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Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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THE HON'BLE THE CHIEF JUSTICE THOTTATHIL B. NAIR RADHAKRISHNAN

Thottathil B. Radhakrishnan was sworn-in as permanent Judge of the High Court of Kerala on 14th October, 2004. He is the son of late N. Bhaskaran Nair and late K. Parukutty Amma, both Advocates, who practised at Kollam.

Born on 29th April, 1959, he had his early schooling in St. Joseph's Convent and Government Boys' High School, Kollam; Arya Central School, Thiruvananthapuram and secured ISC conferred by the University of Cambridge (Local Examination Syndicate), having studied in Trinity Lyceum, Kollam. After obtaining B.Sc. Degree in Zoology from University of Kerala as a student of the Fatima Matha National College, Kollam, he secured LL.B. Degree from Bangalore University having studied Law in K.G.F. Law College, Kolar Gold Fields.

Enrolled on 11th December, 1983, he practised at Thiruvananthapuram as junior to Advocate late P. Ramakrishna Pillai and thereafter shifted to High Court of Kerala in 1988 as junior to Senior Advocate late P. Sukumaran Nayar. He dealt with cases in different branches of law, the areas of his prominent practice being Civil, Constitutional and Administrative Law. He appeared also for various institutions

including banks, university and other public institutions. He also appeared for the High Court of Kerala. He was appointed as amicus curiae in different matters and was Advocate-Member of the Rule Committee constituted under Section 123 of the Code of Civil Procedure. While an Advocate, he was invited as Resource Person by the Training Directorate which later became the Kerala Judicial Academy. He also addressed various programmes of Legal Services Authority and training programmes for Advocates.

As Judge, he was nominated by the Hon'ble the Chief Justice to deal with original petitions registered following directions of the Supreme Court in relation to mental health matters. He was the President of the Board of Governors of the Kerala State mediation and Conciliation Centre and the President of the Kerala Judicial Academy. On various occasions, he was invited as Resource Person to the National Judicial Academy, Bhopal and the Kerala Judicial Academy. He had also attended various national conferences on different subjects of critical importance. He was the Executive Chairman of the Kerala State Legal Services Authority, the Executive Chairman of the Lakshadweep State Legal Services Authority, the Chairman of the Law Reporting Council, I.L.R. (Kerala Series) and the President of the Rule Committee under Section 123 of the Code of Civil Procedure. He is a Member of the Central Authority of the National Legal Services Authority.

He was the Acting Chief Justice of the High Court of Kerala from 13.05.2016 to 1.8.2016 and from the afternoon of 16.2.2017 till he was sworn in as Chief Justice of the Chhattisgarh High Court in the forenoon of 18.3.2017. He was the Chief Justice of the Chhattisgarh High Court from 18.3.2017 to 6.7.2018. He was the Chancellor of the Hidayatullah National Law University, Naya Raipur, Chhattishgarh. He was sworn in as Chief Justice of the High Court of Judicature at Hyderabad for the States of Telangana and Andhra Pradesh on 7.7.2018. He is the Chancellor of the National Academy for Legal Studies And Research, University of Law, Hyderabad and the Damodaram Sanjivayya National Law University, Visakhapatnam. He is the Patron-in-Chief of the Telangana and Andhra Pradesh States Legal Services Authority. He is the Chief Patron of the A.P. Judicial Academy, Secunderabad.

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

PART - 17 (15TH SEPTEMBER 2018)

Table Of Contents

Reports of A.P. High Court .... 1 to 62

Reports of Supreme Court .... 1 to 14

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NOMINAL - INDEX

Kacharagarala Venkateswarlu @ Venkatesh Naidu & Ors.,Vs. State of A.P., & Anr. (Hyd.) 1
N. Radhakrishnan @ Radhakrishnan Varenickal Vs. Union of India & Ors. (S.C.) 1
Safdar Abbas Zaidi Vs. The State of Telangan (Hyd.) 55
Suresh Chukkapalli Vs. Dr. S. Ali Abbas Hussain & Ors., (Hyd.) 9
V. Kavitha Reddy & Ors., Vs. V. Aditya Reddy & Anr., (Hyd.) 40
Union of India Vs. Rizwan Basha (Hyd.) 48

SUBJECT - INDEX

CIVIL PROCEDURE CODE, Or.III Rule 2 - **EVIDENCE ACT,** Sec.118 – Civil Revision preferred assailing order passed in I.A by lower court - Whether the 1st petitioner/D-4 can be permitted to adduce evidence on behalf of 3rd petitioner/D-2, her sick and infirm mother, or not and whether Court below is entitled to draw an adverse inference because the 3rd petitioner/D-2 did not enter witness box.

Held - Where title to property is in issue, and is based on registered documents and Civil Court decrees as in the instant case, there is nothing wrong, if on behalf of an aged and infirm parent like the 3rd petitioner/D-2, her biological daughter, the 1st petitioner/D-4, gives evidence - It cannot be said that unless title holder deposes, the factum of title does not get proved - Non-examination of title holder cannot confer title on the person disputing his/her title by way of acquiescence, estoppel or silence - Court below acted perversely in not permitting 1st petitioner to depose on behalf of 3rd petitioner/D-2 after having accepted the illness of 3rd petitioner/D-2 – Civil Revision Petition stands allowed. **(Hyd.)** ***40***

CONSTITUTION OF INDIA - Art.19(2) & 32 - Writ petition - Creativity and its impact - Prayer for banning a book on the foundation that a part of it is indecent and offends the sentiments of women of a particular faith.

Held - Book should not be read in a fragmented manner - It has to be read as a whole - Writer should have free play with words, like painter has it with colours - Passion of imagination cannot be directed - Craftsmanship of writer deserves respect by acceptation of concept of objective perceptibility - Writ petition stands dismissed. **(S.C.)** ***1***

CRIMINAL PROCEDURE CODE, Sec.173(8) - Whether after taking cognizance of a case and accused made their appearance, a Court can direct further investigation by Investigating Officer (IO) at request of accused?

Held - Court at post-cognizance stage, cannot direct the I.O to conduct further investigation at the request of the accused - Trial Court rightly observed that petitioners/ accused should vindicate their defence by way of exposing the lacunae in the investigation if any, and also by way of cross-examination of prosecution witnesses and by way of producing defence witnesses if they are so advised - Criminal Petition is dismissed confirming order of Trial court. **(Hyd.)** ***1***

(INDIAN) PENAL CODE, Secs.376, 417 & 420 - Anticipatory bail application – Petitioner/private employee, resident of Burg Dubai.

Held - Accused lured victim with a promise to marry and enjoyed her sexually, but for that she could not even given consent from which it comes under the offence of rape u/Sec.375 IPC, for no free consent as contemplated by Secs.39 and 90 IPC - Petitioner is not entitled to the concession of anticipatory bail – Criminal petition stands dismissed. **(Hyd.)** ***55***

SERVICE LAW - Administrative Tribunal - O.A filed by respondent before Central Administrative Tribunal, Hyderabad Bench - Assailing Order of Secretary, Department of Personnel and Training, Government of India, and seeking a consequential direction to allocate respondent to any of the Central Civil Services, under physically handicapped category, as per the Rank No.48 secured by him in the Civil Services Examination, 2016 - Tribunal allowed the O.A., setting aside the impugned order – Hence instant writ petition.

Held - Final finding of the Appellate Medical Board that the visual disability of the respondent is 40%, and his candidature could not have been rejected on the ground that he fell short of the required percentage of disability - Order of the Tribunal holding to this effect and granting him relief therefore does not brook interference - Writ petition stands dismissed. **(Hyd.)** ***48***

SPECIFIC PERFORMANCE ACT - Oral agreement – Suit for specific performance lies even on an oral agreement - Whether there was an oral contract would be essentially a question of fact and the burden of proof in relation thereto would rest heavily upon the person who intends to get such an oral agreement specifically enforced through a Court of law - Plaintiff would be required to prove an oral agreement with certainty and unless and until all the conditions necessary to infer the existence thereof are made out, the Court would not enforce it - Section 20(1) of the Act confers discretionary jurisdiction upon Court to decree specific performance and Court is not bound to grant such relief merely because it is lawful to do so - Plaintiff utterly failed in proving the oral development agreement - Absence of irrefutable and consistent evidence in support of oral development agreement - Appeal stands dismissed. **(Hyd.)** ***9***

--X--

LAW SUMMARY
2018 (3)

State of Telangana and the State of Andhra Pradesh High Court Reports

2018(3) L.S. 1 (Hyd.)

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

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

Kacharagarala Venkateswarlu
@ Venkatesh Naidu
& Ors., ..Petitioners

Vs.

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

CRIMINAL PROCEDURE CODE, Sec.173(8) - Whether after taking cognizance of a case and accused made their appearance, a Court can direct further investigation by Investigating Officer (IO) at request of accused?

Held - Court at post-cognizance stage, cannot direct the I.O to conduct further investigation at the request of the accused - Trial Court rightly observed that petitioners/accused should vindicate their defence by way of exposing the lacunae in the investigation if any, and also by way of cross-examination of prosecution witnesses and by way of producing defence witnesses if they are so advised - Criminal Petition is dismissed confirming order of Trial court.

Mr.T. Pradyumna Kumar Reddy, Advocate for the Petitioners.
Public Prosecutor (AP), Advocate for the Respondents: R1.

J U D G M E N T

1. The important and interesting point involved in this Criminal Petition is:

"Whether after taking cognizance of a case and accused made their appearance, a Court can direct further investigation by Investigating Officer (IO) at the request of the accused?"

2. The factual matrix of the case briefly is thus:

a) In Crime No.31 of 2015 of Pedavadugur PS of Anantapur District, the facts are that the deceased contested and elected as President of Primary Agricultural Cooperative Society (PACS), Kristipadu village in February, 2013 which became an eye-sore for accused, who belonged to rival political party and they were waiting for an opportunity to get rid. On 30.03.2015, the

Crl.P.No.1247/2018 Date:23-08-2018

deceased requested LW7—Chief Executive Officer, PACS, Kristipadu to hold General Body Meeting on 31.03.2015 and to inform the same to the Directors of the society and accordingly LW7 informed the same to all concerned. Then it is alleged, A1 and others hatched a plan to eliminate the deceased and in furtherance of their common intention, all the accused conspired together and came to the PACS office on vehicles by getting sticks in the vehicles. On 31.03.2015 at about 10:00 AM, the deceased along with LWs.5, 9 to 12 reached the PACS office, Kristipadu for attending the General Body Meeting. At about 10.30 AM, A2 and A4 went to the meeting place and informed the deceased that one of the Directors by name Gopal Reddy of Kodaraguttapalli Village died and asked the deceased to enter the said information in the Minutes book and send proposals for which the deceased replied that it was not under his purview. On that, wordy altercation took place between deceased and accused and in that melee the deceased pushed A2 towards wall and he sustained injury. Then A1, A3, A5 to A16 picked up the sticks from the Bolero vehicle and went upon the deceased. A1, A2, A4 attacked the deceased with sticks. A3, A7, A10 and A12 also attacked the deceased and beat him indiscriminately causing severe injuries. When LWs.9 to 12 questioned, A9 to A16 attacked them and caused injuries. The deceased sustained grievous injuries to his head and other parts of the body and died on the spot. On the report given by wife of the deceased, the police registered a case in Cr.No.31 of 2015 for the offences under Sections 147, 148, 324, 307, 302 r/w 34 IPC and after investigation filed charge sheet. The learned Additional Judicial Magistrate of First Class, Gooty has taken cognizance of the charge sheet and registered as PRC No.18 of 2015 and committed the case to Sessions Court, Anantapur. The case was registered as S.C.No.421 of 2016 and made over to the VI Additional Sessions Judge, Gooty, Anantapur District.

b) The petitioners/accused filed Crl.M.P.No.113 of 2017 under Section 173(8) Cr.P.C before the Trial Court seeking a direction for further investigation of the case on the ground that LWs.5 to 12 stated in their 161 Cr.P.C. statements that four Directors of Kristipadu PACS were also present and witnessed the incident but those four Directors were not examined and their statements were not recorded by the IO. Their evidence is important and material to unravel the truth relating to the incident. The petitioners sent petitions and representations to all higher authorities including the Honourable the Chief Minister seeking further investigation. Further, the petitioners filed W.P.No.42807 of 2016 wherein the High Court in its order dated 19.01.2017, has given liberty to the petitioner/A4 to move the concerned Court for appropriate directions. The accused thus prayed for further investigation. Learned Additional Public Prosecutor filed counter and opposed the petition contending that further investigation can be ordered only on the request of investigating agency on finding additional material but not on the request of either the complainant or the accused. The Trial Court agreeing with the Addl.P.P, dismissed the petition.

Hence, the Criminal Petition at the instance of petitioners/A1 to A16.

3. Heard arguments of Sri T.Pradyumna Kumar Reddy, learned counsel for petitioners and learned Public Prosecutor for the State (A.P). Though notice to respondent No.2 was served but there is no representation on his behalf.

4. The term "further investigation" with which we are now concerned has been succinctly narrated by the Apex Court in **K.Chandra Sekhar v. State of Kerala (**AIR 1998 SC 2001), thus:

> "Para 25: x x x x … The dictionary meaning of further' (when used as an adjective) is 'additional'; more; supplemental. "Further investigation" therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab-initio wiping out the earlier investigation altogether. In drawing this conclusion we have also drawn inspiration from the fact that Sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a 'further' report or reports - and not fresh report or reports-regarding the 'further' evidence obtained during such investigation."

Thus the above decision differentiates further investigation on one hand and fresh investigation/re-investigation on the other, as per which, further investigation is only a sequential to the earlier investigation made in quest of further evidence by the investigating agency to add to the stock of evidence already gathered and stored. Thus, further investigation is not to sequester the earlier investigation unlike in the case of fresh investigation or re-investigation or de novo investigation. This difference is expounded pellucidly in the above decision.

5. The concept of "further investigation" was alien to Code of Criminal Procedure, 1898 and it was ofcourse, introduced in Section 173(8) of Code of Criminal Procedure, 1973 due to the recommendation made in 41st Report of Law Commission of India, wherein at Para 14.23, it was observed thus:

> "Para 14.23: Re-opening Investigation—A report under Section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting the report under section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the magistrate concerned. It appears, however, that courts have sometimes taken the narrow view that once a final report under section 173 has been sent, the police cannot touch the case again and cannot re-open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and for that matter, even to the accused. It should be made clear in section 173 that the competent police officer can examine such evidence and send a

report to the magistrate. Copies concerning the fresh material must of course be furnished to the accused."

The Law Commission of India in fact recommended the recast Section 173 also, wherein under sub-Section (7) it postulated a provision for further investigation. The reinforced Section 173 has been incorporated in Cr.P.C, 1973. This Section as it stands now reads thus:

"**Section 173-Report of police officer on completion of investigation**

(1) x x . . .

(2) x x . . .

(3) x x . . .

(4) x x . . .

(5) x x . . .

(6) x x . . .

(7) x x . . .

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under subsection (2) has been forwarded to the Magistrate and, where upon such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding, such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

Thus in the context of Section 173(8), the power of a Magistrate to direct further investigation has to be tested now. Since the issue of a Court directing further investigation arises after the IO files his report under Section 173(2) Cr.P.C, it has now to be seen what are the different courses that are available to a Magistrate after IO files his report under Section 173(2) Cr.P.C. This aspect has been considered by the Apex Court in **Bhagwant Singh v. Commissioner of Police and another** (1985) 2 SCC 537), as follows:

"Para 4: Now, when the report forwarded by the officer-in charge of a police station to the Magistrate under Sub-section (2)(i) of Section 173 comes up for consideration by the Magistrate, one of two different situation may arise:

The report may conclude that **an offence appears to have been committed** by a particular person or persons and in such a case, the Magistrate may do one of three things:

1) he may accept the report and take cognizance of the offence and issue process or

2) he may disagree with the report and drop the proceeding or

3) he may direct further investigation under

Sub-section(3) of Section 156 and require the police to make a further report.

The report may on the other hand state that, **in the opinion of the police, no offence appears to have been committed** and where such a report has been made, the Magistrate again has an option to adopt one of three courses:

1) he may accept the report and drop the proceeding or

2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or

3) he may direct further investigation to be made by the police under Sub-section (3) of Section 156."

In the above decision, Court's adopting the third method i.e, directing IO to conduct further investigation under Section 156(3) Cr.P.C should be understood as further investigation at pre-cognizance stage. This aspect has been clarified in **Amrutbhai Shambhubhai Patel v. Sumanbhai Kantibhai Patel and others (**AIR 2017 SC 774 = (2017) 4 SCC 177), wherein the Apex Court observed thus:

> "**Para 40**: The rendition in Bhagwant Singh (supra) was also relied upon. It was eventually held, by drawing sustenance from the pronouncement in Bhagwant Singh (supra) that a Magistrate, before whom a report Under Section 173(2) of the Code had been filed, was empowered in law to direct further investigation and require the police to submit a further or a supplementary report. To reiterate, in Bhagwant Singh (supra), this Court had in particular dealt with the courses open to a Magistrate, once a charge-sheet or a closure report is submitted on the completion of investigation Under Section 173(2) of the Code and thus did essentially concentrate at the pre-cognizance stage of the proceedings.(emphasis supplied)."

6. Be that it may, whether a Court has power to direct further investigation at post-cognizance stage is precisely the question that is engaged with us now. After the IO filed report under Section 173(2) Cr.P.C, which was accepted and summons were issued to the accused and they made their appearance, at this stage whether the Court under its suo motu power or on the application of either the complainant or the accused but not on the request of the investigating agency, can direct further investigation is a mootable question. When once the report filed by the IO is accepted and cognizance is taken, the Court is said to have applied its judicial mind to the facts and evidence submitted by the IO and at that stage the Court on its own or on the application of the complainant or the accused cannot order for further investigation as there is no enabling provision to undertake that exercise. Section 173(8) Cr.P.C can be pressed into service only at the instance of the investigating agency but not at the option of the complainant or accused. That the Magistrate has no suo motu power to order further investigation at

the post-cognizance stage has been held by the Apex Court in **Reeta Nag v. State of West Bengal and others** (2009) 9 SCC 129), wherein it was observed thus:

> "Para 25: What emerges from the above-mentioned decisions of this Court is that once a charge sheet is filed under Section 173(2) Cr.P.C. and either charge is framed or the accused are discharged, the Magistrate may, on the basis of a protest petition, take cognizance of the offence complained of or on the application made by the investigating authorities permit further investigation under Section 173(8). The Magistrate cannot suo motu direct a further investigation under Section 173(8) Cr.P.C. or direct a reinvestigation into a case on account of the bar of Section 167(2) of the Code."

a) In a recent judgment in **Amrutbhai Shambhubhai Patel** (3 supra), the Apex Court held that the Court cannot order further investigation at the post-cognizance stage on the request of the defacto complainant. On a survey of various judgments of its own, the Apex Court concluded thus:

> "Para 49: On an overall survey of the pronouncements of this Court on the scope and purport of Section 173(8) of the Code and the consistent trend of explication thereof, we are thus disposed to hold that though the investigating agency concerned has been invested with the power to undertake further investigation desirably after informing the court thereof, before which it had submitted its report and obtaining its approval, no such power is available therefor to the learned Magistrate after cognizance has been taken on the basis of the earlier report, process has been issued and the accused has entered appearance in response thereto. **At that stage, neither the learned Magistrate suo motu nor on an application filed by the complainant/informant can direct further investigation** (emphasis supplied). Such a course would be open only on the request of the investigating agency and that too, in circumstances warranting further investigation on the detection of material evidence only to secure fair investigation and trial, the life purpose of the adjudication in hand.

Para 51: In contradistinction, Sections 156, 190, 200, 202 and 204 Cr.P.C clearly outline the powers of the Magistrate and the courses open for him to chart in the matter of directing investigation, taking of cognizance, framing of charge, etc. Though the Magistrate has the power to direct investigation under Section 156(3) at the precognizance stage even after a charge-sheet or a closure report is submitted, once cognizance is taken and the accused person appears pursuant thereto, he would be bereft of any competence to direct further investigation either suo motu or acting on the request or prayer of the complainant/informant.

x x x x . . . . .

If the power of the Magistrate, in such a

scheme envisaged by Cr.P.C to order further investigation even after the cognizance is taken, the accused persons appear and charge is framed, is acknowledged or approved, the same would be discordant with the state of law, as enunciated by this Court and also the relevant layout of Cr.P.C adumbrated hereinabove. Additionally had it been the intention of the legislature to invest such a power, in our estimate, Section 173(8) Cr.P.C would have been worded accordingly to accommodate and ordain the same having regard to the backdrop of the incorporation thereof."

Therefore, the Apex Court in this decision emphatically held that the Magistrate is not vested with either suo motu power or on the application of the complainant to order further investigation in a postcognizance stage. It must be noted that this decision though rendered in the context of a complainant's request for further investigation, in my considered view, the principle laid down therein applies in all its fours also to the instances where accused seeks further investigation as in the instant case.

7. We have the decisions relating to the request made by accused for further investigation. In **Shyama Charan Dubey v. State of U.P. (**1990 CriLJ 456 = MANU/UP/0285/1988), the High Court of Allahabad encountered the question as to whether the accused possesses a right to get further investigation ordered through Magistrate's Court in supposed exercise of powers under Section 173(8) Cr.P.C.

"**Para 16**: Reverting back to the said sub-section as enacted by the legislature, it has to be noted that it is only permissive in character. The Investigating Officer (or Officer-in-Charge of Police Station) may undertake a further investigation even after filing of a chargesheet. If he does so, the further evidence collected by him shall be forwarded to the Magistrate along with a further report. Therefore, I am clearly of the view that neither the prosecution, i.e. the informant nor the accused can claim as a matter of right a direction from a Court commanding further investigation by the Investigating Officer under Sub-section (8) of Section 173 after a charge-sheet was filed after investigation."

Subsequently a similar issue had come up before the High Court of Orissa in **Dara Singh alias Rabindra Kumar Pal and others v. Republic of India represented by the Superintendent of Police, Special Crime Branch, Central Bureau of Investigation (**2002 CriLJ 1754 = MANU/OR/0468/2002). Relying upon the judgment of the High Court of Allahabad in **Shyama Charan Dubey** (5 supra), the High Court of Orissa also held that neither informant nor the accused can claim further investigation as of right after charge sheet was filed.

8. Therefore, the argument of learned counsel for petitioners that in the interest of justice and to exhume the truth, the Trial Court has power to direct further investigation cannot be countenanced, as, such a direction for further investigation in the words of Hon'ble Apex Court is discordant with state of law, as enunciated by the Apex Court and also relevant layout of the Code

of Criminal Procedure.

9. It must be held at this juncture, the decision in **Vinay Tyagi v. Irshad Ali @ Deepak and others** (2013) 5 SCC 762), relied upon by the petitioners will not help their cause, because in that case the Apex Court on a perusal of the various judgments has held that the Magistrate has power to direct further investigation after filing of a police report in the light of Sections 156(3) and 173(8) Cr.P.C. Obviously, the said power of further investigation refers to pre-cognizance stage. The Apex Court held thus:

"Para 40: Having analysed the provisions of the Code and the various judgments as aforeindicated, we would state the following conclusions in regard to the powers of a Magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code:

> **40.1.** The Magistrate has no power to direct "reinvestigation" or "fresh investigation" (de novo) in the case initiated on the basis of a police report.
>
> **40.2.** A Magistrate has the power to direct "further investigation" after filing of a police report in terms of Section 173(6) of the Code.
>
> **40.3.** The view expressed in Sub-para 40.2 above is in conformity with the principle of law stated in Bhagwant Singh case [Bhagwant Singh v. Commr. of Police, (1985) 2 SCC 537 : 1985 SCC (Cri) 267] by a three-Judge Bench and thus in conformity with the doctrine of precedent.
>
> **40.4.** Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8)."

10. The petitioners also relied upon an unreported judgment of the High Court of Madras in **Crl.R.C.No.1569 of 2008 dated 21.03.2012 (V.Siva Kumar v. Ravi Kapoor and another) (**Crl.R.C.No.1569/2008 dt.21.03.2012), wherein the order of the Trial Court directing further investigation on the request of the accused of High Court of Judicature at Madras 15 was upheld by the High Court. However, since the same is against the spirit of the Apex Court judgments, no reliance can be placed on the cited judgment.

11. In view of the judicial jurimetrics on the subject in issue, it can only be held that the Court at the post-cognizance stage, cannot direct the I.O to conduct further investigation at the request of the accused. As rightly observed by the Trial Court, the petitioners/accused should vindicate their defence by way of exposing the lacunae in the investigation if any, and also by way of cross-examination of the prosecution witnesses and by way of producing the

defence witnesses if they are so advised.

12. Accordingly, this Criminal Petition is dismissed by confirming the order dated 10.01.2018 in Crl.M.P.No.113/2017 in S.C.No.421/2016 passed by the learned VI Additional Sessions Judge, Anantapur at Gooty.

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

–X–

2018(3) L.S. 9 (D.B.) (Hyd.)

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

Present:
The Hon'ble Mr.Justice
Sanjay Kumar &
The Hon'ble Mr.Justice
T.Amarnath Goud

Suresh Chukkapalli ..Petitioner
Vs.
Dr. S. Ali Abbas Hussain
& Ors., ..Respondents

SPECIFIC PERFORMANCE ACT - Oral agreement – Suit for specific performance lies even on an oral agreement - Whether there was an oral contract would be essentially a question of fact and the burden of proof in relation thereto would rest heavily upon the person who intends to get such an oral agreement specifically enforced through a Court of law - Plaintiff would be required to prove an oral agreement with certainty and unless and until all the conditions necessary to infer the existence thereof are made out, the Court would not enforce it - Section 20(1) of the Act confers discretionary jurisdiction upon Court to decree specific performance and Court is not bound to grant such relief merely because it is lawful to do so - Plaintiff utterly failed in proving the oral development agreement - Absence of irrefutable and consistent evidence in support of oral development agreement - Appeal stands dismissed.

C.C.C.A. No. 94/2002 Date: 28-8-2018

Mr.Vivek Jain, B. Vijaysen Reddy, Advocates for the Appellant.
Mr.Sunil B. Ganu, Advocate for the Respondent No.1.
Manjiri S. Ganu, Advocate for the Respondent No.2.
Mr.V. Manohar Rao, Advocate for the Respondent No.3.

J U D G M E N T

(Per the Hon'ble Mr.Justice
Sanjay Kumar)

By judgment and decree dated 28.11.2001, the learned I Senior Civil Judge, City Civil Court, Hyderabad, dismissed O.S.No.547 of 1996 on his file. Aggrieved thereby, Suresh Chukkapalli, the plaintiff therein, is in appeal.

O.S.No.547 of 1996 was instituted seeking specific performance of an oral development agreement entered into by and between the plaintiff and Dr.Ali Abbas Hussain, a medical

practitioner, the defendant, in relation to the suit schedule property owned by the defendant and for delivery of vacant physical possession thereof to the plaintiff for development in accordance with the stipulations agreed upon between them. He also sought a direction to the defendant to execute and register a power of attorney in his favour, inter alia, authorising him to deal with 40% of the built up area after such development.

The property bearing Municipal No.6-3-883/ A&B, admeasuring 2560 square yards, situated at Somajiguda junction, Punjagutta, Hyderabad, is the suit schedule property.

The plaint averments read as under:

> The plaintiff is engaged in the business of acquisition, development and sale of immovable property, comprising flats, commercial and other units. He is a Director of Front Line Constructions Limited which is engaged in the business of civil construction and development by erecting multi-storeyed buildings and selling them either as a whole or in units. The modus operandi of the plaintiff and the company is to acquire immovable properties worthy of development from their owners with the stipulation that the same would be developed by investing their own funds and in consideration of the owners entrusting their properties, certain percentage of the constructed area would be given to them and the balance area would be retained/ owned by the plaintiff or the company, as the case may be.

The case of the plaintiff is that the defendant approached him through one Mohd. Masiuddin Farooqui (P.W.5) representing that he owned the suit schedule property and that he desired the old building standing thereon should be demolished so that a building with modern taste, in line with the present market demand, should be constructed. The plaintiff visited the suit schedule property thereupon and having evaluated its commercial potential, he proposed that it was best suited for a commercial building and that as the area fell in a residential zone, he informed the defendant that change of land use would have to be obtained from the Government. He also pointed out to the defendant that a considerable part of the land would be affected in road-widening and relaxation in respect of statutory setbacks would have to be obtained to avail the total floor space index. The defendant agreed to his suggestions and thereafter, the parties concluded the contract. The terms and conditions of the development of the suit schedule property deliberated upon and concluded between the parties, set out in para 5, read as under: '(i) The Plaintiff shall draw up petitions, plans and other documents at his own cost and expense ,
necessary for seeking Change of Land use as also for relaxation of Mandatory Open Spaces and coverage and shall follow up the matter with various Statutory Authorities and the Government.

(ii) That upon receipt of the change of land and also the relaxations of open Spaces,

the paties shall apply to the Appropriate Authority under Chapter XX C of Income tax Act, 1961 and obtain NO Objection as laid down under the said Act. Simultaneously therewith, the Plaintiff shall get the Municipal Plans drawn and submit the same for approval by paying requisite fees.

(iii) The Defendant shall sign all such petitions and plans as may be required by the Plaintiff. The Plaintiff shall pay for and bear all charges, fees payable under any Regulation to the Government or otherwise without seeking any re imbursement thereof from the Defendant.

(iv) The Defendant shall within a period of 30 days from the date of receipt of No Objection from the Appropriate Authority hand over physical vacant possession of the Suit schedule Property to the Plaintiff to enable him to develop the property.

(v) That at the time of handing over of Possession of the Suit Schedule Property the Plaintiff shall pay a sum of Rs.40,000,00/- [Rupees Forty Lacs Only] as Interest free Refundable Deposit to the Defendant.

(vi) The construction shall be completed with in period of [24] months from the date of handing over of Possession of the Suit Schedule Properlty to the Plaintiff.

(vii) The Plaintiff shall invest his own monies and construct a commercial building utilising the maximum permissible constructed area after obtaining necessary permissions from the Corporation.

(viii) That out of total constructed area, the Defendant shall own and possess 60% [Sixty Percent] of the built up [including the circulation areas] and the balance of 40 % of the constructed areas shall be the ownership of the Plaintiff. The Defendant shall execute and register Power of Attorney authorising the Plaintiff to deal with the undivided share of Land as also the constructed areas falling to his share and also pertaining to construction of building.

(ix) The Interest Free Security Deposit shall be refunded to the Plaintiff simultaneously with the areas falling to the share of the Defendant are ready for occupation.'

The plaintiff retained M.N.Rao (P.W.3), a renowned architect, and got the plans drawn up in consultation with the defendant. He engaged another expert architect, Upal Ghosh (P.W.8), to give his opinion on the plans drawn up by M.N.Rao (P.W.3). Having accepted the assignment, Upal Ghosh (P.W.8) came to Hyderabad on 06.06.1995, visited the suit schedule property and scrutinised the plans drawn up by M.N.Rao (P.W.3). The defendant accompanied the plaintiff to Hotel Golconda, Hyderabad, where Upal Ghosh (P.W.8) was staying and participated in the discussions. He appreciated the suggestions made by Upal Ghosh (P.W.8) on the plans drawn up by M.N.Rao (P.W.3). After conclusion of the contract, the plaintiff drew up a petition for change of land use and got the same signed by the defendant, after verification. The plaintiff then submitted the petition and followed up the matter with the Government of Andhra Pradesh. After considerable effort on his part, the Government was pleased to accede to the request for change of land

use and issued G.O.Ms.No.84 dated 21.02.1995 (Ex.A4/Ex.B36) approving the change of use of the suit schedule property from residential to commercial. This change of land use was subject to payment of a sum of Rs.8,562/- towards development charges and a further sum of Rs.2,000/- towards processing fee, payable to Hyderabad Urban Development Authority (HUDA) so as to obtain the final order, as evidenced by the Government Memo bearing No.1231/I1/94-2 dated 29.11.1994 (Ex.A3/Ex.B39). The plaintiff claimed that, as per the agreement, he paid the development charges and also the processing fees, vide Challan No.4 dated 16.12.1994 (Ex.A1/Ex.B1). The plaintiff was advised to approach the Government of Andhra Pradesh for getting the maximum floor space index by seeking relaxation of setback areas and he drew up applications and plans apart from corresponding with the Government and also the Municipal Corporation of Hyderabad. Upon his persuasion, the authorities accepted the claim for relaxation of the mandatory open areas and issued G.O.Rt.No.1410 dated 12.12.1995 (Ex.B43). The plaintiff spent huge amounts on payment of professional fees, drawing up of plans and other miscellaneous expenses. The defendant signed the applications, plans, etc., whenever the plaintiff required him to do so. The plaintiff stated that issuance of G.O.Rt.No.1410 dated 12.12.1995 (Ex.B43) brought the matter to the stage of drawing up of an agreement for seeking clearance from the Income-tax authorities under Chapter XX C of the Income-tax Act, 1961 but the defendant started avoiding him on one pretext or the other. He initially did not notice the change of behaviour on the part of the defendant as, in the course of interaction during this period, he had picked up friendship with the defendant. When the evasion on the part of the defendant became too obvious, he had to give a fresh look to the entire scenario and the fact which emerged was that the defendant was resiling from the agreement. While the matter stood thus, he went to Guntur to see his parents and while he was there, he came to know through Minhaj Amjad (P.W.6), a friend, that the defendant was negotiating for disposal of the suit schedule property with some other parties. He immediately called the defendant on phone but in vain. He rushed to Hyderabad and made efforts to meet the defendant but to no avail. As the defendant was evading performing his part of the contract and resiling therefrom but he had performed and discharged his obligations and was willing and ready to perform further acts so as to discharge the remaining obligations, the plaintiff claimed entitlement to get the agreement enforced. He accordingly prayed for a decree of specific performance.

The written statement reads as follows:

> The defendant denied that there was any agreement entered into between himself and the plaintiff for development of the suit schedule property. He asserted that the plaintiff did not approach the Court with clean hands and had not put forth the true and correct version. He denied knowledge of the plaintiff's experience in acquisition, development and sale of immovable properties or that he

is a Director of Front Line Constructions Limited or whether the said company was also engaged in the business of civil construction. He denied the plaintiff's claim that he had approached the plaintiff through Mohd. Masiuddin Farooqui (P.W.5) or that he had desired that his old building in the suit schedule property should be demolished and a building with modern taste, in line with the present market demand, should be constructed. He denied that he ever offered the suit schedule property for development to the plaintiff. He further denied that the plaintiff visited the suit schedule property or evaluated its commercial potential. He denied the other claims put forth by the plaintiff in this regard including the terms of the alleged oral agreement set out in para 5 of the plaint. He admitted that the Government of Andhra Pradesh was pleased to accede to the change of land use of the suit schedule property but denied that the plaintiff paid the necessary charges in this regard. He claimed that he himself paid the amount under the Challan (Ex.B1). He admitted that G.O.Rt.No.1410 dated 12.12.1995 (Ex.B43) was issued by the Government with regard to relaxation of norms but denied that the same was due to the follow-up by the plaintiff and that he spent huge amounts on professional fees, drawing up of the plans or other miscellaneous expenses. He stated that he had been planning to raise a complex on his property and for the said purpose, he filed an application before HUDA for knowing the zonal use of the land. Having received a reply to the effect that his property was situated in a residential zone as per the master plan, but as neighbouring properties had been converted into non-residential complexes, he knew that he had to apply for and obtain change of land use from the appropriate authority. He could not take immediate steps as he had to go abroad and was also tied up with his professional engagements. After some time, he resumed plans to develop the property. At that stage a family friend, Mir Nasir Ali Khan (P.W.7), happened to meet him and when the defendant revealed his plan, Mir Nasir Ali Khan (P.W.7) stated that he was also trying to get change of land use in respect of the property belonging to his uncles, which he proposed to develop, and promised to guide the defendant and help him on the strength of their friendship. When the application for obtaining change of land use was prepared, the defendant approved the same after correcting it and submitted it to the authorities. Much later, Mir Nasir Ali Khan (P.W.7) introduced the defendant to the plaintiff stating that he is an engineer by profession having a business in automobiles. The defendant asserted that there was never any discussion or agreement between the plaintiff and himself for the development of the suit schedule property. He stated that he came to know later that Mir Nasir

Ali Khan (P.W.7) and his brother along with the plaintiff and his brother formed a company called Front Line Constructions Limited. The defendant claimed that he actively pursued his application for obtaining the change of land use and submitted various documents and plans to the authorities. During his talks with Mir Nasir Ali Khan (P.W.7), he suggested that the defendant should utilise the services of M.N.Rao (P.W.3) for preparing the plans for submitting to the authorities in this regard. The defendant was informed by Mir Nasir Ali Khan (P.W.7) that M.N.Rao (P.W.3) was engaged for his other projects and it was in these circumstances that M.N.Rao (P.W.3) prepared the plans. The defendant submitted the plans to the Municipal Corporation of Hyderabad with an endorsement that it was for MCH use only. The defendant alleged that the plaintiff, with the collusion of Mir Nasir Ali Khan (P.W.7), obtained the plans from the concerned authorities. He stated that after follow-up with the Government, he was called upon to deposit Rs.10,562/- towards the fee for change of land use. The said amount was to be deposited and the Challan was to be produced before HUDA. Again, Mir Nasir Ali Khan (P.W.7) offered to have the amount deposited and gave the defendant the Challan. Accordingly, the defendant gave money to Mir Nasir Ali Khan (P.W.7) who sent it to the bank through his office employee. After receiving the Challan, the defendant submitted the same to HUDA with a covering letter through an employee of Mir Nasir Ali Khan (P.W.7). Thereafter, G.O.Ms.No.84 dated 21.02.1995 (Ex.A4/Ex.B36) was issued. The original of this G.O. was received by him through certificate of posting directly from HUDA. He stated that the plaintiff curiously obtained a duplicate copy of the Challan, which had to be retained by HUDA, and filed the same in the suit proceedings. He further stated that he personally submitted the plans, using the services of M.N.Rao (P.W.3), in terms of the G.O. Thereupon, a report was submitted recommending relaxation of setbacks and the final G.O. (Ex.B43) was issued. He stated that he was in possession of the original G.O. He asserted that he had neither engaged the services of the plaintiff nor was an agreement entered into with him for the development of the suit schedule property. He claimed that the plaintiff obtained various documents pertaining to the property from the authorities for laying a false claim. He stated that after receipt of the second G.O., he also received a communication from the MCH calling upon him to submit the plans for the proposed construction and asserted that he had not done so till date. He stated that Mir Nasir Ali Khan (P.W.7) was aware that the defendant was contemplating to take up development of the suit schedule property on his own and on an occasion when his architect from

Delhi was in city, the defendant accompanied him as desired. But for the same, the defendant stated that all the other allegations made relating to his meeting with Upal Ghosh (P.W.8) were incorrect and false. He stated that he met Upal Ghosh (P.W.8) for not more than ten minutes only on the suggestion made by Mir Nasir Ali Khan (P.W.7). He claimed that the said casual meeting was being misused by the plaintiff in collusion with Upal Ghosh (P.W.8) to suit their purpose. He stated that even prior to 1994, he had been intending to develop the suit schedule property and engaged the services of reputed architects, namely, A.A. Associates, for preparing plans. However, by then he had not obtained the permission for change of land use and it was only subsequently that he corresponded with HUDA to know the exact position with regard to the nature of the land use. He was informed in writing that the land was earmarked for residential purpose and that substantial part of his property would be affected in road widening. He stated that he was therefore well aware that he had to apply for change of land use and also seek relaxation regarding setbacks for obtaining maximum benefit of the floor space index. He denied that the plaintiff took necessary steps in this regard. He stated that he engaged the services of M.N.Rao (P.W.3) through the good offices of Mir Nasir Ali Khan (P.W.7) for preparing plans and even at that stage, he had furnished the plans prepared by A.A. Associates as the basis for preparing fresh plans. He claimed that he adequately remunerated M.N.Rao (P.W.3) for his services and asserted that the plaintiff managed to obtain some of the documents to lay a false claim. He emphatically denied that there was any agreement between himself and the plaintiff, much less a concluded contract, for development of the suit schedule property. Even assuming, without admitting, that the plaintiff had taken steps for obtaining exemptions as pleaded, the defendant stated that they were without his knowledge or consent and in any event, not because of any agreement. He pointed out that the manner in which the said agreement was stated to have been entered into was inconceivable. He stated that Mir Nasir Ali Khan (P.W.7) and Mohd. Masiuddin Farooqui (P.W.5), who were his family acquaintances, had joined hands with the plaintiff to knock away his valuable property. He alleged that Mir Nasir Ali Khan (P.W.7), Mohd. Masiuddin Farooqui (P.W.5) and the plaintiff, with the help of M.N.Rao (P.W.3) and Upal Ghosh (P.W.8), conspired together so as to file the present suit in collusion with each other. He alleged that the confidence reposed by him in Mir Nasir Ali Khan (P.W.7) had been misused so as to foist the present proceedings on the basis of documents which were retained by Mir Nasir Ali Khan (P.W.7) and his employees, while helping him. He

pointed out that any development agreement had to contain basic terms as to the period of construction, particulars as to the specific areas which would fall to the share of each of the parties concerned, with floor-wise particulars etc. The nature and specifications of the construction would also be mentioned, as the rates of deluxe construction and normal construction would vary. The alleged oral agreement put forth by the plaintiff therefore could not be treated as a concluded contract. He pointed out that prior to filing of the suit, the plaintiff had not even issued any notice to him and that the oral agreement propounded by the plaintiff lacked bonafides in every respect. He asserted that the suit was untenable as the terms and conditions, as set out in the alleged oral contract, were incapable of being enforced. He also alleged that the suit was undervalued. He accordingly prayed for dismissal of the suit with exemplary costs.

Upon consideration of the pleadings, the trial Court settled the following issues for trial:

1. Whether the oral agreement pleaded by plaintiff is true, valid and binding on defendant?

2. Whether plaintiff is entitled to the specific performance as prayed for?

3. Whether plaintiff is entitled to the directions prayed for regarding execution of GPA?

4. Whether the suit is undervalued?

5. To what relief?

The plaintiff examined himself as P.W.1 apart from 7 other witnesses. He marked Exs.A1 to A22 in evidence. The defendant examined himself as D.W.1 and another witness. He marked in evidence 44 documents. Six documents were marked in the 'C' series.

The trial Court adopted a rather novel approach as the suit agreement was allegedly an oral one and insisted on the chief examination of the witnesses being continuous so that they could not be tutored in keeping with the cross-examination of earlier witnesses. In consequence, P.W.1 was examined in chief on 17.01.1997 and 21.01.1997. He was cross-examined on 25.02.1997. P.W.2 was examined in chief on 17.02.1997 and cross-examined on 03.03.1997. P.W.3 was examined in chief on 17.02.1997 and crossexamined on 04.03.1997. P.W.4 was examined in chief on 17.02.1997 and cross-examined on 04.03.1997. P.W.5 was examined in chief on 18.02.1997 and cross-examined on 03.03.1997. P.W.6 was examined in chief on 18.02.1997 and cross-examined on 03.03.1997. P.W.7 was examined in chief on 18.02.1997 and cross-examined on 25.02.1997 and 27.02.1997. P.W.8 was examined in chief on 27.02.1997 and cross-examined on the same day.

The plaintiff speaking as P.W.1 stated as follows in his chief examination: Mohd.

Masiuddin Farooqui (P.W.5) introduced him to the defendant on 02.10.1994. He was not doing construction business individually but only on behalf of the company, Front Line Constructions Limited, which was floated in the year 1994. He met the defendant at his residence, the suit schedule property, and in the course of the meeting, the defendant expressed his desire to develop the property. As he liked the property, he expressed his willingness to take the property for development and they decided to finalise the terms and conditions in the next meeting. On 12.10.1994, they met again at the residence of the defendant and decided the terms for development. Front Line Constructions Limited was to be the developer and they decided that after obtaining all clearances, the application for obtaining permission from the Municipal Corporation would be filed and the permit fee would be paid by the developer. After obtaining the permission, they would go for permission from the Income-tax authorities from Bangalore. Within one month of receiving such permission, the defendant would hand over possession of the property and execute a General Power of Attorney to develop the same. The plaintiff had to pay Rs.40,00,000/- towards an interest-free deposit to the defendant, which was refundable after delivery of possession of the developed property falling to the share of the defendant. 60% of the developed area was to be handed over to the defendant and 40% of the developed area was to be retained by the developer. The building had to be completed within 24 months from the date of obtaining the sanction and physical possession. He stated that after the terms and conditions were concluded, he drafted a representation to the Minister for Municipal Administration on 20.10.1994 seeking permission for change of land use and relaxation of setbacks. He obtained the signatures of the defendant after he made some corrections therein and submitted the same to the Minister on 23.10.1994. The officials of HUDA inspected the site in his presence and sent their remarks to the Government. He was also present when the officials of the Municipal Corporation of Hyderabad inspected the site. After receiving the remarks from both the authorities, the Government issued a draft variation proposal calling for objections. Thereafter, the G.O. was issued permitting change of land use on 21.02.1995. As development charges and processing fee had to be paid for conversion, he scribed the Challan on 16.12.1994 in the name and address of the defendant in his own hand writing and requested his Office Assistant, R.V.Ramana Murthy (P.W.2), to go to HUDA office to do the needful. After paying the amount, R.V.Ramana Murthy (P.W.2) submitted the same to HUDA under a covering letter. Thereafter, the Government issued the final G.O. He arranged meetings between the defendant on the one hand and M.N.Rao (P.W.3) and Upal Ghosh (P.W.8) on the other.

In his cross-examination, the plaintiff stated thus: He met the defendant for the first time on 02.10.1994 and for the second time on 12.10.1994. In the first meeting, P.W.5, the defendant and he were present and during the second meeting only the defendant and he were present. By 12.10.1994, Front Line Constructions Limited was not in existence and he had not made up his mind as to

whether he would individually take up the development or through which company. According to him, Front Line Constructions Limited came into existence in January, 1995 and he along with Mir Nasir Ali Khan (P.W.7) and his brother, Hussain Ali Khan, were the Directors of the said company. Mir Nasir Ali Khan (P.W.7) was the Managing Director of the company. For the first time in January, 1995, he discussed about the subject project with Mir Nasir Ali Khan (P.W.7) and his brother. He admitted that as on the date of his deposition, the company was doing two projects - one on Raj Bhavan Road, in respect of the property belonging to the uncles of Mir Nasir Ali Khan (P.W.7), and another property opposite the Secretariat at Saifabad belonging to Basheerunnisa Begum, Bahadur and others. Bahadur was also Mir Nasir Ali Khan (P.W.7)'s uncle. There were contracts in writing for construction of these buildings, containing details like the kind of flooring, kind of electrical installations, sanitary equipment, plastering, elevation and all particulars as to how the building was to be made. In relation to the Raj Bhavan Road property, the development contract also contained particulars as to flooring, electrical installations, sanitary fittings, plastering, etc. On 02.10.1994, when he first met with the defendant, the defendant and he agreed upon the contract but it was only agreed that he would take up the construction contract and except that, nothing was decided. On 12.10.1994, the terms as mentioned in para 5 of the plaint, were agreed upon. By 02.10.1994, he had not seen the title deeds of the property. In some cases, they obtained legal opinion and in some cases, they did not do so. If it is an open land, they obtained legal opinion and he did not obtain any legal opinion in respect of the suit schedule property as he did not feel it necessary to verify the title. By the date of filing of the suit, he thought of developing the property through Front Line Constructions Limited. By 02.10.1994, he knew the number of floors that could be constructed but did not know the shape of the building. On 12.10.1994, they decided that the constructed area should be split vertically and the defendant should take 60%. Para 5 of the plaint did not mention the actual allocation of 60% area. He, personally, had Rs.40,00,000/- with him on 12.12.1995 and did not withdraw the same from his individual account but got it from other sources, i.e., by withdrawing it from Front Line Constructions Limited. This amount was withdrawn from the cash reserve of Front Line Constructions Limited, which is from sale receipts. He admitted that he had stated in his affidavit (Ex.C1) filed in support of I.A.No.1855 of 1996 filed in the suit that the amount was essentially meant for the purpose of his business and that he was losing interest on it. He further admitted that he had not mentioned that it was from the cash reserve. He drafted the representation for change of land use on 20.10.1994 and the defendant signed it on the same day. He alone was present when the defendant signed the representation and the defendant corrected the word 'we' in the opening of each paragraph of the representation as 'I'. As they were both doing the project, they prepared it by mentioning the word 'we' but the defendant made the change because he was signing it as the owner. He admitted that he did

not feel it necessary to obtain a written contract even after the defendant changed the word 'we' in each paragraph to 'I'. He also admitted that he did not protest about the said change. He admitted that all the correspondence was sent to the defendant at his own address, i.e., the suit schedule property. He further admitted that he did not take any authority letter from the defendant during this process. He filled up Ex.A1/Ex.B1 Challan form first and then R.V.Ramana Murthy (P.W.2) filled the remaining part of the form. He stated that he knew Mohd. Masiuddin Farooqui (P.W.5) since the last five years and never did any business with him or had any financial transactions. He stated that he knew him as a co-member of Nizam Club. Mohd. Masiuddin Farooqui (P.W.5), the defendant and he met only once, i.e., on 02.10.1994. He stated that he met Mir Nasir Ali Khan (P.W.7) for the first time during 1991. He further stated that Mohd. Masiuddin Farooqui (P.W.5) and Mir Nasir Ali Khan (P.W.7) were related but he did not know the exact relationship. He claimed to have come into possession of Ex.A1 Challan and had retained the same with him. He admitted that Ex.A1 Challan was the duplicate and stated that the original Challan was with HUDA. He admitted that as per Ex.A1, the duplicate Challan, it was meant to be the copy for estate/planning/ development office of the HUDA. He also admitted that Ex.B1 was the original Challan which was the remitter's copy and that it did not contain his handwriting anywhere. He admitted that it was in the handwriting of R.V.Ramana Murthy (P.W.2) and bore his signature. He stated that he introduced the defendant to Mir Nasir Ali Khan (P.W.7) prior to relaxation in respect of the land use and that they did not know each other before that. He admitted that in total, he had invested a sum of Rs.1,00,000/- towards the project in the suit schedule property but could not give the details. He denied the suggestion that he was introduced to the defendant by Mir Nasir Ali Khan (P.W.7) and not by Mohd. Masiuddin Farooqui (P.W.5). He also denied the suggestion that he came into the picture as he was already doing follow-up work with the Government for their other projects and as Mir Nasir Ali Khan (P.W.7) had also offered to do the necessary follow-up work for the defendant out of friendship. He stated that he went to Guntur sometime in January, 1996 but did not remember as to when he came back. He stated that he met the defendant immediately after he came back from Guntur and it must have been in January, 1996. According to the plaintiff, he knew Minhaj Amjad (P.W.6) for the last 4 or 5 years as he was also a member of Nizam Club. He stated that he had no business transactions or financial transactions with him. He was also a builder and owner of complexes. He stated that he realised that the defendant was resiling from the contract even before his visit to Guntur. He stated that by mistake he mentioned in para 11 of the plaint that he had no meeting with the defendant after his return from Guntur. He claimed to have issued a legal notice to the defendant between January and April, 1996 before filing the suit. He admitted that the said notice was not filed into Court. He claimed that he himself posted the notice but did not remember the date of the posting. He stated that the defendant denied the contract on telephone on 19.04.1996. He said that

the notice was sent by ordinary post and that he had a copy thereof. He claimed that 40% of the constructed area as per the oral development agreement would come to Rs.2.5 crores. He stated that he knew Upal Ghosh (P.W.8) since 1994 and that he was doing both their projects. He denied the suggestion that there was no discussion on 02.10.1994 for development of the suit schedule property and that no terms were agreed upon on 12.10.1994 as stated by him.

R.V.Ramana Murthy (P.W.2) is an employee of the plaintiff. He stated that he worked with him since 1993. He admitted that Ex.A1/Ex.B1 Challan bore his signature and that the plaintiff had asked him to make payment to HUDA thereunder. He further stated that the said Challan was filled half by the plaintiff and half by himself. After payment, two copies of the Challan were stated to have been retained by the bank and the other two copies were given to him. He stated that out of the two Challans given to him, one was taken away by the office and the other Challan was given to him. According to him, Ex.A1 was the Challan copy given to him which he handed over to the plaintiff. He stated that the property mentioned in Ex.A1 Challan is the suit schedule property and that he knew that the plaintiff had taken it for development. In his cross-examination, P.W.1 stated that he did not attend to the work of Mir Nasir Ali Khan (P.W.7) though he was an employee of Front Line Constructions Limited and that he attended mainly to the work of the plaintiff. He admitted that in Ex.B1 Challan, the name of the defendant was in his handwriting. He also admitted that Ex.B1 Challan was the original and that Ex.A1 Challan was the copy to be retained by HUDA. He denied that Ex.A1 was not the Challan copy that was given to him after the payment was made. He stated that the plaintiff informed him about the development agreement with the defendant in 1994 and that is how he came to know of it. He denied that he was giving false evidence due to his employment with Front Line Constructions Limited.

M.N.Rao (P.W.3) stated that he was an architect in practice since 1978. He claimed that the plaintiff used to come to him since 1992 for consultation in relation to project work undertaken at that time. He stated that in 1995, the plaintiff engaged him to prepare a project work for conversion of the house property belonging to the defendant into a shopping complex. He stated that he visited the suit schedule property and inspected the same and then drew up plans. Ex.A7 was stated to be the plan prepared by him and it bore his signature. He claimed that he was appointed by the plaintiff and not by the defendant and that the defendant did not pay any amount to him. In his cross-examination, P.W.3 stated that he was not drawing plans for all the projects of Front Line Constructions Limited but only for some of its projects. He admitted having drawn plans for the Raj Bhavan Road project and also the project near the Secretariat. He admitted that since 1992, he must have received approximately more than Rs.2,00,000/- from Front Line Constructions Limited, the plaintiff and Mir Nasir Ali Khan (P.W.7). He also admitted that he drew up plans for P.W.7 at Jubilee hills. He visited the suit schedule property 3 or 4 times and

stated that it was a plain area with ups and downs but he could not say where there was a gradient as he visited the property more than two years ago. He further stated that there were trees in the suit schedule property but he could not give the number. He could not say whether trees were all around the property or on front side. He also could not say the names of the trees. He stated that he inspected the outside periphery of the house and did not go inside. He further sated that he did not observe any swimming pool in the suit schedule property. He claimed to have prepared only one plan in original on a tracing paper and Ex.A7 was the print prepared on the basis of the original. He admitted that Ex.B9 plan was prepared by him and bore his signature and seal but claimed that he never gave it to the defendant. He stated that he visited the suit schedule property for the first time towards the end of 1994 and again within an interval of 10 to 15 days. He claimed that he prepared Ex.A7 plan in February, 1995. He claimed to have met the defendant for the first time in November, 1994. He denied the suggestion that Mir Nasir Ali Khan (P.W.7) introduced him to the defendant. He stated that he could not say whether there was a dividing wall in the suit schedule property separating the house portion and the back portion. He denied the suggestion that the defendant paid him Rs.7,000/- for drawing the plan.

N.S.Bose (P.W.4) is an Executive Engineer in the Roads and Buildings Department of the State. He is also the brother-in-law of the plaintiff. He was examined in the context of his attestation of certain documents brought to him by the plaintiff.

Mohd. Masiuddin Farooqui (P.W.5) admitted that he knew the defendant for the past 25 years. He also knew the plaintiff and claimed that the defendant approached him to introduce him to the plaintiff in September, 1994. He stated that in October 1994, he arranged a meeting between the plaintiff and the defendant. This meeting was arranged in connection with development of the defendant's property. The meeting was held at the residence of the defendant, i.e., the suit schedule property. In the meeting, the defendant agreed to give the property for development to the plaintiff and the plaintiff accepted. He was present at the time of the talks and came to know subsequently that the defendant resiled from the agreement. In his cross-examination, he admitted that the defendant was a close friend of his cousin and was also his wife's cousin. Mir Nasir Ali Khan (P.W.7) was his wife's nephew and he knew him since their marriage in 1968. He admitted that the defendant used to visit him on all important functions and festivals previously. Mir Nasir Ali Khan (P.W.7) also used to meet him on all important functions and festivals. He said that it may be true that the defendant and Mir Nasir Ali Khan (P.W.7) might also be meeting each other. He knew the plaintiff as they were club-mates. He stated that Akbar Ali Khan was his mother-in-law's uncle and Faizunnissa Begum was his aunty. He further stated that he knew Waseema and Isiaq, the children of Faizunnissa Begum. Upon being shown Ex.B3 photograph, he stated that the person on the extreme left therein was Zaffer Hussain Khan, the brother-in-law of Akbar Ali Khan, and that

the family of the defendant and the family of Akbar Ali Khan were close as they knew each other since childhood. He stated that he did not attend the marriage of the defendant but he identified the defendant, his brother Abid, the defendant's wife, Akbar Ali Khan, Faizunnissa and Isaiq's wife in Ex.B4 photograph. He said that he could not give the specific date when the defendant met him in September, 1994. He further stated that he did not talk to Mir Nasir Ali Khan (P.W.7) but talked to the plaintiff when the defendant met him. He claimed that though he knew the plaintiff only from 5 or 6 years, he introduced the defendant to the plaintiff as he knew that the plaintiff worked with Mir Nasir Ali Khan (P.W.7). The defendant asked him whether he could introduce him to the plaintiff for developing his property. The defendant requested him to introduce the plaintiff and Mir Nasir Ali Khan (P.W.7). He stated that after September 1994, he might have met Mir Nasir Ali Khan (P.W.7) but did not raise this subject with him at any time. When asked the specific question as to whether after he introduced the defendant to the plaintiff, the plaintiff immediately agreed to take the property for development, he said that at the instance of the defendant to develop his property, he arranged the meeting at the defendant's place and the plaintiff and the defendant agreed to develop the property and that the entire finance would be made by the plaintiff and they agreed to the normal ratio between the builder and the owner. It was also agreed that the entire liaison work would be the responsibility of the plaintiff. He admitted that he did not contact the defendant when he came to know that he was going back from his promise. He also admitted that the plaintiff did not request him to intervene in the matter to talk to the defendant about the contract. He admitted that Mir Nasir Ali Khan (P.W.7)'s grandmother was married to his wife's grandfather and that his wife was instrumental in arranging the marriage of Mir Nasir Ali Khan (P.W.7). He denied the suggestion that he did not introduce the defendant to the plaintiff and there was no meeting held on 02.10.1994 and that he was deposing falsely at the instance of the plaintiff and Mir Nasir Ali Khan (P.W.7).

Minhaj Amjad (P.W.6) stated that he knew the plaintiff but did not know the defendant personally. He stated that he was a builder doing construction business. He stated that one broker by name, Irfan Khan, informed him that the suit schedule property was available for development and he told him that his friend, the plaintiff, had taken the said property for development but the broker informed him that it was still available for negotiations. He stated that he then contacted the plaintiff, who was at Guntur, on phone as he was not available at Hyderabad. In his cross-examination, he stated that he knew the plaintiff since 5 or 6 years as he was a friend of Mir Nasir Ali Khan (P.W.7) and also a member of Nizam Club. He stated that he was never introduced to the defendant. He stated that it was in March, 1996 that Irfan Khan informed him that the property at Somajiguda was available for development and he immediately rang up to the plaintiff who was not in Hyderabad. The plaintiff came back from Guntur and met him after 2 or 3 days. He denied that he was deposing falsely at the instance of the plaintiff and Mir Nasir Ali Khan (P.W.7).

Mir Nasir Ali Khan (P.W.7) stated that he was engaged in the business of construction and that he knew the plaintiff, as he was one of the Directors of his company, Front Line Constructions Limited. He admitted that he was the Managing Director of the said company. According to him, the plaintiff introduced him to the defendant in 1995. He further claimed that he accompanied the plaintiff and Upal Ghosh (P.W.8) to the house of the defendant to discuss about the development contract. He denied the suggestion that he had introduced the plaintiff to the defendant. He also denied the suggestion that he had agreed to render help to the defendant to get the plans approved and in getting permissions. He denied the suggestion that he conspired with Upal Ghosh (P.W.8) and others to knock away the property of the defendant. He denied the suggestion that his family and the defendant's family were friends since a long time. He denied the suggestion that he had advised the defendant to utilise the services of M.N.Rao (P.W.3). He stated that he never met the defendant at Nizam Club. He denied the suggestion that he got the money paid in the Government treasury and delivered the Challan to the defendant. In his cross-examination, he stated that he met the defendant in January, 1995 when he came with the plaintiff to his house. He stated that he came to know about the project for the first time in January, 1995. He admitted that Badrunissa, also known as Faizunnissa Begum, was related to him but claimed that he did not know the exact relationship. He also knew Waseema, daughter of Faizunnissa Begum, and stated that he had been meeting them in family gatherings and such occasions. He said that he did not know whether Waseema was earlier staying in the defendant's family house. He identified Mir Akbar Ali Khan, his relation, in the photograph shown to him (Ex.B3) and admitted that the bridegroom in the photograph looked like the defendant. He also identified Faizunnissa Begum in the photograph shown to him (Ex.B4). In Ex.B.5, he identified Waseema and admitted that she was his cousin. He admitted that Ex.B7 cover bore his handwriting and that it was addressed to the defendant. He claimed that he did not remember what was sent by him in Ex.B7 cover. When asked as to what were the particulars of the discussion about the development contract when he accompanied the plaintiff and Upal Ghosh (P.W.8) to the defendant's home, he stated that he did not remember. He admitted that the properties developed so far through Front Line Constructions Limited were those of his relations. He further stated that he never advised the plaintiff at any time in relation to the suit schedule property. He stated that the Front Line Constructions Limited had given Rs.40,00,000/- as a loan to the plaintiff but could not say whether it was out of its reserve fund. He stated that the plaintiff did not consult him before filing this suit and that he was not present when instructions were given for drafting of the plaint. He denied the suggestion that the defendant was known to him through a relation from his mother's side and that he was closely acquainted with him. He stated that his marriage was performed in 1993 but denied the suggestion that the wife of Mohd. Masiuddin Farooqui (P.W.5) was instrumental in arranging it. He stated that Mohd. Masiuddin Farooqui (P.W.5) knew

the plaintiff for about 5 years. He stated that his mother was aged about 60 years but stated that he did not remember whether his mother had a heart attack and was taken to Apollo hospital where she was attended upon by Dr. Shailendra. He stated that he stayed next door to his mother and that his brother stayed with her. He stated that he did not remember whether his mother had a chest pain and in that connection, he requested the help of the defendant and Dr. Shailendra attended upon his mother at Apollo hospital, at the instance of the defendant. He sated that his mother was not a heart patient but did not remember whether she had any chest pain at any time. He stated that he did not remember whether he along with his wife, his brother, his wife and the defendant and his wife went to Orchid Restaurant to celebrate his marriage anniversary. He admitted that his association with Mohd. Masiuddin Farooqui (P.W.5) was more than the association between the plaintiff and Mohd. Masiuddin Farooqui (P.W.5). He said that he did not remember as to whether he met the defendant at the house of Mohd. Masiuddin Farooqui (P.W.5) at any time. He denied the suggestion that he had offered to help the defendant when he came to know that the defendant was approaching the Government for land use conversion. He denied the suggestion that as the defendant reposed confidence in him as a family friend, he did not doubt his bonafides when his employees and associates did some of the follow-up work. He denied the suggestion that the defendant gave money to him and he got it deposited through his employee.

Upal Ghosh (P.W.8) stated that he was a private architect with his head office at New Delhi. He stated that he knew the plaintiff who was a good friend of his since three years. He stated that he knew the defendant through the plaintiff. He said that he was developing a few commercial complexes for the plaintiff and in June 1995, the plaintiff called him for a new project. He came to Hyderabad on 06.06.1995 and the plaintiff brought the defendant to his hotel and introduced him for a joint venture project at Somajiguda. He stated that he, the plaintiff along with Mir Nasir Ali Khan (P.W.7) went to the site where the defendant was waiting and they inspected it. In his cross-examination, he admitted that the plaintiff consulted him in respect of the project on Raj Bhavan Road and the project opposite the Secretariat. He admitted that for a project like this, normally a development agreement will be there in respect of the nature of construction, flooring, plastering, elevation, etc. between the developer and the owner. He further admitted that the third party affidavit filed by him (Ex.C2) was dictated to him by the plaintiff over the phone and he noted down the same and gave instructions to his office to prepare it. He then added that he got a call from the plaintiff who told him over phone to submit an affidavit regarding his involvement in the suit project and he got prepared the draft in his Delhi office and sent it to the plaintiff. He admitted that in his affidavit, he stated that he verified the contents of the site plan but did not mention drawing up any sketch plan. He denied that he was deposing falsely due to the friendship with the plaintiff and that the defendant was introduced to him by Mir Nasir Ali Khan (P.W.7), while he was staying in Golconda Hotel, as a property

owner who was interested in developing it.

Speaking as D.W.1, the defendant stated that he was the owner and possessor of the suit schedule property which was his only immovable property. He asserted that he never entered into any agreement, either oral or otherwise, in respect of the said property with the plaintiff. He pointed out that by Ex.B10 letter dated 16.07.1993, HUDA informed him that his land was situated in a residential zone and would be affected by the proposed road-widening. He stated that he knew Mir Nasir Ali Khan (P.W.7) since a long time as the uncles and aunts of Mir Nasir Ali Khan (P.W.7), Mr. & Mrs. Javed Kamal and Mr. & Mrs. Juned Adil, had been his neighbours since his childhood, i.e., 1960. He further stated that they used to meet each other quite often. Mir Nasir Ali Khan (P.W.7)'s parents used to visit his uncles and aunts quite frequently and on such occasions they used to come along with their children. He therefore stated that he knew Mir Nasir Ali Khan (P.W.7) since that time. He further stated that he knew the mother and grandmother of Mir Nasir Ali Khan (P.W.7), apart from the brothers of his grandmother. He said that he knew Akbar Ali Khan since his childhood as a respected member of the family. In Ex.B3 photograph taken at the time of his marriage, the defendant stated that Akbar Ali Khan and the brother of Mir Nasir Ali Khan (P.W.7)'s maternal grandfather are both seen. He also gave details of his acquaintance with various members of Mir Nasir Ali Khan (P.W.7)'s family. He stated that he knew Mohd. Masiuddin Farooqui (P.W.5) since his marriage and that P.W.5's wife was instrumental in arranging the marriage of Mir Nasir Ali Khan (P.W.7). He asserted that he was introduced to the plaintiff by Mir Nasir Ali Khan (P.W.7) in December, 1994 or January, 1995. He stated that he was called to see P.W.7's mother in an emergency at her house as she was complaining of uneasiness in the chest. He stated that he referred her to Dr.Shailendra at Apollo hospital and Ex.B35 was the letter addressed by Dr. Shailendra Singh in that regard. He further stated that he had occasion to see Mir Nasir Ali Khan (P.W.7)'s son when he was admitted in New City Hospital at Secunderabad. He said that he told Mir Nasir Ali Khan (P.W.7) about his intention to develop the suit schedule property and he offered to help him in that regard. He spoke of the various steps taken by him even earlier and thereafter with the help of those introduced to him by Mir Nasir Ali Khan (P.W.7). He categorically denied receipt of any legal notice from the plaintiff and asserted that he never entered into any agreement with him. In his cross-examination, the defendant was put several questions in connection with his relations with Mir Nasir Ali Khan (P.W.7) and his family apart from his medical practice. He denied the suggestion that on 20.10.1994, the plaintiff prepared the application for submission to the Minister for change of land use. He added that he had not even met the plaintiff by then. He claimed that he prepared the application and then showed it to Mir Nasir Ali Khan (P.W.7) and he offered to get it typed. He then made corrections in that application. Though the cross-examination of the defendant continues at great length thereafter, the thrust thereof is directed at exhibiting his

ignorance of construction activity and is not of much relevance to the suit claim.

Mir Taaqi Ali Khan (D.W.2), a cousin of the defendant, stated that he knew Mir Nasir Ali Khan (P.W.7) since his childhood. He stated that he also knew the father of P.W.7 apart from his grandfather and great-grandfather. He further stated that his maternal grandmother's sister was married to the _first cousin of Mir Nasir Ali Khan (P.W.7)'s great grandfather. He stated that the defendant and the aunts of P.W.7 had houses opposite each other at Somajiguda and that the relatives of P.W.7 and the defendant used to visit each other. He claimed to have seen them meeting and wishing each other in various social gatherings. He asserted that P.W.7 used to visit his aunts at Somajiguda. He said that he is a member of Nizam Club and he had seen Mir Nasir Ali Khan (P.W.7) and the defendant wishing and meeting each other in the Club. According to him, in September 1994, while he and the defendant were sitting in the house of the defendant and the defendant was telling him about his proposal to develop the property on his own, Mir Nasir Ali Khan (P.W.7) dropped in and during the course of the discussion, P.W.7 offered to help the defendant, if he required, to obtain conversion of the land use and to get sanction. There was no discussion about the development of the property by P.W.7, who knew that the defendant himself wanted to develop the property. Nothing useful was elicited in his cross-examination.

By the judgment under appeal, the trial Court, having considered the pleadings and the evidence, oral and documentary, held against the plaintiff on crucial issues. As regards Issue No.1, the trial Court held that the plaintiff failed to prove that there was any oral development agreement between him and the defendant and that it was true and valid. On Issue Nos.2 and 3, the trial Court held that as Issue No.1 was decided against the plaintiff and he had failed to prove the oral development agreement, he was not entitled for the relief of specific performance or for execution of a GPA in his favour. On Issue No.4, the trial Court found that there was no material to show that the suit was undervalued and rejected the contention of the defendant in that regard. In the result, the trial Court dismissed the suit with costs.

It appears that during the pendency of this appeal, the defendant orally gifted an extent of 144 square yards out of the suit schedule property to his daughter, Noor Fatima Hussain, on 05.07.2012. Subsequently, Noor Fatima Hussain and the defendant, signing as a confirming party, executed registered sale deed bearing Document No.1125/2013 dated 24.01.2013 in favour of Sandhya Hotels Private Limited, Hyderabad, as regards the said extent of 144 square yards. Thereupon, the plaintiff filed C.C.C.A.M.P.No.493 of 2013 in this appeal seeking to implead the defendant's daughter and the alienee. The implead petition was ordered by this Court on 08.02.2018 and Noor Fatima Hussain and Sandhya Hotels Private Limited, Hyderabad, are shown as respondents 2 and 3 in this appeal.

Heard Sri Vivek Jain, learned counsel representing Sri B.Vijaysen Reddy, learned

counsel for the appellant-plaintiff, and Sri Sunil B.Ganu, learned counsel for the respondent-defendant. Smt. Manjiri S.Ganu, learned counsel, entered appearance for Noor Fatima Hussain, respondent 2, and Sri V.Manohar Rao, learned counsel, entered appearance for Sandhya Hotels Private Limited, respondent 3, but they did not choose to contest this appeal.

Contesting parties shall hereinafter be referred to as arrayed in the suit.

The points for determination that arise in this appeal are:

1. Whether the plaintiff adequately proved the oral development agreement dated 12.10.1994?

2. Whether the discrepancies in the oral evidence of the plaintiff's witnesses are fatal?

3. Whether the plaintiff, in any event, disentitled himself from seeking the equitable relief of specific performance owing to his own acts?

4. Whether the plaintiff is entitled to any relief?

Sri Vivek Jain, learned counsel, would contend that the plaintiff is entitled to specific performance notwithstanding the fact that the development agreement was an oral one in the light of the evidence, both oral and documentary, adduced by him in proof thereof. He would point out that the involvement of the plaintiff at each stage is writ large and the defendant could not claim that the plaintiff merely helped him in that regard. He would assert that there was consensus ad idem between the parties at the meeting held on 12.10.1994 and therefore, the oral terms settled at such meeting would be binding. He would assert that the subsequent events clearly bore out that the said oral agreement was acted upon. He would point out that the defendant admitted the assistance rendered by the employees of the plaintiff and that was sufficient to show that, in furtherance of the oral agreement, such assistance was extended to him. He would assert that the oral agreement is adequately proved and that the trial Court erred in not accepting the same and decreeing specific performance.

Per contra, Sri Sunil B.Ganu, learned counsel, would point out that the admitted conduct of the plaintiff completely goes against character. Being an experienced builder and developer, the plaintiff admitted that he had not even undertaken due diligence by obtaining copies of the title deeds or seeking legal opinion in relation thereto. He also did not get any public notice issued through newspapers calling for objections. He would point out that the agreement was yet to be drawn up and as such, it could not be said that there was a concluded contract between the parties even if there were any discussions. He would point out that the nine clauses set out in para 5 of the plaint did not even mention that such an agreement would be drawn up, which goes against the plaint averments. He would further point out that the clauses set out in para 5 of the plaint do not even indicate as to how the owner's share was to be identified or the nature and

quality of the construction that was to be made. No specifications were stipulated, which would go against the grain of an experienced builder entering into such an agreement. He would place reliance on Section 14(3)(c) of the Specific Relief Act, 1963 (for brevity, 'the Act of 1963') and assert that even if believed, the oral agreement put forth by the plaintiff is not enforceable thereunder. Learned counsel would also point out the various discrepancies in the depositions of the plaintiff's witnesses. Having appeared before the trial Court, the learned counsel would point out that the trial Court insisted on the chief examination of the witnesses being continuous so that the witnesses could not thereafter be tutored and in the light of this procedure being adopted, discrepancies galore in the stories put forth by the plaintiff's witnesses clearly showed that the entire transaction, as claimed by the plaintiff, was concocted. Learned counsel would contend that Mir Nasir Ali Khan (P.W.7) was well known to the defendant and the extent to which P.W.7 went to support his partner, the plaintiff, is obvious from the fact that he stated on the one hand that he was close to his mother but went on to state that he did not even remember as to whether she had a heart attack. Learned counsel would therefore assert that P.W.7 was an interested witness who was bent upon protecting his relations with the plaintiff. He would further assert that the very fact that the plaintiff did not produce any pre-suit legal notice lent itself to an adverse inference being drawn against him. He would point out that Ex.B1 Challan produced by the defendant was admittedly the original one and that Ex.A1 duplicate Challan was produced by the plaintiff from the records of the HUDA to support his false claim. He would also point out that the admitted fact was that Mir Nasir Ali Khan (P.W.7) was closer to Mohd. Masiuddin Farooqui (P.W.5) than the plaintiff was to P.W.5, but the story put forth was that the defendant approached P.W.5 to introduce him to the plaintiff and P.W.7 but Mohd. Masiuddin Farooqui (P.W.5) chose to introduce him to the plaintiff despite knowing P.W.7 better. Learned counsel would state that this version is patently improbable, if not unbelievable. Learned counsel would further assert that there is no proof of any consensus ad idem and that in the light of Section 16(c) read with Section 20 of the Act of 1963, the discretionary relief of specific performance could not be granted to the plaintiff, given his conduct. In this regard, reference is again made by the learned counsel to Ex.A1 Challan obtained from the HUDA file apart from the fact that the plaintiff claimed to have spent Rs.1,00,000/- but had no account in proof thereof. Learned counsel would also point out that much water has flown under the bridge and inform this Court that during the suit proceedings, an injunction was granted at the initial stage subject to deposit of the sum of Rs.40,00,000/- by the plaintiff but after dismissal of the suit, the plaintiff chose to withdraw the said amount. Learned counsel would point out that the property has already changed hands and that no cause is made out to decree specific performance at this late stage even if this Court is inclined to believe that there was an oral agreement at that point of time.

In his written synopsis of submissions, Sri Sunil B.Ganu, learned counsel, pointed out

that a development agreement is a totally different transaction when compared to a sale, as the magnitude of investment would depend upon the nature of development, flooring, plastering, doors & windows, electrical fittings, sanitary ware, elevation and other facilities like swimming pool, club house, office room, which would be decided and looked into before conclusion of a contract of such nature. He further pointed out that absolute clarity would be required as to the nature of the construction in terms of the aforestated parameters and a development agreement would not be complete otherwise. Learned counsel asserted that the settled legal position with respect to oral contracts was that the burden would rest heavily upon the plaintiff to prove the same and unless the terms of such an oral agreement are proved in well defined terms, the question of specific performance thereof would not arise.

In reply Sri Vivek Jain, learned counsel, would only point out that Section 14(3)(c) of the Act of 1963 does not bar a specific performance suit.

There can be no doubt that a suit for specific performance lies to enforce even an oral agreement. However, in such a situation, it is essential that the plaintiff should establish the necessary ingredients for seeking the equitable relief of specific performance. A heavy burden lies on the plaintiff to firstly prove that there was consensus ad idem between the parties and that the oral agreement was, in fact, concluded. Secondly, the plaintiff would also have to prove the vital terms of such an oral contract. As to whether or not such a concluded oral contract was there would be essentially a question of fact and the burden of proof in relation thereto would rest heavily upon the person who intends to get such an oral agreement specifically enforced through a Court of law. Therefore, even if an oral agreement is legally permissible and would be enforceable through a Court of law, the plaintiff would be required to prove such an oral agreement with certainty and unless and until all the conditions necessary to infer the existence thereof are made out, the Court would not enforce it.

It is equally well settled that grant of the equitable relief of specific performance would be wholly within the discretion of the Court and cannot be claimed as a matter of right. Before granting such a decree, the Court must be satisfied that (i) the contract is certain and unambiguous in its terms, (ii) the consideration has passed, (iii) the contract is fair and not vitiated by fraud etc., (iv) the contract does not offend a third party, (v) the contract does not impose any hard or unconscionable bargain, and (vi) the contract is capable of execution. At the same time, it should not be lost sight of that such discretion must be exercised by the Court based on sound judicial principles and not arbitrarily. The fundamental condition, which must be proved beyond all reasonable doubt, is the existence of a valid and enforceable contract. If a valid and enforceable contract is not made out, the Court would not make a contract for the parties. (See **MERAHUL ENTERPRISES V/s. VIJAYA SRIVASTAVA (**AIR 2003 Delhi 15 (D.B.). As long back as in the year 1969, in **OUSEPH**

VARGHESE V/s. JOSEPH ALEY (1969) 2 SCC 539), the Supreme Court observed that very rarely would a decree for specific performance be granted on the basis of an agreement supported solely by oral evidence.

In **YELAMATI VEERA VENKATA JAGANADHA GUPTA V/s. VEJJU VENKATESWARA RAO (**AIR 2002 AP 369), a learned Judge of this Court observed that where an oral agreement of sale is pleaded and the very existence of such an oral agreement is disputed by the other side, a heavy burden would lie upon the plaintiff to establish its existence as well as the conditions thereof with clinching and admissible evidence. It was further observed that the nature and extent of proof in this regard would vary from case to case and would depend upon the proximity or otherwise of the parties, nature of the transactions existing between them in the past, their conduct and the steps undertaken by the parties after the alleged agreement of sale, etc. The said judgment was confirmed in appeal in **YELAMATI VEERA VENKATA JAGANADHA GUPTA V/s. VEJJU VENKATESWARA RAO (**2002 (4) ALT 448 (D.B.).

In **BRIJ MOHAN V/s. SUGRA BEGUM** (1990) 4 SCC 147), the Supreme Court pointed out that there is no requirement of law that an agreement or contract of sale of immovable property should only be in writing but in a case where the plaintiffs come forward to seek a decree for specific performance of a contract of sale of immovable property on the basis of an oral agreement alone, a heavy burden would lie on them to prove that there was consensus ad idem between the parties for a concluded oral agreement for such sale. It would have to be established by the plaintiffs that vital and fundamental terms for the sale of the property were concluded between the parties orally and a written agreement, if any, to be executed subsequently would only be a formal agreement incorporating such terms which had already been settled and concluded in the oral agreement.

In **K.NANJAPPA (DEAD) BY LEGAL REPRESENTATIVES V/s. R.A.HAMEED @ AMEERASAB (DEAD) BY LEGAL REPRESENTATIVES** (2016) 1 SCC 762), the Supreme Court observed that a decree for specific performance can be granted on the basis of an oral contract. Reference in this regard was made to the observations of Lord Du Parcq in **SHANKARLAL NARAYANDAS MUNDADE V/s. NEW MOFUSSIL CO.LTD. (**AIR 1946 PC 97)In **KOLLIPARA SRIRAMULU V/s. T.ASWATHA NARAYANA (**AIR 1968 SC 1028), the Supreme Court however added the rider that when the plaintiff comes forward to seek a decree for specific performance on the strength of an oral agreement, a heavy burden lies upon him to prove that there was consensus ad idem between the parties and whether there was such a concluded contract or not would be a question of fact to be determined in the facts and circumstances of each individual case.

It is in the light of the aforestated settled legal position, that the alleged oral development agreement asserted by the plaintiff has to be tested. In this regard,

the first and foremost aspect that must be noted is that there was no prior relationship between the parties. The plaintiff admits that he met the defendant for the first time on 02.10.1994 and according to him, the oral development agreement was concluded at their second meeting on 12.10.1994. There are a number of discrepancies as to this claim. The plaintiff's case is that Mohd. Masiuddin Farooqui (P.W.5) introduced him to the defendant. However, it is brought out in the evidence that P.W.5 and Mir Nasir Ali Khan (P.W.7) are more closely associated with each other. If that be so, it is hardly believable that P.W.5 would introduce the defendant to the plaintiff instead of taking him to see P.W.7, had he desired to enter into a development agreement. Further, the plaintiff's stand is that P.W.5 only introduced him to the defendant on 02.10.1994. While confirming this, P.W.5 went a step further in his chief-examination and asserted that during the first meeting itself, the defendant agreed to give the property for development to the plaintiff, who accepted it. He further stated that he was present during these talks. In his cross-examination, P.W.5 was put a specific question and he answered thus:

Q. After you introduced defendant to the plaintiff, did the plaintiff immediately agree to take the property for development?

A. At the instance of Abbas to develop his property, I arranged the meeting at Abbas's place, Suresh and Abbas agreed to develop the property and the entire finance will be made by Suresh. They agreed for the normal ratio between the builder and owner. It was agreed that the entire liaison work is the responsibility of the plaintiff.

This is not the version of the plaintiff. In his cross-examination, he said that on 02.10.1994, it was agreed that he would take up the contract and except that nothing was agreed. He further stated that it was only on 12.10.1994 that the terms, set out in para 5 of the plaint, were agreed upon.

Further, the plaintiff contradicted himself time and again. On the one hand, he said he was not executing constructions individually and that the agreement with the defendant was that the construction on the suit schedule property would be through Front Line Constructions Limited, but on the other hand, he admitted that Front Line Constructions Limited was not even in existence on 12.10.1994 and came into being only in January, 1995 but did not indicate as to which was the other company through which he wanted to take up the subject construction. He then said that he had not decided whether he would undertake such construction individually or through a company. He further stated that by the date of filing of the suit, he thought of developing the property through Front Line Constructions Limited and that he arrived at that decision in April, 1996.

He claimed that while he was on a visit to see his parents at Guntur, Minhaj Amjad (P.W.6), a friend, informed him that the defendant was negotiating for disposal of the suit schedule property with third parties. In his cross-examination, he stated that he went to Guntur in January, 1996 and was there for 2 or 3 days. Minhaj Amjad (P.W.6),

on the other hand, stated in his cross-examination that it was in March, 1996 that he was informed that the suit property was available for development and he immediately rang up the plaintiff. Further, in his plaint, the plaintiff claimed that when he rushed to Hyderabad and made efforts to meet the defendant, he could not do so. However, in his cross-examination, he admitted that he met the defendant on one occasion after coming back from Guntur but did not remember the date. He further clarified that he met him immediately after he came from Guntur and it must have been in January, 1996.

As regards the payment made under Ex.A1/ Ex.B1 Challan, the plaintiff filed Ex.A1 copy of the said Challan claiming that it was the original. On the other hand, the defendant filed Ex.B1 copy of the said Challan asserting that it was the original retained by him. Though the original suit record was transmitted by the trial Court after the institution of this appeal, it is distressing to note that the said record is not complete. Some of the original records, and more particularly Ex.A1 and Ex.B1 Challans, are not available in the original record. However, photocopies of Ex.A1 and Ex.B1 Challans are part of the appeal record and perusal thereof demonstrates that Ex.A1 is the duplicate copy for estate/planning/ development office of the HUDA, while Ex.B1 is the original remitter's copy. Ex.A1 copy of the Challan filed by the plaintiff is therefore from the record of the Hyderabad Urban Development Authority while the original Challan, which would normally be available with the remitter, is Ex.B1 produced by the defendant. These photocopies put it beyond doubt that the original Challan was produced by the defendant and a duplicate copy from the records of the HUDA was produced by the plaintiff.

Upal Ghosh (P.W.8) admitted straightaway that the contents of his affidavit (Ex.C2) were dictated by the plaintiff over the phone and he noted down the same and gave instructions to his office to prepare the affidavit. He then tried to make up for the slip by saying that the plaintiff told him over the phone to submit an affidavit regarding his involvement in the suit project, so he got prepared the affidavit in his Delhi office and sent it. He further admitted that in his affidavit (Ex.C2), he did not mention about furnishing any architectural sketch designs, i.e., rough designs for the suit project and only mentioned that he verified the contours of the site plan.

That apart, it may be noted that the plaintiff did not issue any notice to the defendant prior to the institution of the suit, as per the plaint. But during his cross-examination, the plaintiff claimed that he got issued a legal notice to the defendant between January and April, 1996, before filing the suit. He further stated that the notice was not filed in the Court. Conveniently, he did not remember the date of the notice and the date he posted it. According to him, the defendant denied the contract on phone on 19.04.1996. He claimed that the notice was sent by ordinary post and he retained a copy thereof, but never produced it.

In **PUSHPARANI S.SUNDARAM V/s. PAULINE MANOMANI JAMES (DECEASED)** (2002) 9 SCC 582), the Supreme Court found fault with the plaintiff

in not even sending any notice to the defendant about his willingness to perform his part of the contract while suing for specific performance.

It may also be noticed that Section 16(c) of the Act of 1963 requires the plaintiff to aver and prove that he has performed or was always ready and willing perform the essential terms of the contract. In terms of this requirement, a suit notice must precede the institution of the suit, wherein the plaintiff would set forth his averments as to his performance or his readiness or willingness to perform the essential terms of the contract. In the present case, there is no evidence of the plaintiff serving upon the defendant a notice prior to institution of the suit fulfilling the requirements of Section 16(c) of the Act of 1963.

It is also relevant to notice that the plaintiff admits to the fact that written development agreements were executed in relation to the projects that he thereafter undertook at Raj Bhavan road and opposite the Secretariat at Saifabad. Interestingly, these projects were in respect of the properties belonging to the relations of Mir Nasir Ali Khan (P.W.7), the Managing Director of Front Line Constructions Limited. Despite the said relationship, the parties resorted to written development agreements! When the plaintiff admittedly met the defendant for the first time on 02.10.1994 and orally settled the terms of the alleged development agreement relating to the suit schedule property ten days thereafter, it is hardly believable that he would not have taken some sort of commitment in writing from the defendant. All the more so, when he claimed that he took several steps pursuant to the oral agreement resulting in expenditure of Rs.1,00,000/-. The said sum was not an insubstantial amount in the year 1994. However, the plaintiff conveniently claimed that he did not keep an account of the said expenditure and could not give details of the same.

Apart from the aforestated discrepancies in the oral evidence of the plaintiff's witnesses, it may be noticed that the plaintiff's claim is that the terms of the oral development agreement, as set out in para 5 of the plaint, were decided on 12.10.1994. The details of such terms, totalling 9 clauses in all, which were never reduced to writing, were recalled by the plaintiff with such clarity so as to be set out at great length nearly one and half years later. If the parties had really negotiated these terms of the development agreement with such precision and in such detail, it is hardly believable that they would not have reduced the same to some sort of informal written agreement even if they agreed to have a formal agreement drawn up later. The terms and conditions of the oral development agreement, as set out in para 5 of the plaint, therefore weaken the case of the plaintiff that such an oral agreement was concluded between him and the defendant on 12.10.1994. At the same time, as rightly pointed out by Sri Sunil B.Ganu, learned counsel, a development agreement would be essentially lacking if it does not set out the particulars and specifications of the development sought to be made. The plaintiff's own witness, Upal Ghosh (P.W.8), admitted that for a project like this, normally, a development agreement would be there

in respect of the nature of construction, flooring, plastering, elevation, etc. In the absence of the building specifications, the nature of construction, the quality of the components of such construction, etc., the exact nature of the development that was proposed to be undertaken pursuant to the so-called agreement between the plaintiff and the defendant is not certain or determinable. It may also be noted that though as many as 9 detailed terms of the development agreement were stated to have been settled orally, there was no condition imposed as to what would happen in the event of default. There was also no identification of the 60% of the built up area that would fall to the share of the defendant. Therefore, the terms and conditions of the oral agreement, while detailed in relation to some aspects, fall woefully short in relation to the aforestated aspects.

Further, it is difficult to believe that the plaintiff, being an experienced builder, would blindly settle the terms of the development agreement orally without even verifying the title of the defendant and without causing a public notice to be issued before he ventured to invest his monies in the project. Admittedly, the plaintiff did neither.

Section 14 of the Act of 1963, as it stood then, spoke of contracts not specifically enforceable. Section 14 of the Act of 1963 is relied upon strongly by Sri Sunil B.Ganu, learned counsel, and it reads as under:

'**14. Contracts not specifically enforceable**.— (1) The following contracts cannot be specifically enforced, namely:—

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences or arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:—

(a) where the suit is for the enforcement of a contract,—

(i) to execute a mortgage or furnish any other security for securing the repayment

of any loan which the borrower is not willing to repay at once:

Provided that where only a part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract; or

(ii) to take up and pay for any debentures of a company; (b) where the suit is for,—

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of a share of a partner in a firm;

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land:

Provided that the following conditions are fulfilled, namely:—

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.'

It may be noted that Sections 14(1) and (2) of the Act of 1963 effectively bar suits for specific performance in relation to the contracts mentioned therein. Section 14(3) thereof is in the nature of an exception to Section 14(1)(a), (c) and (d) and permits enforcement of contracts falling within its ambit, notwithstanding the aforestated three clauses. Sections 14(3)(a) and (b) are not relevant to the case on hand. Sri Sunil B.Ganu, learned counsel, would however press into service Section 14(3)(c) and assert that the plaintiff's suit is barred thereunder. Significantly, Section 14(3)(c) permits enforcement of a contract for construction of a building or execution of work on land subject to fulfilment of the conditions prescribed in the three provisos thereunder. The first proviso reads to the effect that the building or other work must be described in the contract in terms sufficiently precise to enable the Court to determine the exact nature of the building or work. The second proviso stipulates that the plaintiff must have a substantial interest in the performance of the contract and the interest must be of such a nature that compensation in money for non-performance of the contract is not an adequate relief. The third proviso states that the defendant must have obtained possession of the whole or any part of the land on which the building is to be constructed or the work is to be executed, pursuant to such contract. All the three conditions stipulated in the aforestated three provisos have to be fulfilled before the contract can be enforced.

In effect, a suit to enforce a development agreement in terms of Section 14(3)(c) of the Act of 1963 necessarily has to be construed to be a suit at the behest of the land owner and not at the instance of the developer. The use of the words 'the defendant' in the third proviso, in the context of his 'obtaining possession' of the whole or any part of the land 'pursuant to the contract', puts it beyond the pale of doubt that it is only the developer who could be arrayed as a defendant in such a suit, as he alone would come into possession of the land pursuant to the contract and not the owner of the said land. The possession of the land would ordinarily be with the owner thereof and would not be obtained by him pursuant to the development contract, specific performance of which is sought. It is thus clear that Section 14(3)(c) of the Act of 1963 visits stringent conditions upon the land owner when he sues for specific performance of a development agreement but such conditions are not applicable to a developer when he files a suit to enforce a development agreement. Therefore, a suit wherein the developer is the plaintiff, whereby he seeks enforcement of the development agreement, would not come within the ambit of Section 14(3)(c) of the Act of 1963 and the requirements to be fulfilled, under the three provisos thereunder, would have no application to such a suit. In consequence, the present suit, being one filed by a purported developer, would not attract Section 14(3)(c) of the Act of 1963. We are fortified in our interpretation of this provision by the Full Bench decision of the Calcutta High Court in **ASHOK KUMAR JAISWAL V/s. ASHIM KUMAR KAR (**AIR 2014 (CAL) 92 (F.B.). Therein, Section 14(3)(c) of the Act of 1963 and more particularly, sub-clause (iii) thereof, fell for consideration. The Full Bench was dealing with the question as to whether a suit at the instance of a developer was not maintainable in view of Section 14(3)(c) of the Act of 1963. The conclusion of the Full Bench was that such a suit, where the developer was not the land owner, would not be prohibited by Section 14(3)(c) of the Act of 1963. Reliance placed by Sri Sunil B.Ganu, learned counsel, on Section 14(3)(c) of the Act of 1963 and the case law relating thereto is therefore misplaced.

That being said, we are of the opinion that Section 14(1)(a), (b) and (d) of the Act of 1963 would however apply to the case on hand.

In **DAVENDER KUMAR SHARMA V/s. MOHINDER SINGH (**ILR (2012) V DELHI 703), a learned Judge of the Delhi High Court was considering a case similar to the one on hand. The plaintiff claimed therein that he had an agreement to construct a four-storied building in the land belonging to the defendant. However, there was no agreement as regards the specifications of the proposed construction and as to what would happen if the plan was not sanctioned or in the event the parties did not agree on the specifications of the proposed construction. There was no provision with regard to the supervision of the construction and the agreement was silent as to what would happen if the plaintiff did not complete the construction. Significantly, the agreement was not even oral but a written one. Despite the same, the learned Judge held that the contract was unenforceable

in terms of Section 14(1)(b) and (d) of the Act of 1963.

Earlier, in **VINOD SETH V/s. DEVINDER BAJAJ** (2010) 8 SCC 1), the Supreme Court was dealing with specific performance of an oral agreement for commercial collaboration for business benefits. The agreement alleged by the plaintiff was termed as a commercial collaboration agreement for development of a residential property belonging to the defendant. The Supreme Court however found that the alleged oral agreement was vague and incomplete, requiring consensus, decisions or further agreement on several minute details. The Court observed that the alleged oral agreement involved performance of a continuous duty by the plaintiff, which the Court would not be able to supervise and ultimately concluded that a collaboration agreement of the nature alleged by the plaintiff was not one that could be specifically enforced.

Applying the above principles, it may be noted that the plaintiff claims to have spent Rs.1,00,000/- but he is not in a position to substantiate the same. Even if the same is accepted to be true, Section 14(1)(a) of the Act of 1963 provides that in the event of non-performance of a contract for which compensation in money is an adequate relief, the contract cannot be specifically enforced. Therefore, going by the plaintiff's own claim of having spent Rs.1,00,000/-, he would, at best, be entitled to be recompensed and not to specific performance after such a long lapse of time as that would be an adequate relief given the fact that the plaintiff himself, speaking as P.W.1, stated to the effect that the suit project would run into crores of rupees and the claimed expenditure of Rs.1,00,000/-, as per the plaintiff's own claim, would be a just an iota thereof. However, as already stated, the plaintiff did not even substantiate the claimed expenditure of Rs.1,00,000/-.

Further, as already pointed out, the alleged oral agreement put forth by the plaintiff, even if accepted, falls woefully short in relation to several essential aspects of the proposed development and in the absence of consensus between the parties on such crucial issues, it is not for this Court to fill in the blanks and enforce such an agreement. Section 14(1)(b) of the Act of 1963 would therefore be squarely applicable. Lastly, as the alleged oral agreement is bereft of essential details of the proposed development and if enforcement thereof is now to be permitted by this Court, the supervision of such development by the plaintiff over a period of time cannot be undertaken by this Court, when there is no specific agreement on various crucial factors of such development. Section 14(1)(d) of the Act of 1963 would therefore have application and bar grant of relief to the plaintiff, even if the alleged oral development agreement is accepted as true.

On the above analysis, even if the plaintiff's version is to be accepted, he would clearly be disentitled to seek specific performance of the oral agreement put forth by him. On the other hand, it may be noticed that the defendant has a cogent and reasonable explanation to offer for the participation of the plaintiff's employees in assisting him in his transactions and interactions with the

authorities. According to him, it was Mir Nasir Ali Khan (P.W.7), his family friend, who offered to help him to get the change of land use in relation to the suit schedule property and put him in contact with M.N.Rao (P.W.3) and Upal Ghosh (P.W.8). The defendant further claimed that it was Mir Nasir Ali Khan (P.W.7) who introduced him to the plaintiff much later than 12.10.1994, the date of the alleged oral development agreement. In this regard, the desperate attempt of P.W.7 to disown acquaintance with the defendant failed miserably as the defendant clearly brought out the close family relations that they had. That apart, they were also members of Nizam Club and Mir Taaqi Ali Khan (D.W.2) confirmed that he saw the defendant and Mir Nasir Ali Khan (P.W.7) together in the Club. D.W.2 also claimed to have been present in September, 1994 at the house of the defendant when the defendant spoke of his proposed plan to develop the suit schedule property on his own and at that time Mir Nasir Ali Khan (P.W.7) dropped in and the discussion continued and during the course of such discussion, P.W.7 offered to help the defendant, if he required, in obtaining the conversion of land use and getting MCH permissions and sanction. The details forthcoming from the defendant's oral evidence clearly bring out the falsity of the claim of Mir Nasir Ali Khan (P.W.7) that he had nothing to do with the defendant or the various transactions which form the sheet-anchor of the plaintiff's case. It may be noticed that all original documents were produced by the defendant himself in 'B' series while copies thereof were produced by the plaintiff in 'A' series. Given the admitted fact that R.V.Ramana Murthy (P.W.2), an employee of Mir Nasir Ali Khan (P.W.7) and the plaintiff, admittedly paid the fees under Ex.A1/Ex.B1 Challan, production of the duplicate Challan by the plaintiff from the records of HUDA is easily explained. As rightly pointed out by Sri Sunil B.Ganu, learned counsel, M.N.Rao (P.W.3) and Upal Ghosh (P.W.8) were both closely associated with the plaintiff and his construction company and would not have ventured to speak against him, even if their involvement with the plaintiff was only due to Mir Nasir Ali Khan (P.W.7). Despite being a close family friend of the defendant, Mir Nasir Ali Khan (P.W.7) surprisingly chose to support the plaintiff, perhaps to safeguard his own professional interests and those of his relations whose properties were being developed jointly by the plaintiff and him through Front Line Constructions Limited, their company. Given the relationship between the defendant's family and the family of Mir Nasir Ali Khan (P.W.7), a presumption can be drawn under Section 114 of the Indian Evidence Act, 1872, that being members of old Hyderabadi Muslim families, there would have been a close level of contact and friendship between them, lending credibility to the version put forth by the defendant and confirmed by Mir Taaqi Ali Khan (D.W.2). The evidence of the defendant to the effect that he was instrumental in the mother of Mir Nasir Ali Khan (P.W.7) being treated at Apollo Hospital, Hyderabad, when she suffered chest pain remained unshaken. The correspondence (Ex.B35) from Dr.Shailendra Singh, who treated her, clearly demonstrates the participation of the defendant in the said exercise. In that view of the matter, participation of the plaintiff's employees in

assisting the defendant does not come to the aid of the plaintiff as they were also the employees of P.W.7, who is proved beyond doubt to have been a close acquaintance, if not a friend, of the defendant.

Significantly, Mir Nasir Ali Khan (P.W.7) admitted in his cross-examination that he had not even thought of taking the suit schedule property for development till the date of his deposition and that there was no discussion amongst the Directors of Front Line Constructions Limited to do so. The claim of the defendant was that Mir Nasir Ali Khan (P.W.7) helped him in his transactions with the authorities at that point of time for development of the suit schedule property on his own and one such help rendered by him was the payment of fees through his office employee and that the original Challan was then sent to him by Mir Nasir Ali Khan (P.W.7) in Ex.B37 cover. Significantly, P.W.7 admitted in his cross-examination that Ex.B37 cover was in his handwriting but claimed that he did not remember as to what paper he had sent in the said cover to the defendant.

The version of the defendant therefore has a ring of truth, unlike the plaintiff's version.

Lastly, it may be noted that Section 20(1) of the Act of 1963 confers discretionary jurisdiction upon the Court to decree specific performance and the Court is not bound to grant such relief merely because it is lawful to do so. Exercise of this discretion by the Court is not arbitrary but guided by sound judicial principles. In the case on hand, there is no explanation forthcoming from the plaintiff as to how and why he procured Ex.A1 Challan from the records of the HUDA. The original of the said Challan (Ex.B1) was produced by the defendant. Production of Ex.A1 Challan by the plaintiff therefore weighs heavily against him, as it reflects adversely upon his bonafides. Having resorted to such subterfuge to boost his suit claim, the plaintiff irrevocably disentitled himself from seeking the equitable relief of specific performance. This Court must also be conscious of the relentless passage of time since the alleged oral development agreement of October, 1994, and its concomitant vicissitudes. This Court therefore finds no grounds to exercise its discretionary jurisdiction in favour of the plaintiff, in any event.

On the above analysis, this Court holds that the plaintiff utterly failed in proving the oral development agreement dated 12.10.1994. Multitude of discrepancies in the oral evidence clearly sets at naught his claim as to how events transpired. Given the absence of irrefutable and consistent evidence in support of the so-called oral development agreement, this Court has no hesitation in rejecting the plaintiff's plea as to the very existence of such an oral development agreement. This Court therefore finds that the judgment and decree under appeal do not brook interference either on facts or in law. All the points framed for determination are answered against the appellant/plaintiff.

The appeal is devoid of merit and is accordingly dismissed with costs. Pending miscellaneous petitions, if any, shall also stand dismissed.

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2018(3) L.S. 40 (Hyd.)

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

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

V. Kavitha Reddy & Ors., ..Petitioners

Vs.

V. Aditya Reddy & Anr., ..Respondents

CIVIL PROCEDURE CODE, Or.III Rule 2 - EVIDENCE ACT, Sec.118 – Civil Revision preferred assailing order passed in I.A by lower court - Whether the 1st petitioner/D-4 can be permitted to adduce evidence on behalf of 3rd petitioner/D-2, her sick and infirm mother, or not and whether Court below is entitled to draw an adverse inference because the 3rd petitioner/D-2 did not enter witness box.

Held - Where title to property is in issue, and is based on registered documents and Civil Court decrees as in the instant case, there is nothing wrong, if on behalf of an aged and infirm parent like the 3rd petitioner/ D-2, her biological daughter, the 1st petitioner/D-4, gives evidence - It cannot be said that unless title holder deposes, the factum of title does not get proved - Non-examination of title holder cannot confer title on the person disputing his/ her title by way of acquiescence, estoppel or silence - Court below acted perversely in not permitting 1st petitioner to depose on behalf of 3rd petitioner/D-2 after having accepted the illness of 3rd petitioner/D-2 – Civil Revision Petition stands allowed.

C.R.P. No.1698/2018 Date: 29-8-2018

J U D G M E N T

1. This Civil Revision Petition is filed assailing order dt.16-02-2018 in I.A.No.29 of 2018 in O.S.No.06 of 2009 of the I Additional District Judge, Chittoor, Andhra Pradesh.

2. The petitioners herein are defendant Nos.1 to 5 in the above suit.

3. The suit was filed by 1st respondent/ plaintiff for partition of the plaint schedule properties into 64 equal shares, for allotting 15/64th share to him, and to put him in separate possession thereof and also to direct the petitioners to pay to him a sum of Rs.93,000/- per month towards share of rents from the date of suit till the date of delivery of his share to him.

4. The 1st respondent/plaintiff is a minor. He is represented by his mother P.Lavanya Reddy. The 1st respondent’s case is that the plaint A to D schedule properties are the joint family properties of the 1st respondent/plaintiff, the 1st defendant and late V.Raghunatha Reddy.

5. The 2nd petitioner late V.Ravindranath Reddy is the 1st respondent’s father, and he was D-1 in the suit. The 3rd petitioner is D-2 and she is the mother of D-1 and

is the paternal grandmother of 1st respondent. The petitioners 1 and 4 are the daughters of 3rd petitioner/D2. Husband of 3rd petitioner/D-2 by name V. Raghunatha Reddy died on 07-12-2003. The 5th Petitioner/D-5 is purchaser of 'A' schedule property on 15-02-2008.

6. There were four schedules mentioned in the plaint i.e "A" to "D" schedules.

7. The 1st petitioner filed Written Statement in the suit which was adopted by petitioners 2 to 4.

8. It is the defence of the petitioners to the claim for partition that there was a divorce between the 1st defendant and the mother of 1st respondent/plaintiff. It is further contended that A-D schedule properties are all self acquired and separate properties of V.Raghunath Reddy, the husband of 3rd petitioner/D-2 and Smt. Rangamma, the mother of the said V. Raghunath Reddy; that there was a suit O.S.No.226 of 1971 filed by certain third parties against V.Raghunatha Reddy, his mother Smt. Rangamma and the 3rd petitioner, in which there was a finding recorded that the properties mentioned in schedules A to D in the instant suit are absolute properties of V.Raghunatha Reddy and the 3rd petitioner. It is therefore contended that the decree dt.04-12-1980 in O.S.No.226 of 1971 having declared that the subject properties belong to V.Raghunatha Reddy and the 3rd petitioner, the 1st respondent/plaintiff is not entitled to any relief.

9. Thereafter, issues were framed and evidence on the side of the 1st respondent/ plainitff was completed.

10. On the side of the petitioners/defendants, the 5th petitioner/D5 was examined as D.W.1 and the 4th petitioner/D-3 was examined as D.W.2. Thereafter, the matter was posted for further evidence of petitioners.

11. On 22-01-2018, the 1st petitioner/D-4 filed I.A.No.29 of 2018 stating that her mother the 3rd petitioner/D-2 is aged 76 years; that she was suffering from diabetes mellitus, hypertension and also transient ischaemic attack and coronary heart disease; that she is also suffering from senile dementia and has severe arthritis; that she has restricted mobility and is unable to walk which is certified by medical certificate dt.07-11-2017 by Dr.A.Latha, Civil Assistant Surgeon, District Head Quarter Hospital, Chittoor; and therefore the 1st petitioner may be permitted to adduce evidence on her own behalf and also on behalf of the 3rd petitioner/D-2.

12. Another I.A.No.22 of 2018 was filed under Order 8 Rule 1 (a) (3) CPC to receive certain documents. I.A.No.22 of 2018 was allowed by the Court below on 16-02-2018.

13. Coming to I.A.No.29 of 2018, an objection was taken on behalf of 1st respondent to the authority of the Court to exempt a party(the 3rd petitioner/D-2) to a suit from entering into a witness box or not examining her in proceeding and permitting other defendants to the suit to adduce evidence on her behalf.

14. On 16-02-2018 by a separate order, I.A.No.29 of 2018 was rejected by the Court

below upholding the objection raised by 1st respondent/plaintiff.

THE ORDER DT. 16-02-2018 IN I.A.No.29 of 2018

15. In the said order, the Court below stated that 1st petitioner/D-4 is entitled to depose on her behalf and also on behalf of her mother about the facts of the case which are within her knowledge, but the 3rd petitioner/D-2, who is ill, needs to depose to facts which are within her knowledge in order to prove her case; in view of the Medical Certificate about her restricted mobility and inability to walk since 2015, she should have better legal advice and should invoke provisions of law in order to place oral and documentary evidence which are required to prove her contention.

16. The Court below further expressed an opinion that 1st respondent/plaintiff has a right to ask the Court to draw an adverse inference if the 3rd petitioner/D-2 did not choose to enter the witness box and such right cannot be restricted by the Court. It opined that if a defendant, who is contesting the suit and filed Written Statement, did not prove his version according to law, the plaintiff is entitled to have adverse inference drawn. It further held that the 1st petitioner/ D-4 has no right to seek grant to her of leave to adduce evidence on behalf of 3rd petitioner/D-2.

17. Assailing the same, this Revision Petition is filed by petitioners.

18. Heard Sri S.Rajagopalan, the learned counsel for the petitioners and Sri O.Uday Kumar, learned counsel for the 1st respondent.

CONTENTIONS OF COUNSEL FOR PETITIONERS

19. Learned counsel for the petitioners contended that the law does not require all defendants to be examined and even one defendant or a witness who is well informed can give evidence, particularly, when the other defendant is infirm and sick and that only when a party has to establish something with reference to state of mind, he is required to give evidence himself. He contended that when all the documents on basis of which title is claimed are registered documents and there are also Court decrees such as O.S.No.226 of 1971, the 1st petitioner, being one of the biological daughters of 3rd petitioner/D-2 and who is conversant and having knowledge of the circumstances, is competent to give evidence on behalf of 3rd petitioner/D-2 who is sick and unable to give evidence. He contended that in these circumstances, there is no question of drawing adverse inference against 3rd petitioner/D-2. He relied on the judgment of the Supreme Court in **Man Kaur (Dead) by LRs. Vs. Hartar Singh Sangha** (2010) 10 S.C.C. 512) and contended that the Supreme Court itself recognized the son or daughter managing affairs of an old and infirm parents to give evidence on their behalf.

CONTENTIONS OF COUNSEL FOR 1ST RESPONDENT

20. Sri O.Uday Kumar, learned counsel, appearing for 1st respondent/plaintiff,

however refuted the above contentions and supported the order passed by the Court below.

THE CONSIDERATION BY THE COURT

21. From the facts stated above, it is clear that the 1st petitioner/D-4 and 4th petitioner/D-3 are the daughters of the 3rd petitioner/D-2 and V.Raghunatha Reddy and the 1st respondent is the minor son of the deceased 1st defendant, who was the son of 3rd petitioner and V.Raghunatha Reddy.

22. The 1st respondent's case is that the plaint A to D schedule properties are the joint family properties of the 1st respondent/plaintiff, the 1st defendant and late V.Raghunatha Reddy.

23. The petitioners/Defendants are opposing the same stating that the plaint schedule properties are self acquired properties of V.Raghunatha Reddy and his mother Rangamma and that in O.S.No.26 of 1971, there is a finding recorded that the properties are the self acquired properties of V.Raghunatha Reddy and the 3rd petitioner since Rangamma died pending the suit; and in view of the said defence, the 1st respondent/plaintiff is not entitled to the relief of partition. It is the case of the petitioners that the title claim of late V.Raghunatha Reddy and his mother Rangamma is established by registered title deeds and also by the decision in O.S.No.26 of 1971.

24. The fact that the 3rd petitioner/D-2 is unwell is evidenced by medical certificate dt.07-11-2017 produced by the petitioners before the Court below and is sufficient to show that the 3rd petitioner/D-2 would not be in a position to come to Court and give evidence in support of the stand taken by her in the suit. The Court below also did not disagree with the said plea.

25. In these circumstances, the question is whether the 1st petitioner/D-4 can be permitted to adduce evidence on behalf of the 3rd petitioner/D-2, her sick and infirm mother, or not and whether the Court below is entitled to draw an adverse inference because the 3rd petitioner/D-2 did not enter the witness box.

26. Section 118 of the Indian Evidence Act, 1872 states that all persons shall be competent to testify unless the Court's considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body and mind, or any other cause of the same kind. Thus all persons are competent to testify, if they did not fall under the category mentioned in Section 118. Judged by this, the 1st petitioner is competent to testify.

27. Order III Rule 2 CPC recognizes certain agents through whom parties may act and it include a person holding a power of attorney.

28. As regards power of attorney holders, the Supreme Court considered their capacity to give evidence in relation to the principal who appointed them as their agent in **Janki**

Vashdeo Bhojwani and others Vs. Indusind Bank Limited and others (2005) 2 S.C.C. 217)**.**

29. In **Janki Vashdeo Bhojwani and others** (2 supra), the Supreme Court held that if the power of attorney holder has rendered some acts in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. It also held that the power of attorney holder cannot depose for the principal in respect of matters which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross examined.

30. In **Man Kaur (Dead) by LRs.** (1 supra), this decision was followed and further explained. Similar issued had arisen out of a suit for specific performance of contract. The Supreme Court summed up the principles in paras 11 and 12 as under:

> "11. To succeed in a suit for specific performance, the plaintiff has to prove:
>
> (a) that a valid agreement of sale was entered by the defendant in his favour and the terms thereof;
>
> (b) that the defendant committed breach of the contract; and
>
> (c) that he was always ready and willing to perform his part of the obligations in terms of the contract.
>
> If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross examination on that issue. A plaintiff cannot obviously examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney holder of the person concerned.
>
> 12. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:
>
> (a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. **Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/ wife exclusively managing the**

> **affairs of his/her spouse, a son/ daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.**"(emphasis supplied)

31. Thus, in the above decision, the Court clarified that where the law requires or contemplates that the plaintiff or other party to proceed has to establish or prove something with reference to his state of mind or conduct, normally, the person concerned alone has to give evidence and not an attorney holder.

32. But it recognized a situation where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), and held that in such an event it may be possible to accept the evidence of such attorney even with reference to bona fides or readiness and willingness. It gave illustrations of such powers of attorney holders who are husband/wife, who are exclusively managing affairs or his or her spouse, a son/daughter exclusively managing the affairs or old and infirm parent and mother exclusively managing the affairs of a son/daughter living abroad.

33. Therefore, it is clear that the law recognizes that even children who are exclusively managing affairs of their old and infirm parents can give evidence on their behalf even with regard to their principal's state of mind or conduct such as regarding bona fides or readiness and willingness.

34. No doubt there is also a principle of law as laid down in **Vidhyadhar Vs. Manikrao and others** (1999) 3 S.C.C. 573) that if a party to a suit does not appear in the suit and state his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him was not correct.

35. But the said principle laid down in **Vidhyadhar** (3 supra) has no application in the case of exceptions mentioned in the **Janki Vashdeo Bhojwani and others** (2 supra).

36. It may be in the instant case, the 3rd petitioner/ D-2 has not given a power of attorney to the 1st petitioner/D-4. But being the biological daughter of the 3rd petitioner /D-2, she would naturally be aware of the details of acquisition of title of her mother/ D-2, when the same is more importantly reflected in registered documents/ Court orders.

37. In my view, where title to property is in issue, and is based on registered documents and Civil Court decrees as in the instant case, there is nothing wrong, if on behalf of an aged and infirm parent like the 3rd petitioner/D-2, her biological daughter, the 1st petitioner/D-4, gives evidence.

38. It is not as if proof of title is akin to a state of mind or a conduct which is only in the personal knowledge of the title holder

and cannot therefore be spoken to by others knowing of it. So it cannot be said that unless such title holder deposes, the factum of title does not get proved.

39. Further, in law, the non-examination of the title holder cannot confer title on the person disputing his/her title by way of acquiescence, estoppel or silence.

40. As held in **Kamakshi Builders Vs. Ambedkar Educational Society and others** (2007) 12 S.C.C. 27), where title to property is in issue, the finding as to who has got title is an inference of law, arising out of certain set of facts. The Supreme Court held that if in law, a person does not acquire title, the same cannot be vested only by reason of acquiescence or estoppel on the part of the other. It held that the title cannot be vested because a witness or a party is not examined.

41. This principle applies on all fours to the instant case.

42. It cannot also be disputed that there is no mandatory rule that all defendants ought to depose in a suit. In **Saradamani Kandappan and others Vs. S.Rajalakshmi and others** (2011) 12 S.C.C. 18), the Supreme Court held that where the entire transaction was done on behalf of defendant Nos.1, 2 and 3 for the other defendants, it was not unnecessary for the other defendants to be examined as witnesses and duplicate the evidence.

43. In this view of the matter, I am of the view that the Court below acted perversely in not permitting the 1st petitioner to depose on behalf of 3rd petitioner/D-2 after having accepted the illness of the 3rd petitioner/ D-2. It could not have held that D-2 should depose or else adverse inference can be drawn for the benefit of the 1st respondent/ plaintiff. It would be a travesty of justice to take such a view in the facts and circumstances of the case.

44. Accordingly, the Civil Revision Petition is allowed; the order dt.16-02-2018 in I.A.No.29 of 2018 in O.S.No.6 of 2009 of the I Additional District Judge, Chittoor, Andhra Pradesh, is set aside; the said I.A.No.29 of 2018 is allowed; it is further directed that no adverse inference shall be drawn by the Court below on the ground of non-examination of 3rd petitioner/D-2 in the suit. No costs.

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

–X–

2018(3) L.S. 48 D.B. (Hyd.)

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

Present:
The Hon'ble Mr. Justice Sanjay Kumar &
The Hon'ble Mr. Justice M.Ganga Rao

Union of India ..Petitioner
Vs.
Rizwan Basha ..Respondent

SERVICE LAW - Administrative Tribunal - O.A filed by respondent before Central Administrative Tribunal, Hyderabad Bench - Assailing Order of Secretary, Department of Personnel and Training, Government of India, and seeking a consequential direction to allocate respondent to any of the Central Civil Services, under physically handicapped category, as per the Rank No.48 secured by him in the Civil Services Examination, 2016 - Tribunal allowed the O.A., setting aside the impugned order – Hence instant writ petition.

Held - Final finding of the Appellate Medical Board that the visual disability of the respondent is 40%, and his candidature could not have been rejected on the ground that he fell short of the required percentage of disability - Order of the Tribunal holding to this effect and granting him relief therefore does not brook interference - Writ petition stands dismissed.

W.P.No.23647/2018 Date: 31-8-2018

Mr.K. Lakshman, Assistant Solicitor General, Advocates for the Petitioners.
Mr.K. Sudhakar Reddy, Advocate for the Respondent.

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

O.A/020/0056/2018 was filed by Rizwan Basha Shaik, the respondent herein, before the Central Administrative Tribunal, Hyderabad Bench (for brevity, 'the Tribunal'), assailing the order dated 07.11.2017 of the Under Secretary, Department of Personnel and Training, Government of India, and seeking a consequential direction to allocate him to any of the Central Civil Services, under physically handicapped category, as per the Rank No.48 secured by him in the Civil Services Examination, 2016. By order dated 23.03.2018, the Tribunal allowed the O.A., setting aside the impugned order dated 07.11.2017 and directing his appointment to a suitable post in the civil services based on his rank. Aggrieved thereby, the Union of India, represented by the Secretary, Department of Personnel and Training (AIS Division), Government of India, New Delhi, filed this writ petition.

The respondent appeared for the Civil Services Examination, 2016, under the visually impaired category with 40% blindness. He secured All India Rank No.48. The Union Public Service Commission recommended his name for appointment to the civil services under physically handicapped category.According to him, he

has no vision in the right eye and high myopia nystagmus in his left eye, with visual acuity of 6/24, coming under visually impaired category with 40% disability.

Rule 3 of the Rules formulated by the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), Government of India, vide Notification F.No.13018/3/2016-AIS(I) dated 27.04.2016 (for brevity, 'the Rules of 2016'), provides reservation for candidates belonging to physically disabled categories in the Central Civil Services and Rule 22 thereof provides that the eligibility for availing such reservation shall be the same as prescribed in The Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for brevity, 'the Act of 1995'). Section 2(t) of the Act of 1995 defines 'person with disability' to mean a person suffering from not less than 40% of any disability as certified by a medical authority. Section 2(i) of the Act of 1995 defines 'disability' to mean both, 'blindness' as well as 'low vision', amongst others. It is therefore clear that to avail the benefit of such reservation in the Central Civil Services, a person with visual disability must suffer from not less than 40%, as certified by a medical authority. Appendix-III to the Rules of 2016 is titled 'Regulations Relating to the Physical Examination of Candidates'. Regulation 3 therein provides that candidates would be intimated to present themselves before the Central Standing Medical Board constituted for the purpose of conducting medical examination to determine their mental and physical status. Regulation 3.1.4 provides that in case of dissatisfaction/disagreement with the report of the medical examination/ medical test and its recommendations, the candidate may prefer an appeal to the Department of Personnel and Training. Thereupon, medical examination of such candidate by the Appellate Medical Board would be arranged at Delhi. Regulation 3.1.5 is relevant for the purposes of this case and it reads as under:

'3.1.5. Candidate filing an appeal will be assigned an Appellate Medical Board by the DoPT and he/she will have to present him/her before this Board on the date and time indicated in the notice for the same which will be uploaded in the website on the dedicated page for the candidate concerned. No separate notice by post would be sent. Failure to appear before the Appellate Medical Board on the appointed day would amount to forfeiture of the opportunity of appeal for the candidate and as a consequence the recommendation of CSMB would be final. The recommendation of this Appellate Medical Board would be final and no appeal would lie against the opinion of this Appellate Medical Board.'

In terms of the aforestated Rules of 2016, the respondent was subjected to medical examination by the Central Standing Medical Board at Sucheta Kriplani Hospital, New Delhi, on 20.04.2017. By a report bearing the same date, the Chairman and two Members of the Board opined that the respondent was unfit for all services under physically handicapped category as his visual disability was 30% and not 40%, as claimed by him. Aggrieved by this finding, the respondent preferred an appeal under Regulation 3.1.4 and was referred to the

Appellate Medical Board at Guru Nanak Eye Centre, New Delhi. The Appellate Medical Board examined him on 14.07.2017 and opined, vide a certificate bearing the same date, that his degree of visual handicap was 40% and that he may be considered under the physically handicapped quota.

According to the authorities, they had received complaint dated 01.07.2017 in the interregnum alleging that the respondent was relying on a fake disability certificate. Further, as the findings of the Medical Board and the Appellate Medical Board were at variance with a difference of 10%, they referred the matter to the Directorate General of Health Services, Government of India. Thereafter, by letter dated 14.08.2017, the Additional Deputy Director General (AS) of the Directorate General of Health Services informed the Under Secretary, Department of Personnel and Training, Government of India, that the case of the respondent had been referred to a Committee of Experts and that a copy of the Minutes of the meeting dated 08.08.2017 held by the experts in that regard was forwarded therewith. The said Minutes are of particular relevance and are extracted hereunder:

'**Minutes of the meeting**

A meeting was held under the Chairmanship of Dr. B.D.Athani, Spl. DGHS on 08.08.2017 at 10:30 AM regarding a complaint against Shri Rizwanbasha Shaik (Rank 48, Roll No.355764) CSE 2016 candidate of Visual Impairment (VI) subcategory of Physically Handicapped (PH) category who was medically examined by CSMB, Sucheta Kriplani Hospital on 20.04.2017 and subsequently by Appellate Medical Board at Guru Nanak Eye Centre on 14.07.2017.

After examination of the documents available in the case record the committee observed that Shri Rizwanbasha Shaik was initially examined at Smt.Sucheta Kriplani Hospital New Delhi where he was examined and vision was recorded to be 6/12 in the better eye. This was done by a chart where the distance could be varied without patient's knowledge. In the normal Snellen's chart he refused to read more than 6/24. All the other tests like PAM, ERG & VEP was done to try to prove objectively that his vision was 6/12 in the normal eye. He used every means to try and get his above reports i.e. ERG & VEP subnormal by not fixating and opening his eyes completely when the test was in progress. Hence the Disability of 30% was given.

At the Appellate stage this candidate was examined in Guru Nanak Eye Centre where his vision was PL –ve Rt. Eye and 6/24 with glasses (-4.0 DS/-0.5D Cyl. @ 180) and was not further improving with pinhole. His ocular examination revealed Rt. Phthisis Bulbi with artificial eye & Lt. refractive error. There was no obvious cause for low vision in Lt. eye. His VEP was attached which was sub-normal with a comment from R P Centre for Ophthalmic Sciences, New Delhi that he was not fixating and opening his eyes completely when the test was in progress. He also did not co-operate well on objective test of Laser interferometry. There is no further objective test to prove that the candidate has better vision than what he was reading in front of the Medical Board. Therefore Disability of 40% was given.

In view of the above this committee feels that the medical opinion given at Sucheta Kriplani Hospital New Delhi is correct and the Appellate authorities from Guru Nanak Eye Centre also agree with it.

Sd/- 8/8/17
Dr.Ritu Arora
Dir. Prof. Ophthalmology Dir.
Guru Nanak Eye Centre
New Delh LHMC, New Delhi

Sd/-8/8/17
Dr.Rita Aggarwal
Consultant, Ophthalmology
Safdarjung Hospital, New Delhi

Sd/-
Dr.Anil Manaktala
DDG (P), Dte. GHS
Nirman Bhawan, New Delhi

Sd/- 8/8/17
Dr.Sarita Beri
Prof. Ophthalmology
LHMC, New Delhi

Sd/- 8/8/17
Dr. Manoj Kumar Yadav
Eye Spl. Gr III,CGHS Wing
Dr. RML Hospital, NewDelhi

Sd/- 8/8
Dr. B.D.Athani
Spl. DGHS, Dte. GHS
Nirman Bhawan, New Delhi'

Basing on the finding of this Expert Committee that the opinion given by the Central Standing Medical Board, Sucheta Kriplani Hospital, New Delhi, was correct and not the opinion given by the Appellate Medical Board at Guru Nanak Eye Centre, New Delhi, the candidature of the respondent was cancelled and he was informed of the same, vide order dated 07.11.2017. It was this order which was subjected to challenge by the respondent before the Tribunal.

Thereupon, the Tribunal found that the case of the respondent had been referred to the Expert Committee which opined that his disability stood at 30%, without even clinically examining him, and that the respondent was not even aware that his case had been referred to an Expert Committee or the contents of its opinion. Having considered the scheme obtaining under the Rules of 2016, the Tribunal opined that there was no provision enabling the authorities to refer the decision of the Appellate Medical Board to further scrutiny. The Tribunal also noted that the respondent had earlier appeared for selection to the Indian Information Services in 2015; the Indian Corporate Law Services in 2016; the Indian Railway Accounts Services in 2017; the IFS in 2017 and was selected for all the said services. He opted for the Indian Railway Accounts Services and was working as such, but before his appointment to this service, he was subjected to medical examination and his visual impairment was

assessed at 40%. As the respondent had not even been subjected to actual physical examination by the Expert Committee, which expressed its opinion based only on the record available before it, the Tribunal held to the effect that the opinion of the Appellate Medical Board which attained finality in terms of Regulation 3.1.5 of the Rules of 2016 could not be disturbed. The Tribunal accordingly set aside the order dated 07.11.2017 and granted relief to the respondent.

Sri K.Lakshman, learned Assistant Solicitor General for India, appearing for the Union of India, would contend that the Rules of 2016 make it clear, in terms of Rule 20, that success in the examination would not confer the right of appointment unless the Government is satisfied after such enquiry as may be considered necessary that the candidate, having regard to his character and antecedents is suitable in all respects for appointment to the service. He would also rely on Rule 21 of the Rules of 2016 which reads as under:

’21. A candidate must be in good mental and bodily health and free from any physical defect likely to interfere with the discharge of his duties as an officer of the service. A candidate who after such medical examination as Government or the appointing authority, as the case may be, may prescribe, is found not to satisfy these requirements will not be appointed. Any candidate called for the Personality Test by the Commission may be required to undergo medical examination. No fee shall be payable to the Medical Board by the candidate for the medical examination including the case of appeal.

Provided, further that Government may constitute a special Medical Board with experts in the area for conducting the medical examination of physically disabled candidates.’

On the strength of the aforestated proviso, the learned Assistant Solicitor General would assert that the Government was fully entitled to constitute a Special Medical Board with experts for conducting the medical examination of the respondent in the light of the complaint received against him and the variance in the findings of the two Boards. He would further point out that one of the members of the Appellate Medical Board was part of the Expert Committee and her change of view clearly demonstrated that the opinion expressed by the Appellate Medical Board could not be accepted.

Sri K.Sudhakar Reddy, learned counsel for the respondent, would contest these arguments by pointing out that the scheme obtaining under the Rules of 2016 attaches finality to the findings of the Appellate Medical Board and contend that the authorities were not justified in practically sitting in appeal over the same. He would further state that the person who allegedly made the complaint against the respondent informed the Department of Personnel and Training, vide letter dated 05.01.2018, that a false complaint had been made against the respondent misusing his name. Learned

counsel would therefore assert that the order passed by the Tribunal does not warrant interference on merits and pray for dismissal of the writ petition.

Basically, the Union of India presses into service two grounds to justify the cancellation of the respondent's candidature.

Firstly, the complaint allegedly made by one S.Narasimha Reddy, claiming that the respondent was using a fake disability certificate, weighed upon them. However, the letter dated 05.01.2018 addressed by the said S.Narasimha Reddy to the Department of Personnel and Training bears out that he never made such a complaint and that his name was misused for that purpose. Therefore, on the strength of this pseudonymous complaint, no action was warranted. The complaint therefore cannot form a justifiable basis for the action taken by the authorities.

The second ground is that the proviso to Rule 21 of the Rules of 2016 empowers the Government to form an expert committee. It may however be noted that Appendix-III to the Rules of 2016, relating to physical examination of candidates, actually implements and gives effect to Rule 21. Regulation 1 in Appendix-III refers to Rule 21 which provides that a candidate must be in good mental and bodily health free from any physical defect likely to interfere with the discharge of his duties and a candidate, who after medical examination, is found not to satisfy these requirements would not be appointed. It is therefore clear that Rule 21 is given effect to by Appendix-III and the Regulations contained therein. Examination by Medical Boards constituted at seven designated hospitals in Delhi, vide Regulation 2.1, and appeals that may be preferred by candidates from the findings of such Medical Boards, in terms of Regulations 3.1.4 and 3.1.5, are therefore relatable to Rule 21 of the Rules of 2016. The argument advanced by the learned Assistant Solicitor General that Rule 21 operates independently of the Regulations in Appendix-III and that an Expert Committee can be constituted to sit in appeal over the opinion expressed by the Appellate Medical Board therefore proceeds on a complete misconception and lack of understanding of the scheme obtaining under the Rules of 2016.

Further, when a pointed query was put to the learned Assistant Solicitor General as to what would distinguish the case on hand from any other case where the Appellate Medical Board disagrees with the findings of the Central Standing Medical Board, his answer was that the case of the respondent stood out owing to two grounds – (1) the complaint received against him, and (2) the fact that there was a variation of 10% in the findings of the two Boards. However, as already pointed out supra, the argument relating to the complaint no longer survives as the so-called complainant himself stated that his name had been misused to make a false complaint. As regards the other ground, in every case that the Appellate Medical Board disturbs the findings of the

Central Standing Medical Board, there is bound to be a variation in the extent of the disability determined by both the Boards. In the absence of a Regulation in Appendix-III to the Rules of 2016 which permits further examination in the event the degree of variation is found to be above a particular percentage, it is not open to the authorities to seek an appellate remedy over the opinion expressed by the Appellate Medical Board. Regulation 3.1.5 in Appendix-III of the Rules of 2016 puts it beyond doubt that the recommendation of the Appellate Medical Board would be final and no appeal would lie against the opinion of the Appellate Medical Board. Such finality would cut both ways and it would be as binding on the authorities as it would be on the candidate.

Further, as already stated supra, the very understanding of the scheme by the authorities as reflected in the argument of the learned Assistant Solicitor General goes against the structure and intendment of Rule 21 and Appendix-III to the Rules of 2016. As the very constitution of an Expert Committee to sit in appeal over the Appellate Medical Board lacks legal basis, participation of one of the members of the Appellate Medical Board in the said Expert Committee is of no consequence. That apart, there is no getting over the fact that the respondent was not even physically examined by the said Expert Committee, which seems to have gone by the record, but made adverse remarks against the respondent not only touching upon the extent of his disability but also upon his character and bonafides. Such findings, in any event, could not have been rendered behind his back in utter violation of the principles of natural justice. No value whatsoever can therefore be attached to the Minutes dated 08.08.2017 of the Expert Committee.

Given the binding and final finding of the Appellate Medical Board that the visual disability of the respondent is 40%, his candidature could not have been rejected on the ground that he fell short of the required percentage of disability. The order of the Tribunal holding to this effect and granting him relief therefore does not brook interference, be it on facts or in law.

The writ petition is utterly devoid of merit and is accordingly dismissed. Pending miscellaneous petitions, if any, shall also stand dismissed in the light of this final order. No order as to costs.

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2018(3) L.S. 55 (Hyd.)

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

Present:
The Hon'ble Dr.Justice
B. Siva Sankara Rao

Safdar Abbas Zaidi ..Petitioner
Vs.
The State of Telangana ..Respondent

INDIAN PENAL CODE, Secs.376, 417 & 420 - Anticipatory bail application – Petitioner/private employee, resident of Burg Dubai.

Held - Accused lured victim with a promise to marry and enjoyed her sexually, but for that she could not even given consent from which it comes under the offence of rape u/Sec.375 IPC, for no free consent as contemplated by Secs.39 and 90 IPC - Petitioner is not entitled to the concession of anticipatory bail – Criminal petition stands dismissed.

Mr.Sarosh Bastawala, Advocate for the Petitioner.
Learned Addl.Public Prosecutor, Advocate for the Respondent.

J U D G M E N T

1. The petitioner, a private employee, resident of Burg Dubai, by name Safdar Abbas Zaidi represented by his father Khaleem Akthar Abid Zaidi as G.P.A. holder maintained the present anticipatory bail application in Cr.No.115 of 2018 of Malkajgiri Police Station, Rachakonda district, Telangana State, registered for the offences punishable under Sections 376, 417 and 420 IPC. Earlier with self-same array, he filed anticipatory bail application in Crl.P.No.4825 of 2018 and the same was by detailed order running in 15 paragraphs with 9 pages ended in dismissal on 09.07.2018 with observation of the same not a bar for future bail application from showing of any changed circumstances, no doubt to consider on own merits and that he is not entitled to the concession of anticipatory bail from the propensity of the crime which prima facie makes out the offence alleged u/sec.376 IPC among others and thereby the contentions of he is an employee and likelihood of loosing job if he is arrested cannot be outweighed in the consideration over the sufferance of the victim.

2. After said dismissal order dt.09.07.2018, the present anticipatory bail application is filed within one month on 08.08.2018 with 8 paragraphs of averments by reproducing the complaint in gist, the ingredients of Section 376 IPC and expressions of the Apex Court in **Kaini Rajan Vs. State of Kerala** (2013) 9 SCC 113)**,** and **Vinod Kumar Vs. State of Kerala** (2014) 5 SCC 678)**, referring to earlier expressions in**

Crl.P.No.8407/2018 Date: 27-8-2018

State of HP Vs. Mango Ram (2000) 7 SCC 224) **and Deelip Singh Vs. State of Bihar** (2005) 1 SCC 88) besides the guidelines for anticipatory bail laid down at para-112 of **Siddharam Satlingappa Mhetre Vs. State of Maharashtra** (2011) 1 SCC 694) and **Bhadresh Bipinbhai Sheth Vs. State of Gujarat** (2016) 1 SCC 152) and ultimately at paras-7 and 8 of the bail application stated there is no specific averments in the occurrence of rape or any other averment of any possible date or time it had occurred and the conduct of the defacto-complainant and her mother (not arrayed therein) as 2nd respondent to the bail application is systematically paranoid, and shows pattern of distress and suspiciousness such that the others motives are interpreted as malevolent and such persons are known to harbour severe antagonism and such persons suffering with paranoid personality disorder, and individuals with this disorder are generally difficult to get along with and often have problems with close relations because of their excessive suspiciousness and hostility and unable to collaborate well with others at work and their combative and suspicious nature may elicit a hostile response in others, which then serves to confirm their original expectations. They are often rigid, and critical by they never accept criticism about themselves, and this causes significant impairment in academic, occupational and/ or social functioning. It is further submitted that he is never in India and the question that he is absconding in misleading does not arise.

3. In fact, in the bail application from the earlier dismissal order referred supra to the date of filing supra as to any worth changed circumstances mentioned. Even in the course of hearing nothing could be brought to the notice of the Court of any changed circumstances but for placed reliance in addition to the decisions referred supra in the bail application, the expressions of the Apex Court in **Pradeep Kumar Verma Vs. State of Bihar** (2007) 7 SCC 413), **Tilakraj Vs. State of Himachal Pradesh** (2016) 4 SCC 140) and a single judge expression of Maharashtra High Court in anticipatory bail application No.2221 of 2016, dt.09.01.2017 in **Akshay Manoj Jaisinghani Vs. State of Maharashtra.**

4. The learned Public Prosecutor opposed the bail application saying neither any merits to review the order of dismissal of the anticipatory bail application by this Court in the previous month nor worth changed circumstances even mentioned though not res judicata for bound to disclose any worth changed circumstances rather mentioning anything as if a changed circumstance to maintain a subsequent bail application which is a pre-requisite even for the Court to entertain and that there is a prima facie accusation as concluded earlier and the petitioner/A.1 no way deserves concession of anticipatory bail, leave about the A.2

obtained regular bail is not a ground to grant anticipatory bail to A.1-the main perpetrator of the crime and in the larger interest of the society.

5. Heard both sides and perused the material on record.

6. There is no quarrel on the scope of the anticipatory bail for granting or refusal more particularly from the expression of the Apex Court in **Siddaram** supra and even from the decision of the Apex Court in **Bhadresh** supra where it is observed that the Court is not concerned with the feasibility of the framing of charge or merits thereof in considering the application of the grant of anticipatory bail as that would be a matter before the trial Court for arriving of a finding of the evidence and once charge is framed, the question for consideration by the Court an application for anticipatory bail at post-charges stage is whether in the circumstances of the case, appellant is entitled to anticipatory bail or not. It was observed regarding the principles that the Court has to come to a conclusion from the verification of the FIR as to false or frivolous complaint or genuine including of investigative, fairness besides gravity of charge and role of accused in evaluating the facts of the case in exercising discretion to grant or refuse besides other criteria is not likelihood of absconding or not cooperating with the investigation but for that no special case need be made out for anticipatory bail but for imposing any necessary conditions, leave about power of the Court if at all to cancel whenever required any such concession of bail if granted and that thereby there are no other inflexible guidelines or straitjacket formula that can be provided for grant or refusal of anticipatory bail other than nature and gravity of the accusation and role of the accused and intensities of the accused and possibility of fleeing from justice or any possibility or likelihood of repeating the same or other crime so that balance be struck between free and fair investigation and personal liberty in taking care of any apprehension or threat to victim or possibility of interfering with the witnesses or tampering the evidence or material etc. There the facts are of the alleged rape occurred 17 years ago in 2001 and no charge so far framed and the charge u/sec.376 is added only in the year 2013 and not earlier in saying entitlement to the concession of anticipatory bail with reference to it even the offence u/sec.376 is added for further investigation more than 12 years after registration of the crime.

7. Now coming to the accusation against the petitioner with propensity of the crime concerned, the earlier dismissal order in Crl.P.No.4825 of 2018, dt.09.07.2018 in detail dealt with at paras-6 and 7. Now coming to the contentions in the present second anticipatory 7 bail application at para-2 what is mentioned as “changed circumstances are evidenced from the fact

that the Gandhi hospital stated that the evidence of sexual assault cannot be ruled out, but however the medical examination report for sexual assault dt.10.02.2018 (wrongly mentioned as 10.02.2012) states that ‘opinion reserved pending availability of reports of the sample sent.” It is in fact not a new material even. It is further averred the victim did not report to police but the defacto-complainant-cum-her mother. In this regard, a perusal of the Case Diary clearly shows the victim was even examined as a witness and her version corroborates to the contents of the report on material aspects at least if not, with more details. So far as the report of the occurrence in setting criminal law in motion concerned, there are no conventional protocols as held by the Constitution Bench of the Apex Court wayback in **R.S.Naik Vs. A.R.Anthuley (**AIR (1984) SC 718).

8. So far as the legal position on the scope of Section 376 IPC including from the decision placed reliance concerned, no doubt, learned Single Judge of the Bombay High Court in **Akshay Manoj Jaisinghani** supra, on facts of the victim aged 21 years became a friend of accused and when he invited her for celebrations of his birthday, she attended along with friends and spent 2.5lakhs for gifting gold chain, mobile phone of Samsung Company, laptap, hair straitjacketner and clothes to him and he promised her to marry and when she went to his house later having promised her to marry, he had sexual intercourse and later took her to various hotels under said promise to marry and had sexual intercourse without her consent. He consumed liquor drugs at the time of sexual intercourse and when she informed about their relationship to the parents of the accused who did not react and later she realised that she was pregnant out of sexual relationship with him and when she informed him so, he advised to go for termination and against her will, he administered her pills however it was not successful. Nearly one and half month later, he had forcible intercourse with her and later she went to Dubai to her parents where she had medical check up and found pregnancy was not terminated and she returned back to India and when contacted the accused he abused her and threatened saying she should not give any complaint against him to police. It was observed that a major and educated woman concerned, she is supposed to fully aware of the consequences of having sexual intercourse with a man before marriage and consent obtained by fraud or inducement is one of the necessary ingredients in such an event to attract Section 376 IPC with some material to believe that she was induced by the accused. It was observed that sexual urge is a free decision of any major individual irrespective of gender and promise to marry cannot be a condition precedent to have sex, though behavioural pattern and psyche of Indian society to be taken into account in dealing with the issue and ultimately

anticipatory bail was granted therein.

9. So far as **Pradeep Kumar** supra concerned, it was against dismissal of the discharge application by the trial Court and also by High Court with single line order without proper consideration when approached the Apex Court, it remitted the matter without expression of any opinion on merits for fresh consideration, where the charges framed were for the offences punishable under Sections 376 and 406 IPC. The Apex Court in fact referred **Uday Vs. State of Karnataka** (2003) 4 SCC 46) and **Deelip Singh** supra. There, on facts, the observation was that the trial Court failed to note while framing charges u/ secs.376 and 406 IPC, of the lady victim accepted that whatever physical relationship with the accused were there with her consent and she was married to the accused. That being so, the question of any offence punishable under Section 376 IPC does not arise was the observation in so remitting.

10. So far as the application of Section 375 and 376 IPC concerned, referring to the two earlier expressions supra, it was observed in **Pradeep Kumar** supra that though the crucial expression in Section 375IPC defines 'rape' as 'against her will', the consent defined in section 90IPC is not in positive terms but what cannot be regarded as consent is explained and it is firstly on the point of view of the victim and secondly on the point of view of accused and misconception of fact is one of the parameters of no consent. Where it envisages from the second part of Section 90 IPC of accused to have knowledge or reason to believe the consent of the victim was in consequences of fear or injury or misconception of fact.

11. With that by referring to **Deelip Singh** supra where at paras- 17 to 19, the Apex Court observed at page-99 of consent u/ sec.90 cannot be considered as exhaustive definition of consent for the purposes of IPC and the normal connotation and concept of consent is not intended to be excluded. In Stroud's Judicial Dictionary it is defined consent as 'an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side'. Jowitt, while employing the same language added that consent supposes three things a physical power, a mental power and a free and serious use of them. Hence if the consent is obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence etc., it is to be treated as a delusion, and not as a deliberate and free act of the mind.

12. In **Udaya** supra, the Apex Court at page 53 para-12 observed as 'the Courts in India have by and large adopted these tests to discover whether the consent was voluntary or whether it was vitiated so as not to be a legal consent' and the same was referred

later in **Deelip Singh** supra and further observed in **Deelip Singh** supra that as held by Panjab High Court in **Rao Harnarain Singh Sheoji Singh Vs. the State (**1958 Crl.L.J. 563) on the expression of 'consent' in the context of Section 375IPC by Hon'ble Tec Chand J. at para-7 of difference between consent and submission and however consent involves submission but consent does not follow and the mere fact of submission does not involve consent thereby. The proposition is virtually repetition of what was stated by Coleridge J in **R Vs Day** (1841) 9 C&P 722).

13. It was also observed of mere fact of helpless resignation in the face of unfavourable compulsion, non-resistance and passive giving in, cannot be deemed to be consent. The 3JB of the Apex Court in **Mangoram** supra at para-13 at page 213 held that consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the consequences and merely quality of the act, but after having fully exercised the choice between the resistance to and assent, where there was consent or not, is to be ascertained only on careful study of relevant circumstances.

14. It also referred in Division Bench expression of Madras High Court in **N. Jaladu, Re (**ILR(1913) 36 Mad 453)**.** that misconception of fact is not a consent agreeing under Section 90 IPC in dealing with a kidnap case where the parents consent was taken under a false representation of taking the minor girl for a festival, however later the marriage was performed with first accused by the second accused who had taken the girl, in saying there was no consent in observing misconception of fact is brought enough to include of cases where consent is obtained by misrepresentation, misrepresentation should be regarded as leading to misconception of the facts with reference to which the consent is given.

15. It also referred to the judgment of Bombay High Court where the view of the Madras High Court accepted, by Division Bench in **Parshottam Mahadev Patharphod Vs. State of Maharashtra (**AIR 1963 Bombay 74) of consent given pursuant to a false representation that the accused intends to marry the victim could be regarded as consent given in misconception of fact and thereby no consent u/sec.90 IPC within the meaning u/sec.375IPC. It also referred the subsequent Calcutta High Court expression in **Jayanti Rani Panda Vs. State (**1984 Crl.L.J.1535) on facts the victim alleged that the accused came to her house and had intercourse many a time allegedly kept in a secret with her parents as not believable of the alleged intercourse on the promise to marry, but for otherwise voluntary with consent.

16. It also referred a Chancery Court expression in **Edgington Vs. Fitzmaurice (**1885 29 CHD 459) para-8 referred in **Jayanti Rani Panda** supra by Calcutta High Court that mis-statement of the intention of the defendant in doing a particular act may be mis-statement of fact, and if the plaintiff was misled by it, action of deceit may be founded in it. In **Uday Supra** all the case law was referred.

17. From that in Pradeep Kumar supra at para-27 in page 721 observed that a false promise does not come within the meaning of the consent. Having inclined to agree with this view, but we must add that there is no straitjacket formula for determination whether consent given by the prosecutrix for sexual intercourse is voluntary or whether it is given in misconception of fact and the Court must in each case consider the evidence before it and the surrounding circumstances, before reaching any conclusion, because each case has its own peculiar facts which may have bearing on the question whether the consent was voluntary, or is given in misconception of fact.

18. Thus, from the expressions in **Uday, Deelip Singh** and **Pradeep Kumar** supra, each case depends upon own facts and misstatement or mis-representation is even within the meaning of no consent to constitute the offence of rape.

19. Coming to the expression in **Vinod Kumar Vs. State of Kerala** (2014) 5 SCC 678) what was observed on facts that consequent sexual indulgement amounted to consensual sexual relationship for which accused cannot be held guilty for rape. If accused was honest or forthright and did not conceal anything, he cannot be convicted for rape. It is clear from the above that in **Vinod Kumar** supra, neither new principle laid down nor the earlier principle of law explained or overruled.

20. Coming to the expression in **Tilakraj** supra, it was also a case where the trial Court acquitted the accused for the offences punishable of rape u/sec.376 IPC besides the other offences charged u/sec.417 and 506 IPC whereas the High Court in appeal by State, convicted for the offences u/ sec.417 and 506 IPC and the same when attacked before the Apex Court, the observations that were made therein in setting aside the High Court's reversal finding to the above extent, also with observations of double presumption after acquittal for not to interfere with acquittal unless there are findings of perversity in the trial Court's judgment. On facts, it was held that the age of the prosecutrix is 40 years and the accused is 10 years younger to her, that too, she is a Government servant and she was appointed as Protection Officer under the Protection of Women from Domestic violence Act, 2005 and she was in continuous relation with the accused

since 2 years prior to the alleged incident that established the physical intimacy and her case on it is under a false pretext to marry. On analysis of the facts from the evidence on record her version proved false. Thereby the conclusions are on factual basis and there is no any new principle of law laid down nor the earlier expressions in this regard referred, including on the scope of Section 375 and 90 IPC.

21. Apart from the above, in the earlier order(Crl.P.No.4825 of 2018), the High Court answering the bail application of the petitioner, referred several expressions in para-12 of the order though not discussed in detail of those with reference to the facts in its saying from the FIR contents and the statement of the victim, it shows that the accused lured her with a promise to marry and enjoyed her sexually, but for that she could not even given consent from which it comes under the offence of rape under Section 375 IPC, for no free consent as contemplated by Sections 39 and 90 IPC as already observed on the scope of law by this Court in **Bhumpaka Praveen Kumar Vs. State of Telangana** (2015) 2 ALT Crl. 239), **Deelip, Mangoo Ram Supra**, **Deepak Gulati Vs. State of Haryana (**2013 3 ALT Crl.339 SCC), Yedla **Srinivasa Rao Vs. State of A.P. (2007 1 ALT Crl.61SCC), Pradeep Kumar** supra and **State of UP Vs. Noushad (**2014 1 ALD Crl.634 SCC). For that conclusion, the other expression of the Apex Court in **Karti Vs. State (**2013 12 SCC 710)also lends support by almost reiterating the principle laid down in **Deelip Singh** supra.

22. Having regard to the above, the petitioner is not entitled to the concession of anticipatory bail.

23. In the result, the Criminal Petition is dismissed. Consequently, miscellaneous petitions, if any, pending in this Criminal Petition shall stand closed.

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LAW SUMMARY

2018 (3)

Supreme Court Reports

2018 (3) L.S. 1 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

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

N. Radhakrishnan @
Radhakrishnan Varenickal ..Petitioner
Vs.
Union of India & Ors., ..Respondents

CONSTITUTION OF INDIA - Art.19(2) & 32 - Writ petition - Creativity and its impact - Prayer for banning a book on the foundation that a part of it is indecent and offends the sentiments of women of a particular faith.

Held - Book should not be read in a fragmented manner - It has to be read as a whole - Writer should have free play with words, like painter has it with colours - Passion of imagination cannot be directed - Craftsmanship of writer deserves respect by acceptation of concept of objective perceptibility - Writ petition stands dismissed.

W.P.(Civil) No.904/2018 Date:5-9-2018

J U D G M E N T

(per the Hon'ble Mr.Chief Justice of India Dipak Misra)

A writer or an author, while choosing a mode of expression, be it a novel or a novella, an epic or an anthology of poems, a play or a playlet, a short story or a long one, an essay or a statement of description or, for that matter, some other form, has the right to exercise his liberty to the fullest unless it falls foul of any prescribed law that is constitutionally valid. It is because freedom of expression is extremely dear to a civilized society. It holds it close to its heart and would abhorrently look at any step taken to create even the slightest concavity in the said freedom. It may be noted here that we are in this writ petition, preferred under Article 32 of the Constitution, dealing with creativity and its impact and further considering the prayer for banning a book on the foundation that a part of it is indecent and offends the sentiments of women of a particular faith. Having said this, we would like to refer to two authorities highlighting the importance of creativity and necessity of freedom of expression and how the principle of pragmatic realism assures the said creative independence as civilization, indubitably a progressive one, perceives and eagerly desires for its accentuated protection, nourishment and constant fostering. It is so because curtailment of an author's right to freedom of expression is a matter of serious concern.

2. In Devidas Ramachandra Tuljapurkar v. State of Maharashtra and others (2015) 6 SCC 1), the Court, dealing with the meaning of the words "poetic licence", observed:

"… it can never remotely mean a licence as used or understood in the language of law. There is no authority who gives a licence to a poet. These are words from the realm of literature. The poet assumes his own freedom which is allowed to him by the fundamental concept of poetry. He is free to depart from reality; fly away from grammar; walk in glory by not following systematic metres; coin words at his own will; use archaic words to convey thoughts or attribute meanings; hide ideas beyond myths which can be absolutely unrealistic; totally pave a path where neither rhyme nor rhythm prevail; can put serious ideas in satires, ifferisms, notorious repartees; take aid of analogies, metaphors, similes in his own style, compare like "life with sandwiches that is consumed everyday" or "life is like peeling of an onion", or "society is like a stew"; define ideas that can balloon into the sky never to come down; cause violence to logic at his own fancy; escape to the sphere of figurative truism; get engrossed in the "universal eye for resemblance", and one can do nothing except writing a critical appreciation in his own manner and according to his understanding. When a poet says "I saw eternity yesterday night", no reader would understand the term "eternity" in its prosaic sense. The Hamletian question has many a layer; each is free to confer a meaning; be it traditional or modern or individualistic. No one can stop a dramatist or a poet or a writer to write freely expressing his thoughts, and similarly none can stop the critics to give their comments whatever its worth. One may concentrate on Classical facets and one may think at a metaphysical level or concentrate on Romanticism as is understood in the poems of Keats, Byron or Shelley or one may dwell on Nature and write poems like William Wordsworth whose poems, say some, are didactic. One may also venture to compose like Alexander Pope or Dryden or get into individual modernism like Ezra Pound, T.S. Eliot or Pablo Neruda. That is fundamentally what is meant by poetic licence."

3. In Raj Kapoor and others v. State and others (1980) 1 SCC 43), Krishna Iyer, J., speaking for himself, while quashing the criminal proceedings initiated against the petitioner therein for the production of the film, namely, 'Satyam, Sivam, Sundaram', observed:

> "12. … Jurisprudentially speaking, law, in the sense of command to do or not to do, must be a reflection of the community's cultural norms, not the State's regimentation of aesthetic expression or artistic creation. Here we will realise the superior jurisprudential value of dharma, which is a beautiful blend of the sustaining sense of morality, right conduct, society's enlightened consensus and the binding force of norms so woven as against positive law in the Austinian sense, with an awesome halo and barren autonomy around the legislated text is fruitful area for creative exploration. But

> morals made to measure by statute and court is risky operation with portentous impact on fundamental freedoms, and in our constitutional order the root principle is liberty of expression and its reasonable control with the limits of 'public order, decency or morality'. Here, social dynamics guides legal dynamics in the province of 'policing' art forms."[Emphasis added]

4. The learned Judge further went on to say:

> "15. … The relation between Reality and Relativity must haunt the Court's evaluation of obscenity, expressed in society's pervasive humanity, not law's penal prescriptions. Social scientists
> and spiritual scientists will broadly agree that man lives not alone by mystic squints, ascetic chants and austere abnegation but by luscious love of Beauty, sensuous joy of companionship and moderate non-denial of normal demands of the flesh. Extremes and excesses boomerang although some crazy artists and film directors do practise Oscar Wilde's observation: 'Moderation is a fatal thing. Nothing succeeds like excess'.

16. All these add up to one conclusion that finality and infallibility are beyond courts which must interpret and administer the law with pragmatic realism, rather than romantic idealism or recluse extremism."

[Emphasis added]

5. We have referred to the aforesaid decisions in the beginning as we intend to adjudicate the lis on the touchstone of "pragmatic realism". When we say "pragmatic realism", it has to be understood in the context of creativity, for the present Writ Petition preferred under Article 32 of the Constitution seeks for issue of an appropriate writ to ban the novel, namely, "Meesha" meaning Moustache which appeared in a popular Malayalam weekly, "Mathrubhumi", published from Kozikhode, Kerala and circulated throughout the country and abroad.

6. It is averred by the petitioner that the said literary work is insulting and derogatory to temple going women and it hurts the sentiments of a particular faith/community. It is further asserted that the portion of the book 'Meesha' which was published in 'Mathrubhumi' shows temple going women in bad light and it has a disturbing effect on the community.

7. It is contended that the editor of 'Mathrubhumi' has failed in his duty by not editing or scrutinizing the portion of the book 'Meesha' which was published in the weekly. It is put forth by the petitioner that he has approached this Court singularly for the protection of the legitimate interest of the women community. The petitioner submits that such writings which have appeared in 'Mathrubhumi' are not a manifestation of the freedom of expression but are collusive efforts aimed at dividing the society, for such imputations are discriminatory against women and threaten the very fabric of the society which embodies within itself the virtues of pluralistic community, religion and gender balance.

The petitioner avers that defamatory and degrading publications which cater to perverted and communal minds need to be checked and nipped in the bud as they have a tendency to propel the general public to view the women community as mere sexual and material objects which, in turn, denies the women community their fundamental rights and also jeopardizes their safety and wellbeing.

8. It is also alleged by the petitioner that the impugned incriminating material appearing in 'Mathrubhumi' defiles the places of worship and causes the public to look down upon them with contempt and ridicule, whereas worshipping of deities by visiting the temples with purity of body and mind is an integral part of the Hindu religion.

9. It is urged that the said publication in 'Mathrubhumi' has the proclivity and potentiality to disturb the public order, decency or morality and it defames the women community, all of which are grounds for the State to impose reasonable restrictions under Article 19(2) on the fundamental right of freedom of speech and expression. To buttress his stand, the petitioner has submitted that after the publication of the incriminating material, women visiting temples are subjected to ridicule and embarrassment through various social media platforms and instances such as these are bound to have an adverse effect on the liberty, freedom and empowerment of women.

10. The petitioner has also averred that if such a work of literature is not checked, it may trigger a 'Charlie Hebdo' kind of a backlash in our country and, therefore, it is necessary for this Court to lay down guidelines to regulate and prohibit, those who control/manage/publish both on print and electronic media platforms, from publishing such insensitive, incriminating and defamatory articles which could disrupt the peaceful coexistence of various communities and religions in the country.

11. In view of the aforesaid, the petitioner has prayed to this Court to issue a writ of Mandamus or any other writ/directions to the Respondent No. 1, the Union of India, the Respondent No. 2, the State of Kerala and the Respondent No. 4, the Chief Editor of 'Mathrubhumi' weekly, to search and seize all copies of 'Mathrubhumi' weekly volume2 dated 11.07.2018 from all the States and/or issue a writ of prohibition or any other directions to the Respondents to prevent any further publication/circulation of the novel titled 'Meesha' in the form of a book or in any other form including the internet. The petitioner has also prayed to issue appropriate directions in the nature of mandamus or otherwise to the Ministry of Information and Broadcasting, New Delhi, to frame such guidelines as to prevent the recurrence of such instances which have the tendency to cause threat to the integrity of the society and the safety of women.

12. It may be noted here that when the Writ Petition was listed on 02.08.2018, this Court, before issuing notice, deemed it appropriate to pass an order on the same date which reads as follows:

"Mr. M.T. George, learned counsel shall file within five days hence the central theme

of the book and the three chapters, which have been published in a weekly newspaper, namely, Mathrubhumi."

13. In pursuance of the aforesaid order of this Court, Mr. M.T. George, learned counsel appearing on behalf of the Chief Editor of 'Mathrubhumi', the Respondent No. 4 herein, has filed the translated copy of the central theme of the book 'Meesha' along with an English translation of the three chapters of the novel.

14. A perusal of the central theme of 'Meesha' reveals that the book is a narration which revolves back to the 19th century and extends to the present times with Vavachan alias Meesha (Moustache), Paviyam, Chella and Sita as its central characters. Vavachan is one of the six children of Paviyam and Chella and their family is engaged in agriculture for a living. The novel begins with young Vavachan travelling in a boat with his father for gathering fodder grass. On the way, Paviyam tries to steal a bunch of raw bananas from a Pulaya (farm) but his attempt was foiled by a young woman of the household, named, Sita. Vavachan at his young age is stunned and baffled when he sees the halfnaked body of Sita. After this rendezvous, a storm hits and Paviyam, the father, along with his son Vavachan lose their way. After the storm subsides and time passes, Vavachan comes across two men who tell him that the world was about to witness a big war and they were going to Malaya (town) to escape a famine. Vavachan gets hooked with the idea of Malaya though he had no idea as regards its location.

15. As the narration proceeds, Vavachan along with his family lived in constant hunger. One day, a theatre group comes to their village from Malabar. The proprietor of the theatre group needs an actor with a big and ferocious moustache to play the role of a policeman. But there was no one in the village who was sporting a big moustache as it was considered as act of defiance especially among the lower castes. The proprietor of the theatre group comes across Vavachan who had never shaven in his life and sported thick hair and a beard. The proprietor gave Vavachan a tonsure treatment, that is to say, he shaved his head but allowed a ferocious Moustache (Meesha) to remain. Thereafter, Vavachan was put on stage where he only has to scream twice bloodcurdling 'daa' (you).

16. In response, people got scared and ran away from the scene and Vavachan's moustache, which he refused to shave off even after the show, became a notorious legend. The upper caste people who resented Vavachan's Moustache ascribed to him every kind of crime, even though he was innocent and just wanted to go to Malaya and marry the girl, Sita, who had bedazzled him when he was young and whom he had seen halfnaked.

17. When the period of famine and hunger struck, Vavachan, with armed men after him, fled from his village and hid in the fields of Kuttanadan where labyrinthine canals and marshes saw human presence only during the farming season. Gradually, with the passage of time, Vavachan got immersed in the Kuttanadan environment where he encountered the myths, legends, folklore and superstitions ingrained among the

people.

18. Paviyam and Chella, the parents of Vavachan, die without seeing him. But after Chella's death, he returns to his native village and runs away with a book from Kalan and reads it fully. The stories of (Meesha) Vavachan alias Moustache get etched in the region's sub-consciousness. The moustache becomes a legend himself with super natural powers. The landlords and the government become afraid that Meesha's activities would hurt the farming activities in Kuttanadan and they deploy a legendary subinspector named Thanu Linga Nadar to deal with Meesha. However, at that time, Kuttanadan witnessed a deluge and Nadar's mysterious death increased Meesha's terror. Subsequently, Meesha locks horns with a local strongman named Karumathara Ittichan and rumors went around that Meesha was killed in fight with Ittichan.

19. But Meesha had reached Kumarakom, an important place in northern Kuttanadan, where an Englishman called Brenen Sayip (Saheb) had installed a machine to pump out water from the fields of Kuttanadan. Refusing to divulge the secret of the machine, Brenen Saheb charges hefty amounts from the people. Avarachan, a man interested in science, manages to steal the secret with the help of Meesha. Meesha works as a help of Baker Sayip who has vast fields and also conducts missionary work in the region. There Meesha befriends a fisherman called Ouseph, who was born to a Malayali woman from Baker Sayip's father.

20. Baker Sayip is a wellknown crocodile hunter who was known to have caused the extinction of crocodiles in the Vembanad Lake. However, the last crocodile is after Baker for revenge. In the end, it is Meesha who conquers the crocodile and due to this feat of Meesha, Baker Sayip becomes his b_te noire. When Meesha realizes that Baker has turned against him, he escapes from there along with Ouseph.

21. Thereafter, Meesha comes across a prostitute, Kuttathi, who had heard about the adventures of Meesha. One Kunjachan, the son of the lake area's owner troubles Kuttathi and is a big nuisance for her. Meesha slams Kunjachan as well. In return, Kuttathi, with the assistance of one Narayanan, who also sports a moustache, helps Meesha to find his childhood crush Sita. Meesha saves Sita from a robber called Katta Pulavan. Thereupon, Meesha asks Sita to accompany him, but Sita is unwilling and refuses to submit herself to Meesha.

22. Thus, Vavachan alias Meesha, who is able to defeat everyone in life, is defeated by a woman in the end.

23. Presently, we may refer to and quote the dialogue from the book "Meesha" that has impelled the petitioner to move this Court in the instant writ petition. The English translation of the dialogue appears at page twenty-six of the translated copy of the three chapters submitted by Mr. M.T. George, learned counsel appearing for the Respondent No. 4, the Chief Editor of the weekly 'Mathrubhumi'. It reads thus:"

Why do these girls take bath and put on their best when they go to the temple?" a friend who used to join the morning walk

until six months ago once asked.

"To Pray", I said.

"No", he said. "Look carefully, why do they need to put their best clothes in the most beautiful way to pray? They are unconsciously proclaiming that they are ready to enter into sex", he said. I laughed.

"Otherwise," he continued, "why do they not come to the temple four or five days a month? They are letting people know that they are not ready for it. Especially, informing those Thirumenis (Brahmin priests) in the temple. Were they not the masters in these matters in the past?"

24. The primary issue that emerges for consideration is whether the aforesaid portion of the book 'Meesha' which the petitioner asserts to be derogatory to the women community is an aberration of such magnitude which requires the intervention of this Court on the ground that it has the potentiality to disturb the public order, decency or morality and whether it defames the women community, and, therefore, invites imposition of reasonable restriction under Article 19(2) of the Constitution.

25. For deciding this question, we must advert to the fundamental idea behind art and literature and the liberalism associated with artistic expression. Literature symbolizes freedom to express oneself in multitudinous ways. One should never forget that only when creativity is not choked, it helps the society to be able to accept the thoughts and ideas of a free mind.

26. Literature can act as a medium to connect to the readers only when creativity is not choked or smothered. The free flow of the stream of creativity knows no bounds and imagination brooks no limits. A writer or an artist or any person in the creative sphere has to think in an unfettered way free from the shackles that may hinder his musings and ruminations. The writers possess the freedom to express their views and imagination and readers too enjoy the freedom to perceive and imagine from their own viewpoint. Sans imagination, the thinking process is conditioned.

27. Creative voices cannot be stifled or silenced and intellectual freedom cannot be annihilated. It is perilous to obstruct free speech, expression, creativity and imagination, for it leads to a state of intellectual repression of literary freedom thereby blocking free thought and the fertile faculties of the human mind and eventually paving the path of literary pusillanimity. Ideas have wings. If the wings of free flow of ideas and imagination are clipped, no work of art can be created. The culture of banning books directly impacts the free flow of ideas and is an affront to the freedom of speech, thought and expression. Any direct or veiled censorship or ban of book, unless defamatory or derogatory to any community for abject obscenity, would create unrest and disquiet among the intelligentsia by going beyond the bounds of intellectual tolerance and further creating danger to intellectual freedom thereby gradually resulting in "intellectual cowardice" which

is said to be the greatest enemy of a writer, for it destroys the free spirit of the writer. It shall invite a chilling winter of discontent. We must remember that we live not in a totalitarian regime but in a democratic nation which permits free exchange of ideas and liberty of thought and expression. It is only by defending the sacrosanct principles of free speech and expression or, to borrow the words of Justice Louis Brandeis, "the freedom to think as you will and to speak as you think" and by safeguarding the unfettered creative spirit and imagination of authors, writers, artists and persons in the creative field that we can preserve the basic tenets of our constitutional ideals and mature as a democratic society where the freedoms to read and write are valued and cherished.

28. The aforesaid also calls from the readers and admirers of literature and art to exhibit a certain degree of adherence to the unwritten codes of maturity, humanity and tolerance so that the freedom of expression reigns supreme and is not inhibited in any manner. The flag of democratic values and ideals of freedom and liberty has to be kept flying high at all costs and the Judiciary must remain committed to this spirit at all times unless they really and, we mean, really in the real sense of the term, run counter to what is prohibited in law. And, needless to emphasise that prohibition should not be allowed entry at someone's fancy or view or perception.

29. In Samaresh Bose and another v. Amal Mitra and another (1985) 4 SCC 289), the question that arose before this Court was whether the accused persons had committed an offence under Section 292 IPC. In the said case, an author had written a novel under the caption 'Prajapati' which was published in 'Sarodiya Desh'. The contention before the trial court was that the novel was obscene and both the accused persons, namely, the author and the publisher had sold, distributed, printed and exhibited the same. The accused persons who faced trial stood convicted. Their conviction was affirmed by the High Court. This Court, while dealing with the issue for the purpose of deciding the question of obscenity in any book, story or article, opined:

> "29. … The decision of the court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passages complained of in the book, story or article. The court must take an overall view of the matter complained of as obscene in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall. Though the court must consider the question objectively with an open mind, yet in the matter of objective assessment the subjective attitude of the Judge

hearing the matter is likely to influence, even though unconsciously, his mind and his decision on the question. A Judge with a puritan and prudish outlook may on the basis of an objective assessment of any book or story or article, consider the same to be obscene. It is possible that another Judge with a different kind of outlook may not consider the same book to be obscene on his objective assessment of the very same book. The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the viewpoint of the author the Judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. The Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. …"

The Court, further analyzing the story of the novel, expressed thus:"

35. … If we place ourselves in the position of readers, who are likely to read this book—and we must not forget that in this class of readers there will probably be readers of both sexes and of all ages between teenagers and the aged—we feel that the readers as a class will read the book with a sense of shock and disgust, and we do not think that any reader on reading this book would become depraved, debased and encouraged to lasciviousness. It is quite possible that they come across such characters and such situations in life and have faced them or may have to face them in life. On a very anxious consideration and after carefully applying our judicial mind in making an objective assessment of the novel we do not think that it can be said with any assurance that the novel is obscene merely because slang and unconventional words have been used in the book in which there have been emphasis on sex and description of female bodies and there are the narrations of feelings, thoughts and actions in vulgar language. Some portions of the book may appear to be vulgar and readers of cultured and refined taste may feel shocked and disgusted. Equally in some portions, the words used and description given may not appear to be in proper taste. In some places there may have been an exhibition of bad taste leaving it to the readers of experience and maturity to draw the necessary inference but certainly not sufficient to bring home to the adolescents

any suggestion which is depraving or lascivious."

30. In this regard, we may refer with profit to the pronouncement in Bobby Art International and others v. Om Pal Singh Hoon and others (1996) 4 SCC 1), popularly known as "Bandit Queen case". The Court analysed the storyline, the humiliation faced by the female child, the torment faced by her and, eventually, the innocent woman becoming a dreaded dacoit and observed that to appreciate the story, the character of the person portrayed had to be viewed. In that context, the Court held:

> "27. First, the scene where she is humiliated, stripped naked, paraded, made to draw water from the well, within the circle of a hundred men. The exposure of her breasts and genitalia to those men is intended by those who strip her to demean her. The effect of so doing upon her could hardly have been better conveyed than by explicitly showing the scene. The object of doing so was not to titillate the cinemagoer's lust but to arouse in him sympathy for the victim and disgust for the perpetrators. The revulsion that the Tribunal referred to was not at Phoolan Devi's nudity but at the sadism and heartlessness of those who had stripped her naked to rob her of every shred of dignity. Nakedness does not always arouse the baser instinct. The reference by the Tribunal to the film 'Schindler's List' was apt. There is a scene in it of rows of naked men and women, shown frontally, being led into the gas chambers of a Nazi concentration camp. Not only are they about to die but they have been stripped in their last moments of the basic dignity of human beings. Tears are a likely reaction; pity, horror and a fellow-feeling of shame are certain, except in the pervert who might be aroused. We do not censor to protect the pervert or to assuage the susceptibilities of the oversensitive. 'Bandit Queen' tells a powerful human story and to that story the scene of Phoolan Devi's enforced naked parade is central. It helps to explain why Phoolan Devi became what she did: her rage and vendetta against the society that had heaped indignities upon her."

The aforesaid, as is evident, appreciates the agonies and torture suffered by the protagonist and the nature of depiction of the scenes on celluloid and lays down the principle not to be guided by the sensitivity of a pervert viewer. The principle of assuagement is not to be taken recourse to so as to make the idea of freedom of expression susceptible to suit the views and perceptions of a pervert thinker or viewer. Similarly, while reading a book, the setting, the constituents that constitute the elements of the character and the purpose are to be kept in view. 31. In this context, reference to the view expressed in Viacom 18 Media Private Limited and others v. Union of India and others (2018) 1 SCC 761) would be

apposite. In the said case, the challenge was to the ban imposed by four States for screening the movie 'Padmaavat'. The Court quashed the notifications of banning on the bedrock that the expression of an idea through the medium of cinema which is a popular medium has its own status and the artistic expression should not be tinkered with. The Court went on to observe that if intellectual prowess and natural or cultivated power of creation is inhibited without the permissible facet of law, the concept of creativity would pave the path of extinction; and when creativity dies, values of civilization corrode. The Court, in the said context, reproduced a passage from an order in Nachiketa Walhekar v. Central Board of Film Certification (2018) 1 SCC 778) which reads as under:

"Be it noted, a film or a drama or a novel or a book is a creation of art. An artist has his own freedom to express himself in a manner which is not prohibited in law and such prohibitions are not read by implication to crucify the rights of expressive mind. The human history records that there are many authors who express their thoughts according to the choice of their words, phrases, expressions and also create characters who may look absolutely different than an ordinary man would conceive of. A thought provoking film should never mean that it has to be didactic or in any way puritanical. It can be expressive and provoking the conscious or the subconscious thoughts of the viewer. If there has to be any limitation, that has to be as per the prescription in law."

32. In Adarsh Cooperative Housing Society Ltd. v. Union of India and others 2018 (4) SCALE 390, the issue before this Court was whether screening of feature film, which incorporated a perception with regard to a particular situation, would affect the trial which involved the petitioner, the society or the exercise of "error jurisdiction" of the appellate court. This Court negatived the said contention and ruled that courts of law decide the lis on the basis of the materials brought on record and not on the basis of imagination as projected in the language of the theatre or a script on celluloid. The Court opined thus:

> "… there can be multitudinous modes, manners and methods to express a concept. One may choose the mode of silence to be visually eloquent and another may use the method of semi melodramatic approach that will have impact. It is the individual thought and approach which cannot be curbed."

And again:

> "…the doctrine of sub-judice may not be elevated to such an extent that some kind of reference or allusion to a member of a society would warrant the negation of the right to freedom of speech and expression which is an extremely cherished right enshrined under the Constitution. The moment the right to freedom of speech and expression is atrophied, not only the right but also the person

having the right gets into a semi coma. We may hasten to add that the said right is not absolute but any restriction imposed thereon has to be extremely narrow and within reasonable parameters. In the case at hand, we are obligated to think that the grant of certificate by the CBFC, after consulting with the authorities of the Army, should dispel any apprehension of the members or the society."

33. It would usher in a perilous situation, if the constitutional courts, for the asking or on the basis of some allegation pertaining to scandalous effect, obstruct free speech, expression, creativity and imagination. It would lead to a state of intellectual repression of literary freedom. When we say so, we are absolutely alive to the fact that the said right is not absolute but any restriction imposed thereon has to be extremely narrow and within the reasonable parameters as delineated by Article 19(2) of the Constitution. Here, we may remind ourselves of the expression used by George Orwell. It is free thinking and intellectual cowardice. Creative writing is contrary to intellectual cowardice and intellectual pusillanimity.

34. Keeping in view the aforesaid principles, the objections raised as regards the contents of the novel and the language used which is reflected in the dialogue as reproduced hereinbefore are to be decided. The grievance, as is reflectible, pertains to derogatory comments on women, especially when they go to temple. As stated earlier, it is the duty of the Court to see whether such a dialogue was contrived to give rise to any kind of sensuous situation or projection of a class to humiliate them. A creative work has to be read with a matured spirit, catholicity of approach, objective tolerance and a sense of acceptability founded on reality that is differently projected but not with the obsessed idea of perversity that immediately connects one with the passion of didacticism or, for that matter, perception of puritanical attitude. A reader should have the sensibility to understand the situation and appreciate the character and not draw the conclusion that everything that is written is in bad taste and deliberately so done to pollute the young minds. On the contrary, he/she should elevate himself/herself as a cowalker with the author as if there is social link and intellectual connect. The feeling of perverse judging should be abandoned. A creative writing is expectant of empathetic reading. It is not averse to criticism but certainly does not tolerate unwarranted protest. The author of "Wuthering Heights" expects the readers to appreciate the morbidity that surrounds the character of "Heathcliff". Similarly, the great poet of "Nala Damayanti" desired the readers to enjoy the description of the beauty of the princess appreciating the narrative but not to engage in pervert thinking.

35. One has to understand and appreciate the characteristics of the character and the plots and sub-plots that are woven in the

story. The character of Meesha as has been projected shows the myriad experiences with different situations. The situations, as we find, can be perceived as certain subplots which evolved around the fundamental characteristics of the protagonist. The theory of consistency of character as adopted by certain writers seems to have been maintained in the narrative. The situations and the treatment of situations may be different but the basic response of the protagonist remains unchanged. All these, we say, can be from one reader's point of view. To another reader, it may seem that the subplots have been enthusiastically contrived to bring in tempting situations to draw the protagonist in and to exposit chain reactions. Appreciated from either point of view, it cannot be denied that it is a manifestation of creativity. The perception of a character which is in consonance with the story invites empathetic readers to view him/her from a different perspective. A reader with mature sensibility would connect with the plight of the protagonist or may distance himself/herself by expressing the view that the projection is derogatory and hurtful to a section of people. He/she treats the novel as scandalous and offensive. The Court is not to be swayed by any kind of perception. One may have a grave dislike towards a particular manner of expression but that would not warrant for issue of a mandamus from the Court to ban the book or the publication. The language used in the dialogue cannot remotely be thought of as obscene. The concept of defamation does not arise. Nurturing the idea that it is derogatory and hurtful to the temple going women would tantamount to pyramiding a superstructure without the infrastructure.

36. If one understands the progression of character through events and situations, a keen reader will find that beneath the complex scenario, the urge is to defeat and to conquer and not to accept a denial. Both the facets are in the realm of obsession and the author allows the protagonist to rule his planet. His imagination encircles his world. A reader has the liberty to admire him or to sympathise. Either way, the dialogue to which the objection is raised is not an intrusion to create sensation. It is a facet of projection of the characters. It is, in a way, imaginative reality or as Pablo Picasso would like to put it, "Everything you can imagine is real". A pervert reader may visualise absence of decency or morality or the presence of obscenity but they are really invisible.

37. If books are banned on such allegations, there can be no creativity. Such interference by constitutional courts will cause the death of art. True it is, the freedom enjoyed by an author is not absolute, but before imposition of any restriction, the duty of the Court is to see whether there is really something that comes within the ambit and sweep of Article 19(2) of the Constitution. At that time, the Court should remember what has been said in S. Rangarajan v. P. Jagjivan Ram and others (1989) 2 SCC 574) wherein, while interpreting Article 19(2), this Court borrowed from the American test of

clear and present danger and observed:

> "45. … Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or farfetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a power keg"."

38. To apply the said litmus test, it is to be borne in mind that a book should not be read in a fragmented manner. It has to be read as a whole. The language used, the ideas developed, the style adopted, the manner in which the characters are portrayed, the type of imagery taken aid of for depiction, the thematic subsidiary concepts projected and the nature of delineation of situations have to be understood from an objective point of view. There may be subjective perception of a book as regards its worth and evaluation but the said subjectivity cannot be allowed to enter into the legal arena for censorship or ban of a book.

39. Quite apart from the above, the creativity and the author's perception of the universe are to be borne in mind. What is true to poetry is applicable to novels or any creative writing. It has to be kept uppermost in mind that the imagination of a writer has to enjoy freedom. It cannot be asked to succumb to specifics. That will tantamount to imposition. A writer should have free play with words, like a painter has it with colours. The passion of imagination cannot be directed. True it is, the final publication must not run counter to law but the application of the rigours of law has to also remain alive to the various aspects that have been accepted by the authorities of the Court. The craftsmanship of a writer deserves respect by acceptation of the concept of objective perceptibility.

40. It ought to be remembered that eventually, what the great writer and thinker Voltaire had said ¯ "I may disapprove of what you say, but I will defend to the death your right to say it" becomes the laser beam for guidance when one talks about freedom of expression.

41. In view of the aforesaid analysis, the writ petition, being devoid of merit, stands dismissed. However, there shall be no order as to costs.

–X–

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