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Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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PART-18 (30TH SEPTEMBER 2019)

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SUBJECT - INDEX

CIVIL PROCEDURE CODE, Order XIII, Rule 3 & Sec.151 – Suit for permanent injunction - Civil revision assailing the Order passed in I.A. by virtue of which lower Court dismissed the petition filed by the Petitioner/Defendant, under Order XIII Rule 3 and Section 151 of C.P.C., seeking to demark Ex A2/Agreement of sale, which was allegedly executed by petitioner in favour of Respondent/Plaintiff – Petitioner contends that lower Court ought to have not marked the document, as no collateral purpose exists.

Held – Petitioner can be given an opportunity to raise objection before lower Court with regard to consideration of Ex A2, which is already marked and he is given opportunity to raise contention with regard to absence of recital pertaining to delivery of possession to the respondent before the lower Court, when Ex A2 comes for consideration – Lower Court shall give specific finding with regard to the objection that would be raised by the petitioner – Civil revision is accordingly disposed of. **(A.P.)** ***46***

CIVIL PROCEDURE CODE, Or. 41 Rules 23, 27, 28 and 29 – Civil appeal against the impugned judgment, whereby, appeal was allowed setting aside the decree and judgment passed by trial Court and matter was remanded to the trial Court to receive additional evidence filed by both appellant and defendants.

Held – Lower appellate Court committed an error in setting aside the judgment and decree of trial Court and holding that the appeal is allowed - Lower appellate Court is directed to examine the matter afresh and decide whether additional evidence is to be recorded by itself or whether the matter should be sent to the trial Court for recording the additional evidence – After recording the evidence by itself or after recorded evidence is received from trial Court, the lower appellate Court shall dispose of appeal on merits – Entire process should be completed within a period of three months – Appeal stands allowed. **(A.P.)** ***55***

CONSTITUTION OF INDIA, Article 227 - Revision is filed challenging the Order in I.A. in O.S - Petitioners herein are defendant Nos.1 to 5 in the said suit - Petitioners contended that the Court below erred in refusing to reject the plaint and that Order II Rule 2 C.P.C. would clearly bar the instant suit.

Held - Cause of action for both the suits is different and in O.S.No.87 of 2011, the respondent is claiming partition and separate possession of the properties of her late biological father - In the instant suit, however, she is seeking cancellation of gift settlement deeds - Since the suits are not between the same parties (though 5th petitioner is common in both the suits) and since there is a distinct cause of action in the instant suit, no error of jurisdiction in the Order passed by the Court below warranting interference by this Court under Article 227 of the Constitution of India - Civil Revision Petition stands dismissed - However, both the suits ought to be heard by the same Court to avoid conflicting decisions on the validity of the Wills in question. **(T.S.)** ***5***

CRIMINAL PROCEDURE CODE, Sec.482 – **DRUGS AND COSMETICS ACT,** Secs.23 & 32 – Criminal petition to quash proceedings against the petitioner – Drugs inspector, picked up a drug for analysis manufactured by the M/s Essel Pharma/ Petitioner/Accused, and a sample drug was sent to the Government analyst – After the analysis, it was held that the sample drug was not of standard quality as defined under the Act – Thereafter, drug inspector filed complaint under Section 32 of the act, before the Magistrate of First class – Aggrieved thereby, petitioner seeks to quash the said complaint and proceedings initiated against them.

Held – Section 25(3) provides for a valuable right conferred upon accused to controvert the correctness of the report submitted by the government analyst by notifying to drug inspector or Court within 28 days in writing – In the present case, expiry date of sample drug is in 2009, whereas, the analyst report was furnished to accused in 2010, long after the expiry of the drug – Therefore, accused lost valuable right conferred on him by the Statute under Section 25(3) of the Act – Proceedings initiated against the accused are liable to be quashed – Criminal Petition stands allowed. **(A.P.)** ***20***

HINDU MARRIAGE ACT, Sec. 13(1)(ia) – Appeal filed by the husband aggrieved by the impugned Order passed by the Family Court dismissing the petition for grant of dissolution of marriage between himself and the wife/respondent – Contention of appellant is that the respondent filed a false criminal case against him and his family which ended in acquittal and that respondent has been residing separately from appellant from nearly 22 years.

Held – Appellant and respondent are living separately since 22 years and there appears no possibility of reunion – Appellant is entitled for grant of a decree of dissolution of marriage under Section 13(1)(ia) of Hindu Marriage Act and counter claim filed by the respondent under Section 9 of the Act is liable to be dismissed – Appeal is allowed setting aside the Order passed by Lower Court. **(A.P.)** ***49***

LIMITATION ACT - Suit for specific performance - Suit for recovery of amount based upon cause of action that is with in limitation cannot in any manner impact the separate and independent remedy of a winding up proceeding. **(S.C.) 44**

(INDIAN) PENAL CODE, Secs. 416, 417 & 418 – Respondent/Complainant underwent an eye surgery and claiming that Doctor/A2 did not perform the surgery as required and hospital/A1 did not have a specialist, filed a private complaint against the doctor and hospital.

Held – Private complaint against a medical doctor or a FIR against a medical doctor should not be proceeded with or entertained unless and until it has supported by an independent impartial opinion given by another doctor, who is specialized in the same field – Even in the matter of arrest, unless and until the arrest is necessary, arrest has to be withheld – Instant case is purely a tortious or civil wrong and invocation of criminal process is therefore an abuse of process of Court – Criminal petition stands allowed and criminal proceedings against the petitioners are quashed. **(A.P.)** ***25***

(INDIAN) PENAL CODE, Secs. 420, 384 r/w 34 – **TRANSPLANTATION OF HUMAN ORGANS ACT,** Secs.18 & 19 – Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act – E. Srinivasulu was admitted into Simhapuri hospital in Nellore – Basing on a press report, a committee of doctors enquired into the matter and came to conclusion that hospital and doctors were guilty of illegally harvesting the organs – Accused have preferred instant criminal petition to quash the criminal proceedings against them and to grant anticipatory bail – Petitioners contended that there is absolutely no commercial transaction in this entire episode and that they acted strictly as per the scheme of the government.

Held – Sequence of events that are detailed in the doctors report show that the preparations for harvesting kidney began even before the patient was declared as brain dead – Entire proceedings cannot be quashed at this stage as prima facie case is made out – Doctors who have harvested the organ would have harvested the same whether deceased was a member of SC or ST – No atrocity is committed in the facts of this case – Applicability of SC ST POA Act is ruled out and FIR to that extent

is quashed – Petitioners are entitled to an anticipatory bail – Doctors shall cooperate with investigation and shall appear before S.H.O. whenever their presence is required – Accordingly, Criminal petitions are allowed. **(A.P.) 30**

INDIAN PENAL CODE, Sec.498-A - Jurisdiction of Courts - Entertaining complaints u/Sec.498-A - Supreme Court allowed a women to proceed with her complaint where she is residing. **(S.C.) 43**

(INDIAN) SUCCESSION ACT - LAND ACQUISITION ACT, Sec.18 - Revision is filed challenging the Order in I.A.in L.A.O.P - O.P. arose out of a reference under Section 18 of the Land Acquisition Act, made vide letter of the Land Acquisition officer/ Revenue Divisional Officerin respect of the land acquired under Adrial village of Manthani Mandal of Karimnagar District - O.P. was disposed of on 21-07-2000 enhancing the compensation awarded by the Land Acquisition Officer in the Award - In the said O.P., claimant No.12 died pending the O.P. and on his demise, his wife Madhuramma was brought on record as Class-I legal heir who subsequently expired leaving the petitioners as her Class-I legal heirs - They therefore filed I.A. claiming equal shares of compensation awarded in respect of Ac.9.29 gts in in the above village which was the subject matter of the said Award - Court below dismissed the said application.

Held - Property sought to be acquired is self-acquired property of claimant No.12 and it is not the case of the petitioners that it is a Mitakshara joint family property - Claim of the petitioners is only through succession and not by survivorship - Petitioners ought to obtain a Succession Certificate if they intend to withdraw the compensation deposited in the Court below to the credit of the L.A.O.P - They cannot simply file an application to bring them on record as legal heirs in the place of their deceased mother and claim compensation – No error of jurisdiction in the Order passed by the Court below warranting interference by this Court under Article 227 of the Constitution of India - Civil Revision Petition stands dismissed. **(T.S.) 12**

TELANGANA CIVIL SERVICES (CONDUCT) RULES, Rule 3 – Penalty –Tribunal allowed application filed by Applicant/Respondent and set aside the Order which imposed penalty of reduction in time scale, with cumulative effect on future increments and pension, besides treating unauthorized sick period as leave without pay and suspension period till he reported for duty as ‘not on duty’ and directed to treat suspension period as on duty for all purposes, without monetary benefit and monetary benefit, be restricted to, subsistence allowance paid to Respondent, during his suspension period.

Held – Findings of Enquiry Officer in departmental proceedings is traceable to misconduct alleged and proved against Respondent – Punishment imposed by disciplinary authority is commensurate, if not deficient, with misconduct on part of Respondent – Respondent being Policeman shown desperate character and such act on his part is against public interest – Such acts on the part of the member of the disciplined force would tarnish image of Department – Rule 3 of the Rules, requires that no Government servant shall behave in manner which is unbecoming of such employee or derogatory to prestige of Government, though it is exigencies of circumstances that determine as to what is becoming or unbecoming for Government servant to do or not to do – Order of Tribunal is wholly unsustainable and is set aside – Punishment imposed on respondent by disciplinary authority is maintained – Petition stands allowed. **(T.S.)** ***16***

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sufficient for her maintenance, the court holds that it would enlarge the limited estate into absolute estate, it would run contrary to the spirit with which the Supreme Court in **SADHU SINGH V GURDWARA SAHIB NARIKE – (2006) 8 SCC 75** held that when a person validly disposes of his property by providing for a limited estate to his heir, the wife or widow has to take it as the estate falls. This restriction on her right so provided, is really respected by the estate falls. This restriction on her right so provided, is really respected by the Act and it provides in Section 14(2) of the Act, that in such a case, the widow is bound by the limitation on her right and she cannot claim any higher right by invoking Section 14(1) of the Act. Invocation of Section 14(1) of the Act in the case of a testamentary disposition taking effect after the Act, would make Sections 13 and 14(2) redundant or otiose. The Supreme Court further observed that in such case it will also make redundant, the expression 'property possessed by a female Hindu', occurring in Section 14(1) of the Act and an interpretation that leads to such a result cannot certainly be accepted and surely, there is nothing in the Act compelling such an interpretation. It also held that Sections 14 and 30 both have play. Section 14(1) applies in a case where the female is entitled to the property prior to the act being entitled to it as a matter of right, even if the right be to a limited estate under the Mitakshara Law or the right to maintenance.

17. The Supreme Court in **SHIVDEV KAUR's** case held that whether a person is a destitute or not is a question of fact. As already observed, in this case, there is absolutely no evidence on the aspect whether Durgamma is a destitute or not by the date the property in dispute is gifted to her. Hence, at any stretch of understanding, Durgamma cannot be held to be a destitute. The Supreme Court in **LAXMAPPA's** case also held that the moral obligation of the father is only when his married daughter becomes a destitute and is unable to maintain herself. Whether the property given by her in laws is sufficient to maintain herself or not, is proved or not proved before the court, the admitted fact is that she had some property. Hence, the possible assumption would be that the said property would be sufficient to maintain herself as the same is given by her in laws for her maintenance. Further assumption would be that after considering the adequacy of the property for her maintenance, the properties were given to Durgamma by her in laws.

18. In the above circumstances, this court opines that there is absolutely no reason to interfere with the impugned judgment.

19. In view of the above, the Second Appeal is dismissed.

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

--X--

2019(3) L.S. 20 (A.P.)

IN THE HIGH COURT OF
ANDHRA PRADESH

Present:
The Hon'ble Mr.Justice
Cheekati Manavendranath Roy

M.V.Srinivasa Rao ..Petitioner
Vs.
State of A.P., & Anr., ..Respondent

CRIMINAL PROCEDURE CODE, Sec.482 – DRUGS AND COSMETICS ACT, Secs.23 & 32 – Criminal petition to quash proceedings against the petitioner – Drugs inspector, picked up a drug for analysis manufactured by the M/s Essel Pharma/Petitioner/Accused, and a sample drug was sent to the Government analyst – After the analysis, it was held that the sample drug was not of standard quality as defined under the Act – Thereafter, drug inspector filed complaint under Section 32 of the act, before the Magistrate of First class – Aggrieved thereby, petitioner seeks to quash the said complaint and proceedings initiated against them.

Held – Section 25(3) provides for a valuable right conferred upon accused to controvert the correctness of the report submitted by the government analyst by notifying to drug inspector or Court within 28 days in writing – In the present case, expiry date of sample drug is in 2009, whereas, the analyst report was furnished to accused in 2010, long after the expiry of the drug – Therefore, accused lost valuable right conferred on him by the Statute under Section 25(3) of the Act – Proceedings initiated against the accused are liable to be quashed – Criminal Petition stands allowed.

Mr.Ch. Dhanamjaya, Advocate for the petitioner.
Public Prosecutor, Advocate for the respondents.

O R D E R

This Criminal petition, under Section 482 Cr.P.C., is filed by the petitioner, to quash the proceedings in C.C.No.448 of 2011 on the file of the Additional Judicial Magistrate of First Class, Chirala, Prakasam District.

The petitioner is the sole accused in C.C.No.448 of 2011 on the file of the Additional Judicial Magistrate of First Class, Chirala, Prakasam District.

Thumbnail sketch of the facts leading to file the complaint against the petitioner may be stated as follows:

On 13.11.2008 the then Drugs Inspector, Chirala, picked up the drug "OMOX-500 capsules" batch No. APC-009, with manufacturing date 10/2007 and expiry date 09/2009, manufactured by M/s. Essel Pharma, Solan, for analysis along with four other drugs from the premises of M/s. Saravan Medical Agencies, Chirala, in the presence of its proprietor under intimation to him in From -17 as required under Section 23 of the Drugs and Cosmetics

Act, 1940 (for short, "the Act"). On the same day i.e. on 13.11.2008, the Drugs Inspector has sent on sealed portion of the sample drug to the Government Analyst, Drugs Control Laboratory, Hyderabad along with Form-18 through registered post. He has also sent one copy of Form -18 along with specimen impression of seal separately to the Drugs Analyst, Drugs Control Laboratory, Hyderabad through registered post.

On 02.09.2009, the Drugs Inspector received the certificate of analysis in From-13 from the Government Analyst, Drugs Control Laboratory, Hyderabad, Wherein it is declared that the test sample "OMOX-500 capsules" batch No.APC-009, with manufacturing date 10/2007 and expiry date 09/2009, manufactured by M/s. Essel Pharma, Solan, is "not of standard quality" as defined in the Act as the sample did not comply with the test for uniformity of weight.

On the same day i.e. on 02.09.2009 the Drugs Inspector issued proceedings to M/s. Saravan Medical Agencies, Chirala, from whose premises he has picked – up the drug for analysis, under Section 18A of the Act, requiring them to disclose the name, address and other particulars of the person from whom they purchased the drug in question along with attested copy of the purchase bill. On receipt of the said letter, M/s. Saravan Medical Agencies, Chirala, issued a reply stating that they purchased the sample drug from M/s. Vasavi Medical Enterprises, Sattenapalli Road, Narasaraopet, as per invoice No.00903, dated 30.06.2008.

Thereafter, on 05.09.2009 the Drugs Inspector issued proceeding to the said M/s. Vasavi Medical Enterprises under Section 18A of the Act requiring them to disclose the name, address and other particulars of the person from whom they purchased the drug in question along with attested copy of the purchase bill. One sealed portion of the sample drug and copy of the analyst report were also furnished to M/s. Vasavi Medical Enterprises.

On 16.09.2009 M/s. Vasavi Medical Enterprises replied stating that they have purchased the sample drug from M/s. Vijaya Vasavi Traders, Narasaraopet, vide invoice No.VNT-414, dated 02.05.2008.

Therefore, on 17.09.2009 the Drugs Inspector issued proceeding to M/s. Vijaya Vasavi Traders under Section 18A of the Act requiring them to disclose the name, address and other particulars of the person from whom they purchased the drug in question, along with attested copy of the purchase bill. Copy of the Analyst report was also furnished to them. On 20.10.2009 the said M/s. Vijay Vasavai Traders replied stating that they purchased the sample drug from M/s. Essel Pharma, Solan i.e. accused No.1-firm under invoice No.EP/231/07-08, dated 10.10.2007. It is further stated by them that they have closed their firm and enclosed the licence and cancellation letter.

So, on 26.10.2010, the Drugs Inspector issued proceeding to accused No.1-firm i.e. M/s. Essel Pharma, Solan, requiring them to furnish the manufacturing, analytical and constitution particulars of the firm along with attested manufacturing

licenses, under Section 18B of the Act. In response to the said proceedings, accused No.1-firm replied and furnished copies of manufacturing, analytical records and license particulars.

Therefore, the Drugs Inspector after completion of the process, found that "OMOX-500 capsules" batch No.APC-009, with manufacturing date 10/2007 and expiry date 09/2009, manufactured by accused No. 1-M/s. Essel Pharma, Solan, is a drug within the meaning of section 3(b) of the Act and the said drug is declared as "not of standard quality" by the Government Analyst, Drugs Control Laboratory, Hyderabad, as defined in the Act and as such, accused No.1-firm violated Section 18(a)(i) read with Section 16 of the Act, by manufacturing, selling and distributing the drug, which is "not of standard quality" and thereby rendered itself liable for punishment under Section 27(d) of the Act.

Therefore, the Drugs Inspector filed the complaint under Section 32 of the Act before the Court of Addition Judicial Magistrate of First Class, Chirala, Prakasam District, and the same was taken on to the file in C.C.No.448 of 2011 on the file of the said Court.

Heard Sri Ch.Dhanamjaya, learned counsel for the petitioner, and the learned Public Prosecutor for the respondents.

The petitioner-accused No.1 seeks to quash the said complaint and the proceedings initiated thereon mainly on the ground that the date of manufacture of the said drug is October, 2007 and the expiry date of the said drug is September, 2009 **12** and the Drugs Inspector issued letter to the petitioner-firm on 26.10.2010 after the date of expiry of the said drug and as such, by the time the petitioner received information relation to report of the Government Analyst from the Drugs Inspector on 26.10.2010, the drug is expired and the petitioner lost his valuable right of taking steps to send the drug to the Central Laboratory in exercise of his valuable right conferred on him under Section 25(4) of the Act.

Learned counsel for the petitioner contends that the provisions of Section 25 of the Act are mandatory and non-supply of the Government Analyst report to the petitioner before expiry date of the drug resulted in depriving him of his valuable right to test the sample drug by the Central Laboratory and as such the proceedings are vitiated and consequently, the complaint filed by the Drugs Inspector against the petitioner-firm is to be quashed.

In order to appreciate the said contention raised by the petitioner, it is expedient to extract Section 25 of the Act, for ready reference and it reads thus:

> "25 Reports of Government Analysts.
>
> (1) The Government Analyst to whom a sample of any drug or cosmetic has been submitted for test or analysis under sub-section(4) of Section 23, shall deliver to the Inspector submitting it a signed report in triplicate in the prescribed form.

(2) The Inspector on receipt thereof shall deliver one copy of the report to the person from whom the sample was taken and another copy to the person, if any, whose name, address and other particulars have been disclosed under Section 18A, and shall retain the third copy for use in any prosecution in respect of the sample.

(3) Any document purporting to be a report signed by a Government Analyst under this Chapter Shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken or the person whose name, address and other particulars have been disclosed under Section 18A has, within twenty-eight days of the receipt of a copy of the report, notified in writing the Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in controversion of the report.

(4) Unless the sample has already been tested or analysed in the Central Drugs Laboratory, where a person has under sub-section (3) notified his intention of adducing evidence in controversion of a Government Analyst's report, the court may, of its own motion or in its discretion at the request either of the complainant or the accused: cause the sample of the drug or cosmetic produced before the Magistrate under sub-section (4) of Section 23 to be sent for test or analysis to the said Laboratory, which shall make the test or analysis and report in writing signed by or under the authority of, the Director of the Central Drugs Laboratory the result in writing signed by or under the authority of, the Director of the Central Drugs Laboratory the result thereof, and such report shall be conclusive evidence of the facts stated therein.

(5) The cost of a test or analysis made by the Central Drugs Laboratory under sub section (4) shall be paid by the complainant or accused as the Court shall direct."

A reading of the aforeside Section makes it manifest that the Government Analyst after analyzing the sample of the drug shall deliver a signed report in triplicate in the prescribed form to the Inspector. The Inspector in turn on receipt of the report, shall deliver one copy of the report to the person from whom the sample was taken and another copy to person, if any, whose name, address and other particulars have been disclosed under Section 18A of the Act i.e. to the accused herein and the Inspector has to retain the third copy for use in any prosecution in respect of the sample. Clause (3) thereof envisages that the report of the Government Analyst shall be conclusive evidence unless the person from whom the sample was taken or the person whose name, address and other particulars have been disclosed under Section 18A has, within twenty-eight days of the receipt of a copy of the report, notified in writing to the Drug Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in controversion of the report. Clause (4) thereof mandates that unless the sample has already been tested or analysed in the

Central Drugs Laboratory, where a person has notified his intention under sub-section (3) thereof of adducing evidence in controversion of a Government Analyst's report, the Court may, of its own motion or in its discretion at the request either of the complainant or the accused: send the sample of the drug under Section 23(4) of the Act for test or analysis to the **Central Laboratory,** which shall make the test or analysis and send report in writing to the Director the Central Drugs Laboratory and such report shall be conclusive evidence of the facts stated therein.

Thus, the aforesaid provision would reveal that certain obligations as well as certain safeguards are provided for a person from whom a drug has been seized for analysis or testing. Section 25(3) is clear enough to say that a valuable right is conferred on the accused to controvert the correctness or genuineness of the report submitted by the government Analyst by notifying to Drug Inspector or the Court within 28 days in writing that he intends to adduce evidence to controvert the said report of the Government Analyst.

It is significant to not that, in the instant case, even though the date of manufacture of the drug is October, 2007 and the expiry date of the said drug is September, 2009, the State Analyst report was furnished to the accused on 26.10.2010 i.e., long after the date of expiry of the drug. Almost one year the date of expiry of the drug, the report was furnished to the accused. So, even if the accused exercises his right conferred on him under Section 25(3) of the Act, to request the Court to send the drug for test or analysis by the Central Drug Laboratory, no useful purpose would be served as the drug already expired by then. So, the accused has no opportunity to test the correctness or genuineness of the report of the State Analyst. It is well settled law that the right conferred on the accused to have the drug tested by the Central Drug Laboratory is a valuable right conferred on him and if such a valuable right is defeated for any reason, the proceedings initiated against the accused on the basis of the said State Analyst report, which is not tested as per choice of the accused by the Central Drug Laboratory, stands vitiated.

The Apex Court in the judgment in **Medicamen Biotech Ltd. V. Rubina Bose, Drug Inspector- (2008) 3 SCC (Cri.) 20** held that there is no explanation as to why the complaint itself had been filed about a month before expiry of shelf life of the drug and concededly filing of the complaint had nothing to do with the appearance of the accused in response to the notices which were to be issued by the Court after the complaint had been filed. Likewise, requests for retesting of drug had been made by the appellants in August/ September, 2001 and there is absolutely no reason as to why the complaint could not have been filed earlier and the fourth sample sent for retesting well within time. Facts of the case suggest that the appellants have been deprived of a valuable right under Sections 25(3) and 25(4) of the Act, which must necessitate the quashing of the proceedings against them.

14 The analogy of the aforesaid

judgment squarely applies to the present facts of the case on hand. By the time, the State Analyst report was furnished to the accused, the accused lost his valuable right conferred on him by the Statute under Section 25(3) & 25(4) of the Act to test the correctness or genuineness of the report of the State Analyst by sending the drug in question for test and analysis by the Central Drugs Laboratory. Ergo, the proceedings initiated against the accused in C.C.No.448 of 2011 on the file of the Additional Judicial Magistrate of First Class, Chirala, Prakasam District, stood vitiated and they are liable to be quashed.

In the result, the Criminal Petition is allowed and the complaint in C.C.No.448 of 2011 on the file of the Additional Judicial Magistrate of First Class, Chirala, Prakasam District, initiated against the petitioner herein along with further proceedings therein are hereby quashed.

The miscellaneous petitions pending, if any, shall also stand closed.

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2019(3) L.S. 25 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Dr.Ramesh Cardiac Multi Speciality Hospital (P) Ltd., & Anr., ..Petitioner

Vs.

M.Satyanarayana & Anr., ..Respondents

INDIAN PENAL CODE, Secs. 416, 417 & 418 – Respondent/Complainant underwent an eye surgery and claiming that Doctor/A2 did not perform the surgery as required and hospital/A1 did not have a specialist, filed a private complaint against the doctor and hospital.

Held – Private complaint against a medical doctor or a FIR against a medical doctor should not be proceeded with or entertained unless and until it has supported by an independent impartial opinion given by another doctor, who is specialized in the same field – Even in the matter of arrest, unless and until the arrest is necessary, arrest has to be withheld – Instant case is purely a tortious or civil wrong and invocation of criminal process is therefore an abuse of process of Court – Criminal petition stands allowed and criminal proceedings against the petitioners are quashed.

Crl.P.No.3451/2019 Date: 10-7-2019

Public Prosecutor for Respondents.

O R D E R

This criminal petition is filed under section 482 Cr.P.C. seeking to quash the proceedings in FIR No.129 of 2019 dated 19.04.2019 of Nagarampalem Police Station. The petitioners/A.1 is a Hospital and A.2 is a Doctor, who worked at the said hospital. The first respondent/complainant underwent an eye surgery in the said hospital on 23.11.2016. Claiming that the doctor did not perform the surgery as required that the first petitioner gave an advertisement stating that they are a "Multi Specialty Hospital"; that after the operation the complainant realized that the Doctors are not qualified and the hospital does not have a specialist to treat the complainant etc., the present complaint is filed under sections 416, 417, 418 and 419 r/w 34 IPC against the Hospital and the Doctor. A private complaint was filed and the same was referred for investigation and the FIR was registered.

This Court has heard Sri T. Sreedhar, learned counsel for the petitioners and first respondent/complainant in person, who has filed a written counter opposing the application.

Learned counsel for the petitioners submits that the complainant underwent a surgery in the A.1/hospital and he was under the care of A.2 and during the surgery known as PHACO. An IOL (Intra Ocular Lens) was inserted into the eye of the complainant. Later, after some time, it was noticed that IOL was dislocated. Alleging that the Doctors were negligent, the complainant filed a consumer case bearing CC No.38 of 2017. Learned counsel submits that the consumer case was decided on merits and it was allowed in part. Questioning the same, an appeal is filed, which is also pending as pr the learned counsel for the petitioners. He submits that this is essentially a civil dispute which is being converted into a criminal case to coerce the Doctors into accepting the claim. Learned counsel submits that the operation was performed in November, 2016, 2017 and after the consumer case was filed. Counsel also submits that there is inordinate delay in filing the complaint. He also states that none of the sections quoted are applicable at all. Last, but not the least, he submits that after the judgment of the Hon'ble Supreme Court in the case of **Jacob Mathew v. State of Punjab- (2005) 6 SCC 1,** a private complaint cannot be entertained unless there is a *prima facie* medical opinion produced by the complainant. He therefore, submits that the lower Court committed an error in taking the complaint on record and also taking cognizance of the offence.

I reply to this, the party-in-person argues that the operation was conducted in November, 2016 and soon thereafter the IOL was found to have dropped due to non –support of the retina. He, therefore, submits that he had to take further medical treatment. He also submits that the first accused/hospital has advertised itself as a Multi Specialty Hospital with 24/7 availability of specialists. The grievance of the complainant is that soon after his operation, bills were collected, but neither Multi Specialty Services nor Emergency

Services were provided. He submits that therefore, the offences are made out. In addition, he also states that the case is still at investigation stage and the power under Section 482 Cr.P.C. should not be exercised. He relies upon the order passed of the consumer form which held that the petitioners are guilty of negligence.

This court after hearing the learned counsel for the petitioners and the party-in-person notices that a decree of Consumer Court has also been challenged in the Appellate forum and the matter is pending there. The learned counsel also relies upon the Consent Form, which is filled at the time of surgery. He submits that in the consent form itself it is clearly pointed out that every surgery has some inherent complications and that there is 2% chance of complications. Learned counsel points out that this consent Form is signed by the daughter of the complainant and that therefore they were made aware of the fact that there can be a risk in the surgery. In the case of Jacob Mathew (1supra), he draws the attention of the Court to the conclusions of the Hon'ble Supreme Court of India, wherein the distinction between civil liability and criminal negligence was drawn out by the Hon'ble Supreme Court. Learned counsel relies upon sub-paras 4, 5, 6 and 7 of the said judgment at para 48, which is to the following effect:

> (4) The test for determining medical negligence as laid down in Bolam's case (1957) I W.L.R. 582 holds good in its applicability in India.
>
> (5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e., gross or of a very high degree. Negligence which is neither gross nor of a higher degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.
>
> (6) The word 'dross' has not been used in Section 304a of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.
>
> (7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused Doctor should be of such a nature that the injury which resulted was most likely imminent."

He lastly relies upon conclusion para at 52, wherein it is clearly held that a private complaint cannot be entertained against a Doctor unless the complainant has produced evidence in the form of a credible opinion given by another doctor to support the charge of rashness and negligence. Similarly, a note of caution was given to the Investigating Officers, who receive a complaint directly wherein it was held that they should first get an opinion from a qualified Government Doctor and then proceed with the investigation.

This court after examining the case law submitted and hearing the submissions of the learned counsel notices that there is no allegation of gross negligence. In the case on hand, there is no allegation of any *mens rea.* This is the case of surgery that in the opinion of the complainant went wrong. Nothing more nothing less.

In addition, the sections under which the petitioners are charged do not also apply to the facts of the case. Sections 416 and 419 are not applicable. The mere fact that the petitioner/A.1advertised itself as a Multi specialty hospital will not lead to a conclusion that these sections are applicable. Multi Specialty means that they have a number of Doctors who are qualified in various fields. Emergency services are also been provided by the hospital. Admittedly, after the surgery, the complainant received the treatment from the hospital. So it cannot be said that "Multi Specialty Services" are not being provided. The second accused is an MS in Ophthalmology and she attended on the complainant.

Last, but not the least, the caution sounded by the Hon'ble Supreme Court of India has been overlooked by the learned Magistrate while taking cognizance of the offence. A private complaint should not be entertained against a Doctor unless the complainant has produced prima facie evidence in the form of clear opinion by a competent Doctor in the same field to support a charge of rashness or negligence. Similarly, even a police officer cannot proceed against the doctor, accused of rash and negligent act unless he gets an independent and competent medical opinion from a Doctor in Government Services etc., who is qualified in the branch and has given an impartial and un-biased opinion. The Hon'ble Supreme Court clearly held that a mere opinion is not enough. The opinion should be a 'credible' opinion given by another competent Doctor. Therefore, even the doctor giving the opinion should be well qualified and he should examine the available material and then give an opinion which necessarily has to be impartial and unbiased.

A reading of these two summations, it is clear that a private complaint against a medical Doctor or a FIR against a medical Doctor should not be proceeded with or entertained unless and until it has supported by an independent impartial opinion given by another Doctor, who is specialized in the same filed. Even in the matter of arrest, unless and until the arrest is necessary, arrest has to be withheld. The Hon'ble Supreme court of India again reviewed the

entire case law on the subject in the case of **Kusum Sharma v. Batra Hospital and medical Research Centre-AIR 2010 SC 1050.** The conclusions of the Apex court are at Paragraph 94, of these the following are very relevant for the present case.

> **94 VIII.** It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.
>
> **X.** The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.
>
> **95.** In our considered view, the aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that Doctors can never be prosecuted for medical negligence. As long as the Doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the Doctors must be able to perform their professional duties with free mind.

In that view of the matter, after reviewing the submissions, perusing the material, this Court is of the opinion that the lower Court committed a serious error in ignoring the procedural safeguard mandated by the judgment of the Hon'ble Supreme court of India in the case of **Jacob Mathew (1 supra).** Without an independent impartial medical opinion, the Magistrate should not have been taken cognizance of the case. Apart from this, an examination of the complaint makes it clear that none of the offences that are mentioned are actually attracted in this case. This is purely a tortuous or civil wrong for which the petitioners have already invoked the remedy available to them. The invocation of the criminal process is therefore an abuse of process of Court.

For all these reasons, the criminal petition is allowed and the proceedings in FIR No.129 of 2019 dated 19.04.2019 of Nagarampalem Police Station are quashed.

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

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2019(3) L.S. 30 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Dr.Desai Madhav, Nellore & Ors., ..Petitioners

Vs.

SHO, SPSR, Nellore Rural ..Respondent

INDIAN PENAL CODE, Secs. 420, 384 r/w 34 – TRANSPLANTATION OF HUMAN ORGANS ACT, Secs.18 & 19 – Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act – E. Srinivasulu was admitted into Simhapuri hospital in Nellore – Basing on a press report, a committee of doctors enquired into the matter and came to conclusion that hospital and doctors were guilty of illegally harvesting the organs – Accused have preferred instant criminal petition to quash the criminal proceedings against them and to grant anticipatory bail – Petitioners contended that there is absolutely no commercial transaction in this entire episode and that they acted strictly as per the scheme of the government.

Held – Sequence of events that are detailed in the doctors report show that the preparations for harvesting kidney began even before the patient was declared as brain dead – Entire proceedings cannot be quashed at this stage as prima facie case is made out – Doctors who have harvested the organ would have harvested the same whether deceased was a member of SC or ST – No atrocity is committed in the facts of this case – Applicability of SC ST POA Act is ruled out and FIR to that extent is quashed – Petitioners are entitled to an anticipatory bail – Doctors shall cooperate with investigation and shall appear before S.H.O. whenever their presence is required – Accordingly, Criminal petitions are allowed.

Mr.O.Manohar Reddy, Advocate for the Petitioners.

Mr.P.Raja Rao, Mr.D.Suresh Kumar, and Learned Public Prosecutor, Advocate for the Respondents.

C O M M O N O R D E R

Both these applications arise out the Cr.No.149 of 2019 dated 28.04.2019 on the file of the Station House Officer, Sri Potti Sritamulu, Nellore rural, where under the applicants who are A.1, A.3 to A.10 were accused of committing crimes under section 420, 384 r/w 34 IPC and Sections 18 and 19 of the Transplantation of Human Organs Act, 1994 and also 3(1) (e) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act (for short 'the SC ST POA Act').

A fatal accident that occurred on 17.04.2019 in which one Sri E. Srinivasulu died is the genesis of this entire case. The said Sri E. Srinivasulu was admitted into a hospital called Simhapuri Hospital in

Nellore. The deceased was declared brain dead and later his organs were harvested. Basing on a press report, the District Administration initiated an enquiry into this episode. A Committee of Doctors enquired into the matter and came to the conclusion that the Hospital and the Doctors wee guilty of illegally harvesting the organs and directed that action must be taken. Thereafter, a crime (149/2019) was registered and an investigation began. The petitioners moved an application for anticipatory bail before the lower court which was dismissed. Then Crl.P.No.3210/2019 and Crl.P.No.3211 of 2019 were filed by the applicants, who are A.1 to A.3 to A.10 for quashing the proceedings and to grant anticipatory bail respectively.

On behalf of the wife of the deceased, an application (IA No.2 of 2019 in Crl.P.No.3211 of 2019) was filed to implead her as a respondent. The said application is allowed and the applicant/wife of deceased was permitted to be come on record. Office is directed to make the necessary changes.

This Court has heard Sri O. Manohar Reddy, learned counsel for the petitioners and Sri P. Raja Rao, D. Suresh Kumar, learned counsels for the intervener and the Learned Advocate General for respondent-State.

Since the issues raised in these cases are interlinked, they were taken up for hearing together.

Sri O. Manohar Reddy, learned counsel for the petitioners submits that the entire case of the petitioners rests upon the report dated 26.04.2019 given by the Committee of Doctors. He submits that the committee of Doctors relied upon the Transplantation of Human Organs Act ignoring the fact that the Andhra Pradesh Government has enacted its own Act called A.P. Transformation of Human Organs Act, 1995 (Act 24 of 1995). Therefore, he submits that the offences alleged are not applicable at all. He draws the attention of this Court to Act, 24 of 1995 of the Andhra Pradesh. Government and also the Transplantation of Human Organs Act, 1994 (Act, 22 of 1994). In addition, learned counsel also relies upon the rules framed by the Andhra Pradesh Government under Act, 21 of 1994 for a scheme which is popularly known as “Jeevandan Scheme”. He relies upon G.O.Ms.No.184 dated 16.08.2010 under which the harvesting and transplantation of human organs is permissible in the State of Andhra Pradesh. Learned counsel submits that the Doctors acted strictly as per the scheme as formulated by the Government and they harvested only one kidney from the deceased. The rest of the organs were harvested and sent to other hospitals and other recipients. He points out that there is absolutely no commercial transaction in this entire episode and that as the Organ Transplantation Centre (OTC), the hospital was entitled to one kidney as per this ‘Jeevandan Scheme’ and that it used only one kidney for the benefit of a needy patient after securing the consent of the wife of the deceased. Learned counsel also submits that neither section 420 IPC nor 384 IPC are applicable to the facts and circumstances of the case. He also submits that the subsequent inclusion of the SC ST POA Act, based on an opinion of a

learned Public Prosecutor is also incorrect and that Section 3 (i) (e) of the SC ST POA Act does not apply.

In view of the fact that the TOHO Act does not apply and since other sections that are alleged also do not apply, the learned counsel prays for quashing of the proceedings as he contends that continuing the proceedings would amount to abuse of process of Court. He also submits in the alternative that as the SC ST POA Act does not apply, the bar contained under the Act will not also apply and therefore, in the alternative he states that the petitioners are entitled to anticipatory bail.

The counsel for the implead petitioner, wife of the deceased, commenced his arguments first. He very vehemently and strongly opposed the prayers. He pointed out the sequence of events relying upon the report of the committee of Doctors. He states that the Doctors exploited the innocence of the Schedule Tribe woman who is the wife of the deceased and have commercially exploited the cadaver. He submits that the SC ST POA Act squarely applicable and that Section 3(1)(e) of the SC ST POA Act applies to the facts and circumstances of the case. Relying heavily on the sequence of events, the learned counsel points out that the offences mentioned did take place and that therefore, petitioners are not entitled to either quashing of the proceedings and/or anticipatory bail.

Learned Advocate General appearing for the State also argued that the power to quash proceedings should be exercised sparingly. He submits that if a *prima facie* case is there, the power to quash should not be exercised. He also points out that the FIR is not an encyclopedia and that even if the wrong section or the wrong Act is mentioned, the entire proceedings cannot be quashed. Learned Advocate General also points out in the alternate that Section 19 of the Central Act and the State Act are in *pari material* and that the facts of the case make it clear that an offence was committed even if it is held that it is only the State Act that is applicable. He also submits in reply to the query of the Court that even the deceased is entitled to dignity and fair treatment and that Section 3(1) (e) of the SC ST POA Act is applicable. Learned Advocate General relies upon **Superintendent of Police, CBI v. TapanKumar Singh- (2003) 6 SCC 175, State of A.P. v. Golconda Linga Swamy – (2004) 6 SCC 522, Dr. Subhash Kashinath Mahajan v. State of Maharashtra- (2018) 6 SCC 522, Ashabai Machindra Adhagale v. State of Maharashtra- (2009) 3 SCC 789 and Pt. Parmanand Katara, Advocate v. Union of India-(1995) 3 SCC 248.** He also states that the principle of *ejusdem generis* should be applied to the interpretation of Section 3(1) (e) of the SC ST POA Act and argues that the harvesting of a kidney would come within the ambit of Section 3(1) (e) of the SC ST POA Act.

This Court is conscious of the fact that the power under Section 482 Cr.P.C. is extremely wide but that it should be very sparingly used. As held by the Hon'ble Supreme Court of India in large number of cases **R.B. Kapoor v. State of Punjab- AIR 1960 SC 866**, this power should be

sparingly used. Of all the decisions that are available on this subject, **State of Haruyana v. Ch. Bhajan Lal-AIR 1992 SC 604**, is regarded as the *locus classicus.* Therefore, the application to quash the proceedings under Section 482 Cr.P.C. is being examined against the back drop of the settled law on the subject.

Report of Committee of Doctors and the facts:

As mentioned earlier, the crux of the matter is the report given by the committee of Doctors who have conducted an enquiry into the entire issue. The report of the committee has been filed as a material paper by the petitioners. The sequence of events that occurred on 18.04.2019 to 20.04.2019 are given in a tabular statement at pages 6, 7 and 8 of this report.

The important parts of the sequence are detailed below.(1) Patient admitted into hospital on 18.04.2019 at 01.34 a.m., mid night. (2) Nephrologists notice that the kidneys of this patient are suitable for transplantation at 09.30 a.m. on 19.04.2019 (Sl.No.4). (2) The brain-stem death of the deceased was first assessed at 2.00 p.m. on 19.04.2019. (3) Second examination of the brain-stem death was at 8.00 p.m. on 19.04.2019 (Col.7). (4) The patient was formally declared as brain-stem dead at 8.00 p.m. on 19.04.2019 (col.8). Therefore, it is clear that the doctors came to a conclusion that the deceased was brain dead at 8.00 p.m. on 19.04.2019. the counseling for organ donation of the wife began at 01.37 p.m. on 19.04.2019 (col.9). Although the doctors used the terms a.m. and p.m. rather loosely, the observation shows that the counseling began much prior to the first examination of the brain-stem death. The counseling began at 1.37 p.m. in the afternoon itself whereby the wife was counseled and motivated towards organ donation (col.9).

The recipient of the organ/the patient who needed the organ was admitted into the hospital in the evening at 5.26 p.m. on 19.04.2019. This is much prior to the declaration of the patient as brain dead. (col,15). The kidney of the deceased was allotted to the hospital at 10.15 p.m. on 19.04.2019 and the approval under the "Jeevandan Scheme" was at 8.46 p.m. on 19.04.2019 (col.12 and 13). Therefore, the recipient of the kidney was informed prior to the allotment of the kidney itself and she was admitted into the hospital on 19.04.201* at 5.26 p.m. prior to the deceased being declared brain dead and before the allotment of the kidney under the Jeevandan scheme.

This sequence of events shows that even before the deceased was declared brain dead, the Nephrologists opined that the kidneys are suitable for transplantation and the recipient of the kidney was also informed. She traveled from her house and got herself admitted into the hospital by 5.26 p.m. Under the "Jeevandan Scheme" the permission was granted at 8.46 p.m. and the kidney was allotted at 10.15 p.m. on 19.04.2019, but the patient who was received the kidney was already admitted into the hospital by then.

The report also shows that the Simhapuri Hospital, Nellore waived the entire bill of Rs.1,28,354/-. In addition, they also paid a sum of Rs.20,000/- to the family of

the deceased. These are the events that can be gleaned from this report.

Submitssions:

Learned counsel for the petitioners argued that the Government of Andhra Pradesh itself is encouraging the transplantation and harvesting of organs from cadavers and that in this case the hospital merely followed the said procedure. He stated that cases for medical emergencies cannot be examined with a micro scope and that certain amount of latitude should be given to the doctors who act against great pressure. He submits that the intimation was given to the Jeevandan authorities and after securing the permission of the Jeevandan authorities' only one kidney was taken by this hospital and the other kidney, heart and two corneas were sent to other hospitals and to other recipients. Learned counsel relies upon clause 8.8 of the "Jeevandan Scheme" under G.O.Ms.No.184 dated 16.08.2010 under which the organ transplantation centre is entitled to register itself under the scheme and also has the first priority for liver, heart and one kidney. Therefore, learned counsel submits that the Simhapuri Hospital took one kidney alone under 11.5.2 and that they followed the law/rules on the subject. He also argues that the harvesting of an organ from a cadaver will not come within the meaning of "atrocity" that is defined in Section 3(1) (e) of the SC ST POA Act.

In reply to this, the learned counsel for the intervener relied strongly on the sequence of events and points out that the sequence of events clearly shows a pre-meditated design to harvest the organs. Waiver of the hospital fees clearly shows that there was a quit pro quo or a commercial dealing as per the learned counsel by exploiting the poverty and ignorance of a scheduled tribe lady.

Learned Advocate General argues that section 19 of the Central Act (42 of 1994) is in *pari material* and Section 19 of the State Act (Act 24 of 1995). He submits that even if the Central Act is not held to be applicable for the sake of argument, the offence in this case is squarely covered by section 19 of the State Act. Learned Advocate General argues on the basis of the case law that a FIR is not an encyclopedia. The mere fact that a wrong section of law is mentioned in the FIR cannot lead to a conclusion that the entire offence is false. Learned Advocate General relies upon Tapan Kumar Singh's case (1 supra) to support his arguments. He submits that the basic ingredient of harvesting of an organ from a cadaver without the clear consent of the spouse, making advance preparations for harvesting the organ even before the patient was declared brain dead, informing the recipient of the kidney to the hospital and ensuring her admission into the hospital even before the patient was declared brain dead and finally the waiver of the entire hospital fees clearly shows that the hospital and the doctors are correctly charged under the law for the time being in force. Learned Advocate General submits that since more that a *prima facie* case is visible from the sequence of events in the committee report, quashing of the proceedings is not permissible. He relies upon the case of **Golconda Linga Swamy** (2 supra).

COURT:

This Court, after hearing the learned counsel considering the submissions made and after perusing the record, notices that the sequence of events that are detailed in the doctors report which lead to the filing of the FIR do show that the preparations for harvesting the kidney began even before the patient was declared as brain dead. The doctors' observation in the case sheet that the kidneys are suitable for transplantation and the admission of the recipient of the harvested kidney much prior to the patient being declared brain dead are important facts. The Jeevandan authorities gave the approval at 8.46 p.m. on 19.04.2019 and the kidney was allotted to the Simhapuri hospital by Jeevandan for the recipient at 10.15 p.m. on 19.04.2019. But prior to that itself the recipient was admitted into the hospital. In addition, the waiver of the fee of Rs.1,28,354/- and the payment of Rs.20,000/- does lead to a *prima facie* conclusion that the kidney was harvested for commercial purposes.

In view of the fact that a *prima facie* case is made out, this Court is of the opinion that the entire proceedings cannot be quashed at this stage. The law is fairly well settled if *prima facie* material is available the power to quash proceedings should not be exercised.

SC ST POA Act and its applicability:

What then survives for consideration in this application and as a consequence in the other application Crl.P.No.3210 of 2019 is the applicability of the SC ST POA A ct to the facts. If the SC ST POA Act applies the petitioners are not entitled to an anticipatory bail.

Admittedly, in this case, the kidney and other organs were harvested or taken out from the body of the deceased. A lot of argument was advanced on the applicability of this Act, to the facts. Initially, the FIR was registered under the provisions of the IPC and the Transplantation of Human Organs Act only. Later, after the opinion of the Public Prosecutor was obtained, section 3(1)(e) of the SC ST POA Act was also included in the FIR by following the procedure prescribed under law.

Section 3(1)(e) of the said Act has been included by the 2015 Amendment which is to the following effect:

3. **Punishments for offences atrocities**-3 (1) Whoever, not being a member of a scheduled Caste or a Scheduled Tribe,——

(e) forcibly commits on a member of a Scheduled Caste or a Scheduled Tribe any act, such as removing clothes form the person, forcible tonsuring of head, removing moustaches, painting face or body or any other similar act, which is derogatory to human dignity;

The learned counsel for the petitioner/applicant argues that it is only if an atrocity is committed against a living person, the Act is applicable. Learned counsel relies upon the scheme of the Act, the rules of compensation etc., that are provided therein and argues that if an offence is committed against a victim, punishment is prescribed under the Act. He also draws the attention of the Court to the

compensation scheme that has been enumerated in the Act and the Rules 1995 which talks of payment of compensation to the victim in most cases and payment of compensation to the victims' family in certain cases. Therefore, he argues that only if the victim is alive and is subjected to an atrocity the act will be applicable. He submits that the act was enacted to ensure that members of the SC ST community are not subjected to indignities, abused in the name of their caste etc. He therefore argues that the harvesting of organs from a cadaver or body would not come within the atrocity that is sought to be prevented by this Act.

Learned Advocate General on the other hand argues that even a dead body is entitled to be treated with respect and that Article 21 of the Constitution of India along with its safeguards would apply. He submits that the right to dignity and fair treatment under Article 21 of the Constitution of India is not merely available to a living man, but also to his body after his death. He relies upon **Pt. Parmanand Katara, Advocate's** case (5 supra) to buttress the submission. In addition, by reading Section 3(1)(e) of the SC ST POA Act, the learned Advocate General submits that the words "any other similar act" which occur in this Section would also extend to harvesting of a kidney. He relies on the principle of *ejusdem generis* and argues that similar words should be interpreted in a like manner encouraging the cause/purpose rather than an interpretation that would defeat the provisions of the Act. Learned Advocate General submits that the transplantation of removing of kidney would fit within the definition of section 3(1)(e) of the SC ST POA Act.

This Court after hearing the submissions of the learned counsel notices that the word "atrocity" is not defined in the Act. It merely states that atrocity is an offence punishable under Section 3 of the Act. Section 3 of the SC ST POA Act defines various types of offences. A Majority of the offences described in Section 3 of the SC ST POA Act (a) to (z) deal with offences against a "live" or "living" member of the Schedule Caste and Schedule Tribe. A few of the offences like 3(1)(t)(u) (v) deal with inanimate objects or things which are revered or treated with respect. In Section 3(1)(t) destruction, damage or defiling of a sacred object is dealt with. Section 3(1)(u) deals with an attempt by words signs or otherwise to promote enmity or ill-will of schedule caste and schedule tribes. Section 3(t)(v)(u) talks of an offence committed by means of disrespect to the deceased person who is held in high esteem by the schedule caste and schedule tribes. Almost all the other offences deal with living human beings and offences being committed against them.

Even that the definition of a "victim" under Section 2 talks of an individual, who has suffered or experienced physical, mental, psychological, emotional or monetary harm or harm to his property as a result of the commission of offence and includes his relatives. Therefore, a victim necessarily has to be a person who has personally experienced the physical, mental, psychological emotional or monetary harm.

Again atrocity as per Black's Law

Dictionary- 10th edition- means 1. An extremely cruel and violent act especially one committed in war, an instance of extreme heinousness. 2. The quality, state or condition of extreme cruelty or criminality – enormous wickedness.

The judgment in **Pt. Parmanand Katara, Advocate's** case (5supra) is a judgment in the peculiar facts of that case. This Court also agrees that a human body deserves to be treated with respect. But the question is – Was an "atrocity" committed in this case?.

In the case on hand, if the actions of the Doctors are examined against the backdrop of the scheme of the Act and the purpose for which it is enacted and the term atrocity, it cannot be said that the harvesting of an organ was an atrocity that was committed against a member of the schedule caste and schedule tribe. The Doctors harvested an organ and gave it to a recipient. Whether it was done for a commercial purpose or not and whether it is in contravention of the State or Central Government are matters which have to be decided during the course of trial. At that stage, the Doctor, who harvested the organ would have harvested the same whether the deceased was a member of the schedule caste and schedule tribe or not. It is a case of harvesting of an organ. The caste or tribe of the cadaver was hardly material at that stage. Whether it is lawfully done as per the "Jeevandan Scheme" or not is a matter of investigation.

The argument of *ejusdem generis* and the consequent interpretation appeared good at the first blush. It is however to be remembered that this is a rule of construction and not a rule of substantive law. In addition Sec.3(1)(e) the SC ST POA Act was added by the 2016 amendment which was brought in as the Legislative felt that the provisions of the existing act were not enough to deal with the situation. The Legislature did not define an atrocity nor did it prescribe that an offence against a cadaver would also amount to an atrocity. By interpreting the sub-section as the learned Advocate General suggests would mean including or creating a new offence by judicial interpretation.

Apart from all of this-the reading of the words shows that section 3(1)(e) of the SC ST POA Act deals with an atrocity, which is defined as follows- removing clothes from the person, forcible tonsuring of head, removing moustaches, painting face or body or any other similar act, which is derogatory to human dignity. The general words will take their colour or meaning form the Therefore, even if the *ejusdem generis* rule is applied, "any similar act" would mean any similar act like removing moustaches, painting face or body etc., but it will not include the harvesting of a kidney from inside a dead body.

Even otherwise Section 3(1)(e) of the SC ST POA Act starts with the word- "forcibly" which implies the use of some physical force against a person will or under coercion or compulsion. The use of this word again presupposes the existence of life and the lack of consent which cannot exist in this case as a cadaver was involved.

Therefore, if a doctor harvests an organ, it cannot be said by any stretch of

interpretation that he has committed an "atrocity" under the SC ST POA Act more so under Sec.3(1)(e) of the SC ST POA Act. As per the Doctors version, the wife gave consent and as a token of gratitude they have not charged the hospital expenses. Whether this is the payment or consideration for harvesting a human organ will have to be determined, but it definitely cannot be said to be an "atrocity". There is neither extreme cruelty nor violence nor is there any heinous crime involved in this case. The version of the Doctors in this case is that as per the "Jeevandan Scheme" they are entitled to an that they have harvested the organ.

Hence, this Court is of the opinion that no atrocity that is committed in the facts of this case. Section 3(1)(e) of the SC ST POA Act thus does not apply to the facts and circumstances of the case. As the section or the Act itself is not *prima facie* attracted, this Court is of the opinion that the continuation of the trial under the SC ST POA Act would amount to an abuse of process of Court.

Hence, Crl.P.No.3211 of 2019 is partially allowed. The applicability of the SC ST POA Act is ruled out and FIR to that extent is quashed. The investigation can continue with regard to the other offences mentioned in the FIR.

Since this Court has held that the SC ST POA Act is not applicable, the bar under Section 18 of the Act will not come in the way. The petitioners in Crl.P.No.3210 of 2019 namely A.1, A.3 to A.10 are entitled to an anticipatory bail as prayed for.

Accordingly, Crl,P.N.3210 is allowed and petitioners/A.1, A.3 to A.10 are directed to be released on bail, in the event of their arrest in Crime No.149 of 2019 of Station House Officer, Sri Potti Sriramulu, Nellore Rural, on their executing a bond for Rs.1,00,000/- (Rupees one lakh only) with two sureties in a like sum each to the satisfaction of the Station House Officer, Sri Potti Sriramulu, Nellore Rural. Further, the Doctors shall cooperate with the investigation and shall appear before the Station House Officer whenever their presence is required. The Station House Officer, Sri Potti Sriramulu, Nellore Rural is also directed to keep in view the responsibilities/duties of the Doctors and summon them with adequate advance written notice whenever their presence is necessary for investigation. The conditions as per Section 438(2) Cr.P.C. shall also be strictly adhered to by the petitioners. None of them will travel abroad or leave the country without informing the Station House Officer, Nellore Rural Police Station.

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

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2019(3) L.S. 39 (A.P.)

IN THE HIGH COURT OF
ANDHRA PRADESH

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

Dr.N.Sridhar Reddy & Ors., ..Petitioner
Vs.
State of A.P., ..Respondents

CRIMINAL PROCEDURE CODE, Sec.482 – HINDU MARRIAGE ACT, Sec.13 – Whether decree granted by the Court at Cambridge, U.K. is a valid decree and whether the marriage between the A1 and A4 is valid – A1/Husband was married to complainant – A1 filed a case for divorce from complainant in Cambridge Court, U.K.and Court passed an Order dissolving the marriage – Complainant later found out that A1 got married to A4 in U.K. and thereafter, complaint was lodged U/S 494, 120-B r/w Section 34 I.P.C. – Petitioner/ Husband contended that there was no subsisting marriage on the date of the marriage between him and A4 and therefore the offence of bigamy is not made out at all – A2/Mother-in-law and A3/Father-in-law also prayed for quashing of proceedings against them on the ground that they never encouraged A1 to go in for a second marriage - Hence all the Petitioners/ Accused 1 to 4 prayed for quash of the proceedings.

Held - Issues about the Orders passed by the Cambridge Court, issue whether defense of jurisdiction has been answered by the Court properly or not, whether such judgment is binding on the complainant and also on the Indian Courts are all matters which have to be decided during the trial – Not the stage to quash the proceedings in their entirety – Criminal petition stands dismissed.

Mr.Venkateswara Rao Gudapati, Mr.K. Srinivas, Advocates for the Petitioners.
Public Prosecutor for Respondent No.1.
Mr.G.V.S.Mehar Kumar, Advocate for the Respondent No.2.

C O M M O N O R D E R

Crl.P.No.122 of 2019 is filed by petitioners-A.2 and A-3, who are father-in-law and mother-in-law of the 2nd respondent-complainant under Sec.482 Cr.P.C. to quash the proceedings.

Crl.P.No.348 of 2019 is filed by the petitioners A.1 and A.4 who are the husband and the alleged second wife of Sri N. Sridhar Reddy-A.1 to quash the proceedings under Sec.482 Cr.P.C.

All the four (4) petitioners are accused in CC.No.571 of 2018. Both these cases were heard together.

This Court has heard Sri K.Srinivas, learned counsel for the petitioner in Crl.P.No.122 of 2019, Sri G. Venkateswara Rao, learned counsel for the petitioner in Crl.P.Bo.348 of 2019 and Sri A.T.M. Ranga Ramanujam, learned senior counsel

representing Sri G.V.S. Hari Mehar, learned counsel for the de-facto complainant and the learned Public Prosecutor for the respondent-State.

FACTS: This case has a long history.

Sri N. Sridhar Reddy-A.1 was married to the complainant. Their marriage was a troubled marriage. They lived in England for some time and during the wedlock they begot a child.

As per the averments in the petition, A.1 filed an application for divorce under the Hindu Marriage Act bearing No.8 of 2010 on the file of Sattenapalli Court. The said application was dismissed on 09.03.2010. A.1 preferred an appeal before the Hon'ble High Court against the order dated 09.03.2010, but he withdrew the same. Therefore, the complainant alleges that the marriage is subsisting.

As can be seen from the facts, after withdrawing the appeal, A.1 filed a case for divorce from the complainant in the Cambridge Country Court vide case No.CB13D01124. The said Court issued a notice as to why the marriage should not be dissolved and thereafter, it is stated that the Court has passed an order on 29.01.2014 dissolving the marriage. Therefore, according to A.1, the marriage is dissolved.

Apart from this, on 12.01.2014, the complainant filed an application for restitution of conjugal rights in HMOP No.4 of 2014. A decree was passed on 10.03.2014 for restitution of conjugal rights as A.1 did not appear.

The complainant's case is that later, she came to know that A.1 married A.4 in United Kingdom on 03.03.2014.Thereafter, the complaint was lodged under Sections 494, 120-B r/w Section 34 IPC. The complaint was actually registered on 01.02.2016 in Cr.No.28 of 2016. After investigation C.C.No.571 of 2018 was filed on the file of I Additional Junior Civil Judge, Sattenapalli.

Crl.P.No.122 of 2019 was filed by A.2 and A.3 who are the father-in-law and mother-in-law of the de-facto complainant for quashing the proceedings on the ground that they have never encouraged A.1 to go in for a second marriage. They state that they have no knowledge about A.1 marrying A.4. They also state that as A.1 was living far away, they had absolutely no role to play in the marriage. Lastly, they submit that even if the said marriage is true, it occurred in United Kingdom and therefore, the Indian Court has no jurisdiction to entertain the case.

A counter was filed by the complainant, wherein all these facts are denied stating that the present petitioners are actively involved in the marriage of A.1 with A.4.

Crl.P.No.348 of 2019 is filed by A.1 and A.4 on the ground that the marriage between complainant and A.1 was validly dissolved by a Court of competent jurisdiction and that therefore, there is no subsisting marriage on the date of the marriage between A.1 and A.4. therefore, it is averred that the offence of bigamy is not made out at all. Hence, a prayer for quashing.

In this matter also a very detailed counter affidavit is filed opposing the prayer. It is mentioned that the marriage has not been dissolved by a Court of competent jurisdiction and that the English Courts judgment is not binding on the complainant nor is it a valid judgment for this Court to follow the same.

Submissions: Learned counsel argued that the petitioners in Crl.P.No.122 of 2019 are the parents of A.1. Therefore, he submits that Section 494 cannot be applied at all. He submits that the offence under Section 494 IPC is a personal offence limited to the person who marries another during the subsistence of a valid marriage and the spouse is living. Therefore, he argues that an offence under Section 494 IPC cannot be attributed to the parents. He also submits that they had no role to play in the so called second marriage and that therefore, they cannot be charge sheeted. He also relies upon the judgment reported **in Pashaura Singh v. State of Punjab – (2010) 11 SCC 749** of the Hon'ble Supreme Court of India, wherein the Apex Court has held that the offence under Section 494 IPC is only attracted when a second marriage is contracted; when the first marriage is subsisting and the spouse is living. The counsel points out that in view of the divorce granted by the Cambridge Court, Section 494 IPC is not attracted. Learned counsel raises an important point and states that as the alleged offence of bigamy was committed in England, permission under Section 188 Cr.P.C. is necessary for pursuing the case. He relies upon a judgment of Madras High Court reported in **Dr.S.Karthikeyan v. E.Vedavanam – 2015 (1) MU(Crl.)** 517 and argues that without the permission of the Central Government the trial cannot proceeded. Hence, the contention of the learned counsel is that the petition should be allowed and that in the alternative, if the Court holds otherwise, the issuance of summons to the accused should be quashed.

In Crl.P.No.348/2009, the learned counsel relies upon the judgment of the Court at Cambridge and argues that a preliminary order was passed on 29.01.2014 asking the respondent/complainant/wife to show cause as to why the earlier marriage should not be dissolved. He submits that thereafter a final order was passed on 29.01.2014. Learned counsel also points out that only after the first marriage was dissolved, the second marriage was performed. He relies upon the marriage entry in the marriage register dated 04.03.2014 to show that the petitioner disclosed the fact that the previous marriage was dissolved before marrying A.4. Learned counsel submits that therefore, the essential ingredients under Section 494 IPC are not satisfied at all and that the application should be quashed. He also points out that in the charge sheet the police have deleted the name of A.4 as can be seen from plain reading of the charge sheet itself; yet he submits that the Lower Court issued NBW to A.4 without application of mind. Therefore, learned counsel submits that the petition should be allowed.

In reply to this, learned senior counsel appearing for the complainant in both the cases argues that the complainant/

wife never appeared before the English Court unconditionally. He relies upon the reply submitted by the complainant/wife filed along with the counter affidavit wherein in Col.No.1, she has protested against the jurisdiction of the Court. It is clearly mentioned that foreign Courts have no jurisdiction and that Section 13 C.P.C., would apply to the facts of the case. The learned counsel then argues that the decree that is passed by the English Court is not binding as the decree is also granted on the ground of "irretrievable breakdown" which is not a ground that is recognized by the Hindu law, more specifically the Hindu Marriage Act. Learned counsel relies upon **Y. Narasimha Rao v. Y. Venkata Lakshmi- (1991) 3 SCC 451** and argues that as per Section 13 of CPC., the English Courts judgment is not binding. He lays stress on Section 13(c) of CPC., and argues that a foreign judgment is not binding if it refuses to recognize the law of India, which is applicable to the facts of the case. He clearly points out in that case also before the Hon'ble Supreme Court, the Circuit Court of St. Louis Country granted divorce on the ground of irretrievable break down. He submits that irretrievable break down is not a ground to dissolve the marriage. He relies upon para 16 and 17 of the said judgment and argues that the said judgment is not binding. He also relies upon the Hon'ble Supreme Court's judgment **in Smt. Satya v. Shri Teja Singh – (1975) 1 SCC 120** and states that there is fraud as to jurisdiction and that the application was filed before a Court which has no territorial jurisdiction to entertain the application. He states that complainant/wife was not residing in England when the case was filed. He also relies upon **R. Sridharan v. Presiding officer, principal Family Court – II (2010) DMC 190 (DB),** wherein a Division Bench of the Madras High Court held that the provisions of the Hindu Marriage Act, with regard to jurisdiction will also come into play and that a petition presented in any other Court more so a foreign Court cannot be entertained or decided. Learned Counsel submits that the question of jurisdiction is determined by Section 19 of the Hindu Marriage Act, and therefore, the Cambridge Court has no jurisdiction.

In view of the rival contentions, this Court is of the opinion that the crux of the matter therefore is whether the decree granted by the Court at Cambridge is a valid decree? If the decree is a valid decree of divorce, the marriage between A.1 and A.4 is valid. If it is held that the said decree is not binding, whether the offence of bigamy is attracted?

Both the applications that are filed are under Section 482 Cr.P.C. to quash the proceedings. The law on the subject is very well settled. Although the power of the court to quash the proceedings is very vide, the same should be exercised with care and caution. Only if the Court is satisfied that the proceedings are an abuse of process of Court, the extraordinary power should be exercised. The Hon'ble Supreme Court of India in the case reported in **Prashant Bharti v. State of NCT of Delhi – (2013) 9 SCC 293** clearly held as follows:

> "Based on the factors canvassed in the Foregoing paragraphs, we would delineate The following steps to determine the veracity of a prayer

for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Code of Criminal Procedure:

(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges leveled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complain t, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

(iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/ complainant?

(iv) Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal-proceedings, in exercise of power vested in it under Section 482 of the Code of Criminal Procedure. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

If the present case is examined against the backdrop of this settle case law on the subject, the facts that would be clear are (a) divorce was granted by the Court at Cambridge on 29.01.2014 holding that marriage has irretrievably broken down but such a ground is not recognized under Indian law/Hindu Marriage Act, as a ground for dissolution of the marriage (b) the petitioner has never submitted to the jurisdiction of the Court. In the reply filed to the counter affidavit in (IA.No.3 of 2019 in Crl.PNo.122 of 2019) the written statement filed by the complainant/wife in the foreign Court was filed. In paras 15 to 18, it is clearly specified that appropriate Court to deal with this case is the Indian Court and that A.1 has adopted forum shopping and filed the case in a Court which does not have jurisdiction. It is also visible at the very initial stage itself that before filing the written statement on 28.08.2013, the objection as to jurisdiction was taken. Thus, both in the initial application made on 28.08.2013 and in the subsequent written statement dated 24.11.2013 which are filed along with IA No.3 of 2019, the complainant raised an issue about jurisdiction and the competency

of the Cambridge Court. It is also pointed out that if a divorce was granted in England on the ground of irretrievable break down, it would lead an anomalous situation where the marriage was treated as divorced in England while it is subsisting in India. The records do not show if this important issue has been answered by the English Court.

Of all the judgments that are relied upon, this Court is of the opinion that the judgment of the Hon'ble Supreme Court of India in **Y. Narasimha Rao's** case (3 supra) is most appropriate to the case on hand. In that case also, it was held that the decree is not binding. Prima facie this Court is of the opinion that this judgment is squarely applicable to the facts.

The second issue raised about a fraud being committed as far as the jurisdiction of the English Court is concerned, is also an arguable point. The Judgment of the Hon'ble Supreme Court of India reported in **Smt.Satya's** case (4 supra) is also applicable. It is also clear from the record that the complainant/wife has raised an objection more than once about the jurisdiction of the Court to entertain the matter. The English Court did not answer the matter.

The law is well settled that once a party appears under protest and contests the jurisdiction of the court, then it cannot be said that the party has submitted unconditionally to the Courts jurisdiction.

Therefore, this Court is of the opinion that the power under Section 482 Cr.P.C. cannot be exercised at this stage. The material relied upon by the accused is not in the words of the Hon'ble Supreme Court of India of "sterling or impeccable" character. The material filed by the complainant also raises a doubt of the date of the alleged bigamous marriage. He assertion is that the said marriage took place earlier but was registered later in March 2014.

The material relied upon by the accused thus would not lead to the irresistible conclusion that the accusations in the complaint are false. It would not also cannot lead to a conclusion that the trial would result in an abuse of process of Court.

Therefore, in view of all of above, this Court is of the opinion that this is not the stage to quash the proceedings in their entirety. The issues about the orders passed by the Cambridge Court; the issue whether the defense of jurisdiction has been answered by the Court properly or not, whether such judgment is binding on the complainant and also on the Indian Courts are all matters which have to be decided during the trial of the Court. The role of A.2/A.3 in the alleged second marriage, whether the second marriage was in March, 2014 etc., are all matters to be established during the trial.

This Court also notices that the respondent in her written statement requested for transfer of the matter to the high Court/family division. It is not clear what happened to this plea.

Many of the issues raised are thus matters which have to be decided during the course of the trial. The entire application cannot be dismissed. Prima facie material is available for proceeding further.

Therefore, both these grounds (a) whether the decree of the English Court is valid and binding (b) whether A.2 and A.3 have played an active role in encouraging the second marriage while the first marriage is subsisting and spouse is living are matters to be determined during the course of the trial.

The extra ordinary remedy of quashing the entire proceedings thus cannot be granted.

One fact however, remains i.e., the argument advanced by the learned counsel on Section 188 Cr.P.C.. The judgment of the Madras High Court which is passed in **S. Karthikeyan's** case, the issue of Section 188 Cr.P.C., was discussed is of importance. The learned counsel argued that unless permission is obtained from the Central Government the case should bot proceed further as the alleged offence of bigamy was committed in England. In the case of **Thota Venkateswarlu vs. State of A.P. tr. Princl. Secretary – AIR 2011 SC 2900** at para 29, the Hon'ble Supreme Court held as follows:

> "29. Language of the section is plain and simple. It operates where an offence is committed by a citizen of India outside the country. Requirements are, therefore, *one – commission of an offence; second – by an Indian citizen; and third – that it should have been committed outside the country."*

Hence, a plan reading of the section and the judgment of the Apex Court makes it clear that the ingredients are no satisfied as it is not clear if A.1 is a citizen of India or not. In fact, the description of A.1 in the charge sheet is that he is a "BRITISH CITIZEN". This is again a matter to be looked into and decided.

In the result, Crl.P.Nos.122 and 348 of 2019 are dismissed.

In view of the long arguments on legal and factual aspects, certain opinions are expressed by this Court. All these conclusions are for the purpose of the present applications only and they should not come in the way of the lower Court in dealing with the case. The trial Court shall decide the matter without being influenced by what is stated in this order.

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

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2019(3) L.S. 46 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Nagella Siva Kumar ..Petitioner
Vs.
Smt.G.Sowjanya ..Respondent

CIVIL PROCEDURE CODE, Order XIII, Rule 3 & Sec.151 – Suit for permanent injunction - Civil revision assailing the Order passed in I.A. by virtue of which lower Court dismissed the petition filed by the Petitioner/ Defendant, under Order XIII Rule 3 and Section 151 of C.P.C., seeking to demark Ex A2/Agreement of sale, which was allegedly executed by petitioner in favour of Respondent/Plaintiff – Petitioner contends that lower Court ought to have not marked the document, as no collateral purpose exists.

Held – Petitioner can be given an opportunity to raise objection before lower Court with regard to consideration of Ex A2, which is already marked and he is given opportunity to raise contention with regard to absence of recital pertaining to delivery of possession to the respondent before the lower Court, when Ex A2 comes for consideration – Lower Court shall give specific finding with regard to the objection that would be raised by the petitioner – Civil revision is accordingly disposed of.

Mr.Challa Siva Sankar, Advoocate foooor the Petitioner.
Mr.G.Sravan Kumar, Advocate for the Respondent. .

O R D E R

This civil revision petition is filed under Article 227 of the Constitution of India, assailing the order dated 24.8.2018, passed in I.A.No.298 of 2018 in O.S. No.56 of 2017 on the file of the Court of Senior Civil Judge, Atmakur, by virtue of which the lower Court dismissed the petition filed by the petitioner-defendant, under Order XIII Rule 3 and Section 151 of the Code of Civil Procedure, 1908 (CPC), seeking to demark Ex.A.2-agreement of sale, which was allegedly executed by the petitioner in favour of the respondent-plaintiff. The suit is filed for permanent injunction.

2. Heard the counsel for the petitioner and the counsel for the respondent.

3. The ground on which the counsel for petitioner assails the order is that the lower court ought to have not marked the document, as no collateral purpose exists in respect of the said document. The counsel for the petitioner submits that the agreement of sale does not contain any recital that possession of the property was delivered to the respondent. A perusal of the agreement of sale, no doubt, shows that there is no recital to the effect that

the property was delivered to the respondent. But the lower court, somehow, considered that the document can be marked for proving collateral purpose. Be that as it may, the petition filed by the petitioner, in the lower court, is not maintainable under Order XIII Rule 3 CPC, as the said provision does not prescribe the procedure for demarking a document, which

is already marked before the court. It only specifies that the Court may, at any stage of the suit, reject any document, which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

4. In this case, the agreement of sale is filed along with the plaint. In the written statement, the petitioner herein does not take any plea that the document is not admissible. He only contends that the signature on the document is forged and that he intends to send the same to an Expert. Though the document was filed along with the plaint, the petitioner does not raise objection with regard to the said document, either in his written statement or at the time of marking it as Ex.A.2, and hence, the lower court might not have any other option except to mark the said document. Proof and relevancy of a document is different from marking of the same. Hence, whether the contents of the document go to prove delivery of possession of the property to the respondent or not, is an aspect, which has to be gone into, while appreciating the aspect of proof of the document.

5. The judgments relies upon by the petitioner's counsel, except one, do not have any relevancy on the issue involved in this revision. The first judgment reported in Lakkoji Mohana Rao v. Lakkoji Viswanadham 2012 (3) ALT 476 is in respect of marking of document, which is not registered and which is inadmissible in evidence. But, in this case, the lower court considered that the document is admissible for collateral purpose. However, this judgment does not throw any light with regard to the maintainability of the petition under Order XIII Rule 3 CPC.

6. The second judgment in H.Siddiqui (dead) by LRs v. A.Ramalingam 2011 (3) ALD 19 (SC) is with regard to the obligation that the court has in deciding the question of admissibility of document produced by way of secondary evidence. The document, which was marked by the lower court, is not in the form of secondary evidence and hence, the said judgment does not help the petitioner.

7. The third judgment rendered by the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in S.Mohan Krishna v. V.Varalakshmamma 2017 (5) ALT 264 also does not appear to be relevant, as it reiterates the procedure laid down under Order XIII Rule 3 CPC with regard to marking of document. The question involved in this revision is not with regard to procedural propriety of marking the document.

8. The last judgment relies upon by the counsel for the petitioner in Boggavarapu Narasimhulu v. Sriram Ramanaiah 2014 (1) ALT 577 touches upon the aspect of demarking of document. While dealing with the question, whether a document, which is already marked, can be demarked under Order XIII Rule 3 CPC, the Court at paragraph No.6 of the judgment held as follows:

> 6.Accordingly, the impugned order is set aside and the Civil Revision Petition is allowed, however, with the following directions:
>
> 'The defendants are at liberty to raise an objection before the trial Court as to the inadmissibility of the exhibit A1 for want of registration as required under Section 17 of the Indian Registration Act. In case, such an objection is raised, the trial Court shallconsider the said objection at the appropriate stage of the matter and on merits and shall either exclude from consideration the exhibit A1 and the evidence in regard to the said document or take into consideration the exhibit A1 and also the evidence in regard to the said document having regard to the decision on merits that may be made by the Court after taking into consideration the contents of exhibit A1 and the law applicable.' It is made clear that this Court did not go into the merits of the matter as to either the requirement of the registration or the sufficiency or otherwise of the stamp duty in respect of the exhibit A1 and the said aspects are left open for consideration by the trial Court.

9. Hence, in this case also, the petitioner can be given an opportunity to raise objection before the lower court with regard to consideration of Ex.A.2, which is already marked and he is given opportunity to raise contention with regard to absence of recital pertaining to delivery of possession to the respondent before the lower court, when Ex.A.2 comes for consideration. The lower court shall give specific finding with regard to the objection that would be raised by the petitioner, which would be at the time of arguments.

10. Accordingly, the civil revision petition is disposed of. As a sequel, the miscellaneous applications, if any pending, shall stand closed.

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2019(3) L.S. 49 (D.B.) (A.P.)

IN THE HIGH COURT OF
ANDHRA PRADESH

Present:
The Hon'ble Mr.Justice
M. Seetharama Murti &
The Hon'ble Mr.Justice
Gudiseva Shyam Prasad

Grandham Sridhar ..Appellant

Vs.

Smt.Grandham Jaya Vani ..Respondent

HINDU MARRIAGE ACT, Sec. 13(1)(ia) – Appeal filed by the husband aggrieved by the impugned Order passed by the Family Court dismissing the petition for grant of dissolution of marriage between himself and the wife/ respondent – Contention of appellant is that the respondent filed a false criminal case against him and his family which ended in acquittal and that respondent has been residing separately from appellant from nearly 22 years.

Held – Appellant and respondent are living separately since 22 years and there appears no possibility of reunion – Appellant is entitled for grant of a decree of dissolution of marriage under Section 13(1)(ia) of Hindu Marriage Act and counter claim filed by the respondent under Section 9 of the Act is liable to be dismissed – Appeal is allowed setting aside the Order passed by Lower Court.

CMA.Noo.1274/2005 Date: 3-7-2019

Ms.G.Amuulya Spencer, rep. Mr.G.Ronald Raju, Advocate for the Appellant.

Mr.Raja Reddy Koneti, Advocate for the Respondeent.

J U D G M E N T

(per the Hon'ble Mr.Justice Gudiseva Shyam Prasad)

This Civil Miscellaneous Appeal is arising out of the order dated 03.12.2004, passed in OP No.38 of 2000 on the file of the Principal Senior Civil Judge, Eluru, filed under Section 13(1)(ia) of Hindu Marriage Act 1955 seeking for dissolution of marriage of the petitioner/appellant with the respondent.

2. Brief facts of the case are:

The marriage of the appellant-Grandham Sridhar was performed with the respondent-Grandham Jaya Vani on 10.04.1996, at Eluru as per Hindu Rites and Caste custom prevailed in their community. The appellant/husband has filed OP No.38 of 2000 on the file of Principal Senior Civil Judge, Eluru, against the respondent/wife seeking dissolution of marriage. The learned Principal Senior Civil Judge, Eluru, on consideration of the evidence of PWs.1 to 4 on behalf of the appellant, and RWs.1 to 3 on behalf of respondent, and the documents Ex.A1 and Ex.A2, has dismissed the petition filed for dissolution of marriage by the appellant/ husband. The counter claim made by the respondent/wife for restitution of conjugal rights has been allowed. Aggrieved by the impugned order, the present appeal has

been filed by the appellant on the following grounds.

(i) The respondent has filed a false criminal case in C.c.No.635 of 2000 on the file of II Additional Judicial Magistrate of First Class, Eluru under Sections 498-A, 506 IPC and under Sections 3 and 4 of Dowry and Prohibition Act.

(ii) The filing of a false criminal case by the respondent against the appellant amounts to cruelty and on that ground the appellant is entitled for grant of divorce;

(iii) The respondent has never issued any notice to the appellant seeking for restitution of conjugal rights.

(iv) The counter claim of the respondent on conjugal rights was filed three years after filing of O.P.No.38 of 2000 seeking for dissolution of marriage and therefore the petition under Section 9 of Hindu Marriage Act is filed as a counterblast for divorce OP No.38 of 2000 filed by the respondent.

(v)The respondent has voluntarily deserted the appellant without any reason and therefore on the ground of desertion also the appellant is entitled for dissolution of marriage.

(vi)The appellant and his relatives have tried their best for re-union of the couple but the same has failed because of indifferent attitude of the respondent. There is no possibility of re-union in this case in view of the longer separation between the couple and therefore the judgment and decree of the trial Court may be set aside.

3.Heard the arguments of Ms.G. Amulya Spencer, learned counsel representing Sri G. Ronald Raju, learned counsel for the appellant and the arguments of the Mr. Raja Reddy Koneti, learned counsel for the respondent.

4.The points arise for consideration in this case are:

(1) Whether the appellant is able to establish his case by proving the ingredients under sections 13(1)(ia) of Hindu Marriage Act 1955?

(2) Whether the respondent in her counter-claim is able to prove her case in the light of the provision under Section 9 of Hindu marriage Act?

5.At the outset, this is an appeal filed by the husband aggrieved by the impugned order passed by the Family Court dismissing the petition for grant of dissolution of marriage between himself and the respondent under Section 13(1)(ia) of the Hindu Marriage Act, 1955 (for short 'the Act').

6.The main contention of the learned counsel for the appellant is that though the appellant is able to prove the cruelty on the part of the respondent, the trial Court has not granted dissolution of marriage and dismissed the petition, therefore, sought

for setting aside the order of the trial Court and sought for decree of divorce.

7.Section 13(1) (ia) of the Act reads as under:

> **13. Divorce**: (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party;
>
> (ia) has, after the solemnization of the marriage, treated the petitioner with cruelty.

8. The burden is on the appellant to prove the cruel acts on the part of the respondent. The cruel acts may constitute physical cruelty and also mental cruelty. It was held in *Vidhya Viswanathan v Karthik Balakrishnan – AIR 2015 SC 285* that refusal to have sexual intercourse for considerable period by wife amounts to mental cruelty.

9. It is held in *K. Srinivasa Rao v D.A. Deepa – AIR 2013 SC 2176* that making undoubted, indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospects or the job of the spouse and filing repeated false complaints would, in the facts of a case amount to causing mental cruelty to the other spouse.

10. Keeping the ratio laid down in the two decisions when the facts of the case on hand are analysed, the contention of the learned counsel for the appellant is that the respondent-wife has not joined him for co-habitation after few days of the marriage and she had also filed false case against him which ended in acquittal amounts to mental cruelty.

11. The appellant has clearly stated in para 9 of his evidence as PW.1 that the respondent-wife was not interested to lead marital life with him. The respondent in all lived with him for six days only i.e., 3 days during nuptial ceremony at Eluru from 24.04.1998 to 26.04.1998 and later for 3 days at Khammam from 27.04.1998 to 29.04.1998 and thereafter, she never joined him. It is also the case of the appellant that the respondent openly stated to him that even from the nuptial ceremony that she was aspiring for highly educated affluent husband to her and that he was a mis-match for her and she was forced to marry him at the instance of her parents against her will. It is also stated by the appellant that the respondent never treated him with love and affected and never extended any respect to him at any point of time and that she had superiority complex. Her parents, brothers also looked him down and never respected him. In spite of best efforts made by him, she never joined him to lead marital life.

12. PW.1 stated in his evidence that the respondent had given a complaint to police and a case in CC No.635 of 2000 on the file of the II Addl. Judl. Magistrate of I Class, Eluru was registered and the said case ended in acquittal, which

was filed against him, his mother and brother-in-law on 29.04.2003.

13. Learned counsel for the appellant submits that in view of filing of criminal case against the appellant, the appellant and his family members have put to humiliation and suffered mental agony and insult, which amounts to mental cruelty.

14. The learned trial Judge has not considered these facts and relying on the part of the testimony of the other witnesses, PWs.2 to 4, who are brother-in-law, neighbor and relative of PW.1 had dismissed the claim of the appellant.

15. It is the case of the respondent that the appellant had harassed the respondent for additional dowry and ill-treated her and she give complaint against him and a case in CC No.635 of 2000 on the file of the II Addl.Judl. Magistrate of I Class, Eluru was registered. On consideration of evidence, it is obvious that the case has ended in acquittal and basically it appears that the there are differences between the appellant and the respondent with regard to their educational qualifications and also expectations by each of them. The respondent appears to have lived with him for short period after the marriage and thereafter a criminal complaint was given and the criminal case ended in acquittal. As of now, they have been residing separately for almost more than 20 years.

16.Learned counsel for the appellant placing reliance on the decision of Division bench of this Court submitted that when there is longer separation and there is no possibility of re-union, the marriage may be dissolved as no purpose would be served if the marriage is not dissolved.

17.This Court in *Konda Srinivasa Rao v Konda Sridevi (CMA Nos.4441 of 2004 and 621 of 2006*) held in para 9 as follows:

> "The aforementioned dicta of the Supreme Court applied in all fours to the present case because even as per the respondent, she has been living separately from the end of 2001. 15 years passed by since then, and there are no chances of reunion of the parties. Therefore, we are of the opinion that this is a fit case where the marriage between the appellant and the respondent needs to be dissolved."

18. Learned Counsel for the respondent fairly submitted that the parties are living separately for more than 22 years and there is no possibility of reunion and the respondent is also not seriously contesting the matter and therefore, sought for dissolution of marriage between the parties to lead their lives separately.

19. The appellant got examined himself as PW.1 and got examined his brother-in-law and a neighbor and his relatives as PWs.2 to 4 respectively. The evidence of PW.1 reveals that there was a mediation took place between the appellant and the respondent with regard to the matrimonial disputes. The trial Court disbelieved the evidence of mediators PWs.3 and 4 as they have stated in their

cross-examination that they have not mediated the matter and that they have no personal knowledge about the family affairs fo the appellant and the respondent. The trial Court has disbelieved the evidence of PWs.2 to 4 with regard to the proof of cruelty on the part of the respondent/wife.

20.the evidence of PW.1 clearly reveals that the respondent was not willing for the marriage from the beginning with the appellant and that she had informed the said fact to him while she was in his conjugal society for a few days.

21.The appellant is the husband and the respondent is legally wedded wife of the appellant. The appellant has filed a petition for dissolution of his marriage and the respondent as a counterblast filed counter claim for restitution of conjugal rights.

22.Admittedly the marriage was performed on 10.04.1996. After four years of the marriage, the appellant has filed OP No.38 of 2000 for dissolution of his marriage. Thereafter the respondent has filed criminal case in CC No.635 of 2000 under Sections 498A, 506 IPC and Sections 3 and 4 of Dowry Prohibition Act and also counter claim for restitution of conjugal rights.

23. The trial Court on disbelieving the evidence of PWs.2 to 4 and believing the evidence of RWs.1 to 3, has dismissed the petition filed for dissolution of marriage holding that the cruelty has not been proved. Consequently, allowed the counter-claim directing restitution of conjugal rights in the year 2004.

24.The main contention of the appellant is that the respondent has filed a false criminal case against him and his family members which is in CC No.635 of 2000 on the file of II Additional Judicial Magistrate of I Class, Eluru under Sections 498A, 506 IPC and Sections 3 and 4 of Dowry Prohibition Act which ended in acquittal. As the respondent has filed a false criminal case against the appellant it amounts to cruelty, therefore the appellant is entitled for grant of divorce on that ground. The trial Court has not considered the said fact and dismissed the petition of the appellant.

25.The other contention of the appellant is that the respondent though filed a petition for restitution of conjugal rights and did not take any steps for joining the association of the appellant by issuing any notice to him. The respondent has not taken any steps for execution of the decree of restitution of conjugal rights to join the association of the appellant which clearly reveals that the respondent had no intention to join the appellant.

26. It is mainly argued that the respondent has been residing separately from her husband/appellant from nearly 22 years and therefore there is no question of reunion between the parties and the appellant is entitled for a decree of divorce on the ground of cruelty.

27.On consideration of the submissions of learned counsel for the respondent and the material on record, we

are of the considered view that the appellant and the respondent have been residing separately for almost more than 20 years. The appellant was also not informed about the birth of the child given by the respondent, there were no instances fo any mediation taking place for reconciliation or for joining the appellant by the respondent. It is obvious that the counter claim made by the respondent seeking for restitution of conjugal rights is only as a counterblast to resist the divorce application filed by the appellant. The subsequent conduct of the respondent clearly reveals that she had no intention to join the association of the appellant to lead a conjugal life even after obtaining a decree for restitution of conjugal rights.

28.It is also pertinent to note that the acts of the respondent in filing a criminal complaint against the appellant and his family members is only with an intention to harass him is proved as the criminal complaint had ended in acquittal. No doubt a revision has been filed by the respondent which is pending on the file of this court but however there are no reasons coming forward for the respondent for not joining the association of her husband in spite of the orders of the Court granting restitution of conjugal rights to her. This speaks volumes about the conduct of the respondent in staying away from the appellant. The findings of the trial Court clearly reveal that the evidence was not properly appreciated in the light of the events that have taken place since the date of marriage. The trial Court has also not given any satisfactory reasons for disbelieving the plea of the appellant of cruelty.

29. Having considered the submissions of the learned counsel for the appellant and the respondent and in view of the foregoing reasons, we are of the considered view that the appellant and the respondent are living separately for more than 22 years and there appears to be no possibility of reunion and the criminal case filed by the respondent is also ended in acquittal and the marriage is irretrievably broken down and in such circumstances, placing reliance on the judgment of the *Apex court in Kohli v Neelu Kohli* – and the judgment of this Court in CMA Nos.4441 of 2004 and 621 of 2006, this is a fit case where dissolution of marriage has to be granted on the grounds urged.

30. On consideration of material on record, we are of the considered view that the appellant is entitled for grant of a decree of dissolution of marriage under Section 13(1)(ia) of the Act and at the same time, the counter claim by the respondent under Section 9 of the Act is liable to be dismissed.

31. In the result, the appeal is allowed setting aside the order, dated 03.12.2004 in OP No.38 of 2000 passed by the Principal Senior Civil Judge, Eluru and the said OP is allowed granting a decree dissolving the marriage between the parties. However, the counter claim made by the respondent for restitution of conjugal rights is dismissed No order as to costs. Miscellaneous petitions, if any pending in this appeal shall stand closed.

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2019(3) L.S. 55 (A.P.)

IN THE HIGH COURT OF
ANDHRA PRADESH

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

Palla Aruuna ..Appellant

Vs.

Botta Seethamma & Anr., ..Respondents

CIVIL PROCEDURE CODE, Or. 41 Rules 23, 27, 28 and 29 – Civil appeal against the impugned judgment, whereby, appeal was allowed setting aside the decree and judgment passed by trial Court and matter was remanded to the trial Court to receive additional evidence filed by both appellant and defendants.

Held – Lower appellate Court committed an error in setting aside the judgment and decree of trial Court and holding that the appeal is allowed - Lower appellate Court is directed to examine the matter afresh and decide whether additional evidence is to be recorded by itself or whether the matter should be sent to the trial Court for recording the additional evidence – After recording the evidence by itself or after recorded evidence is received from trial Court, the lower appellate Court shall dispose of appeal on merits – Entire process should be completed within a period of three months – Appeal stands allowed.

Mr.M.Radha Krishna, Advocatee fooor thee Appellant.

Mr.P.Rajasekhar, Advocate for the Respondent No.2.

O R D E R

This Civil Miscellaneous Appeal is filed questioning the order, dated 18.07.2018, passed in A.S.No.225 of 2008 by the learned XI Additional District & Sessions Judge, Visakhapatnam. By the impugned judgment the appeal was allowed setting aside the decree and judgment dated 23.06.2008 in OS No.40 of 1997 passed by the learned Junior Civil Judge, Bheemunipatnam and the matter was remanded to the 1st Court to receive the additional evidence filed by both the appellant and the defendants.

This court has heard Sri M. Radha Krishna, learned counsel for the appellant and Sri P. Raja Sekhar, learned counsel for the respondent.

Learned counsel for the appellant relied upon number of judgments of the Hon'ble Supreme Court of India reported in **Uttaradi Mutt v Raghavendra Swamy Mutt – (2018) 10 SCC 484; H.P. Vedavyasachar v Shivashankara and Another – (2009) 8 SCC 231** and **Shanti Devi v Daropti Devi and others- (2006) 13 SCC 775** and the judgment of a learned single Judge of this Court reported in **Kesava Reddy v A. Virupaksha Reddy and others-(2016) 1 ALD 564**.

Learned counsel for the appellant argued that the lower Court committed a

fundamental error in remanding the matter to the lower court. It is his contention that the procedure prescribed under Order 41 Rule 27 of CPC has not been followed at all. Learned counsel submits that after the Court was convinced that the additional evidence is to be received the procedure prescribed under Order 41 Rule 28 and 29 of CPC has to be followed and that the Appellate Court has a discretion either to receive the evidence by itself or to direct the lower Court to receive the evidence and send back the finding. It is his contention that allowing the Appeal is not called for in the circumstances.

In reply to this learned counsel for the respondent argued that there is no error committed by the Court below and that once the Court came to the conclusion that additional evidence is necessary, the Court had the option of sending the matter back to the lower Court. Learned counsel relied upon the judgment of the Supreme court in The **Corporation of Madras & Another v M. Parthasarathy and others – (2018) 9 SCC 445** and argued that the Court has the power under Order 41 Rule 23-A of CPC to set aside the judgment and decree of the lower court and that in view of this judgment the trial Court could frame additional issues and decide the suit afresh. Therefore, learned counsel contends that there is no error in the impugned order.

Learned counsel for the appellant essentially relied upon the grounds, which are raised by him in para-13 of the grounds of appeal.

Order 41 Rule 23 of CPC deals with remand of a case by the Appellate Court. If the original *lis* has been disposed of on a preliminary point and the Appellate Court has decided to reverse the said finding, the Appellate Court may direct the remand of the matter and may also direct what issue or issues should be tried by the Trial court. Even otherwise, as per Order 41 Rule 23-A of CPC after the decree is reversed in appeal and retrial is considered necessary the Appellate court has the power to remand the case. Therefore, Order 41 Rule 23-A of CPC deal with a situation where the finding is reversed in appeal and the Appellate Court feels that there is a need for further evidence.

If, however, the court is of the opinion that the available evidence is sufficient it can decide the case on its own and without remand and can decide the case finally

If, however, the Appellate court feels that the lower Court has omitted to frame any issue, failed to try any issue or determine a question of fact, which the Appellate Court deems essential, then the Appellate Court may frame issue/issues by itself and refer the same to the lower Court for a trial and for taking additional evidence on such issue/s. the lower Court shall after recording the evidence on the specific issue/ issues return the same to the Appellate Court. The Appellate Court shall then decide the appeal by itself after receiving the evidence under Order 41 Rule 26 of CPC.

Apart from all of these, Order 41 Rule 27 of CPC gives an option to the parties to the case to file an application for receipt of additional evidence.

In the present case both the parties have exercised this option – Both the appellant and the respondent herein has filed applications for receiving additional evidence. The said applications and the order passed thereon are not strictly the subject matter in challenge. By the impugned order the appeal itself was "allowed" and the decree of the trail Court was "reversed" – which is the essential question that is raised here.

After hearing both the learned counsel and after considering the law on the subject, this Court is of the opinion that the Court below has overlooked the provisions of Order 41 Rule 28 and 29 of CPC. Order 41 Rule 28 of CPC clearly states that where additional evidence is allowed to be produced the Appellate Court may (a) either take evidence directly or (b) direct the trial Court or any other subordinate Court to record the evidence and send it back to the Appellate court, Rule 29 further clarifies by stating that the Appellate court should specify the point to which the evidence is to be confined. In fact, the Hon'ble Supreme Court of India in The Corporation of Madras case (5 supra) also held that the Appellate court has an option of taking the evidence by itself or remitting the case to the trial Court for a limited trial on a particular issue. However, in that case as the Appellate Court did not give an opportunity to the opposite party to file any rebuttal evidence to counter the additional evidence the Hon'ble Supreme Court of India held prejudice was caused. Therefore, the Hon'ble Supreme Court of India remanded the matter under Order 41 Rule 23-A of CPC and ordered a trial.

In the present case, the lower Court felt that the applications filed by both the parties for receiving additional evidence should be allowed. The reasons given by the parties in filing the applications for additional evidence were accepted. Thereafter, the Appellate court in the opinion of this court, committed an error. It allowed the entire appeal and remanded the matter for receiving fresh evidence.

It had an option of (a) deciding to record the evidence by itself or (b) direct the lower court to take such evidence and send back the finding to the Appellate Court. It did not do either of the above. In addition, the Appellate Court also failed to specify the point to which the evidence is to be confined.

In that view of the matter, this Court is of the opinion that the lower Court committed an error in setting aside the judgment and decree of the trial court and holding that the appeal is allowed. The judgment passed in this case is a judgment on merits. The Appellate court was not exercising its power under Order 41 Rule 23 and 23-A of CPC. It was dealing with the situation falling under order 41 Rule 27 of CPC. In that view of the matter, the case law cited by the learned counsel for the appellant is much more relevant and

applicable to the facts of the case. A plain language interpretation of the provisions of Order 41 of CPC and the case law cited make it very clear that the first Appellate Court committed an error in this case. Hence, the impugned order is set aside and the following directions are issue to the Appellate court in this matter viz.,

1) The learned XI Additional District and Sessions Judge, Visakhapatnam, is directed to examine the matter afresh and decide whether additional evidence is to be recorded by itself or whether the matter should be sent to the trial Court for recording the additional evidence. If the 1st Appellate Court viz., XI Additional District and Sessions Judge, Visakhapatnam decides to send the matter to the trial Court for recording the evidence the Court has to strictly follow the procedure specified under Order 41 Rule 28 and 29 of the CPC.

2) After recording the evidence by itself or after recorded evidence is received from the trial Court, the lower Appellate Court shall dispose of the appeal on merits.

3) The entire process should be completed within a period of three months from the date of receipt of this order without further extension of time.

In view of the fact that the original suit is of the year 1997, the trial Court judgment is of the year 2008 and the Appellate Court's judgment is of the year 2018, the time frame is fixed and learned XI Additional District and Sessions Judge, Visakhapatnam is directed to strictly adhere to the time frame that is so fixed.

With the above directions, this Civil Miscellaneous Appeal is allowed, but in the circumstances, there shall be no order as to costs.

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

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there is an imminent possibility of his committing similar offences which are detrimental to public order, unless he is prevented from doing so by an appropriate order of detention, is highly misplaced. It is the bounden duty of the Police to inform the learned Public Prosecutor about the conduct of an accused and to handover the history-sheet of the accused. The police ought to have been vigilant in collecting the whole data against the detenu and to furnish the same to the Public Prosecutor/Additional Public Prosecutor to defeat the bail applications of the detenu. However, it is the Police that have to take required measures to inform the Public Prosecutor about the criminal history of the offender. For the inaction of the Police, the detaining authority cannot be permitted to invoke the preventive detention laws, in order to breach the liberty of an individual.

14. Grave as the offences may be, they relate to cheating and criminal breach of trust. So, no inference of disturbance of public order can be drawn. These cases can be tried under the normal criminal law. And, if convicted, can certainly be punished by the Court of law. Hence, there was no need for the detaining authority to pass the detention order.

15. Therefore, for the reasons stated above, the impugned orders are legally unsustainable.

16. In the result, the Writ Petition is allowed. The impugned detention order dated 31.10.2018 and the confirmation order dated 26.02.2019 are hereby set aside. The respondents are directed to set the detenu, namely, Mr. Sateeshan Palayad, S/o. Late M. Karunan, at liberty forthwith, if he is no longer detained in judicial custody in the criminal cases, which have been so far registered against him.

17. The miscellaneous petitions pending in this Writ Petition, if any, shall stand closed. There shall be no order as to costs.

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2019(3) L.S. 5 (T.S.)

IN THE HIGH COURT OF TELANGANA

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

T. Malahar Rao
& Ors., ..Petitioners

Vs.

P. Sucharitha ..Respondent

CONSTITUTION OF INDIA, Article 227 - Revision is filed challenging the Order in I.A. in O.S - Petitioners herein are defendant Nos.1 to 5 in the said suit - Petitioners contended that the Court below erred in refusing to reject the plaint and that Order II Rule 2 C.P.C. would clearly bar the instant suit.

Held - Cause of action for both the suits is different and in O.S.No.87 of 2011, the respondent is claiming partition and separate possession of the properties of her late biological father

- In the instant suit, however, she is seeking cancellation of gift settlement deeds - Since the suits are not between the same parties (though 5th petitioner is common in both the suits) and since there is a distinct cause of action in the instant suit, no error of jurisdiction in the Order passed by the Court below warranting interference by this Court under Article 227 of the Constitution of India - Civil Revision Petition stands dismissed - However, both the suits ought to be heard by the same Court to avoid conflicting decisions on the validity of the Wills in question.

Mr.B. Nalin Kumar, Advocates For the Petitioners.
Mr.K. Rama Subba Rao, Advocate For the Respondent.

J U D G M E N T

1. This Revision is filed under Article 227 of the Constitution of India challenging the order dt.01-06-2017 in I.A.No.982 of 2013 in O.S.No.644 of 2013 of the Principal District Judge, Ranga Reddy District at L.B. Nagar, Hyderabad.

2. Petitioners herein are defendant Nos.1 to 5 in the said suit.

Plea of the respondent/plaintiff

3. The respondent herein filed the said suit against petitioners to declare that she and 5th petitioner are absolute owners of suit 'A' and 'B' schedule properties and consequently to cancel the gift settlement deeds dt.18-05-2004 and 25-05-2004 executed by 1st petitioner in favour of 2nd petitioner and by 3rd petitioner in favour of 4th petitioner and also for recovery of possession of 'A' and 'B' schedule properties to respondent and 5th petitioner.

4. It is the contention of the respondent that one B.Radhamma was the owner of land in Sy.No.594 of extent Ac.10.08 gts; that she executed a registered Will in favour of biological father of respondent by name S.P.Bhaskar Rao on 02-02-1976 bequeathing all her property and also in favour of Smt.Indira Devi, Smt.Boodevi and Sri B.Ramachander Rao; that S.P.Bhaskar Rao gave registered G.P.A. in favour of his brother late B.Ramachander Rao on 26-04-1976; that respondent was gave in adoption by S.P.Bhaskar Rao to B.Ramachander Rao in 1963; and 5th petitioner, who is the son of M.Bhupathi Rao, was also adopted by B.Ramachander Rao. She contended that S.P.Bhaskara Rao died on 31-01-2010 and B.Ramachander Rao died on 06-04-2003 and that respondent succeeded to the property of S.P.Bhaskar Rao as per his Will dt.18-07-2009 and so she sought partition from the 5th petitioner.

5. She contended that 5th petitioner did not respond for partition and so respondent filed O.S.No.87 of 2011 before the I Additional District Judge, Ranga Reddy District and the same is now transferred to the XIII Additional District Judge, Ranga Reddy District at L.B. Nagar and is pending. She contended that she and the 5th petitioner had succeeded to the property of B.Radhamma and S.P. Bhaskar Rao.

6. She alleged that 1st petitioner executed

a gift deed on 18-05-2004 in favour of 2nd petitioner in respect of 'A' schedule property claiming that 'A' schedule property was acquired by 1st petitioner towards his share in the ancestral property; 3rd petitioner executed gift deed on 25-05-2004 in favour of 4th petitioner in respect of 'B' schedule property and 3rd petitioner also claims that it is his ancestral property.

7. She alleged that petitioner Nos.1 and 3 do not have any right in 'A' and 'B' schedule properties and they have brought into existence the said gift settlement deeds only to lay claim over the suit schedule properties. According to her, only herself and 5th petitioner are the original owners of the said property.

Plea of the petitioners/defendants

8. Petitioner Nos.1 to 4 filed a Written Statement opposing the suit claim. They contended that respondent had filed O.S.No.87 of 2011 before the District Judge, Malkajgiri, to which 5th petitioner is a party for partition of various properties including the property which is the subject matter of the instant suit. They contended that the instant suit is barred under Order II Rule 2 C.P.C.

9. They contended that 5th petitioner is the natural brother of M.Lakshmikantha Rao, father of 3rd petitioner and husband of 4th petitioner. They contended that 5th petitioner was taken in adoption by late B.Ramachander Rao and Smt.Bhoodevi and the later is the natural daughter of Smt.B.Radhamma, the original owner of the properties in Sy.No.594 of Alwal village. They contended that 1st petitioner is the father of 2nd petitioner and 2nd petitioner is also the daughter-in-law of late 4th petitioner.

10. According to them, late B.Ramachander Rao was taken as illatom son-in-law by B.Radhamma during her life time and she gave various properties in Alwal including the land in Sy.No.594, and his name was included as pattadar and possessor in Khasra Pahani for the year 1954-55. They contended that a layout was got prepared on 11-02-1967 by late B.Ramachandra Rao, and in the said layout, the 2nd petitioner owns plot No.67 and 4th petitioner owns plot No.115. They contended that various plots in the layout comprising Sy.Nos.590, 591 and 594 (part) admeasuring 50889 Sq. yds had already been alienated in favour of third parties and in some of them buildings were also constructed.

11. They contended that late B.Ramachander Rao, after making a layout, executed a Power of Attorney in favour of one A.Premanandam for dealing with the plots in the layout giving the latter full power and authority to deal with the plots in the layout. According to them, the said A.Premanandam entered into an agreement of sale dt.26-07-1996 in favour of 1st petitioner agreeing to sell plot No.67 and 117 admeasuring 506 sq. yds and another agreement of sale dt.19-01-1997 in favour of 3rd petitioner agreeing to sell plot Nos.16, 17, 18, 20 and 115 but regular sale deeds were not executed. According to them, the said Power of Attorney executed by late B.Ramachander Rao in favour of A.Premanandam was not available at the

moment.

12. They also alleged that subsequently gift settlement deeds were executed by 1st petitioner in favour of 2nd petitioner and 3rd petitioner in favour of 4th petitioner and they obtained sanction from the GHMC and made constructions in the property.

13. They also raised a plea that the suit is barred by limitation since from 1954-55 the name of B.Ramachander Rao was recorded as pattedar and possessor in Khasra Pahani and B.Radhamma died on 22-03-1976.

The I.A.No.982 of 2013 under Or.VII Rule 11(a) and (d) CPC

14. Pending suit, petitioners filed I.A.No.982 of 2013 under Order VII Rule 11(a) and (d) C.P.C. seeking rejection of plaint in O.S.No.644 of 2013.

15. According to them, the plaint ought to be rejected since the respondent had already filed O.S.No.87 of 2011 before the VI Additional District Judge, Malkajgiri, Ranga Reddy District against the 5th petitioner, his 3 sons, wife and third parties for partition of certain properties including the land in Sy.No.594, which is subject matter of the instant suit. According to them, cause of action for filing O.S.No.87 of 2011 as well as in the instant suit arose out of the same set of facts, that nature of evidence which is required to be let-in in both the suits would be one and the same, and so the suit is barred under Order II Rule 2 C.P.C.

The stand of the respondent

16. Counter-affidavit was filed by respondent opposing the above application. In the counter-affidavit, the respondent contended that petitioners claim to have right over the suit schedule property by virtue of agreements of sale and sale deeds yet to be executed and that the agreement of sale was executed by A.Premanandam, alleged to be G.P.A. of B.Ramachander Rao, but even according to the petitioners, the said G.P.A. is not available. She contended that therefore petitioner Nos.1 to 4 have no right at all over the suit schedule property.

17. She denied that the cause of action for filing O.S.No.87 of 2011 as well as the present suit arose out of the same set of facts. She contended that the cause of action for filing O.S.No.87 of 2011 is different from the cause of action in the present suit and that the relief was sought in O.S.No.87 of 2011 for partition of the suit schedule property in view of the silence maintained by the 5th petitioner to the demand for partition made by her (respondent). She contended that cause of action for the instant suit is execution of gift settlement deeds dt.18-05-2004 and 23-05-2004 by 1st petitioner in favour of 2nd petitioner and 3rd petitioner in favour of 4th respondent to lay a claim over the suit schedule property without having any right therein. She contended that Order II Rule 2 C.P.C. is not at all attracted.

The Order of the Court below in I.A.No.982 of 2013

18. By order dt.01-06-2017, the Court below

dismissed I.A.No.982 of 2013. It observed that the reliefs claimed in both the suits are different and even if it is accepted that in both the suits, the respondent is relying on Will deeds dt.02-02-1976 and 18-07-2009, cause of action for both suits would be different. It held that in O.S.No.87 of 2011, respondent is claiming partition and separate possession of the properties of her late biological father while the cause of action in the instant suit, according to respondent arose in 2013 when she came to know about the execution of gift settlement deeds mentioned above. It held that cause of action in the instant suit, according to plaint, arose in 2013 and it is not possible to include it in O.S.No.87 of 2011. It held that it is not possible to ascertain at this stage whether cause of action for both suits is one and the same and whether there was failure to include all the reliefs in the earlier suit and even otherwise since the nature of relief claimed is different, it is not possible to conclude that suit is barred under Order II Rule 2 C.P.C.

19. It observed that cause of action in O.S.No.87 of 2011 appears to be only against 5th petitioner, who being the adoptive son of B.Ramachander Rao and brother of respondent did not respond to her demand for partition while the cause of action in O.S.No.644 of 2013 is against petitioner Nos.1 to 4 and declaratory relief was sought in favour of respondent and 5th petitioner.

20. Assailing the same, this Revision is filed.

The Consideration by the Court

21. Learned counsel for petitioners contended that the Court below erred in refusing to reject the plaint and that Order II Rule 2 C.P.C. would clearly bar the instant suit O.S.No.644 of 2013.

22. Order II Rule 2 C.P.C. states:

"2. Suit to include the whole claim:-.

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim:- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs:- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any reliefs so omitted.

Explanation- For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

23. The proviso to Order II Rule 2 C.P.C. indicates that if a plaintiff is entitled to several reliefs against the defendant in

respect of the same cause of action, he cannot split up the claim so as to omit one part of the claim and sue for the other. If the cause of action is the same, the plaintiff has to place all his claims before the Court in one suit as Order II Rule 2 C.P.C. is based on the cardinal principle that defendant should not be vexed for the same cause. The essential requirement of applicability of Order II Rule 2 C.P.C. is identity of causes of action in previous suit and the subsequent suit (**Deva Ram and another Vs. Ishwar Chand and another** (1995) 6 SCC 733**)**.

24. Interpreting Order II Rule 2 C.P.C., the Supreme Court in **Bengal Waterproof Limited Vs. Bombay Waterproof Manufacturing Company and another** (1997) 1 SCC 99) held that before the second suit of the plaintiff can be held to be barred by the said provision, it must be shown that the second suit is based on the same cause of action on which the earlier suit was based; and if the cause of action is the same in both the suits, and if in the earlier suit plaintiff has not sued for any of the reliefs available to it on the basis of that cause of action, the reliefs which it had failed to press into service in that suit cannot subsequently prayed for except with the leave of the Court. It must, therefore, be shown by the defendants for supporting their plea of bar of Order II Rule 2 (3) C.P.C. that the second suit of the plaintiff is based on the same cause of action on which the earlier suit was based and because it has not prayed for any relief on the ground of passing off action and it had not obtained leave of the Court in that connection, it cannot sue for that relief in the second suit. It observed that to establish a plea of bar under Order II Rule 2 C.P.C. the defendants must file in evidence pleadings in the previous suit and prove to the Court the identity of causes of action in the two suits.

25. The cause of action in the instant suit, as can be seen from para- 8 of the plaint is :

"8) Cause of Action:-

The cause of action for the suit arose on which biological father of the plaintiff executed a Will dated 18-07-2009 which came to light after the death of her biological father on 31-01-2010 and on 02-05-2013 when the plaintiff came to know of execution of alleged Gift Settlement Deeds by the defendant 1 & 3 and cause of action continuing since the defendants are making construction over the suit schedule land."

26. The cause of action in O.S.No.87 of 2011 is described by respondent as under:

"26) The cause of action for the suit arose when the plaintiff for the first time made an application to the Tahsildar, Malkajgiri Mandal, R.R. District claiming correction of Record of Rights in respect of Survey No.543 to an extent of Ac.2.16 guntas on 28-07-2008. The Tahsildar after putting the 1st defendant on notice and receiving his objections issued memo on 23-01-2009 stating that the dispute is of civil nature and advised the plaintiff to approach the competent court of law with regard to legal heirs of late Sri B.Ramachandra Rao. Thereafter the plaintiff got issued a notice to the defendant 1 to 5 and others on 11-

05-2010 calling upon them to account for the properties left by late Smt.B.Radhamma in the hands of late Sri B.Ramachandra Rao and late Sri S.P. Bhaskar Rao and divide the same in to two equal shares and allot one such share to the plaintiff. Though the notices were received by the defendants 1 to 5 on 14-05-2010, they have chosen not to give any reply and hence the cause of action is still subsisting."

27. As rightly held by the Court below, the cause of action for both the suits is different and in O.S.No.87 of 2011, the respondent is claiming partition and separate possession of the properties of her late biological father S.P. Bhaskara Rao under a Will dt.18-07-2009 allegedly executed by him.

28. In the instant suit, however, she is seeking cancellation of gift settlement deeds dt.18-05-2004 and 25-05-2004 which she claims to have come to know on 02-05-2013.

29. Prima facie, the relief claimed in O.S.No.87 of 2011 is against 5th petitioner herein and his family members while the relief claimed in the instant suit is against petitioner Nos.1 to 4. Therefore, it cannot be said that cause of action in both the suits is one and the same.

30. Learned counsel for petitioners relied on decision in **M.Thimma Raju and another Vs. Dronamraju Venkatakrishna Rao and another (**AIR 1978 AP 385) in support of his pleading that the instant suit is barred under Order II Rule 2 C.P.C. In that case, a suit for partition and separate possession of some lands was filed and during pendency of the suit, some of the properties were sold. The plaint was amended to bring the purchasers on record challenging their purchases, but the relief of recovery of possession against them was not sought and no Court Fee was paid and so it was not granted. Subsequently second suit against the purchasers was filed for possession. This Court held that the second suit between the same parties on the same cause of action was barred by Order II Rule 2 C.P.C. and also observed that the relief of possession which could have been sought in the previous suit, not having been sought, the second suit for the relief of possession was barred by res judicata. It further held that the rule does not preclude a second suit based on a distinct and separate cause of action and for applicability of Or.II Rule 2, two conditions must be satisfied i.e. that the previous suit and the present suit must arise out of the same cause of action, and secondly, they must be between the same parties. It observed that if evidence to support the suits is different then causes of action are also different.

31. If we apply the said decision to the instant case, since the suits are not between the same parties (though 5th petitioner is common in both the suits) and since there is a distinct cause of action in the instant suit, I do not find any error of jurisdiction in the order passed by the Court below warranting interference by this Court under Article 227 of the Constitution of India with its order.

32. Accordingly, the Civil Revision Petition fails and it is dismissed.

33. However, both the suits O.S.No.644 of 2013 and O.S.No.87 of 2011 ought to be heard by the same Court to avoid conflicting decisions on the validity of the Wills in question. Therefore, O.S.No.644 of 2013 is transferred from the Court of the Principal District Judge, Ranga Reddy District at L.B. Nagar to the Court of XIII Additional District Judge, Ranga Reddy District at L.B. Nagar to be tried along with O.S.No.87 of 2011 pending on its file. No costs.

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

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2019(3) L.S. 12 (T.S.)

IN THE HIGH COURT OF TELANGANA

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

Ramachandra Reddy & Ors., ..Petitioners

Vs.

Special Deputy L.A Unit SCCL, Godavarikhani & Anr., ..Respondents

INDIAN SUCCESSION ACT - LAND ACQUISITION ACT, Sec.18 - Revision is filed challenging the Order in I.A. in L.A.O.P - O.P. arose out of a reference under Section 18 of the Land Acquisition Act, made vide letter of the Land Acquisition officer/Revenue Divisional Officerin respect of the land acquired under Adrial village of Manthani Mandal of Karimnagar District - O.P. was disposed of on 21-07-2000 enhancing the compensation awarded by the Land Acquisition Officer in the Award - In the said O.P., claimant No.12 died pending the O.P. and on his demise, his wife Madhuramma was brought on record as Class-I legal heir who subsequently expired leaving the petitioners as her Class-I legal heirs - They therefore filed I.A. claiming equal shares of compensation awarded in respect of Ac.9.29 gts in in the above village which was the subject matter of the said Award - Court below dismissed the said application.

Held - Property sought to be acquired is self-acquired property of claimant No.12 and it is not the case of the petitioners that it is a Mitakshara joint family property - Claim of the petitioners is only through succession and not by survivorship - Petitioners ought to obtain a Succession Certificate if they intend to withdraw the compensation deposited in the Court below to the credit of the L.A.O.P - They cannot simply file an application to bring them on record as legal heirs in the place of their deceased mother and claim compensation – No error of jurisdiction in the Order passed by the Court below warranting interference by this Court under Article 227 of the Constitution of India - Civil Revision Petition stands dismissed.

CRP.No.429/2019 Date:11-7-2019

Ramachandra Reddy & Ors., Vs. Special Deputy L.A Unit SCCL, Godavarikhani 13

Mr.Srinivasa Rao Putluri, Advocates For the Petitioner.

G.P. for Arbitration (TG), Advocate. For the Respondents.

J U D G M E N T

1. This Revision is filed under Article 227 of the Constitution of India challenging the order dt.02-01-2019 in I.A.No.389 of 2018 in L.A.O.P.No.78 of 1988 of the Senior Civil Judge, Peddapalli.

2. The said O.P. arose out of a reference under Section 18 of the Land Acquisition Act, 1894 (for short "the Act") made vide letter dt.25-04-1985 of the Land Acquisition officer/Revenue Divisional Officer, Pedapalli in his Award proceedings No.5/87-88 dt.03-08-1987 in respect of the land acquired under Adrial village of Manthani Mandal of Karimnagar District.

3. The said O.P. was disposed of on 21-07-2000 enhancing the compensation awarded by the Land Acquisition Officer in the Award.

4. In the said O.P., claimant No.12 was one Musipatla Venkat Reddy. He died pending the O.P. and on his demise, his wife Madhuramma was brought on record as Class-I legal heir. She subsequently expired on 09-03-2001 leaving the petitioners as her Class-I legal heirs.

5. They therefore filed I.A.No.389 of 2018 claiming equal shares of compensation awarded in respect of Ac.9.29 gts in Sy.No.18/D and 30/D in the above village which was the subject matter of the said Award.

6. By order dt.02-01-2019, the Court below dismissed the said application stating that petitioners ought to have obtained a Succession Certificate under the provisions of the Indian Succession Act, 1925 (for short 'the Act') and since they did not obtain and file it along with the application, it should be dismissed. The Court below rejected the contention of the petitioners that they need not file Succession Certificate as they are claiming compensation under the Act and held that such compensation is classified as 'debt' and provisions of the Act are applicable. It held that the deceased claimant No.12 acquired rights by reason of compensation of his land and after the decree was passed by the competent Court, the claimant had died and so rights of the deceased claimant to claim compensation is a 'debt' that is payable by the Government to the deceased claimant and his legal heirs cannot seek recovery of debt (compensation) without filing a Succession Certificate. It pointed out that in certain cases legal representatives are not brought on record and some of them take away the compensation depriving the other legal representatives of the same, and for that purpose it is necessary that parties should obtain a Succession Certificate. It observed that necessity for obtaining Succession Certificate cannot be waived by the parties and that it indemnifies the payer.

7. Assailing the same, this Revision is filed.

8. A perusal of the order passed by the Court below shows that the Court below had relied on the judgment of a Division

Bench of this Court in **Ali Mohammed Khusro and others Vs. The Special Deputy Collector Land Acquisition, Industries (**AIR 1974 AP 18), the Division Bench in the said case considered the identical questions which arises in the instant case i.e. (a) whether compensation awarded under the Act is a 'debt' within the meaning of sub-Section (2) of Section 214 of the Indian Succession Act, 1925 and (b) whether Succession Certificate is necessary to recover the same at the instance of the legal representatives of a deceased claimant. After considering several decisions on the point, the Division Bench took a view that Section 214 of the Indian Succession Act, 1925 would be attracted and that a Succession Certificate is necessary. The Bench observed that the definition of the term 'debt' showed in sub-Section (2) of Section 214 is comprehensive enough to include every kind of debt except those excluded from its meaning i.e. rent, revenue or profits payable in respects of land used for agricultural purposes. It observed that when a person is deprived by law of acquisition of his property, he is entitled to be compensated in equivalent to the value of the property acquired; once the Court determines the equivalent value of the property taken over in money, he is entitled to payment of the same; and if the decree is not satisfied, he has a right to execute the decree against the judgment-debtor as in the case of any other debt. The Bench held that the expression of 'debt' in Section 214(2) is of wide amplitude to take in compensation amount payable under the Act.

9. The said Division Bench judgment was also followed by another Division Bench of this Court in **Tella Koteswara Rao and others Vs. Land Acquisition Officer and Special Tahsildar (Land Acquisition), Guntur and others (**2009(6) ALD 770 (DB). It was held in this case as under:

> "17. ..... The liability to pay compensation under the Land Acquisition Act arises the moment the land is acquired. It is in respect of that liability that an award is made determining the sum of money payable towards compensation. It is thus a liability or debt to be paid on ascertainment of money equivalent for the property acquired under the provisions of the Act. Since that liability to pay compensation is money is there even before the decree or award of the Court, it falls within the ambit of subsection (1)(b) of Section 214. …. The amount payable under the Land Acquisition Act is not a future contingent liability nor an inchoate liability in its embryo stage. The money payable under the Land Acquisition Act is an ascertainable sum. It is, therefore, is liquidated money obligation for the recovery of which an action will lie."

10. Though learned counsel for petitioners relied upon other decisions of a learned Single Judge of this Court in **G.Shiva Kumari Vs. Md.Nasim and others (**1992(3) ALT 458), **L.Sathyanarayana Murthy and another Vs. Land Acquisition Officer, Revenue Divisional Officer, Chittoor (**2002(2) ALD 76), **Yerukali Chinna Balaiah (died) by L.Rs. Vs. Special Deputy**

Collector, L.A. Unit, P.J.P., Gadwal, Mahaboobnagar District (2005(5) ALD 518) and **J.Kista Reddy and others Vs. Mandal Revenue Officer (**AIR 2005 A.P. 217), in view of the above two Division Bench judgments, which are binding on me, I decline to follow them.

11. The decision in **Sreeram Rangaiah (died) per LRs and others Vs. Gajula Krishnaiah (**2006(1) ALD 757 (DB) of another Division Bench cited by the learned counsel for petitioners does not relate to claim by legal representatives of a claimant in L.A.O.P. where compensation was awarded to the claimant. It relates to an Execution Petition in a suit filed for recovery of money against respondent which was decreed wherein the trial Court had refused to entertain an Execution Petition in the absence of Succession Certificate granted in favour of the legal heirs. The Division Bench held that Succession Certificate covers only cases of survivorship where family is a joint Mitakshara family and the amount sought to recovered is an asset of the joint family, and the plaintiff, who claims on basis of survivorship, cannot be compelled to take out a Succession Certificate to enable him to recover the amount. The Bench clarified that where the legal representatives claimed through survivorship and not by succession, there is no necessity to seek any Succession Certificate under Section 214(1)(b) and when the claim rests on succession from the deceased plaintiff/Decree Holder, it mandates them to obtain Succession Certificate.

12. In the instant case, the property sought to be acquired is self-acquired property of claimant No.12 and it is not the case of the petitioners that it is a Mitakshara joint family property. The claim of the petitioners is only through succession and not by survivorship.

13. Therefore even as per the above decision, the petitioners ought to obtain a Succession Certificate if they intend to withdraw the compensation deposited in the Court below to the credit of the L.A.O.P. They cannot simply file an application to bring them on record as legal heirs in the place of their deceased mother and claim compensation.

14. I therefore do not find any error of jurisdiction in the order passed by the Court below warranting interference by this Court under Article 227 of the Constitution of India.

15. Accordingly, the Civil Revision Petition fails and it is dismissed. No costs.

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

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2019(3) L.S. 16 (T.S.)

IN THE HIGH COURT OF TELANGANA

Present:
The Hon'ble Mr. Chief Justice Thottathil B. Radhakrishnan &
The Hon'ble Mr. Chief Justice B. Rajasheker Reddy

The Commandant,
SAR CPL, Hyd.,& Ors., ..Petitioner
Vs.
M. Ramesh ..Respondent

TELANGANA CIVIL SERVICES (CONDUCT) RULES, Rule 3 – Penalty – Tribunal allowed application filed by Applicant/Respondent and set aside the Order which imposed penalty of reduction in time scale, with cumulative effect on future increments and pension, besides treating unauthorized sick period as leave without pay and suspension period till he reported for duty as 'not on duty' and directed to treat suspension period as on duty for all purposes, without monetary benefit and monetary benefit, be restricted to, subsistence allowance paid to Respondent, during his suspension period.

Held – Findings of Enquiry Officer in departmental proceedings is traceable to misconduct alleged and proved against Respondent – Punishment imposed by disciplinary authority is commensurate, if not deficient, with misconduct on part of Respondent –Respondent being Policeman shown desperate character and such act on his part is against public interest – Such acts on the part of the member of the disciplined force would tarnish image of Department – Rule 3 of the Rules, requires that no Government servant shall behave in manner which is unbecoming of such employee or derogatory to prestige of Government, though it is exigencies of circumstances that determine as to what is becoming or unbecoming for Government servant to do or not to do – Order of Tribunal is wholly unsustainable and is set aside – Punishment imposed on respondent by disciplinary authority is maintained – Petition stands allowed.

Government Pleader for Services-I (TG).
Advocates For the Petitioners.
Mr.T.P. Acharya, For the Respondent.

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

1. The petitioners, the Commandant, Special Armed Reserve Central Police Lines, (SARCPL), Amberpet, Hyderabad and others, have challenged the order dated 08-02-2016 passed by the Andhra Pradesh Administrative Tribunal, Hyderabad, in OA No.1175 of 2013 wherein and whereby the Tribunal allowed the OA filed by the applicant-respondent herein and set aside the order dated 30-11-2012 which imposed the penalty of reduction in time scale of pay for two stages, for a period of two years, with cumulative effect on future

increments and pension, besides treating the unauthorized sick period w.e.f. 19-05-2010 to 11-06-2010 as leave without pay and suspension period from 12-06-2010 to till he reported for duty as 'not on duty' and consequently directed to treat the suspension period as on duty for all purposes, without monetary benefit and monetary benefit, be restricted 4 to, subsistence allowance paid to the respondent, during his suspension period.

2. Facts briefly stated are that the respondent (applicant in the OA) is working as a Police Constable attached to SARCPL, Hyderabad, having been appointed in the year 1992 and continuing as such in the said post. The respondent was issued with proceedings dated 29-06-2010 placing him under suspension for his alleged involvement in a criminal case and in that connection arrested by the Police, Malkajgiri, Hyderabad, on 12-06-2010 and remanded to judicial custody. Besides registration of criminal case, articles of charges were framed by the Department, by initiating departmental proceedings and sought for his written explanation. Articles of charges framed reads as follows:-

Count no.1 :- Gross misconduct in falsely reporting sick on 19-05- 2010 and procured medical certificates for his fake illness with the intention to cover up his guilt of involving in a criminal case and his arrest by civil Police.

Count no.2:- Involvement of Sri M. Ramesh, PC 1361 in Cr.No.161/2010, u/s.392 IPC. On 18-04-2010 along with his nephew Sri M. Venkata Krishna intercepted the vehicle of victim Sri D. Dayanand and robed cash of Rs.9700/- one gold ring and Nokia cell phone.

3. The respondent submitted his written statement, but not satisfied with the explanation offered, enquiry was ordered. With due participation of the respondent in the proceedings, the Enquiry Officer conducted enquiry and submitted his report dated 25-03-2011 to the disciplinary authority holding the charges as proved. Thereafter, the respondent was provided with a copy of the enquiry report and asked to submit his remarks, who in turn, submitted his remarks along with a copy of the order in CC No.736 of 2010 wherein the competent criminal Court has acquitted him of the criminal charges. But the disciplinary authority by proceedings dated 30-11-2012 imposed the penalty stated supra. Aggrieved thereby, the respondent filed the OA before the Tribunal. The Tribunal by the order impugned in this writ petition, set aside the penalty imposed subject to certain directions noted supra. Hence, this writ petition by the Department.

4. In the counter affidavit filed by the respondent, inter alia it is stated that in the remarks submitted by him, it was specifically brought to the notice of the disciplinary authority that the competent criminal Court has acquitted him of the self same charges, but the disciplinary authority without considering the same imposed penalty on him, which was rightly set aside by the Tribunal. It is also submitted that he reported sick w.e.f. 19-05-2010 to 02-07-2010 and during his sick period, he was arrested on 12-06-2010 and released on

bail on 19-06-2010 and he was falsely implicated in the criminal case and as nothing could be recovered from him, and his involvement was based on presumptions, the criminal Court had acquitted him observing that the prosecution failed to prove his guilt beyond all reasonable doubt. That there is no misrepresentation to his superiors as he was already on sick leave and his arrest during the sick period was on a false ground and the falsity is substantiated by the acquittal order passed by the competent criminal Court.

5. The criminal case registered against the respondent, as borne out from the record, was for an offence punishable under Section 392 IPC, r/w.Section 34 IPC in Cr.No.161 of 2010. The criminal proceedings were set in motion based on the complaint lodged by one D. Dayanand complaining that on 18-04-2010, he after attending a party hosted by his friend at Ambika Wines at HB Colony, Moulali, and about 10.30 pm, and while he was going home and on the way when he reached Eveready Batteries Company, two unknown persons attacked him and due to the impact, the complainant fell down and became unconscious and when re-regained conscious and checked his belongings, he could realize that his cell phone (Nokia model no.58001), cash of Rs.9,700/- and one gold ring weighing 05.6 tola was stolen and he immediately reported the same to the Police Malkajgiri. During the course of investigation, the Police laid a trap with the stolen mobile IME no.354182023838103 through third eye of Police Internet Portal system and came to know that the stolen mobile cell phone is being used by the son of the respondent and on apprehending the nephew of the respondent, he spilled the details and stated that the son of the respondent is using the stolen mobile cell phone and he confessed to the crime committed by him and the respondent on the fateful day; and that they distributed the stolen property equally. Based on the FIR lodged by the complainant, the above crime was registered and the accused i.e. the respondent (A-1) and his nephew (A-2) were remanded to judicial custody and later released on bail, and as they pleaded not guilty, trial proceeded, but the criminal case registered as CC No.736 of 2010 ended in acquittal as all the prosecution witnesses turned hostile and that order became final.

6. Heard the learned Government Pleader for Services-I for the petitioners and the learned counsel for the respondent.

7. In view of the rival contentions of the learned counsel for parties, the point that arises for consideration is whether in the facts and circumstances of the case, the impugned proceeding dated 08-02-2016 passed in OA No.1175 of 2013 is sustainable in law and; whether the order of acquittal recorded by the competent criminal Court in CC No.736 of 2010 is binding on the enquiry proceedings, as alleged by the respondent, as both the criminal and departmental proceedings proceeded on the same charges more so when the complainant and the witnesses are one and the same.

8. The admitted facts are the respondent is a member of the disciplined force. The witnesses examined including the complainant and other witnesses are same

in the criminal case and the departmental proceedings. The respondent was acquitted of the criminal charges by the competent criminal Court in CC No.736 of 2010 and order of the criminal Court became final. The respondent was acquitted on account of the complainant and the witnesses turned hostile and the acquittal of the respondent is not on hot contest of the matter, in other words it is not "an honourable" acquittal.

9. The respondent though claims to be on sick leave from 19–05–2010 to 02-07-2010 admits of being arrested on 12– 06–2010 and remanded to judicial custody and his release on bail on 19–06–2010. According to the respondent's version he along with his nephew went to attend a treat hosted by some of his friends at Ambika wines at HB Colony and while they returning home, on reaching Eveready battery company, found one cell phone on the road without sim card and he picked up and waited about 1 ½ hours at the said place, with a fond hope to return it the person to which the cell phone belong, but as none came to claim it, he took it to his house and his son used it for a day. The Tribunal was persuaded to accept the submission of the respondent primarily on the ground that the charges in the criminal case and the charges in the departmental proceedings, the complainant and the witnesses are same and the competent criminal Court has acquitted the respondent, during the pendency of the departmental proceedings, the disciplinary authority ought to have taken note of the fact of the findings of the competent criminal Court and exonerated him of the charges. It is convenient to refer to the relevant portion of the order of the Tribunal, which is as follows:-

> "…….The main witness is the victim. In the absence of his witness and corroborate evidence to show that stolen property was recovered from the possession of applicant, the Enquiry Officer ought to have held him not guilty of the charges. The findings of the Enquiry Officer are based on surmises and conjectures, but not the evidence linking the applicant to the so-called crime. But, the disciplinary authority, instead of disagreeing with the findings, impose the penalty in question. The impugned penalty order and the judgment of criminal Court in CC No.736 of 2010 were also cited, but no reasons are given as to why the penalty in question was imposed against the applicant even though the victim has turned hostile…."

10. The Tribunal relied on the decisions in **G.M.TANK vs. STATE OF GUJARAT,** (2006) 5 SCC 446)**CAPT. M. PAUL ANTHONY vs. BHARAT GOLD MINES LIMITED** (1999) 3 SCC 679)**& CORPORATION OF THE CITY OF NAGPUR, CIVIL LINES, NAGPUR vs. RAMCHANDRA G. MODAK (**AIR 1984 SC 626)and observed that the judgment in criminal case takes precedence over the findings of the Enquiry Officer, if the incident is one and the same and accordingly set aside the punishment imposed on the respondent.

11. It is contended by learned Government Pleader for Services-I that the acquittal of the respondent in the criminal case is not

"an honourable" acquittal and the acquittal is only on account of the complainant and witnesses turned hostile and, therefore, the Tribunal ought not to have given much credence to the finding given by the competent criminal Court in setting aside the punishment imposed by the disciplinary authority. The Tribunal proceeded on the ground that the order in the criminal case in acquitting the respondent ought to have been taken note of by the disciplinary authority, such an observation in our considered view cannot be appreciated for the reason that the acquittal in a criminal case is not an honourable acquittal and mere acquittal does not entitle the delinquent to automatic reinstatement, and as has been held consistently in various rulings of the Supreme Court, disciplinary action can be taken even after acquittal. The observation to this effect made by the Supreme Court in **UNION OF INDIA vs. BIHARI LAL SIDHANA,** (1997) 4 SCC 385) at para 5 of the judgment deserves to be reproduced, which is as follows:-

"5. It is true that the respondent was acquitted by the criminal Court, but acquittal does not automatically give him the right to be reinstated into the service. It would still be open to the competent authority to take decision whether the delinquent government servant can be taken into service or disciplinary action should be taken under the Central Civil Services (Classification, Control & Appeal) Rules……"

12. To the same effect is the ratio laid down in **DEPUTY INSPECTOR GENERAL OF POLICE vs. S. SAMUTHIRAM's** (2013) 1 SCC 598)case by the Supreme Court, wherein it is held that mere acquittal of an employee by a criminal Court has no impact on the disciplinary proceedings initiated by the Department more so when the respondent was not honourably acquitted by the criminal Court, but only due to the fact that the witnesses turned hostile and other prosecution witnesses were not examined. It was further held that in the absence of any provision in the service rules for reinstatement, if an employee is even honourably acquitted by a criminal Court, no right is conferred on the employee to claim any benefit including reinstatement.

13. It is to be seen that the decisions relied on by the Tribunal are distinguishable and are of little help to the respondent's case. In **BALJINDER PAL KARU vs. STATE OF PUNJAB** (2016) 1 SCC 671)which considered the decisions in G.M.Tank's case (1 supra) and Capt. M. Paul Anthony's case (2 supra), the Supreme Court held that acquittal on account of witnesses turned hostile and appeared to have been won over in a criminal case, cannot be a ground to interfere with the dismissal order passed in departmental proceedings.

14. The Enquiry Officer considering the evidence of the official and other witnesses including the complainant came to the conclusion that the charges levelled against the respondent are proved and such an finding was accepted by the disciplinary authority. The Tribunal should not have disturbed the finding of the Enquiry Officer, as approved by the disciplinary authority, basing on the criminal Court judgment, which is not on merits. The degree of proof, in departmental proceedings which can

proceed on preponderance of probabilities, unlike in criminal proceedings cannot insist for strict proof beyond all reasonable doubt. As seen from the version of the respondent himself in the enquiry, two things are discernable i.e. during the relevant period, he was on sick leave and on the fateful day, he along with the is nephew went to attend a treat hosted by his friends at Ambika wines at HB Colony and while returning home in the night found a cell phone and he brought home and gave it to his son and his son used it for a day. It is true that none of the witnesses, including the complainant did not support the case of the prosecution nor the departmental proceedings. The case on hand is a case based purely on preponderance of probabilities and the sequence of events arranged together it connects the respondent with the alleged misconduct. It is contention of the learned counsel for the respondent that the prosecution failed to connect the respondent with the alleged crime, the competent criminal Court has acquitted and dehors the same, the disciplinary authority proceeded in the matter and held the charges proved, without there being any material and it was rightly set aside by the Tribunal. It is also stated that the opinion formed by the Enquiry Officer that the respondent is guilty of misconduct being a Policeman, was on assumptions and without any legal basis and material on record to support the same and, therefore, the Tribunal rightly disbelieved the finding of the Enquiry Officer and the impugned order warrants no interference.

15. In the departmental enquiry, though the complainant and other witnesses turned hostile, the Inspector of Police and the SI of Police, PS Malkajgiri, and during the course of investigation collected evidence and recorded the statements of witnesses and caused enquires and the crime party men laid a trap and located the house of the respondent through stolen mobile IMEI number through 3rd eye Police Internet portal and found the mobile phone of the complainant being used by respondent's son and on further investigation they arrested the respondent and his nephew and recovered the stolen property from the nephew of the respondent.

16. The respondent has admitted the fact that the cell phone of the complainant was found on the road on the relevant date and he picked up the cell phone. The respondent being a member of a disciplined force ought to have surrender the cell phone in the nearest Police station, instead he took the cell phone with him and given it to his son for his use. It is also a fact that he was arrested and remanded to judicial custody. All these acts of the respondent goes to show that the respondent failed to inform about these acts, to his senior Officers of his unit and to avoid arrest falsely reported sick during the relevant period, as concluded by the Enquiry Officer in his report and accepted by the disciplinary authority.

17. It is also not explained by the respondent as to how he could attend the treat hosted by his friends on the fateful day, though he was on sick leave allegedly on account of back pain. The opinion formed by the Tribunal that the respondent is entitled for the benefit of a clean chit though the Enquiry

Officer found that the charges framed against him as proved only on the ground that he is acquitted of the criminal charges by the competent Court, which is not "an honourable' acquittal, but on account of the witnesses turned hostile, cannot be judicially sustained. A judicious exercise of discretion would not be apparent if the reasoning is not in accordance with law.

18. The presumption, though it cannot be inferred, the respondent being policeman could won over, if not terrorize the complainant and the witnesses, and that reason could not be ruled out for not turning up during the proceedings in the criminal case or in the departmental proceedings. It is equally true that it would be difficult to brand a witness who turned hostile is a witness who has been won over. However, evidence of a witness cannot be discarded in its entirety barely on the ground that he has turned hostile. The evidence of a hostile witness can still be relied upon if it is otherwise found trustworthy. The findings of the Enquiry Officer in the departmental proceedings is traceable to the misconduct alleged and proved against the respondent. The punishment imposed by the disciplinary authority is commensurate, if not deficient, with the misconduct on the part of the respondent. The respondent being a Policeman shown desperate character and such act on his part is against public interest. Such acts on the part of the member of the disciplined force would tarnish the image of the Department. Rule 3 of the Telangana Civil Services (Conduct) Rules, 1964, requires that no Government servant shall behave in a manner which is unbecoming of such employee or derogatory to the prestige of the Government, though it is the exigencies of circumstances that determine as to what is becoming or unbecoming for a Government servant to do or not to do.

19. For the reasons stated and in the totality of facts and circumstances, the order of the Tribunal is wholly unsustainable and it is accordingly set aside. The punishment imposed on the respondent by the disciplinary authority is maintained. In the result the writ petition is allowed. As a sequel to the disposal of writ petition, miscellaneous petitions, if any, pending shall stand closed. There shall be no order as to costs.

--X--

2019 (3) L.S. 43 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Deepak Gupta &
The Hon'ble Mr.Justice
Aniruddha bose

Priti Kumar ..Appellant
Vs.
The State of Bihar
& Ors., ..Respondents

INDIAN PENAL CODE, Sec. 498-A - Jurisdiction of Courts - Entertaining complaints u/Sec.498-A - Supreme Court allowed a women to proceed with her complaint where she is residing.

O R D E R

Leave granted.

In this case, the main dispute is whether the appellant – wife could have filed a complaint under Section 498A, IPC at the place where she was residing. The High Court held that no cause of action has arisen where she was residing. This matter is squarely covered by the judgment of this Court in *Rupali Devi v. State of U.P. & Ors.* [(2019) 5 SCC 384]; wherein this Court held as follows:

"10. The question that has posed for an answer has nothing to do with the provisions of Section 178 (b) or (c). What has to be really determined is whether the exception carved out by Section 179 would have any application to confer jurisdiction in the courts situated in the local area where the parental house of the wife is located.

11.To answer the above question, one will have to look into the Statement of Objects and Reasons of the Criminal Law [2nd Amendment Act, 1983 (Act 46 of 1983)] by which Section 498A was inserted in the Indian Penal Code. The section itself may be noticed in the first instance:

"498A.Husband or relative of husband of a woman subjecting her to cruelty.- Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine .

Explanation.- For the purposes of this section, "cruelty" means -

(a)any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b)harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

16. We, therefore, hold that the

courts at the place where the wife takes shelter after leaving or driven away from the matrimonial home on account of acts of cruelty committed by the husband or his relatives, would, dependent on the factual situation, also have jurisdiction to entertain a complaint alleging commission of offences under Section 498A of the Indian Penal Code."

In view of the above, the criminal appeal is allowed and the judgment of the High Court is set aside.

Pending application, if any, stands disposed of.

--X--

2019 (3) L.S. 44 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
R.F. Nariman
The Hon'ble Mr.Justice
R. Subhash Reddy &
The Hon'ble Mr.Justice
Surya Kant

Jignesh Shah & Anr., ..Petitioners
Vs.
Union of India & Anr., ..Respondents

LIMITATION ACT - Suit for specific performance - Suit for recovery of amount based upon cause of action that is with in limitation cannot in any manner impact the separate and independent remedy of a winding up proceeding.

W.P.No.455/19 Date: 25-9-2019

J U D G M E N T

(per the Hon'ble Mr.Justiice R.F.Nariman)

The issues involved in Writ Petition (Civil) No.645 of 2019 are entirely different from the Writ Petition (Civil) No.455 of 2019 and its other connected matters. This writ petition is accordingly de-tagged from Writ Petition (Civil) No.455 of 2019. The Registry is directed to list this writ petition separately. W.P.(C) No.455 of 2019 & Civil Appeal (Diary No.16521 of 2019)

2.Delay is condoned. Civil Appeal (Diary No. 16521 of 2019) is admitted.

3.Writ Petition (Civil) No.455 of 2019 and Civil Appeal (Diary No.16521 of 2019) have been filed by Shri Jignesh Shah and Smt. Pushpa Shah respectively, both of whom are shareholders of La-Fin Financial Services Pvt. Ltd. (hereinafter "La-Fin") assailing the order of the National Company Law Tribunal, Mumbai Bench (hereinafter referred to as the "NCLT") admitting a winding up petition that was filed by IL&FS Financial Services Ltd. (hereinafter referred to as "IL&FS") against La-Fin before the High Court of Judicature at Bombay (hereinafter referred to as the "Bombay High Court"), which was transferred to the NCLT and then heard as a Section 7 application under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to the "the Code").

4.The brief facts necessary to appreciate the narrow controversy that arises in Writ Petition (Civil) No.455 of 2019 and its connected matters are as follows:

(i) On 20th August, 2009, a share purchase agreement was executed between Multi-Commodity Exchange India Limited (hereinafter referred to as "MCX"), MCX Stock Exchange Limited (hereinafter referred to as "MCX-SX") and IL&FS, whereby IL&FS agreed to purchase 442 lakh equity shares of MCX-SX from MCX.

(ii) Pursuant to this agreement, La-Fin, as a group company of MCX, issued a 'Letter of Undertaking' to IL&FS on 20th August, 2009 (hereinafter referred to as the "Letter of Undertaking") stating that La-Fin or its appointed nominees would offer to purchase from IL&FS the shares of MCX-SX after a period of one year, but before a period of three years, from the date of investment. On facts, this period of three years expired in August, 2012.

(iii) IL&FS, therefore, by its letter dated 3rd August, 2012, exercised its option to sell its entire holding of shares in MCX-SX, and called upon La-Fin to purchase these shares in accordance with the Letter of Undertaking. On 16th August, 2012, La-Fin replied that it was under no legal or contractual obligation to buy the aforesaid shares.

(iv) Thereafter, correspondence between the parties continued, until finally, on 19th June, 2013, IL&FS filed a Suit No.449 of 2013 in the Bombay High Court for specific performance of the Letter of Undertaking by La-Fin or, in the alternative, for damages. It is important to note that the cause of action for the suit - as stated in the plaint - arose on 16th August, 2012, i.e. the day La-Fin purportedly refused to honour its obligation under the Letter of Undertaking.

(v) On 13th October, 2014, a learned Single Judge of the Bombay High Court passed an injunction order restraining La-Fin from alienating its assets pending disposal of the suit, subject to attachments of La-Fin's properties that had been made by the Economic Offences Wing of the Mumbai Police (hereinafter referred to as the "EOW") during the pendency of the suit. An appeal against this order was dismissed by a Division Bench of the Bombay High Court on 11th September, 2015.

(vi) On 3rd November, 2015, a statutory notice under Section 433 and 434 of the Companies Act, 1956 was issued by IL&FS to La-Fin, referring to the attachment by the EOW, and stating that La-Fin was obviously in no financial position to pay the sum of INR 232,50,00,000/- which, according to IL&FS, was owing to them as of

31st October, 2015. On 18th November, 2015, a reply was promptly given by La-Fin to the aforesaid notice referring to the pending suit, and stoutly disputing the fact that any amount was due and payable. The reply went on to state that La-Fin was otherwise commercially sound and that the statutory notice issued under Sections 433 and 434 of the Companies Act, 1956 was only a pressure tactic.

(vii) On 21st October, 2016, a winding up petition (hereinafter referred to as the "Winding up Petition") was then filed by IL&FS against La-Fin in the Bombay High Court under Section 433(e) of the Companies Act, 1956.

(viii) The Code came into force on 1st

December, 2016, and as a result, as per the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the Winding up Petition was transferred to the NCLT as a Section 7 application under the Code. The statutory form under these Rules, namely, Form-1 was filled up by IL&FS indicating that the date of default was 19th August, 2012.

(ix) On 28th August, 2018, the said Winding up Petition was admitted by the NCLT as an application under Section 7 of the Code, stating on a reading of the share purchase agreement and the Letter of Undertaking that a financial debt had, in fact, been incurred by La-Fin. The National Company Law Appellate Tribunal

(hereinafter referred to as the "NCLAT") by an order dated 21st January, 2019 dismissed the appeal filed by Shri Jignesh Shah against the aforesaid admission order, agreeing with the NCLT that the aforesaid transaction would fall within the meaning of "financial debt" under the Code, and that the bar of limitation would not be attracted as the Winding up Petition was filed within three years of the date on which the Code came into force, viz., 1st December, 2016.

(x) A Writ Petition was filed by Smt. Pushpa Shah against these orders in the Bombay High Court, challenging certain provisions of the Code, with which we are not directly concerned. Writ Petition (Civil) No.455 of 2019 was then filed in this Court on 4th April, 2019 challenging the constitutionality of certain provisions of the Code, as well as the NCLT and NCLAT orders, after which the Civil Appeal (Diary No. 16521 of 2019) was also filed against the NCLAT order under Section 62 of the Code.

5. Dr. Abhishek Manu Singhvi, learned Senior Advocate appearing on behalf of the Petitioners/Appellants, did not go into the merits of the case, but has raised only the statutory bar of limitation against IL&FS. According to the learned Senior Advocate, after this Court's judgment in **B.K. Educational Services Pvt. Ltd. v. Parag Gupta**

and Associates 2018 SCC OnLine 1921, it is clear that the Limitation Act, 1963 (hereinafter referred to as the "Limitation Act") would apply to all Section 7 applications that are filed under the Code and that the residuary Article, i.e., Article 137 of the Limitation Act would be attracted to the facts of this case. Inasmuch as the Winding up Petition that has been transferred to the NCLT was filed on 21st October, 2016, i.e., beyond the period of three years prescribed (as the cause of action had arisen in August, 2012), it is clear that a time-barred winding up petition filed under Section 433 of the Companies Act, 1956 would not suddenly get resuscitated into a Section 7 petition under the Code filed within time, by virtue of the transfer of such petition. He relied heavily on **B.K. Educational Services Pvt. Ltd.** (supra) which, according to him, covered this case on all fours. In addition, he relied upon High Court judgments, Judgments from the United States of America, and one English judgment to buttress the proposition that the mere filing of a suit for specific performance would not in any manner impact the limitation period for a winding up petition, which as

a separate and independent remedy, must fall or stand on its own legs. He also painstakingly took us through the statutory notice under Sections 433 and 434 sent by IL&FS, as well as the Winding up Petition filed

by IL&FS, and relied heavily on the fact that the Form-1 (which was filled by IL&FS in order to transfer the aforesaid Winding up Petition to the NCLT) itself stated that the date of default was 19th August, 2012, clearly indicating that the Winding up Petition, being beyond three years of the cause of action, was time-barred.

6. On the other hand, Shri Neeraj Kishan Kaul, learned Senior Advocate appearing on behalf of the Respondents IL&FS, argued that the cause of action for the suit and the cause of action for the Winding up Petition filed were separate and distinct. He argued that it is well-settled that a winding up petition cannot be filed in order to recover a debt, but is a proceeding 'in rem', which involves commercial insolvency of the company sought to be wound up. Therefore, according to the learned Senior Advocate, the cause of action for filing the Winding up Petition arose only in 2015/2016, after Shri Jignesh Shah (the Petitioner before us) was arrested; after attachment of the assets of La-Fin; and as stated in the Winding up Petition, after La-Fin's assets had fallen from being worth around INR 1000 crores in 2013, to only being worth around INR 200 crores in October, 2016. He relied on several judgments to support this argument. According to him, the suit that was filed by IL&FS for specific performance of the Letter of Undertaking on 19th June, 2013 kept alive the debt that was owed to his client and, therefore, in any event, the Winding up Petition filed after such debt was kept alive would be in time, notwithstanding that it was filed at a subsequent period after the suit. According to him, in any event, limitation being a mixed question of fact and law, at best the matter ought to be remanded to the NCLT for a determination on this mixed question.

7. Having heard the learned Senior Counsel for the parties, it is important to first advert to this Court's decision in **B.K. Educational Services Pvt. Ltd.** (supra) in which Section 238A of the Code was referred to, which states as follows:

"**238A. Limitation**.—The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."

8. In paragraph 7 of the said judgment, the Report of the Insolvency Law Committee of March, 2018 was referred to as follows:

"**7.** Having heard the learned counsel for both sides, it is important to first set out the reason for the introduction of Section 238A into the Code. This is to be found in the Report of the Insolvency Law Committee of March, 2018, as follows:

"28. APPLICATION OF LIMITATION ACT, 1963

The question of applicability of the Limitation Act, 1963 ("Limitation Act") to the

Code has been deliberated upon in several judgments of the NCLT and the NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected.1 In light of the confusion in this regard, the Committee deliberated on the issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are time- barred. It is settled law that when a debt is barred by time, the right to a remedy is time-barred.2 This requires being read with the definition of 'debt' and 'claim' in the Code. Further, debts in winding up proceedings cannot be time-barred,3 and there appears to be no rationale to exclude the extension of this principle of law to the Code.

Further, non-application of the law on limitation creates the following problems: first, it re-opens the right of financial and operational creditors holding time-barred debts under the Limitation Act to file for CIRP, the trigger for which is default on a debt above INR one lakh. The purpose of the law of limitation is "*to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or latches*"4. Though the Code is not a debt recovery law, the trigger being 'default in payment of debt' renders the exclusion of the law of limitation counter-intuitive. Second, it re-opens the right of claimants (pursuant to issuance of a public notice) to file time-barred claims with the IRP/RP, which may potentially be a part of the resolution plan. Such a resolution plan restructuring time-barred debts and claims may not be in compliance with the existing laws for the time being in force as per section 30(4) of the Code.

Given that the intent was not to package the Code as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period, the Committee thought

it fit to insert a specific section applying the Limitation Act to the Code. The relevant entry under the Limitation Act may be on a case to case basis. It was further noted that the Limitation Act may not apply to applications of corporate applicants, as these are initiated by the applicant for its own debts for the purpose of CIRP and are not in the form of a creditor's remedy."

(emphasis supplied)

9. After referring to Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016, the Court extracted passages from the judgment in **M.P. Steel Corporation v. CCE** (2015) 7 SCC 58 and then concluded:

"**20.** A perusal of this judgment would show that limitation, being procedural in nature, would ordinarily be applied retrospectively, save and except that the new law of limitation cannot revive a dead remedy. This was said in the context of a new law of limitation providing for a longer period of limitation than what was provided earlier. In the present case, these observations are apposite in view of what has been held by the Appellate

Tribunal. An application that is filed in 2016 or 2017, after the Code has come into force, cannot suddenly revive a debt which is no longer due as it is time-barred.

21. In *State of Kerala* v. *V.R. Kalliyanikutty*, (1999) 3 SCC 657, ("*V.R. Kalliyanikutty*"), this Court dealt with whether a time-barred debt can be recovered by resorting to recovery proceedings under the Kerala Revenue Recovery Act of 1968. In stating that the said Act cannot extend to recovery of a time-barred debt, this Court stated in paragraph 8,

"8. …… In every case the exact meaning of the word "due" will depend upon the context in which that word appears."

22. It was held in that case that Section 17(3) of the Kerala Revenue Recovery Act, 1968 made it clear that a person making payment under protest will have a right to institute a suit for refund of the whole or part of the sum paid by him under protest. It was thus held that when the right to file such a suit is expressly preserved, there is a necessary implication that the shield of limitation available to a debtor in a suit is also preserved, as a result of which, a wide interpretation of the expression "amount due" to include time-barred debts would destroy an important defence available to a debtor in a suit against him by the creditor, and may fall foul of Article 14 of the Constitution of India.

23. Another judgment referred to by learned counsel for the appellants is contained in *Union of India* v. *Uttam Steels Ltd.*, (2015) 13 SCC 209. Here the question was whether Section 11-B of the Central Excise Act as amended on 12.05.2000 would apply to the fact situation in that case. Section 11-B provided a longer period of limitation by substituting "six months" with "one year". Since the rebate application was filed within a period of one year, the respondent contended that they were within time. This Court held, in paragraph 10, that limitation, being procedural law, would ordinarily be retrospective in nature. This is however with one proviso superadded, which is that the claim made under the amended provision should not itself have been a dead claim in the sense that it was time-barred before the amending Act came into force, bringing a larger period of limitation with it. On the facts of that case, it was held that since the claim for rebate was made beyond the period of six months but within the extended period of one year, such extended period would not avail the respondent in that case.

24. In *Allied Motors (P) Ltd.* v. *CIT*, (1997) 3 SCC 472, this Court took the view that the amendment made to Section 43-B in the Income Tax Act was retrospective, holding:

"14. …… As observed by G.P. Singh in his *Principles of Statutory Interpretation*, 4th Edn. at p. 291: "It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended." In fact the amendment would not serve its object in such a situation unless it is construed as retrospective……"

25. In the present case also, it is clear that the amendment of Section 238A would not serve its object unless it is construed

as being retrospective, as otherwise, applications seeking to resurrect time-barred claims would have to be allowed, not being governed by the law of limitation."

The Court then held:

"**38.** This case is most apposite. As in the present case, and as is reflected in the Insolvency Law Committee Report of March, 2018, the legislature did not contemplate enabling a creditor who has allowed the period of limitation to set in to allow such delayed claims through the mechanism of the Code. The Code cannot be triggered in the year 2017 for a debt which was time-barred, say, in 1990, as that would lead to the absurd and extreme consequence of the Code being triggered by a stale or dead claim, leading to the drastic consequence of instant removal of the present Board of Directors of the corporate debtor permanently, and which may ultimately lead to liquidation and, therefore, corporate death. This being the case, the expression "debt due" in the definition sections of the Code would obviously only refer to debts that are "due and payable" in law, i.e., the debts that are not time-barred."

Finally, the Court held:

"**48.** It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default

has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

10. This judgment clinches the issue in favour of the Petitioner/Appellant. With the introduction of Section 238A into the Code, the provisions of the Limitation Act apply to applications made under the Code. Winding up petitions filed before the Code came into force are now converted into petitions filed under the Code. What has, therefore, to be decided is whether the Winding up Petition, on the date that it was filed, is barred by lapse of time. If such petition is found to be time-barred, then Section 238A of the Code will not give a new lease of life to such a time-barred petition. On the facts of this case, it is clear that as the Winding up Petition was filed beyond three years from August, 2012 which is when, even according to IL&FS, default in repayment had occurred, it is barred by time.

11. Dr. Singhvi relied upon a number of judgments in which proceedings under Section 433 of the Companies Act,1956 had been initiated after suits for recovery had already been filed. These judgments have held that the existence of such suit cannot be construed as having either revived a period of limitation or having

extended it, insofar as the winding up proceeding was concerned. Thus, in **Hariom Firestock Limited v. Sunjal Engineering Pvt. Ltd.** (1999) 96 Comp Cas 349, a Single Judge of the Karnataka High Court, in the

fact situation of a suit for recovery being filed prior to a winding up petition being filed, opined:

"**8**…To my mind, there is a fallacy in this argument because the test that is required to be applied for purposes of ascertaining whether the debt is in existence at a particular point of time is the simple question as to whether it would have been permissible to institute a normal recovery proceeding before a civil court in respect of that debt at that point of time. Applying this test and de hors that fact that the suit had already been filed, the question is as to whether it would have been permissible to institute a recovery proceeding by way of a suit for enforcing that debt in the year 1995, and the answer to that question has to be in the negative. That being so, the existence of the suit cannot be construed as having either revived the period of limitation or extended it. It only means that those proceedings are pending but it does not give the party a legal right to institute any other proceedings on that basis. It is well settled law that the limitation is extended only in certain limited situations and that the existence of a suit is not necessarily one of them. In this view of the matter, the second point will have to be answered in favour of the respondents and it will have to be held that there was no enforceable claim in the year 1995, when the present petition was instituted."

12. Likewise, a Single Judge of the Patna High Court in **Ferro Alloys Corporation Ltd. v. Rajhans Steel Ltd.** (2000) Comp Cas 426 also held:

"**12….**In my opinion, the contention lacks merit. Simply because a suit for realisation of the debt of the petitioner- company against opposite party No. 1 was instituted in the Calcutta High Court on its original side, such institution of the suit and the pendency thereof in that court cannot enure for the benefit of the present winding up proceeding. The debt having become time-barred when this petition was presented in this court, the same could not be legally recoverable through this court by resorting to winding up proceedings because the same cannot legally be proved under section 520 of the Act. It would have been altogether a different matter if the petitioner-company approached this court for winding up of opposite party No. 1 after obtaining a decree from the Calcutta High Court in Suit No. 1073 of 1987, and the decree remaining unsatisfied, as provided in clause (b) of sub-section (1) of section 434. Therefore, since the debt of the petitioner-company has become time-barred and cannot be legally proved in this court in course of the present proceedings, winding up of opposite party No. 1 cannot be ordered due to non-payment of the said debt."

13. In **Rameswar Prasad Kejriwal & Sons Ltd. v. M/s. Garodia Hardware Stores** (2002) 108 Comp Cas 187, a money suit that was filed in 1994 was decreed in 1997, after which a winding up petition under Section 433 of the Companies Act, 1956 was filed in 2001. In this fact situation, the learned Single Judge held:

"**13.** It is an admitted position that the cause of action of the company arose in 1992. The suit was filed in 1994 and the decree was obtained in 1997. But on the basis of the said debt which is said to be merged

in the decree, the winding up petition cannot be filed after the period of limitation that means after a period of three years.

14. It is not in dispute that in the instant case, the period of limitation is covered by residuary article namely Article 137 of Limitation Act. A special Bench of this Court, in the

case of *Hari Mohan Dalai* v. *Parmeshwar Shau*, reported in 56 Indian Law Reports, 61, has made certain observations on how the residuary article is to be construed.

15. Construing the provisions of Article 181 the residuary article under the old Act, Chief Justice Rankin, speaking for the Special Bench, held that "In Article 181 the legislature makes provisions not for any definite type of cases but for an unknown number of cases of all kinds. The provision which it makes specific as regard the period of limitation, but as regarded the terminus a quo it is content to state in general language and quite simply the fundamental principle that, for the purposes of any particular application, time is to run from the moment at which the applicant first had the right to make it."

16. This Court goes by the same principle and holds that period of limitation should be counted from 1992. But assuming it is not counted from 1992, it has to be counted from 1997. Therefore, considering the matter from all possible angles, this Court is of the view that instant winding up petition has become barred on the date on which it is presented. It cannot be held that in case of winding up petition, limitation period will be 12 years which may be the case in matters of execution of a decree.

17. Therefore, this winding up petition is, therefore, dismissed but in the facts of this case, there will be no order as to costs."

14. In **Dr. Dipankar Chakraborty v. Allahabad Bank & Ors.** 2017 SCC OnLine Cal 8742, the fact situation was that a suit had been filed by the petitioner in the City Court at Calcutta for damages against the Allahabad Bank. The Bank, in turn, filed a proceeding under Section 19 of the Recovery of Debts Due to Banks and

Financial Institutions Act, 1993 in 2001 before the Debt Recovery Tribunal, Calcutta. The Civil Suit was also transferred to the Debt Recovery Tribunal, Calcutta where both proceedings were pending adjudication. Meanwhile, under the Securitisation and Restructure of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act"), a notice dated 3rd March, 2016 was issued under Section 13(2) of the SARFAESI Act. The question which arose before the Court was whether the invocation of the SARFAESI Act, being beyond limitation, would be saved because of the pending proceedings under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The Court negatived the plea of the Bank, stating:

"**22.** Section 14 of the Limitation Act, 1963 permits exclusion of the time taken to proceed bona fide in a Court without jurisdiction. Such section permits a plaintiff to present the same suit, if the Court of the first instance, returns a plaint from defect

of jurisdiction or other causes of like nature, being unable to entertain it. In the present case, a secured creditor is not withdrawing a proceeding pending before the Debts Recovery Tribunal under Section 19 of the Act of 1993 to invoke the provisions of the Act of 2002. Rather the secured creditor is proceeding, independent of its right to proceed under the Act of 1993, while invoking the provisions of the Act of 2002. This choice of the secured creditor to invoke the Act of 2002 is independent of and despite the pendency of the proceedings under the Act of 1993, has to be looked at from the perspective of whether or not such an action meets the requirement of Section 36 of the Act of 2002, when the secured creditor is proposing to take a

measure under Section 13(4) of the Act of 2002. Although, a secured creditor, as held in *Transcore* (supra), is entitled to take a remedy or a measure as available in the Act of 2002, despite the pendency of other proceedings, including a proceeding under Section 19 of the Act of 1993, in respect of the self-same cause of action, in my view, the invocation of such independent right under the Act of 2002, has to be done within the period of limitation prescribed under the Limitation Act, 1963 in terms of Section 36 of the Act of 2002. The Act of 2002 gives an independent right to a secured creditor to proceed against its financial assets and in respect of which such asset the secured creditor has security interest. The right to proceed, however, is subject to the adherence to the provisions of limitation as enshrined in the Limitation Act, 1963. The provisions of the Limitation Act, 1963 are, therefore, attracted to a proceeding initiated under the Act of 2002. That being the legal position, the invocation of the provisions of the Act of 2002 in the facts of the present case, on July 5, 2011, without there being an extension of the period of limitation by the act of the parties cannot be sustained.

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25. The issues raised are, therefore, answered by holding that, the initiation of the proceedings by the bank was barred by the laws of limitation on July 5, 2011 and all proceedings taken by the bank consequent upon and pursuant to the notice under Section 13(2) of the Act of 2002 dated July 5, 2011 are quashed including such notice."

15. In Indo Alusys Industries v. Assotech Contracts (India) Ltd.2009 (110) DRJ 384, a learned Single Judge of the Delhi High Court opined that a suit for recovery and a winding up proceeding are distinct and independent remedies, as follows:

"**12.** So far as the objection that the petitioner has filed a suit disentitling it to maintain the present petition is concerned, it is well settled that the right to bring a winding up action is statutory conferred under Section 433 of the Companies Act, 1956. However, no person has a statutory right to winding up of a company incorporated under the Companies Act, 1956. Action to recover amounts and to winding up of the company are two wholly distinct and independent remedies. It is not necessary that every petition under Section 433 of the Companies

Act, 1956 ends up in an order of winding up. Several essential factors as public interest, justice and convenience enter into the consideration before the prayed for order results. The nature of the defence and extent of dispute raised by the respondent also impact adjudication in winding up action. At the same time, limitation for seeking the remedy of recovery against the company continues to run. The two remedies are not alternative remedies. More often than not, as a matter of abundant caution, parties do not wait for final decision in one remedy before invoking the other.

xxx xxx xxx

14. In view of the above, mere filing of the suit by the petitioner in order to protect its right and by way of abundant caution certainly would not prohibit filing of the winding up petition or preclude the petitioner from maintaining the same."

16. In **Board of Regents of the University of the State of New York et. al. v. Mary Tomanio** 100 S. Ct. 1790, the Supreme Court of the United States of America held that a federal action under the Civil Rights Act of 1871 was barred by the application of a three-year New York statute of limitations. What was argued was that the federal remedy became available only as a consequence of the

State remedy being denied, as the Respondent had commenced a proceeding in the New York states courts attacking a decision of the Board of Regents not to grant a waiver of a licence to practice as a chiropractor. By November 1975, the appeals in the State proceedings being exhausted, and the Respondent being denied any relief, the Respondent instituted an action in the Federal District Court on 25th June, 1976. The Supreme Court of the United States of America held that the second action was clearly barred by the law of limitation, being filed three years after the cause of action had arisen. It was held that once the limitation period started running, it did not stop because a separate and independent remedy had been pursued in the meanwhile. The Court held:

"No section of the law provides, however, that the time for filing a cause of action is tolled during the period in which a litigant pursues a related, but independent cause of action."

17. In **Martiza Alamo-Hornedo v. Juan Carlos Puig and Jose Perez-Riera** 745 F.3d 578, the US Court of Appeals, First Circuit held on the facts of the case, that a separate and independent action which was otherwise barred by limitation could not be brought within limitation merely because a prior suit had been filed. The Court held:

"**4.** The plaintiff also suggests that her prior suit in the Court of First Instance somehow tolled the statute of limitations. This suggestion is fanciful.

5. To begin, exhaustion of state remedies is not a condition precedent to the maintenance of a section 1983 action. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 516, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982); *Rogers v. Okin,* 738 F.2d 1, 5 (1st Cir. 1984). Thus, the commencement and pendency of a state proceeding ordinarily does not toll the limitations period for a parallel action under Section 1983. See,

e.g., Rodriguez-Garcia

v. Municipality of Caguas, 354 F.3d 91, 93 (1st Cir.2004); *Ramirez de Arellano v. Alvarez de Choudens*, 575 F.2d 315, 319 (1st Cir. 1978). The plaintiff attempts to parry his thrust by noting that, under Puerto Rico law, the statute of limitations can be "interrupted" by, among other things, suing on the relevant claim. P.R. Laws Ann. tit. 31, 5303. Once the court action "comes to a definite end," the "statute of limitations begins to run anew." *Rodriguez- Gracia*, 354 F.3d at 97 (internal quotation marks omitted).

***582.** The plaintiff's reliance on this principle elevates hope over reason. In order to have the tolling effect desired by the plaintiff, the complaint in the first action "must assert causes of action identical to" those asserted in the second action. *Id.* (internal quotation marks omitted).

6. The identicality requirement has three facets. The two actions "must seek the same form of relief"; they "must be based on the same substantive claims"; and they "must be asserted against the same defendants in the same capacities." *Id.* at 98. The plaintiff offers no developed argumentation sufficient to show that she satisfies these conditions.

In all events, it is readily apparent that the plaintiff has not satisfied the identicality requirement. The first action, brought in the Court of First Instance, sought the equitable remedies of reinstatement and back pay; the second action, brought in the federal district court, sought the legal remedies of compensatory and punitive damages. Thus, it is nose-on-the-face plain that the two actions did not seek the "same form of relief."

We hasten to add that this conclusion breaks no new ground. This court has held, squarely and repeatedly, that under Puerto Rico law, "seeking only equitable relief does not toll the statute of limitations where the subsequent complaint… seeks damages." *Nieves-Vega*

v. Ortiz-Quinones, 443 F.3d 134, 137 (1st Cir. 2006) (collecting cases).

In view of the plaintiff's failure to satisfy the first facet of the identicality requirement, we need not inquire into the other two facets. Puerto Rico law is pellucid that a plaintiff who seeks to interrupt the running of a statute of limitations on this basis must satisfy all three facets of the identicality requirement. *See, e.g., Santana-Castro v. Toledo-Davila*, 579 F.3d 109, 116 (1st Cir. 2009); *Nieves-*

Vega, 443 F.3d at 137-38.

That ends this aspect of the matter. When all is said and done, the plaintiff's decision to sit idly by while the proceedings in the Court of First Instance unfolded dooms her tardy attempt to assert a federal claim. Although waiting for the Commonwealth court's ruling may have served to strengthen the plaintiff's belief that her firing was illegal, there is no requirement that a period who wishes to pursue a Section 1983 claim premised on an allegedly wrongly termination of employment await an independent finding that her dismissal was unlawful. Consequently, the plaintiff's election to await a ruling by the Court of

First Instance does not justify her failure to bring her federal claim within the time allotted by statute."

18. In **Re Karnos Property Co. Ltd.** (1989) 5 B.C.C. 14, a learned Single Judge of the Chancery Division (Companies Court) held that a local authority's petition to wind up a company for non-payment of rates was barred by the law of limitation, being presented more than

six years after the cause of action arose. The fact that the rate demanded had been the subject of distress warrants did not in any manner impact the limitation period for the winding up petition. It was thus held:

"Applying those words to the petition proceedings now in train it seems that the cause of the proceedings arose at the latest when the company failed to pay the latest rate demand on 1 April 1981. That is more than six years before the presentation of the petition. Accordingly I conclude that the petition must be dismissed because it is founded on rates unpaid for more than six years. In other words a local authority petition for non-payment of rates is subject to the provisions of the Limitation Acts.

Mr. Acton for the local authority conceded, as I understand, that rates unpaid for six years and never the subject of a distress warrant were irrecoverable in any way; so that the local authority ceases to be a creditor and thus may not petition. But, said Mr. Acton, once a distress warrant has been obtained it remains always available for execution and thus preserves the local authority its character as a creditor and ever able to petition. I do not accept this submission. If one assumes that the two distress warrants issued in this case remain available to the local authority, I do not think it follows that the provisions of the Limitation Acts that I have mentioned do not operate to stop the presentation of a petition. The effect of Section 2(1) of the 1939 Act (or Section 9(1) of the 1980 Act) is that a petition may not be presented if six years have passed since the rates were demanded. There is nothing there to qualify the position if a distress warrant happens to be current. A petition lies not because a distress warrant has been or may be issued but because a local authority is a "creditor" as that word is and has been used in the Companies Acts (see the North Bucks case).

The remedies by way of distress and petition are separate and distinct."

19. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgement of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding up proceeding.

20. Shri Kaul, however, relied heavily

on the judgment of a Single Judge of the Bombay High Court reported as **Re: Messrs: Bhimji Nanji and Co.** (1969) Mh.L.J. 827. That case arose under the Presidency-towns Insolvency Act, 1909, the question raised being as follows:

"**4.** Whether the debt on the basis of which the petition for adjudication is presented and an adjudication order is sought should be a subsisting debt at the date of the

hearing of the petition or is it enough that it subsisted at the date of the presentation of the petition?"

Section 13 of the Presidency-towns Insolvency Act, 1909 laid down what factors are required to be proved by a petitioning-creditor at the hearing of the petition before the Court. Section 13(2) of the said Act, which fell for consideration before the Bombay High Court, is set out hereinbelow:

"At the hearing the Court shall require proof of –

(a) the debt of the petitioning creditor, and

(b) the act of insolvency or, if more than one act of insolvency is alleged in the petition, some one of the alleged acts of insolvency."

The observation that was made by the Court which is relied upon heavily by Shri Kaul is contained in paragraph 9, which is set out hereinbelow:

"**9.** Mr. Shah urged that if this view were accepted by the Court it would cause great hardship to the creditor. Once an insolvency petition is presented by a creditor, he normally expects that the adjudication order would be passed at the hearing of his petition and simply because the hearing of the petition is delayed not for any default on his part but say on account of the exigencies of the Court work the creditor will have to meet the fate which he may not have thought of or contemplated, if in the meantime the debt becomes barred by limitation. I do not see any hardship arising to the creditor as suggested by Mr. Shah, for it would be open to the creditor or rather it would be his duty to see that he keeps the debt alive either by means of an acknowledgement or part payment or by filing a suit in respect thereof in a proper court well within the period of limitation, but to my mind, it is clear

that mere pendency of an insolvency petition without anything more cannot have the effect of saving the limitation prescribed by the Indian Limitation Act."

The context in which the learned Single Judge made an observation that the filing of a suit within limitation would keep the debt alive, is in the context of Section 13 of the Presidency-towns Insolvency Act, 1909 - which requires that the debt of the petitioning creditor should be alive even at the hearing of the insolvency petition. Obviously, if at the hearing of the petition, the debt was time-barred, the stringent result of insolvency of the individual concerned would not follow. It is in this context that the learned Single Judge held that a debt would be subsisting at the date of hearing of the insolvency petition if a suit was filed to recover it within the period of limitation.

The context of Section 13 of the Presidency-towns Insolvency Act, 1909 is far removed from the present context, in which what has to be seen is whether a winding up proceeding has been filed within the limitation period provided. In the facts of the present case, no question as to subsistence of a live debt at the hearing of a winding up petition is at all involved. This case is, therefore, wholly distinguishable.

21. Shri Kaul then relied strongly on the rationale for laws of limitation generally, which was set out in **Rajender Singh and Ors.**

v. Santa Singh and Ors. (1973) 2 SCC 705 as follows:

"**17.** The policy underlying statutes of limitation, spoken of as statutes of "repose", or of "peace" has been thus stated in *Halsbury's Laws of England* Vol. 24, p. 181 (para 330):

"330. *Policy of Limitation Acts.*—The Courts have expressed at least three differing reasons supporting the existence of statutes of limitation, namely: (*1*) that long dormant claims have more of cruelty than justice in them,

(*2*) that a defendant might have lost the evidence to disprove a stale claim, and (*3*) that persons with good causes of actions should pursue them with reasonable diligence."

18. The object of the law of limitation is to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence, or laches."

These observations are apposite in the context of the facts of the present case. It is clear that IL&FS pursued with reasonable diligence the cause of action which arose in August, 2012 by filing a suit against La-Fin for specific performance of the Letter of Undertaking in June, 2013. What has been lost by the aforesaid party's own inaction or laches, is the filing of the Winding up Petition long after the trigger for filing of the aforesaid petition had taken place; the trigger being the debt that became due to IL&FS, in repayment of which default has taken place.

22. At this stage, it is necessary to set out Section 433(e) and Section 434 of the Companies Act, 1956, which read as follows:

"**433. Circumstances in which company may be wound up by Tribunal.-** A company may be wound up by the Tribunal,-

xxx xxx xxx

(e) if the company is unable to pay its debts;"

"**434. Company when deemed unable to pay its debts.-**(1) A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to

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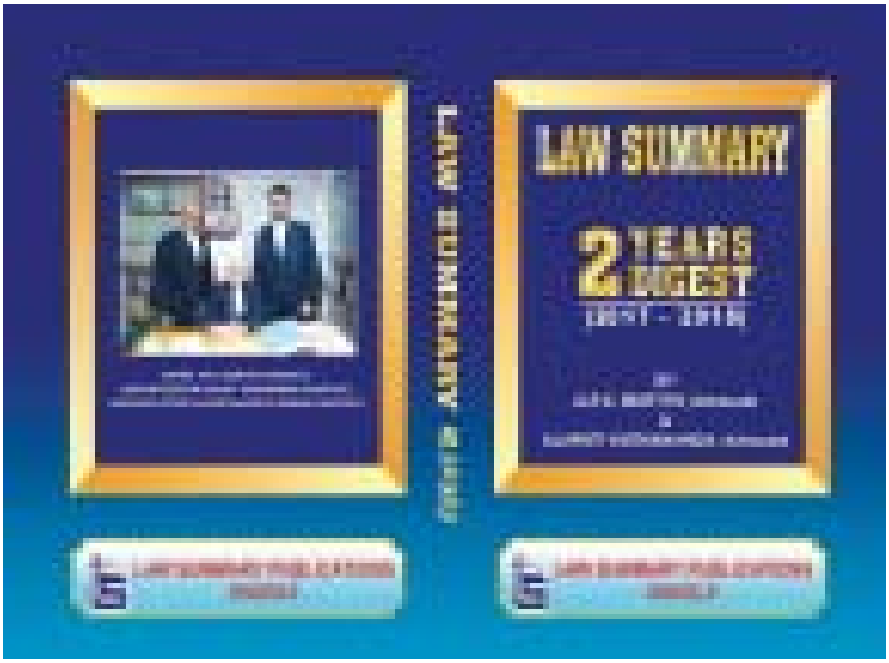

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