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# Law Summary

( Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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PART - 14 (31ST JULY 2019)


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Held - To attract Section 47 of CPC, two conditions must be fulfilled i.e. (1) the question must be one arising between the parties to the suit in which the decree was passed or their representatives; and (2) the said question must relate to the execution, discharge or satisfaction of the decree - In the instant case, both these conditions are fulfilled and so even E.A. filed by the respondent to cancel the registered sale deed executed in favour of the 1st petitioner and for restoration of possession is maintainable - It was made to make the the lower Court believe that it was the respondent who signed the Vakalathnama, the written statement, the suit agreement of sale, receipts, counters in the I.As., etc., and the Court below found as a fact that respondent's signature was forged on the said documents - So it is a case of fraud on the Court as well as on the respondent, and so the respondent was justified in invoking Section 151 CPC to set aside the decree – Appeal stands dismissed.

**(T.S.) 45**

**CIVIL PROCEDURE CODE,** Or.20 Rule 6A(2), Order 21 Rule 2 and Rule 11(3) and Secs.151 & 152 - Executing Court issued warrant of possession against Respondent/ Judgment debtor in respect of suit house in eviction suit against Respondent - Executing Court dismissed applications filed by Respondent challenging executability of consent order itself as being null and void - Whether the High Court was justified in allowing the respondent's (Judgment Debtor's) appeal and thereby was justified in holding that the Execution Petition filed by the appellant was not maintainable for want of formal decree not being drawn up by the Court after passing of the order.

Held – High Court was not right in holding that in the absence of a formal decree not being drawn or/and filed, the appellant (decree holder) had no right to file the Execution petition on the strength of the consent order - Though Rule 6A (2) of Order 20 of the Code deals with the filing of the appeal without enclosing the copy of the decree along with the judgment and further provides the consequence of not drawing up the decree yet, the principle underlined in Rule 6A(2) can be made applicable also to filing of the execution application under Order 21 Rule 2 of the Code.

Order 21 Rule 11(3) of the Code makes it clear that the Court "may" require the decree holder to produce a certified copy of the decree - This clearly indicates that it is not necessary to file a copy of the decree along with execution application unless the Court directs the decree holder to file a certified copy of the decree – Even though the appellant did not file the certified copy of the decree along with the execution application for the reason that the same was not passed by the Court, yet the execution application filed by the appellant, in our view, was maintainable.

High Court was right in directing the appellant to apply to the Court for drawing a decree, but was not right in directing to apply under Section 152 of the Code - Appellant is hereby granted two weeks' time to apply under Section 151 read with Order 20 Rule 6(A) of the Code to the concerned Court with a prayer for passing a decree in accordance with the order passed under Order 23 Rule 3 of the Code – Appeal stands allowed. **(S.C.)** ***130***

**CIVIL PROCEDURE CODE,** Order XXXIX Rules 1 & 2 - Appeal filed challenging the Order in I.A in O.S of Additional Senior Civil Judge – Appellant, father-in-law of the respondent filed the said suit against the respondent for eviction of the respondent alleging that the respondent is staying in the suit schedule property which is the ground floor portion of the building owned by the appellant and that the son of the appellant had moved out of the appellant's house, but the respondent had refused to move from the suit schedule property and continued to occupy the ground floor portion - Pending the suit, appellant filed I.A. under Order XXXIX Rules 1 & 2 CPC to direct the respondent to stop all commercial activities in the ground floor portion of the suit schedule property - Court below dismissed the said I.A. **5**

Held - When the respondent herself admitted that she is running a boutique in the suit schedule property, the Court below ought not to have said that it is a matter for evidence as to whether the respondent is using the premises for commercial business purpose - Court below could not have stated that it would compensate the appellant if any additional tax for use of the premises for commercial purpose is imposed or award mesne profits if the suit is to be ultimately decreed evicting the petitioner, because there is no prayer in the suit either for mesne profits - Finding of the Court below that when the respondent is in possession of the suit schedule property she cannot be restrained by imposing any condition to enjoy the possession is clearly perverse and cannot be sustained – Appeal allowed - Order in I.A of the Court below is set aside. **(T.S.)** ***55***

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Held - Respondent had option to institute summary suit at very inception of dispute - But consciously opted for prosecution under the Act which undoubtedly was more efficacious remedy for recovery of any specified amount of dishonoured instrument raising presumption against drawer – Defence raised by Appellant was certainly not sham or moonshine much less frivolous or vexatious and neither could it be called improbable - Appellant had raised substantial defence and genuine triable issues – Fact that there may have been commercial relations between parties was ground for institution of summary suit but could not per se be justification for grant of conditional leave sans proper consideration of defence from materials on record - Thus, there was no justification to grant conditional leave to defend - Impugned orders granting conditional leave to defend were set aside and Appellant was granted unconditional leave to defend – Appeal stands allowed. **(S.C.)** ***140***

**HINDU MINORITY AND GUARDIANSHIP ACT, 1956,** Secs.8 & 17 - **GUARDIANS AND WARDS ACT, 1890 - HINDU MARRIAGE ACT** - “CUSTODY OF MINOR CHILD” - Wife filed OP for dissolution of marriage in Family court and IA filed to restrain husband from coming any where near her or their minor son - Husband filed IA seeking grant of interim custody of minor child - Family Court passed common order dismissing IA filed by wife and allowing IA filed by husband partly allowed granting interim custody of minor son to father 4 pm Saturday to 6 pm Sunday every week.

High Court modifying the orders of lower Court and passed orders pending final orders in both IAs father shall handover child to mother certain dates to certain dates and father is also entitled to speak to child at least once in a day and other conditions.

It is settled legal position that in deciding the issue of temporary custody or visitation paramount consideration is welfare and interest of child.

The arrangement made by Court below had continued during pendency of revision and for summer vacation - Court has passed orders which both parties had stated that the arrangements went on peacefully. **(T.S.)** ***59***

**NDPS Act,** Section - 8(c) r/w Section 20(b)(ii)(c) – Petitioner/A4 sought bail - Prosecution contends that petitioner acted as a mediator for purchase of 135 Kgs ganja - Complainant and the Investigating Officer are the same.

Held - it cannot be said that the petitioner would be entitled for acquittal and hence, Section 37 of the NDPS Act does not come in the way of granting bail to the petitioner - This Court can understand from the language used in Section 37(i)(b)(ii) is that the reasonable grounds should be in respect of believing that the accused is not guilty but not that he would be acquitted – Instant case fit for granting interim bail to the petitioner - Criminal petition is disposed of and the petitioner is enlarged on interim bail for a period of 30 days. **(A.P.)** ***93***

**INDIAN PENAL CODE,** Secs. 147, 148, 302/149 and 323/149 – Appellant/ Accused no. 1) along with three others tried for an offence under Sections 147, 148, 302/149 and 323/149 of the IPC - Appellant and one VikasKirola were convicted under Section 304 Part II/34 IPC and sentenced to undergo rigorous imprisonment for 10 years while other two accused were acquitted.

Held - A court, while imposing sentence, has to keep in view the various complex matters in mind - To structure a methodology relating to sentencing is difficult to conceive of - Considering the tender age of Appellant at the time of offence, subsequent conduct and other ancillary circumstances, including that no untoward incident has been reported against him and the mitigating circumstances, it is appropriate that in the obtaining factual score, the sentence of rigorous imprisonment be altered to the period already undergone for offence under Section 304 Part II/34 IPC, to meet the ends of justice - Appealstands partly allowed. **(S.C.)** ***150***

**(INDIAN) PENAL CODE,** Secs.302, 201 r/w Sec.34 - Appeal by the prosecution assailing the judgment of the High Court acquitting the respondents charged for the offences under Sections 302, 201 read with Section 34 IPC - High Court in its impugned judgment recorded a finding that the chain of circumstantial evidence produced by the prosecution is very doubtful and not reliable at all.

Held - Prosecution has failed to complete the chain of events leaving any reasonable ground for the conclusion consistent with all human probability that the act

**--X--**

# PAPER PRESENTATION ON THE TOPIC OF " SCOPE OF EXERCISING DISCREATION TO GRANT RELIEF OF SPECIFIC PERFORMANCE"

**M.BABU,**
Principal Junior Civil judge,
Kandukur

**Introduction:-**

The term "specific performance is not defined any where in the specific relief act 1963. As per the oxford dictionary "specific performance'' means the performance of contractual duty, as ordered in cases, where damages would not be adequate remedy. The law of specific relief has been enacted for certain kind of specific reliefs. The specific relief act came into force with effect from 13-12-1963 replacing old specific relief act 1877. The real object of this Act is to give a party seeking specific relief of protection of some civil right or the prevention of some civil wrong. The Civil injury means violation of obligation. This specific relief is a form of judicial redress, and an equitable relief.

A contract is an agreement upon sufficient consideration to do or not to do a particular act. The party on whom contractual obligation rests must not fail to discharge of such obligation. In case of his failure, the other party will have a right sue for specific performance of contract. This is called specific performance. The orders of specific performance is granted when damages are not an adequate remedy, and in some specific cases such as land the sale. Such orders are discretionary, As with all equatable remedies, so the availability of this remedy will be depend on whether it appropriates in circumstance of the case.

**THE OBJECT AND SCOPE:**

The object of the Specific Relief act is confined to that class of remedies which a suit or seeks to obtain and court of justice to seeks to give him the very reliefs which he is entitled to. The law of specific relief seeks to implement the idea of Bentham, who said "the law ought to assure me every thing which is mine, with out forcing me to acceptance equivalents, , although I have no particular objection to them" . The Specific Relief Act explains and enunciates the various reliefs, which can be granted under its provisions, provides the law of with respect to them. It provides of exact fulfillment of the obligation of specific performance of contract. It is directed to the obtaining the of the very thing, which a person is deprived of and ought to be entitled to ask for. It is an remedy by which a part to the contract is compelled to do or omit to do

the very act which as undertaken to do or omit. The remedies which have been administered by civil courts of justice against any wrong or injury falls broadly into two classes.

1) Those by which the suit or obtains the very thing to which he is entitled, and

2) Those by which he obtains not very thing, but compensation for the loss of it. The forward is the specific relief. Thus specific relief is a remedy, which aims at the exact of fulfillment of an obligation. It is a remedy when the court directs the specific permanence of contract and protective when the court makes a declaration or grants an injunction.

**SCOPE OF GRANTING SPECIFIC PERFORMANCE:**

Sec 20 of specific relief act provides the

Discretion as to decreeing specific performance

1) The Jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary,; but sound and reasonable, guided by judicial principles and capable of correction by a Court appeal.

2) The following are the cases in which the Court may properly exercise discretion not to decree specific performance.

a) Where the terms of the contract or the conduct of the parties at the time entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or,

b) Where the performance of the contract would involve some hardship on the defendant, which he did not foresee,

c) Where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

**Explanation 1**: Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause(b)

**Explanation2:** The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause(b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

3) The Court may properly exercise discretion to decree specific performance, in any case, where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

4)The Court shall not refuse any party the specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other property.

Before granting decree for specific performance the court must be satisfied that.

I) The contract is certain and unambitious in its terms.

ii) A valuable consideration is passed.

iii) The contract is fair,

iv) The contract is not vitiated by fraud/mistake and misrepresentation,

v) The contract does not offend third party.

vi) The contract does not impose a harm and unconscionable bargain,

ix) The plaintiff is not guilty of unreasonable delay and latches.

After considering the provision of Sec.20 of the Act, it appears that merely because of contract is lawful, the specific performance should not be granted. Further, while using the discretio,n the court has to consider some of the factors found in between the parties. The discretion of the court is not arbitrary, but should be sound and reasonable, guided by judicial principles and capable of correction by court of appeal. Further, while using discretion, the court has to consider hardship to the parties. If the greater hardship would be caused to the defendant which he did not foresee and due to non-performance of contract, no such hardship would be caused to the purchaser then discretion is not necessary to grant decree for specific performance.

**In Sen Kukherjee and Co., Vs.Smt Chhaya Banerji ane AIR 1998 Calcutta 252**

The Hon'ble Supreme Court has held that the relief of specific performance having its roots in equity. The specific Relief Act,1963 has preserved the discretion of the Court not to grant the relief even though the agreement is specifically performable in law. The only letters imposed by the statue on the exercise of the discretion are that the discretion must not be exercised arbitrarily but soundly, reasonably and guided by judicial principles. The phrase "capable of correction by Court of appeal" has been inserted possibly to indicate the necessity for the trial Court to state the reasons for exercising its discretion in a particular way. The circumstances mentioned in the clauses (a), (b) and (c) of sub sec. (2) of S.20 are not expressly exhaustive. They indicate the situations in which the court may properly exercise discretion not to decree specific performance.

However, certain considerations have been excluded as relevant factors. These are contained in Explns 1 & 2 to the Section as well as in S.2(4). It has to be noticed that each of these exclusions are preceded by the word 'mere'. The word 'mere' in the context means 'sole'. In other words, any one of those factors by itself would not justify the exercise of discretion against granting specific performance. The factors cumulatively or with other factors, may from the basis of a decision not to grant specific performance.

**The conduct of the plaintiffs deciding Criteria:**

The relief of Specific performance of contract is based upon the principles of Equity that "He who seeks Equity must do Equity" and the plaintiff has to plead that he has always been ready and willing to perform his part of the essential terms of the contract and he has to prove the same. Thus, it does not suffice on the part of the plaintiff that he is ready and willing to perform his part of the contract, but he has to prove the same. The readiness and willingness on the part of the plaintiff can be inferred from the surrounding circumstances and the conduct of the plaintiff, not only prior to filing of the suit, but during the course of the trial. His conduct must be such that he shall not be blamed in any way for the failure of the contract and the said responsibility exclusively lies upon the defendant. Thus, the conduct of the plaintiff plays a vital role in adjudicating, whether he is entitled for the equitable relief of specific performance of the contract. The same was held in the case of **(Man kaur Vs.Haratr(2010) 10 Scc 512.**

Clause(a) of sub sec.2 of Sec 20 of Specific Relief Act mention about "conduct of parties" but such conduct is referable to point of time of entering into contract. Conduct of defendant in taking upon sustainable or untrue defence does not come under this clause. Words" at time of entering into contract" in clause (a) would indicate this. Scope of enquiry under clause(a) is to find where any of three ingredients mentioned therein would give plaintiff an unfair advantage over defendant. Bonafide of party who approached to court for reief and his conduct are important factors to be taken into account. The same was held in the case of **P.Prabhakara rao Vs-P. (AIR 2007 (Andhra pradewsh) 163.**

**False representation:**

Mere false representation is not enough. It has to be further shown by defendant that this false representation resulted in adversely affecting their interest, or it altered the position of the parties in such a way that it would be inequitable to grant relief as laid down to the plaintiff it was held in the case of **Vuppalapati Butchiraj and another-Vs-Rajan Sri Ranga.**

**and others, A.I.R 1967 AP 69.**

**Ready and Willing of plaintiff**

**Lord Campbell in cort V.Ambergate, etc. railway Co. (1851) 117 ER 1229**

observed as follows**:** In common sense, the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it has not been renounced by the defendant".

**In Amarjeet Vs.Sushiladevi, 2002 (2) B.C.R.694" it was held that**

The words "ready" and willing used in Sec 16(c) are very significant and in my **opinion**, where the performance on the part of plaintiff contemplates payment of certain money. The word "willing" in the same context means, the plaintiff's desire is to pay money to the defendant. The term refers to both physical and mental elements. The combination of which answers the requirement of the term. A plaintiff may have money ready and with him or he may be capable of raising the requisite money, yet he may not have desire to pay the same. Conversely, a plaintiff may have an earnest and sincere desire to pay money, but he may not have the same readily with him or he may not be in position to raise the same. In either case, the result is the same, such a plaintiff cannot perform his obligation to pay the consideration amount to his vendor and therefore, he cannot be regarded to be a person "ready and willing" to perform the essential obligation regarding making payment".

The plaintiff in a suit for specific performance has to allege and if the fact is traversed, he must prove his continuous readiness and willingness from date of contract to the time of hearing, to perform the contract on his part. Failure to make good if the averment brings with it is the inevitable dismissal of his suit.

Where the conduct of the plaintiff from the beginning to the end i.e. from the institution of the suit and even thereafter, clearly indicated his readiness and willingness to perform his part of contract, he would be entitled to decree for specific performance.

**Popatlal Maneshankar Pande Vs.nanalal Nagardas Vhora 1987 Mah.L.J.1055 (1064)**

**In Ardeshir H.Mama Vs.Flora Sassoon AIR 1928 PC 208, it was held that**

Where the injured partly sued at law for a breath, going to the root of the contract, he thereby elected to treat the contract as at an end himself and as discharged from the obligations. No further performance by him was either contemplated or has to be tendered. In a suit for specific performance on the other hand, he treated

and was required by the court to treat the contract as still subsisting. He had in that suit to allege, as if the fact was traversed, he was required to prove a continuous readiness and willingness from the date of contract to the time of hearing to perform the contract on his part. Failure to make good that averment bring with it, leads to inevitable dismissal of the suit."

**In Fakir chand Vs Sudehskumari 2006 (4) Mah, l.R.553(SC), it was held that**

"The language under Section 16(c) of the Act in our view, does not require any specific phraseology but not only that the plaintiff must aver that he has performed or has always been ready and willing to perform his part of contract. Therefore, the compliance with the readiness and willingness has to be in spirit and substance and not in letter and form."

**Compliance of the requirement of Forms 47 and 48 of Appendix-A of the C.P.C Whether necessary:**

The language of Rule 3 of Order VI of the Code of Civil Procedure is mandatory and any plaint in a suit for specific performance of contract has to be strictly in conformity with the form No.47 or 48 of Appendix A of the Code of Civil Procedure. It shows that in a suit for specific performance there must be averment to the effect that plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so in the case of **Ram Awadh (Dead) by L.Rs.And other V/S Achhaibar Dubey and another, AIR 2000SC 860."** It is held that a court may not, therefore grant relief to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement of the specific performance where of he seeks.

Where evidence clearly established that the plaintiff has capacity to pay and was also ready and willing to pay the balance amount, so in absence of any material to show that the defendant was not acting in an unauthorized manner, it was held that the judgment of the High Court granting decree for specific performance cannot be faulted the same was reported in **India Financial Assn. Seventh Day Adventists V.MN.A Unneerikutty 2007 (10 Civil L.J.599 (C) shaligram Vs.Ramesh 2014 (3) Mh.L.J.704.**

Where vendor sold the suit property to third party during pendency of suit for specific performance of agreement to sell, and the third party purchaser was aware of the previous agreement and pendency of the suit, the purchaser/third party would be bound by the decree in the suit and the fact that he has invested huge amount on suit property would be no ground to refuse the relief of specific performance of agreement the same was held in **Raghunath V.Rajendra, AIR 2007 (Noc) 1089 (Bom).**

To succeed in the suit, plaintiff has to prove his readiness and willingness.

The readiness involves proof of capacity to perform, which in turn requires proof of financial ability at the relevant point of time. The willingness to perform the contract is not mere desire; it should be a genuine willingness to be proved lies on any other fact, circumstances may justify an interference that the assertion of the plaintiff as to his willingness is a mere verbal assertion and as a fact, his conduct may disclose that he was really interested in procrastination, because delay was to his advantage; in many cases, a person who agreed to purchase a property of which he is already in possession may not be anxious at all to complete the contract, either because, he has no ready case with him, or any consider it expedient not to part with the money, so that he can have the continued benefit of the money as well as the enjoyment of the property. The respective position of the parties to the agreement, the circumstances under which the agreement was entered into, the relative advantage or disadvantage to the parties by the performance or non-performance of the contract during the relevant period, are some of the relevant circumstances to be considered by the court, while scrutinizing the evidence adduced before it. The main thrust of the analysis of the facts & circumstances would be to scrutinize the plaintiff's conduct in relation to the property and the term of the agreement. However, even if the plaintiff makes out his case for Specific performance, Court has to still consider as to whether the discretionary relief should be granted in favour of the plaintiff or it should be denied in the light of Section 20 of the Specific Relief Act. No doubt, it is a judicial discretion exercise which depends upon several factors.

**Doctrine of Specific Performance of Contract**

Specific Performance of contract is an extraordinary equitable remedy that compels a party to execute the contract according to the precise terms agreed upon or to execute it substantially so that under the circumstances, justice will be done between the parties. It grants the plaintiff what he actually bargain for in the contract rather than the damages for not receiving it. Thus, it is an equitable rather than a legal remedy. By compelling the parties to perform exactly what they had agreed to perform, more complete and perfect justice is achieved than by avoiding damages for beach of contract.

**Doctrine of delay and latches: time-essence of contract**

Latches cannot be equated with limitation. It is not a question of time. It is a question as to whether it shall be inequitable to permit the claim to be enforced. Court has to see whether there has been some change in the condition or relation of the property and the parties. Mere lapse of time therefore, short of limitation cannot operate as laches. Delay, Short of statutory period of limitation, will be fatal in cases of change in circumstances, accrual of right of third party or where there is inordinate delay etc.

**Time is Essence of contract**

Section 55 of the Contract Act provides that if a party to a contract fails to do certain thing agreed upon within the stipulated period the contract becomes voidable at the option of other party for purpose of the part not performed if the parties intended that time would be the essence of the contract. The Court has to look at the substance of contract and not at the letter to determine whether the parties intended completion of the obligation under the contract within the stipulated period not withstanding fixation of a date for performance. If time is essence of contract, delay operates as bar to a decree for specific performance.

It is the settled position of law that normally time is not essence of a contract to save immovable property however, contract must be performed within a reasonable time. A provision in the contract that in the event of default by the vendee. The vendor will be at liberty to cancel the contract and forfeit the earnest money which does not necessarily make the time as the essence of contract. It all depends upon the intention of the parties and therefore, to make time is essence of contract, the terms must be clear and unambiguous. Whether time is the essence of contract has to be ascertained from the intention of the parties, nature of property and the surrounding circumstances.

**Conclusion:**

Specific performance is a remedy developed by courts of equity. A party to a contract who has suffered damage because of breach of contract by another party has the option to file a suit for specific performance compelling the others to perform their part of contract. Because equity courts will compel specific performance, however, the contract must be one which can be specifically performed. As the law of specific performance is basically founded on equity, consideration, such as conduct of the plaintiff, the element of hardship that may be caused to one of the parties, the availability of adequate alternative relief and such other factors are taken into consideration. Ultimately, it is a discretionary relief.

**--X--**

**2019(2) L.S. 45 (T.S.)**

IN THE HIGH COURT OF TELANGANA

Present:
The Hon'ble Mr. Justice
M.S. Ramachandra Rao

A. Yameen Qureshi ..Petitioner

Vs.

S. Rajeshwari ..Respondent

**CIVIL PROCEDURE CODE, Sec. 151 – Suit was filed by the 1st Petitioner/ Plaintiff against the Respondent/ Defendant for specific performance of contract basing on an agreement of sale and for delivery of possession of the plaint schedule property – In the written statement of the Respondent there was an admission purported to have been made by the respondent admitting the execution of the said agreement of sale but claiming that she did not receive full consideration as agreed – Suit was decreed and the 1st petitioner was directed to deposit remaining sale consideration - Respondent filed an I.A. to set aside the decree and contended that she did not personally receive any notice or summons from the Court and the signatures on vakalathnama, written statement were forged – I.A. filed by the respondent was allowed and decree was set aside.**

**Held - To attract Section 47 of CPC, two conditions must be fulfilled i.e. (1) the question must be one arising between the parties to the suit in which the decree was passed or their representatives; and (2) the said question must relate to the execution, discharge or satisfaction of the decree - In the instant case, both these conditions are fulfilled and so even E.A. filed by the respondent to cancel the registered sale deed executed in favour of the 1st petitioner and for restoration of possession is maintainable - It was made to make the the lower Court believe that it was the respondent who signed the Vakalathnama, the written statement, the suit agreement of sale, receipts, counters in the I.As., etc., and the Court below found as a fact that respondent's signature was forged on the said documents - So it is a case of fraud on the Court as well as on the respondent, and so the respondent was justified in invoking Section 151 CPC to set aside the decree – Appeal stands dismissed.**

Mr.K.V. Satyanarayana, V. Surendra Reddy, Advocates for the Petitioner:
Mr.P.S.P. Suresh Kumar, Advocate for the Respondent.

**C O M M O N O R D E R**

1. The 1st petitioner in both the Revisions is the plaintiff in O.S. No.1590 of 2012 on the file of VII Senior Civil Judge, City Civil Court, Hyderabad. The respondent in both the Revisions is the defendant in the said suit.

**The suit O.S. No.1590 of 2012**

2. The said suit was filed by the 1st petitioner against the respondent for specific performance of contract basing on an agreement of sale dt.14.09.2010 and for delivery of possession of the plaint schedule property which is a double storied house bearing Municipal No.16-2-51/C, admeasuring 253.33 sq.yds., at Akbarbagh, Malakpet, Hyderabad.

3. There was a written statement filed in the above suit on behalf of the respondent, which the respondent denies was signed by her through an advocate N.S. Reddy, whom the respondent denied to have engaged as her counsel.

4. In the said written statement there was an admission purported to have been made by the respondent admitting the execution of the said agreement of sale but claiming that she did not receive full consideration as agreed and seeking Rs.2,75,000/- towards balance consideration from the 1st petitioner.

5. The suit was decreed on 30.10.2013 and the 1st petitioner was directed to deposit remaining sale consideration of Rs.2,75,000/- to the credit of the suit within one month, and on such deposit, the respondent was directed to execute and register a sale deed in favour of the 1st petitioner, failing which the 1st petitioner was granted liberty to get sale deed executed through process of law. It was further stated that after execution of the sale deed, the 1st petitioner is entitled to get possession of the plaint schedule property.

**The E.P. No.230 of 2013**

6. E.P. No.230 of 2013 was filed by the 1st petitioner for execution of the above decree and on 10.06.2014, sale deed was executed by the said Court in favour of the 1st petitioner and was registered on 01.09.2014 as document No.3624 of 2014 before the Sub-Registrar, Azampura, Hyderabad.

7. On 11.05.2015, the respondent was dispossessed through Court and possession was delivered to 1st petitioner.

**I.A.No.236 of 2015 and E.A.No.178 of 2015 filed by respondent**

8. On 15.05.2015, the respondent filed I.A.No.236 of 2015 under Section 151 CPC to set aside the decree dt.30.10.2013 in O.S. No.1590 of 2012 of the VII Senior Civil Judge, City Civil Court, Hyderabad. On the same day she also filed E.A. No.178 of 2015 under Section 47 of CPC to cancel the registered sale deed Doc. No.3624 of 2014 dt.01.09.2014 and restore possession of the plaint schedule property to her.

9. In both these applications, it is the contention of the respondent that on 11.05.2015, some officials from the Court came to her, showed her the order in E.P. No.230 of 2013 in O.S. No.1590 of 2012 of the VII Senior Civil Judge, City Civil Court, Hyderabad and dispossessed her from the suit schedule property; at that time she was unable to understand as to what was transpiring and could not do anything; and that she informed her youngest son about the same and he immediately came from Goa.

10. She contended that on 12.05.2015 she engaged Sri S.Balchand, Advocate, and on verification, she came to know about the filing of the suit, filing of written statement or counter purported to be signed by her, passing of judgment and decree, filing of E.P. No.230 of 2013 etc.,; she stated that she obtained immediately certified copies of all the relevant papers and documents from the Court; and after going through the said papers and documents was astonished to see the fraudulent act done and the forgery of her signatures from time to time.

11. She alleged that the suit filed by the 1st petitioner is vexatious; that she did not personally receive any notice or summons from the Court and she did not engage Sri N.S.Reddy, Advocate as her counsel to represent her. She denied signing vakalathnama or engaging Sri N.S. Reddy and T.Shekar Babu, Advocates or signing written statement and counter affidavits filed in the case and alleged that the entire signatures purporting to be hers are forged and fabricated. She denied entering into any agreement of sale either in 2002 or 2010 as was alleged by the 1st petitioner and contended that signatures on the said agreements do not belong to her and are also forged and fabricated.

12. She contended that she had no need or necessity to sell the suit schedule property to any third party, much less to the 1st petitioner, and the receipts dt.12.12.2002 and 27.12.2002 do not bear her signatures and the signatures on the said receipts are forged and fabricated. She contended that signatures on the letter dt.25.10.2004, 24.02.2006 and 07.06.2012 are not her signatures and the same are forged and fabricated. She denied that any of the acknowledgment cards bear her signature.

13. She alleged that one of her sons by name Kalesh Kumar was a vagabond, had a history with the Police and he caused trouble to her and her husband and debts incurred by him were cleared by her and her youngest son; and on many occasions, she had and her youngest son got him released by going to the Police station. She alleged that she had strong reason to believe that the 1st petitioner in connivance with her son Kalesh Kumar had done the mischievous and fraudulent act, played fraud on the Court and obtained a fraudulent decree in O.S.No.1590 of 2012.

14. According to her, the notice sent in I.A.No.822 of 2012 in O.S. No.1590 of 2012 appears to have been received by Kalesh Kumar and on the said notice, his signature is identified by the son of the 1st petitioner. She alleged that a look at the cause title of the petition in the I.A. makes it clear that the petitioner therein (1st petitioner in the Revisions) is unmarried and therefore the question of identifying the signature of Kalesh Kumar by son of 1st petitioner does not arise. She alleged that the suit summons appears to have been received by Kalesh Kumar and his signature was identified by the 1st petitioner/plaintiff; and the signature of the 1st petitioner on the suit summons does not belong to her. She contended that she was never informed about the receipt of the notice or summons from the Court and it is not within her knowledge and it is a mala fide and fraudulent act of 1st petitioner and Kalesh Kumar.

15. She contended that a party who secures judgment by taking recourse to fraud should not be allowed to enjoy the fruits of the decree; that she was deprived of the suit schedule property because of fraud played by 1st petitioner in collusion with others; and a decree obtained by fraud on the Court is a nullity and non est in the eye of law.

16. She therefore prayed in I.A. No.236 of 2015 filed under Section 151 CPC to set aside the decree in O.S. No.1590 of 2012 and in E.A. No.178 of 2015 filed under Section 47 of CPC to cancel the registered sale deed Doc.No.3624 of 2014 dt.01.09.2014 and restore possession to her.

**The Counter of 1st petitioner**

17. The 1st petitioner filed counter opposing both applications.

18. She denied all the allegations leveled by the respondent in both applications and contended that the applications are not maintainable. She contended that respondent and her son Shiva Kumar have knowledge of the entire proceedings which took place on 11.05.2015; if the signatures of the respondent on the written statement or counter do not belong to respondent, the respondent ought to seek a remedy from a handwriting expert; after due process of law, the Court had executed a registered Doc.No.3624 of 2014 in E.P. No.230 of 2014; there is no wrongful or illegal dispossession of the respondent from the suit schedule property; and it is the respondent who is playing fraud in collusion with others.

19. It is also contended that it was the respondent who executed the receipts dt.12.12.2002, 27.12.2002 and 14.09.2010 in presence of attesting witnesses who are her son Kalesh Kumar and two others; that respondent received Rs.7,00,000/- out of Rs.9,75,000/- and later executed agreement of sale dt.14.09.2010 in front of Kalesh Kumar and two others, who attested it. It is also claimed that respondent got issued legal notice through Sri N.S.Reddy, Advocate on 07.06.2012 which is also signed by her calling upon 1st petitioner to cancel the agreement of sale.

20. It is contended that on account of adamant acts of the respondent in respect of the agreement of sale dt.14.09.2010, 1st petitioner had to file the suit and also seek ad interim injunction in I.A. No.822 of 2012 against the respondent restraining her from alienating the suit schedule property; that respondent filed a counter in the said I.A.; and the interim order was made absolute on 24.01.2013. It is alleged that respondent filed written statement in the suit after signing it and later the suit was decreed.

21. It is also alleged that after the suit was decreed, 1st petitioner got issued a legal notice dt.28.11.2013 to the respondent to execute the registered sale deed in her favor and respondent replied vide reply notice dt.02.12.2013 through Sri N.S.Reddy, Advocate.

22. It was further alleged that respondent put a lock on the plaint schedule property and escaped therefrom and so 1st petitioner filed application to break open the lock and for delivery of possession; and on 11.05.2015, she obtained possession.

**The order in I.A.No.236 of 2015 and E.A.No.178 of 2015 of the Court**

23. Before the VII Senior Civil Judge, City Civil Court, Hyderabad respondent examined herself as P.W.1 and two other witnesses as P.Ws.2 and 3 and marked Exs.P1 and P2.

24. P.W.3 is a handwriting expert who compared the signatures of the respondent on the Vakalathnama, written statement, counter in I.As., agreement of sale dt.14.09.2010, receipts etc., and he gave Ex.P.1 report stating that the respondent did not sign the said documents.

25. To rebut the above evidence, the 1st petitioner did not examine any witness except herself as R.W.1.

26. By common order dt.25.10.2016, the Court below allowed I.A.No.236 of 2015 in O.S.No.1590 of 2012 and set aside the decree dt.30.10.2013 passed in it. It also allowed E.A. No.178 of 2015 and cancelled the registered sale deed Doc.No.3624 of 2014 dt.01.09.2014, marked a copy of the order to the Sub-Registrar, Azampura for necessary action, and directed that the respondent be put in possession of the suit schedule property. It also directed its office to issue warrant of redelivery of the property to the respondent.

27. It placed reliance on the evidence of P.Ws.1 to 3 and Ex.P1 and it also verified, invoking Section 73 of the Evidence Act, 1872, whether the signatures of the respondent exist on the Vakalathnama, written statement etc., and gave a finding that they do not contain the respondent's signatures. It observed that 1st petitioner did not say anything in her Chief Examination about Ex.P1 and she was not aware of the documents filed by the respondent. It held that 1st petitioner knows Kalesh Kumar for a long time, but she stated that she cannot examine him. The Court rejected the contention of the 1st petitioner that respondent cannot question the decree or sale deed executed by the Court under Section 47 CPC and held that all questions arising between the parties to the suit in which the decree is passed and relating to the execution, discharge or satisfaction of the decree shall be determined by the Executing Court and not by way of separate suit. It held that a decision obtained by fraud and misrepresentation cannot be allowed to be enjoyed. It held that the admitted signatures of the respondent did not tally with her disputed signatures in any of the documents, and the decree was obtained by stage managing service of suit summons and other notices, and so the applications are maintainable, and respondent is entitled for relief in both applications.

**CRP. No.5967 of 2016 and CRP. No.6000 of 2016**

28. Challenging the order dt.25.10.2016 in I.A. No.236 of 2015 in O.S. No.1590 of 2012, 1st petitioner filed CRP. No.5967 of 2016. She also filed CRP. No.6000 of 2016 challenging the order dt.25.10.2016 in E.A. No.178 of 2015 in E.P. No.230 of 2013 in O.S. No.1590 of 2012.

29. Petitioners 2 and 3 were impleaded in both the CRPs., as copetitioners to 1st petitioner as they were purchasers from the 1st petitioner after passing of the decree

(as per the order dt.19.02.2019 in CRP. No.927, 928 and 929 of 2019 which they had filed challenging order dt.25.10.2016 I.A.No.236 of 2015 and E.A. No.178 of 2015 by seeking leave to file Revisions).

**Contentions of petitioners**

30. It is the contention of Sri K.V.Satyanarayana and Sri V.Surender Reddy, appearing for petitioners that there was only fraud played on the respondent, if at all, by her son Kalesh Kumar and probably the Advocate N.S. Reddy, and there is no fraud on the Court, and so both I.A. No.236 of 2015 and E.A. No.178 of 2015 are not maintainable.

31. Counsel placed reliance on the decision in **Subbaiyar Vs. S.P.Kallapvian Pillai (**AIR 1914 Madras 158) and contended that respondent can only file a suit to set aside the decree dt.30.10.2013 in O.S.No.1590 of 2012 and she cannot file application under Section 151 CPC or invoke Section 47 of CPC.

32. It is also their further contention that once the decree of specific performance was satisfied by execution of sale deed through Court and possession of property was delivered to the 1st petitioner, the Court below becomes functus officio and is disabled from passing any further orders. They placed reliance on **Teluguntla Hema Bala Sundari and others Vs. Pandiri Sakuntalamma and others (**AIR 1983 ANDHRA PRADESH 49).

**Contentions of Counsel for respondent**

33. Counsel for the respondent refuted the said contention and supported the order passed by the Court below. He placed reliance on **K.Pedda Linga Redd Vs. B.Sathaiah and others (**2003 (6) ALD 723)**, Nakirddy Rajavva Vs. yaprala Narasimha Reddy (**2004 Law Suit (AP) 1276)**, Ram Chandra Singh Vs. Savitri Devi others (**2004(2) ALT 15 SC)**, A.V.Papayya Sastry and others Vs. Govt. of A.P. and others (**2007 (4) SCC 221)**, Meghamala and others Vs. G.Narasimha Reddy and others (**2010 (8) SCC 383)**, Divisional Forest Officer, Eluru Vs. District Judge, West Godavari, Eluru and others (**2011 (2) ALT 130 (DB)**, Aquadev India Ltd., Ongole, Prakasam District Vs. Kode Basava Venkateshwara Rao and another (**2012 (1) ALD 376) **and Raj Kishan Pershad and others Vs. Joint Collector-I, Ranga Reddy District (**2018(6) ALT 79 (DB)**.**

**The Consideration by the Court**

34. I have noted the contentions of the parties.

35. The finding of the court below that the signatures on the Vakalathnama, written statement, suit agreement of sale, receipts, counter in the I.As etc. do not belong to the respondent and are forgeries, is not challenged by the petitioners.

36. So it is clearly a case where a claim put forward in the suit by 1st petitioner was untrue, and it was initiated to injure the respondent, and the 1st petitioner obtained a verdict by practicing fraud on the Court.

37. In **Nagubai Ammal v. B. Shama**

**Rao (**AIR 1956 SC 593)**,** the Supreme Court explained:

> **"13.** Now, there is a fundamental distinction between a proceeding which is collusive and one which is fraudulent. "Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose". (Wharton's Law Lexicon, 14th Edn., p. 212). In such a proceeding, the claim put forward is fictitious, the contest over it is unreal, and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. But when a proceeding is alleged to be fraudulent, what is meant is that the claim made therein is untrue, but that the claimant has managed to obtain the verdict of the court in his favour and against his opponent by practising fraud on the court. Such a proceeding is started with a view to injure the opponent, and there can be no question of its having been initiated as the result of an understanding between the parties. While in collusive proceedings the combat is a mere sham, in a fraudulent suit it is real and earnest." (emphasis supplied)

38. When the 1st petitioner filed the suit against the respondent on basis of an agreement of sale which is proved to be not signed by the respondent, she is guilty of abuse of process of Court and playing fraud on the Court. Whether the son of the respondent, Kalesh Kumar or the Advocate N.S.Reddy helped her or not is not relevant.

39. I shall first consider whether an application under Section 151 of CPC to set aside a decree on the ground of fraud can be maintained.

40. In **Indian Bank v. Satyam Fibres (India) (P) Ltd (1996) 5 SCC 550),** the Supreme Court held that inherent power under Section 151 CPC can be exercised to recall a judgment or order, if it is obtained on fraud on the Court. It declared:

> "22. The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from party or the court itself commits a mistake which prejudices a party, the court has the inherent power to recall its order. (See: Benoy Krishna Mukerjee v. Mohanlal Goenka3; Gajanand Sha v. Dayanand Thakur4; Krishnakumar v. Jawand Singh5; Devendra Nath Sarkar v. Ram Rachpal Singh6; Saiyed Mohd. Raza v. Ram Saroop7; Bankey Behari Lal v. Abdul Rahman8; Lekshmi Amma Chacki Amma v. Mammen Mammen9.) The court has also the inherent power to set aside

> a sale brought about by fraud practised upon the court (Ishwar Mahton v. Sitaram Kumar10) or to set aside the order recording compromise obtained by fraud. (Bindeshwari Pd. Chaudhary v. Debendra Pd. Singh11; Tara Bai v. V.S. Krishnaswamy Rao12.)"

It was also held that fraud is an essential ingredient in forgery.

41. This was reiterated in **Ramprakash Agarwal Vs. Gopi Krishan** (2013) 11 SCC 296).

42. The Supreme Court, in **Ram Chandra Singh v. Savitri Devi** (2003) 8 SCC 319) held that an application to set aside a sale under Sec.151 CPC can be maintained raising the plea of fraud on the Court.

"30. The High Court observed that the application of intervention filed by the appellant purported to be under Order 26 Rules 13 and 14(2) and Order 20 Rule 18 was not maintainable as they do not confer any power to the court for setting aside a preliminary decree on the ground that it was obtained by practising fraud. But once the principles aforementioned are to be given effect to, indisputably the court must be held to have inherent jurisdiction in relation thereto.

**31.** In **Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal (**AIR 1962 SC 527)the law is stated in the following terms: (AIR p. 537, para 43)

> "43. The Code of Civil Procedure is undoubtedly not exhaustive: it does not lay down rules for guidance in respect of all situations nor does it seek to provide rules for decision of all conceivable cases which may arise. The civil courts are authorized to pass such orders as may be necessary for the ends of justice, or to prevent abuse of the process of court, but where an express provision is made to meet a particular situation the Code must be observed, and departure therefrom is not permissible… …

32. In **Sharda v. Dharmpal** (2003) 4 SCC 493) a three-Judge Bench, of which both of us were parties, held that directing a person to undergo a medical test by a Matrimonial Court is implicit by stating: (SCC p. 513, paras 52-53)

> "52. Even otherwise the court may issue an appropriate direction so as to satisfy itself as to whether apart from treatment he requires adequate protection inter alia by way of legal aid so that he may not be subject to an unjust order because of his incapacity. Keeping in view of the fact that in a case of mental illness the court has adequate power to examine the party or get him examined by a qualified doctor, we are of the opinion that in an appropriate case the court may take recourse to such a procedure even at the instance of the party to the lis.

53. Furthermore, the court must be held to have the requisite power even under Section 151 of the Code of Civil Procedure to issue such direction either suo motu or otherwise which, according to him, would

lead to the truth."

43. In my opinion the VII Senior Civil Judge, City Civil Court, Hyderabad was made to believe that it was the respondent who signed the Vakalathnama, the written statement, the suit agreement of sale, receipts, counters in the I.As., etc., and the Court below found as a fact that respondent's signature was forged on the said documents. So it is a case of fraud on the Court as well as on the respondent, and so the respondent was justified in invoking Section 151 CPC to set aside the decree dt.30.10.2013 in O.S.No.1590 of 2012. So I reject the contention of counsel for petitioners that I.A. No.236 of 2015 filed under Sec.151 CPC by the respondent was not maintainable.

44. No doubt, in **Subbaiyar** (1 supra), a Division Bench of Madras High Court held that where the plaintiff suppresses a compromise from the knowledge of the Court and obtains against the defendant an ex parte decree, the proper remedy for the defendant, though there may be other remedies open to him, is to bring a suit to set aside the decree as one obtained by fraud. In the said decision, the Madras High Court had relied upon the decision of the Privy Council in **Rajmohan Vs. Gourmohan** (1865) 8 MIA 91**).**

45. But this is no longer the law in the Country. In **S.P. Chengalyaraya Naidu v. Jagannath (**MANU/SC/0192/1994MANU/SC/0192/1994 : A.I.R. 1994 S.C. 853), the Supreme Court has held that suppression of material documents is fraud on Court and also on a party and a litigant who does it, can be thrown out at any stage of the proceeding. It declared:

> "The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. It can be said without hesitation that a person whose case is based on falsehood has no right to approach the court. He can be summarily thrown out at any stage of the litigation. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

46. In **United India Insurance Co. Ltd. v. Rajendra Singh and others (**MANU/SC/0180/2000MANU/SC/0180/2000 : (2000) 3 S.C.C. 581) the Supreme Court reiterated:

"A party complaining of fraud having been practised on him as well as on the court by another party resulting in a decree, can avail himself of the remedy of review or even the writ jurisdiction of the High Court, as there is no other alternative remedy available to him. Therefore the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wrangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim."

47. The Madras High Court has held in **Krishnan vs. Valliammal (**MANU/TN/1141/2000 = (2001) 1 MLJ 363) that if there is a fraud on the Court or on a party, application under Section 47 of CPC would be maintainable following the above two decisions of the Supreme Court. It held:

> "16. … a suit filed by fraud at whatever later stage the fraud committed on the part of the plaintiff came to be brought forth, the party complaining of fraud playing its part and resulting in a decree, can avail himself of the remedy of review or even the writ jurisdiction of the High Court since the remedy to move for recalling the order on the basis of the newly disclosed facts amounting to fraud of high degree, cannot be foreclosed and no court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wrangled through fraud or misrepresentation of such a dimension that would affect the very basis of the claim.

It is true that this Court has got powers to deal with such matters wherein the plaintiff has obtained a decree by playing fraud upon the other side, especially under Sec. 47 of the C.P.C., as it has been rightly resorted to by the petitioner."

48. I respectfully follow the decisions of the Supreme Court in **S.P. Chengalyaraya Naidu** ( 15 supra) and **United India Insurance Co. Ltd** (16 supra), agree with the decision in **Krishnan** (17 supra), and I decline to follow **Subbaiyar** (1 supra), which is no longer good law and is deemed to be overruled by the above decisions of the Supreme Court.

49. In **Teluguntla Hema Bala Sundari and others** (2 supra), a Division Bench of this Court held that an application under Section 47 CPC to declare an auction sale in favor of a person was illegal and void cannot be maintained if the applicant is not a party to the suit in which the said application was filed. There was a dispute in that case between two auction purchasers in two different suits and so the said applications filed by one of them in the suit in which the other party was the auction purchaser was held to be not maintainable. The Bench reiterated that to attract Section 47, two conditions must be fulfilled i.e. (1) the question must be one arising between the parties to the suit in which the decree was passed or their representatives; and (2) the said question must relate to the execution, discharge or satisfaction of the decree.

50. In the instant case, both these conditions are fulfilled and so even E.A. No.178 of 2015 filed by the respondent to cancel the registered sale deed executed in favor of the 1st petitioner and for restoration of possession is maintainable.

51. I therefore do not find any merit in the Revisions. They are accordingly dismissed with costs of Rs.25,000/- payable by petitioner to the respondent.

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

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## 2019(2) L.S. 55 (T.S.)

IN THE HIGH COURT OF TELANGANA

Present:
The Hon'ble Mr. Justice
M.S. Ramachandra Rao

S.P. Misra ..Petitioner

Vs.

Rekha Misra ..Respondents

**CIVIL PROCEDURE CODE, Order XXXIX Rules 1 & 2 - Appeal filed challenging the Order in I.A in O.S of Additional Senior Civil Judge – Appellant, father-in-law of the respondent filed the said suit against the respondent for eviction of the respondent alleging that the respondent is staying in the suit schedule property which is the ground floor portion of the building owned by the appellant and that the son of the appellant had moved out of the appellant's house, but the respondent had refused to move from the suit schedule property and continued to occupy the ground floor portion - Pending the suit, appellant filed I.A. under Order XXXIX Rules 1 & 2 CPC to direct the respondent to stop all commercial activities in the ground floor portion of the suit schedule property - Court below dismissed the said I.A.**

**Held - When the respondent herself admitted that she is running a boutique in the suit schedule property, the Court below ought not to have said that it is a matter for evidence as to whether the respondent is using the premises for commercial business purpose - Court below could not have stated that it would compensate the appellant if any additional tax for use of the premises for commercial purpose is imposed or award mesne profits if the suit is to be ultimately decreed evicting the petitioner, because there is no prayer in the suit either for mesne profits - Finding of the Court below that when the respondent is in possession of the suit schedule property she cannot be restrained by imposing any condition to enjoy the possession is clearly perverse and cannot be sustained – Appeal allowed - Order in I.A of the Court below is set aside.**

Mr.T.Bala Mohan Reddy, Advocate for the Respondent.
Mr.Vasudha Nagaraj, Advocate for the Respondent.

**J U D G M E N T**

1.Heard both sides.

2. This Appeal is filed challenging the order dt.01.02.2018 in I.A.No.317 of 2018 in O.S.No.195 of 2017 of the XIX Additional Senior Civil Judge, City Civil Court, Secunderabad.

3. The appellant herein is the father-in-law of the respondent.

4. He filed the said suit against the respondent for eviction of the respondent alleging that the respondent is staying in the suit schedule property which is the

ground floor portion of the building owned by the appellant; that the respondent became abusive and disrespectful towards appellant and his wife; that the respondent started a boutique in a small way in the suit schedule property without seeking any permission from the appellant and without having any license to do any business activity therein; that the use of the suit schedule premises by the respondent had caused great inconvenience to him and his wife by way of intrusion into the premises of strangers at all odd hours of the day and night; that the process of dress making and embroidery involved the employment of tailors and other staff, and have made the place a noisy one and a market place; that himself and his wife are senior citizens and this has caused them untold hardship in their peaceful life; that the son of the appellant had moved out of the appellant's house, but the respondent had refused to move from the suit schedule property and continued to occupy the ground floor portion; that his son had instituted proceedings for divorce at Family Court, Hyderabad and that he himself had issued a legal notice on 22.05.2017 terminating the license in the respondent's favour to occupy the premises and directing the respondent to vacate the portion under her occupation, but having received the said notice, she did not vacate the said premises.

5. Written Statement was filed by the respondent denying that the appellant is a landlord and she is a tenant, and contending that the suit itself is not maintainable. She contended that appellant and his son colluded with each other and started litigating against her, and a divorce petition was filed against her by the son of the appellant making false allegations. It is also alleged that the respondent had started a boutique in the suit schedule property with the help of the money advanced by the father and brother of the respondent, so that the respondent would have a source of income and would survive, and that her husband had a meager income and they were largely dependent on the money that respondent's father used to send to respondent for her day to day expenditure. She denied that any license was required to run the boutique and stated that there was implied consent of the appellant, his wife and their son for her to run the boutique in the premises. She denied that there was any inconvenience being caused to the appellant and his wife by way of intrusion into the premises of strangers. She stated that the process of dress making and embroidery involves employment of tailors and other staff, but denied that there was any disturbance caused to the appellant and his wife of the use of the suit schedule property as a boutique. She also stated that the son of the appellant abandoned her and started living separately, and that the appellant and his wife and son have financially exploited the respondent's father.

6. Pending the suit, appellant filed I.A.No.317 of 2018 under Order XXXIX Rules 1 & 2 CPC to direct the respondent to stop all commercial activities in the ground floor portion of the suit schedule property. He reiterated the contents of the plaint.

7. Respondent filed a counter opposing the said application and reiterated the contents of her written statement.

8. By order dt.01.02.2018, the Court below dismissed the said I.A. It observed that the suit schedule property is claimed to be a residential premises owned by the appellant and it is not the case of the appellant that

the Greater Hyderabad Municipal Corporation imposed any tax on the appellant treating it as one used for commercial purpose; and if any additional financial burden falls on the appellant, the Court observed that it would make it good through the respondent at the time of judgment in the suit. It observed that the Court cannot conclude on the basis of photographs filed by the appellant that the respondent is running commercial activity in the suit premises, and that the respondent is using it not only for her residence but also for commercial purposes; that if the respondent gets evicted ultimately in the suit, the appellant can get mesne profits from the respondent, who claims to be a licensee in possession of the suit schedule property. It observed that because there are matrimonial disputes between the respondent and her husband, the Court did not see any merit to direct the respondent to stop the alleged commercial activity by respondent; that the respondent was admittedly in possession of the suit schedule property and she cannot be restrained by imposition of any condition to enjoy her possession merely because she is doing some online fashion pursuit in connection with her profession; and that it is a matter to be proved upon oral and documentary evidence in the suit. It also observed that at the stage of I.A., it cannot be concluded, whether the respondent is carrying on her profession as fashion designer working from home or she is doing open commercial business in the schedule property and any conditional order to stop all commercial activities would be difficult to implement when the respondent is in possession of the property and is not carrying on any unlawful activities. It also observed that there are no bonafides on the part of the appellant and no case for grant of a temporary injunction is made out.

9. Assailing the same, this Appeal is filed.

10. Counsel for the appellant contended that the appellant and his wife are senior citizens; that appellant is owner of the suit schedule property and the respondent is a licensee; that when the appellant had objected to the use of the suit schedule premises for the running of a boutique by the respondent, since it is disturbing the personal life of the appellant and his wife, the Court below cannot refuse to grant relief to the appellant. It is also contended that when the respondent herself had admitted about her doing commercial activity in the premises, the Court below was not correct in saying that the said fact needs to be proved in trial.

11. Counsel for the respondent on the other hand supported the order passed by the Court below and contended that as the wife of the son of the appellant, the appellant has a right to reside in the suit schedule property under the provisions of The Protection of Women from Domestic Violence Act, 2005; that the appellant and his son have colluded with each other and son of the appellant had vacated the premises and allowed the appellant to file the suit to harass the respondent and deprive her of the source of livelihood by running the boutique in the premises. She also contended that from 2004 onwards, with the blessings of the appellant, the boutique was being run, but now with a malafide intention, the appellant has filed the suit and the I.A., to stop the respondent from having a means of livelihood.

12. I have noted the contentions of both sides.

13. The suit has been filed for eviction of the respondent by the appellant, who is admittedly the owner of the suit schedule premises.

14. The respondent, being the daughter-in-law of the appellant and who claims to have been abandoned by the son of the appellant, seeks a right to occupy the matrimonial home on the basis of the rights conferred on her by the Protection of Women from Domestic Violence Act, 2005.

15. However, assuming that she has such a right as per the above statute, the rights of the appellant and his wife as Senior Citizens, to lead a peaceful life cannot also be ignored.

16. It may be that there are disputes between the respondent and her husband, but that does not entitle the respondent to do commercial activity by running a boutique in the suit schedule property, since such activity would lead to engagement of men such as tailors and staff to carry on tailoring activity in the premises, which would undoubtedly cause disturbance to the life of the senior citizens i.e., appellant and his wife.

17. When the respondent herself admitted that she is running a boutique in the suit schedule property, the Court below ought not to have said that it is a matter for evidence as to whether the respondent is using the premises for commercial business purpose.

18. Also, the Court below could not have stated that it would compensate the appellant if any additional tax for use of the premises for commercial purpose is imposed or award mesne profits if the suit is to be ultimately decreed evicting the petitioner, because there is no prayer in the suit either for mesne profits or for compensation for additional taxes.

19. While the rights of the respondent as the daughter-inlaw of the appellant and the wife of the son of the appellant are undoubtedly important, so also are the rights of the senior citizens like the appellant and his wife, and both are required to be balanced.

20. The finding of the Court below that when the respondent is in possession of the suit schedule property she cannot be restrained by imposing any condition to enjoy the possession is clearly perverse and cannot be sustained. It also cannot say that the respondent is not carrying on any unlawful activity and that because there is a matrimonial dispute between the respondent and son of the appellant, there are no bonafides on the side of the appellant, since the premises in question is admittedly the property of the appellant, and if he has any objection for use of the premises for a commercial purpose (other than residential), on the ground that inconvenience is caused to him and his wife by way of entry of strangers to the premises and making the place a noisy place, the Court below should have respected the needs of appellant and his wife as well, instead of showing sympathy only to the respondent.

21. Therefore, this CMA is allowed; the order dt.01.02.2018 in I.A.No.317 of 2017 in O.S.No. 195 of 2017 of the XIX Additional Senior Civil Judge, City Civil Court, Secunderabad is set aside; and the said I.A., is allowed. No order as to costs.

22. Consequently, miscellaneous petitions pending if any, shall stand closed.

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## 2019(2) L.S. 59 (T.S.)

IN THE HIGH COURT OF TELANGANA

Present:
The Hon'ble Mr. Justice
M.S. Ramachandra Rao

Chilukuru Sanjay Reddy ..Petitioner

Vs.

Meghana Pradipak ..Respondent

**HINDU MINORITY AND GUARDIANSHIP ACT, 1956, Secs.8 & 17 - GUARDIANS AND WARDS ACT, 1890 - HINDU MARRIAGE ACT - "CUSTODY OF MINOR CHILD" - Wife filed OP for dissolution of marriage in Family court and IA filed to restrain husband from coming any where near her or their minor son - Husband filed IA seeking grant of interim custody of minor child - Family Court passed common order dismissing IA filed by wife and allowing IA filed by husband partly allowed granting interim custody of minor son to father 4 pm Saturday to 6 pm Sunday every week.**

**High Court modifying the orders of lower Court and passed orders pending final orders in both IAs father shall handover child to mother certain dates to certain dates and father is also entitled to speak to child at least once in a day and other conditions.**

**It is settled legal position that in deciding the issue of temporary custody or visitation paramount consideration is welfare and interest of child.**

**The arrangement made by Court below had continued during pendency of revision and for summer vacation - Court has passed orders which both parties had stated that the arrangements went on peacefully.**

Mr.B.Vijaysen Reddy, Advocate for the Petitioner.
Mr.Sarang Afzul Purkar, Advocate for the Respondent.

**C O M M O N O R D E R**

In both these Revisions, the same order dt.08.05.2018 passed in I.A.No.365 of 2018 in O.P.No.266 of 2018 by the Additional Family Court at Hyderabad, is challenged.

2. The said O.P. was filed by Meghna Pradipak (hereinafter referred to as 'M') against C. Sanjay Reddy (hereinafter referred to as 'S') seeking dissolution of the marriage between them which took place on 26.05.2005, grant of permanent alimony of Rs.100.00 crores to her, granting permanent custody of their minor son Anikait (for short 'A') and for costs.

3. It is her contention that 'S' treated her with cruelty and several allegations are leveled against 'S' by her in the O.P.

4. Pending O.P., 'M' filed I.A.No.259 of 2018 to restrain 'S' from coming anywhere near her or their minor son 'A' either at her house or the child's school or anywhere else

including forcibly taking the child from school or anywhere pending disposal of the O.P.

5. 'S' filed I.A.No.365 of 2018 in the said O.P. seeking grant of interim custody of minor child 'A' to him on every alternative day of the week after School on all Mondays, Wednesday, Friday afternoon to Sunday afternoon, all holidays, vacations, Hindu festivals, functions of his family etc., pending disposal of the main O.P.

6. By a common order dt.08.05.2018, the Judge, Additional Family Court at Hyderabad dismissed I.A.No.259 of 2018, but partly allowed I.A.No.365 of 2018 granting interim custody of 'A' to 'S' from 4 pm, of Saturday to 6 pm of Sunday of every week, for first half of Pongal holidays, Dasara holidays, Christmas holidays and summer vacation, and from 9 am to 2 pm on the birthday of 'A' i.e., on 16th of May, pending disposal of the O.P. The Court below also permitted 'A' to speak to 'M' for half an hour a day through video chatting. It directed 'S' to attend parents meeting in the school of 'A'.

7. On 12.10.2018, this Court modified the order in the following manner:

> *"After interacting with the child last Friday, I met both the petitioner-husband and the respondent-wife in chambers today. I also interacted with Sri L. Ravichander, learned Senior Counsel appearing on behalf of the respondent, and Sri B. Vijaysen Reddy, learned counsel for the petitioner, today. On the overall view of the matter, the following order is passed.*
>
> *During the ensuing Dasara Vacations, the respondent-mother of the child shall take the child to the petitioner-father's house every Saturday and Sunday at 11.00 am. The child shall be free to interact with his father and his grand-parents for a period of six hours till 5.00 pm each Saturday and Sunday during Dasara Vacations. For a period of four weeks after Dasara vacations, the child shall be brought to his father's house by his mother at 11.00 am and shall be permitted to spend time with the father and grand-parents for a period of six hours till 5.00 pm. During the period of six hours when the child is brought to his father's house, the child's mother shall be entitled to stay thereat during the entire duration of six hours from 11.00 am to 5.00 pm. This arrangement shall continue till the third week of November, 2018. Post on 16.11.2018."*

8. On 28.12.2018, this Court directed that the same pattern as directed earlier would continue.

9. The matter was heard by this Court on 24.04.2019 and 25.04.2019, and on 29.04.2019 orders in the Revisions were reserved. But because summer vacation of the child was going, the following order was passed on 29.04.2019:

*"Heard both sides in both the Civil Revision Petitions. Orders reserved in Civil Revision Petition Nos.3125 and 3245 of 2018.*

*Pending passing of final orders in both the Civil Revision Petitions, the petitioner is permitted to have custody of the minor child, viz., Anikait Reddy from 01.05.2019 to 15.05.2019; he shall then deliver the child to the respondent on 16.05.2019 and the respondent shall retain him till 23.05.2019. Again, the respondent shall handover the child to petitioner on 24.05.2019, and the petitioner can retain the child till 07.06.2019.*

*The respondent is also entitled to speak to the child at least once a day and to see the child every alternate day, at lease for one hour, at a mutually agreed time to be arranged by the counsel on either side.*

*The parties are given liberty to move the Summer Vacation Court in case there is any problem in carrying out this arrangement.*

*The petitioner shall be entitled to participate in the Birthday Celebration/Parry of the Child on 16.05.2019 at whichever place the respondent intends to hold the said Birthday Party, and the same shall be informed by respondent to petitioner or by the counsel for respondent to the counsel for petitioner two (02) days in advance."*

10. Against this order passed on 29.04.2019, 'M' approached the Supreme Court by way of special Leave to Appeal (Civil) Nos.11586-11587 of 2019.

11. On 13.05.2019, the following order was passed by the Supreme Court:

> *"The order impugned is modified to the extent that the petitioner may visit the child for one hour every day, if she so chooses, while the child is in the interim custody of the father.*
>
> *Needless to mention that this order will not prevent the petitioner from approaching the High Court if the occasion arises.*
>
> *The special leave petition stands disposed of accordingly…."*

12. The matter was listed under the caption 'For Being Mentioned' on 03.06.2019 by this Court to find out how the arrangement between the parties regarding visitation rights/temporary custody of the minor child worked out during the summer vacation of the child in May, 2019. Both parties reported that it went on smoothly except that custody of the child was given 4 days late. The orders were again reserved in the matter.

13. Before I deal with the contentions of the parties, it is necessary to refer to the reasoning of the Court below which passed

the impugned order dt.08.05.2018 in I.A.No.365 of 2018.

**The reasoning of the Court below in the impugned order:**

14. Before the court below, though no oral evidence was adduced, Exs.P-1 to P-11 were marked by 'S' and Exs.R-1 to R-11 were marked by 'M'.

15. The Court below observed that parties had leveled several allegations and counter-allegations against each other and pleadings in the applications indicate that parties are at logger heads with any amount of hatred towards each other. It observed that it made efforts to make some arrangement of temporary custody in respect of the child with consent of the parties, but it could not convince them. It therefore considered to the extent necessary the allegations and counter-allegations made by the parties for the purpose of deciding I.A.Nos.365 and 259 of 2018.

16. It took note of the fact that Ex.P.1, a bunch of 37 photographs along a C.D. filed by 'S' showed that 'A; was comfortable and in joyful mood with him and his parents and some of the photographs also show that with the permission of 'M', 'A' was taken by 'S' on the occasion of marriage of nephew of 'S' from 23.02.2018 to 02.03.2018 and he was made "Thodi Pellikoduku" (co-bridegroom as per custom in the community). It observed that since very recently prior to its passing of the order, 'A' had spent considerable time with 'S' and his family members happily by participating in the marriage function of nephew of 'S', it indicates that 'A' was very close and affectionate towards 'S' and his family members, and his was a strong circumstance which goes in favour of 'S'. it also took note of Exs.P-7 to P-9 which show that for 2015, 2016 and till March, 2017 school fee of 'A' was paid by 'S' and Ex.R-2 certificate and 3 fee receipts show that 'M' paid fee for 'A' on 25.07.2017, 07.09.2017 and 08.03.2018; and that since the date of separation of the parties, 'M' had paid school fee of 'A'. It also referred to Ex.P.11, a C.D. containing video of 'A' and some photographs covered by Ex.P-5 which showed that the child was in a joyful mood in the company of both parties. It noted that Ex.P-6 showed that 'S' had taken the minor child to Hyderabad Polo and Riding club and this material showed that he was very much attached to both parties.

17. Though allegations were leveled by 'M' against the family members including the parents of 'S' about their bad reputation in the O.P., in the counter filed by her in I.A.No.365 of 2018 and in the affidavit filed along with I.A.No.259 of 2018, the Court below recorded that some of the photographs covered by Ex.P-5 show that the father of 'S' was felicitated by Bulk Drug Manufacturers Association and the father of 'S' had participated in meetings along with ex-Vice president of India Sri K.R. Narayanan and Mother Teresa and he was present for inauguration of St. Anns Hostel for Women, said to have been constructed by him as a charity. The allegations of bankruptcy and cheating leveled against the parents of 'S' by 'M' were not accepted by the Court below stating that no *prima facie*

material has been filed by her in that regard. It also recorded that Ex.P-10 shows that mother of 'S' occupied good position in Lions Club of Hyderabad. It therefore concluded that the families of the parties have no bad reputation.

18. it referred to certain other photographs covered by Exs.R-9 and R-10, which showed that 'S' was smoking by keeping 'A' in his lap and a boy was found sitting in the chair in front of a counter with liquor bottles and that the face of the boy was not visible. It observed that in the said photograph, 'S' was not present. It noted that 'S' himself stated that he and 'M' used to consume alcohol for social drinking only and not for otherwise, and denied consuming alcohol or smoking in the presence of 'A'. more importantly, the Court below observed that in some of the photographs covered by Ex.P-5, 'M' was also taking alcohol and this indicate that she was also in the habit of taking alcohol and so the Court would not attach much importance to the said aspect.

19. The Court below also appreciated the free service being done by 'M' in teaching meditation to students and others and also her efforts to take care of the minor son in extra-curricular activities. It however held that no conclusion can be drawn that 'S' had no concern towards the child.

20. the Court below also noted that 'M' had suffered chronic myeloid leukemia for the last 18 years and she is under medical treatment with good improvement, and on that count she cannot be said to be not capable of holding custody of the child.

21. the Judge of the Addl. Family Court also referred to the meeting he had with 'A' in his Chambers on 31.03.2018 and stated that the child was active and wanted to stay with the mother 'M', but he was mingling with 'S' also and was speaking good English. He stated that 'A' told about 'M' and 'S' fighting with each other in his presence and abusing each other and observed that they should not have fought in the presence of the child.

22. He held that since the child was staying with 'M', one cannot rule out the possibility of tutoring by her. He also noted that the child did not say anything adverse against 'S'. He observed that in the interest and welfare of the minor child, he should have love and affection of 'S' and vice-a-versa and he cannot be isolated and the Court has to strike a balance in that regard. He held that restraining 'S' from coming anywhere near 'M' or 'A' pending O.P. (as was sought in I.A.No.259 of 2018 by 'M' ) would result in depriving natural father of meeting his child, which cannot be permitted.

23. He noted that 'S' was not asking the Court to altogether to take away the custody of the child from 'M' and handover 'A' to his and thus made the interim arrangement as mentioned above.

**The contentions of the parties:**

24. it is the contention of the learned counsel for 'M' that 'S' had ill-treated her, that he is addicted to alcohol and smoking by 'S' is harmful to the child and so the

custody of the child even for a short time ought not to be granted to 'S'.

25. these allegations are refuted by 'S', who pointed out that the material filed before the trial Court indicated that even 'M' is used to consuming alcohol and merely because 'S' is in the habit of consuming alcohol on social occasions, he cannot be penalized by being deprived of the company of the child to satisfy the revengeful desire of 'M'. He also stated that he does not indulge in smoking in front of the child.

Consideration by the Court:

26. Incidentally there was another I.A. in the O.P.No.266 of 2018 where interim maintenance of Rs.1.5 lakhs p.m. was granted by the /court below to 'M', which order had not been honoured by 'S'. In a Revision filed by 'S' challenging it, this Court directed had directed in April, 2019 'S' to give 'M' Bankers cheques for Rs.30.00 lakhs representing interim maintenance of 20 months and on the very next date, learned counsel for 'S' handed over Bankers Cheques for Rs.30.00 lakhs to the learned counsel for 'M'. This covers the period of interim maintenance upto almost September, 2019 and the learned Counsel for 'S' assured that 'S' will honour the order of interim maintenance thereafter too during pendency of the O.P.

27. The material on record indicates that both parties 'S' and 'M' come from an affluent families and that 'M' is a qualified doctor while 'S' is a graduate of Mechanical Engineering from Purdue University, USA. The father of 'M' is an Arjuna awardee and National Champion in Sailing and the father of 'S' is an Industrialist.

28. Though their marriage was solemnized on 25.06.2005 and the child was born on 16.05.2012, the parties had been living separately since 18.03.2017. The child was studying 1st class in Shri Ram School, Jubilee Hills, Hyderabad and is stated to be now promoted to II class.

29. Learned counsel on both sides stated that the parties are staying hardly 1 K.M. from each other's houses in Banjara Hills, Hyderabad.

30. It is also important to note that 'S' is staying with his parents and 'M' is staying with her parents.

31. Prima Facie the material Exs.P-5 to P-10 filed by 'S' show that the parents of 'S' have considerable social standing and are not people of bad reputation involved in bankruptcy or cheating as is alleged by 'M'. In fact, no material regarding the poor financial status of the parents of 'S' has been filed. If they are really bankrupt, 'M' would not have claimed Rs.100.00 crores as maintenance from 'S'.

32. It is settled legal position that in deciding the issues of temporary custody or visitation, paramount consideration is welfare and interest of the child and question of welfare of the minor child had to be considered in the back ground of relevant facts and circumstances. Children cannot be treated as mere chattels nor are they mere playthings for their parents and the Court is expected to strike a just and proper

balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

33. It is also settled law that orders relating to custody of children are by their very nature not final but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody, but such change in custody must be proved to be in the paramount interest of the child **(Rosy Jacob Vs. Jacob A.Chakramakkal- (1973) 1 SCC 840 and Jai Prakash Khadria Vs. Shyam Sunder Agarwalla and another – (2000) 6 SCC 598)**

34. As held in **R.V. Srinath Prasad Vs. Nandamuri Jayakrishna and other – (2001) 4 SCC 71**, custody of minor children is a sensitive issue. It is also a matter involving sentimental attachment. Such a matter is to be approached and tackled carefully. A balance has to be struck between the attachment and sentiment of the parties towards the minor children and the welfare of the minors which is of paramount importance.

35. In custody matters, particularly relating to minor children, when custody is with one of the parent, in this case 'M', usually the other parent would be extended the facility of visitation.

36. In the instant case, 'S' has not sought for permanent custody of the child but only temporary custody for short periods as can be seen from the prayer in I.A.No.365 of 2018.

37. The material in the form of photographs produced before the Court below, according to the Court below indicate that the child was in a joyful mood in the company of 'S' and his parents. The interaction of the Family Court Judge with 'A' also showed that 'A' liked both parents.

38. The material produced before the Court below indicate that not only 'S' but even 'M' is in the habit of taking alcohol. In this situation, *prima facie* 'M' cannot label 'S' as a drunkard unfit even to have temporary custody or access to the child.

39. Though learned counsel for 'M' wanted to rely on further material before this Court, since the O.P. is pending, this Court felt that it is not desirable to take any further evidence in this Court and expressing any opinion in either way on the merits of the claims of the parties.

40. Suffice it to say that the arrangement made by the Court below had continued during pendency of the Revisions, and for summer vacation, 2019 this Court had passed order on 29-04-2019, which both the parties had stated that the arrangement want on peacefully.

41. Therefore, I do not find any error of jurisdiction in the order passed by the Court below warranting interference with the view of the Court below that 'S' should have interim custody of 'A' for certain period particularly since 'S' is a parent too, and whatever be the animosity with 'M' and 'S', the child should not be deprived of company of 'S' altogether and 'S' also should not be deprived of the company of 'A'. Therefore, I

modify the interim custody order passed by the Court below as under:

42. Pending disposal of the O.P.

(i) starting from the date of pronouncement of this order, the interim custody of 'A' should be given to 'S' by 'M' during weekends from 11 am to 5 pm;

(ii) during ensuing Dasara vacations and Christmas/Pongal vacations henceforth, 'S' shall have custody of 'A' child for the first half and 'M' shall have custody of 'A' for the second half:

(iii) during the summer vacations, 'S' is permitted to have custody of 'A' every alternate week commencing from the first Sunday to the following Saturday; he shall then deliver the child to 'M' on the evening of the said Saturday after 6 pm; and from the following Sunday she shall have custody of 'A' till the ensuing Saturday evening 6 pm; and so on. 'M' is also entitled to visit the child for one hour every day, if she so chooses, while the child is in the interim custody of 'S' at least from one hour, at a mutually agreed time to be arranged by the counsel on either side;

(iv) 'S' shall be entitled to participate in the Birthday Celebration/ Parry of the Child on 16/05 at whichever place 'M' intends to hold the said Birthday party, and the same shall be informed by her to 'M' two (02) days in advance; and

(v) 'M' and 'A' are permitted to speak each other every alternate day at mutually agreed time to be arranged by the counsel on either side when he is in the interim custody of 'S'.

43.The Court below shall endeavour to dispose of the O.P. as expeditiously as possible uninfluenced by it's observations in the impugned order or observations/ findings given in this order passed by this Court.

44. The Civil Revision Petitions are disposed of accordingly. No costs.

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

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**2019(2) L.S. 67 (D.B.) (T.S.)**

IN THE HIGH COURT OF TELANGANA

Present:
The Hon'ble Mr. Justice Sanjay Kumar &
The Hon'ble Mr. Justice P.Keshava Rao

Asset Recoonstruction Co., India Ltd., ..Petitioner

Vs.

Abhishsek Steel & Power Ltd., ..Respondents

**SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002, Secs.13(2),14,17 & 13(4) – SECURITY INTEREST (ENFORCEMENT) RULES, 2002, Rules 8(6) & 9(1) – CIVIL PROCEDURE CODE, Or.2, Rule 2(3) – LIMITATION ACT, Sec.5 – Secured creditor can take physical possession even after sale of property under Securitisation Act.**

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

**[1]** Challenge in all these writ petitions is to the order dated 05.03.2019 passed by the Debts Recovery Appellate Tribunal, Kolkata, in Application Nos.427 and 430 of 2019 in Tender (Appeal) Nos.109 and 110 of 2018 respectively. By the said order, the Appellate Tribunal allowed the aplictions and condoned the delay in the presentation of the appeals by Abhishek Steel and Power Limited, Ranga Reddy District, the borrower, viz., 520 days in the filing of Tender (Appeal) No.109 of 2018 and 646 days in the filing of Tender (Appeal) No.110 of 2018.

**[2]** W.P. No.5683 of 2019 was filed by Asset Reconstruction Company (India) Limited, Mumbai (ARCIL), an asset reconstruction company, assailing the order dated 05.03.2019 in so far as it pertained to Application No.430 of 2019 in Tender (Appeal) No.110 of 2018 W.P.No.5691 of 2019 was filed by ARCIL against the said order in so far as it related to Application No.427 of 2019 in Tender (Appeal) No.109 of 2018. W.P.No.5686 of 2019 was filed by Pragathi Leasing and Developers, Hyderabad, and its Managing Partner, P. Pundarikaksha Rao, the auction purchasers of the secured assets, against the order dated 05.03.2019 in so far as it pertained to Application No.427 of 2019 in Tender (Appeal) No.109 of 2018 W.P.No.5701 of 2019 was filed by them against the said order in so far as it related to Application No.430 of 2019 in Tender (Appeal) No.110 of 2018.

[3] Heard Sri D.V. Sitarama Murthy, learned senior counsel representing M/s. Pillix Law Firm, learned counsel for the borrower; Sri Vedula Venkataramana, learned senior counsel appearing for Sri P. Sri Harsha Reddy, learned counsel for ARCIL; Sri S. Niranjan Reddy, learned senior counsel appearing for Sri P. Panduranga Reddy, learned counsel for the auction purchasers; and Sri Dishit Bhattacharjee, learned counsel for Canara Bank, the original secured creditor.

[4] The admitted facts are as follows:

[5] Abhishek Steel and Power Limited, Ranga Reddy District, the borrower, availed loans from Canara Bank and owing to default in repayment, the same came to be classified and non-performing assets on 29.03.2012. Demand notice dated 02.06.2012 was issued by the bank under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (for brevity, 'the Act of 2002'), quantifying the amount due from the borrower at Rs.45,29,09,818.59 ps. The bank then initiated measures under section 13(4) of the Act of 2002 by taking symbolic possession of the secured assets of the borrower on 21.09.2012. Thereafter, the bank assigned the debt of the borrower to ARCIL under Assignment Agreement dated 28.03.2014. Thereupon, ARCIL invoked the provisions of Section 14 of the Act of 2002, by way of Crl.P.No.416 of 2016, before the learned Chief Metropolitan Magistrate, Hyderabad, and took over physical possession of the secured assets under Panchanama and Inventory dated 16.04.2016.

[6] The borrower approached the Debts Recovery Tribunal-I, Hyderabad, under Section 17 of the Act of 2002 by filing S.A.No.180 of 2016 aggrieved by the measure taken by ARCIL. The said securitization application was dismissed, vide order dated 17.10.2016. Review Application No.2 of 2016 was filed by the borrower in S.A.No.180 of 2016. ARCIL initiated steps under Rules 8(6) and 9(1) of the Security Interest (Enforcement) Rules, 2002 (for brevity, 'the Rules of 2002'), for bringing the secured assets of the borrower to sale. Challenging the sale notice, the borrower filed W.P.No.44265 of 2016 before the High Court. The ground taken therein was that a review petition had been filed in S.A.No.180 of 2016 and that the same was still pending consideration. However, as the auction failed for want of bidders, ARCIL against issued sale notice dated 04.01.2017 proposing to conduct an auction sale on 01.02.2017. Aggrieved thereby, the borrower filed W.P.No.3032 of 2017 but the same came to be dismissed as infructuous on 01.02.2017, as a sale did not crystallize for want of bids. Review Application No.2 of 2016 filed by the borrower in S.A. No.180 of 2016 was dismissed auction sale of the secured assets on 22.09.2017. The reserve price was fixed at Rs.42.87 Crore. The total outstanding of the borrower as per this sale notice was Rs.99,63,46,211/- as on 31.10.2016. The borrower challenged this sale notice in W.P.No.30971 of 2017. During the pendency of the writ petition, the e-auction was held on the stipulated date and three bidders participated therein. Pragathi Leasing and Developers, Hyderabad, emerged the highest bidder at Rs.53,80,00,000/-. After completion of formalities after payment of the total sale consideration, ARCIL issued sale certificate dated 11.12.07 in favour of the auction purchaser and the same was duly registered with the sub-Regstrar's Office at Medchal. Physical possession of the sold secured assets was handed over to the auction purchaser on 11.12.2017.

[7] While so, letter dated 10.07.2018 was addressed by the borrower to the Registry of the High Court, through its counsel, stating that it no longer wished to pursue W.P.No.30971 of 2017 and that it may be permitted to withdraw the writ petition reserving liberty to it to approach the Appellate Tribunal at Kolkata in accordance with law. The writ petition came to be dismissed as withdrawn with the liberty aforestated on 12.07.2018. The borrower then filed the subject appeals before the Appellate Tribunal. One appeal was filed against the dismissal of the review application in R.A.No.2 of 2016 filed in S.A.No.180 of 2016 on 14.02.2017 while the other appeal was preferred against the dismissal order dated 17.10.2016 in S.A.No.180 of 2016. As both the appeals were filed with delay, the borrower filed applications under Section 5 of the Limitation Act, 1963 (for brevity, 'the Act of 1963') seeking condonation thereof. These applications came to be allowed by the Appellate Tribunal leading to the filing of these writ petitions.

[8] Sri Vedula Venkataramana, learned senior counsel appearing for ARCIL, would contend that the progression of events clearly demonstrates that the litigation initiated by the borrower in S.A.No.180 of 2016 was dead for all practical purposes due to the developments after its dismissal, viz., issuance of sale notices, one after the other, and the eventual sale. The learned senior counsel would assert that mere filing of appeals against this dead litigation did not have the effect of breathing life into it. He would further assert that no cogent reasons were given by the borrower to explain the delay and as Section 14 of the Act of 1963 would not be applicable, the Appellate Tribunal erred in giving effect to its provisions while dealing with the delay. He would further point out that the proceedings under the Act of 2002 culminated in registration of a sale certificate and delivery of possession of the secured assets to the auction purchaser and therefore, it is too late in the day for the borrower to assert any right of redemption.

[9] Supporting these arguments, Sri S. Niranjan Reddy, learned senior counsel for the auction purchaser, would state that even by the time writ petitions were filed before this Court by the borrower against the sale notices, the cause of action in relation to dismissal of the securitization application and thereafter, the dismissal of the review application filed therein, had crystallized but despite the same, the borrower did not choose to include any challenge to those orders in the writ petitions. He would therefore assert that Order 2 Rule 2(3) CPC would bar any such challenge being reopened at this late stage by way of appeals. He would further assert that sufficient cause was not cited before the Appellate Tribunal for it to show any indulgence to the borrower, ignoring the attendant facts. He would point out that the review application in S.A.No.180 of 2016 was dismissed on 14.02.2017 and the borrower filed a writ petition challenging the sale notice on 12.09.2017 but the sale came to be held on 22.09.2017 and was confirmed in favour of the auction purchaser on

26.09.2017, whereupon the sale certificate was issued on 11.12.2017 and registered on 12.07.2018. the learned senior counsel would therefore contend that in the light of these facts, the Appellate Tribunal ought not to have been generous in dealing with the borrower's condone delay applications filed in the belated appeals.

[10] Per contra, Sri D.V. Sitarama Murthy, learned senior counsel appearing for the borrower, would point out that these writ petitions only warrant judicial review of the discretionary order passed by the Appellate Tribunal condoning the delay and once such exercise of discretion is not shown to be injudicious, no cause would be made out for interference by this Court in exercise of its extraordinary jurisdiction. He would further state that Order 2 Rule 2(3) CPC has no application to filing of writ petitions as the statute provides the remedy of appeal against the orders passed in a securitization application. He would therefore contend that no interference is called for with the order dated 05.03.2019 passed by the Appellate Tribunal.

[11] S.A.No.180 of 2016 was filed by the borrower assailing the action of ARCIL in taking physical possession of the secured assets on 16.04.2016 pursuant to the order dated 30.03.2016 passed by the learned Chief Metropolitan Magistrate, Hyderabad, in Crl.P.No.416 of 2016, in exercise of power under section 14 of the Act of 2002. The said securitization application came to be dismissed by the Debts Recovery Tribunal-I, Hyderabad, vide order dated 17.10.2016. Review Application No.2 of 2016 was filed in S.A.No.180 of 2016 by the borrower asserting that there was an error apparent in the order dated 17.10.2016 as para 2 of the said order referred to an auction purchaser though the secured assets had not been sold by that date. Certain other grounds were also raised by the borrower in relation to the said order. However, the Tribunal opined that mentioning of the bank as the auction purchaser in para 2 of the order was only a typographical mistake and did not have any effect on the order. The other grounds urged by the borrower were not found to be meritorious. The Tribunal therefore held that there was no error apparent in the order under review and dismissed the review petition, vide order dated 14.02.2017.

(12) Thus, it is clear that the subsequent sale notices issued by ARCIL after it took possession of the secured assets never fell for consideration before the jurisdictional Tribunal either in S.A.No.180 of 2016 or in the review application filed therein. The sale notices issued by ARCIL came to be challenged independently by way of separate writ petitions before the High Court by the borrower. Two writ petitions failed automatically consequent upon the fact that the proposed auction sales did not materialize. In so far as the third writ petition was concerned, despite the fact that the proposed auction sale crystallized in the sale of the secured assets, the borrower, in its wisdom, chose to withdraw the said writ petition on 12.07.2018 reserving liberty to approach the Appellate Tribunal at Kolkata in accordance with law. This liberty was sought by way of letter dated 10.07.2018

addressed to the Registry by the learned counsel for the borrower. It is therefore manifest that the only liberty sought by the borrower was to continue the challenge to the proceedings which were the subject matter of S.A.No.180 of 2016 and not the subsequent developments in the form of issuance of sale notices by ARCIL and the successful sale held thereafter. The question that falls for consideration is whether, having taken this conscious step, the borrower can now seek to turn back the clock and again challenge the taking over of possession by ARCIL pursuant to the order secured under Section 14 of the Act of 2002. The further question that would arise is, even if such a challenge can be successfully maintained by the borrower before the Appellate Tribunal, whether it would have any impact upon the auction sale held pursuant to the sale notice dated 31.08.2017, which was not subjected to challenge in S.A.No.180 of 2016.

[13] Be it noted that in the light of the law laid down by the Supreme Court in ITC LIMITED vs. BLUE COAST HOTELS LIMITED, 2018 15 SCC 99 = 2018 SCC On Line SC 237, the act of the secured creditor in initiating sale proceedings in relation to the secured assets would stand apart and be independent of the proceedings for taking actual physical possession of the secured assets. The aforestated judgment makes it clear that taking over of physical possession can be done even after the successful sale of secured assets. In effect, the borrower cannot now seek to impact the unchallenged sale proceedings held by ARCIL in favour of the auction purchaser, even if it revives its challenge to the proceedings under Section 14 of the Act of 2002 by filing these belated appeals.

[14] That apart, the Appellate Tribunal, when it considers an application filed for condonation of delay in the presentation of an appeal, necessarily has to exercise its discretion and such exercise must be as per judicious norms. The Appellate Tribunal must therefore take note of the conduct of the party seeking such indulgence and cannot ignore relevant factors. However, the manner in which the Appellate Tribunal chose to deal with the subject applications leaves a lot to be desired. Perusal of the impugned order dated 05.03.2019 demonstrates that the auction purchaser was also represented by learned counsel before the Appellate Tribunal. Despite the same, the Appellate Tribunal did not choose to advert to any of the later developments, viz., the successive sale notices issued by ARCIL and the final sale in favour of the auction purchaser. Surprisingly, the Appellate Tribunal treated W.P.No.30971 of 2017 filed against the sale notice dated 31.08.2017 as relevant for the purposes of Section 14 of the Act of 1963 and opined that delay in the filing of the appeals, after dismissal of the said writ petition on 12.07.2018, would be a mere 13 days. This is clear from the following observation of the Appellate Tribunal:

> *'Since the Appellant was pursuing the matter bona-fidely before the Hon'ble High Court from 12.09.2017 to 12.07.2018 and in that writ*

*petition objection was also taken by the Bank that the borrower had not challenged the findings of the Tribunal below recorded in S.A. So the time spent before the Hon'ble High Court also deserves condonation. After disposal of the writ petition, the appeal was filed on 25.07.2018, i.e., just after 13 days.'*

**[15]** Unfortunately, the Appellate Tribunal completely lost sight of the fact that the subject matter of W.P.No.30971 of 2017 was altogether different from the subject matter of S.A.No.180 of 2016 and the review filed therein and therefore, the time consumed in pursuing the said writ petition was not liable to be excluded. To compound matters further, the Appellate Tribunal observed that no prejudice would be caused to the respondents if the delay was condoned and the appeals were heard on merit. This observation was made by the Appellate Tribunal despite being made aware of the later developments culminating in the successful sale of the secured assets in favour of the auction purchaser. It is now well settled that the right of redemption available to a borrower would cease to survive after registration of the sale certificate in favour of the auction purchaser. (See DWARIKA PRASAD v/s STATE OF UTTAR PRADESH, 2018 5 SCC 491 = 2018 SCC OnLine SC 183).

**[16]** In RAMLAL, MOTILAL AND CHHOTELAL v/s REWA COALFIELDS LTD., 1962 AIR(SC) 361, The Supreme Court observed as under:

*'7. In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in Krishna V. Chathappan, 1890 13 ILR(Mad) 269.*

*12. It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition*

*precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration;'*

**[17]** The above principles were affirmed and applied by the Supreme Court in BALWANT SINGH vs. JAGDISH SINGH, 2010 8 SCC 685. Reference may also be made to the observations of a Division Bench of the Bombay High Court in MANILAL GOVINDJI KHONA Vs. INDIAN BANK, 2013 2 Bank Cas 444 to the effect that where the delay is inordinate, unreasonable and totally unexplained, the Court is entitled to pass an appropriate order in the facts and circumstances of such case since condonation of delay is not an empty formality. Applying these principles to the case on hand, it is before the High Court, it consciously chose not to lay any challenge, be it by way of an appeal or by way of a writ petition, to either the order dated 17.10.2016 dismissing the securitization application or the order dated 14.02.2017 dismissing the review application filed therein. In effect, there is no explanation as to why the borrower, when it was diligent in the context of the sale notices, did not show the same diligence in the context of the dismissal of its securitization application and the review petition filed therein.

**[18]** The Appellate Tribunal therefore ought not to have brushed aside the crucial developments after the dismissal of the securitization application and the review application filed therein. Permitting this litigation to be reopened only for the purpose of testing the validity of the delivery of possession pursuant to the order secured by ARCIL under Section 14 of the Act of 2002 at this late point of time therefore served no purpose whatsoever, as it would anyhow be open to ARCIL to initiate proceedings afresh for doing so, even if the appeals were allowed.

**[19]** Further, as stated supra, the very fact that the borrower all along chose to accept and abide by the decision of the jurisdictional Tribunal in dismissing S.A.No.180 of 2016 and thereafter, the review application filed therein, clearly showed that it had no interest in pursuing its challenge in that regard. Significantly, the borrower chose to litigate about later developments in the form of sale notices ignoring the adverse orders suffered by it, implying that it had no continuing grievance therewith. Having allowed the taking over of possession by ARCIL to attain finality by its own inaction in maintaining the challenge laid in S.A.No.180 of 2016, the borrower is deemed to have waived its right to challenge the taking over of possession by ARCIL. The borrower therefore could not have maintained appeals against the orders in the

securitization application with such substantial delay, brushing aside the later developments culminating in the successful sale of the secured assets. The Appellate Tribunal grievously erred in overlooking all these relevant aspects and showing indulgence to the borrower by condoning the delay in the filing of the appeals.

[20] The writ petitions are accordingly allowed setting aside the order dated 05.03.2019 passed by the Debts Recovery Appellate Tribunal, Kolkata, in Application Nos.427 and 430 of 2019 in Tender (Appeal) Nos.109 and 110 of 2018 respectively. Pending miscellaneous petitions shall stand closed in the light of this final order. In the circumstances, there shall be no order as to costs.

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## 2019(2) L.S. 74 (T.S.)

IN THE HIGH COURT OF TELANGANA

Present:
The Hon'ble Mr. Justice
M.S. Ramachandra Rao

Seelam Prameela ..Petitioner

Vs.

Ganta Mani Kumar ..Respondents

**RECORDING OF EVIDENCE - Through video conference - Permissible if both parties wish the same.**

CRP.NO.3228/18 DATE: 19-7-2019

**J U D G M E N T**

[1] This Revision is filed under Article 227 of the Constitution of India challenging the order dt.23.05.2018 in I.A.No.625 of 2018 in F.C.O.P. Nos.892 of 2014 and 1557 of 2013 of the Principal Judge, Family Court, City Civil Court Hyderabad.

[2] Petitioner herein had filed F.C.O.P.No.892 of 2014 against respondent for dissolution of the marriage between them which took place on 15.02.2012 and for other reliefs.

[3] Respondent filed F.C.O.P.No.1557 of 2013 before the Family Court, City Civil Court, Hyderabad for restitution of conjugal rights against petitioner.

[4] Both the matters have been clubbed together.

[5] Petitioner is presently employed in United States of America for employment purpose along with a son born to the parties. Petitioner is represented by her father / G.P.A. Holder. Petitioner's plea in I.A.625 of 2018.

[6] She filed I.A.No.625 of 2018 giving the said reason and sought recording of evidence by video conference from her residence in the United States of America.

[7] Earlier also, petitioner had made a request for recording of her evidence through video conference on the ground that she was staying in U.S.A. and contended that it was not possible for her to appear before the Family Court, Hyderabad on the several

dates of adjournment, but the trial Court declined to give such permission.

[8] Petitioner then questioned the same in C.R.P. Nos.6015 and 5319 of 2017.

[9] This Court on 12.03.2018 held that since petitioner was coming down to India on 25.03.2018, and the O.Ps stand posted to 26.03.2018, and since she stated that she is ready to give evidence before the Family Court, Hyderabad as she will remain in India from 25.03.2018 for 21 days, the Family Court should complete the recording of her evidence within the period of her stay in India and an order to that effect was passed by this court.

[10] This fact was also mentioned by petitioner in I.A.No.625 of 2018 it was mentioned in the said I.A. that she had filed evidence affidavit in both O.Ps., that the Court below directed her to file a comprehensive affidavit was filed through her father as G.P.A. holder to receive documents filed by her, but due to some reason, it was returned twice and resubmitted by complying with the objections. She contended that though she requested the Court to record her cross-examination as she has to leave India on 15.04.2018, the Court below did not consider her request and posted the matter to 16.04.2018 for counter of respondent. She contended that respondent had filed an application for seizing her passport and to restrain her from traveling abroad and this shows the malafide intention of the respondent.

The Counter affidavit of the respondent.

[11] Counter-Affidavit was filed by respondent opposing this application. He contended that the subject matter of O.Ps. relate to disputes between the parties and G.P.A. holder of petitioner cannot say things which have transpired between petitioner and respondent. He alleged that petitioner had abandoned the proceedings in the O.P. without leave or permission from the court. He alleged that on account of the same, petitioner is not entitled to the relief of recording of evidence though video conference from her residence at U.S.A. and that is not the procedure in law to look into issues relating to matrimonial cases.

[12] It is also alleged that comprehensive affidavit of petitioner in both the O.Ps. was filed by her only on 10.04.2018 and the petitioner left to U.S.A. on the very next day and willfully absented herself. He contended that it was impossible to conclude the evidence of petitioner in the short period available since chief-examination itself ran into 8 pages warranting comprehensive cross-examination. He alleged that petitioner feared cross-examination and left India immediately after filing of chief-examination affidavit and therefore no relief should be granted to her.

The order in I.A.No.625 of 2018.

[13] By order dt.23.02.208, the Court below dismissed I.A.No.625 of 2018 observing that in the premises of the City Civil Court, Hyderabad where the Family Court was located, infrastructure facility for video conferencing has not been provided.

[14] It observed that in view of the nature of the case and the guidelines issued by the High Court apart from lack of sufficient infrastructural facilities for video conferencing in the Court Complex, request of the petitioner cannot be acceded to.

[15] It also observed that as per the decision of the supreme Court in Santhini Vs. Vijaya Venkatesh, 2018 1 SCC 1, only both parties can consent that a witness can be examined by video conferencing. So only a joint application would be entertained for recording evidence through video conferencing and since the respondent did not consent to it, request of the petitioner cannot be entertained.

[16] Assailing the same, this Revision is filed.

Contentions of Petitioner in the CRP:

[17] Learned counsel for petitioner contended that the stand taken by the Court below is not proper and the petitioner cannot be compelled to leave her employment in U.S.A. and stay in India to attend the day-to-day hearings in the O.Ps., which would result in her losing employment. He also contended that the judgment in Santhini (1 supra) refer only to the question whether in transfer petitions video conferencing can be directed, but it did not take away the power of the Family Court, in cases where settlement talks failed, to record evidence through video conferencing if it will sub-serve the cause of justice.

Contention of the Respondent:

[18] Learned counsel for respondent contended that there is no facility to record evidence through video conferencing and in any event, conduct of the petitioner did not warrant permission to record her cross-examination through video conferencing.

The Consideration by the Court

[19] I have noted the contentions of both sides.

[20] This Court verified with the Registry and ascertained that though the Family Court, City Civil Court, Hyderabad does not have exclusive video conferencing facility, the City Civil Court Complex in Hyderabad where the Family Court is located, has been provided now with a video conferencing facility. Therefore, one of the reasons given by the Court below for not permitting evidence to be recorded by video conferencing, no longer exists.

[21] In Santhini (1 supra), the Supreme court observed:

"55. Be it noted, sometimes, transfer petitions are filed seeking transfer of cases instituted under the Protection of Women from Domestic Violence Act, 2005 and cases registered under the Indian Penal Code. As the cases under the said Act and the Indian Penal Code have not been adverted to in Krsihna Veni Nagam Vs. Harish Nagam, 2017 4 SCC 150 or in the order of reference in these cases, we do intend to advert to the same.

56. In view of the aforesaid analysis, we sum up our conclusion as follows:

(i) In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera.

(ii) After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through video conferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer.

(iii) After the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that video conferencing will sub-serve the cause of justice, it may so direct.

(iv) In a transfer petition, video conferencing cannot be directed.

(v) Our directions shall apply prospectively.

(vi) The decision in Krishna Veni Nagam (2 supra) is overruled to the aforesaid extent."

[22] A reading of the above passages indicates that essentially the court in the said case was dealing with power to direct video conferencing and recording of evidence through video conferencing; in petitions filed for transfer of cases. Even the said decision in para-56(3) empowers the Family Court in appropriate cases where settlements fails, to permit video conferencing having regard to the facts and circumstances of the case and if it would sub-serve the cause of justice.

[23] In the State of Maharashtra and P.C. Singh Vs. Praful B. Deasai and others, 2003 4 SCC 601, the Supreme Court held that video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before the Court; and in fact, he/she is present before you on a screen, except for touching, one can see, hear and observe as if the party is in the same room. It observed that in video-conferencing both parties are in presence of each other and so long as the accused and/or his pleader are present when evidence is recorded by video-conferencing, that evidence is being recorded in the 'presence' of the accused and would thus fully meet the requirements of Section 273 Criminal Procedure Code and recording of such evidence would be as per 'procedure established by law'. It observed that the accused and his pleader can see the witness as clearly as if the witness was actually sitting before them and the accused may be able to see the witness better than her may have been able to if he was sitting in the dock in a crowded court room and can observe his or her demeanour. It also observed that the witness can be confronted with documents or other material or statement in the same manner as if he/she was in Court and no prejudice, of whatsoever nature, is caused to the accused provided evidence by video conferencing is done subject to some conditions.

[24] Thus if in criminal cases, recording of evidence through video conferencing is

accepted, subject to certain conditions, I do not see why there ought to be a bar for recording of evidence through video conferencing in matrimonial proceedings.

[25] In a situation where one or both of the parties to a matrimonial proceeding is living abroad, and is unable to come to India to give evidence on account of his/her employment there, and there is risk of the party losing his/her employment if she were to return to India, it would be unjust to compel the said party to give up her job there so that he/she can appear on every date of adjournment in the Family Court in India where his/her case is pending. It is common knowledge that pendency in some of the Family Courts is very high and there is every possibility of the matter getting dragged on indefinitely.

[26] I am also of the opinion that the petitioner cannot be penalized if her evidence could not be recorded if she was in India in the year 2018 because she admittedly attempted to file her documents through G.P.A. which was rejected and much later it was permitted.

[27] For the aforesaid reasons, the impugned order is set aside; I.A.No.625 of 2018 is allowed; and the Principal Judge, Family Court, City Civil Court, Hyderabad is directed to record the chief-examination/ cross-examination of the petitioner through video conferencing at the video conferencing facility available in City Civil Court, Hyderabad after fixing appropriate time with the consent of both parties and their counsel. Such evidence shall be recorded in the presence of counsel for petitioner at Hyderabad as well as counsel for respondent in the O.Ps and such recording shall be done by the Presiding Judge of the Family Court within four (04) weeks from the date of receipt of copy of the order. Learned counsel for both parties shall inform the Presiding Judge of the Family Court of the date and time at which such video conferencing can be done within one week from the date of receipt of copy of the order and the Chief Judge, City Civil Court, Hyderabad shall accord permission for recording of evidence of the witness through video conferencing, and the expenses in that regard shall be collected from the petitioner's G.P.A. Holder in advance.

[28] This Civil Revision Petition is allowed with the above directions. No costs.

[29] As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

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**2019(2) L.S. 93 (A.P.)**

IN THE HIGH COURT OF ANDHRA PRADESH

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

Suksen Mandal ..Petitioner

Vs.

State of A.P., ..Respondent

**NDPS Act, Section - 8(c) r/w Section 20(b)(ii)(c) – Petitioner/A4 sought bail - Prosecution contends that petitioner acted as a mediator for purchase of 135 Kgs ganja - Complainant and the Investigating Officer are the same.**

**Held - it cannot be said that the petitioner would be entitled for acquittal and hence, Section 37 of the NDPS Act does not come in the way of granting bail to the petitioner - This Court can understand from the language used in Section 37(i)(b)(ii) is that the reasonable grounds should be in respect of believing that the accused is not guilty but not that he would be acquitted – Instant case fit for granting interim bail to the petitioner - Criminal petition is disposed of and the petitioner is enlarged on interim bail for a period of 30 days.**

Mr.G. Venkata Reddy, Advocates for the Petitioner.

Public Prosecutor.Advocate for the Respondent.

**J U D G M E N T**

1. This petition is filed, under Sections 437 and 439 of the Criminal Procedure Code, 1973, seeking to enlarge the petitioner, who is A4, on bail in Crime No.60 of 2017 on the file of the Station House Officer, Chinturu Police Station, East Godavari District. The offences alleged are under Section 8(c) read with 20(b)(ii)(c) of NDPS Act.

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

3. The case of the prosecution is that 135 Kgs. of Ganja is involved in this case and that this petitioner is acting as a mediator for purchase of Ganja. Hence, Section 37 of the NDPS Act comes in the way of granting bail to the petitioner as one of the two conditions for granting bail is the satisfaction of the Court that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit offence while on bail.

4. As regards this hurdle, the Counsel raised a technical argument based on the fact that the complainant and the Investigating Officer in this case are the same and hence, there is every likelihood of he being acquitted from the case. He relies on a judgment of the Supreme Court passed in Crl. A No. 1880 of 2011 between Mohan Lal and the State of Punjab wherein the Supreme Court held that, 'a fair investigation which is but the very foundation of fair trial, necessarily

postulates that the informant and the investigator must not be the same person. The said judgment was passed in an appeal. Hence, the Apex Court deemed it appropriate to hold that the prosecution is vitiated.

5. On the other hand, the Public Prosecutor relies on a judgment of this Court, dated 14.11.2018, passed in Crl. P Nos. 6901, 6918 and 6928 of 2018, wherein this Court by considering the said fact and also by relying on the judgment of the Supreme Court referred supra, set aside the cognizance orders of the Court and reverted the clock back to the crime registration stage and directed the Superintendent of Police concerned to handover the investigation to another police officer other than the person who conducted the raid and detected the crime and registered the FIR.

6. In view of the above, it cannot be said that the petitioner would be entitled for acquittal and hence, Section 37 of the NDPS Act does not come in the way of granting bail to the petitioner. Moreover, what this Court can understand from the language used in Section 37(i)(b)(ii) is that the reasonable grounds should be in respect of believing that the accused is not guilty but not that he would be acquitted. However, the Counsel for the petitioner makes an alternative prayer for granting interim bail to the petitioner on the ground that his wife is suffering from spine problem and that his presence for fixing up surgery to his wife is very much necessary.

7. Considering the above circumstances, this Court opines that this is a fit case for granting interim bail to the petitioner.

8. With the above observations, the criminal petition is disposed of and the petitioner is enlarged on interim bail for a period of 30 days starting from 31.1.2019 subject to the condition of his executing a personal bond for a sum of Rs. 20,000/-(Rupees Twenty thousand only) with two sureties for a like sum each to the satisfaction of the I Additional District and Sessions Judge, East Godavari at Rajamahendravaram. It is made clear that the petitioner shall surrender before the concerned State House Officer on 1.3.2019 without fail.

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

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Reynders was acting for and on behalf of respondent No.2 and had the authority of respondent No.2, collapses, then it must necessarily follow that respondent No.2 was not a party to the stated agreement nor had it given assent to the arbitration agreement and, in absence thereof, even if respondent No.2 happens to be a constituent of the group of companies of which respondent No.1 is also a constituent, that will be of no avail. For, the burden is on the applicant to establish that respondent No.2 had an intention to consent to the arbitration agreement and be party thereto, maybe for the limited purpose of enforcing the indemnity clause 9 in the agreement, which refers to respondent No.1 and the supplier group against any claim of loss, damages and expenses, howsoever incurred or suffered by the applicant and arising out of or in connection with matters specified therein. That burden has not been discharged by the applicant at all. On this finding, it must necessarily follow that respondent No.2 cannot be subjected to the proposed arbitration proceedings. Considering the averments in the application under consideration, it is not necessary for us to enquire into the fact as to which other constituent of the group of companies, of which the respondents form a part, had participated in the negotiation process.

10. Suffice it to observe that respondent No.2 was never involved in the negotiation process concerning the stated agreement dated 1st May, 2014. On this finding, the application must fail as against respondent No.2 and as a consequence whereof, the provisions for making reference to the sole arbitrator, on the assumption that it is an international commercial arbitration, cannot be taken forward. As respondent No.1 is a company having been established under the provisions of the Indian Companies Act and having its registered office in India, the applicant can pursue its remedy against respondent No.1 for appointment of a sole arbitrator to conduct arbitration proceedings, as a domestic commercial arbitration.

11. Indeed, the applicant had vehemently relied upon the circumstances and correspondence postcontract but that cannot be the basis to answer the matter in issue. The respondent No.2 has justly relied upon the exposition in Godhra Electricity Co. Ltd. and Anr. Vs. State of Gujarat and Anr., ((1975) 1 SCC 199)to buttress the argument that postnegotiations in law would not bind the respondent No.2 qua the arbitration agreement limited between applicant and respondent No.1. In any case, even this plea is based on the assumption that Mr. Frederik Reynders was associated with and had authority to transact on behalf of respondent No.2, which assertion hasbeen refuted and rebutted by respondent No.2. It is clearly stated that Mr. Frederik Reynders was neither connected to nor had any authority of respondent No.2, but was only an employee of respondent No.1 and acted only in that capacity.

12. For the view that we have taken, it is unnecessary to dilate on other contentions. Suffice it to observe that the application must fail against respondent No.2 and on that conclusion, no relief can be granted to the applicant who has invoked the jurisdiction of this Court on the assumption

that it is a case of international commercial arbitration. Despite that, respondent No.1 through counsel has urged that as the subject agreement between the applicant and respondent No.1 contains an arbitration clause (clause 13) and since disputes have arisen between them, the respondent No.1 would agree to the appointment of a sole arbitrator by this Court for conducting arbitration proceedings between the applicant and respondent No.1, as domestic commercial arbitration. This stand has been reiterated in the written submissions filed on behalf of respondent No.1, filed after the conclusion of the oral arguments. Resultantly, even though no relief can be granted to the applicant as against respondent No.2, we proceed to pass the following order in the interest of justice.

13. The arbitration application is dismissed as against respondent No.2. However, we appoint Mr. Justice Badar Durrez Ahmed (Former Chief Justice, Jammu & Kashmir High Court) as the sole arbitrator to conduct domestic commercial arbitration at New Delhi, between the applicant and respondent No.1 on the terms and conditions as specified in the Act of 1996.

14. Application stands disposed of in the above terms. No costs. All pending interim applications are also disposed of.

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## 2019 (2) L.S. 130 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Abhy Manohar Sapre &
The Hon'ble Mr.Justice
Dinesh Maheshwari

Sir Sobha Singh
& Sons Pvt. Ltd. ..Appellant

Vs.

Shashi Mohan Kapur
(Deceased) Thr. L.R ...Respondent

**CIVIL PROCEDURE CODE, Or.20 Rule 6A(2), Order 21 Rule 2 and Rule 11(3) and Secs.151 & 152 - Executing Court issued warrant of possession against Respondent/Judgment debtor in respect of suit house in eviction suit against Respondent - Executing Court dismissed applications filed by Respondent challenging executability of consent order itself as being null and void - Whether the High Court was justified in allowing the respondent's (Judgment Debtor's) appeal and thereby was justified in holding that the Execution Petition filed by the appellant was not maintainable for want of formal decree not being drawn up by the Court after passing of the order.**

**Held – High Court was not right in holding that in the absence of a formal decree not being drawn or/and filed, the appellant (decree holder) had no right to file the Execution petition**

C.A.No.5534/2019 Date:15-7-2019

**on the strength of the consent order - Though Rule 6A (2) of Order 20 of the Code deals with the filing of the appeal without enclosing the copy of the decree along with the judgment and further provides the consequence of not drawing up the decree yet, the principle underlined in Rule 6A(2) can be made applicable also to filing of the execution application under Order 21 Rule 2 of the Code.**

**Order 21 Rule 11(3) of the Code makes it clear that the Court "may" require the decree holder to produce a certified copy of the decree - This clearly indicates that it is not necessary to file a copy of the decree along with execution application unless the Court directs the decree holder to file a certified copy of the decree – Even though the appellant did not file the certified copy of the decree along with the execution application for the reason that the same was not passed by the Court, yet the execution application filed by the appellant, in our view, was maintainable.**

**High Court was right in directing the appellant to apply to the Court for drawing a decree, but was not right in directing to apply under Section 152 of the Code - Appellant is hereby granted two weeks' time to apply under Section 151 read with Order 20 Rule 6(A) of the Code to the concerned Court with a prayer for passing a decree in accordance with the order passed under Order 23 Rule 3 of the Code – Appeal stands allowed.**

**J U D G M E N T**

(Per the Hon'ble Mr.Justice

Abhay Manohar Sapre)

Leave granted.

2. This appeal is filed against the final judgment and order dated 31.10.2018 passed by the High Court of Delhi at New Delhi in Ex.F.A. No.42 of 2018 whereby the High Court allowed the appeal filed by the respondent herein and set aside the order dated 22.10.2018 passed by the ADJ-02 & Waqf Tribunal, New Delhi District, New Delhi in Execution No. 5665 of 2016.

3. A few facts need mention hereinbelow for the disposal of this appeal, which involves a short point.

4. The appellant is the plaintiff/decree holder and the respondent is the defendant/ judgment debtor.

5. The dispute arises out of the execution proceedings and it emanates from Civil Suit No. 369/2009 (new No.675/2009) decided on 01.06.2012.

6. The appellant is the landlord of a Flat-G-81, IInd floor along with one Servant Quarter J-3-62, IIIrd floor situated at Sujan Singh Park, New Delhi (hereinafter referred to as "suit house").

7. The appellant let out the suit house to the father of the original respondent-Late Mr. R.L.Kapur as back as in 1959. The appellant, however, determined the tenancy by serving a quit notice to Mr. R.L. Kapur on 21.12.2004. Mr. R.L. Kapur died on 13.07.2007 leaving behind the respondent as his legal representative.

8. The appellant served another quit notice dated 16.01.2009 to the respondent and called upon him to vacate the suit house. Since the respondent failed to vacate the suit house, the appellant was constrained to file Civil Suit in 2009 (Old No.369/2009 new number 675/2009) against the respondent in the Court of AD J for his eviction from the suit house and the mesne profits.

9. The respondent, after entering his appearance in the suit, did not contest it and compromised the matter with the appellant. It was agreed that the respondent (tenant) would hand over the vacant possession of the suit house on or before 31.05.2016 to the appellant; Second, the respondent would pay a sum of Rs.5,000/- per month towards user charges w.e.f. 01.06.2012 till the date of handing over of the suit house to the appellant; and third, the respondent would not sublet or create any third party rights in the suit house.

10. The Trial Court recorded the statement of the parties and accordingly disposed of the civil suit in terms of the aforementioned compromise by its judgment dated 01.06.2012 which reads as under:

"With judicial intervention, the dispute between the parties has been amicably settled. It is agreed that defendant shall vacate and hand over the vacant and peaceful possession of the suit property, i.e., Flat No.G-81, IInd floor and servant quarter No.J-3-62, IIIrd floor, Sujan Singh Park, New Delhi, as shown in the site plans already exhibited as Ex.PW1/14 and Ex.PW 1/15, to the plaintiff on or before 31.05.2016. Defendant also undertakes to pay the user charges of the suit property at the rate of Rs.5000/- per month w.e.f. 01.06.2012 to the plaintiff regularly till the date of handing over of the suit property to the plaintiff. Defendant also undertakes not to sublet or create any third party interest in the suit property. It is prayed that the case may be disposed off as compromised.

Statements of Brig. Gurbax Singh and Mr. Shashi Mohan Kapur have been separately recorded and they have been identified by their respective counsel.

Heard Perused. Considered.

It appears that the statements have been made voluntarily and are accepted.

Both the sides shall remain bound by their respective statements.

In view of the submissions made as well as the statements of both the sides, the case is hereby disposed off as compromised.

Attested copies of the order be given to both the sides, dasti, as requested.

After completion of the formalities, file be consigned to record room."

11. On 27.05.2016, the respondent filed an application under Section 148 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") and prayed therein for extension of time to vacate the suit house. The extension to vacate the suit house was sought on medical grounds.

12. By order dated 09.06.2016, the Trial Court allowed the said application and

granted time to the respondent till 15.07.2016 to vacate the suit house. The respondent was also directed to clear the arrears of rent.

13. Instead of vacating the suit house on 15.07.2016, the respondent filed another application on 18.07.2016 and further sought time to vacate the suit house. The Trial Court, by order dated 08.08.2016, dismissed this application and declined to extend the time to vacate the suit house. As a result of the dismissal of this application, the respondent was under a legal obligation to vacate the suit house immediately.

14. Since the respondent failed to vacate the suit house, the appellant was constrained to file Execution Petition (5655/2016) in the Executing Court for execution of the consent decree dated 01.06.2012 against the respondent for obtaining vacant possession of the suit house.

15. The Executing Court, by order dated 30.09.2016, issued a warrant of possession against the respondent/Judgment debtor in respect of suit house. Since the respondent obstructed the execution of decree, the appellant applied to the Executing Court for providing him the police assistance for obtaining possession of the suit house from the respondent. In the meantime, the Judgment debtor died leaving behind the present respondent as legal representative of the original tenant.

16. On 18.10.2016 and 23.07.2018, the respondent herein filed four applications. One was under Order 47 read with Sections 114 and 151 of the Code for review of the order; Second was under Sections 47 & 151 read with Order 21 Rules 11(2) and 26 of the Code; Third was under Order 47 read with Sections 114 and 151 of the Code; and Fourth was under Section 151 of the Code. One application was filed by one Mr. Manmohan Kapur under Order 1 Rule 10 of the Code.

17. These applications were filed to challenge the executability of the consent order dated 01.06.2012 itself as being null and void. The respondent, in these applications, raised essentially the following three grounds.

18. The first ground was that the appellant obtained the consent order dated 01.06.2012 by concealing the material facts from the respondent which, according to him, was in the nature of fraud. The second ground was that no decree was drawn by the Trial Court after passing the consent order dated 01.06.2012; and the third ground was that the suit in which the consent order dated 01.06.2012 was passed was not maintainable in view of Section 50 of the Delhi Rent Control Act. The appellant filed his reply to the aforementioned applications denying all the three grounds raised by the respondent.

19. By order dated 22.10.2018, the Executing Court dismissed the applications filed by the respondent (Judgment debtor). The Executing Court held that the respondent was indulging in delaying tactics only to avoid the execution of the consent order dated 01.06.2012. The Executing Court dealt with each objection raised by the respondent and found no merit in any of them. The Executing Court held that the respondent having taken time twice to vacate the suit house did not honor the orders of the Court and, therefore, while dismissing his applications and the application of one

Mr. Manomohan Kapur imposed a cost of Rs. 5 lakhs upon each of them with a direction to pay 50% tothe appellant and remaining 50% to the Delhi Legal Services Authority.

20. The respondent felt aggrieved and filed first appeal before the Delhi High Court. By impugned order, the High Court allowed the appeal and set aside the order dated 22.10.2018 passed by the Executing Court. The High Court held that since the Trial Court did not draw up the formal decree after passing the consent order on 01.06.2012, the Execution Petition filed by the appellant (decree holder) is not maintainable. The High Court, however, granted liberty to the appellant (decree holder) to apply to the Trial Court under Section 152 of the Code for drawing up a decree in terms of the consent order dated 01.06.2012. The appellant (decree holder) felt aggrieved by this order of the High Court and has filed the present appeal by way of special leave in this Court.

21. So, the short question, which arises for consideration in this appeal is whether the High Court was justified in allowing the respondent's (Judgment Debtor's) appeal and thereby was justified in holding that the Execution Petition filed by the appellant (5655/2016) was not maintainable for want of formal decree not being drawn up by the Court after passing of the order dated 01.06.2012.

22. Heard Mr. Huzefa Ahmadi, learned senior counsel, for the appellant and Ms. Aishwarya Bhati, learned senior counsel, for the respondent.

23. Having heard the learned senior counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal, set aside the impugned order and restore the order of the Trial Court with modification as indicated below.

24. In our opinion, the High Court was not right in holding that in the absence of a formal decree not being drawn or/and filed, the appellant (decree holder) had no right to file the Execution petition on the strength of the consent order dated 01.06.2012. This finding of the High Court, in our view, is not legally sustainable for the reasons set out hereinbelow.

25. The issue in this case is required to be decided in the light of Order 20 Rule 6, Order 20 Rule 6A, Order 20 Rule 7, Order 21 Rules 11(2) & (3) and Order 23 Rule 3 of the Code. These provisions read as under:

"Order 20 Rule 6

Contents of decree. (1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, their registered addresses, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

Order 20 Rule 6A

Preparation of decree. (1) Every endeavour shall be made to ensure that the decree is drawn up as expeditiously as possible, and, in any case, within fifteen days from the date on which the judgment is pronounced.

(2) An appeal may be preferred against the decree without filing a copy of the decree and in such a case the copy made available to the party by the Court shall, for the purposes of rule 1 of Order XLI, be treated as the decree. But as soon as the decree is drawn, the judgment shall cease to have the effect of a decree for the purposes of execution or for any other purpose.

Order 20 Rule 7

Date of decree- The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

Order 21 Rule 11(2)

Written application-Save as otherwise provided by sub-rule(1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely-

(a) the number of the suit;

(b) the names of the parties;

(c) the date of the decree;

(d) whether any appeal has been preferred from the decree;

(e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;

(f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;

(g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;

(h) the amount of the costs (if any) awarded;

(i) the name of the person against whom execution of the decree is sought; and (j) the mode in which the assistance of the Court is required whether-

(i) by the delivery of any property specifically decreed;

[(ii) by the attachment, or by the attachment and sale, or by the sale without attachment, of any property;

(iii) by the arrest and detention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise, as the nature of the relief granted may require.

Order 21 Rule 11 (3)

The Court to which an application is made under sub-rule (2) may require the applicant

to produce a certified copy of the decree.

Order 23 Rule 3

Compromise of suit- Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit."

26. Order 20 Rule 6 of the Code deals with contents of decree and provides that the decree shall agree with the judgment, it shall contain the number of the suit, the names and descriptions of the parties, their registered addresses and particulars of claim, relief granted or any other determination made in the suit, amount of costs incurred in the suit, and by whom or out of what property and in what proportions, the cost to be paid. Rule 6A deals with the preparation of decree. It says that every endeavor shall be made to ensure that the decree is drawn up as expeditiously as possible and, in any case, within fifteen days from the date on which the judgment is pronounced. Rule 6A (2) of Order 20 of the Code says that an appeal may be preferred against the decree without filing a copy of the decree and in such a case the copy made available to the party by the Court shall for the purposes of Rule 1 of Order 41 be treated as the decree but as soon as the decree is drawn, the judgment shall cease to have the effect of a decree for the purposes of execution or for any other purpose.

27. In our considered opinion, though Rule 6A (2) of Order 20 of the Code deals with the filing of the appeal without enclosing the copy of the decree along with the judgment and further provides the consequence of not drawing up the decree yet, in our opinion, the principle underlined in Rule 6A(2) can be made applicable also to filing of the execution application under Order 21 Rule 2 of the Code.

28. Order 20 Rule 7 deals with the date of decree. It says that the decree shall bear date the day on which the judgment was pronounced and when the judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

29. Order 21 Rule 11(2) of the Code, which deals with the execution of the decree, provides that the decree holder is only required to give details of the judgment and the decree in the execution application along with other details [see clauses (a) to (j)].

30. Similarly, Order 21 Rule 11(3) of the Code makes it clear that the Court "may" require the decree holder to produce a certified copy of the decree. This clearly indicates that it is not necessary to file a copy of the decree along with execution application unless the Court directs the decree holder to file a certified copy of the decree.

31. The aforesaid discussion, therefore, leads us to a conclusion that as and when

the decree holder files an application for execution of any decree, he is required to ensure compliance of three things.

32. First, the written application filed under Order 21 Rules 10 and 11 (2) of the Code must be duly signed and verified by the applicant or any person, who is acquainted with the facts of the case, to the satisfaction of the Court; Second, the application must contain the details, which are specified in clauses (a) to (j) of Rule 11(2) of the Code, which include mentioning of the date of the judgment and the decree; and Third, filing of the certified copy of the decree, if the Court requires the decree holder to file it under Order 21 Rule 11(3) of the Code.

33. This takes us to deal with next point urged by the learned senior counsel for the appellant. According to learned counsel, the order dated 01.06.2012 itself is capable of being executable by virtue of Section 36 of the Code and, therefore, the High Court was not right in holding that the decree was required to be drawn.

34. The argument is not acceptable for more than one reason. True it is that there are some orders, which are in the nature of decree and thus capable of being executed as such but the question, which arises for consideration in this case, is whether the order passed under Order 23 Rule 3 of the Code is such an order. In our opinion, it is not.

35. First, the language of Order 23 Rule 3 of the Code does not admit passing of an order of the nature urged by the learned senior counsel for appellant; Second, the expression "the court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith" occurring in Order 23 Rule 3 of the Code, in clear terms, suggests that it is necessary after recording the compromise in the order to further pass a decree in accordance therewith.

36. In other words, the expression "and shall pass a decree in accordance therewith" is a clear indication that after the compromise is recorded by the Court, it shall proceed to "pass a decree". So, the rule contemplates, first an order recording of the compromise and then simultaneously pass a decree in accordance with the order.

37. In the light of the clear language of Order 23 Rule 3 of the Code, it is not possible to accept the submission of learned senior counsel for the appellant that the order dated 01.06.2012 itself amounts to a decree and, therefore, it is not necessary for the Court to pass a decree. Had this been the intention, the legislature would not have used the expression "and shall pass a decree in accordance therewith" in Order 23 Rule 3 of the Code.

38. This takes us to examine the next question though not decided by the High Court on merits.

39. As mentioned above, the Executing Court dismissed the applications filed by the respondent with a cost of Rs. 5 lakhs which resulted in issuance of warrant of possession of the suit house. The High Court, by impugned order, set aside the order of the Executing Court and dismissed the execution application as being not maintainable. The High Court, however, did not then consider it necessary to examine the question as to whether the Executing Court was right in rejecting the respondent's

applications.

40. We have, therefore, perused the order of the Executing Court. Having perused it, we are of the considered view that the Executing Court was right in rejecting the objections raised by the respondent in his applications and, therefore, find no good ground to interfere in those findings of the Executing Court.

41. In our view, all the objections raised by the respondent were frivolous and were raised only with a view to avoid execution of the compromise decree. None of the objections raised by the respondent could be gone into after consent order had been passed. In any event, none of the objections raised by the respondent had any substance on merits and were, therefore, rightly rejected by the Executing Court to which we concur. In our view, the respondent having taken time twice to vacate the suit house and yet not adhering to the undertaking given, this Court cannot countenance such conduct of the respondent. It is reprehensible.

42. This takes us to examine the next question, namely, what is the effect of not filing the copy of the decree along with the execution application filed by the appellant. In our view, even though the appellant did not file the certified copy of the decree along with the execution application for the reason that the same was not passed by the Court, yet the execution application filed by the appellant, in our view, was maintainable. Indeed, so long as the formal decree was not passed, the order dated 01.06.2012 was to be treated as a decree during the interregnum period by virtue of Order 20 Rule 6A (2) of the Code. In other words, notwithstanding the fact that the decree had not been passed, yet by virtue of principle underlined in Order 20 Rule 6A(2) of the Code, the order dated 01.06.2012 had the effect of a decree till the date of actual passing of the decree by the Court for the purposes of execution or for any other purpose. This empowered the Executing Court to entertain the execution application and decide the objections raised by the respondent on merits.

43. This takes us to examine the last point as to whether the High Court was justified in directing the appellant to apply under Section 152 of the Code for drawing a decree.

44. In our opinion, though the High Court was right in directing the appellant to apply to the Court for drawing a decree, but was not right in directing to apply under Section 152 of the Code.

45. Section 152 of the Code deals with the amendment of judgments, decrees or orders. It provides that any clerical or arithmetical mistakes in the judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties. Order 20 Rule 3 also provides that judgment can be altered or added either under Section 152 or in review.

46. In our opinion, in order to invoke the powers under Section 152 of the Code, two conditions must be present. First, there has to be a judgment or decree or an order, as the case may be, and second, the judgment or decree or order, as the case may be, must contain any clerical or

arithmetical error for its rectification. In other words, Section 152 of the Code contemplates that the Court has passed the judgment, decree or the order and the same contains clerical or arithmetical error.

47. Any party to such judgment, decree or order, as the case may be, has a right to apply at any time under Section 152 of the Code to the concerned Court for rectification of any arithmetical or/and clerical error in the judgment, decree or the order, as the case may be.

48. In the case at hand, we find that the Court, which disposed of the suit, did not draw the decree but only passed the order. In such a situation, the decree holder was required to file an application under Section 151 read with Order 20 Rule 6A of the Code to the Court for drawing a decree in accordance with the order dated 01.06.2012. Indeed, we find in the concluding para of the order dated 01.06.2018 that the Court has already directed to ensure compliance of the formalities. It would have been, therefore, proper in such circumstances for the Court to simultaneously draw a decree the same day itself or in any event within 15 days as provided in Order 20 Rule 6A.

49. Be that as it may, this being a procedural matter, even if it was not done, yet the same could be done by the Court at the instance of the appellant (decree holder) applying for drawing up a decree after filing of the execution application.

50. This takes us to examine the last question as to whether the Executing Court was right in imposing a cost of Rs.5 lakhs on the respondent for filing applications raising therein frivolous objections to avoid execution of the decree against them. As mentioned above, the Executing Court while rejecting the respondent's objection imposed a compensatory cost of Rs.5 lakhs on the respondent. In our view, though we find that it is a fit case for imposition of cost but imposition of cost of Rs.5 Lakhs is excessive.

51. Having regard to all facts and circumstances of the case which we have discussed above, we consider it just and proper to impose a compensatory cost of Rs. 50,000/- on the respondent under Section 35-A of the Code. Let it be paid by the respondent to the appellant within one month from the date of this order.

52. We are, therefore, of the considered opinion that the High Court was not right in holding that the execution petition itself is not maintainable. The High Court though was right in directing the appellant to apply to the concerned Court for drawing up a decree but the High Court was not right in directing the appellant to apply it under Section 152 of the Code.

53. In view of the foregoing discussion, we hold that the execution petition filed by the appellant is maintainable and was, therefore, rightly allowed by the Executing Court by rejecting the objections raised by the respondent except with two modifications indicated above.

54. The appellant is hereby granted two weeks' time to apply under Section 151 read with Order 20 Rule 6(A) of the Code to the concerned Court with a prayer for passing a decree in accordance with the order dated 01.06.2012 passed under Order 23 Rule 3 of the Code. In the peculiar circumstance of this case, we would expect the Court concerned to pass and draw the

decree without any delay and, in any case, within one week of moving of the application by the appellant. It is also made clear that such act of passing and drawing up the decree being formal in nature, no objection or dispute in that regard is to be entertained by any Court. Once the decree is drawn and its details are specified in the execution application as provided under Order 21 Rule 11 (2)(c) and the certified copy of the decree is filed, if required by the Court, in terms of Order 21 Rule 11(3) of the Code, the order of the Executing Court dated 22.10.2018 with the above modification regarding payment of costs amount will be given effect to against the respondent.

55. Let the aforementioned procedural proceedings be completed within the time framed by the concerned Court. The respondent is, however, granted one month's time to vacate the suit house after completion of the procedural formalities by the concerned Court after making payment of all arrears of rent till the date of delivery of possession of suit house to the appellant.

56. In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. The impugned order is set aside whereas the order of the Executing Court is modified to the extent indicated above.

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## 2019 (2) L.S. 140 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Ashok Bhushan &
The Hon'ble Mr.Justice
Navin Sinha

Sudin Dilip Talaulikar ..Appellant
Vs.
Polycap Wires Pvt.
Ltd. & Ors., ..Respondents

**CIVIL PROCEDURE CODE,Or. XXXVII – Appellant was aggrieved by grant of conditional leave to defend in Summary Suit filed against him, by Respondent for recovery of amount.**

**Held - Respondent had option to institute summary suit at very inception of dispute - But consciously opted for prosecution under the Act which undoubtedly was more efficacious remedy for recovery of any specified amount of dishonoured instrument raising presumption against drawer – Defence raised by Appellant was certainly not sham or moonshine much less frivolous or vexatious and neither could it be called improbable - Appellant had raised substantial defence and genuine triable issues – Fact that there may have been commercial relations between parties was ground for institution of summary suit but could not per se be justification**

**for grant of conditional leave sans proper consideration of defence from materials on record - Thus, there was no justification to grant conditional leave to defend - Impugned orders granting conditional leave to defend were set aside and Appellant was granted unconditional leave to defend – Appeal stands allowed.**

**J U D G M E N T**

(per the Hon'ble Mr.Justice Navin Sinha )

Leave granted.

2. The appellant is aggrieved by grant of conditional leave to defend in Summary Suit No. 1289 of 2015 filed against him, by the respondent under Order XXXVII of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") for recovery of Rs.64,18,609/, inclusive of interest.

3. Learned counsel for the appellant submitted that under the Second Proviso to sub-Rule 5 of Rule 3 of Order XXXVII of the Code, the condition for deposit of Rs.30,00,000/could not have been ordered in absence of any admissible dues. The fact that there may have been a commercial transaction between the parties in the past, cannot ipso facto be construed as an admission of debt merely because the respondent may have so claimed in the suit. The respondent had unconditionally withdrawn the prosecution instituted by him earlier under Section 138 of Negotiable Instruments Act (hereinafter referred to as "the Act"), for the same dues. All legitimate dues have been paid. The defective goods were returned, the balance of five lacs was also paid, and the accounts cleared, after which no further transactions had taken place between the parties. Reliance was placed on IDBI Trusteeship Services Limited vs. Hubtown Limited, 2017(1) SCC 568.

4. Learned counsel for the respondent submitted that the summary suit had been instituted for recovery of outstanding dues with regard to goods supplied to the appellant. It was for the appellant to demonstrate that he had paid for goods. The impugned orders notice that the appellant had placed no documentary evidence in his reply. The reference to the admitted commercial transaction between the parties has been made in that context. The withdrawal of the criminal prosecution was irrelevant. It was no bar to the maintainability of the summary suit. It is for the appellant to prove during the trial of the suit that he had in fact paid for the goods as claimed. The impugned orders are based on sound exercise of discretion in the facts of the case and merit no interference.

5. A brief recapitulation of facts would bring the matter in proper perspective for appreciation of issues involved. The respondent supplied electrical cables and wires to the appellant between 09.05.2010 to 03.06.2011. Acknowledging some payments they claimed outstanding dues of Rs.34,24,633/. Likewise, for supplies between 01.04.2010 to 10.03.2011 they claimed dues of Rs.1,88,377/. A notice was given to the appellant under Section 138(b) of the Act after the cheques dated 01.03.2014 and 01.03.2014 were

dishonored, as the account was blocked. The respondent then instituted a prosecution under Section 138 read with Section 142 of the Act lodged for Rs.34,24,633/on 30.04.2014 with regard to the former instrument and on 01.08.2014 with regard to the latter instrument. Different dates have been mentioned in different documents placed before us.

6. While the prosecution under the Act was pending, the respondent instituted the present summary suit on 24.11.2015 for a cumulative sum of Rs.36,13,410/, being the total amount of two dishonored instruments, with an additional claim for Rs.28,05,199/ as interest at the rate of 18% per annum amounting to a total of Rs.64,18,609/. The Suit expressly referred to the pendency of the prosecution under the Act.

7. In Summons for Judgment No. 105 of 2016 dated 16.03.2016, in the summary suit the respondent relied upon the extracts of accounts of the appellant to support its claim for unpaid dues. The prosecutions under the Act were withdrawn on 14.12.2015. The order withdrawing the prosecution under the Act is unconditional in nature and is a suomoto action.

8. The appellant in its defence to the summons for judgment relied upon the institution of the prosecution under the Act prior to the suit and its unconditional withdrawal to contend that there were in fact no dues payable. The appellant further relied upon an order dated 29.10.2015 passed in the prosecution under the Act requiring the respondent to produce certain original documents materials to the complaint and only subsequent to which, without producing the said documents the prosecution under the Act was unconditionally withdrawn. Denying any dealings with the respondents after 2011, the appellant questioned that there was no occasion for it to issue a cheque in the year 2014 for any alleged dues of the year 2011. It was further contended that different inks had been used in the instruments for the signatures and its contents. Defective goods on the consignment had been returned and the balance of Rs.5,00,000/paid, facts which were not disputed by the respondent.

9. The Civil Judge by order dated 20.07.2017 recorded the satisfaction of a triable defence but granted conditional leave to defend with an unreasoned finding based on the existence of a commercial relationship between the parties. The High Court acknowledged that there was no admission by appellant about its liability to repay any amount, but because the appellant had not disputed a commercial relationship and purchase of goods from the respondent, and in absence of any material to show sufficient payment, the order for conditional leave to defend required no interference.

10. Order XXXVII, Rule 3 of the Code dealing with the procedure for summary suit, in the relevant extract provides as follows:

"3. Procedure for the appearance of defendant

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(4) if the defendant enters an appearance, the plaintiff shall thereafter serve on the

defendant a summons for judgment in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

XXXXX

11. In a summary suit, if the defendant discloses such facts of a prima facie fair and reasonable defence, the court may grant unconditional leave to defend. This naturally concerns the subjective satisfaction of the court on basis of the materials that may be placed before it. However, in an appropriate case, if the court is satisfied of a plausible or probable defence and which defence is not considered a sham or moonshine, but yet leaving certain doubts in the mind of the court, it may grant conditional leave to defend. In contradistinction to the earlier subjective satisfaction of the court, in the latter case there is an element of discretion vested in the court. Such discretion is not absolute but has to be judiciously exercised tempered with what is just and proper in the facts of a particular case. The ultimate object of a summary suit is expeditious disposal of a commercial dispute. The discretion vested in the court therefore requires it to maintain the delicate balance between the respective rights and contentions by not passing an order which may ultimately end up impeding the speedy resolution of the dispute.

12. The controversy in the facts of the present case is therefore not with regard to any dues admitted by the appellant or not, and the requirement to deposit the same. The issue for adjudication is whether on basis of the materials on record, whether their has been just and proper exercise of the discretion to grant conditional leave to defend by deposit of Rs.30,00,000/after consideration of all material and relevant factors.

13. In Hubtown Limited (supra), this court has laid down the principles which should guide exercise of such discretion as follows :

"…17.1. If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.

17.2. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.

17.3. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

17.4. If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5. If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.

17.6. If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

14. In our opinion, both the Civil Judge and the High Court have posed unto themselves the wrong question and have therefore misdirected themselves in application of the above principles by granting conditional leave to defend without properly adverting and referring to the facts of the case and the materials on record. The fact that there was commercial dealing between the parties was not in issue at all. According to the plaint of the respondent, commercial dealings between the parties ended on 03.06.2011. It stands to reason why outstanding payment in respect of the same came to be made by cheque as late as 01.03.2014. It does not appeal to logic or reason much less to the usual practice in commercial dealings. In any event the respondent has not furnished any explanation with regard to the same. At this stage it becomes necessary to notice the contention of the appellant that the signatures and the contents of the cheques are in different writings. The respondent had the option to institute a summary suit at the very inception of the dispute. But it

consciously opted for a prosecution under the Act which undoubtedly was a more efficacious remedy for recovery of any specified amount of a dishonoured instrument raising a presumption against the drawer, as in a summary suit the possibility of leave to defend could not be completely ruled out, in which case the recovery gets delayed and protracted.

15. Significantly on 29.10.2015, in the prosecution instituted by the respondent under the Act, the court required the respondent to file certain additional documents because the appellant denied the existence of any legal liability for any sum due. It is only thereafter that the Summary Suit was instituted on 24.11.2015. The prosecution under the Act was subsequently unconditionally withdrawn on 14.12.2015. These facts are not in dispute and are clearly discernible from the records. This coupled with the specific contention of the appellant, not denied by the respondent, that it had returned defective goods and paid the balance dues of Rs.5,00,000/, we find the conclusion to grant leave to defend as perfectly justified.

16. But the defence raised by the appellant in the aforesaid background was certainly not a sham or a moonshine much less frivolous or vexatious and neither can it be called improbable. The appellant had raised a substantial defence and genuine triable issues. The failure both by the Trial Judge and the High Court to notice and consider the aforesaid issues as discussed by us hereinbefore leaves us satisfied that there was no justification to grant conditional leave to defend. The fact that there may have been commercial relations between the parties was the ground for the institution of the summary suit but could not per se be the justification for grant of conditional leave sans proper consideration of the defence from the materials on record.

17. In the result, the impugned orders granting conditional leave to defend are held to be unsustainable and are set aside. The appellant is granted unconditional leave to defend.

18. The appeal is allowed

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## 2019 (2) L.S. 145 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Ms.Justice
Indira Banerjee &
The Hon'ble Mr.Justice
Ajay Rastogi

State of Rajasthan ..Appellant

Vs.

Mahesh Kumar
@ Mahesh Dhaulpuria
& Anr., ..Respondents

**INDIAN PENAL CODE, Secs.302, 201 r/w Sec.34 - Appeal by the prosecution assailing the judgment of the High Court acquitting the respondents charged for the offences under Sections 302, 201 read with**

**Section 34 IPC - High Court in its impugned judgment recorded a finding that the chain of circumstantial evidence produced by the prosecution is very doubtful and not reliable at all.**

**Held - Prosecution has failed to complete the chain of events leaving any reasonable ground for the conclusion consistent with all human probability that the act must have been done only by the respondents - We find that the High Court in its impugned judgment has elaborately considered the circumstantial evidence which has been adduced by the prosecution and arrived to the conclusion that many important and relevant witnesses have not been produced by the prosecution - Judgment of the High Court requires no interference – Appeal stands dismissed.**

**J U D G M E N T**

(per the Hon'ble Mr.Justice Ajay Rastogi )

These appeals have been filed by the prosecution assailing the judgment of the High Court of Rajasthan dated 3rd January, 2012 acquitting the respondents charged for the offences under Sections 302, 201 read with Section 34 IPC.

2. As per case of the prosecution, on 19th October, 2002 in the morning at 12.30 p.m., the informant Abdul Haq gave a written report that in the intervening night of 18th and 19th October, 2002, while he was sleeping in his railway quarter situated at Borkheda Culvert near the railway line, Kota at about 12.05 a.m., one Madan Bheel and Parmanand Bheel came to his quarter and woke him up and stated that the dead body of one unknown person was lying beneath the culvert at 916/8.10 km of the railway line, Kota (Rajasthan). Thereupon, he reached there and saw that dead body had injuries on its head, mouth and face. On inquiry, Smt. Saroti Bai Bheel disclosed that sometime before she woke up for urinating, she saw two-three persons coming by an auto rikshaw, who had placed the said body on the railway line and had gone away. One person who was standing there revealed that the said dead body was of Bajranglal, retired Constable. From the facts of the report made by informant Abdul Haq, the Police Station Incharge reached at the spot and found an offence under Sections 302, 201 read with Section 34 IPC. This report was sent with Shri Fazlur Rehman, Head Constable for registering a case to Police Station Nayapura, Kota.

3. Crime No. 679/02 was registered by the Head Constable and First Information Report was sent to the Police Station In-charge. Thereafter, the investigation was done and charge-sheet was submitted against the respondents Mahesh Kumar, Dinu @ Deendayal and Bhaiya @ Devkaran in the Court of Magistrate. Learned Magistrate handed over the case to the Sessions Court, Kota from where it was transferred to the Court of Additional Sessions Judge, No. 2, Fast Track, Kota.

4. The prosecution in support thereof produced 25 witnesses and got exhibited Exhibit P-1 to P-45 in its documentary evidence. Thereafter, the statements of the

respondents were recorded under Section 313 of Code of Criminal Procedure, 1973. In defence, DW-1 Rajendra Singh was produced and the statements of prosecution witnesses Pratap and Bhupendra recorded under Section 161 of Code of Criminal Procedure, 1973 were relied as Exhibit D-1 and D-2.

5. The learned Sessions Judge, based on the material available on record, held all the respondents guilty under Sections 302, 201 read with Section 34 IPC and sentenced them to undergo imprisonment for life along with fine, which came to be challenged by the respondents in Appeal under Section 374 of the Code of Criminal Procedure, 1973 before the Division Bench of the High Court of Rajasthan, Jaipur Bench, Jaipur.

6. On appraisal of the records, the High Court in its impugned judgment dated 3rd January, 2012 recorded a finding that the chain of circumstantial evidence produced by the prosecution is very doubtful, contradictory and not reliable at all. At the same time, it was also observed that most of the prosecution witnesses were declared hostile and many important and relevant witnesses without any reason has not been produced by the prosecution.

7. Dayaram and Gulab, who identified the dead body of the deceased Bajranglal and who lifted the dead body from the railway track and kept in side have not been produced. The Samdhi of deceased Bajranglal and Brijgopal, father of PW-5 Rajeshbai were not produced. That apart, the witnesses alleging the reason for murder Surendrasingh, Ramgopal, Ramswarup, Girraj Gupta, Premchand and Shyambabu were not produced. The motive of the incident which is allegedly the illicit relation of Sulochana and respondent-Mahesh, the said Sulochana has not been produced as prosecution witness. The witnesses of MemosExhibit P-13, P-15, P-41, etc. Dilipsingh have not been produced. Witness Hemraj of Memos Exhibit P-30, P-35 and P-36 and witnesses Manoj, Vijay of Memo Exhibit P-41 have not been produced. Fazlur Rahman, Police Head Constable who took the written report Exhibit P-24 and gone to the Police Station and on his written report, FIR was registered, has not been produced. The aunt of Ramesh who along with PW-2 Narendra is alleged to have gone to Rajesh has not been produced. The witness of Exhibit P-20 Bharatram, Rais Mohammad, Surendrasingh and Brijgopal have not been produced. The witness Balak @ Mansingh and Imam of the Memo of Arrest of the accused Exhibit P-26, P-27, P-28 and P-32 have not been produced.

8. It has further been observed that the prosecution failed to tender any justification that all the three respondents were arrested on 19thOctober, 2002 at 11.30 p.m. but why proceedings of the recoveries were undertaken after gap of 3 to 10 days, i.e., on 23rd, 25th, 26th and 29thOctober, 2002. It has also been pointed out by the High Court that the Investigating Officer in his statement has recorded that no blood marks were found in the auto, which could not establish that the auto asalleged was carrying the body of deceased to the railway line. PW-1 Madan Bheel and PW-4 Parmanand Bheel were declared hostile and PW-5 Smt. Rajeshbai, daughter-in-law of

the deceased, in cross-examination, deposed that whatever she had told earlier with respect to the incident was hearsay and has not supported the prosecution.

9. It reveals from the record that most of the prosecution witnesses have been declared hostile and the statement of witnesses produced suffer from serious material contradictions. In the light of statements of prosecution witnesses suffering from material deficiencies, the High Court arrived at the conclusion that the circumstantial evidence produced by the prosecution appears to be doubtful, contradictory and is not safe to rely upon and acquitted the respondents from charge under Section 302, 201 IPC and released them from judicial custody under its impugned judgment dated 3rd January, 2012.

10. It is well settled that in the cases of circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of guilt of the accused. The circumstances should be of a conclusive nature and should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a complete chain of evidence as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused and none else.

11. The enunciation of law pertaining to circumstantial evidence, its relevance and decisiveness, as a proof of charge of a criminal offence, is amongst others traceable decision of this Court in Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116. The relevant excerpts from para 153 of the decision is assuredly apposite:-

" 153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not"may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade & Anr. vs. State of Maharashtra (1973) 2 SCC 793 where the observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

12. It has been further relied by this Court in Sujit Biswas vs. State of Assam, 2013(12) SCC 406 and Raja alias Rajinder vs. State of Haryana 2015(11) SCC 43 and has been propounded that while scrutinising the circumstantial evidence, it is the duty of the Court to evaluate it to ensure the chain of events clearly established and completely to rule out any reasonable likelihood of innocence of the accused. It is true that the underlying principle whether the chain is complete or not, indeed would depend on the facts of each case emanating from the evidence and there cannot be a straitjacket formula which can be laid down for the purpose. It is always to be kept in mind that the circumstances adduced when considered collectively, must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused.

13. On analysis of the overall fact situation, we find that the High Court in its impugned judgment has elaborately considered the circumstantial evidence which has been adduced by the prosecution and arrived to the conclusion that many important and relevant witnesses have not been produced by the prosecution on which a detailed reference has been made in para 23 of the impugned judgment which we consider it appropriate to quote:-

"23. It has also to be mentioned that in the case many important and relevant witnesses the prosecution has not produced. As has been mentioned above that the dead body of the deceased at which place has been found, that the person who identified it has the dead body of Bajranglal there has not been produced. Dayaram and Gulab who lifted the dead body from the railway track and kept in side those Dayaram and Gulab also have not been produced. According to P.W.5 Rajeshbhai Rameshchand to her and her father gave information of the death of her father-in-law Bajranglal, this Ramesh has not been produced. The Samdhi of deceased Bajranglal and Brijgopal, father of P.W. 5 Rajeshbai have not been produced who are also the witnesses of Exhibit P. 20, P.21 and P.25 Memos. According to prosecution the witnesses alleging the reason for murder Surendrasingh, Ramgopal, Ramswarup, Girraj Gupta, Premchand and Shyambabu have not been produced. The owner of the Auto Rickshaw Sobhagsingh has not been produced. The motive of the incident, which relation of Sulochana and Mahesh has been alleged that Sulochana has not been produced. The witnesses of Memos Exhibit P. 13, P. 15, P.41 etc. Dilipsingh has not

been produced. Witness Hemraj of Memos Exhibit P.30, P.35 and P.36 an witness Manoj Vijay of Memo Exhibit P.41 have not been produced. That Fazlur Rahman Police Head Constable also has not been produced who taking written report Exhibit P. 24 had gone to the police station and on this getting written the F.I.R. Exhibit P.44 and taking that had come back to S.H.O. at the site. P.W.2 Narendra taking with him the aunt of Ramesh is alleged to have gone to Rajesh. This aunt of Ramesh has not been produced. Witness Madrasi, Bhoorsingh, Shambhusingh Kaushi etc. shown in the site plan Exhibit P. 25 the dead body lying have not been produced. The witness of Exhibit P.20 Bharatram, Rais Mohammad, Surendrasingh and Brijgopal have not been produced. The witness Balak @ Mansingh and Imam of the Memo of arrest of the accused Exhibit P.26, P.27, P.28 and P.32 have not been produced."

14. After hearing learned counsel for the parties and after perusal of the impugned judgment and material of the case on record, we are of the considered view that the prosecution has failed to complete the chain of events leaving any reasonable ground for the conclusion consistent with all human probability that the act must have been done only by the respondents.

15. We find no error being committed by the High Court in arriving to the conclusion as aforesaid noticed by us in the impugned judgment dated 3rd January, 2012.

16. Consequently, both the appeals are wholly devoid of merit and accordingly dismissed.

17. Pending application(s), if any, also stand disposed of.

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## 2019 (2) L.S. 150 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
A.M.Khanwlkar &
The Hon'ble Mr.Justice
Ajay Rastogi

Pratap Singh
@ Pikki ..Appellant

Vs.

State of Uttarakhand ..Respondent

**INDIAN PENAL CODE, Secs. 147, 148, 302/149 and 323/149 – Appellant/ Accused no. 1) along with three others tried for an offence under Sections 147, 148, 302/149 and 323/149 of the IPC - Appellant and one VikasKirola were convicted under Section 304 Part II/34 IPC and sentenced to undergo rigorous imprisonment for 10 years while other two accused were acquitted.**

**Held - A court, while imposing sentence, has to keep in view the various complex matters in mind - To structure a methodology relating to sentencing is difficult to conceive of - Considering the tender age of Appellant at the time of offence, subsequent conduct and other ancillary circumstances, including**

**that no untoward incident has been reported against him and the mitigating circumstances, it is appropriate that in the obtaining factual score, the sentence of rigorous imprisonment be altered to the period already undergone for offence under Section 304 Part II/34 IPC, to meet the ends of justice - Appealstands partly allowed.**

**J U D G M E N T**

(per the Hon'ble Mr.Justice Ajay Rastogi )

1. The appellant(accused no. 1) along with three others tried for an offence under Sections 147, 148, 302/149 and 323/149 of the Indian Penal Code(hereinafter being referred to as "IPC"). The appellant and one Vikas Kirola were convicted under Section 304 Part II/34 IPC and sentenced to undergo rigorous imprisonment for 10 years and other two persons Manoj Singh Rautela and Deepak Pathak were acquitted vide judgment dated 12th January, 1998.

2. Both the unsuccessful convicted persons preferred criminal appeal against the judgment dated 12th January, 1998 before the High Court of Uttarakhand. In the case of appellant, the High Court observed that according to his marksheet of Secondary School Certificate Examination 1993, his date of birth is 13th June, 1977 while the incident was of 18th June, 1995 and he was not a juvenile on the date of the incident. At the same time, Vikas Kirola, whose date of birth was 26th December, 1977 on the basis of his secondary school certificate was given the benefit of Juvenile in view of Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 and their conviction under Section 304 Part II/ 34 IPC came to be confirmed vide impugned judgment of the High Court dated 9th November, 2010 which has been challenged by the appellant in the instant appeal.

3. The facts in brief which are essential to be stated for adjudication of this appeal are that complainant Mukesh Sah(PW1) lodged FIR stating interalia that on 18th June, 1995, his cousin brother Rajesh Sah had gone to see Jagjit Singh night at Mallital, Nainital. At about 10.30 PM, Manoj Joshi, friend of Rajesh Sah, had come and informed that some boys had committed Marpit with his brother(Rajesh Sah) near the flat and his situation was serious and was admitted to B.D. Pandey Hospital. On this information, the complainant immediately rushed to B.D. Pandey Hospital and saw that his brother Rajesh was in operation theatre. When his brother was brought out, he was unconscious and after some time at about 12.25 AM, he succumbed to his injuries. He also came to know that in the Marpit committed with his brother, Harshwardhan Verma, Sanjay Goswami and Deepak Verma also sustained injuries. He further came to know that in Jagjit Singh night, his brother(Rajesh Sah) along with Harshvardhan Verma, Deepak Verma, Pankaj Verma, Sanjay Goswami and Tanmay Tiwari @ Fatty were there and on their next row, some girls were sitting to whom some boys were passing indecent remarks. Complainant's brother Rajesh

stopped those boys not to do so, on which one of those boys slapped Rajesh and gone from there by threatening to see him. When Jagjit Singh night was going to end and the people were coming out of it, Rajesh Sah along with his friends proceeded towards his house and near the fountain at about 10.00 PM in the night, 56 boys assaulted Rajesh by lathisdandas. After sustaining injuries, Rajesh fell down on the earth but even then, those persons continued beating him. Some of the companions of Rajesh, namely, Harshvardhan Verma, Deepak Verma and others tried to intervene, who too sustained injuries. Injured Rajesh was then immediately brought to B.D. Pandey Hospital. The persons accompanying Rajesh informed the names of accused as Pratap Singh Bisht, Vikas Kirola, one Pathak and also about 23 other boys, however, their names were not known.

4. On the said complaint, FIR (Exhibit Ka1) was lodged by PW1 Mukesh Sah on 19th June, 1995 at 1.20 AM at P.S. Mallital, Distt. Nainital. Injured Rajesh Sah was primarily medically examined on 18th June, 1995 at 10.10 PM by PW5 Dr. Rajeev Kumar, who after the examination, prepared injury report (Exhibit Ka3). Similarly injured Harshvardhan Verma was examined at 1.10 AM on 19th June, 1995 and his injury report (Exhibit Ka4) was prepared. Injured Sanjay Goswami was examined on 19th June, 1995 at 1.15 AM and his injury report (Exhibit Ka5) was prepared. Likewise, injured Deepak Verma was examined on 19th June, 1995 at 1.20 AM and his injury report (Exhibit Ka6) was also prepared by the same medical officer. In the intervening night of 18th/19th June, 1995 at about 12.30 AM, injured Rajesh Sah succumbed to his injuries and autopsy on the dead body was conducted on 19th June, 1995 at 11.45 AM and postmortem report (Exhibit Ka2) was prepared by PW4 Dr. J.P. Bhatt. On 19th June, 1995, inquest of his dead body was conducted by the I.O. and inquest report (Exhibit Ka8) was prepared. The Investigating Officer during the course of investigation, recorded the statements of the witnesses and on completing the investigation, he filed the charge sheet (Exhibit Ka14).

5. The following injuries were found on the body of the deceased:

1. Traumatic Swelling present over left tempora – parieto – occpital region size 15 cm X 12 cm. On cutting clotted blood present in the subcut tissues.

2. Stitched wound size 5 cm long on left side parietal region 3 cm away from midline. On cutting clotted blood present in the subcutaneous tissues.

3. Stitched wound size 4.5 cm long on left side parietal region, 1 cm medial and posterior to injury no. 2.

4. Stitched wound 7 cm long on left side on parieto occipital region 1 cm medial and posterior to injury no. 3.

5. Lacerated wound size 7 cm X 1 cm X bone deep present over left parietooccipital

region 10 cm above and posterior to upper brain of left pinna of ear. Underlying bone is fractural, Dark coloured blood is coming out on removing the guaze packing. On cutting injury no. 3, 4 and 5, clotted blood present in the subcutaneous tissues. Injury no. 2 to 5 are present over injury no. 1. All the injuries abovementioned are dressed and bandaged.

6. Lacerated wound 1 cm X .3 cm X bone deep on the occipital bone over skull (Top of Skull) present slightly right of midline. On cut, clotted blood is present in the subcutaneous tissues.

7. Abrasion 1.5 cm X .5 cm present obliquely downwards on the right side face 1 cm below outer aspect of right eye. On cutting clotted blood is present in the subcutaneous tissues.

8. Contusion 6 cm X 4 cm on the dorsum of left hand with a lacerated wound 2.5 cm X 1 cm X muscle deep just above 2nd knuckle and two abrasions of .5 cm X .5 cm each on the lateral aspect of the contusion. On cutting clotted blood is present in the subcutaneous tissues.

9. Abraded contusion 12 cm X 6 cm over back of left upper arm in its middle portion. On cutting, clotted blood is present.

10. Abraded contusion 6 cm X 4 cm on the front of left side of chest 6 cm below left nipple at 5 o' clock position. On cutting clotted blood present in the subcutaneous tissues.

11. Abraded contusion 2 cm X 1 cm on the back in the lower region 1 cm to the left of midline. On cutting clotted blood is present on the subcutaneous tissues.

6. After receiving the charge sheet, CJM, Nainital committed the case to the Court of Sessions after giving necessary copies to the accused persons as required under Section 207 CrPC. Charges were framed against the appellant along with other persons under Sections 147,148, 302/149 and 323/149 IPC.

7. The prosecution of the case examined PW1 Mukesh Sah(complainant), PW2 Sanjay Goswami (injured eyewitness), PW 3 Harshvardhan Verma (injured eyewitness), PW 4 Dr. J.P. Bhatt, Radiologist who conducted the post mortem, PW 5 Dr. Rajiv Kumar, who examined the injuries on the body of deceased and that of injured witness and PW 6 SI Prem Singh, IO of the case.

8. The accused appellant in his statement under Section 313 CrPC denied the allegations and stated that he was falsely implicated in the case.

9. After hearing learned counsel for the parties, Sessions Judge held the appellant along with Vikas Kirola guilty for the offence under Section 304 Part II/34 IPC and sentenced both of them to 10 years rigorous imprisonment vide judgment dated 12th January, 1998 and the conviction and sentence of the appellant came to be confirmed by the High Court on dismissal

of the appeal under the impugned judgment dated 9th November, 2010.

10. The main thrust of the submission of Mr. Siddharth Luthra, learned senior counsel for the appellant is that there is a sole testimony of PW3 Harshvardhan Verma on record. The statement of PW2 Sanjay Goswami cannot be read into evidence because the opportunity of cross-examination had not been provided to the defence. The examination in Chief of PW2 Sanjay Goswami was recorded on 27th March, 1997. On that day, the cross was deferred and later on, it was not possible for the prosecution to produce him for cross examination as he died on 30th March, 1997. Thus, the solitary statement of the prosecution witness of PW3 Harshvardhan Verma has not been corroborated by any other evidence on record and on his sole testimony, he could not be held guilty and it is the manifest error which has been committed by both the Courts below and needs to be interfered with by this Court.

11. Learned counsel further submits that the appellant obtained a birth certificate from the competent authority on 14th September, 2010 in which his recorded date of birth is 28th June, 1977 and he too was juvenile on the date of incident, i.e. 18th June, 1995 and in support of the certificate (P10page 101 of the paper book), application was filed under Section 391 CrPC that has not been properly considered by the High Court while dismissing the appeal preferred by him under the impugned judgment dated 9th November, 2010.

12. Mr. Jatinder Kumar Sethi, learned Deputy A.G. appearing for the respondent, in support of the finding recorded by both the Courts further submits that the submission made is nothing but a reiteration of what being considered by the trial Judge and also by the High Court in detail needs no further indulgence by this Court.

13. We have heard learned counsel for the parties and with their assistance perused the evidence adverted by the Courts below to examine the finding of guilt which has been recorded against the appellant(A1) under the impugned judgment.

14. After careful consideration of the evidence of PW3 Harshvardhan Verma who himself is an injured eyewitness and made a statement in his deposition that he was one of them who accompanied the deceased Rajesh Sah, were sitting on the chairs and looking the programme of Jagjit Singh night. On the next row, some girls were sitting, to whom some boys were passing indecent remarks. Deceased Rajesh Sah stopped them not to do so and in course of time, some altercation and after that a scuffle took place. The police persons intervened and stopped the scuffle at about 9.30 PM. After Rajesh Sah and his friends saw the program and moved towards the fountain and on the way, the road leading towards the main road, some boys met them, out of whom, Pratap Singh Bisht, Deepak Pathak, Manoj Rautela and Vikas Kirola were identified by him. When Rajesh Sah(deceased) proceeded to talk to those

persons, the accused assaulted Rajesh Sah with dandas and due to the injuries sustained by him, he fell down, however, even then the accused persons including appellant(A1) continued to beat him. He tried to intervene but he too was beaten and was injured by the accused persons. On seeing the accumulation of crowd, the appellant(A1) ran away. After that, Rajesh Sah was brought to the hospital, however, he became unconscious before reaching the hospital and blood was oozing from his head and succumbed to injuries at 12.30 AM in the night.

15. PW2 Sanjay Goswami who too was injured eyewitness of the incident supported the case of the prosecution and examination-in-chief was recorded on 27th March, 1997. On that day, the cross was deferred on the application of the accused but later on 30th March, 1997 unfortunately he died and it was not possible for the prosecution to produce him for cross-examination.

16. The presence of PW3 Harshvardhan Verma cannot be doubted. The medical evidence supports the prosecution story including his injury report, supported by the postmortem report of deceased (Rajesh Sah) furnished by PW4 Dr. J.P. Bhatt. We are of the considered view that the evidence of PW3 Harshvardhan Verma is reliable, believable and inspire implicit confidence as well as the corroboration of statement of PW2 Sanjay Goswami.

17. The appellant in his statement under Section 313 CrPC did not produce any evidence in support of his defence and made a bald statement. The involvement of the accused appellant(A1) has been established by the deposition of PW3 Harshvardhan Verma, the injured eyewitness. After going through the records of the case, we find no reason to deviate from the concurrent view taken by the two Courts below and finding of guilt recorded against the appellant being in conformity with the evidence produced by the prosecution and the order of conviction of the appellant for offence under Section 304 Part II/34 IPC needs no interference by this Court.

18. The submission of the learned counsel for the appellant is that he was a juvenile on the date of incident and his date of birth as per the birth certificate issued on 14th September, 2010 was 28th June, 1977 which was not properly appreciated by the High Court in passing the impugned judgment. The submission is without substance for the reason that documentary evidence has come on record that the appellant passed out his Secondary School Examination in the year 1993 from CBSE and marksheet was issued to him by the Education Board on 5th June, 1993 in which his recorded date of birth is 13th June, 1977. In 1995, he passed out his Senior School Certificate Examination from CBSE, his recorded date of birth is 13th June, 1977 which clearly establishes that he was more than 18 years of age by few days on the date of incident, i.e. 18th June, 1995.

19. The strength of the appellant's case is that birth certificate issued to him by

the competent authority dated 14th September, 2010 recorded his date of birth as 28th June, 1977 which shows that he was less than 18 years of age on the date of incident. Taking note of the later birth certificate issued by the competent authority which was obtained by him on 14th September, 2010, this Court vide its Order dated 9th January, 2019 directed the appellant to file copy of the affidavit which was filed by him before the competent authority on the basis of which birth certificate was obtained by him on 14th September, 2010 with liberty to the learned counsel for the State also to file affidavit of the concerned Officer to place on record the factual position about the genuineness of the stated birth certificate, if so required.

20. In compliance of the Order of this Court dated 9th January, 2019, the appellant has placed on record the application under RTI furnished by him obtaining the affidavit and other documents which he furnished on which the date of birth certificate was issued to him by the competent authority dated 14th September, 2010. In response to the RTI application, he was informed that such record on transportation has been missed somewhere and is not available. It goes without saying that it is the appellant who furnished the relevant documentary evidence before the competent authority on which a birth certificate was issued to him on 14th September, 2010. No supporting evidence has been placed on record to justify the later birth certificate obtained by him in absence thereof, no credence can be attached to it. At the same time, under the scheme of Juvenile Justice(Care and Protection of Children) Act, 2000, it clearly manifests that the age of juvenility prior to Act, 2000 was 18 years but the law having changed, with retrospective effect one can always claim benefit of juvenility.

21. It has been settled that the person below 18 years at the time of incident can claim benefit of Juvenile Justice Act at any time and taking note of the scheme of the Act and Rule 12 of the Juvenile Justice(Care and Protection of Children) Rules, 2007 in particular, it lays down the procedure in determination of age.

22. The relevant rule is as under:"

12. Procedure to be followed in determination of age.—(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or

juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year,

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

23. In terms of the scheme of Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules 2007, the committee constituted has been entrusted to hold inquiry by seeking evidence in support of the respective claim has to first consider

if there is a matriculation certificate available, in the first instance. In absence thereof, the date of birth certificate from the school (other than the play school) first attended; and in absence, the birth certificate given by the Corporation or a Municipal Corporation or a Panchayat in the descending form has to be considered as the basis for the purpose of determination of age of the juvenile.

24. In the instant case, admittedly, the secondary school certificate was issued to the appellant in the year 1993 on 5th June, 1993 in which his recorded date of birth is 13th June, 1977. In the given circumstances, when the appellant has failed to place any supporting material on record while obtaining the date of birth certificate at the later stage on 14th September, 2010, the reliable evidence on record can be discerned from his own certificate issued by the statutory board(CBSE) from where he passed out Secondary and Senior School Examination in the year 1993 and 1995 where his recorded date of birth is 13th June, 1977. In the given circumstances this Court is clear in its view that the appellant was not a juvenile and has crossed the age of 18 years by few days on the date of incident, i.e. 18th June, 1995 and the protection of the Juvenile Justice Act was not available to him.

25. Learned counsel for the appellant alternatively requests that the sentence awarded to the appellant is excessive and the incident is of June, 1995 with no previous criminal record and the appellant was also just at his tender age and undoubtedly, the incident took place on the spur of moment without any premeditation and by passage of time, he has settled with his family who are dependent on him and at least the sentence awarded to him needs interference by this Court which has neither been looked into by the trial Court nor considered by the High Court while dismissing the appeal in the instant proceedings.

26. To examine the question of sentencing, we refer the decision of this Court in Gopal Singh Vs. State of Uttarakhand 2013 (7) SCC 545 which eloquently laid down the principles of proportionality of sentencing policy. The relevant paras are stated as under:

"18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect — propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct

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