. On consideration of the oral evidence of PW-2 and the medical opinion of PW-18, we are of the considered view that A-17, A-23, A-25, A-27, A-29 to A-37 are also entitled for the benefit of doubt. We uphold their acquittal as recorded by the High Court. A-16, A-18 to A-22, A-26 and A-28 who were armed with hunting sickles and iron pipes are liable to be convicted for causing the death of Rami Reddy in view of the testimony of PW-1 to PW-3, PW-5 to PW-7 and the medical opinion given by PW-18 which corroborates the oral evidence.

16. In view of the above, the acquittal of Seema Govinda Reddy(A-6), Sura Sreedhar Reddy(A-9), Vadde Gunja Venkatasubbadu(A-10), Kasireddy Bhupal Reddy(A- 11), Kasireddy Vasantha Kumar Reddy(A-12), Bathula Pranamananda Reddy(A-14), Vadde Pallapu Jambula(A-15),

Bathula Sankar Reddy (A-17), Mulla Hassan Peera (A-23), Murasani Sudersana Reddy(A-25), Vadde Sindesudu(A-27), 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), Vadde Pedda Venkateswarlu (A-40), Kasireddy Venkateswar Reddy (A- 41), as recorded by the High Court is upheld for the reasons mentioned above. In view of the affirmation of the acquittal of Murasani Sudersana Reddy(A-25), it is not necessary for us to deal with the point pertaining to his being a minor.

17. Pullagummi Kasireddy Krishna Reddy(A-13), Kondapuram Narayana Reddy(A-16), Vade Malesh(A-18), Yedula Rami Reddy(A-19), Perugu Pedda Venkateswarlu(A- 20), Mulla Sha Hussaini(A-21), Mulla Moula Peera(A-22), Vade Hanumanna (A-26), Vadde Venkatesu(A-28) are convicted of the offence punishable under Section 302 I.P.C. and sentenced to undergo life imprisonment. The above Accused are directed to surrender within a period of four weeks from today. The appeals are disposed of accordingly.

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2018 (2) L.S. 82 (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

Shalu Ojha ..Petitioner

Vs.

Prashant Ojha ..Respondent

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT - Petitioner is respondent's wife and after their marriage, they stayed together hardly for four months - For almost ten years they have parted company and are living separately - Present petition is concerned with dispute regarding rate of maintenance.

Held - Appropriate course of action would be to allow petitioner to file an application for maintenance under the Hindu Adoptions and Maintenance Act, 1956 or u/Sec.125 of Code of Criminal Procedure, 1973 so that in these proceedings, both parties lead their documentary and oral evidence and on basis of such material, appropriate view is taken – Accordingly, petition is disposed by granting liberty to the petitioner to move appropriate application for maintenance.

44 Spl.L.P.(Criminal)No.3935 /16 Dt:23-7-18

J U D G M E N T

(per the Hon'ble Mr.Justice A.K. Sikri)

1. On an earlier occasion, after hearing the petitioner who appeared in person, and the learned counsel for the respondent, we had passed order dated September 4, 2017, thereby disposing of this petition with the following directions:

(a) insofar as domestic violence proceedings before the Family Court are concerned, necessary documents shall be filed by both the parties within four weeks from today and evidence led pursuant thereto. The trial court shall endeavour to decide the case finally, within a period of eight months from today, on the basis of evidence and fix the rate of maintenance finally; and

(b) Crl.MC. No. 850 of 2015, pending before the High Court, shall be taken up for hearing immediately and the High Court shall endeavour to dispose of the same as expeditiously as possible and determine at what rate interim maintenance is to be given, i.e. whether order dated February 13, 2015 passed by the learned ASJ need any modification or not.

2. Thereafter, review petition was filed by the petitioner pointing out that there was apparent error in passing the aforesaid directions inasmuch as matter was remitted to the High Court for presumption that proceedings were pending but the fact is that no such proceedings are pending under the Protection of Women from Domestic Violence Act, 2005 (for short the 'DV Act'). Realising this error, the review petition was allowed and the Special Leave Petition was restored which has been heard afresh.

3. Notwithstanding the aforesaid factual error which had crept in the order dated September 4, 2017, the other factual details recorded in the said order are a matter of record. Therefore, it would be in the fitness of things to reproduce the same:

Though this case has a chequered history, only those facts which are very material are taken note of, eschewing other unnecessary details, in order to avoid burdening this judgment with the facts which may not be relevant.

The petitioner is the respondent's wife. It is unfortunate that after their marriage on April 20, 2007 in Delhi, they stayed together hardly for four months. Thus, for almost ten years they have parted company and are living separately. It is not necessary to go into the reasons which led to the matrimonial discord as in the present petition this Court is concerned only with the dispute regarding the rate of maintenance.

The petitioner had filed an application sometime in June 2009 claiming maintenance under the provisions of Section 12 of the DV Act. In that application, apart from other reliefs, she has claimed maintenance as well. Order dated July 05, 2012 was passed by the learned Metropolitan Magistrate granting interim maintenance @ Rs. 2,50,000/- per month with effect from the date of filing of the complaint as well as compensation of Rs. 1,00,000/-. Since the respondent did not

honour the said order, the petitioner filed the execution petition for recovery of the arrears of maintenance. In the meantime, the respondent challenged the order of the Metropolitan Magistrate granting maintenance, by filing appeal under Section 29 of the DV Act, in the Court of Additional Sessions Judge, Delhi (for short, the 'ASJ'). In the said appeal, the learned ASJ issued interim directions dated January 10, 2013 for depositing of the entire arrears of maintenance within two months. As this order was not complied with, the appeal filed by the respondent was dismissed on May 07, 2013. This order of dismissal was challenged by the respondent before the High Court. In those proceedings, order dated July 23, 2013 was passed allowing the appellant herein to file the reply, etc. As no stay was granted, order dated July 23, 2013 was challenged by the respondent in this Court by filing a special leave petition. This Court, however, did not entertain the same. At the same time, while disposing of the special leave petition, observations were made to the effect that if the parties apply for mediation, the matter shall be referred to the Delhi High Court Mediation and Conciliation Centre at the earliest. Keeping in view these observations, the High Court referred the dispute to the Mediation Centre at the Delhi High Court and also stayed the execution proceedings in the meantime. Mediation proceedings failed. As a result, the High Court took up the matter on merits and passed orders dated September 10, 2013 directing the respondent to pay Rs. 5,00,000/- on or before September 30, 2013 and another sum of Rs. 5,00,000/- on or before October 31, 2013. The petitioner filed an application seeking modification of these orders and prayed for the directions to the respondent to pay entire arrears of maintenance as per the order of the Family Court in domestic violence proceedings. In the said application only notice was issued and since interim stay on the execution proceedings continued, the petitioner filed special leave petition in this Court for vacation of the interim order passed by the High Court in the execution proceedings. This special leave petition was converted into appeal on grant of leave, in which judgment was delivered on September 18, 2014 allowing the said appeal. Operative portion of the said judgment reads as under:

> "31. The issue before the High Court in Crl.MC. No. 1975 of 2013 is limited i.e. whether the sessions court could have dismissed the respondent's appeal only on the ground that respondent did not discharge the obligation arising out of the conditional interim order passed by the sessions court. Necessarily the High Court will have to go into the question whether the sessions court has the power to grant interim stay of the execution of the order under appeal before it.
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> 32. In a matter arising under a legislation meant for protecting the rights of the women, the High Court should have been slow in granting interim orders, interfering with the orders by which maintenance is granted to the appellant. No doubt, such interim orders are now vacated. In the process the appellant is still

awaiting the fruits of maintenance order even after 2 years of the order.

33. We find it difficult to accept that in a highly contested matter like this the appellant would have instructed her counsel not to press her claim for maintenance. In our view, the High Court ought not to have accepted the statement of the counsel without verification. The impugned order is set aside.

34. We are of the opinion that the conduct of the respondent is a gross abuse of the judicial process. We do not see any reason why the respondent's petition Crl.MC No. 1975 of 2013 should be kept pending. Whatever be the decision of the High Court, one of the parties will (we are sure) approach this Court again thereby delaying the conclusion of the litigation. The interests of justice would be better served if the respondent's appeal before the Sessions Court is heard and disposed of on merits instead of going into the residuary questions of the authority of the appellate Court to grant interim orders or the legality of the decision of the Sessions Court to dismiss the appeal only on the ground of the noncompliance by the respondent with the conditions of the interim order. The Criminal Appeal No. 23/2012 stands restored to the file of the Sessions Court.

35. We also direct that the maintenance order passed by the magistrate be executed forthwith in accordance with law. The executing court should complete the process within 8 weeks and report compliance in the High Court. We make it clear that such hearing of the Sessions Court should only be after the execution of the order of maintenance passed by the Magistrate.

36. In the event of the respondent's success in the appeal, either in full or part, the Sessions Court can make appropriate orders regarding the payments due to be made by the respondent in the execution proceedings."

Notwithstanding the aforesaid judgment, as the respondent did not clear the entire arrears of maintenance, he was sent to judicial custody, where he remained till December 22, 2014. A miscellaneous application was filed by the respondent in this Court in the afore-mentioned disposed of appeal stating that he was in judicial custody due to his inability to pay the entire maintenance and requested that his matter be heard by the Sessions Court on merits. In this application this Court passed orders dated December 18, 2014 directing the Sessions Court to decide the appeal of the respondent within six weeks. He remained in judicial custody till December 22, 2014, on which date he was released. During this period, though the respondent had paid certain amounts towards maintenance, but he did not clear the entire outstanding dues.

Thereafter, on February 13, 2015, the learned ASJ decided the appeal of the respondent

reducing the maintenance from Rs. 2,50,000/-, as fixed by the Family Court, to Rs. 50,000/- per month, from the date of filing of the petition under Section 12 of the DV Act. This order was challenged by the appellant by filing a petition (Crl.MC. No. 850 of 2015) before the High Court under Section 482 read with Section 482 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.').

It will also be of interest to note that the maintenance of Rs. 50,000/-, as fixed by the learned ASJ, even when reduced significantly from Rs. 2,50,000/-, was still not acceptable to the respondent either. Seeking further reduction in the maintenance, the respondent also challenged this order before the High Court by filing petition under Section 482 Cr.P.C. However, his petition was dismissed by the High Court vide order dated April 06, 2015. The special leave petition filed by the respondent there against was also dismissed by this Court on May 11, 2015. In this manner, insofar as maintenance granted by the learned ASJ @ Rs. 50,000/- per month is concerned, this order has attained finality qua the respondent. The question, therefore, is as to whether the petitioner is entitled to enhancement and whether the learned ASJ rightly reduced the amount of maintenance.

Though, the petitioner has filed a petition under Section 482 Cr.P.C., which is registered as Crl.MC. No. 850 of 2015, as pointed out above, and the same is still pending. Notwithstanding, the petitioner has chosen to file the instant special leave petition challenging the order dated February 13, 2015 passed by the ASJ.

Normally, when the proceedings are still pending before the High Court, where same order dated February 13, 2015 passed by the ASJ is challenged, this Court should not have entertained the instant petition from the very beginning. However, notice was issued in this petition, keeping in mind the consideration as to whether the dispute can be resolved amicably, suitably and appropriately by this Court. For this purpose, matter was taken up from time to time. Attempts were even made that the parties settle all their disputes amicably. We even called the parties to the Chambers and had discussions with them. However, amicable solution to the problem, acceptable to both the parties, could not be achieved.

The petitioner, who appears in person, has submitted that there were no valid reasons for the learned ASJ to reduce the maintenance. In order to prove that the respondent is a man of means who is running number of businesses either as the proprietor or partner of firm(s) or shareholder/director in certain companies and possesses various assets and is also enjoying the life of affluence, she has produced plethora of documents in support. The respondent has refuted the authenticity or the relevance of those documents and his submission is that his stakes in all these businesses are no longer there. According to him, some of the companies/firms mentioned by the petitioner never took off and started any business and in some other companies he no longer enjoys any stakes. Picture painted by the respondent is that he is undergoing very hard times and his financial condition is pathetic. It is also stated that he had

to even go behind bars and remain in custody for more than fifty days because of his inability to pay the arrears.

4. We may point out that during arguments, it was contended by learned counsel for the respondent that apart from the monthly maintenance amount which the respondent was giving to the petitioner every month, the petitioner had some other source of income as well. This submission was based on the premise that the amount of maintenance so far received by the petitioner, which was to the tune of Rs. 49 lakhs, was kept by the petitioner in the fixed deposits accounts in the banks. According to him, it proves that the petitioner had other source of income and she was employed/self-employed and from that income, she was meeting her day to day needs. We accordingly passed order dated January 29, 2018 directing the petitioner to file an affidavit of her income which would be in the fomat as prescribed in the judgment of Delhi High Court in the case of Kusum Sharma v. Mahinder Kumar Sharma decided on January 14, 2015 (FAO No. 309/1996). Respondent was also given opportunity to file additional documents along with affidavit. Such an affidavit of income was, therefore, filed by the petitioner. Respondent also filed reply to the said income affidavit to which petitioner filed her rejoinder.

5. In the income affidavit filed by the petitioner in the prescribed format, she has, inter alia, mentioned that she is staying with her parents in their house in Mansarovar Garden. The petitioner has also mentioned about monthly expenditure. Col. 11 and Col. 16 of Part I being relevant are reproduced below:

Sl. No.	Description	Particulars
11.	Monthly expenditure (as mentioned in S. No. 60)	Rs. 1.5 lac approx. spent jointly by parents and self. My share in the above expenditure is around Rs. 1 lac per month.
16.	If not staying at Matrimonial home, relationship and income of the person with whom you are staying?	Staying with my parents in House in which my brother has a sizable share. Income Rs. 1.5 lac p.m.

6. It is not understood as to how petitioner's share of expenditure is Rs. 1 lakh per month out of Rs. 1.5 lakhs monthly expenditure. Likewise, it is not explained in Col. 16 as to in what form, income of Rs. 1.5 lakhs per month is generated and who is earning that income. Of course, the petitioner has otherwise maintained that she is not having any other source of income except the amount of maintenance given to her by the respondent. The petitioner has also stated that she is compelled to live in her parents house as the maintenance amount is not sufficient even to pay monthly rent of an aparment.

7. In Part II of the affidavit, the petitioner has made averments relating to respondent. The petitioner says that respondent is earning about Rs. 20 lakhs per month. She has given the details of certain business ventures/restaurants owned by the respondent in which he is having his share. The petitioner has also given particulars of assets allegedly owned by the respondent. The petitioner has annexed photocopies of various documents in support of her assertions.

8. In the reply affidavit filed by the respondent, it is averred that the petitioner is maintaining four bank accounts and the total amount lying in these accounts is Rs. 8,36,610/-. It is also stated that the petitioner is having fixed deposits in the banks for a total sum of Rs. 35,75,000/-. In this manner, the total bank balance of the petitioner is Rs. 44,11,610/-. As against this, the respondent has paid to the petitioner a sum of Rs. 49 lakhs from June 4, 2009 to July, 2017. Thus, in the last eight years, against a sum of Rs. 49 lakhs paid by the respondent to the petitioner, the petitioner is still having bank balance of Rs. 44 lakhs. According to the respondent, it would be inconceivable that petitioner has spent only Rs. 5 lakhs of rupees (or little more if interest earned by the petitioner on the aforesaid Rs. 49 lakhs is added) in eight years and that shows that she has other sources of income as well. Other averments in the petitioner's affidavit was also denied including her share of expenditure in the neighbourhood of Rs. 1 lakh per month or that respondent is earning Rs. 20 lakhs per month. In respect of the particulars given by the petitioner about the businesses of the respondent, the respondent has denied the same and submits that, at present, there is no Restaurant or Bar anywhere in India in which respondent has any share or interest. He has his own explanation and has given alleged circumstances in which he had to give up his share in certain businesses. The petitioner has controverted his averments in her rejoinder affidavit. During arguments, the petitioner also tried to demonstrate, by referring to certain documents filed by her, that the respondent was indulging in falsehood.

9. We have given a glimpse of the respective cases set up by both the parties, without giving details thereof, as asserted by the petitioner and the manner in which the respondent has refuted the same.

10. After giving conscious and objective consideration to the documents placed on record by both the sides, we are of the view that it is only after the evidence is led by both the parties, the veracity and evidential value of such material can be finally adjudged, more particularly, when the said material and assertions of the parties would be tested with their cross-examination.

11. The present proceedings arise out of the petition which was filed by the petitioner under Section 12 of the DV Act. The trial court had arrived at a figure of maintenance on the basis of affidavits filed by both the parties along with their respective documents. Same exercise is undertaken by the learned ASJ in the impugned order while adjudging the correctness of the order passed by the trial court and, in the process, reducing the maintenance from Rs. 2.50 lakhs to Rs. 50,000/- per month. This obviously happened as the proceedings under the DV Act are of summary nature.

12. In these circumstances, the appropriate course of action would be to allow the petitioner to file an application for maintenance under the Hindu Adoptions and Maintenance Act, 1956 or under Section 125 of the Code of Criminal Procedure, 1973 so that in these proceedings, both the parties lead their documentary and oral evidence and on the basis of such material, appropriate view is taken by the said Court.

13. We accordingly dispose of this petition by granting liberty to the petitioner to move appropriate application for maintenance, as indicated above. Once such application is moved, same shall be decided by the concerned Court most expeditiously having regard to the fact that the petitioner is fighting for her maintenance for last number of years and these proceedings should attain finality at the earliest. We also make it clear that any maintenance fixed shall not, in any case, be less than Rs. 50,000/- per month which figure of maintenance has already attained finality.

14. As a sequel, the respondent shall continue to pay Rs. 50,000/- per month to the petitioner in the meanwhile. The present petition stands disposed of accordingly.

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2018 (2) L.S. 90 (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

M/s. Nandhini Deluxe ..Petitioner
Vs.
Karnataka Co-Operative
Milk Producers Federation
Ltd. ..Respondent

TRADE MARKS ACT, Sec.18(1) - Dispute pertains to use of mark 'NANDHINI' – Respondent, a Cooperative Federation of Milk Producers of Karnataka, adopted mark 'NANDINI' and under this brand name it has been producing and selling milk and milk products - Appellant adopted mark 'NANDHINI' for its restaurants in year 1989 and applied for registration of said mark in respect of various foodstuff items sold by it in its restaurants - Respondent had opposed registration and objections of the respondent were dismissed by Deputy Registrar of the Trade Mark who passed orders allowing registration of the said mark in favour of the appellant.

Held - Not only visual appearance of two marks is different, they even relate to different products and manner in which they are traded, it is difficult to imagine that an average man of ordinary intelligence would associate goods of appellant as that of the respondent - No question of confusion or deception - Appeals are allowed and Order of Deputy Registrar granting registration in favour of the appellant is hereby restored.

J U D G M E N T

(per the Hon'ble Mr.Justice A.K. Sikri)

1. The judgment dated 2nd December, 2014 given by the High Court of Karnataka in writ petitions filed by the appellant herein is the subject matter of detailed debate and arguments in the present proceedings, because of the reason that the dispute in question has evoked considerable controversy. The dispute pertains to the use of mark 'NANDHINI'. The respondent herein, which is a Cooperative Federation of the Milk Producers of Karnataka, adopted the aforesaid mark 'NANDINI' in the year 1985 and under this brand name it has been producing and selling milk and milk products. It has got registration of this mark as well under Class 29 and Class 30. The appellant herein, on the other hand, is in the business of running restaurants and it adopted the mark 'NANDHINI' for its restaurants in the year 1989 and applied for registration of the said mark in respect of various foodstuff items sold by it in its restaurants. The respondent had opposed the registration and the objections of the respondent were dismissed by the Deputy Registrar of the Trade Mark who passed orders dated August 13, 2007 allowing the registration of the said mark in favour of the appellant.

2. We may note at this stage itself that the mark used by the appellant is objected to by the respondent on the ground that it is deceptively similar to the mark of the respondent and is likely to deceive the public or cause confusion. According to the respondent, the appellant could not use the said mark which now belongs to the respondent inasmuch as because of its long and sustained use by the respondent, the mark 'NANDINI' is held to have acquired a distinctive character and is well-known to the public which associates 'NANDINI' with the respondent organization. Therefore, according to the respondent, it has exclusive right to use the said mark and any imitation thereof by the appellant would lead the public to believe that the foodstuffs sold by the appellant are in fact that of the respondent. When these objections were rejected by the Deputy Registrar and registration granted to the appellant, the respondent approached the Intellectual Property Appellate Board (for short, 'IPAB'), Chennai by filing appeal with the prayer that the registration given by the Deputy Registrar, Trade Mark in favour of the appellant be cancelled. These appeals of the respondent were allowed by the IPAB vide common order dated 4th October, 2011 and the writ petitions filed by the appellant there against have been dismissed by the High Court vide impugned order dated 2nd December, 2014, thereby confirming the order of the IPAB and, in the process, accepting the plea of the respondent therein.

3. Before we proceed further, it is pertinent to mention at this stage that the milk and milk products, which are sold by the respondent under the trade mark of 'NANDINI', fall under Class 29 and Class 30 as per classification under Schedule IV to the Trade Marks Rules, 2002. On the other hand, various kinds of foodstuffs sold by the appellant in its restaurants also fall under Class 29 and 30 as well as other Classes.

4. For the sake of clarity and comparison, we may also, at this stage itself, give the representation of competing marks of the appellant as well as respondent, which is as under:

"IMAGE"

5. Before we proceed to state the arguments of the learned counsel for appellant and rebuttal thereof by the respondent, it would be necessary to have a brief discussion in respect of the orders passed by the Deputy Registrar of Trade Marks, IPAB and the High Court.

ORDER OF THE DEPUTY REGISTRAR, TRADE MARKS:

6. This order discloses that the appellant herein had moved the applications for registration of trade mark 'NANDHINI DELUXE WITH LOGO (Kannada)" in respect of meat, fish, poultry and game, meat extracts, preserved, dried and cooked fruits and vegetables, jellies, jams, eggs, milk and milk products, edible oils and fats, salad dressings, preserves and all other goods being included in Class 29. In the Opposition filed by the respondent herein, it was, inter alia, stated that respondent was manufacturer and dealer of milk and milk products, cattle feed and other allied

products which are the source of 'NANDINI' products. Trade mark 'NANDINI' with device of the cow is being used by the respondent extensively not only in the State of Karnataka but in other parts of country as well. This trade mark was registered in the name of the respondent which was used right from the year 1985. The trade mark sought to be adopted by the appellant was confusingly and deceptively similar to the respondent's trade mark. It was a clever move on the part of the appellant who wanted to trade upon and benefit from the reputation and goodwill acquired by the respondent for the last so many years and, therefore, the appellant could not claim any proprietary rights in the impugned mark under Section 18(1) of the Trade Marks Act, 1999 (hereinafter referred to as the 'Act'). Registration was objected to under Sections 9,11,12 and 18 of the Act.

7. In the counter statement filed by the appellant to the aforesaid objections, it was pleaded that the appellant had honestly conceived and adopted the trade mark 'NANDHINI' in Kannada with a particular artistic work, design and getup for running vegetarian and non-vegetarian Andhra style restaurant. It had opened as many as six branches (particulars whereof were given) all over Bangalore by using trade mark 'NANDHINI' since 1989. The appellant had also obtained registration of copyright of 'NANDHINI' under Copyright Act, 1957. It was further argued that since the artistic work, design and getup adopted by the appellant was totally different, there was no question of any deception or confusion arising in the mind of public. Moreover, the class of purchasers/customers of both the trade marks was entirely different. The Deputy Registrar noted that the issues involved in these proceedings were based on Sections_[S.9. Absolute grounds for refusal of registration.-(1) The trade marks-

(a) which are devoid of any distinctive character, that is to say, not capable of distinguishing the goods or services of one person from those of another person;

(b) which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service or other characteristics of the goods or service;

(c) which consist exclusively of marks or indications which have become customary in the current language or in the bona fide and established practices of the trade,

shall not be registered:

Provided that a trade mark shall not be refused registration if before the date of application for registration it has acquired a distinctive character as a result of the use made of it or is a well-known trade mark.

(2) A mark shall not be registered as a trade mark if-

(a) it is of such nature as to deceive the public or cause confusion;

(b) it contains or comprises of any matter likely to hurt the religious susceptibilities

of any class or section of the citizens of India;

(c) it comprises or contains scandalous or obscene matter;

(d) its use is prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950 (12 of 1950).

(3) A mark shall not be registered as a trade mark if it consists exclusively of-

(a) the shape of goods which results from the nature of the goods themselves; or

(b) the shape of goods which is necessary to obtain a technical result; or

(c) the shape which gives substantial value to the goods.

Explanation.-For the purposes of this section, the nature of goods or services in relation to which the trade mark is used or proposed to be used shall not be a ground for refusal of registration.

S. 11 Relative grounds for refusal of registration.-(1) Save as provided in section 12, a trade mark shall not be registered if, because of-

(a) its identity with an earlier trade mark and similarity of goods or services covered by the trade mark; or

(b) its similarity to an earlier trade mark and the identity or similarity of the goods or services covered by the trade mark, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.

(2) A trade mark which-

(a) is identical with or similar to an earlier trade mark; and

(b) is to be registered for goods or services which are not similar to those for which the earlier trade mark is registered in the name of a different proprietor, shall not be registered, if or to the extent, the earlier trade mark is a well-known trade mark in India and the use of the later mark without due cause would take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade mark.

(3) A trade mark shall not be registered if, or to the extent that, its use in India is liable to be prevented

(a) by virtue of any law in particular the law of passing off protecting an unregistered trade mark used in the course of trade; or

(b) by virtue of law of copyright.

(4) Nothing in this section shall prevent the registration of a trade mark where the proprietor of the earlier trade mark or other earlier right consents to the registration, and in such case the Registrar may register the mark under special circumstances under section 12.

Explanation.-For the purposes of this section, earlier trade mark means-

(a) a registered trade mark or convention

application referred to in section 154 which has a date of application earlier than that of the trade mark in question, taking account, where appropriate, of the priorities claimed in respect of the trade marks;

(b) a trade mark which, on the date of the application for registration of the trade mark in question, or where appropriate, of the priority claimed in respect of the application, was entitled to protection as a well-known trade mark.

A trade mark shall not be refused registration on the grounds specified in sub-sections (2) and (3), unless objection on any one or more of those grounds is raised in opposition proceedings by the proprietor of the earlier trade mark.

(6) The Registrar shall, while determining whether a trade mark is a well-known trade mark, take into account any fact which he considers relevant for determining a trade mark as a well-known trade mark including-

(I) the knowledge or recognition of that trade mark in the relevant section of the public including knowledge in India obtained as a result of promotion of the trade mark;

(ii) the duration, extent and geographical area of any use of that trade mark;

(iii) the duration, extent and geographical area of any promotion of the trade mark, including advertising or publicity and presentation, at fairs or exhibition of the goods or services to which the trade mark applies;

(iv) the duration and geographical area of any registration of or any application for registration of that trade mark under this Act to the extent they reflect the use or recognition of the trade mark;

(v) the record of successful enforcement of the rights in that trade mark; in particular, the extent to which the trade mark has been recognised as a well-known trade mark by any court or Registrar under that record.

(7) The Registrar shall, while determining as to whether a trade mark is known or recognised in a relevant section of the public for the purposes of sub-section (6), take into account-

(I) the number of actual or potential consumers of the goods or services;

(ii) the number of persons involved in the channels of distribution of the goods or services;

(iii) the business circles dealing with the goods or services, to which that trade mark applies.

(8) Where a trade mark has been determined to be well-known in at least one relevant section of the public in India by any court or Registrar, the Registrar shall consider that trade mark as a well-known trade mark for registration under this Act.

(9) The Registrar shall not require as a condition, for determining whether a trade mark is a well-known trade mark, any of the following, namely:-

(i) that the trade mark has been used in India;

(ii) that the trade mark has been registered;

(iii) that the application for registration of the trade mark has been filed in India;

(iv) that the trade mark-

(a) is well known in; or

(b) has been registered in; or

(c) in respect of which an application for registration has been filed in, any jurisdiction other than India; or

(v) that the trade mark is well-known to the public at large in India.

(10) While considering an application for registration of a trade mark and opposition filed in respect thereof, the Registrar shall-

(i) protect a well-known trade mark against the identical or similar trade marks;

(ii) take into consideration the bad faith involved either of the applicant or the opponent affecting the right relating to the trade mark.

(11) Where a trade mark has been registered in good faith disclosing the material informations to the Registrar or where right to a trade mark has been acquired through use in good faith before the commencement of this Act, then, nothing in this Act shall prejudice the validity of the registration of that trade mark or right to use that trade mark on the ground that such trade mark is identical with or similar to a well-known trade mark.

S. 18. Application for registration.- (1) Any person claiming to be the proprietor of a trade mark used or proposed to be used by him, who is desirous of registering it, shall apply in writing to the Registrar in the prescribed manner for the registration of his trade mark.

(2) A single application may be made for registration of a trade mark for different classes of goods and services and fee payable therefor shall be in respect of each such class of goods or services.

(3) Every application under sub-section (1) shall be filed in the office of the Trade Marks Registry within whose territorial limits the principal place of business in India of the applicant or in the case of joint applicants the principal place of business in India of the applicant whose name is first mentioned in the application as having a place of business in India, is situate: Provided that where the applicant or any of the joint applicants does not carry on business in India, the application shall be filed in the office of the Trade Marks Registry within whose territorial limits the place mentioned in the address for service in India as disclosed in the application, is situate.

(4) Subject to the provisions of this Act, the Registrar may refuse the application or may accept it absolutely or subject to such amendments, modifications, conditions or limitations, if any, as he may think fit.

(5) In the case of a refusal or conditional acceptance of an application, the Registrar shall record in writing the grounds for such refusal or conditional acceptance and the materials used by him in arriving at his decision.]] 9, 11 and 18 of the Act. As per Section 9, the generic words cannot be registered as trade mark unless they have acquired distinctiveness and are associated with the persons/company using the said mark. The case set up by the appellant was that its mark was distinctive one and was its trading style as well. It was also argued that trade mark 'NANDHINI' is not an invented word and, therefore, there was no question of copying trade mark of the respondent. The word 'NANDHINI' represents the name of goddess and a cow in Hindu Mythology. The trade mark 'NANDHINI' is used by people from all walks of life and it is also referred in puranas and Hindu mythological stories. Large number of people worship NANDHINI as a goddess and, therefore, the respondent cannot claim monopoly over the word 'NANDHINI'.

8. Taking note of the aforesaid submissions and virtually accepting the same, the Deputy Registrar noted that since the appellant is using the trade mark continuously from 1st April, 1989 which claim of the appellant was supported by documentary proof, objection raised by the respondent under Section 9 stood waived.

9. Coming to Section 11 of the Act which prohibits registration of mark and the goods in which it is sought for registration is likely to deceive or confuse, he noted that whereas respondent's mark is 'NANDINI' per se, the appellant's mark is 'NANDHINI DELUXE WITH LOGO (In Kannada). Moreover, respondent is using trade mark 'NANDINI' in respect of dairy products, i.e., milk and milk products only. On the other hand, the goods for which the registration was sought by the appellant were altogether different, even though both fall in the same Class, i.e., Class 29. Highlighting this factual difference of the nature of goods in which the appellant and respondent are trading, the Deputy Registrar was of the view that the respondent's objection under Section 11 was not tenable. While coming to this conclusion, he also took aid of some judgments of the IPAB as well as different High Courts. In the process, he also rejected the contention of the respondent that the trade mark used by the appellant was a colourable imitation of the respondent's trade mark which was well-known mark under Section 11(2) of the Act.

10. Dealing with the objections on the touchstone of Section 18 of the Act, the Deputy Registrar came to a conclusion that the appellant is the proprietor of the mark as claimed under Section 18(1) of the Act, but restricted his entitlement for registration by holding that the appellant would not be entitled to registration in respect of milk and milk products. Relevant discussion in this behalf is reproduced below:

"The balance of convenience is in favour of the applicants. The applicants are the extensive user of the mark since the year 1989. the adoption of the mark by the Applicants is honest and concurrent. To prove their claim, the applicants have filed documents in support of application. In these circumstance, the applicants are having

definite claim to the proprietorship of the mark applied for. Hence the Applicants are the proprietors of the mark as claimed for under the provisions of Section 18(1) of the Act.

On carefully considered the arguments advanced by both the counsel and materials available on the record and the evidence adduced by the concerned parties, in the interest of justice and purity of the Register since the Applicants are not using milk and milk products in class-29 whereas the Opponents have proved that they are the famous Dairy products producers and the evidence produced by the Opponents also reveals that they are using the mark for Milk and Milk products only. Therefore, the applicants are directed to delete the goods "Milk and Milk products" from the specification of goods by way of filing a request on from TM-16 to delete the same and after deletion of the goods, the same should be notified in the Trade Marks Journal.

It is significant to note that both Applicant and Opponent are carrying business in Bangalore. While the Applicant claims to be suing the trade mark NANDHINI since 1989, the Opponents have been using the trade mark NANDINI prior to Applicant, the artistic work, design and getup are totally different. While the Applicant has been using the traded mark NANDHINI with a lamp and written in a particular style, the Opponents are using NANDINI with device of cow. The Opponent has not produced any evidence to show that use of trade mark NANDHINI by Applicant is causing confusion or deception. In view of continuous user of the trade mark NANDHINI by Applicant, the Applicant has deemed to have become proprietor of the trade mark NANDHINI.

Lastly coming to the exercise of discretion of the Registrar vested with him, the onus to prove the claim of proprietorship of the mark is always on the Applicants. The Applicants have successfully discharged their onus that they are the proprietors of the mark NANDHINI DELUXE WITH LOGO (Kannada) applied for registration. In order to safeguard the public interest and to protect the intellectual and industrial property rights of the Applicants who are honest adopters and bonafide users, the applicant's trade mark is to be protected by granting registration enabling the applicants to use their mark legally without any hindrance, this authority has no other alternative except to allow application and to grant registration of the impugned mark.

In view of the foregoing, it is ordered that the opposition No. MAS-194405 is dismissed and application No. 982285 in Class-29 shall proceed to registration subject to deleting the items "Milk and Milk products" from the specification of goods by filing a request on form TM-16 and the amended application should be notified in the Trade Marks Journal."

ORDER DATED 20TH APRIL, 2010 OF THE IPAB :

11. The aforesaid order rejecting the opposition of the respondent to the registration of trade mark 'NANDHINI' as sought by the appellant and allowing appellant's application for registration,

except for milk and milk products, was challenged by the respondent by filing set of appeals. One such appeal being OA/4/2008/TM/CH was decided by IPAB vide its order 20th April, 2010. The IPAB referred to the judgment of this Court in Vishnudas Trading as Vishnudas Kushandas v. The Vazir Sultan Tobacco Ltd. and Anr., [1996 SCALE (5) 267] and quoted the following passage therefrom:-

"In our view if a trader or manufacturer actually trades in or manufactures only one or some of the articles coming under a broad classification and such trader or manufacturer has no bonafide intention to trade in or manufacture other goods or articles which also fall under the said broad classification, such trader or manufacturers to get registration of separate and distinct goods which may also be grouped under the broad classification."

12. If registration has been given generally in respect of all the articles under the broad classification and if it is established that the trader or manufacturer who got such registration had not intended to use any other article except the articles being used by such trader or manufacturer, the registration of such trader is liable to be rectified by limiting the ambit of registration and confining such registration to the specific article or articles which really concerns the trader or manufacturer enjoying the registration made in his favour.

13. The IPAB noted that in the instant case, the respondent is dealing with milk and milk products whereas the appellant is dealing with the other products like meat and fish etc. from which dishes are prepared in its restaurants and served to the customers. It took note of certain principles that when a person trades or manufactures one good under the broad classification having no bona fide intention to trade in all other goods falling under that broad classification, he cannot be permitted to enjoy monopoly in articles falling under such classification as held in Vishnudas Trading as Vishnudas Kushandas_[Supra]. Therefore, in the instant case, when the respondent has its limited business only in milk and milk products with no intention to expand the business of trading in other goods falling under Class 29 and the appellant was given registration in other articles only, specifically excluding milk and milk products, there was nothing wrong in according registration of those products in favour of the appellant under the trade mark 'NANDHINI'. The IPAB also observed that the respondent had failed to prove that by allowing such registration in favour of the appellant, any confusion or deception would ensue. On that reasoning, appeal of the respondent was dismissed. At the same time, the appellant was asked to file a request on Form 16 to delete the goods 'milk and milk products'.

The appellant filed the affidavit to this effect, as directed by IPAB on 18th July, 2011.

ORDER DATED 4TH OCTOBER, 2011 OF THE IPAB :

14. Notwithstanding, order dated 20th April, 2018 passed by the IPAB, insofar as other appeals of the respondent are concerned, the events took a different turn as vide

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orders dated 4th October, 2011 appeals of the respondent herein were allowed by the IPAB. It accepted the case of the respondent that 'NANDINI' is a wellknown trade mark and a household name in the State of Karnataka and that it is the registered trade mark of the respondent. The goods sold are milk and milk products such as curd, butter, cheese, ghee, milk powder, flavoured milk, paneer, khoya, ice cream and all milk based sweets. They are sold in bottles, sachets, tetra packs, polythene containers etc. The device used by the respondent is standing cow on a grass land having rising sun in the background. The IPAB also took note of the statistics given by the respondent in respect of sales turnover as well as advertisement and sale promotion expenditure for the last 10 years. It had obtained several registrations in respect of trade mark NANDINI and label forms in Classes 29, 30, 31 and 32 and had also secured copyright registration as early as in the year 1984 and 1985.

15. In the opinion of IPAB, the appellant is running a restaurant which would come under Class 42 with which the Board was not concerned. Therefore, the fact that respondent had not raised any objection to appellant's mark for 18 years was of no relevance.

It also noted that insofar as this trade mark 'NANDINI' used by the respondent is concerned, it has acquired distinctiveness. It further held that since milk and milk products fall under Classes 29 and 30 and the goods registered in the name of the appellant also fall in the same class, the average consumer would conclude that goods manufactured by the appellant belonged to the respondent and, therefore, there is likelihood of confusion. Further, the respondent was using the trade mark prior to the appellant in the same class of goods and, therefore, registration of the appellant's mark could not be permitted. We would like to reproduce the following discussion as that captures the entire essence of the reasoning given by the IPAB in support of its conclusion:

"14. So each case has to be decided on the basis of t he facts on hand. With regard to the appellant's mark we find that one of the documents which is the Kannada Weekly Sudha where it is stated that "I am using NANDINI. You?" In Tharanga Kahhanda Weekly, `Nandini Ghee has a role in every moment of life celebration" (translated from Kannada). These are pieces of evidence to show that the word Nandini itself has become associated with the appellant's products and therefore, though it might be a Hindu name, or even a deity's name, it has come to be recognized as a distinctive mark of the appellant by the appellant's use of the same for nearly two decades. The conclusion of the Registrar that it is not likely to confuse cannot be sustained. The word is identical. The addition of a letter H by the respondent cannot make a difference. Whether it is Nandini or Nandhini, it is pronounced identically. And in Kannada there is no difference in the spelling of the trademark of the appellant and that of the respondent.

15. We have referred to the advertisement which says 'I am using Nandini". It is clear that the consumer and the general public

who are the source of the goods 'when the word Nandini is used. When that is so, we cannot permit the respondent to use the identical mark in relation to goods which are akin to the appellants.

16. The addition of the Word Deluxe cannot improve the case of the respondent since the word NANDHINI is identical and it definitely will confusion in the minds of the consumers.

17. The priority in use is indisputably the appellants. It has been so and consistently used that the marks have become entrenched in the minds of the consumer. It will definitely not being in the interest of the public to allow the respondent to use the mark in connection with the goods in question. The balance of convenience is not in favour of the respondent."

IMPUGNED JUDGMENT OF THE HIGH COURT:

16. The High Court upholding the order dated 4th October, 2011 of the IPAB and dismissing the writ petitions of the appellant herein has done nothing except accepting the the aforesaid reasoning of the IPAB, namely, (a) mark NANDINI as held by the respondent has acquired a distinctive character and has become well-known; (b) the use of another mark is different only in one alphabet but with no difference in spelling or pronunciation in the local language and would very likely to cause confusion in the minds of public if allowed to be registered for the commodities falling in the same class; (c) argument of the appellant herein that it was running the business of restaurant since 1989 and the respondent had started using mark 'NANDINI' since the year 1985 only for milk and not for other products was rejected on the ground that there is no foundation in facts for the aforesaid argument and no material was produced to substantiate the same.

17. As stated in the beginning, very detailed arguments are advanced by counsel for both the parties. The precise nature of the arguments of the parties is as follows:

18. Mr. Sushant Singh, learned counsel appearing for the appellant, advanced the following propositions, while laying attack to the orders of IPAB as well as the High Court:

(i) In the first instance, he submitted that both the High Court of Karnataka as well as IPAB grossly erred in law in interpreting the provisions of Section 11 of the Act to mean that once a trademark has acquired a distinctive character, then the registration of the trade mark is barred and is likely to cause confusion if it is allowed to be registered in the commodities within the same class. His response was that this finding of the High Court of Karnataka as well as of IPAB, is in principle erroneous inasmuch as there is no proposition of law which supports this interpretation to Section 11 of the Act. Learned counsel emphasised that no proper weightage and consideration was given to the fact that goods and services of the appellant were totally different from that of the respondent and, therefore, there was no likelihood of confusion or deception among the public. Instead, the courts below

compared only the marks. This is not in accord with Sections 9 and 11 of the Act. He also referred to the following judgments in support of his plea:

(a) Eco Lean Research and Development A/S v. Intellectual Property Appellate Board and The Asst. Registrar of Trade Marks, Trade Mark Registry [MANU/TN/3041/2011]:

"11. As noticed above, the intimation given to the petitioner at the first instance by the Trade Mark Registry on 6.12.2007 is by stating that the registration has been refused under Sections 9 and 11 of the Act. However, in the grounds of decision, the order proceeds only under Section 11 and not under Sections 9 and 11 of the Act."

(b) British Sugar Plc v. James Robertson & Sons Ltd., [(1996) RPC 281 (CH)]:

"(d) Infringement pursuant to section 10(2)?

Because "Treat" is the very mark registered and is clearly used by Robertson's I think the case falls to be considered under section 10(2)(a), the identical mark/similar goods provision. I do not think it falls within section 10(2)(b) because I reject the argument that the sign used is to be regarded as "Robertson's Toffee Treat". That is used too but the first two words are added matter and it does not matter in what capacity "Treat" is used.

The questions arising under section 10(2)(a) are:

(1) Is the mark used in the course of trade?

(2) Are the goods for which it is used similar to those covered by the registration?

(3) Is there a likelihood of confusion because of that similarity?

The first of these questions causes no difficulty here. The problems arise under the second and third questions. British Sugar seek to elide the questions of confusion and similarity. Their skeleton argument contends that there is "use in relation to a product so similar to a dessert sauce that there exists a likelihood of confusion because the product may or will be used for identical purposes." I do not think it is legitimate to elide the question in this way. The sub-section does not merely ask "will there be confusion?": it asks "is there similarity of goods?", if so, "is there a likelihood of confusion?" The point is important. For if one elides the two questions than a "strong" mark would get protection for a greater range of goods than a "weak" mark. For instance "Kodak" for socks or bicycles might well cause confusion, yet these goods are plainly dissimilar from films or cameras. I think the question of similarity of goods is wholly independent of the particular mark the subject of registration or the defendant's sign."

(c) London Rubber Co. Ltd. v. Durex Products Incorporated & Anr., [(1964) 2 SCR 211]:

"8. The provisions of Sections 8 and 10 of the Act are enabling provisions in the sense that it is not obligatory upon a proprietor of a mark to apply for its registration so as to be able to use it. But when a proprietor of a mark, in order to obtain the benefit of the provisions of the Trade Marks Act,

such as a legally protected right to use it, applies for registration of his mark he must satisfy the Registrar that it does not offend against the provisions of Section 8 of the Act. The burden is on him to do so. Confining ourselves to clause (a) the question which the Registrar has to decide is, whether having regard to the reputation acquired by use of a mark or a name, the mark at the date of the application for registration if used in a normal and fair manner in connection with any of the goods covered by the proposed registration, will not be reasonably likely to cause deception and confusion amongst a substantial number of persons (See 38 Halsbury's Laws of England pp. 542-43). What he decides is a question of fact but having decided it in favour of the applicant, he has a discretion to register it or not to do so (Re Hack's Application [(1940) 58 RPC 91]). But the discretion is judicial and for exercising it against the applicant there must be some positive objection to registration, usually arising out of an illegality inherent in the mark as applied for at the date of application for registration (Re Arthur Fairest Ltd. Application [(1951) 68 RPC 197]). Deception may result from the fact that there is some misrepresentation therein or because of its resemblance to a mark, whether registered or unregistered, or to a trade name in which a person other than the applicant had rights (Eno v. Dunn [(1890) 15 AC 252]). Where the deception or confusion arises because of resemblance with a mark which is registered, objection to registration may come under Section 10(1) as well (See note `k' at p. 543 of 38 Halsbury's Laws of England). The provisions in the English Trade Marks Act, 1938 (1 & 2 Geo. 6 clause 22) which correspond to Sections 8 and 10(1) to 10(3) of our Act are Sections 11 and 12(1) to 12(3). Dealing with the prohibition of registration of identical and similar marks Halsbury has stated at pp. 543-44, Vol. 38, thus:

"Subject to the effect of honest concurrent use or other special circumstances, no trade mark may be registered in respect of any goods or description of goods that (1) is identical with a trade mark belonging to a different proprietor and already registered in respect of the same goods or description of goods; or (2) so nearly resembles such a registered trade mark as to be likely to deceive or cause confusion."

Since the Trade Marks Act, 1940 is based on the English statute and the relevant provisions are of the same nature in both the laws, though the language of Section 8(a) is slightly different from that of Section 11 of the English Act and that of Section 10(1) from that of Section 12(1) of the English Act, we see no reason for holding that the provisions of Section 8(a) would not apply where a mark identical with or resembling that sought to be registered is already on the register. The language of Section 8(a) is wide and though upon giving full effect to that language the provisions of Section 10(1) would, in some respects, overlap those of Section 8(a), there can be no justification for not giving full effect to the language used by the legislature."

(ii) He also argued that even if it is assumed that Section 9(2)(a) is distinct from Section 11(1), insofar as enquiry "likelihood of

confusion and deception" is concerned, it was supposed to be undertaken by applying well settled factors and variables which are stipulated in a series of judgments. He referred to Polaroid Corporation v. Polarad Electronics Corporation, [182 F. Supp. 350 (1960)], Shree Nath Heritage Liquor Pvt. Ltd. & Ors. v. Allied Blender and Distillers Pvt. Ltd., [(2015) 221 DLT 359] and Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd., [(2001) 5 SCC 73] in this behalf.

(iii) Another submission of Mr. Sushant Singh was that the finding of the High Court that the mark is prohibited from registration in respect of entire class or classes of goods runs contrary to the principle of law laid down in Vishnudas Trading Co. v. Vazir Sultan Tobacco Co. Ltd., [(1997) 4 SCC 201] where the Court has observed that the monopoly under Trademark only extends to the goods which are falling in a particular class and not the entire class of goods and the trade mark which is identical or similar in nature can be registered for the goods which are falling within the same class inasmuch as giving the monopoly to the entire class of goods and services to the registered proprietor would lead to trafficking in the trade mark which is not the object and the purpose of the Trade Mark Act.

(iv) Learned counsel went to the extent of targeting the finding that Trademark "NANDHINI" adopted by the respondent is a wellknown inasmuch as such finding was without any supporting material. In this behalf, he attempted to show that there was no finding by the IPAB that the mark "NANDHINI" of the respondent is a well-known mark. He argued that the concept of well-known trademark enshrined under Section 11(2) of the Act which gives wider net of protection to the trademarks in respect of different set of goods is a completely different than that of the Section 11(1). It is submitted that for arriving at the conclusion of well-known trademark there are certain defined parameters on which the trademark is required to be tested, as held by Delhi High Court in Nestle India Ltd. v. Mood Hospitality Pvt. Ltd., [(2010) 42 PTC 514 (Del) (DB)].

(v) According to the learned counsel, the matter also needed to be examined in the light of the fact that the nature of the mark "NANDHINI" which is admittedly a common name and name of the diety and coupled with its level of distinctiveness on account of its user confined to milk and milk products would not warrant invocation of Section 11(2) of the Act as the said provision is applicable in the present case. Stress was laid on the submission that the use of the mark "NANDHINI" by the appellant is honest and with due cause since the year 1989. Respondent has never filed any suit for injunction against the appellant and clearly acquiesced to the user of the appellant. Therefore, Section 11(2) is not applicable.

(vi) Advancing the aforesaid line of argument, his another submission was that Section 12 is an inbuilt scheme which allows the Registrar to register same or similar trademark in respect of same or similar goods. More so, when the name "NANDHINI" is a common name of the deity and common name of Hindu girl to which IPAB agrees. In this context, he also referred to the order passed by the Registrar wherein concurrent

user of both the appellant and the respondent was accepted and submitted that there was no reason to upset the said finding.

(vii) Mr. Sushant Singh further argued that since the respondent was in the business of manufacture and marketing of milk and milk products only, and had admittedly not expanded its business to any other items in Class 29 or 30, the case of the respondent at the highest could be qua milk and milk products only. He submitted that the appellant was ready to give concession by not claiming any registration or trademarks which fell in the category of milk and milk products. In this behalf, he submitted the list of goods which the appellant was ready to delete from its application for registration and the goods in respect of which the appellant intended to claim registration. This was submitted in the tabulated form as under:

CLASS	GOODS APPLIED IN THE TRADE MARK APPLICATION	GOODS PROPOSED TO BE DELETED	GOODS PROPOSED TO BE RETAINED
Class 29	TRADE MARK APP. NO. 982285 Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs; milk and milk products; edible oils and fats, salad dressings, preserves and all other goods being included in Class 29.	Eggs; milk and milk products and all other goods being included in Class 29	Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; edible oils and fats, salad dressings, preserves
Class 30	TRADE MARK APP. NO. 817305 Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee, flour and preparations made from cereals, bread, pastry and confectionery, ices, honey, treacle, yeast, baking-powder, salt, mustard, vinegar, sauces (except salad dressings), spices, ice and all other goods being included in Class 30TRADE MARK APP. NO. 982284 Coffee, tea, cocoa, sugar, rice, sago, substitute flour and preparations made from cereal, bread, biscuits, cakes, pastry and confectionery, ices, honey, yeast, baking powder, salt, mustard, pepper, masala paste, vinegar sauces, spices	Tea, coffee, cocoa, artificial coffee, coffee substitute, biscuits, cakes, pastry and confe-ctionery, ices, ice and all other goods being included in Class 30.	Sugar, rice, tapioca, sago, flour and preparations made from cereals, bread, honey, treacle, yeast, bakingpowder, salt, mustard, pepper, masala paste, vinegar, sauces (except salad dressings), spices.

(viii) The learned counsel submitted that neither the IPAB nor the High Court had answered all the questions/issues which had been raised by the Registrar on the basis of which findings of the Registrar had been premised including under Section 12 of the Act. Moreover, argued the counsel, IPAB did not even refer to or take into consideration the earlier order dated April 20, 2010 passed by IPAB itself wherein IPAB had dismissed the appeal of the respondent on the same issue. Therefore, the appeal filed by the respondent before the IPAB was even barred by the Principle of Issue Estoppel.

19. Mr. S.S. Naganand, learned senior counsel appearing for the respondent submitted, per contra, that IPAB had properly considered all the contentions expressly argued in the appeal as well as in the review petition. It had recorded the factual position and upon such appreciation of facts, the IPAB concludes not only that "the word Nandhini has acquired a distinctiveness" but also that "there is no doubt that if goods under Class 29 and 30 bearing the respondent's (petitioner herein) trademark come out in the market, the average consumer would conclude that it belongs to the Karnataka Cooperative Milk Producers Federation". The IPAB was also pleased to hold that "the work Nandhini itself has become associated with the appellant's (present respondent's) products and, therefore, though it might be a Hindu name, or even a deity's name, it has come to be recognized as a distinctive mark of the appellant by the appellant's use of the same for nearly two decades. The conclusion of the Registrar that it is not likely to confuse cannot be sustained." These findings were expressly affirmed by the High Court in the impugned judgment. Mr. Naganand also submitted that all the essential characteristics of a well-known mark as understood under Section 11(2) read with Section 11(8) of the Act have been found by the IPAB in the respondent's mark "NANDHINI". Under Section 11(8) of the Act, if any Court or Registrar has found that a trade mark is well-known in at least one relevant section of the public in India, it shall be a well-known trade mark for purposes of the Act. Based on the facts and evidence on record, IPAB has clearly recorded a finding that the respondent's trademark is associated with the respondent organisation and that it has acquired distinctiveness in Paras 9 and 14 of the IPAB order. These findings of fact cover the essentials to be considered as a `well-known' trademark and a household name. The High Court has affirmed the correct findings of the IPAB. He asserted that the respondent's trademark "NANDHINI" is a household name in the entire South India, and more so in Karnataka. "NANDHINI" is to Karnataka what "Amul" is to Gujarat. Therefore, there can be no doubt as to "NANDHINI" being a well-known mark. It is important to note that the appellant is running Restaurants only in the city of Bangalore in Karnataka and one town in Tamil Nadu. Outside the city of Bangalore, the public are not aware of the respondent's restaurant and "NANDHINI" all over Karnataka is related exclusively to the respondent organisation.

20. Insofar as argument of the appellant that "NANDHINI" is the name of a God/

Deity and, therefore, cannot be registered as Trademark, reply of the learned senior counsel was that this argument is counterproductive and against the appellant's own interest. He submitted that the prevailing question in the present petition is whether or not the appellant can register a trademark bearing the name "NANDHINI". If it is the appellant's averment that the name "NANDHINI" is the name of a Hindu deity and as a result cannot be registered, then such an argument will not only render futile the very registration the appellant has applied for, but will also render the present petition otiose.

Without prejudice to the above, he argued that merely because the word "NANDHINI" denotes a Hindu Goddess or deity, does not mean that it cannot be registered. He submitted that the only provision contained in the Act on the subject matter of registration of trademarks that affect religious sentiments is contained in Section 9(2)(b) which is set out below for ready reference:

"Section 9(2) : A mark shall not be registered as a trademark if:

(b) : it contains or comprises of any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India."

21. According to the learned senior counsel, the significance of Nandhini, as a symbol of purity and the source of wholesome milk is the reason for the adoption of that word by the respondent. In view of the same, the registration of the trademarks of the respondent in the present case, do not fall within the ambit of the provisions of Section 9(2)(b) of the Act. There is no prohibition in law to include the name of any God as a part of a trademark. It is settled law that if a mark has obtained a secondary distinctiveness in the minds of the consumer, then the same should be registered and protected. He emphasised that the respondent has been able to prove that the appellant's case was covered by Section 11(2) of the Act and, therefore, it could not be registered. For this purpose, he referred to the judgment of Delhi High Court in Nestle India Ltd. wherein the Court laid down following conditions which need to be satisfied for the applicability of Section 11(2):

"(a) The mark has to be identical with or similar to an earlier trademark and is to be registered for goods or services which are not similar to those for which the earlier trademarks is registered - both the aforementioned conditions (forming sub-section (a) and (b) of Section 11(2)) have to be satisfied and not just one, due to the use of the word and between them.

(b) The registered Trademark must have a reputation in India, and

(c) The use of the mark in question must be without due cause, and

(d) Such use must take unfair advantage of or be detrimental to the distinctive character or repute of the registered trademark."

22. In this hue, another submission of the learned senior counsel for the respondent was that the appellant's contention regarding

honest and concurrent user was untenable for the following reasons:

(a) The question of the Court/Registrar taking into consideration the provisions of Section 12 of the Act, which provides for registration in the case of honest and concurrent user does not arise as the very basis for the application of this Section is the "honesty of the concurrent use." The appellant was wellaware of the widespread use of the mark Nandhini by the respondent and has admitted that they were purchasing Nandhini milk for their restaurant. Therefore, the appellant cannot claim to be an honest or concurrent user, as such claims would be contrary to the evidence placed on record and their own admissions.

(b) Section 12 of the Act relates to identical or similar goods or services. The appellant is not in the business of selling milk or milk products and the claim made by it is with regard to the trading style for their restaurants' name "NANDHINI". Therefore, the goods or services of the appellant are neither identical, nor similar, to those of the the respondent.

(c) At any rate, Section 11(2) being couched in negative language indicates that it is mandatory nature and would override the provisions of Section 12.

(d) Section 12 has never been expressly pleaded by the appellant. In any case, this contention has not been expressly argued on behalf of the appellant before the lower fora.

23. We have duly considered the aforesaid submissions of both the counsel with reference to the record of the case. Though the detailed arguments are advanced touching upon various aspects, it is not necessary to traverse through all these arguments. We proceed on the presumption that the trade mark 'NANDHINI', which is registered in the name of the appellant has acquired distinctiveness though the appellant disputes the same. Otherwise also there is no challenge to the registration of this name in favour of the respondent. The moot question, according to us, is as to whether the appellant is entitled to seek registration of the mark 'NANDHINI' in respect of the goods in which it is dealt with, as noted above. Therefore, the fulcrum of the dispute is as to whether such a registration in favour of the appellant would infringe rights of the respondent. The entire case of the respondent revolves around the submissions that the adaptation of this trade mark by the appellant, which is phonetically similar to that of the respondent, is not a bona fide adaptation and this clever device is adopted to catch upon the goodwill which has been generated by the respondent in respect of trade mark 'NANDINI'. On that premise, the respondent alleges that the proposed trade mark 'NANDHINI' for which the appellant applied for registration is similar trade mark in respect of similar goods and, therefore, it is going to cause deception and confusion in the minds of the users that the goods in which the appellant is trading, in fact, are the goods which belong to the respondent. Precisely, it is this controversy which needs to be addressed in the first instance.

24. Before we answer as to whether the

approach of the IPAB and the High Court in the impugned orders is correct, as contended by the respondent or it needs to be interdicted as submitted by the appellant, some of the relevant facts about which there is no dispute, need to be recapitulated. These are as follows:

(A) Respondent started using trade mark in respect of its products, namely, milk and milk products in the year 1985. As against that, the appellant adopted trade mark 'NANDHINI' in respect of its goods in the year 1989.

(B) Though, the respondent is a prior user, the appellant also had been using this trade mark 'NANDHINI' for 12-13 years before it applied for registration of these trade marks in respect of its products.

(C) The goods of the appellant as well as respondent fall under the same Classes 29 and 30. Notwithstanding the same, the goods of the appellant are different from that of the respondent. Whereas the respondent is producing and selling only milk and milk products the goods of the appellant are fish, meat, poultry and game, meat extracts, preserved, dried and cooked fruits and vegetables, edible oils and fats, salad dressings, preserves etc. and it has given up its claim qua milk and milk products.

(D) Insofar as application for registration of the milk and milk products is concerned, it was not granted by the trade mark registry. In fact, the same was specifically rejected. The appellant was directed to file the affidavit and Form 16 in this behalf to delete the goods 'milk and milk products' which affidavit was filed by the appellant. Further concession is already recorded above.

(E) NANDINI/NANDHINI is a generic, it represents the name of Goddess and a cow in Hindu Mythology. It is not an invented or coined word of the respondent.

(F) The nature and style of the business of the appellant and the respondent are altogether different. Whereas respondent is a Cooperative Federation of Milk Producers of Karnataka and is producing and selling milk and milk products under the mark 'NANDINI', the business of the appellant is that of running restaurants and the registration of mark 'NANDHINI' as sought by the appellant is in respect of various foodstuffs sold by it in its restaurants.

(G) Though there is a phonetic similarity insofar as the words NANDHINI/NANDINI are concerned, the trade mark with logo adopted by the two parties are altogether different. The manner in which the appellant has written NANDHINI as its mark is totally different from the style adopted by the respondent for its mark 'NANDINI'. Further, the appellant has used and added the word 'Deluxe' and, thus, its mark is 'NANDHINI DELUXE'. It is followed by the words 'the real spice of life'. There is device of lamp with the word 'NANDHINI'. In contrast, the respondent has used only one word, namely, NANDINI which is not prefixed or suffixed by any word. In its mark 'Cow' as a logo is used beneath which the word NANDINI is written, it is encircled by egg shape circle. A bare perusal of the two marks would show that there is hardly any similarity

of the appellant's mark with that of the respondent when these marks are seen in totality.

25. When we examine the matter keeping in mind the aforesaid salient features, it is difficult to sustain the conclusion of the IPAB in its order dated 4th October, 2011 as well in the impugned order of the High Court that the mark adopted by the appellant will cause any confusion in the mind of consumers, what to talk of deception. We do not find that the the two marks are deceptively similar.

26. We are of further opinion that the earlier order dated 20th April, 2010 of IPAB approached the subject matter in correct perspective. The test laid down in Polaroid Corporation v. Polarad Electronics Corporation, [287 F.2d 492 (1961)] is as follows:

"The problem of determining how far a valid trademark shall be protected with respect to goods other than those to which its owner has applied it, has long been vexing and does not become easier of solution with the years. Neither of our recent decisions so heavily relied upon by the parties, Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc., 2 Cir., 1960, 281 F.2d 755, by plaintiff, and Avon Shoe Co., Inc. v. David Crystal, Inc., 2 Cir., 1960, 279 F.2d 607 by defendant, affords much assistance, since in the Ritchie case there was confusion as to the identical product and the defendant in the Avon case had adopted its mark "without knowledge of the plaintiffs' prior use," at page 611. Where the products are different, the prior owner's chance of success is a function of many variables: the strength of his mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers. Even this extensive catalogue does not exhaust the possibilities - the court may have to take still other variables into account. American Law Institute, Restatement of Torts, __ 729, 730, 731. Here plaintiff's mark is a strong one and the similarity between the two names is great, but the evidence of actual confusion, when analyzed, is not impressive. The filter seems to be the only case where defendant has sold, but not manufactured, a product serving a function similar to any of plaintiff's, and plaintiff's sales of this item have been highly irregular, varying, e. g., from $2,300 in 1953 to $303,000 in 1955, and $48,000 in 1956."

27. This Court in National Sewing Thread Co. Ltd. v. James Chadwick and Bros., [AIR 1953 SC 357] accepted the following principles which are to be applied in such cases:

"22. The principles of law applicable to such cases are well settled. The burden of proving that the trade mark which a person seeks to register is not likely to deceive or to cause confusion is upon the applicant. It is for him to satisfy the Registrar that his trade mark does not fall within the prohibition of Section 8 and therefore it should be registered. Moreover in deciding whether a particular trade mark is likely to deceive

or cause confusion that duty is not discharged by arriving at the result by merely comparing it with the trade mark which is already registered and whose proprietor is offering opposition to the registration of the mark. The real question to decide in such cases is to see as to how a purchaser, who must be looked upon as an average man of ordinary intelligence, would react to a particular trade mark, what association he would form by looking at the trade mark, and in what respect he would connect the trade mark with the goods which he would be purchasing."

28. Applying the aforesaid principles to the instant case, when we find that not only visual appearance of the two marks is different, they even relate to different products. Further, the manner in which they are traded by the appellant and respondent respectively, highlighted above, it is difficult to imagine that an average man of ordinary intelligence would associate the goods of the appellant as that of the respondent.

29. One other significant factor which is lost sight of by the IPAB as well as the High Court is that the appellant is operating a restaurant under the trademark 'NANDHINI' and it had applied the trademark in respect of goods like coffee, tea, cocoa, sugar, rice, rapioca, sago, artificial coffee, flour and preparations made from cereals, bread, pastry, spices, bill books, visiting cards, meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces, etc. which are used in the products/services of restaurant business. The aforesaid items do not belong to Class 29 or 30. Likewise, stationery items used by the appellant in the aid of its restaurant services are relatable to Class 16. In these circumstances, there was hardly any question of confusion or deception.

30. Having arrived at the aforesaid conclusion, the reasoning of the High Court that the goods belonging to the appellant and the respondent (though the nature of goods is different) belong to same class and, therefore, it would be impermissible for the appellant to have the registration of the concerned trade mark in its favour, would be meaningless. That apart, there is no such principle of law. On the contrary, this Court in Vishnudas Trading as Vishnudas Kushandas2 has decided otherwise as can be seen from the reading of para 47 of the said judgment:-

"47. The respondent Company got registration of its brand name "Charminar" under the broad classification "manufactured tobacco". So long such registration remains operative, the respondent Company is entitled to claim exclusive use of the said brand name in respect of articles made of tobacco coming under the said broad classification "manufactured tobacco". Precisely for the said reason, when the appellant made application for registration of quiwam and zarda under the same brand name "Charminar", such prayer for registration was not allowed. The appellant, therefore, made application for rectification of the registration made in favour of the respondent Company so that the said registration is limited only in respect of the articles being manufactured and marketed by the respondent Company, namely,

cigarettes. In our view, if a trader or manufacturer actually trades in or manufactures only one or some of the articles coming under a broad classification and such trader or manufacturer has no bona fide intention to trade in or manufacture other goods or articles which also fall under the said broad classification, such trader or manufacturer should not be permitted to enjoy monopoly in respect of all the articles which may come under such broad classification and by that process preclude the other traders or manufacturers from getting registration of separate and distinct goods which may also be grouped under the broad classification. If registration has been given generally in respect of all the articles coming under the broad classification and if it is established that the trader or manufacturer who got such registration had not intended to use any other article except the articles being used by such trader or manufacturer, the registration of such trader is liable to be rectified by limiting the ambit of registration and confining such registration to the specific article or articles which really concern the trader or manufacturer enjoying the registration made in his favour. In our view, if rectification in such circumstances is not allowed, the trader or manufacturer by virtue of earlier registration will be permitted to enjoy the mischief of trafficking in trade mark. Looking to the scheme of the registration of trade mark as envisaged in the Trade Marks Act and the Rules framed thereunder, it appears to us that registration of a trade mark cannot be held to be absolute, perpetual and invariable under all circumstances. Section 12 of the Trade Marks Act prohibits registration of identical or deceptively similar trade marks in respect of goods and description of goods which is identical or deceptively similar to the trade mark already registered. For prohibiting registration under Section 12(1), goods in respect of which subsequent registration is sought for, must be (i) in respect of goods or description of goods being same or similar and covered by earlier registration and (ii) trade mark claimed for such goods must be same or deceptively similar to the trade mark already registered. It may be noted here that under sub-section (3) of Section 12 of the Trade Marks Act, in an appropriate case of honest concurrent use and/or of other special circumstances, same and deceptively similar trade marks may be permitted to another by the Registrar, subject to such conditions as may deem just and proper to the Registrar. It is also to be noted that the expression “goods” and “description of goods” appearing in Section 12(1) of the Trade Marks Act indicate that registration may be made in respect of one or more goods or of all goods conforming a general description. The Trade Marks Act has noted distinction between description of goods forming a genus and separate and distinctly identifiable goods under the genus in various other sections e.g. goods of same description in Section 46, Sections 12 and 34 and class of goods in Section 18, Rules 12 and 26 read with Fourth Schedule to the Rules framed under the Act.

48. The “class” mentioned in the Fourth Schedule may subsume or comprise a number of goods or articles which are separately identifiable and vendible and which are not goods of the same description as commonly understood in trade or in

common parlance. Manufactured tobacco is a class mentioned in Class 34 of Fourth Schedule of the Rules but within the said class, there are a number of distinctly identifiable goods which are marketed separately and also used differently. In our view, it is not only permissible but it will be only just and proper to register one or more articles under a class or genus if in reality registration only in respect of such articles is intended, by specifically mentioning the names of such articles and by indicating the class under which such article or articles are to be comprised. It is, therefore, permissible to register only cigarette or some other specific products made of "manufactured tobacco" as mentioned in Class 34 of Fourth Schedule of the Rules. In our view, the contention of Mr Vaidyanathan that in view of change in the language of Section 8 of the Trade Marks Act as compared to Section 5 of the Trade Marks Act, 1940, registration of trade mark is to be made only in respect of class or genus and not in respect of articles of different species under the genus is based on incorrect appreciation of Section 8 of the Trade Marks Act and Fourth Schedule of the Rules." 31. We may mention that the aforesaid principle of law while interpreting the provisions of Trade and Merchandise Act, 1958 is equally applicable as it is unaffected by the Trade Marks Act, 1999 inasmuch as the main object underlying the said principle is that the proprietor of a trade mark cannot enjoy monopoly over the entire class of goods and, particularly, when he is not using the said trade mark in respect of certain goods falling under the same class. In this behalf, we may usefully refer to Section 11 of the Act which prohibits the registration of the mark in respect of the similar goods or different goods but the provisions of this Section do not cover the same class of goods.

32. The aforesaid discussion leads us to hold that all the ingredients laid down in Section 11(2) of the Act, as explained by the Delhi High Court in Nestle India Ltd., have not been satisfied. We are not persuaded to hold, on the facts of this case, that the appellant has adopted the trade mark to take unfair advantage of the trade mark of the respondent. We also hold that use of 'NANDHINI' by appellant in respect of its different goods would not be detrimental to the purported distinctive character or repute of the trade mark of the respondent. It is to be kept in mind that the appellant had adopted the trade mark in respect of items sold in its restaurants way back in the year 1989 which was soon after the respondent had started using the trade mark 'NANDINI'. There is no document or material produced by the respondent to show that by the year 1989 the respondent had acquired distinctiveness in respect of this trade mark, i.e., within four years of the adoption thereof. It, therefore, appears to be a case of concurrent user of trade mark by the appellant.

33. There is some force in the argument of learned counsel for the appellant that IPAB while passing orders dated 4th October, 2011 ignored its earlier order, of a Coordinate Bench, passed on 20th April, 2010. Appeal in which order dated 20th April, 2010 was passed was between the same parties on identical issue. The IPAB

had dismissed the said appeal of the respondent and that order had attained finality. Prima facie, this would act as an issue of estoppel between the parties (see the Bhanu Kumar Jain v. Archana Kumar and Anr. [(2005) 1 SCC 787]; Hope Plantations Ltd. v. Taluk Land Board, Peermade and Another, [(1999) 5 SCC 590)]. However, as we are holding that the impugned orders of the IPAB and High Court are not sustainable in law and have decided these appeals on merits it is not necessary to make any further comments on the aforesaid aspect.

34. As a result, the orders of the IPAB and High Court are set aside. These appeals are allowed and the order of the Deputy Registrar granting registration in favour of the appellant is hereby restored, subject to the modification that registration will not be given in respect of those milk and milk products for which the appellant has abandoned its claim, as noted in para 18(vii) above.

35. In the peculiar facts of this case, we refrain ourselves from awarding any costs.

2018 (2) L.S. 113 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr. Justice
Abhay Manohar Sapre &
The Hon'ble Mr.Justice
Uday Umesh Lalit

Union of India ..Petitioner
Vs.
Dyagala Devamma
& Ors., ..Respondents

LAND ACQUISITION ACT, Sec.4 - Question for consideration in present appeal is whether Reference Court was justified in deducting 50% from market value of land or whether High Court was justified in deducting 25%.

Held - While determining true market value of acquired land especially when acquired land is a large chunk of undeveloped land, it is just and reasonable to make appropriate deduction towards expenses for development of acquired land - Reference Court was justified in making deduction of 50% towards developmental charges from the market value, High Court did not assign any good reason as to why and on what basis, it considered proper to make deduction towards developmental charges at the rate of 25% in place of 50% - Appeal is allowed.

C.A.Nos.6986-6987/18 Date:25-7-2018

(per Hon'ble Mr.Justice Abhay Manohar Sapre)

1.Leave granted.

2. These appeals are filed against the final judgment and order dated 08.08.2014 passed by the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in LAAS No.762 of 2010 and CO(SR) No.373 of 2011 whereby the High Court dismissed the appeal filed by the appellant herein and partly allowed the cross objections filed by the respondents herein and enhanced the compensation as mentioned in detail infra.

3. We herein set out the facts, in brief, to appreciate the issues involved in these appeals.

4. 0n 12.11.2003, the State of Andhra Pradesh issued a notification under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as "the Act") and acquired the land measuring about 10100 acres (SY No.398/3 and other connected survey numbers) situated at Jagitial Municipality, District Karimnagar (AP). The acquisition of land was for a public purpose, namely, "laying new broad gauge single railway line from Karimnagar to Jagitial Phase -II by the appellant-Railways". This was followed by issuance of notification under Section 6 of the Act and then possession on 02.12.2003.

5. The Land Acquisition Officer (LAO) started proceedings under Section 11 of the Act for determination of the compensation payable to the landowners for their lands. By award No.26/2006 dated 14.07.2006, the LAO determined the market value of the acquired land at the rate of "Rs.1,30,000/- per acre for wet lands" and "Rs.1,24,000/- per acre for dry lands". The LAO also awarded compensation for structures, wells etc. to some landowners.

6. The claimants (landowners) felt aggrieved and sought reference under Section 18 of the Act to the Civil Court in OP No.27/2007. By award dated 23.07.2010, the Civil Court (Sr. Civil Judge, Jagitial) re-determined the market value of the land in question. The Reference Court determined the market value of the acquired land at Rs. 21,29,600/-per acre uniformly. However, having regard to the totality of facts of the case, the Reference Court considered it just and proper to deduct 50% towards developmental charges and accordingly worked out the market value of the land at "Rs.10,64,800/- per acre" for being paid to the landowners.

7. The appellant-Railways felt aggrieved and filed appeal before the High Court of Andhra Pradesh whereas the landowners also felt aggrieved and filed cross objections claiming enhancement of the market value determined by the Reference Court.

8. By impugned judgment, the High Court dismissed the appeal filed by the appellant-Railways and partly allowed the cross

objections filed by the landowners and enhanced the compensation to Rs. 15,97,200/- per acre. The High Court, upheld the market value determined by the Reference Court i.e. Rs. 21,29,600/- per acre but reduced the deduction towards developmental charges from 50% to 25% and accordingly worked out the compensation "at the rate of Rs. 15,97,200/- per acre". It is against this judgment, the appellant-Railways felt aggrieved and filed the present appeals by way of special leave before this Court.

9. Heard Mr. Vikramjit Banerjee, learned Additional Solicitor General for the appellant-UOI and Mr. B. Adinarayana Rao, learned senior counsel for the respondents.

10. Mr. Vikramjit Banerjee, learned Additional Solicitor General appearing for the appellant while assailing the legality and correctness of the impugned judgment essentially made two submissions.

11. In the first place, learned ASG contended that the High Court erred in further enhancing the compensation at Rs. 15,97,200/- per acre.

12. According to him the compensation determined by the Reference Court payable at the rate of Rs. 10,64,800/- per acre was just, legal and proper and, therefore, it did not call for any further enhancement.

13. In the second place, learned ASG urged that having placed reliance on exemplar Sale Deed (ExP18) for determining the market value, the Reference Court rightly deducted 50% towards development charges, whereas the High Court erred in deducting 25% towards developmental charges.

14. According to learned ASG, the High Court ought to have appreciated that there were three distinguishing factors appearing from the exemplar sale deed (Ex.P-18). Due to these three factors, deduction of 50% towards developmental charges from the market value was called for. These factors are, First, Sale Deed (Ex.P-18) was for a very small piece of land (19 Guntas=1/2 acre); Second, the land which was the subject matter of Ex-P-18 had a peculiar site because it was situated facing two roads one on the east side and other on the north side; and Third, it was a developed land.

15. It was, therefore, urged that so far as the land in question is concerned, the same did not have these factors and, therefore, the Reference Court rightly considered it proper to deduct 50% towards developmental charges from the market value which was worked out on the basis of Sale Deed (Ex.P18). It was urged that the High Court without assigning any reasons much less cogent reasons erred in reducing developmental charges from 50% to 25% from the market value. Learned ASG, therefore, prayed for restoration of the award

of the Reference Court in place of impugned judgment of the High Court.

16. Per contra, learned senior counsel for the respondents (landowners) supported the impugned judgment and contended that it does not call for any interference and hence the appeals deserve to be dismissed.

17. The question arises for consideration in these appeals is whether the High Court was justified in deducting 25% towards developmental charges from the market value of the land in question against 50% deduction made by the Reference Court. In other words, having regard to the facts and circumstances of the case, whether the Reference Court was justified in deducting 50% from the market value of the land or whether the High Court was justified in deducting 25%.

18. Before we examine the facts of this case, it is necessary to take note of general principles of law on the subject in question which are laid down by this Court in several cases and some of which were also cited at the Bar by the learned counsel for the parties. Indeed, if we may say so, law on the several issues urged herein by the learned counsel for the parties is already settled by this Court and what has varied in its application depends on the facts of each case.

19. In Chimanlal Hargovinddas v. Special Land Acquisition Officer, Poona & Anr. (1988) 3 SCC 751, this Court dealt with the question as to how the Court should determine the valuation of the lands under acquisition and what broad principle of law relating to acquisition of land under the Act should be kept in consideration to determine the proper market value of the acquired land.

20. In Para 4 of the judgment, this Court laid down as many as 17 principles, which are reproduced below for perusal:

> "(1) to (4).....
>
> (5) The market value of land under acquisition has to be determined as on the crucial date of publication of the notification under Section 4 of the Land Acquisition Act (dates of notifications under Sections 6 and 9 are irrelevant).
>
> (6) The determination has to be made standing on the date line of valuation (date of publication of notification under Section 4) as if the valuer is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that the vendor is willing to sell the land at a reasonable price.
>
> (7) In doing so by the instances method, the court has to correlate the market value reflected in the most

comparable instance which provides the index of market value.

(8) Only genuine instances have to be taken into account. (Sometimes instances are rigged up in anticipation of acquisition of land.)

(9) Even post-notification instances can be taken into account (1) if they are very proximate, (2) genuine and (3) the acquisition itself has not motivated the purchaser to pay a higher price on account of the resultant improvement in development prospects.

(10) The most comparable instances out of the genuine instances have to be identified on the following considerations:

(i) proximity from time angle,

(ii) proximity from situation angle.

(11) Having identified the instances which provide the index of market value the price reflected therein may be taken as the norm and the market value of the land under acquisition may be deduced by making suitable adjustments for the plus and minus factors vis-a-vis land under acquisition by placing the two in juxtaposition.

(12) A balance-sheet of plus and minus factors may be drawn for this purpose and the relevant factors may be evaluated in terms of price variation as a prudent purchaser would do.

(13) The market value of the land under acquisition has thereafter to be deduced by loading the price reflected in the instance taken as norm for plus factors and unloading it for minus factors.

(14) The exercise indicated in clauses (11) to (13) has to be undertaken in a common sense manner as a prudent man of the world of business would do. We may illustrate some such illustrative (not exhaustive) factors:

(15) The evaluation of these factors

Plus factors	Minus factors
1. smallness of size	1. largeness of area

2. proximity to a road	2. situation in the interior at a distance from the road
3. frontage on a road	3. narrow strip of land with very small frontage compared to depth
4. nearness to developed area	4. lower level requiring the depressed portion to be filled up
5. regular shape	5. remoteness from developed locality
6. level vis-a-vis land under acquisition	6. some special disadvantageous factor which would deter a purchaser
7. special value for an owner of an adjoining property to whom it may have some very special advantage	

of course depends on the facts of each case. There cannot be any hard and fast or rigid rule. Common sense is the best and most reliable guide. For instance, take the factor regarding the size. A building plot of land say 500 to 1000 sq. yds. cannot be compared with a large tract or block of land of say 10,000 sq. yds. or more. Firstly while a smaller plot is within the reach of many, a large block of land will have to be developed by preparing a lay out, carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers (meanwhile the invested money will be blocked up) and the hazards of an entrepreneur. The factor can be discounted by making a deduction by way of an allowance at an appropriate rate ranging approximately between 20 per cent to 50 per cent to account for land required to be set apart for carving out lands and plotting out small plots. The discounting will to some extent also depend on whether it is a rural area or urban area, whether building activity is picking up, and whether waiting period during which the

capital of the entrepreneur would be locked up, will be longer or shorter and the attendant hazards.

(16) Every case must be dealt with on its own fact pattern bearing in mind all these factors as a prudent purchaser of land in which position the judge must place himself.

(17) These are general guidelines to be applied with understanding informed with common sense."

21. These principles are invariably kept in mind by the Courts while determining the market value of the acquired lands (also see Union of India v. Raj Kumar Baghal Singh (Dead) Through Legal Representatives & Ors., (2014) 10 SCC 422).

22. In addition to these principles, this Court in several cases have laid down that while determining the true market value of the acquired land especially when the acquired land is a large chunk of undeveloped land, it is just and reasonable to make appropriate deduction towards expenses for development of acquired land. It has also been consistently held that at what percentage the deduction should be made varies from 10% to 86% and, therefore, the deduction should be made keeping in mind the nature of the land, area under acquisition, whether the land is developed or not and, if so, to what extent, the purpose of acquisition, etc. It has also been held that while determining the market value of the large chunk of land, the value of smaller pieces of land can be taken into consideration after making proper deduction in the value of lands especially when sale deeds of larger parcel of land are not available. This Court has also laid down that the Court should also take into consideration the potentiality of the acquired land apart from other relevant considerations. This Court has also recognized that the Courts can always apply reasonable amount of guesswork to balance the equities in order to fix a just and fair market value in terms of parameters specified under Section 23 of the Act. (See Trishala Jain & Anr. v. State of Uttaranchal & Anr., (2011) 6 SCC 47 and Vithal Rao & Anr. v. Special Land Acquisition Officer, (2017) 8 SCC 558)

23. Keeping in mind the aforementioned principles, when we take note of the facts of the case at hand, we find that firstly, the land acquired in question is a large chunk of land (101 acres approx.); Secondly, it is not fully developed; Thirdly, the respondents (landowners) have not filed any exemplar sale deed relating to large pieces of land sold in acres to prove the market value of the acquired land; Fourthly, exemplar relied on by the respondents, especially Ex.P-18 pertains to very small pieces of land (19 guntas); Fifthly, the three distinguishing features noticed in the land in sale deed (Ex.P-18) are not present in the acquired land.

24. It was for the aforementioned reasons, in our opinion, the Reference Court was justified in making deduction of 50% towards developmental charges from the market value. The High Court, in our opinion, did not assign any good reason as to why and on what basis, it considered proper to make deduction towards developmental charges at the rate of 25% in place of 50%.

25. This Court has held in Trishala Jain's case (supra) that it depends upon the facts of each case to decide for determination of the market value of the land as to what percentage should be adopted for deduction. In our opinion, the reasons mentioned above were rightly made basis by the Reference Court to support the deduction of 50%.

26. So far as the determination of market value made by the Reference Court is concerned, i.e., Rs. 21,29,600/- per acre, the same having been upheld by the High Court, we do not find any justification to examine this issue again. Even the learned ASG did not challenge this finding and confined his submissions only relating to the issue of percentage of the deduction only.

27. Learned counsel for the respondents was not able to point out any fact/evidence which could persuade us to uphold the reasoning and conclusion arrived at by the High Court in the impugned judgment.

28. In view of the foregoing discussion, we are inclined to uphold the reasoning and the conclusion arrived at by the Reference Court instead of the High Court.

29. As a consequence of the foregoing discussion, the appeals succeed and are accordingly allowed. Impugned judgment is set aside and that of the Reference Court (Civil Court) dated 23.07.2010 in OP No.27/2007 is restored.

--X--

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