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Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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PART-19 (15TH OCTOBER 2019)

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Held – Petitioner is born to the deceased through Shaik begum out of illegal contact or adultery – Shaik begum was the servant of the deceased – It is not the case of the parties that there was a marriage, void or voidable, between the deceased and shaik begum – The object of Section 16 of Hindu Marriage Act is to protect legitimacy of the children born of void or voidable marriages – If there is no marriage, then the benefit of deemed 'legitimacy' will not be available to the children who are begotten out of any physical relationship of a man and woman – Family Court appeal stands dismissed. **(A.P.)** ***65***

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Held – No ambiguity in terms of the award – Lower Court's observation that the description of the immovable property is not furnished, is not found to be correct, as the award permits the execution in respect of the property already attached in I.A. in the suit and hence description can be secured from schedule of I.A. – Rejection of E.P. is not sustainable – Lower Court is directed to number the E.P. and proceed in accordance with law. **(A.P.)** ***62***

(INDIAN) PENAL CODE, Secs.363, 366, 376(2)(i), 376(2)(n), 376(2)G), 376(2)(m), 376-A, 302 and 201 - Appellant assails the judgment passed by the High Court, whereby the death reference made by the trial Court has been confirmed and the appellant's criminal appeal has been dismissed - Trial Court held the appellant guilty of kidnapping a 13 year-old girl, committing rape on her, killing her by throttling and thereafter destroying the evidence by throwing her half naked body in a dry well - These crimes were held as being 'rarest of the rare' and the appellant was sentenced to death under Section 376-A of the Indian Penal Code.

Held - A crucial witness for constructing the last seen theory, P.W.5 is partly inconsistent in cross-examination and quickly jumps from one statement to the other - Death being irrevocable, there lies a greater degree of responsibility on the Court for an indepth scrutiny of the entire material on record - The penalty imposed by awarding death is much different than in incarceration, both for the convict and for the state - We are thus of the considered view that the present case falls short of the 'rarest of rare' cases where the death sentence alone deserves to be awarded to the appellant - Appeals are allowed in part to the extent that the death penalty as awarded by the courts below is set aside and is substituted with the imprisonment for life with a direction that no remission shall be granted to the appellant and he shall remain in prison for the rest of his life. **(S.C.)** ***64***

(INDIAN) PENAL CODE, Secs. 447, 506, 509 & 436 r/w 34 – Petitioners seek a writ of mandamus declaring the inaction of official respondents in registering the F.I.R. on the complainant made by petitioners.

Held – When allegations levelled disclose commission of cognizable offences, the concerned police have no other option except to register the F.I.R. – Concerned Superintendent of Police, is directed to cause enquiry for the inordinate delay occurred in registration of the F.I.R. and take prompt departmental action against the errant officer within 8 weeks from date of receipt of a copy of this Order. **(A.P.)** ***75***

PREVENTION OF DAMAGE TO PUBLIC PROPERTY ACT, 1984 - Secs.2(a) & (b) & 3 - Petitioners assail seizure of their motor transport vehicles and seek release of the vehicles - The seizure of vehicles is assailed on the ground that it violates their right to carry on business in transportation as guaranteed by Article 19(1)(g) of the Constitution of India.

Held - While disposing the Petition, following findings and directions were made:

i.Writ petitions against seizure of vehicle on the allegation of violation of Motor Vehicles Act, 1988 is not maintainable. Owner /person in charge/ driver of the offending vehicle has to avail statutorily engrafted remedies before seeking to initiate writ proceedings.

ii. On seizure of vehicle under Section 207 (1) of the Act, owner/ person-in-charge/ driver can file application under Section 207 (2) read with Rule 448 (B) of the Telangana State Motor Vehicles Rules. It is for the Secretary, Road Transport Authority to consider the application and to pass appropriate orders as warranted by law.

iii.The proceedings of seizure of a motor transport vehicle should be video recorded. The CCTV footage capturing the movement of the offending vehicle wherever available should be obtained and be made part of the case record.

iv.Apparently, the primary grievance on not availing remedy under Section 207 (2) is delay in processing the applications and delay in the decisions. To expedite the process of decision making under Section 207 (2), the applications can be accepted through online web portal.

v.Amount paid as per interim orders shall be adjusted towards fine that may be imposed, if found guilty. It is also open to owner/driver/person-in-charge to file application under Section 200 to compound. It is also open to authorities to initiate prosecution under Act, 3 of 1984. Similar system and procedure to applications under Section 207 (2) be evolved to applications under Section 200.

vi.Even if owner/driver/person-in-charge applies to compound the offence and such application is allowed, before permitting the vehicle to ply on the roads, road worthiness of the vehicle has to be assessed and certified. Owner/driver/person-in-charge can use such vehicle on the public roads only if such a certificate is issued.

vii.The authorities entrusted with the responsibility to enforce the provisions of the 'Telangana State Sand Mining Rules, 2015' shall ensure completion of confiscation proceedings within the time frame, not exceeding three months and collection of fine as prescribed in the Rules on the excess load transported and confiscation of sand as per the provisions of the Rules.

viii.The prosecution against owner/person-in-charge/ driver of the offending motor vehicle has to be in a fixed time frame. The State Government may formulate guidelines fixing time frame. Such guidelines be notified within three months from the date of receipt of the copy of the judgment. **(T.S.)** ***24***

PROVINCIAL INSOLVENCY ACT, Sec.8 – Civil Revision by unsuccessful 2nd respondent/Judgment debtor, assailing Order passed in E.P. before the lower Court – E.P. was filed for arrest of Judgment debtors for realization of the decree amount – Petitioner contended that he has no capacity to pay the decree amount.

Held – Arrest shall not be ordered unless willful failure to pay with object of obstructing and delaying execution of decree inspite of having sufficient means is established – Petitioner in instant case having filed an insolvency petition is in distress – It is not lawful and fair to order his arrest – Civil revision is allowed and Order impugned insofar related to ordering arrest of petitioner is only set aside. **(A.P.)** ***59***

REGISTRATION ACT - Writ Petitioner's grievance is that the 3rd Respondent/ Sub-Registrar, is refusing to register the sale deed presented by him – Respondents contended that a restraint Order has already been passed in relation to the subject property.

Held - Though petitioner asserts that the restraint order passed by the Debts Recovery Tribunal is only with respect to the parties mentioned therein, this Court cannot ignore the fact that such restraint order is in relation to the subject property - When there is a judicial order restraining registration, this Court cannot ignore the said order and direct the Registering Officer to violate the order of another judicial forum though it is subordinate to this Court in all respects - Writ petition is accordingly dismissed giving liberty to the petitioner to approach the appropriate forum for getting the order of attachment of immovable property passed by the Debts Recovery Tribuinal-1, varied/modified. **(T.S.)** ***23***

REGISTRATION OF DOCUMENT - Witness to documents such as sale deeds and wills need not necessarily know what is contained in them. **(S.R.C.)** ***I***

SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS ENFORCEMENT OF SECURITY INTEREST ACT,2002, Sec.14 - Chief Judicial Magistrate is equally competent to deal with the application moved by secured creditor under the Act. **(S.R.C.) 3**

SPECIFIC PERFORMANCE ACT - An agreement contray to law cannot be enforced by Court in favour of plaintiff in a suit for specific performance, even if the defendant who was also party to such illegality stands benefited by it. **(S.R.C.)** ***1***

SPECIFIC RELIEF ACT – Suit is filed for specific performance of a partnership agreement – Along with the appeal, interim mandatory injunction I.A.No.1 is filed seeking a direction to respondent no.8 to continue supply of oil and petrol to retail outlet of second appellants-firm, pending disposal of appeal.

Held – For grant of interim mandatory injunction, plaintiff's case should be of a higher standard than the normal prima facie case that is required for grant of temporary injunction – There should be a threat of irreparable loss which cannot be compensated in terms of money – Appellants have faied to prove the necessary ingredients that are necessary for grant of interim mandatory injunction – The balance of convenience is in favour of the respondents – The larger issues of the maintainability of the suit and of the suit for specific performance of a partnership deed etc, are left open to be decided during the course of the appeal - I.A.No.1 is dismissed. **(A.P.)** ***76***

SPECIFIC RELIEF ACT - Performance of agreement - Without any proof of financial resources is not sufficient to prove that plaintiff in a suit for specific performance was ready and willing to perform her part of the contract. **(S.R.C.) 4**

TELANGANA HERITAGE (PROTECTION,PRESERVATION, CONSERVATION AND MAINTENANCE) ACT, 2017 - High Court stated that merely because a Law was badly drafted, could not be the reason for setting aside the same. **(T.S.) 3**

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LAW SUMMARY
2019 (3)
Summary of Recent Cases

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Deepak Gupta Hemkunwar Bai
Anirubdha Bose,J.J. Vs.
C.A.No.8827/11 Sumersing & Ors.
Dated 25-9-2019

REGISTRATION OF DOCUMENT - Witness to documents such as sale deeds and wills need not necessarily know what is contained in them.

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2019 (3) S.R.C. 2 (Supreme Court)

Deepak Gupta Dr.Swapan Kumar
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Dated 19-9-2019 State of W.B.

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2019 (3) S.R.C. 3 (Supreme Court)

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SPECIFIC PERFORMANCE ACT - An agreement contray to law cannot be enforced by Court in favour of plaintiff in a suit for specific performance, even if the defendant who was also party to such illegality stands benefited by it.

--X--

2019 (3) S.R.C. 4 (Supreme Court)

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C.A.No.1669/19 (dead) by Lrs.,
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2019 (3) S.R.C. 5 (Supreme Court)

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Conssession by a counsel (Lawyer) as to matters of law before a Court is not binding on the client.

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2019 (3) S.R.C. 6 (Supreme Court)

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Dated 26-9-2019 O.V.Narasimha Setty (D) by Lrs.

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SLP.No.7203/19 Anand Prakash
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CRIMINAL PROCEDURE CODE,Sec.125 - Higher Courts should not stay an order of maintenance unless there are very special reasons, the Supreme Court has observed.

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2019 (3) S.R.C. 8 (Supreme Court)

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Dated 24-9-2019 Maharashtra

CRIMINAL PROCEDURE CODE, Sec.102 - Expression "any property" appearing in Sec.102 of Code would not include immovable property.

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2019 (3) S.R.C. 9 (Supreme Court)

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Hemant Gupta,J.J. Chotabhai Patel
C.A.No.7528/19 Vs.
Dated 23-9-2019 Patel Ramanbhai Mathurbhai

HINDU LAW - Mitakshara Law of Succession - Father's self acquired property given to son by way of Will /gift will retain the character of self acquired property and will not become ancestral property, unless a contrary intention is expressed in the testament.

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2019 (3) S.R.C. 10 (Supreme Court)

A.M.Khanvilkar Authorized Officer
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SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS ENFORCEMENT OF SECURITY INTEREST ACT,2002, Sec.14 - Chief Judicial Magistrate is equally competent to deal with the application moved by secured creditor under the Act.

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2019 (3) S.R.C. 11 (Supreme Court)

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Aniruddha Bose,J.J. Singh
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Dated 12-9-2019 State of Bihar
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CRIMINAL TRIAL - Failure to recover material object - Prosecution case cannot be disbelieved merely because the weapon of assult or the bullet was not recovered.

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2019 (3) S.R.C. 12 (Supreme Court)

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Dated 18-9-2019 Sing(D) by Lrs.

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2019 (3) S.R.C. 13 (Supreme Court)

Deepak Gupta Vani Agro
Aniruddha Bose,J.J. Enterprises
Crl.A.No.587-590/10 Vs.
Dated 05-9-2019 State of Gujarat

CRIMINAL PROCEDURE CODE,Sec.219 - NEGOTIABLE INSTRUMENTS ACT - Apex Court while rejecting plea to consolidate multiple cheque bounce cases against accused which emanated from a single notice, the Supreme Court has observed that there is no provision of consolidation of cases in the code of criminal procedure.

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2019 (3) S.R.C. 14 (Telangana High Court)

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TELANGANA HERITAGE (PROTECTION,PRESERVATION, CONSERVATION AND MAINTEN-

ANCE) ACT, 2017 - High Court stated that merely because a Law was badly drafted, could not be the reason for setting aside the same.

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2019 (3) S.R.C. 15 (Supreme Court)

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SPECIFIC RELIEF ACT - Performance of agreement - Without any proof of financial resources is not sufficient to prove that plaintiff in a suit for specific performance was ready and willing to perform her part of the contract.

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2019 (3) S.R.C. 16 (Supreme Court)

Navin Sinha, Indira Banerjee, J.J.
C.A.No.2896/09
Dated 11-9-2019

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INDIAN CONTRACT ACT - Undue influence - Mere close relation also was insufficient to presume undue influence.

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2019 (3) S.R.C. 17 (Telangana High Court)

G. Sri Devi, J.,
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Date:09-9-2019

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2019(3) L.S. 59 (A.P.)

IN THE HIGH COURT OF
ANDHRA PRADESH

Present:
The Hon'ble Mr.Justice
M. Seetharama Murti

Beeram Guru Prasad ..Petitioner
Vs.
M/s.Margadarsi Chit
Fund Pvt. Ltd. Tenali & Ors.,
..Respondents

PROVINCIAL INSOLVENCY ACT, Sec.8 – Civil Revision by unsuccessful 2nd respondent/Judgment debtor, assailing Order passed in E.P. before the lower Court – E.P. was filed for arrest of Judgment debtors for realization of the decree amount – Petitioner contended that he has no capacity to pay the decree amount.

Held – Arrest shall not be ordered unless willful failure to pay with object of obstructing and delaying execution of decree inspite of having sufficient means is established – Petitioner in instant case having filed an insolvency petition is in distress – It is not lawful and fair to order his arrest – Civil revision is allowed and Order impugned insofar related to ordering arrest of petitioner is only set aside.

Mr.M.Ramakanth, Advocate for the Petitioner.

Mr.P.Durga Prasad, Advocate for the Respondents.

O R D E R

This Civil revision petition, under Article 227 of the Constitution of India is filed by the unsuccessful 2nd respondent – 2nd JDr assailing the order, dated 15.07.2015, of the learned Principal Senior Civil Judge, Guntur, passed in EP.No.286 of 2013 in OS No.76 of 2011.

I have heard the submissions of the learned counsel for the revision petitioner – 2nd JDr ['2nd JDr', for short] and of the learned counsel for the 1st respondent – DHr ['DHr, for short]. Respondents 2 to 7 – JDrs 1,3 to 6 & 7 are stated to be not necessary parties. I have perused the material record.

After the original suit of the DHr chit fund company was decreed, on 13.04.2012, the subject Execution Petition was filed for arrest of the JDrs 2,3 & 5 for realization of the decree amount. The DHr pleaded that the said JDrs are paying income tax and that amongst the said three JDrs, the 2nd JDr is proprietor of M/s. Sai Lakshmi Sewing Machines at Station Road, Guntur, and that he is getting an income of Rs.25,000/- per month and is having sufficient means and capacity to pay, in one lumpsum, the amount due under the decree and that if arrest is ordered, the 2nd JDr will pay the amount due under the decree and mentioned in the EP and hence, the execution petition is filed.

The 2nd JDr, who is the present revision petitioner, filed a counter contending *inter alia* that he has no capacity to pay the decree amount/the amount mentioned in the execution petition and prayed for dismissal of the execution petition.

During the course of enquiry an officer of the DHr chit fund company and the 2nd JDr were examined as PW1 & RW1. One of the other JDrs against whom also the EP for arrest was filed was examined as RW2. The other JDr remained *ex parte.*

The executing Court ordered arrest of all the three JDrs viz., JDrs 2,3 & 5 and directed them to pay the amount due to the DHr on or before 17.08.2015 and further directed for issuance of warrants of arrest on payment of batta by the DHr in the event of non-payment of the EP amount by the said JDrs within the stipulated time.

Aggrieved thereof, the 2nd JDr filed this revision petition, *inter alia,* contending as follows: 'The DHr has already settled the case with the principal debtor. Hence, the DHr has no right to insist upon execution of the decree against this JDr. The EP is not maintainable. This JDr was arrested twice on 28.06.2018 and 08.08.2018. On both the said earlier occasions, he expressed his inability to pay the decree amount and stated that he has filed an insolvency Petition in IP.No.6 of 2018 on file of Senior Civil court, Guntur, and that the same is pending. The health of the 2nd JDr, who is aged 64 years, is deteriorating. He is not of sound health. Hence, he cannot be imprisoned. No purpose would be served by repeatedly arresting an insolvent.'

Learned counsel for the 2nd JDr placed reliance on a decision of the Supreme Court ***in Jolly George Varghese and another v. The Bank of Cochin [(1980) 2 SCC 360]*** in support of the contention that the JDr cannot be subjected to arrest and cannot be imprisoned when he is an insolvent and has no means to pay the decree debt and when it cannot be said that he is willfully and deliberately evading payment of the decree debt though capable of paying the same.

Learned Counsel for the DHr chit fund company contended as follows:- 'The 2nd JDr is running M/s Sai Lakshmi Sewing Machines and he is filing income tax returns and he is a solvent person. His objections are also over ruled while ordering his arrest by the order impugned by him in this revision. Under Section 8 of the Provincial Insolvency Act, 1920, ('Act', for short) the DHr company is exempted from insolvency proceedings and hence though an insolvency petition is wrongly filed and entertained, it is no bar for arrest of the 2nd JDr.

I have given earnest consideration to the facts and submissions.

Dealing first with the contention of the learned counsel for the DHr based on Section 8 of the Act, it is profitable to

refer to the said provision of law, which reads as under:

> *"8. Exemption of corporation, etc., from insolvency proceedings. – No insolvency petition shall be presented against any corporation or against any association or company registered under any enactment for the time being in force."*

A plain consideration of the said provision makes it manifest that an insolvency petition filed against a company is not maintainable in view of the exemption of the companies/corporations from insolvency proceedings. Be that as it may.

Dealing with the merits of the matter, it is to be noted that insofar as the 2nd JDr is concerned, the DHr filed copies of income tax returns of the 2ndJDr for the years 2004-05, 2005-06, 2006-07 and also his pan card and the same are exhibited as exhibits P1, P4, P7 & P10 and no other documents are filed. The EP is filed in the year 2013. After enquiry the order impugned came to be passed in the year 2015. No income tax returns of the later years are filed to show that the 2nd JDr earned income in the later years and is still earning and filing income tax returns. The order impugned does not disclose as to what was the income returned in the earlier years related to which the copies of income tax returns are filed. As per settled law, arrest shall not be ordered unless willful failure to pay with the object of obstructing and delaying the execution of the decree in spite of having sufficient means is established. In the case on hand, the 2nd JDr, having filed an insolvency petition, is in distress. He was arrested twice. It is not stated by either side as to whether he has served the measure of sentence on those occasions or whether he was released on the DHr not depositing the subsistence allowance or for any other reason. The above said facts reflect his inability and the income returned in the earlier years related to which the copies of income tax returns are filed. As per settled law, arrest shall not be ordered unless willful failure to pay with the object of obstructing and delaying the execution of the decree in spite of having sufficient means is established. In the case on hand, the 2nd JDr, having filed an insolvency petition, is in distress. He was arrested twice. It is not stated by either side as to whether he has served the measure of sentence on those occasions or whether he was released on the DHr not depositing the subsistence allowance or for any other reason. The above said facts reflect his inability and incapacity to pay and, therefore, it is possible to accept that there is no willful failure to pay in spite of having sufficient means. In that view of the matter, even though his insolvency petition is not maintainable insofar as the present DHr chit fund company is concerned, yet as his earlier income is immaterial and as his present financial position and inability to satisfy the debt indicate that he is in penury and that there is no *mala fide* refusal and/or willful failure to pay the

decree debt in spite of having means to discharge the decree debt, it is not lawful and fair to order his arrest. Having regard to the facts and circumstances of the case, I am of the considered opinion that ordering arrest of the 2nd JDr one more time, knowing that such a course would be of no avail, would tantamount to violating his life and liberty. Hence, I am of the considered view that the petitioner 2nd JDr is not liable for arrest. The above view of this Court draws ample support from the precedential guidance in the decision in ***Jolly George Varghese and another*** (supra).

In the result, the civil Revision Petition is allowed and the order impugned insofar it related to ordering arrest of the revision petitioner – 2nd JDr is only set aside. In the event the revision petitioner – 2nd JDr is already arrested, he shall be released forthwith as a sequel to this order.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

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2019(3) L.S. 62 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Tummala Lakshmana Rao ..Petitioner

Vs.

P. Sreenivasulu & Ors., ..Respondents

LEGAL SERVICES AUTHORITIES ACT, Sec.17 – Civil revision, assailing the Order rejecting E.P. filed by the petitioner/decree holder before lower Court – Lower Court rejected the E.P. on the ground that award, which is sought to be executed, is passed by the Lok Adalat and it needs registration as per clause (vi) in sub-section (2) of Sec.17 of the Registration Act and it also observed that description of the immovable property is not furnished.

Held – No ambiguity in terms of the award – Lower Court's observation that the description of the immovable property is not furnished, is not found to be correct, as the award permits the execution in respect of the property already attached in I.A. in the suit and hence description can be secured from schedule of I.A. – Rejection of E.P. is not sustainable – Lower Court is directed to number the E.P. and proceed in accordance with law.

CRP.No.6660/17 Date: 29-7-2019

Mr.Syed Kaleemulla, Advocate for the Petitioner.

O R D E R

This Civil revision petition is filed under Article 227 of the constitution of India, assailing the order dated 23.10.2017, rejecting E.P.S.R. No.9890 of 2017 filed by the petitioner – Decree Holder in OS.No.78 of 2014 on the file of the Court of Principal District Judge, Kadapa.

2. Heard the counsel for the petitioner.

3. The impugned order of the lower Court shows that the award, which is sought to be executed, is passed by the Lok Adalat and it needs registration as per clause (vi) in Sub-section (2) of Section 17 of the Registration Act. It also observed that the description of the immovable property of the second defendant is not furnished in the award of terms of compromise and hence, it is difficult to enforce the said omnibus clause.

4. The counsel for the petitioner submits that as per Section 21(1) of the Legal Services Authorities Act, 1987, every award of the Lok Adalat shall be deemed to be a decree of a civil court. Rule 18(1) of the A.P. State Legal Services Authorities Rules, 1995, specifies that the award passed by the Lok Adalat shall be executed by the court in which those matters were pending prior to the passing the award by the Lok Adalat. The judgment of Andhra Pradesh High Court in **Board of Trustees of the Port of Visakhapatnam vs. Presiding Officer – 2000(5) ALT 577** equated the award of Lok Adalat with a decree on compromise. The counsel for the petitioner, with regard to application of Section 17(1)(f) of the Registration Act to this case, argues that while the Legal Services Authorities Act came into force on 11.10.1989, the amendment i.e., brought to Section 17(2)(vi) of the Registration Act by the Government of Andhra Pradesh is on 01.04.1999. Section 17(2)(vi), which stands prior to the amendment is the one, which is applicable to this case, as this award is passed after the said amendment. Section 17(2)(vi), after the amendment, is as follows:

> 17. Documents of which registration is compulsory:
>
> (2) Nothing in Clauses (b) and (c) of sub-section(1) applies to,
>
> (vi) any decree or order of a Court, not being a decree or order or award falling under clause (f) of sub-section (1), except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding; or

5. Section 17(1) of the Registration Act is to the effect that documents specified in Clauses (a) to (g) of Sub-section (1) are compulsorily registerable. By virtue of A.P.State amendment, Clause (f) sub-section (1) of Section 17 of the

Registration Act is inserted, which read as follows:

17. Documents of which registration is compulsory:

> (1) The following documents shall be registered, if the property to which they relate is situate in a district in which and if they have been executed on or after the date on which, Act No.XVI of 1864, or the Indian Registration Act, 1866 (20 of 1866), or the Indian Registration Act, 1871 (8 of 1871), or the Indian Registration Act, 1877 (3 of 1877), or this Act came or comes into force, namely:
>
> (f) any decreed or order or award or a copy thereof passed by a Civil court, on consent of the defendants or on circumstantial evidence but not on the basis of any instruments which is admissible in evidence under Section 35 of the Indian Stamp Act, 1899, such as registered title deed produced by the plaintiff, where such decree or order or award purports or operate to create, declare, assign, limit, extinguish whether in present or in future any right, title or interest whether vested or contingent of the value of one hundred rupees ad upwards to or in immovable property; and

6. In view of the above provisions, the arguments of the counsel for the petitioner stands on sound reasoning and hence, it cannot be said that Section 17(2)(vi) of the Registration Act is not applicable to the present case.

7. As regards the finding that the E.P., is premature, the court observed that Rs.70,000/- is ordered to be paid every month if the retirement date is beyond June 2021. It has to be said that the said finding is based on a complete perverse understanding of the terms of the award. The award is to the effect that the defendants 1 and 2 therein shall credit Rs.70,000/- every month by 10th, starting from January, 2017 until the debt is discharged or until the end of June, 2021, whichever is later. Retirement is the end point but the starting point is January 10th 2017. Any default from January 10th 2017 gives liberty to the plaintiff to take possession of the property attached in I.A.No.2474 of 2014 in the suit. There is absolutely no ambiguity in the terms of the award. As to why the court led itself into such a misconception and misunderstanding is not known.

8. the lower Court's observation that the description of immovable property of the second defendant is not furnished, is not found to be correct, as, though the description of the immovable property is not given, the award permits the execution in respect of the property already attached in IA No.2474 of 2014 in the suit. Hence, the description of the attached property can be secured from the schedule of IA No.2474 of 2014 and there cannot be any difficulty in executing the award in respect of the said property.

9. The points urged with regard to nature of decree and the rulings relied

upon in that regard are not taken up for discussion, as the impugned order does not touch upon those aspects. Hence, in view of the above, this Court opines that the rejection of the E.P., is not sustainable.

10. Accordingly, the civil revision petition is allowed, setting aside the order dated 23.10.2017, rejecting e.P.S.R.No.9890 of 2017 filed by the petitioner- Decree Holder in O.s.No.78 of 2014 on the file of the Court of Principal district Judge, Kadapa. Consequently, the lower Court is directed to number the E.P., and proceed in accordance with law. As a sequel, the miscellaneous applications, if any pending, shall stand closed.

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2019(3) L.S. 65 (D.B.) (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

Present:
The Hon'ble Mr.Justice M.Seetarama Murti &
The Hon'ble Ms.Justice J. Uma Devi

Nagapatla Venkata Chalam ..Appellant
Vs.
N.Saroja & Ors., ..Respondents

FAMILY COURTS ACT, Sec.19 – Unsuccessful petitioner filed instant appeal, assailing the Order passed by Family Court – Father of the petitioner, deceased, worked as a gateman in 3rd respondent/South Central Railway - Disputes between family members was settled before the Lok Adalat bench and according to the terms of the award, petitioner was entitled for appointment in 3rd respondent on compassionate grounds – 3rd respondent, issued notice, refusing to consider petitioners case for compassionate appointment – Hence, petitioner filed FCOP before the lower Court for declaring that he is the legitimate son of the deceased.

Held – Petitioner is born to the deceased through Shaik begum out of illegal contact or adultery – Shaik begum was the servant of the deceased – It is not the case of the parties that there was a marriage, void or voidable, between the deceased and shaik begum – The object of Section 16 of Hindu Marriage Act is to protect legitimacy of the children born of void or voidable marriages – If there is no marriage, then the benefit of deemed 'legitimacy' will not be available to the children who are begotten out of any physical relationship of a man and woman – Family Court appeal stands dismissed.

Mr.K.S.Gopala Krishna, Advocate for the Petitioner.
Smt.K.Aruna (SC for Railways), Advocate for the Respondent No.3.

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

The unsuccessful petitioner filed this appeal under Section 19 of the

Family Courts Act, 1984, assailing the order, dated 09.11.2012, of the learned judge, Family court-cum-V Additional District Judge, Tirupati of Chittoor District.

2. We have heard the submissions of Sri K.S. Gopalakrishna, learned counsel appearing for the appellant-petitioner and of the learned Standing counsel for Railways appearing for the 3rd respondent. Though respondents 1 & 2 are served with notices, neither a counter affidavit is filed nor is a representation made on their behalf on an earlier date of hearing, that is, on 16.11.2017; and, on that day the delay in filing the appeal is condoned by allowing FCA.MP.No.176 of 2013 and fresh notices were ordered in the appeal. Proof of service is filed showing that the 1st respondent has not claimed the notice sent to her and that the notice sent to the 2nd respondent is delivered as per postal track report. They have not entered appearance.

3. We have perused the material record.

4. The parties in this appeal shall hereinafter be referred to as arraigned in the Original Petition.

5. To begin with, it is necessary to refer to the pleadings, this appeal being a first appeal.

6. the case of the petitioner is this:- 'He is the son of Nagapatla Venkatapathi ('the deceased', for brevity) and his wife Saroja, the 1st respondent. The deceased worked as Gateman in the 3rd respondent – South Central Railways and died, on 07.03.2007, in harness. The date of birth of the petitioner is 15.02.1982. He studied upto 8th class and later appeared for 10th class (SSC examination) privately. All educational and government records reflect that he is the only son of the deceased and the 1st respondent, who are also having daughters. The deceased has shown the petitioner as his son in all his service records and in the records related to Railway pass. After the death of the deceased, there were disputes between the family members. Hence, Succession OP.271 of 2000 (SOP) was filed before the present Family Court. The said SOP was settled before the Lok Adalat Bench, Mandal Legal Services Committee, Tirupati, and an Award, dated 17.07.2004, was passed in terms of the memorandum of compromise. As per the terms of the said Award, the petitioner is entitled for appointment in the 3rd respondent Railways on compassionate grounds as the respondents 1 & 2 herein stated no objection for the employment of the 5th petitioner therein, that is, the petitioner herein on compassionate grounds. They had also submitted applications to the 3rd respondent Railways. All the records including the award of the Adalat are produced before the said respondent along with several representations. The 3rd respondent Railways is raising un-necessary queries and frivolous objections, though their record evidences the fact that the petitioner is the son of the deceased Railway employee. At the instance of the 3rd respondent Railways and for the reasons best known to them, the respondents 1 & 2 started acting adverse to the interests of the petitioner. The 3rd respondent Railways, without

proper appreciation of facts, issued notice, dated 04.01.2007, refusing to consider the petitioner's case for compassionate appointment. Hence, he filed the instant FCOP for declaring that he is the legitimate son of the deceased and is consequently entitled to appointment in the 3rd respondent Railways on compassionate grounds.'

7. The 1st respondent filed a counter. The same was adopted by the 2nd respondent. Their case is this: - 'The material allegations including the allegation that the petitioner is the son of the deceased and the 1st respondent and that he was shown as the son of the deceased in the service records and in records related to Railway pass are all absolutely false. The 1st respondent is the legally wedded wife of the deceased. They were blessed with two daughters, N. Radhamani and the 2nd respondent. The said 1st daughter is living with her husband. The 2nd respondent is unmarried. The 1st respondent received all the death benefits and is also drawing pension regularly. The 1st respondent and four others filed the SOP. It was settled before the Adalat. The petitioner is the son of the deceased and one Shaik Shahajadi begum with whom the deceased had an illegal contact. The 1st respondent has not given birth to the petitioner and she is not his mother. The Divisional Officer, Personnel Branch of Railways, Guntakal, sent a letter, dated 04.01.2007, stating that the petitioner is not the son of the 1st respondent and that if a false effort is made to claim the death benefits like compassionate appointment by hiding the facts, the 1st respondent would be liable for suitable action. After the 3rd respondent Railways refused to give compassionate appointment to the petitioner, the 2nd respondent applied for appointment in the Railways and her said request is pending. The petitioner is not the legitimate son of the deceased.

The 1st respondent reserves liberty to take necessary action against the petitioner for the false claim and false allegations made by him. The petitioner approached the Court with unclean hands and suppressed the facts.'

8. The case of the 3rd respondent Railways is this:

> The material allegations in the petition are false. The allegations that the petitioner is the son of the deceased and the 1st respondent, and that he was born to them, on 15.02.1982, and that his educational records and other Government records evidence the said fact and that the respondents 1 & 2 are acting against his interests at the instance of this 3rd respondent Railways and the other material allegations made in the petition are all false. The deceased died, on 07.03.1997, while working as Gateman. His wife, the 1st respondent, submitted an application, on 26.05.2006, seeking appointment for the petitioner on compassionate grounds. The dues were settled and arranged to be paid to the 1st respondent. In the

application, to which the Award of the Adalat passed in the SOP was attached, it was mentioned that the petitioner is entitled to employment on compassionate grounds. The Railway administration is not a party to the said OP. Hence, it is not bound to implement such orders, which are not binding on it. It has got its own procedure for dealing with compassionate appointments. The report that was received on making enquiries disclosed that the petitioner is not born to the deceased and his legally wedded wife, the 1st respondent, and that he is the son of a Muslim servant maid. Since the wife, that is, the 1st respondent, and her children are only eligible for appointment on compassionate grounds, the petitioner was given a reply with regrets vide office letter, dated 04.01.2007. 1st respondent then submitted an application, dated 19.02.2007, seeking appointment on compassionate grounds in favour of the 2nd respondent, who is her daughter. Hence, the petition may be dismissed.

9. At trial, petitioner and his supporting witness were examined as PWs 1 & 2 and exhibits A1 to A14 were marked. The 1st respondent and her supporting witness were examined as RWs 1 & 2. No documents were marked on behalf of the respondents.

10. On merits and by the order impugned in this appeal, the petition was dismissed. Therefore, the aggrieved petitioner is before this Court.

11. We have gone through the record.

12. Learned counsel for the petitioner, placing reliance on the service records of the deceased wherein the petitioner was shown as the son of the deceased and also on the Lok Adalat Award wherein the parties therein including Shaik Shajadi Begum agreed that the petitioner is the son of the deceased, sought to contend that the petitioner is the legitimate son of the deceased. However, in the terms of compromise pursuant to which the Award has come to be passed, there is no mention that the petitioner is the son of the deceased and the 1st respondent herein; it is only stated in the memorandum of compromise between the parties that the 1st respondent is the wife of the deceased and that the three daughters and the petitioner are the children of the deceased. In the Award it is *inter alia* stated that Shaik Shajadi Begum is not entitled to claim any benefits from South Central Railway and that she confirms the succession certificate issued to the petitioners therein. Learned Standing Counsel for the 3rd respondent Railways contended that the enquiries made by the Railway administration revealed that the petitioner is the illegitimate son of the deceased through one Shaik Shajadi Begum and that he is not the son of the deceased & the 1st respondent, who is the legally wedded wife of the deceased. As rightly contended by the learned standing counsel since the petitioner is the son,

though illegitimate, the deceased has shown the petitioner as his son in the records and hence, the said fact does not entitle the petitioner to claim that he is a legitimate son of the deceased through the 1st respondent. In fact, on one hand, the 1st respondent has specifically denied the claim of the petitioner and further stated that she is not the biological mother of the petitioner; and, on the other hand, Shaik Shajadi Begum, who is a party to the SOP, claimed therein that the petitioner is her son and that she is interested in his compassionate appointment.

13. On careful analysis of the facts and the oral & documentary evidence, we find that the evidence makes it manifest that the petitioner is the son of the deceased and Shaik Shajadi Begum and that the 1st respondent is not the mother of the petitioner and that is the reason why it is not specifically mentioned in the memorandum of compromise filed before the Adalat that he is the son of the deceased and the 1st respondent. In the facts and circumstances of the case, we hold that the petitioner could not establish that he is the legitimate son of the deceased. Be it noted that the Family Court analyzed the fact, the oral & documentary evidence including the evidence of the official of the service records & records of the Department and noted in the impugned order that all the records disclosed that the petitioner was shown as the son of the deceased; that the Adalat Award also discloses that the 1st respondent herein is the legally wedded wife of the deceased and that one Revati, the 2nd respondent and another & the petitioner are their children and that the 1st respondent is entitled to the death benefits & family pension besides other benefits and that the petitioner herein being the son of the deceased is entitled for employment on compassionate ground and that as per the condition of the Award, Shaik Shajadi begum confirmed the succession certificate issued in favour of the petitioners, on 14.11.2000, and stated that she has no objection for the 3rd respondent Railways acting upon it. However, the Family Court in the very same impugned order also noted that exhibit A12 – photocopy of Award, dated 17.07.2004, shows that Sri M. Purushotham Reddy, advocate, who filed the present petition, had defended Shaik Shajadi Begum in SCOP and that in the SOP, Shaik Shajadi Begum, who was said to be the servant maid and with whom the deceased had illegal contact, was represented by an advocate and that she had claimed that the petitioner herein is her son and that she is interested in getting that the petitioner herein is her son and that she is interested in getting appointment for him in Railways on compassionate grounds and hence, she raised the dispute and that the advocate who appeared for her in the SOP filed the present OP on behalf of the petitioner herein. The Family Court further noted that the 1st respondent herein filed IA No.786 of 2010 requesting to direct the parties to undergo DNA test and obtain an opinion from an expert as to whether the 1st respondent is the biological mother of the petitioner and that though the said petition was allowed and the parties were

directed to undergo the said test by giving samples of blood to the Superintendent, SVRRGG Hospital, Tirupathi, for being forwarded to the Regional Forensic Science Laboratory for analysis and report, the petitioner failed to come forward to submit to the said test. Having so noted, the Family Court has drawn an adverse inference against the petitioner, and eventually held that the petitioner failed to prove that he is the legitimate son of the deceased and the 1st respondent. The Family Court also considered the legal aspect and further held that since the 1st respondent is not the biological mother of the petitioner, the petitioner is not entitled to the relief claimed and accordingly declined to grant the declaration as sought for by the petitioner and dismissed his OP duly recording a finding that the petitioner failed to prove that he is the legitimate son of the deceased & the 1st respondent. For the sustainable reasons assigned by us and for the reasons mentioned above of the Tribunal, it can safely be held that the petitioner is the son of the deceased and one Shaik Shajadi Begum.

14. As a sequel to the said finding it must be held that the petitioner is not entitled to the declaration that he is the legitimate son of the deceased. In consequence, it must also be held that he is not entitled to the consequential relief seeking employment on compassionate ground.

15. Learned counsel for the petitioner alternately contended as follows: 'Even the 3rd respondent Railways is contending that the petitioner is the son of the deceased and the Muslim servant maid of the deceased. Since it is established that the petitioner is an illegitimate son of the deceased having been born to the deceased and Shaik Shajadi Begum, he is entitled to compassionate appointment under facts & in law and in view of the Adalat Award, which is binding on the parties to the Award namely, the family members of the deceased and his mother, Shaik Shajadi Begum.' He further requested to mould the relief and grant the relief of compassionate appointment to the petitioner on the basis that he is the illegitimate son of the deceased through Shaik Shajadi Begum. However, the fact of the matter is that the Railway Administration refused to give appointment to the petitioner on compassionate ground for the reason that the wife and children of the deceased employee are only eligible for such appointment and that, as per their procedures and instructions governing the matter, an illegitimate child cannot be given appointment on compassionate grounds. They are also contending that after rejection of the claim of the petitioner, the 2nd respondent, daughter of the deceased and the 1st respondent, made an application for compassionate appointment and that her application is pending. But the learned counsel for the petitioner strongly contended that in the face of the Award of the Adalat in the SOP, by which the parties namely the petitioner and the respondents 1 and 2 are bound, the 2nd respondent cannot make a claim for her appointment contrary to the terms of the Award. Nonetheless, the Railway Administration is not a party to the SOP. The Adalat disposed of the

SOP in terms of compromise between the parties, namely: the wife and children of the deceased and one Shaik Shajadi Begum. In fact, the parties to the SOP made an internal arrangement by means of compromise, in the absence of Railway administration as a party to the SOP and hence, as rightly contended, the Railway administration as a party to the SOP and hence, as rightly contended, the Railway administration is not bound by the terms of the Award in the SOP and it has to deal with the claim for compassionate appointment as per law & procedure. Hence, it is apt to note that merely based on the Award to which the Railway administration is not a party, the petitioner cannot claim compassionate appointment without establishing his claim as per law.

19. Now, in view of the contention of the Railways that as per their procedures and instructions only the legitimate children of the deceased are eligible for appointment on compassionate grounds and not illegitimate children born from a marriage, which is null and void, and that there are circulars prohibiting giving appointments on compassionate grounds to such illegitimate children of the deceased employees, the short question is as to whether the said contention is tenable under law. We shall take up this question now for adjudication.

20. It appears that the answer to the question is no longer *res integra.* In the decision of the Supreme Court in Union of India and another v. V.R. Tripathi [AIR 2019 SC 666], the facts are as follows:- 'Ram Lakhan Tripathi, the father of the respondent, was employed as Technician, Grade-I, in Central Railways at Mumbai. He died in harness, on 28.11.2009. He contracted a second marriage during the subsistence of his first marriage. The respondent is the son born from the second marriage, which the employee contracted in 1987. He applied for compassionate appointment on the death of his father. His application was rejected in March, 2012, by the Railway authorities. He filed Original Petition before Central Administrative Tribunal [CAT]. CAT allowed the said petition. A review petition is also dismissed. Union of India and Railways instituted a writ petition before Bombay High Court. The Bombay High Court, having referred to Section 16 of the Hindu Marriage Act, 1955, which recognized the legitimacy of a child born from a Marriage which is null and void under the provision of Section 11, further noted that the circular of the Railway Board, dated 02.01.1992, instructing not to forward to Railway Board, the cases for compassionate appointment to the second widow or her wards was set aside by a Division Bench of the Calcutta High Court in *Namita Goldar v. Union of India [(2010) 1 Calcutta Law Journal 464]* and that in the decision in *Rameshwari Devi V. State of Bihar [(2000) 2 SCC 431]* the Supreme Court upheld the entitlement of the family of a deceased employee to pensionary benefits notwithstanding the fact that the deceased had, during his life time, contracted a second marriage. Having so noted, the Bombay High Court found no reason to differ with the view of the CAT. Aggrieved thereof, Union of India and the Railways filed Civil Appeal [[SLP(c)]

before the Supreme Court.' In this backdrop of facts, the Supreme Court analyzed the law and noted that once the circular, dated 02.01.1992, was struck down in *Namita Goldar [supra*] and the same was accepted and has been implemented, it was not thereafter open to the Railway authorities to rely upon the same circular, which has all India force and effect. The Supreme Court also held that it was improper on the part of the Railway Board to issue a fresh circular in April, 2013 reiterating the terms of earlier circular of January, 1992 even after the decision in *Namita Goldar (supra)*, which attained finality. Having so held, the Supreme Court dismissed the Civil Appeal of the UOI and the Railway.

21. In the decision in *Yuvraj Dajee Khadake v. The Union of India [2019(2) SCT 134](Bombay),* the facts are as follows:- 'The writ petitioner's father, who was in the employment of Central Railway, died in harness, on 12.08.2003. He made an application for grant of appointment on compassionate ground. The same was rejected on the ground that the marriage of the mother of the petitioner with the deceased employee was solemnized during the subsistence of first marriage of the father of the petitioner. The High Court of Bombay following the Division Bench decision of the Bombay High Court in *V.R. Tripathi (supra)* which was confirmed by the Supreme Court in the afore stated Civil Appeal, directed the respondent Railways to consider the case of the petitioner afresh for grant of compassionate appointment.

22. It is apt to now refer to sections 11, 12 and 16 of the Hindu Marriage Act, 1955, which read as under:

> Section 11: Void marriages:-
>
> Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in Clauses (i), (iv) and (v) of Section 5.
>
> 12. Voidable marriages:-
>
> (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:
>
> 1 (a) that the marriage has not been consummated owing to the impotence of the Respondent; or
>
> (b) that the marriage is in contravention of the condition specified in Clause (ii) of Section 5; or
>
> (c) that the consent of the petitioner, or where the consent of the guardian in marriage of the Petitioner was required Under Section 5, as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, the 1978 (2 of 1978), the consent of such guardian was obtained by force or by fraud

as to the nature of the ceremony or as to any material fact or circumstance concerning the Respondent; or

(a) that the Respondent was at the time of the marriage pregnant by some person other than the Petitioner.

Section 16: Legitimacy of Children of void and voidable marriages:-

(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such a child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties of the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3)Nothing contained in Sub-section (1) or Sub-section(2) shall be construes as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child or his parents."

23. In view of the legal position enunciated in the decision of the Supreme Court supra and the provision of Section 16(1) of the Hindu Marriage Act, it is clear that 'a child born from a marriage which is null and void is a legitimate child'. Therefore the contention of the Railway Administration that such an illegitimate child born from a marriage, which is null and void, is not entitled to appointment on compassionate ground is untenable. But the question here is as to whether the present petitioner is such a child born from a marriage which is null and void, and is, therefore, a legitimate child as per the provision of the afore-stated Section of law.

24. Now we shall revert to the important question, which we postponed adjudication to this stage. The amendment to Section 16 has been introduced and was brought about with the obvious purpose of removing the stigma of illegitimacy on children born in void or voidable marriage. Therefore, the question now is- 'whether the petitioner in

the instant case could be extended the benefit of the said section of law?'

25. In the case on hand, it is borne out by record that the petitioner is born to the deceased through Shaik Shajadi Begum out of illegal contact or adultery. It is also borne out by record that the said Shaik Shajadi Begum was the maid servant of the deceased. It is not the case of the parties herein that there was a marriage, void or voidable, between the deceased and the said Shaik Shajadi Begum. Further, by the time the petitioner was born to them and till the death of the deceased, the marriage of the deceased with the 1st respondent was subsisting.

26. What is to be noted from the legal position enunciated is that a child if born out of a marriage, which is null and void, under section 11, is legitimate under section 16 of the Hindu Marriage Act. The second half of the Section says that "whether or not a decree of nullity is granted in respect of that matter under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act". On a plain reading of the provision of Section 16, as amended in the year 1976, makes it apparent that the object of Section 16 of the Hindu Marriage Act, 1955, is to protect legitimacy of the children born of void or voidable marriages and that the benefit given under the amended section 16 is available only in cases where there is a marriage and when such marriage is void or voidable in view of the provisions of the Act. Nonetheless, if there is no marriage, may be void or voidable, then, this benefit of deemed 'legitimacy' will not be available to the children, who are begotten out of any physical relationship of a man and a woman. Thus, section 16 of the Hindu Marriage Act does not confer the benefit of legitimacy on a child born out of any physical relationship between a man and a woman, who are not married. Consequently, for the benefit of legitimacy to inure to such illegitimate child, such a child must have been born, after a marriage between his father and mother, whether void or voidable. In view of the facts and the legal position adverted to supra, we find that even the alternate contention of the petitioner that he is the illegitimate son of the deceased and his mother, Shaik Shajadi Begum, and hence, he is entitled to compassionate appointment does not come to his aid as from the facts borne out by the record it is noticeable that there is no marriage void or voidable between the deceased and the mother of the petitioner.

27. For all the afore-stated reasoned findings, we hold that the appeal is devoid of merit and is hence, liable for dismissal.

28. In the result the Family Court Appeal is dismissed. There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

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28

2019(3) L.S. 75 (A.P.)

IN THE HIGH COURT OF
ANDHRA PRADESH

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

G.Nagamani & Ors., ..Petitioners
Vs.
The State of A.P.,
& Ors., ..Respondents

INDIAN PENAL CODE, Secs. 447, 506, 509 & 436 r/w 34 – Petitioners seek a writ of mandamus declaring the inaction of official respondents in registering the F.I.R. on the complainant made by petitioners.

Held – When allegations levelled disclose commission of cognizable offences, the concerned police have no other option except to register the F.I.R. – Concerned Superintendent of Police, is directed to cause enquiry for the inordinate delay occurred in registration of the F.I.R. and take prompt departmental action against the errant officer within 8 weeks from date of receipt of a copy of this Order.

Mr.D.Srinivas, Advocate for the Petitioner.
GP for Home, Advocate for Respondent No.1.

O R D E R

1. The petitioners seek a writ of *mandamus* declaring the inaction of official respondents in registering the F.I.R. on the complaint, dated 02.02.2019 made by the petitioners, as arbitrary, illegal, unconstitutional and against the spirit of the judgment of the Hon'ble Supreme Court in Lalita Kumari vs. Government of Uttar Pradesh and others – 2014 (2) SCC 1 and for a consequential direction to respondent No.5 to register the F.I.R. against respondent Nos. 6 to 9.

2. When the matter came up for hearing, learned Government Pleader for Home, on instructions, would submit that the complaint of petitioner No.1 was registered as Crime No.176 of 2019, dated 14.07.2019, by the Police of Annavaram P.s. for the offences under Sections 447, 506, 509 and 436 R/w.34 of I.P.C. In proof of registration of the F.I.R., he produced a copy of the F.I.R. in Crime No.176 of 2019, dated 14.07.2019. However, learned counsel for the petitioners taking the Court through the date of complaint mentioned in the F.I.R. as 14.07.2019, would vehemently contend that in fact the complaint was given by the petitioners on 02.02.2019 itself and they also sent a copy of the complaint through registered post to the Station House Officer, Annavaram P.S. but for the reasons best known to the official respondents, they registered the F.I.R. belatedly on 14.07.2019 by mentioning the date of complaint as 14.07.2019, which is palpably false.

3. As can been seen from the material papers, the date 02.02.2019 is mentioned on the copy of the police complaint. Further,

the copy of the postal receipt shows that the complaint was sent by registered post on 04.02.2019 to the Station House Officer at 11.43 hours from Annavaram sub-post office. Copy of postal acknowledgment produced bears the signature and stamp of Sub-Inspector of Police Annavaram P.S., these documents *prima-facie* render strength to the submission of learned counsel for the petitioners. The allegations in the complaint are grave in nature depicting the offences under Sections 447, 506, 509 and 436 r/w.34 of I.P.C. When the allegations leveled disclose commission of cognizable offences, the concerned Police have no other option except to register the F.I.R. as is held in **Lalita Kumari**. However, the concerned Police have shown utter disdain and scant respect to the provisions of Cr.P.C. on one hand and the dictum laid down by the Hon'ble Apex court on the other.

4. Therefore, while disposing of the writ petition, the concerned Superintendent of Police, East Godavari District, is directed to cause enquiry for the inordinate delay occurred in registration of the F.I.R. and take prompt departmental action against the errant officer within eight (8) weeks from the date of receipt of a copy of this order and report compliance to the Registrar (Judicial) of this High Court. The Registry shall forward a copy of this order to the Director General of Police, Andhra Pradesh for circulation to all the police stations for future guidance.

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

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2019(3) L.S. 76 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

G.Venkata Ramaiah & Anr., ..Appellant
Vs.
G.Subrahmanyam & Ors. ..Respondents

SPECIFIC RELIEF ACT – Suit is filed for specific performance of a partnership agreement – Along with the appeal, interim mandatory injunction I.A.No.1 is filed seeking a direction to respondent no.8 to continue supply of oil and petrol to retail outlet of second appellants-firm, pending disposal of appeal.

Held – For grant of interim mandatory injunction, plaintiff's case should be of a higher standard than the normal prima facie case that is required for grant of temporary injunction – There should be a threat of irreparable loss which cannot be compensated in terms of money – Appellants have faied to prove the necessary ingredients that are necessary for grant of interim mandatory injunction – The balance of convenience is in favour of the respondents – The larger issues of the maintainability of the suit and of the suit for specific performance of a partnership deed etc, are left open to

I.A.No.1/2018 in
A.S.No.2042/18 Date: 13-6-2019

be decided during the course of the appeal - I.A.No.1 is dismissed.

Mr.Anup Koushik Karavadi, Advocate for the Appellant.
Mr.M. Sudhir Kumar & Mr.Madhava Rao Nalluri, Advocates for the Respondents.

O R D E R

This appeal is filed questioning the decree and judgment passed in OS No.151 of 2015 by the VII Additional District Judge, Ongole. The plaint is filed by one Sri G.V. Ramanaiah, (Plaintiff No.1) and M/s Golla Chenchaiah, a partnership firm represented by a partner G.V. Ramanaiah. The suit is filed for the following reliefs:

> "(a) for grant of specific performance directing the defendants 1 to 7 to come forward for reconstitution of the partnership firm Golla Chenchaiah. In the event of failure on the part of defendants 1 to 7 get it done through process of court;
>
> (aa) for mandatory injunction directing the 8th defendant to continue to supply oil to retail outlet of plaintiffs firm (amended as per the orders on I.A.No…../2015 dated……).
>
> (b) For costs; and
>
> (a) for such other reliefs as the Hon'ble Court deems fit and proper in the circumstances of the case."

A reading of the plaint discloses that the suit is filed for specific performance of a partnership agreement. The husband of the second defendant G. Subba Rao died on 13.06.2014. A letter was addressed on 30.07.2014 for reconstitution of proposal of the firm by the 8th defendant. Since then, disputes have arisen. A letter dated 30.07.2014 was addressed by the first plaintiff seeking six months time for reconstitution of the firm. In addition, lawyers' notices were also exchanged between the parties as the defendants did not reconstitute the firm. The exchange of notices was in May, 2015. Hence, the suit was filed for specific performance directing defendant Nos.1 to 7 to come forward for reconstitution of the partnership firm-plaintiff No.2. An alternative prayer is also made that in the event of failure of defendant Nos. 1 to 7, then to get the deed of partnership executed through the process of the Court. As defendant No.8 did not supply the petroleum product an amendment is also sought for adding a prayer of a mandatory injunction against defendant No.8. The said application was allowed and a prayer for mandatory injunction was permitted to be added. Thereafter, parties went to trial and the suit came to be dismissed by judgment dated 22.10.2018. Questioning the same, an appeal was filed.

Along with the appeal, IA No.1 of 2018 has been filed seeking a relief of interim mandatory injunction directing respondent No.8 to continue to supply oil and petrol to the retail outlet of the second appellants firm, pending disposal of the appeal.

To this, a counter affidavit was filed by respondent Nos.1 to 7 opposing the said application. A rejoinder was also filed in IA No.1 of 2018.

The matter was taken up for hearing and this court has heard Sri Anup Koushik Karavadi, learned counsel for the appellants and Sri M. Sudhir Kumar, and Madhava Rao Nalluri, learned counsel for the respondents.

Learned counsel for the appellant argued that the first appeal is a continuation of the suit. It is his contention that both questions of fact and law can be argued in the first appeal. He submits that there was an interim mandatory injunction directing supply of petroleum products during the pendency of the suit and that a similar order should be allowed to be continued. He also submits that a business which has been run for decades should not be brought to a grinding halt because of the attitude and the non-cooperation of the respondents. He also draws the attention of the court to the order passed by this Court in CMA No.337 of 2017, wherein a Division Bench of this Court directed the 8th respondent to supply the petroleum products. Counsel submits that initially an order was granted on 03.02.2017 in IA No.960 of 2017 directing the 8th respondent to supply the petroleum products. Questioning the same, a CMA was filed. In the said CMA, a Division bench of this Court clearly held that the lower Court did not commit any error in passing the order for supply of the petroleum products. Learned counsel for the appellants/ petitioners also relies upon certain other judgments and argues that the *status quo ante* should be preserved and that the supplies should be directed to be continued.

In reply to this, learned counsel for the respondents with equal passion argued that respondent Nos.1 to 7 cannot be forced to enter into a partnership. He submits that partnership is a result of voluntary conduct and that a group of people should "assent" to form a partnership. He contends that partnership cannot be forced upon them. Learned counsel points out that the plaintiff/ appellant has acted in a manner detrimental to the interest of the firm. According to the learned counsel, the accounts of the firm have not been submitted; respondents have not been given their share of the profit. Separate Bank accounts have been opened by the present 1st appellant and he has been diverting all the funds with the said accounts. He also submits that the 1st plaintiff has misappropriated the funds.

As far as the order in the CMA is concerned, learned counsel relies upon the last para of the order passed in the CMA, which clearly states that the lower Court was directed to dispose of the suit without being influenced by what is stated in the order. Therefore, the counsel submits that as the said order is an interlocutory order, the trial Court, after considering the evidence that was let in, came to the protection. He submits that the lower Court came to the definite conclusion that the actions of the 1stpetitioner/ appellant disentitles him from seeking specific performance. Counsel also

raises an objection about the maintainability of the suit. He submits that the prayers in the suit make this clear that the same cannot be granted. He submits that if specific performance is not possible, the Court cannot compel the respondents to continue the business. He distinguishes between a regular specific performance suit for conveyance of property, wherein the Court has the option of executing the sale deed in favour of the plaintiffs and the request for execution of a deed of partnership through court.

In the case on hand, learned counsel submits that the court cannot force the parties to continue the business. According to him, the same is clearly barred by the provisions of Section 14 of the specific Relief Act, 1963 (for short 'the Act'). He submits that it involves performance of a continuous duty which cannot be supervised by the Court. He also submits that the Act as it stood; permitted the specific performance of a partnership deed, if the suit is for the execution of formal deed of partnership, when the parties have commenced to carry on the business of the partnership. According to his contention, if all the parties/partners have commenced or agreed to carry on the business and the execution of a formal deed is pending, then the court can direct the execution of the partnership deed. In the case on hand, he points out that right from 2015, defendant Nos.1 and 7 have refused to carry on the business and that therefore, the suit itself is not maintainable and consequently, interlocutory application is also not maintainable.

Learned counsel also relies upon ***Board of Control for Cricket in India v. Kochi Cricket Private Limited – (2018) 6 SCC 287*** for arguing about the prospective/ retrospective nature of amendment to the Act.

This Court after hearing both the learned counsels and their passionate arguments on the subject, notices that in the CMA, the Division Bench of this Court was dealing with an order passed in February, 2017 at the interlocutory stage. At that stage, this Court did not have the entire evidence before it. Clause (a) of the partnership deed was relied upon by the court at that stage. However, after confirming the order of the lower Court, the Division Bench clearly held that the findings in the said order are for the interlocutory application only and should not influence the lower Court in disposing of the appeal.

After the said order was passed, the evidence of the parties commenced with the chief-examination of PW-1 in June, 2018. For the petitioners, Exs.A.1 to A.8 were marked. Two witnesses were examined for the defendants and Exs.B.1 to B.12 were marked. The partnership deed on the basis of which the specific performance was sought was not filed. However, as per the submission of the learned counsel for the petitioners, there is a clear admission about the clause and

therefore, the non-filing of the deed is not fatal.

Apart from this, this Court notices that while passing the judgment, the lower Court has noticed that the business of the firm is quite prosperous. In addition, from para 19 onwards of the judgment, the court went on to decide the crux of the issue. The lower Court noticed that the 1st appellant as PW.1 clearly admitted that form February, 2012 onwards, he has been looking after the affairs of the petrol and diesel business and that he has not distributed the profits for the last 15 years. In addition, the Court also noticed that out of the 8 partners, defendant Nos.1 to 7 are not interested in carrying on the business and only the first plaintiff is seeking reconstitution. The evidence of PW.1/ appellant also discloses that he is doing business with his own investment, that he opened an account in SBH, Singarayakonda about five years prior to his deposition and that he is carrying on business with respondent No.8(Indian Oil Corporation Ltd.) through that account and also through account in Canara Bank. He admits that he is doing transactions of the firm through his individual Bank accounts. These admissions are in the cross-examination of the witness on 15.07.2018. In addition, he also admits during the course of cross-examination on 15.07.2018 that as per the partnership deed, he is not authorized to represent the firm.

All these factors are highlighted by the learned counsel for the petitioners. In addition, the case law on the subject of interim mandatory injunction is very very clear. In a leading judgment on the subject reported in ***Dorab Cawasji Warden v. Coomi Sorab Warden – (1990)2 SCC 117***, the Hon'ble supreme court of India clearly held that for granting interim mandatory injunction, the plaintiffs' case should be of a higher standard that the normal prima facie case that is required for grant of temporary injunction. In addition, there should be a threat of irreparable and serious loss which cannot be compensated in terms of money. The balance of convenience is also a factor which has to be kept in mind. The said findings of the Hon'ble Supreme Court are found in para 16 of the judgment. In addition, the other leading judgments are ***Purushottam Vishandas Raheja v. Shrichand Vishandas Raheja (D) through L.Rs – 2011 (6) SCC 73*** and ***Samir Narain Bhojwani v. Aurora properties & Investments – 2018 SCC online 1048***. The law on the subject does not require repetition. Apart from that, Section 41 of the Act is also of an importance. Section 41 (1) of the Act states that an injunction can be refused when the conduct of the plaintiff or his agent has been such as to disentitle him from the assistance of the Court.

If the case on hand is examined against the backdrop of this law, the foremost condition to be satisfied is that the plaintiffs case should have a very high

degree of probability of success and something more than the *prima facie* case is made out. The case on hand does not reveal any such higher probability of success or that a case greater than the *prima facie* case has been made out. The authority of 1st plaintiff to file the present suit on behalf of the firm is also in issue. The balance of convenience is also not in favour of the petitioner. He has been unilaterally conducting business on the strength of a partnership firm. Despite the clear stand of the respondents that they are not willing to carry on the business, the petitioner has been unilaterally carrying on the business. Therefore, balancing the mischief, it is clear that the respondents need protection from the Court. The loss is also not irreparable. There is no evidence to show that the business is running into losses or that defendant Nos.1 to 7 are bankrupt/insolvent or do not have the capacity to pay any amount in case damages are awarded.

Last, but not the least, the conduct of the petitioner is also a factor to be considered for granting a relief. He is routing the business funds through his personal account. The accounts of the firm are not yet settled. Shares have not been given to the respondents. A person, who seeks an equitable relief must display conduct which would entitle him to seek the relief of an interim injunction. This is what is commonly called as coming to court with clean hands. This conduct of the plaintiff/appellant is a factor that was held against him during the course of impugned judgment. Those findings cannot be totally overlooked.

After considering the case law that has been cited by them also, this Court is of the opinion that none of the cases cited by the learned counsel for the appellants are directly on the question of an interim mandatory injunction and for granting of a direction. In ***Suresh Kumar Sanghi v. Amrit Kumar Sanghi-AIR 1982 Delhi 131***, the case was filed for a permanent injunction restraining the defendants therein from writing any letter to the Bank of Rajasthan for getting partnership account stopped, closed, suspended etc. The lerned single Judge while deciding the interlocutory application held that respondents cannot be allowed to stop the business and destroy it altogether. However, while granting the injunction, the plaintiffs were directed to maintain true and favourable account of the financial transactions and submit the quarterly report to the Court.

Even in the judgment of the Hon'ble Supreme Court of India cited by the respondent in the case of ***Mohd.laiquiddin v Kamala Devi Misra – (2010) 2 SCC 407***, it is clearly held as follows:

> "26. In the light of aforementioned case, it is clear that when there are only two partners constituting the partnership firm, on the death of one of them, the firm is deemed to be dissolved despite the existence of a clause which says otherwise. A partnership is a contract between the

partners. There cannot be any contract unilaterally without the acceptance by the other partner. The Appellants, the legal representatives of original plaintiff (since deceased) was not at all interested in continuing the firm or constitute a fresh firm and they cannot be asked to continue the partnership, as there is no legal obligation upon them to do so as partnership is not a matter of heritable status but purely one of contract, which is also clear from the definition of partnership under Section 4. Therefore, the trial court was justified in holding that the firm dissolved by virtue of death of one the partners and the first appellate court as well as the High Court has taken the correct view in upholding the same."

In these circumstances, this Court is of the opinion that (a) the plaintiffs have failed to prove the necessary ingredients that are necessary for grant of an interim mandatory injunction. A case higher than a *prima facie* case has not been pleaded or proved. (b) The balance of convenience is in favour of the respondents and not in the petitioners favour. A person who has been unilaterally carrying on the business without the consent of others and without distributing profits is not entitled to a protection of the Court. Greater harm will be caused to the respondent if the business is carried out in the same manner. (c) It is not the case of the appellants that the respondents will not be able to pay the damages if any that will be awarded i.e., there is no proof of irreparable loss.

Last but not the last, the conduct of the petitioner disentitles him to the relief claimed. One seeks equity should come in equity. The petitioner who has not rendered accounts of the firm for the period prior to and during the pendency of the suit is not entitled to any protection from this Court.

Hence, for all these above reasons, this Court is of the opinion that the petitioners have not made out a case for grant of interim mandatory injunction. The larger issues of the maintainability of the suit and the maintainability of the suit for specific performance of a partnership deep etc., in this case are left open to be decided during the course of hearing of the appeal.

Hence, IA No.1 of 2019 is dismissed.

List the appeal for hearing in its usual course.

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2019(3) L.S. 23 (T.S.)

IN THE HIGH COURT OF TELANGANA

Present:
The Hon'ble Mr. Justice
Challa Kodanda Ram

Jakkana Lakshmaiah ..Petitioner
Vs.
The State of Telangana ..Respondent

REGISTRATION ACT - Writ Petitioner's grievance is that the 3rd Respondent/Sub-Registrar, is refusing to register the sale deed presented by him – Respondents contended that a restraint Order has already been passed in relation to the subject property.

Held - Though petitioner asserts that the restraint order passed by the Debts Recovery Tribunal is only with respect to the parties mentioned therein, this Court cannot ignore the fact that such restraint order is in relation to the subject property - When there is a judicial order restraining registration, this Court cannot ignore the said order and direct the Registering Officer to violate the order of another judicial forum though it is subordinate to this Court in all respects - Writ petition is accordingly dismissed giving liberty to the petitioner to approach the appropriate forum for getting the order of attachment of immovable property passed by the Debts Recovery Tribuinal-1, varied/modified.

Mr.Ch. Ravinder, Advocates for the Petitioner.
GP for Revenue, Advocate for the Respondent

J U D G M E N T

In this Writ Petition, petitioner's grievance is that the third respondent – Sub-Registrar, Huzurabad, Karimnagar District, is refusing to register the sale deed presented by him with respect to premises bearing No.1-3-33, 1-3-33/1 (old No.1-98), admeasuring 200 sq.yards, situated at Jammikunta, Karimnagar District, notwithstanding the fact that neither his vendor nor himself is a party to the proceedings in R.C.No.267 of 2016 in O.A.No.722 of 2014.

Learned counsel for the petitioner by making a reference to the order of attachment of immovable property dated 02.02.2019 passed by the Recovery Officer, Debts Recovery Tribunal-1, Hyderabad, in R.C.No.267 of 2016 in O.A.No.722 of 2014, would submit that there is a restraint order with respect to house bearing No.1-3-33 and 1-3-33/1, admeasuring 200 sq.yards, at Main Road, Jammikunta Village and Mandal, Karimnagar District, and that the petitioner is not a party to the said proceedings, as such, the said order is restricted to the parties therein from transferring or charging the property, and therefore, there cannot be any hindrance to the third respondent to register the document said to have been presented by the petitioner.

On the other hand, learned Government Pleader for Revenue appearing for the respondents would bring to the notice of

this Court S.O.No.219(b) issued by the Government vide Memo No.2722/U2/70-4, Revenue, dated 17.11.1970, and it reads as under:

"S.O.219(b). If the A.P. High Court or any other Civil Court restrains a person from alienating a property and if such orders are brought to the notice of the Registering Officer or served on the Registering Officer, the Registering Officer is estopped from going ahead with the registration."

Though the learned counsel for the petitioner asserts that the restraint order passed by the Debts Recovery Tribunal is only with respect to the parties mentioned therein, this Court cannot ignore the fact that such restraint order is in relation to the subject property. When there is a judicial order restraining registration, this Court cannot ignore the said order and direct the Registering Officer to violate the order of another judicial forum though it is subordinate to this Court in all respects.

In those circumstances, there is no merit in the writ petition.

The writ petition is accordingly dismissed giving liberty to the petitioner to approach the appropriate forum for getting the order of attachment of immovable property dated 02.02.2019 passed by the Debts Recovery Tribuinal-1, Hyderabad, varied/modified.

Miscellaneous Petitions, if any pending, shall stand closed. There shall be no order as to costs.

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2019(3) L.S. 24 (T.S.)

IN THE HIGH COURT OF TELANGANA

Present:
The Hon'ble Mr. Justice
P. Naveen Rao

Raju Katravath ..Petitioner

Vs.

The State of Telangana & Ors., ..Respondents

PREVENTION OF DAMAGE TO PUBLIC PROPERTY ACT, 1984 - Secs.2(a) & (b) & 3 - Petitioners assail seizure of their motor transport vehicles and seek release of the vehicles - The seizure of vehicles is assailed on the ground that it violates their right to carry on business in transportation as guaranteed by Article 19(1)(g) of the Constitution of India.

Held - While disposing the Petition, following findings and directions were made:

i.Writ petitions against seizure of vehicle on the allegation of violation of Motor Vehicles Act, 1988 is not maintainable. Owner /person in charge/ driver of the offending vehicle has to avail statutorily engrafted remedies before seeking to initiate writ proceedings.

ii. On seizure of vehicle under Section 207 (1) of the Act, owner/

person-in-charge/ driver can file application under Section 207 (2) read with Rule 448 (B) of the Telangana State Motor Vehicles Rules. It is for the Secretary, Road Transport Authority to consider the application and to pass appropriate orders as warranted by law.

iii.The proceedings of seizure of a motor transport vehicle should be video recorded. The CCTV footage capturing the movement of the offending vehicle wherever available should be obtained and be made part of the case record.

iv.Apparently, the primary grievance on not availing remedy under Section 207 (2) is delay in processing the applications and delay in the decisions. To expedite the process of decision making under Section 207 (2), the applications can be accepted through online web portal.

v.Amount paid as per interim orders shall be adjusted towards fine that may be imposed, if found guilty. It is also open to owner/driver/ person-in-charge to file application under Section 200 to compound. It is also open to authorities to initiate prosecution under Act, 3 of 1984. Similar system and procedure to applications under Section 207 (2) be evolved to applications under Section 200.

vi.Even if owner/driver/person-in-charge applies to compound the offence and such application is allowed, before permitting the vehicle to ply on the roads, road worthiness of the vehicle has to be assessed and certified. Owner/driver/ person-in-charge can use such vehicle on the public roads only if such a certificate is issued.

vii.The authorities entrusted with the responsibility to enforce the provisions of the 'Telangana State Sand Mining Rules, 2015' shall ensure completion of confiscation proceedings within the time frame, not exceeding three months and collection of fine as prescribed in the Rules on the excess load transported and confiscation of sand as per the provisions of the Rules.

viii.The prosecution against owner/person-in-charge/ driver of the offending motor vehicle has to be in a fixed time frame. The State Government may formulate guidelines fixing time frame. Such guidelines be notified within three months from the date of receipt of the copy of the judgment.

Mr.V. Brahmaiah Chowdary, Ch. Ravinder, Janardhana Reddy Ponaka, P. Phalguna Rao, Palle Sriharinath Chowdary, Mohd Arifwati, Karunakar Reddy, Advocates for the Petitioner.

GP for Transport, GP for Industries, GP for Home GP for Mines & Geology, Advocates. for the Respondents.

J U D G M E N T

1. The menace of road accidents is increasing day by day taking away the lives of thousands. One facet of cause of road accidents is plying of motor vehicles with excess load than permissible.

2. Before proverbial travelling into the litigation in these batch of writ petitions, it is apt to extract the observations of Justice V.R.Krishna Iyer in Rattan Singh v. State of Punjab (1979) 4 SCC 719). It reads as under:

"This is a ease which is more a portent than an event and is symbolic of the callous yet tragic traffic chaos and treacherous unsafety of public transportation – the besetting sin of our highways which are more like fatal facilities than means of mobility. More people die or road accidents than by most diseases, so much so the Indian highways are among the top killers of the country. What with frequent complaints of the State's misfeasance in the maintenance of roads in good trim, the absence of public interest litigation to call State transport to order, and the lack of citizens' tort consciousness, and what with the neglect in legislating into law no-fault liability and the induction on the roads of heavy duty vehicles beyond the capabilities of the highways system, Indian Transport is acquiring a meaning reputation which makes travel a tryst with Death. It looks as if traffic regulations are virtually dead and police checking mostly absent. By these processes of lawlessness, public roads are now lurking death traps. The State must rise to the gravity of the situation and provide road safety measures through active police presence beyond frozen indifference, through mobilization of popular organization in the field of road safety, frightening publicity for gruesome accidents, and promotion of strict driving licensing and rigorous vehicle invigilation, lest human life should hardly have a chance for highway use."

[emphasis supplied]

3. These observations are symbolic of the malady that has crept into use of public roads and thirty years later the situation is more grave.

4. In substance, in all these writ petitions, petitioners assail seizure of their motor transport vehicles and seek release of the vehicles. The seizure of vehicles is assailed on the ground that it violates their right to carry on business in transportation as guaranteed by Article 19(1)(g) of the Constitution of India.

5. The seizure of vehicles in issue is primarily on the ground that at the time of inspection, the vehicle was carrying load in excess of permissible limit i.e., sand or other commodities/ without weigh bills without permit/ and in some cases, inter-state transport of sand without transit permit, etc. Following the earlier decisions of this Court, in these matters, interim directions were granted, directing grant of interim custody of the vehicle to the owner of vehicle subject to his depositing Rs. 2000/- and additional amount of Rs.1000/- per tonne of excess load, unloading charges with other conditions. In all these orders, no restraint is imposed on prosecution proceedings. What was granted was only an interim custody of the vehicle. In terms thereof, on

depositing the amount specified in the respective interim orders, vehicles were released.

6. Learned counsel for petitioners placed extensive reliance on the directions issued by this Court in several decisions and prayed to affirm the order granting interim custody of vehicles.

7. According to learned counsel for petitioners, as directed by this Court in K.Ram Reddy v. Government of Andhra Pradesh and others (2014 (3) ALD 651), it is mandatory for the checking officials while checking the vehicles on the allegation of contravention of the Act, 1988 to give option to the driver/owner/accompanier of the vehicle to opt for payment of penalties specified instantaneously for release of vehicle as an interim measure instead of seizing the vehicle, and though circular instructions are issued by the Commissioner for Transport, they are observed more in breach and in spite of request made by the petitioners to release the vehicles on payment of amount as per Section 194 of the Act, 1988, their vehicles are not released and the same amounts to arbitrary exercise of power and authority and violating the directions of this Court. They would further contend that whenever there is an allegation of overload, the vehicle has to be released by collecting overload penalty @ Rs. 1000/- for each excess tonne. Learned counsel further contended that Section 194 of the Act, 1988 only invites penal consequences on the driver, but no penal consequences other than payment of penalty can be imposed on the owner of the vehicle and, therefore, detaining the vehicle even when the owner of the vehicle is agreeing to pay the penalty, amounts to arbitrary exercise of power.

8. Learned Government Pleader did not dispute the directions issued by this Court in K.Ram Reddy (supra) and the circular instructions issued by the Commissioner for Transport, and as per the directions of the Court release of the vehicles. However, learned Government Pleader would urge that under the guise of interim orders, owners have got the vehicles released on paying the penalty but have not surrendered the driving licences of drivers of the offending vehicles and since driving licences were not surrendered, no further action could be taken against the driver of offending vehicle. He would further submit that the owners are indulging in repeated offences but pay the same penalty whenever they are searched and vehicle is seized.

9. Learned Government Pleader emphasized that levying of penalty as prescribed in Section 194 of the Act can only be when such an offence is committed initially, but cannot be made applicable for repeated offences and there should be stringent action whenever there are repeated offences. Having regard to the increase in rate of accidents resulting in human loss, learned Government Pleader endeavoured the Court to view the offences as grave and would urge that mere payment of penalty as stipulated in Section 194 is not sufficient, more particularly on vehicles involved in repeated offences. He would submit that unless stringent measures are enforced and implemented, road accidents cannot be reduced. Learned Government Pleader placed reliance on the judgments rendered by this Court and judgments of Supreme

Court, directions issued by the Monitoring Committee appointed by the Supreme Court, and the guidelines formulated.

10. The following issues require consideration in these writ petitions :

(1) Whether petitioners can institute writ petitions directly without availing remedy provided under the Act, 1988?

(2) Whether owner of motor vehicle can seek release of the vehicle on payment of penalties prescribed in Section 194 even before prosecution is launched and no orders compounding the offence are made under Section 200 of the Act, 1988 ?

(3) Whether motor vehicles involved in repeated offences require to be subjected to more rigorous penalties ?

11. The issues for consideration revolves on right of individual vehicle owner to use his vehicle as per his convenience verses the right to life of millions of road users.

12. The observations and enunciation of law by Supreme Court throw enough light on the crux of the issue, in Paramjit Bhasin v. Union of India (2005) 12 SCC 642,) Supreme Court looked into the reason behind establishing permissible weights and the extent to which the offences of overloading can be compounded by the State Government, when notifications issued by various State Governments condoning offences under Section 113 and 114 of the Act as allowed under Section 200 of the Act were challenged; and held as follows:

"5. Section 200 does not in any way authorise the State Government to permit the excess weight to be carried when on various inspections/detections it is noticed that there is carriage of load beyond the permissible limit. It only gives an opportunity of compounding so that instead of the amounts fixed, lesser amounts can be accepted by the authorised officers. The intention of uploading the excess weight is apparent from a bare reading of Section 194(1). The liability to pay charge for uploading of the excess load is fixed on one who drives a vehicle or causes a motor vehicle to be driven in contravention of the provisions of Sections 113, 114 and 115. It is to be noted that compounding can be done either before or after the institution of the prosecution in respect of the enumerated offences. Any notification which runs counter to the clear import of Section 194 has no validity. As rightly submitted by learned counsel for the petitioners after compounding the excess load, same cannot be permitted to be carried in the vehicle concerned. Such carriage would amount to infraction of Section 113 of the Act. The object for which the maximum permissible weights have been fixed is crystal-clear. On a perusal of the provisions it is clear that the maximum gross weight (in short "GVB") of the trucks is 16.2 tonnes which enables loading of about 9 tonnes. The load rating is primarily based on the road design and specifications of Indian roads. Rule 95(2) of the Central Motor Vehicles Rules, 1989 (in short "the Central Rules") prescribes the principles which cover the fixation of GVB of the vehicles. The same reads as follows:

"95. (2) The maximum gross vehicle weight and the maximum safe axle weight of each axle of a vehicle shall, having regard to the

size, nature and number of tyres and maximum weight permitted to be carried by the tyres as per sub-rule (1), be—

(i) vehicle rating of the gross vehicle weight and axle weight respectively as duly certified by the testing agencies for compliance with Rule 126, or

(ii) the maximum vehicle weight and maximum safe axle weight of each vehicle respectively as notified by the Central Government, or

(iii) the maximum total load permitted to be carried by the tyre as specified in sub-rule (1) for the size and the number of the tyres fitted on the axle(s) of the vehicle,

whichever is less:

Provided that the maximum gross vehicle weight in respect of all vehicles, including multi-axle vehicles shall not be more than the sum total of all the maximum safe axle weights put together."

11. It is to be noted that the constitutional validity of Sections 194 and 200 was challenged. It was noted in P. RatnakarRao v. Govt. of A.P. [(1996) 5 SCC 359] that the discretion given under Section 200(1) to the State Government to prescribe the maximum rates for compounding the offence is not unguided, uncanalised and arbitrary. It was, inter alia, held as follows: (SCC p. 361, para 4)

"4. The contention raised before the High Court and repeated before us by Shri Rajeev Dhavan, the learned Senior Counsel for the petitioners is that the discretion given in Section 200(1) of the Act is unguided, uncanalised and arbitrary. Until an accused is convicted under Section 194, the right to levy penalty thereunder would not arise. When discretion is given to the court for compounding of the offence for the amount mentioned under Section 200, it cannot be stratified by specified amount. It would, therefore, be clear that the exercise of power to prescribe maximum rates for compounding the offence is illegal, arbitrary and violative of Article 14 of the Constitution. We find no force in the contention. For violation of Sections 113 to 115, Section 194 accords penal sanction and on conviction for violation thereof, the section sanctions punishment with fine as has been enumerated hereinbefore. The section would give guidance to the State Government as a delegate under the statute to specify the amount for compounding the offences enumerated under sub-section (1) of Section 200. It is not mandatory that the authorised officer would always compound the offence. It is conditional upon the willingness of the accused to have the offences compounded. It may also be done before the institution of the prosecution case. In the event of the petitioner's willing to have the offence compounded, the authorised officer gets jurisdiction and authority to compound the offence and call upon the accused to pay the same. On compliance thereof, the proceedings, if already instituted, would be closed or no further proceedings shall be initiated. It is a matter of volition or willingness on the part of the accused either to accept compounding of the offence or to face the prosecution in the appropriate court. As regards canalisation and prescription of the amount of fine for the offences committed, Section 194, the penal and charging section

prescribes the maximum outer limit within which the compounding fee would be prescribed. The discretion exercised by the delegated legislation i.e. the executive is controlled by the specification in the Act. It is not necessary that Section 200 itself should contain the details in that behalf. So long as the compounding fee does not exceed the fine prescribed by the penal section, the same cannot be declared to be either exorbitant or irrational or bereft of guidance."

12. It is indisputable that the power of compounding vests with the State Government, but the notification issued in that regard cannot authorise continuation of the offence which is permitted to be compounded by payments of the amounts fixed. If permitted to be continued, it would amount to fresh commission of the offence for which the compounding was done. The State Governments, which have not yet withdrawn the notifications, shall do it forthwith. So far as the practical difficulties highlighted are concerned, it is for the State Governments concerned to make necessary arrangements to ensure that the difficulties highlighted can be suitably remedied by the State Government themselves without in any way overstepping the statutory prescriptions."

(Emphasis supplied)

13. Going a step further, the Supreme Court took cognizance of the rising number of road accidents through a Working Group's report and the Petitioners plea by a three-member Bench in

S. Rajaseekaran v. Union of India (2014) 6 SCC 36, established a mechanism for implementation and enforcement. The order reads as under:

"14.3. An amendment to the Act to provide enhanced penalties for different offences has been passed by the Upper House on 8-5-2012 and the Bill is presently pending before the LokSabha. So far as overloading of vehicles, a major cause of road accidents, is concerned, according to the Union, the enforcement of the law in this regard is the responsibility of the State Governments. 27 States, according to Respondent 1, have taken necessary action for enforcement of the provisions of Section 114 of the Act…" (Excerpt of detailed counter-affidavit filed by Respondent 1, the Road Transport and Highways Ministry, regarding the steps taken to combat high number of road accidents).

19. Finally, in its counter-affidavit, the Ministry (MoRTH) has stated that the enforcement of the core provisions of the Act comes within the purview of the States/ Union Territories and though the first respondent has been impressing upon all States/Union Territories for strict enforcement of the provisions of the Act by issuing advisories from time to time, eventually, it is up to the States to respond appropriately in the matter."

14. While categorizing various offences under the Act for the purposes of identifying them for enforcement, the Supreme Court also, in this judgment, ordered the Central Government to form a Monitoring Committee with members as stated in the order. All State Governments were directed to continue the 4 dimensional approach as established by the Central Government and to report to the Monitoring Committee within

three months on the status of implementation of all the existing laws covering the aforementioned categories. The Monitoring Committee in turn was directed to undertake a detailed scrutiny of the reports submitted from State Governments and then within three months report to the Supreme Court expressing its views and highlighting deficiencies on the part of any of the stakeholders.

15. On 18th August 2015, the Supreme Court Committee on Road Safety issued directions to the States/U.T.'s to implement road safety laws. Following are brief excerpt of its findings:

15.1. The Committee constituted by the Supreme Court of India to monitor and measure implementation of road safety laws in the country has had detailed discussions with the concerned Central Ministries and all the States/U.T.'s on the trend of road accidents and fatalities. The data furnished by them has clearly established that the number of fatalities in India continues to be very high, causing serious emotional trauma and economic loss to the families of the deceased and society. The compensation awarded to the victims by the Insurance Companies also runs into hundreds of crores of rupees every year.

15.2. It appears the Committee issued directions to the States/U.T.'s to establish institutional arrangements to promote road safety, undertake engineering measures to make roads safe, tighten enforcement together with promoting road safety education and establishing adequate trauma care facilities, and the Committee has been closely monitoring the action being taken by the States/U.T.'s. even though a number of measures have been taken by the States/ U.T.'s as directed by the Committee, the Committee on the basis of detailed analysis of traffic accidents and fatalities has come to the conclusion that unless strong and urgent measures are taken to deal with over speeding, drunken driving, red light jumping, violation of helmet laws and seat belt laws, and use of mobile phones while driving, and overloading, the number of accidents and fatalities will continue to remain high.

15.3. The Committee, directed the States/ U.T.'s and their concerned departments to take the following action forthwith: suspension of the license for a period of not less than 3 months under Section 19 of the Motor Vehicles Act, 1988 read with Rule 21 of the Central Motor Vehicle Rules, 1989 for:

i. Driving at a speed exceeding the specified limit which in the Committee's view would also include red light jumping;

ii. Carrying overload in goods carriages and carrying persons in goods carriages;

iii. Driving vehicles under the influence of drinks and drugs;

iv. Using mobile phone while driving a vehicle….

16. The Supreme Court Committee on Road Safety had convened a meeting on 2nd November, 2015 with the Government of Telangana to discuss and review the status of implementation by the State Govt. of the directions issued by the Committee vide its letter dated 8th July, 2015 and also the

Road Safety Action Plan. The further deliberations are not placed on record.

17. It is no more a lurking danger, but a reality of how overloading of vehicles causes havoc on the roads. When the load is more than permissible limit, driver cannot have control on the vehicle movement. The chassis of the vehicle and axle and wheels may not sustain the pressure. In addition, poor upkeep may compound the problem and result in fatal accidents. It also damages the road and cause pollution. For the greediness of owners of the vehicles to earn few rupees more, lives of millions are jeopardized. In spite of concern expressed by NGOs and by the Hon'ble Supreme Court on increase in road accidents, mostly caused due to negligence of driver and owner and cause for many fatal accidents being the motor vehicles plying on public roads carrying excess load, no serious effort is made to penalize the offenders. It cannot be said that the competent authority is without power to penalize the owner of the vehicle and the driver which results in repeated offences. Statistics placed on record and even otherwise, clearly demonstrate that the cause for major road accidents is overload of vehicles plying on the roads.

17.1. India ranks first in the world for road accidents. A major contributor to these accidents is motor vehicles plying on the public roads with excess load. As statistics noted by Hon'ble Supreme Court in S. Rajaseekaran in the decision dated 22.4.2014 illustrates by 2006 fatal accidents in India crossed one lakh and after 11 years the figures stand at 1,47,913 fatal road accidents as of 2017 (Based on Ministry of Road Transport & Highways reply on 11thJuly, 2019, to a question raised in the LokSabha on number of road accidents in India). The accidents reported are far less as compared to accidents that actually happen on the roads. The cases booked are also far few and are only a sample of actual number of vehicles with overload, plying on the roads. The factum of overload is not confined to such vehicles but also has more serious consequences as most of the vehicles plying on the road are very old and badly maintained. The owners intend to squeeze every ounce of the vehicle before it succumbs.

17.2 Whenever an overloaded vehicle travels on the road there is a lurking danger of accidents. By seizing the vehicle that danger is avoided for the time being. Thus, it is not a simple case of overloading but a serious issue of averting a grave fatal accident.

17.3. In this context it is appropriate to note the observations of Supreme Court in S.Rajaseekaran (cited supra).

23. An accident is an incident that happens unexpectedly and unintentionally. It is occasioned either by human failure or human negligence. Viewed from the above perspective and also thorough hindsight, every road accident is an avoidable happening. The history of humankind has been one of conquests over the inevitable. The resignation to fate has never been the accepted philosophy of human life. Challenges have to be met to make human life more meaningful. This is how the constitutional philosophy behind Article 21 has been evolved by the Indian courts over

a long period of time. It is this process of development and the absence of significant and meaningful results from the governmental action till date that impels us to delve into the realms of the issues highlighted by DrRajaseekaran in the present writ petition under Article 32 of the Constitution.

18. There are two enactments made by the Indian Parliament which have bearing on the issues, the Motor Vehicles Act, 1988 (Act, 1988) and the Prevention of Damage to Public Property Act, 1984 (Act 3 of 1984).

i) Sections 19, 113, 114, 194, 200 and 207 of the Motor Vehicles Act, 1988, to the extent relevant read as under :

"S.19. Power of licensing authority to disqualify from holding a driving licence or revoke such licence.—(1) If a licensing authority is satisfied, after giving the holder of a driving licence an opportunity of being heard, that he—

(d) has by his previous conduct as driver of a motor vehicle shown that his driving is likely to be attended with danger to the public; or

…

(f) has committed any such act which is likely to cause nuisance or danger to the public, as may be prescribed by the Central Government, having regard to the objects of this Act; or……..

(2) Where an order under sub-section (1) is made, the holder of a driving licence shall forthwith surrender his driving licence to the licensing authority making the order, if the driving licence has not already been surrendered, and the licensing authority shall,—

(a) if the driving licence is a driving licence issued under this Act, keep it until the disqualification has expired or has been removed; or

(b) if it is not a driving licence issued under this Act, endorse the disqualification upon it and send it to the licensing authority by which it was issued; or

(c) in the case of revocation of any licence, endorse the revocation upon it and if it is not the authority which issued the same, intimate the fact of revocation to the authority which issued that licence: Provided that where the driving licence of a person authorises him to drive more than one class or description of motor vehicles and the order, made under sub-section (1), disqualifies him from driving any specified class or description of motor vehicles, the licensing authority shall endorse the disqualification upon the driving licence and return the same to the holder.

(3) Any person aggrieved by an order made by a licensing authority under sub-section (1) may, within thirty days of the receipt of the order, appeal to the prescribed authority, and such appellate authority shall give notice to the licensing authority and hear either party if so required by that party and may pass such order as it thinks fit and an order passed by any such appellate authority shall be final.

(Emphasis supplied)

S.113. Limits of weight and limitations on use -

(1) The State Government may prescribe the conditions for the issue of permits for 1[transport vehicles] by the State or Regional Transport Authority and may prohibit or restrict the use of such vehicles in any area or route.

(2) Except as may be otherwise prescribed, no person shall drive or cause or allow to be driven in any public place any motor vehicle which is not fitted with pneumatic tyres.

(3) No person shall drive or cause or allow to be driven in any public place any motor vehicle or trailer-

(a) the unladen weight of which exceeds the unladen weight specified in the certificate of registration of the vehicle, or

(b) the laden weight of which exceeds the gross vehicle weight specified in the certificate of registration.

(4) Where the driver or person in charge of a motor vehicle or trailer driven in contravention of sub-section (2) or clause (a) of sub-section (3) is not the owner, a Court may presume that the offence was committed with the knowledge of or under the orders of the owner of the motor vehicle or trailer.

S.114. Power to have vehicle weighed -

(1) 2 [Any officer of the Motor Vehicles Department authorised in this behalf by the State Government shall, if he has reason to believe that a goods vehicle or trailer is being used in contravention of section 113] require the driver to convey to a weighing device, if any, within a distance of ten kilometers from any point on the forward route or within a distance of twenty kilometers from any point on the forward route or within a distance of twenty kilometers from the destination of the vehicle for weighment; and if on such weighment the vehicle is found to contravene in any respect the provisions of section 113 regarding weight, he may, by order in writing, direct the driver to off-load the excess weight at his own risk and not to remove the vehicle or trailer from that place until the laden weight has been reduced or the vehicle or trailer has otherwise been dealt with so that it complies with section 113 and on receipt of such notice, the driver shall comply with such directions.

(2) Where the person authorised under sub-section (1) makes the said order in writing, he shall also endorse the relevant details of the overloading on the goods carriage permit and also intimate the fact of such endorsement to the authority which issued that permit S.194 . Driving vehicle exceeding permissible weight:

(1) whoever drives a motor vehicle or causes or allows a motor vehicle to be driven in contravention of the provisions of Section 113 or Section 114 shall be punishable with minimum fine of two thousand rupees and an additional amount of one thousand rupees per tonne of excess load, together with the liability to pay charges for off-loading of the excess load.

(2) Any driver of a vehicle who refuses to stop and submit his vehicle to weighing after being directed to do so by an officer authorized in this behalf under Section 114 or removes or causes the removal of the load or part of it prior to weighing shall be punishable with fine which may extend to three thousand rupees.

S. 200. Composition of certain offences-

(1) Any offence whether committed before or after the commencement of this Act punishable under section 177, section 178, section 179, section 180, section 181, section 182, sub-section (1) or sub-section (2) of section 183, section 184, section 186, 1[section 189, sub-section (2) of section 190], section 191, section 192, section 194, section 196 or section 198, may either before or after the institution of the prosecution, be compounded by such officers or authorities and for such amount as the State Government may, by notification in the Official Gazette, specify in this behalf.

(2) Where an offence has been compounded under sub-section (1) the offender, if in custody, shall be discharged and no further proceedings shall be taken against him in respect of such offence.

S. 207. Power to detain vehicles used without certificate of registration permit, etc.—(1) Any police officer or other person authorised in this behalf by the State Government may, if he has reason to believe that a motor vehicle has been or is being used in contravention of the provisions of Section 3 or Section 4 or Section 39 or without the permit required by sub-section (1) of Section 66 or in contravention of any condition of such permit relating to the route on which or the area in which or the purpose for which the vehicle may be used, seize and detain the vehicle, in the prescribed manner and for this purpose take or cause to be taken any steps he may consider proper for the temporary safe custody of the vehicle:

Provided that where any such officer or person has reason to believe that a motor vehicle has been or is being used in contravention of Section 3 or Section 4 or without the permit required by sub-section (1) of Section 66 he may, instead of seizing the vehicle, seize the certificate of registration of the vehicle and shall issue an acknowledgment in respect thereof

(2) Where a motor vehicle has been seized and detained under sub-section (1), the owner or person in charge of the motor vehicle may apply to the transport authority or any officer authorised in this behalf by the State Government together with the relevant documents for the release of the vehicle and such authority or officer may, after verification of such documents, by order release the vehicle subject to such conditions as the authority or officer may deem fit to impose."

ii) Rule 21 of Central Motor Vehicles Rules, 1989.

Rule 21. Powers of licensing authority to disqualify.—

For the purpose of clause (f) of sub-section (1) of Section 19, the commission of the following acts by holder of a driving licence shall constitute nuisance or danger to the

public, namely:—

……Carrying persons in goods carriage, either inside the driver's cabin in excess of its capacity or on the vehicle, whether for hire or not…….

iii) Rules 448, 448-A and 448-B of T.S. Motor Vehicles Rules, 1989:

Rule 448. Powers to detain vehicles :- Officer of the Transport Department not below the rank of Assistant Motor Vehicles Inspector and every Police Officer not below the rank of Circle Inspector of Police are authorised to exercise powers under Section 207.

Rule 448-A. Procedure of seizing and detaining a Motor Vehicle :- When a motor vehicle is seized and detained by any officer referred to Rule in 448, he shall take the following steps :-

(i) arrangements shall be made for temporary safe custody of the motor vehicle in the nearest Police Station or at any appropriate place ;

(ii) the fact of seizure and detention shall be informed without delay to the Secretary, Regional Transport Authority of the region and the Secretary, Regional Transport Authority of the region to which the motor vehicle belongs ;

(iii) the officer who seized and detained the motor vehicle may release the vehicle of the offence for which it is seized and detained are compounded under Section 200 under intimation to the Secretaries of Regional Transport Authorities mentioned in Clause (ii) ;

(iv) where prosecution of the driver or owner or both is necessary, charge sheets against them shall be filed before the concerned Magistrate within three days from the date of seizure and the motor vehicle shall be released by the Officer who detained it after the prosecution is completed under intimation to Secretaries of Regional Transport Authorities mentioned in Clause (iii) ;

(v) Mahazor of the vehicles is to be carried out notifying its condition of each tyre fitted and parts which are easily removable, replaceable and tamperable, viz., batteries, fuel-pump, Dynamo, Deferential, engine, extra lights etc. and loose parts, Stepney tyres and tools and a copy of it is to be delivered to the person from whom it is seized, duly signed.

Rule. 448-B. Release of seized and detained vehicles :- (1) An application for release of a vehicle seized and detained under sub-section (1) of Section 207 shall be in the form of a memorandum in duplicate with relevant documents duly enclosing a fee of rupees twenty five.

(2) The Secretary, Regional Transport Authority, of the Region shall be entertain application for release of vehicles sized and detained by his subordinate officers :

Provided that application shall be made to the Deputy Transport Commissioner in the case of check made by the Secretary, Regional Transport Authority in the cadre of Regional Transport Officer and the Transport Commissioner, if the Secretary,

Regional Transport Authority is of the Deputy Transport Commissioner or Joint Transport Commissioner.]"

19. Section 113 of the Act, 1988 vests discretion in the State Government to prescribe the conditions for issue of permits. According to sub-section (3) of Section 113, no person is authorized to drive or allow the motor vehicle to be driven in any public place when unladen weight exceeds unladen weight specified in the Certificate of Registration of the Vehicle or the laden weight of the vehicle exceeds the gross vehicle weight. Section 114 of the Act, 1988 vests power in the competent authority to order weighing of the vehicle if that authority has reason to believe that a goods vehicle or trailer is being used in contravention of provisions of Section 113 of the Act, 1988.

20. The offending vehicle owner and driver are liable for prosecution under Section 194. S.194 prescribes punishment of minimum of fine of Rs. 2000/- and an additional amount of Rs. 1000/- per tonne of excess load, together with the liability to pay charges for off-loading of the excess load. In other words, under this provision, 1) the driver/ occupier of the vehicle has to pay fine of minimum of Rs. 2000/-, 2) Rs. 1000/- per tonne of excess load and 3) charges for off-loading of the excess load.

21. Section 19 of the Act, vests power in the licensing authority to disqualify driver from holding a driving licence or refuse to renew the driving licence on various offences committed by him mentioned in sub-section (1) of Section 19. One of the offences mentioned in clause (f) is committing any such act, which is likely to cause nuisance or danger to the public, as prescribed by the Central Government, having regard to the objects of the Act. Carrying excess load than permissible is certainly dangerous to the public and, therefore, under this provision driving licence of the driver of vehicle found to have violated the provisions of Sections 113 and 114 is liable for suspension for a specified period and in a given case to revoke the driving licence. Section 207 of the Act, 1988 vests power to detain the vehicle whenever the vehicle is found to have violated the provisions of the Act. Sub-section (2) thereof provides for redressal mechanism against seizure of the vehicle.

22. Two aspects are required for a transport vehicle to ply on the road. Firstly, registration of the vehicle and secondly permit to transport. Chapter IV deals with Registration of Motor Vehicles. In this chapter, Sections 39, 58 and 59 are crucial provisions. Under Section 39 registration of a vehicle is mandatory before it is driven in public place. Section 58 deals with transport vehicles other than motor cabs. It has two parts. Sub-Section 1 vests power in the Central Government to specify maximum gross vehicle weight and maximum safe axle weight of each axle of such vehicle. Sub-Section 2 requires the registration authority to enter in the certificate of registration of the vehicle particularly (a) Unladen weight; (b) number, nature and size of tyres attached to each wheel; (c) the gross vehicle weight and the registered axle weight pertaining to several axles, thereof; and (d) if vehicle is used/adopted to use for carriage of passengers solely and in addition to goods, and the number of passengers for whom accommodation is provided. Section 59 vests power in the Central government to

specify life of a motor vehicle.

23. Chapter V deals with control of transport vehicles. Section 77 enables a person to apply for goods transport permit. In the application he has to specify the area and the route /routes, the type and capacity of the vehicle. There are other similar provisions dealing with stage carriage, contract carriage, private service vehicle, motor cabs etc. Section 79 vests power to grant goods carriage permit. While granting permit, the competent authority shall specify the conditions of permit. Among other terms of permit, significant conditions are area/route/routes [79 (2)(i)]; the gross vehicle weight; the conditions of permit cannot be departed without the approval of Regional Transport Authority. Section 84 requires vehicle to comply general conditions attaching to all permits. Significant conditions are valid certificate of fitness; not to exceed permissible speed limit; hours of work of drivers.

24. Chapter VIII deals with control of traffic. Section 112 deals with limits of speed. Section 113 on limits of weight and limitations on use. Section 113 (1) vests power in state government to prescribe conditions for issue of permits for transport vehicles, including area and route. Sub-Section (3) mandates driver and owner and any other person-in-use of the vehicle not to drive the vehicle in public place if it exceeds the unladen weight, specified in the certificate and the laden weight exceeds the gross vehicle weight specified in the certificate. Sub Section (4) pre-supposes knowledge of the owner of the vehicle on committing such offence. Section 114 vests power in the inspecting officer to subject a vehicle allegedly carrying excess load to weigh the vehicle. Section 115 vests power in the State Government to impose restrictions on road use.

25. The above provisions mandate a vehicle owner to comply and obtain registration and permit to use the vehicle on public road. Use the vehicle in strict compliance of terms of registration and permit and other general conditions.

26. The Act also envisages enforcement mechanism. Chapter XIII deals with offences, punishments for violation of various clauses of the Act and procedures thereon. Sections 194, 200 and 207 are part of this chapter.
27. Section 194 is a penal provision. It prescribes punishment for violating the provisions of Sections 113, 114 and 115.

28. As seen from the scheme of the Act in the earlier paragraphs, any goods transport vehicle is entitled to ply on the roads and transport goods, in accordance with the terms of registration of the vehicle and permit granted. Certificate of registration specifies the unladen weight of the vehicle while granting permit to transport goods. The permit also specifies the weight it can carry, route where it can operate and the period of validity. Goods transport vehicles cannot operate the vehicle contrary to registration and permit conditions. If a person is found carrying excess load/ plying on a route not permitted, it would be amounting to violating the terms of Registration and permit granted and would be liable for seizure and launching of prosecution.

29. Power to seize is traceable to Section 207. Section 207 of the Act, 1988 vests

power in the Police Officer or other person as authorised by the State Government to seize the vehicle if he has reason to believe that the same has been or is being used in contravention of the provisions of Sections 3 (driving licence) or Section 4 (Age limit to secure driving licence) or Section 39 (necessity for registration) or without the permit required by Sub Section 1 of Section 66 (necessity for permits) or any contravention of any of the conditions of such permit relating to the route on which or the area in which or the purpose for which the vehicle may be used. One of the grounds for detention of goods vehicle is violation of condition of permit. A goods transport vehicle requires registration under Section 39 and permit under Section 66. Section 113 has to be read in consonance with Chapter V and it only compliments explicitly what is obvious from various provisions of Chapter V.

30. Seizure is based on prima facie assessment of violation of the Act. On seizure of vehicle, proceedings would be launched against the driver and/or owner of the vehicle. In such proceedings if it is proved that the person has violated the provisions of the Act, punishment/s as mentioned in Section 194 may be imposed. The competent authority can also suspend/ cancel the driving license of the driver/ permit/ registration of the vehicle.

31. Section 200 vests discretion in competent authority to compound the offence even after prosecution was launched.

32. From a cumulative reading of various provisions of the Act, it is apparent, seizure of vehicle, launching prosecution and imposing penalties are not routine matters but are part of the statutory scheme to enforce safety on roads and to discipline erring owners and/or drivers of the vehicles.

33. While considering the scope of these provisions it is also necessary to telescope into 'The Prevention of Damage to Public Property Act 1984 (Act 3/1984)'.

34. Sections 2(a) & (b) and 3 of the Prevention of Damage to Public Property Act 1984 (Act 3/1984) read as under :

"2. Definitions.- In this Act, unless the context otherwise requires,-

a. "mischief" shall have the same meaning as in section 425 of the Indian Penal Code (45 of 1860);

b. "public property" means any property, whether immovable or movable (including put any machinery) which is owned by, or in the possession of, or under the control of –

i. the Central Government; or

ii. any State Government; or

iii. any local authority; or

iv. any corporation established by, or under, a Central, Provincial or State Act or

v. any company as defined in section 617 of the Companies Act, 1956 (1 of 1956); or

vi. any institution, concern or undertaking which the Central Government may, by notification in the Official Gazette, specify in this behalf :

Provided that the Central Government shall not specify, any institution, concern or undertaking under this sub-clause unless such institution, concern or undertaking is financed wholly or substantially by funds provided directly or indirectly by the Central Government or by one or more State Governments, or partly by the Central Government and partly by one or more State Governments.

3. Mischief causing damage to public property. –
(1) Whoever commits mischief by doing any act in respect of any public property, other than public property of the nature referred to in sub-section (2), shall be punished with imprisonment for a term which may extend to five years and with fine.

(2) Whoever commits mischief by doing any act in respect of any public property being –

a. any building, installation or other property used in connection with the production, distribution or supply of water, light, power or energy ;

b. any oil installation;

c. any sewage work;

d. any mine or factory;

e. any means of public transportation or of tele-communications, or any building, installation or other property used in connection therewith shall be punished with rigorous imprisonment for a term which shall not be less than six months, but which may extend to five years and with fine:

Provided that the court may, for reasons to be recorded in its judgment, award a sentence of imprisonment for a term of less than six months."

35. Section 425 of IPC defines 'mischief'. It reads as under:

"S.425. Mischief – whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits 'Mischief'.

Explanation-I. it is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation-2. Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others, jointly."

36. According to Section 3, whenever a person commits mischief by doing any act in respect of any public property he is liable to be punished with imprisonment for a term which may extend to five years and with fine. According to sub-section (2), prevention of damage to public property

would also mean, any means of public transportation, or other property use in connection therewith and such violation is liable for rigorous imprisonment for a term which should be not less than six months, but may extend to five years and with fine. Clause (b) of Section (2) defines 'public property'. According to this definition, public property includes movable or immovable, owned by or in possession, or under the control of the Central Government, State Government, local authority or Corporation established by the State, or any Government as defined by the Companies Act or any institution concern or undertaking of the Central Government or State Government, so on. The roads are under the control of Central Government or State Government or special purpose vehicle or the National Highways Authority. Therefore, the public roads are public property as defined in Section 2(b) of the Act, 1988. According to Section 2(a) of the Act, 1984, 'mischief' shall have the same meaning as defined in Section 425 of the Indian Penal Code.

37. From a cumulative reading of the provisions of the Act 3/1984 and Section 425 of IPC, it is apparent that a person knowingly causing damage to the public road is also liable to be proceeded against and be imposed with punishment.

38. It is important to note here that in S.Rajaseekaran, the Supreme Court recorded the recommendations of working Group. To the extent relevant para 5 reads as under :

5 ...After a detailed study the Working Group has recommended, in the main, the following measures for road safety:

(b) Overloading of commercial vehicles should be prosecuted under the Damage to Public Property Act. Liability should be imposed on the transporter, consignor and consignee.

39. In Paramjit Bhasin (cited supra), Supreme Court took judicial note of stand of Union of India. On damage to road surface and the decisions taken in the 30th meeting of Transport Development Council and recorded in its order as under:

"7. It is apparent from the reply filed by the Union of India that overloading causes significant damage to the road surface and also cause pollution through auto-emissions. Even overloaded vehicles are safety hazards not only for themselves, but also for other road users. It is pointed out that since the responsibility of enforcing of the provisions of the Act and the Central Rules is that of the State Government they have been advised by the Central Government to scrupulously enforce the provisions of the Act and the Central Rules. It appears that the matter was discussed at the 30th meeting of the Transport Development Council where the following decisions were taken:

"(i) Strict enforcement of the provisions relating to overloading under the Motor Vehicles Act, 1988 and the Central Motor Vehicles Rules, 1989.

(ii) The State Governments are not to issue special cards/passes which legalise overloading.

(iii)-(iv)***

(v) Non-renewal of registration and denial of permit to habitual offenders of overloading.

A copy of the minutes of the TDC meeting is placed as Annexure R-5."

40. In spite of recommendation of working group extracted above and Supreme Court taking judicial note of the recommendations of working group and decision of Transport Development Council, the respondent have not invoked Act 3 of 1984. They appear to be blissfully ignorant of the said enactment. The roads are formed depending on the velocity of the traffic, including passenger vehicles and goods transport vehicles. The roads require regular maintenance also, and while planning formation of roads and its maintenance, the authorities assess the traffic on the roads based on the vehicular movement and the vehicles that are entitled to carry load. Each category of transport vehicle has fixed carriage capacity and the same is also recorded in the licence/permit granted to such vehicle. So while assessing the road capacity, these parameters are taken note of. Whenever a transport vehicle which has permissible load carriage capacity specified in its licence/permit carries excess load, it will certainly cause damage to the road, in addition to danger to the public using the road and the impact on environment. A vehicle carrying load beyond its permissible limit requires higher energy to pull and can cause emission of pollutants. Therefore, the provisions of the Act (3) of 1984 are attracted whenever owner and/or the driver of the vehicle indulges in carrying excess load on the public road.

41. The Act of 1988 and Act, 1984 complement each other and not in derogation. There is no overlapping. They intend to sub-serve larger public interest. A cumulative reading of these two enactments make it clear that owner and the driver of the motor vehicle carrying excess load on public road is not only liable for prosecution under the Act, 1988 but also liable for prosecution and stringent punishment prescribed under the Act 3 of 1984. These are deterrent provisions and require strict enforcement. Their compliance/ enforcement is in larger public interest.

42. In addition, such vehicles have to be driven by qualified driver having that class of subsisting driving licence and the vehicle fitness is maintained by the owner. These and other provisions emphasize road worthiness of the transport vehicle to transport goods or persons and both.

43. Penalties prescribed in Section 194 can be imposed only if person is found guilty of violating Section 113. However, even before launching prosecution or before prosecution proceedings are concluded, offending vehicle owner/ driver can plead guilty and seek to compound the punishment. Such power to compound is traceable to Section 200.

44. If the Police officer/ designated authority, prima facie is of the opinion that the goods vehicle was carrying excess load, he can seize and detain the vehicle. Rules made under the Act prescribe formalities required to be observed at the time of seizure. Authority seizing the motor vehicle may release the vehicle on the spot, if according to that authority, the vehicle has contravened Section 3 (Driver does not have a valid

driving license)/Section 4 (Driver driving is not meeting the age parameters/Section 66 (1) (vehicle does not have permit and by seizing the certificate of registration of the vehicle). Except in these three contingencies, such authority is not competent to release the vehicle. On seizure of the vehicle, the officer has to initiate proceedings for prosecution. One other contingency when such officer can release the offending motor vehicle is when the owner of the vehicle pleads guilty and prays to compound the offence. Otherwise, he is not competent to collect the penalty and release the vehicle. After vehicle is seized and detained, only the Secretary, Regional Transport Authority or Officer authorized by the State Government is competent to release the vehicle on an application made by the owner or person incharge of the vehicle as prescribed by Section 207 (2) of the Act, 1988.

45. These writ petitions are instituted straight away even before prosecution was launched and without applying to the designated authority under sub section 2 of Section 207 for release of the vehicle. By virtue of the interim orders passed by this Court, the vehicles are released straightaway even before prosecution was launched by accepting the fine stipulated by the Court by mechanically referring to the penalties that can be imposed under Section 194.

46. In this context, there are two aspects that require consideration. Firstly, availing remedy provided by Section 207 (2) to seek release of the offending vehicle; and secondly, can the Court usurp power of statutory authority and by-pass statutory scheme.

47. Learned counsel for petitioners placed heavy reliance on K.Ram Reddy in support of their contention that writ petitions are maintainable without availing remedy under the Act, 1988 and that order to release is sustainable in exercise of extraordinary writ jurisdiction as detention of vehicle would lead to wear and tear, loss of fitness and possibilities of the material losing its value as well as security to such material.

48. The issue of availing remedy under Section 207 (2) was considered by the learned single Judge of this Court in M. Venkateswara Rao and others Vs. Secretary, R.T.A. Warangal and others (2000 (1) ALT 170). By placing reliance on opinion expressed by two Division Benches in Deputy Commissioner (prohibition and Excise, Karimnagar Vs Shobalal (1996 (1) ALT 915) (which was under Excise Act) and in W.P.No.14331 of 1999 and a single judge in A.Raghunandan Vs Assistant Secretary, Gudi Malkapur, Hyderabad (1998 (6) ALD 340) on need to avail statutory remedies before invoking jurisdiction of this Court under Article 226 held that writ petitions are not maintainable and relegated parties to avail remedies under Section 207 (2). Learned Single Judge held as under:

"18. At any rate, it is not possible for this Court to express any opinion whatsoever on the merits of each of the cases, as the same is required to be enquired into by the competent authority.

19. It is also conceded at the Bar that the competent authority has the jurisdiction to pass an appropriate order directing the release of the vehicle in exercise of

jurisdiction under Section 207(2) of the Act. In fact, in the counter-affidavit itself, it is stated that the competent authority is willing to consider the release of the vehicle provided an application is filed under Section 207(2) of the Act. Learned Government Pleader submits that in every case, the competent authority is willing to consider the release of the vehicle provided an application is made under Section 207(2) of the Act.

20. In such view of the matter, I am of the considered opinion that it may not be appropriate to issue Writ of Mandamus compelling the respondents to release the vehicles whenever they are seized subject to such uniform conditions. The aggrieved persons have to necessarily go before the competent authority and ask for release of the vehicle. The application is required to be filed under Section 207(2) of the Act read with the A.P.M.V. Rules, 1989. Rule 448-A prescribes the procedure for seizing and detaining a Motor Vehicle. Rule 448-B says that an application for release of a vehicle seized and detained under sub-section (1) of Section 207 shall be in the form of a memorandum in duplicate with relevant documents duly enclosing a fee of rupees twenty-five. Sub-rule (2) of Rule 448-B says that the Secretary, Regional Transport Authority, of the Region shall entertain application for release of vehicles seized and detailed by his subordinate officers provided that an application shall be made to the Deputy Transport Commissioner in the case of check made by the Secretary, Regional Transport Authority in the cadre of Regional Transport Officer and the Transport Commissioner, if the Secretary, Regional Transport Authority is of the cadre of Deputy Transport Commissioner or Joint Transport Commissioner. Thus it is clear that an application for release of a vehicle seized and detained shall have to be made in accordance with the Rules. In some cases, it is brought to the notice of the Court that oral applications filed by them are not entertained by the authorities. In some other matters, applications are filed but without payment of any fee. Such a course is not permissible."

21. Having regard to all the facts and circumstances of the case and in the light of various orders passed by this Court and the decisions referred to hereinabove, I am of the considered opinion that a Writ of Mandamus would not lie directing the release of the vehicles, nor the seizure itself can be declared as illegal. The aggrieved persons have to necessarily file application for release of the vehicle seized and detained by the competent authority for the release of the vehicle, if they so desire…"

49. This view of the learned single Judge was affirmed by Division Bench in G. Nagaraju Vs. Government of A.P. and others (AIR 2000 AP 442). Division Bench held as under:

"5. At the outset, we may mention that a Division Bench of this Court to which one of us (PVR, J.) was a party decided a Batch of writ petitions in which the orders of the Transport Authorities requiring the petitioners to pay the estimated tax as a precondition for the release of the vehicles were challenged. Directions were sought for in these writ petitions for the release of the vehicles. The said judgment was reported in M. Venkateswara Rao v. Secretary, RTA,

Warangal, 2000(1)ALT170 . This Court indicated that the vehicle owner should first approach the concerned Transport Authority for the release of the vehicle by filing an application under Section 207(2) read with the Rules and the Court also directed that such applications should be dealt with with utmost expedition and if no orders are passed within three days, the aggrieved person can invoke the writ jurisdiction of this Court under Article 226. This Court also dealt with certain other questions as regards the scope of power of seizure under Section 207, MV Act and Section 8 of APMV Taxation Act. The Division Bench also referred to with approval a decision of B. Sudershan Reddy, J., in which the procedure for obtaining the release of vehicles seized under Section 207(1) was laid down. Inter alia, it was held that the application should be filed with requisite fee under Section 207 read with Rule 448-B i.e., the impugned Rule. The next round of litigation has started with the filing of these writ petitions. In the garb of challenging the Rule 448-B, which is apparently innocuous, the petitioners sought for 'consequential order' for the release of the vehicles, by-passing the procedure indicated in the aforementioned decisions. We fail to understand how it can be a 'consequential order'. Even if Rule 448-B is assumed to be invalid, it does not follow that there should be a direction to release the vehicle. The question whether in the facts and circumstances of the case, the release could be ordered, is an independent issue. Be that as it may, as already observed, we would like to remove the lid of uncertainty at the earliest and thwart the attempts to overcome the recent decisions of this Court channelising the procedure to be invoked for obtaining the release of the vehicles. With this brief introduction, we would like to proceed to consider the validity of the impugned rule."

50. In K.Ram Reddy while holding that remedy under Section 207 (2) is available, learned single Judge of this Court held that not approaching the Secretary, Regional Transport Authority seeking release of the seized vehicle for the alleged violation contemplated by Section 194 cannot be considered as a bar for invoking the writ jurisdiction. There is no disagreement with view expressed in precedent decisions but it was only stated that there is no bar to file writ petition even if alternative remedy is available.

51. Single Judge of High Court is bound by the view taken by coordinate bench. If he is not persuaded to agree with the view expressed by another learned single Judge, he should record his opinion and refer to Division Bench, but cannot take a different view unless earlier decision is held per-incuriam. That course was not adopted while considering the issue in K Ram Reddy. The two Division Bench judgments, mentioned above, categorically held that persons aggrieved by the seizure have to avail the remedy provided by sub section 2 of Section 207. The view taken by the learned single Judge in M.Venkateshwar Rao, was also affirmed by the Division Bench. I am therefore bound by law declared by the learned single Judge in M.Venkateshwar Rao affirmed by the Division Bench and view expressed by two Division Benches on the subject.

52. I am guided by following statement of law by Hon'ble Supreme Court on Rule of binding precedents:

52.1 In Tribhuvandas Purshottamdas Thakur v. Ratilal Motilal Patel (AIR 1968 SC 372), Supreme Court held,

"8. The observations made by the learned Judge subvert the accepted notions about the force or precedents in our system of judicial administration. Precedents, which enunciate rules of law, form the foundation of administration of justice under our system. It has been held time and again that a Single Judge of a High Court is ordinarily bound to accept as correct judgments of courts of coordinate jurisdiction and of Division Benches and of the Full Benches of his Court and of this Court. The reason of the rule, which makes a precedent binding, lies in the desire to secure uniformity and certainty in the law."

52.2. In Union of India v. Raghubir Singh (1989) 2 SCC 754), the Supreme Court observed:

"27. What then should be the position in regard to the effect of the law pronounced by a Division Bench in relation to a case raising the same point subsequently before a Division Bench of a smaller number of Judges? There is no constitutional or statutory prescription in the matter, and the point is governed entirely by the practice in India of the courts sanctified by repeated affirmation over a century of time. It cannot be doubted that in order to promote consistency and certainty in the law laid down by a superior Court, the ideal condition would be that the entire Court should sit in all cases to decide questions of law, and for that reason the Supreme Court of the United States does so. But having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions, each Division being constituted of Judges whose number may be determined by the exigencies of judicial need, by the nature of the case including any statutory mandate relative thereto, and by such other considerations which the Chief Justice, in whom such authority devolves by convention, may find most appropriate. It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the Rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges. We may refer to a few of the recent cases on the point. In John Martin v. State of West Bengal [(1975) 3 SCC 836: 1975 SCC (Cri) 255: (1975) 3 SCR 211], a Division Bench of three-Judges found it right to follow the law declared in Haradhan Saha v. State of West Bengal [(1975) 3 SCC 198: 1974 SCC (Cri) 816: (1975) 1 SCR 778], decided by a Division Bench of five Judges, in preference to Bhut Nath Mate v. State of West Bengal [(1974) 1 SCC 645: 1974 SCC (Cri) 300 : AIR 1974 SC 806] decided by a Division Bench of two Judges. Again in Indira Nehru Gandhi v. Raj Narain [1975 Supp SCC 1: (1976) 2 SCR 347], Beg, J. held that the Constitution Bench of five Judges was bound by the Constitution Bench of thirteen Judges in Kesavananda Bharati v. State of Kerala [(1973) 4 SCC 225 : 1973 Supp SCR 1]. In Ganapati Sitaram

Balvalkar v.Waman Shripad Mage [(1981) 4 SCC 143], this Court expressly stated that the view taken on a point of law by a Division Bench of four Judges of this Court was binding on a Division Bench of three-Judges of the Court. And in Mattulalv. Radhe Lal [(1974) 2 SCC 365 : (1975) 1 SCR 127], this Court specifically observed that where the view expressed by two different Division Benches of this Court could not be reconciled, the pronouncement of a Division Bench of a larger number of Judges had to be preferred over the decision of a Division Bench of a smaller number of Judges. This Court also laid down in Acharya Maharajshri Narandraprasadji Anandprasadji Maharaj v. State of Gujarat[(1975) 1 SCC 11 that even where the strength of two differing Division Benches consisted of the same number of Judges, it was not open to one Division Bench to decide the correctness or otherwise of the views of the other. The principle was reaffirmed in Union of India v. Godfrey Philips India Ltd. [(1985) 4 SCC 369 : 1986 SCC (Tax) 11] which noted that a Division Bench of two Judges of this Court in Jit Ram Shiv Kumar v. State of Haryana [(1981) 1 SCC 11: (1980) 3 SCR 689] had differed from the view taken by an earlier Division Bench of two Judges in Motilal Padampat Sugar Mills v. State of U.P.[(1979) 2 SCC 409: 1979 SCC (Tax) 144: (1979) 2 SCR 641] on the point whether the doctrine of promissory estoppel could be defeated by invoking the defence of executive necessity, and holding that to do so was wholly unacceptable reference was made to the well accepted and desirable practice of the later Bench referring the case to a larger Bench when the learned Judges found that the situation called for such reference."

(Emphasis supplied)

53. No doubt on the proposition that Jurisdiction of writ Court under Article 226 of the Constitution of India is very wide and has no bounds. The writ Court reaches out to the aggrieved person to remedy injustice meted out to him in public law domain. Entertaining writ petition is not constrained by any statutory remedy or other remedies available to an aggrieved person. However, writ Court imposes self restraint in entertaining writ petitions, whenever the aggrieved person has an alternative and efficacious remedy subjects him to avail such remedy. Thus, though the availability of alternative remedy is not a bar, the writ Court does not entertain writ petition unless, in the given facts of a case, it is necessary for the writ Court to intervene to grant the remedy required by a person without relegating him to avail the statutorily engrafted remedies. This principle is highlighted by the Division Benches and the learned single Judge in the decisions referred to above.

54. Section 194 is a penal provision. It prescribes punishments that can be imposed for violating Sections 113 and 114. On seizing the vehicle, on the allegation of overload, the competent authority has to launch prosecution. In the prosecution, if guilt is proved, penalities envisaged in Section 194 can be imposed by the jurisdictional Magistrate. However, if the owner or person-in-charge of the offending vehicle applies under Section 200 to compound the offence, the competent authority can levy appropriate penalty and release the vehicle. This remedy is available

before and after launching of prosecution. Thus, issue of levying penalty does not arise before a person is found guilty or person applies for compounding under Section 200.

55. From the scheme of the Act, it is apparent that very limited scope is available to the officer authorized to seize the vehicle alleged to have violated any of the provisions of the Act. He can release the vehicle on the spot only if the alleged violation is under Section 3 or Section 4 or Section 39 but not otherwise. At that stage, he is not competent to decide whether the vehicle owner or the driver has committed the offence and is liable for punishment. He can only set in motion the proceeding to prosecute them. In all other cases, whenever vehicle is seized, the owner or the driver of the vehicle should file application under Section 207 (2) of the Act and subject to compliance of the required formalities and subject to conditions that may be imposed by the Secretary, Road Transport Authority, the vehicle can be released. Rule 448 (B) of A.P. Motor Vehicle Rules, 1989 deals with release of vehicle seized under the sub section 1 of Section 207 and sub Rule 2 thereof deals with entertainment of application for release of vehicles seized and detained by subordinate officers by the Secretary, Regional Transport Authority, who is designated as Appellate Authority. The power to frame such Rule and scope of application of 448 (B) was considered by the Division Bench in the judgments referred to above. By virtue of interim orders of this Court, the competent authority is directed to exercise powers not vested in him. He is asked to collect fine as leviable under section 194 and release the vehicle even before person is found guilty.

56. It is appropriate to note the language employed in Section 194 of the Act. There are three components on levying of penalty/ charges and all three are independent. Notwithstanding the quantity of overload, per se, a vehicle found carrying more load than permissible is liable for punishment in the form of fine. In addition, he is also liable to be fined Rs.1000/- for each excess ton of overload and unloading charges. It stipulates minimum fine of Rs. 2000/-. Thus what is prescribed is minimum fine for the offence of overload per se and there is no restriction to levy higher amount as fine in addition to fine of Rs. 1000/- per tonne of excess load.

I am of the considered opinion that in exercise of power under Article 226 of the constitution of India, the writ Court cannot pre-determine the amount of fine that can be imposed and curtail the discretion vested in the Magistrate.

57. Court cannot travel beyond statutory framework and pass orders. Courts are only required to interpret the provisions of the law or require compliance of the statutory provisions by the competent authorities but Court cannot direct the officer of the Government to act in contravention of the provisions of the Act. In effect, interim directions issued are amounting to directing the officer competent to seize the vehicle to release the vehicle, whereas, he is not competent to release the vehicle unless proviso appended to Section 207 (1) is attracted and not competent to collect fine even before prosecution is launched or the owner or driver of the vehicle requests for

compounding of the offence under Section 200. In these matters writ Court is not only entertaining writ petitions without subjecting the person to resort to remedy under Section 207 (2) but also, at the interlocutory stage of the writ petitions, subsuming the statutory mandate and usurping a role not envisaged by the Act. Thus, it is not a simple case of entertaining writ petition without relegating to avail statutory remedy but the Court is prejudging the issue and prescribing fines to be imposed even before the person is found guilty, contrary to statutory scheme and offence is not recorded in the history sheet of the vehicle/ driver.

58. On due consideration of various provisions of the Act, 1986 and Act, 1984 imposing fine on finding guilt is not the only aspect. The statute envisages special mechanism to deal with violations on overload. It is not a simple case of releasing vehicle on payment of fine. Once a vehicle is found with excess load, the excess load has to be removed. Such load has to be carted away in a separate vehicle by the owner of the offending vehicle. Carrying excess load than permissible would damage vital parts of the vehicle and can develop mechanical problems which may be fatal. Repeatedly overloading also would impact vehicles durability. The road worthiness of the vehicle has to be assessed; the competency of the driver also to be verified before permitting the owner to use the vehicle. It is also necessary to ascertain as to whether the vehicle was involved in similar or in any other offence. According to Rule 184 (2)(i) of A.P. Motor Vehicle Rules, 1989, if history sheet of the owner is not clean and contains more than six entries relating to offence of overload and other offences, he can refuse to grant renewal. It is also relevant to note that wide options are available to competent authority to deal with offending vehicle including suspension and cancellation of driving licence/permit/registration. He is also required to examine whether by such conduct the owner/driver/person-in-charge of the vehicle violated provisions of Act, 3 of 1984 and whether prosecution can be launched under that Act. These are all matters best left to the discretion of the competent authority. Thus, statutory scheme impels the Court to hold that it is not merely a case of not availing alternative remedy, writ petition cannot be instituted straight away as a matter of course the moment vehicle is seized on the allegation of overload and aggrieved persons have to avail statutorily engrafted remedies.

59. In addition to the general issue of overloading of transport vehicles, violating the provisions of the Motor Vehicles Act and the Rules made thereunder, in many of these cases there is an allegation of violation of Telangana State Sand Mining Rules, 2015 as amended from time to time. Most of the vehicles carrying sand were seized on two grounds; firstly that the vehicle was carrying excess load of sand than permitted and secondly the vehicle was not having permit to transport the sand/inter state permit to bring sand from neighbouring States. The Rules prescribe more stringent clauses on such violation. On the first offence, a tractor can be levied fine of Rs. 5000/-, lorry upto 10 tonnes capacity fine of Rs. 25,000/- and increases depending on the capacity of the transport vehicle. If the tractor is involved in second offence, the fine increases to Rs. 15000/-, and lorry

of 10 tonnes capacity, to Rs. 50000/-. The vehicle is liable for seizure and sand is also liable for seizure and is not allowed to be taken by the owner of the vehicle even after off-loading the excess quantity. These provisions are required to be complied with strictly. This aspect also requires consideration while exercising powers under the Act, 1988 and Act 3 of 1984.

60. Having regard to the statutory provisions, the object of Motor Vehicles Act, the Act 3 of 1984 and the larger public interest of preventing road accidents due to the greediness of the owners of the transport vehicles to carry excess load than permissible, it is always desirable to impose higher penalties to take stringent action and launch prosecution under both enactments which should act as a deterrent to commit repeated offences. The Monitoring Committee appointed by the Supreme Court directed to penalize in the case of first offence, suspension of licence for three months and in repeated offence, cancellation of licence permanently or for higher period as the case may be, and also suspension of the authorization to ply the vehicle by the owner, in addition to imposing higher fines. These directions are binding on the respondent-State and requires compliance.

61. In the cases on hand, on payment of penalty and/or fine interim custody of the vehicles was given to the owners. However, apparently so far prosecution is not taken up under the Act, 1988 and Act, 1984 and no action is taken against the driver of offending vehicles. Learned Government Pleader sought to contend that since driving licence of the driver of offending vehicle was not furnished to the competent authority, no further action could be taken against the driver as per the provisions of the Act. I cannot appreciate the stand of respondents in not taking action under Section 19 of the Act merely because the driving licence was not surrendered. It cannot be said that the authority is incompetent to mandate the owner of the vehicle involved in the offence to surrender the driving licence of the driver and instead allow the driver to go scot-free. On careful consideration of the orders passed by this Court directing release of vehicles, it is seen that Court directed to furnish undertaking to produce the subject vehicle as and when required and should file proof of ownership and other valid documents. Therefore, if the owner has not produced the driving licence of the driver of offending vehicle, the competent authority could have compelled the owner to furnish the driving licence or failing thereof to detain the vehicle. The Court is constrained to observe that there is complacence on the part of the transport authorities also in letting off the drivers and the owners of the offending vehicles and tardy progress in penalizing them for the alleged violations. The owner as well as driver are happy to pay fine only when they were caught and to get away and indulge in committing the same offences repeatedly. There appears to be reluctance on the part of transport authorities to exercise the powers vested in them and are, in effect, abetting crime by such conduct. Further, there is stoic silence on enforcing Act 3 of 1984.

62. In retrospect, it is apt to remind the observations made by Justice V.R Krishna Iyer in the year 1979, extracted in the beginning of the judgment. 30 years later

the situation is worse and unless the provisions of Act, 1988 and Act 3 of 1984 are strictly implemented without showing any leniency on violations of road safety norms and provisions of two enactments, more and more innocent will die for no fault of them. Be it noted, though only a miniscule percentage of vehicles plying on the roads are detained on the ground of overload, but at least, by such action, few accidents were averted. There is lurking danger of an accident whenever overloaded transport vehicle is plying on the roads, which may result in fatal consequences. A virtual death trap with wider net. The road that accident that occurred on 4.8.2019 where 13 agricultural labour died on the spot and others are critically injured is the grim reality. They were traveling in an Auto which was designed to carry a driver and 6 adult passengers. Unless there is increase in percentage of seizure, with more rigorous test of suitability of the vehicle before releasing the vehicle and deterrent punishments imposed on offending vehicle owner and driver, the trend of accidents cannot be reversed and lives of innocents cannot be saved. The right of individual to operate his motor vehicle as he wishes shall be subservient to larger public interest. In the larger public interest, it is also necessary for expeditious disposal of applications made under Sections 200 and 207 and prosecution of offending vehicle owner and driver.

63. The writ petitions are disposed of with the following findings and directions:

(i) Ordinarily, writ petitions against seizure of vehicle on the allegation of violation of Motor Vehicles Act, 1988 is not maintainable. Owner /person in charge/ driver of the offending vehicle has to avail statutorily engrafted remedies before seeking to initiate writ proceedings.

(ii) On seizure of vehicle under Section 207 (1) of the Act, owner/ person-in-charge/ driver can file application under Section 207 (2) read with Rule 448 (B) of the Telangana State Motor Vehicles Rules. It is for the Secretary, Road Transport Authority to consider the application and to pass appropriate orders as warranted by law. If he agrees to release the vehicle he can impose appropriate conditions. However, it is necessary to assess the road worthiness of the vehicle before it is released and a certificate be issued to that extent. Such course is in larger public interest.

(iii) The proceedings of seizure of a motor transport vehicle should be video recorded. The CCTV footage capturing the movement of the offending vehicle wherever available should be obtained and be made part of the case record. The Government shall prescribe procedure of video recording of seizure and collection of video footage as evidence.

(iv) Apparently, the primary grievance on not availing remedy under Section 207 (2) is delay in processing the applications and delay in the decisions. To expedite the process of decision making under Section 207 (2), the applications can be accepted through online web portal. For this purpose online web portal/web page on existing portal / a separate mobile application can be exclusively created to process the applications online and to take decisions thereon. The hearings can be conducted

through video conference mode. The applicant need not come to the office of Secretary/ designated authority. Video conferencing facilities can be established at designated places. The Government shall prescribe, within six (6) weeks from date of receipt of judgment to stipulate procedure to file applications praying to grant interim custody of the vehicle and time frame to dispose of such applications. Ordinarily, such applications should be disposed of within one week.

(v) Court is informed that pursuant to interim orders, vehicles were already released. In the peculiar facts of these cases Court is not directing authorities to take back possession of the vehicles. However, this does not come in the way of launching prosecution and penalizing the owner/driver/ person in charge of the vehicle. Amount paid as per interim orders shall be adjusted towards fine that may be imposed, if found guilty. It is also open to owner/driver/person-in-charge to file application under Section 200 to compound. It is also open to authorities to initiate prosecution under Act, 3 of 1984. Similar system and procedure to applications under Section 207 (2) be evolved to applications under Section 200.

(vi) Even if owner/driver/person-in-charge applies to compound the offence and such application is allowed, before permitting the vehicle to ply on the roads, road worthiness of the vehicle has to be assessed and certified. Owner/driver/person-in-charge can use such vehicle on the public roads only if such a certificate is issued.

(vii) The authorities entrusted with the responsibility to enforce the provisions of the 'Telangana State Sand Mining Rules, 2015' shall ensure completion of confiscation proceedings within the time frame, not exceeding three months and collection of fine as prescribed in the Rules on the excess load transported and confiscation of sand as per the provisions of the Rules. They shall also report to the Secretary, Road Transport Authority the action taken under the Rules, 2015. If petitioners have any grievance on levying of penalty under the Rules, 2015, it is open to them to file application and the same shall be acted upon and suitable reply be furnished expeditiously.

(viii) Government and the Commissioner for Transport shall take immediate steps to ensure, by utilizing information technology platform, to put in place mechanism for online monitoring of offences committed by the transport vehicles/goods, as well as passenger vehicles, which is accessible to Police, officials of Industries Department as well as officials in transport department and whenever if owner/driver repeats the offence, the same should be reflected online and consequential action should be taken.

(ix) The prosecution against owner/person-in-charge/ driver of the offending motor vehicle has to be in a fixed time frame. The State Government may formulate guidelines fixing time frame. Such guidelines be notified within three months from the date of receipt of the copy of the judgment.

64. Miscellaneous petitions, if any pending, are closed.

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pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) if execution or other process issued on a decree or order if any Court or Tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, the Tribunal shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in clause (a) of sub-section

(1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorised on his behalf, or in the case of a firm if it is signed by any such agent or legal adviser or by any member of the firm."

A reading of the aforesaid provisions would show that the starting point of the period of limitation is when the company is unable to pay its debts, and that Section 434 is a deeming provision which refers

to three situations in which a Company shall be deemed to be "unable to pay its debts" under Section 433(e). In the first situation, if a demand is made by the creditor to whom the company is indebted in a sum exceeding one lakh then due, requiring the company to pay the sum so due, and the company has for three weeks thereafter "neglected to pay the sum", or to secure or compound for it to the reasonable satisfaction of the creditor. "Neglected to pay" would arise only on default to pay the sum due, which would clearly be a fixed date depending on the facts of each case. Equally in the second situation, if execution or other process is issued on a decree or order of any Court or Tribunal in favour of a creditor of the company, and is returned unsatisfied in whole or in part, default on the part of the debtor company occurs. This again is clearly a fixed date depending on the facts of each case. And in the third situation, it is necessary to prove to the "satisfaction of the Tribunal" that the company is unable to pay its debts. Here again, the trigger point is the date on which default is committed, on account of which the Company is unable to pay its debts. This again is a fixed date that can be proved on the facts of each case. Thus, Section 433(e) read with Section 434 of the Companies Act, 1956 would show that the trigger point for the purpose of limitation for filing of a winding up

petition under Section 433(e) would be the date of default in payment of the debt in any of the three situations mentioned in Section 434.

23. Shri Kaul relied upon several well-known judgments, which lay down the law under Section 433 and 434 of the Companies Act, 1956. He relied upon **M/s Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd.** (1971) 3 SCC 632, wherein in a case of a winding up petition

filed under Section 433(e), the High Court had rejected the claim of the Appellant to wind up the Company as creditors of the Company. Unlike the present case, the Appellant therein gave no statutory notice to raise any presumption of inability to pay debts. In this context, this Court held:

"**20.** Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See *London and Paris Banking Corporation* [(1874) LR 19 Eq 444]) Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been properly was not allowed. (See *Re. Brighton Club and Horfold Hotel Co. Ltd.* [(1865) 35 Beav 204])

21. Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that

particular debt, see *Re. A Company.* [94 SJ 369] Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely See *Re Tweeds Garages Ltd.* [1962 Ch 406] The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends."

The Court then stated that as the making of a winding up order is discretionary, the Court will ordinarily consider the wishes of all the creditors, and if they are opposed to winding up the company, the Court may, in its discretion, refuse such order. What was relied upon strongly by Shri Kaul was paragraph 29, in which the Court held:

"**29**…In determining whether or not the substratum of the company has gone, the objects of the company and the case of the company on that question will have to be looked into. In the present case the company alleged that with the proceeds of sale the company intended to enter into some other profitable business. The mere fact that the company has suffered trading losses will not destroy its substratum unless there is no reasonable prospect of it ever making a profit in the future, and the court is reluctant to hold that it has no such prospect. (See *Re Suburban Hotel Co.* [(1867) 2 Ch App 737] and *Davis and Co.* v. *Brunswick* (*Australia*) *Ltd.* [(1936) 1 AER 299])…The company has not abandoned objects of business. There is no such allegation or proof. It cannot in the facts and circumstances of the present case be held that the substratum of the company is gone. Nor can it be held in the facts and circumstances of the present case that

the company is unable to meet the outstandings of any of its admitted creditors. The

company has deposited in court the disputed claims of the appellants. The company has not ceased carrying on its business. Therefore, the company will meet the dues as and when they fall due. The company has reasonable prospect of business and resources."

24. According to Shri Kaul, it was not possible for his client to approach the High Court with a winding up petition as on the date on which he filed the suit for specific performance, because La-Fin (i.e. the Company sought to be wound up), could not be said to have lost its substratum as on such date. It was for this reason that he approached the winding up Court in 2016, when the assets of La- Fin, which, as of 2013 were worth over INR 1000 crores, had in 2016 become only worth INR 200 crores.

25. This judgment does not take Shri Kaul's argument any further.

Nowhere in the Winding up Petition is it alleged that the company sought to be wound-up has lost its substratum, in the sense that there is no reasonable prospect of it ever making a profit in the future, nor can it be said that the company had abandoned its business and is, therefore, unable to meet the outstandings owed by it. On the other hand, what emerges from this judgment (and paragraph 21 therein in particular), is that it is not open for a company to say that a debt is undisputed, that it has ability to pay the debt, but will not pay the debt. Equally, where a debt is clearly

owed, but the exact amount of debt is disputed, the company will be held to be unable to pay its debts. What has to be seen in each case is whether the debt is *bona fide* disputed. If so, without more, a winding up petition would then be dismissed. One other thing must be noticed at this stage. The trigger for limitation is the inability of a company to pay its debts. Undoubtedly, this trigger occurs when a default takes place, after which the debt remains outstanding and is not paid. It is this date alone that is relevant for the purpose of triggering limitation for the filing of a winding up petition. Though it is clear that a winding up proceeding is a proceeding 'in rem' and not a recovery proceeding, the trigger of limitation, so far as the winding up petition is concerned, would be the date of default. Questions as to commercial solvency arise in cases covered by Sections 434(1)

(c) of the Companies Act, 1956, where the debt has first to be proved, after which the Court will then look to the wishes of the other creditors and commercial solvency of the company as a whole. The stage at which the Court, therefore, examines whether the company is commercially insolvent is once it begins to hear the winding up petition for admission on merits. Limitation attaches insofar as petitions filed under Section 433(e) are concerned at the stage that default occurs for, it is at this stage that the debt becomes payable.

For this reason, it is difficult to accept Shri Kaul's submission that the cause of action for the purposes of limitation would include the commercial insolvency or the loss of substratum of the company.

26. The next judgment referred to and relied upon by Shri Kaul is **Pradeshiya Industrial & Investment Corporation of U.P. v. North India Petrochemicals Ltd. and Anr.** (1994) 3 SCC 348. In this case, it was found that Dalmia Industries had resorted to arbitration proceedings, in which there was a substantial dispute raised on the amount claimed. The passage strongly relied upon by Shri Kaul is set out hereinbelow:

"**27.** What then is inability when the section says "unable to pay its dues"? That should be taken in the commercial sense. In that, it is unable to meet current demands. As stated by William James, V.C. it is "plainly and commercially insolvent — that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain — as to make the Court feel satisfied — that the existing and probable assets would be insufficient to meet the existing liabilities". (In *European Life Assurance Society, Re* [LR (1869) 9 Eq 122] ; *V.V. Krishna Iyer & Sons* v. *New Era Mfg. Co. Ltd.* [(1965) 35 Comp Cas 410 : (1965) 1 Comp LJ 179 (Ker)])"

This passage is in the context of an order under 433(e) of the Companies Act, 1956 being discretionary, which is referred to in the preceding paragraph 25. As stated hereinabove, the facts as to commercial insolvency are to be pleaded and proved at the

admission stage of the winding up petition; the trigger for the winding up proceeding for limitation purposes, as has been stated hereinabove, being the date of default.

27. Shri Kaul then relied upon **Mediquip Systems (P) Ltd. v.Proxima Medical System GMBH** (2005) 7 SCC 42 and in particular, paragraphs 18 and 23 thereof, which state as follows:

"**18.** This Court in a catena of decisions has held that an order under Section 433(*e*) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression "unable to pay its debts" in Section 433(*e*) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilised merely as a means for realising debts due from a company.

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23. The Bombay High Court has laid down the following principles in *Softsule (P) Ltd., Re* [(1977) 47 Comp Cas 438 (Bom)] : (Comp Cas pp. 443-44)

Firstly, it is well settled that a winding-up petition is not legitimate means of seeking

to enforce payment of a debt which is bona fide disputed by the company. If the debt is not disputed on some substantial ground, the court/Tribunal may decide it on the petition and make the order.

Secondly, if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(*a*) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated.

Thirdly, a debt about the liability to pay which at the time of the service of the insolvency notice, there is a bona fide dispute, is not "due" within the meaning of Section 434(1)(*a*) and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" the same so as to incur the liability under Section 433(*e*) read with Section 434(1)(*a*) of the Companies Act, 1956.

Fourthly, one of the considerations in order to determine whether the company is able to pay its debts or not is whether the company is able to meet its liabilities as and when they accrue due. Whether it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise."

28. The Bombay High Court judgment referred to in paragraph 23 of the judgment above states the law on winding up petitions filed under Section 433(a) of the Companies Act, 1956 correctly. The primary test is set out in paragraph 1, which is that a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by the Company. Absent such dispute, the petition may be admitted. Equally, where the debt is *bona fide* disputed, there cannot be 'neglect to pay' within the meaning of Section 434(1)(a) of the Companies Act, 1956 so that the deeming provision then does not come into play. Also, the moment there is a *bona fide* dispute, the debt is then not 'due'. The High Court also correctly appreciates that whether the company is commercially solvent is one of the considerations in order to determine whether the company is able to pay its debts or not.

29. Even on the facts of this case, the Winding up Petition alleges that the ultimatum to the Respondent company asserting that the Respondent company was legally obliged to purchase the requisite shares in accordance with the terms of the Letter of Undertaking was on 7th January, 2013. By this date at the very latest, the cause of action for filing a petition under Section 433(e) certainly arose. Also, as has been correctly pointed out by Dr. Singhvi, the statutory notice given on 3rd November, 2015 does not refer to any facts as to the commercial insolvency of La-Fin. The statutory notice only refers to the suit proceedings and attachment by the EOW which had taken place long before in December 2013. Factually, therefore, no basis is laid for the legal contentions argued before us by Shri Kaul.

30. In the Winding up Petition itself, what is referred to is the fall in the assets of La-Fin to being worth approximately INR 200 crores as of October, 2016, which again does not correlate with 3rd November, 2015, being the date on which the statutory notice was itself issued. This again is only for the purpose of appointing an Officer of the Court as Official Liquidator in order to manage the day-to-day affairs and otherwise secure and safeguard the assets of the Respondent company. There is no averment in the petition that thanks to these or other facts the Company's substratum has disappeared, or that the Company is otherwise commercially insolvent. It is clear therefore that even on facts, the company's substratum disappearing or the commercial insolvency of the company has not been pleaded. Whereas, in Form-1, upon transfer of the winding up proceedings to the NCLT, what is correctly stated is that the date of default is 19th August, 2012; making it clear that three-years from that date had long since elapsed when the Winding up Petition under Section 433(e) was filed on 21st October, 2016.

31.We therefore allow Civil Appeal (Diary No. 16521 of 2019) and dispose of the Writ Petition (Civil) No.455 of 2019 by holding that the Winding up Petition filed on 21st October, 2016 being beyond the period of three-years mentioned in Article 137 of the Limitation Act is time-barred, and cannot therefore be proceeded with any further. Accordingly, the impugned judgment of the NCLAT and the judgment of the NCLT is set aside.

SLP(C) (Diary No.13468 of 2019) & T.P. (C) No.817 of 2019

32. In view of the aforesaid, nothing survives insofar as Special Leave Petition (Diary No.13468 of 2019) and Transfer Petition (Civil) No.817 of 2019 are concerned, and they are accordingly disposed of as having become infructuous.

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2019 (3) L.S. 64 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

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

Ravishankar @ Baba
Vishwakarma ..Appellant

Vs.

The State of M.P.,
..Respondents

INDIAN PENAL CODE, Secs.363, 366, 376(2)(i), 376(2)(n), 376(2)G), 376(2)(m), 376-A, 302 and 201 - Appellant assails the judgment passed by the High Court, whereby the death reference made by the trial Court has been confirmed and the appellant's criminal appeal has been dismissed - Trial Court held the appellant guilty of kidnapping

a 13 year-old girl, committing rape on her, killing her by throttling and thereafter destroying the evidence by throwing her half naked body in a dry well - These crimes were held as being 'rarest of the rare' and the appellant was sentenced to death under Section 376-A of the Indian Penal Code.

Held - A crucial witness for constructing the last seen theory, P.W.5 is partly inconsistent in cross-examination and quickly jumps from one statement to the other - Death being irrevocable, there lies a greater degree of responsibility on the Court for an indepth scrutiny of the entire material on record - The penalty imposed by awarding death is much different than in incarceration, both for the convict and for the state - We are thus of the considered view that the present case falls short of the 'rarest of rare' cases where the death sentence alone deserves to be awarded to the appellant - Appeals are allowed in part to the extent that the death penalty as awarded by the courts below is set aside and is substituted with the imprisonment for life with a direction that no remission shall be granted to the appellant and he shall remain in prison for the rest of his life.

J U D G M E N T

(per the Hon'ble Mr.Justice Surya Kant)

Delay condoned. Leave granted.

2. Hovering between life and death, the appellant assails the judgment dated 6th December, 2016 passed by the High Court of Madhya Pradesh at Jabalpur whereby the death reference made by the IIIrd Additional Sessions Judge, Gadarwara, District Narsinghpur (M.P.) has been confirmed and the appellant's criminal appeal has been dismissed.

Background:

3. The appellant was tried for having committed offences under Sections 363, 366, 376(2)(i), 376(2)(n), 376(2)G), 376(2)(m), 376-A, 302 and 201 of the Indian Penal Code (for short IPC) and alternatively under the corresponding provisions of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act'). Through judgment and order dated 19th July 2016, the Trial Court held the appellant guilty of kidnapping a 13 year-old girl, committing rape on her, killing her by throttling and thereafter destroying the evidence by throwing her half naked body in a dry well. These crimes were held as being 'rarest of the rare' and the appellant was sentenced to death under Section 376-A of the Indian Penal Code, 1860 (I.P.C.). In terms of Section 366 of the Code of Criminal Procedure, 1973 (Cr.P.C), the Trial Court made a reference to the High Court for confirmation of the death sentence. The appellant also filed criminal appeal challenging this judgment and order passed by the Trial Court. The High Court on 6th December 2016, through a common order, both dismissed his appeal and confirmed the Trial Court's death reference giving rise to this special leave petition.

4. At the outset, it must be mentioned that when the appellant's special leave petition came up for hearing before a Three Judge Bench of this Court on 10th January, 2018, the following order was passed:

"Mr. Arjun Garg, learned counsel for the State prays for two weeks' time to argue the matter on the conversion of sentence from death to life, as we are not inclined to interfere with the conviction.

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5. Thus, the limited issue which survives for our consideration is whether or not the appellant deserves to be imposed with the extreme sentence of death penalty?

6. As noted by this Court in Bhupinder Sharma vs. State of Himachal Pradesh, (2003) 8 SCC 551 that the mandate of not disclosing identities of the victims of sexual offences under Section 228A of I.P.C. ought to be observed in spirit even by this Court:

"2. We do not propose to mention name of the victim. Section 228-A of the Indian Penal Code, 1860 (in short the "IPC") makes disclosure of identity of victim of certain offences punishable. Printing or publishing name of any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is the restriction does not relate to printing or publication of judgment by High Court or Supreme Court. But keeping in view the social object of preventing social victimization or ostracisms of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of High Court or lower Court, the name of the victim should not be indicated. We have chosen to describe her as 'victim' in the judgment."

We are thus not disclosing the victim's name and instead are referring to her as the "deceased" throughout this judgment.

Relevant Facts:

7. The necessary facts are to the following effect: P.W.3 (Purushottam Kaurav - grandfather of the deceased), resident of village Baglai filed a report at the Police Station at Gotitoria on 22nd May, 2015 at about 4.00 p.m. giving information of the disappearance of his 13 year old granddaughter. The deceased and her 11 year old brother Harinarayan were children of the informant's younger son, Satyaprakash and had been staying with their mother at the latter's parental home in the neighbouring village, Chargaon, for the last four months. The deceased visited the informant's home in village Baglai with her mother at around 10 a.m. the previous day. The deceased did a few household chores while her mother cooked food for the family. Later, she went out to play with her friend who lived in the neighbourhood. Upon returning back she told her mother that she was not feeling good and requested that they should return back to her maternal uncle's home in Chargaon. Her mother assured her that they would return later that afternoon and both of them went to sleep. Upon waking up at 3.00 p.m., the mother

discovered that the deceased was not around. The mother made unsuccessful enquiries in the neighbourhood and later asked the deceased's 11 year old brother to go and enquire whether she had gone to Chargaon on her own. The brother came back in the evening without any news of the victim. Thinking that their daughter might have gone to her paternal aunt's home in the nearby village of Aadegaon, both parents slept. Next morning enquiries were made at Aadegaon but it was informed that the deceased had not gone there either. Worried, the mother herself left for her parental home at around 9-10 a.m. and informed her brother Vishram that the victim was missing. Vishram and the deceased's mother set out on a wide search in the neighbourhoods of Chargaon with little result. Whilst returning back to Baglai, the mother identified the deceased's salwar and one chappal on the embankment of the water-channel which divided the villages of Baglai and Chargaon. Upon reaching her matrimonial home in Baglai, the mother informed her father-in-law about her daughter's disappearance who then approached the police. P.W.3 thereafter narrated facts of deceased's disappearance and gave description of his grand daughter who was studying in Class 6 at that time. The Police, accordingly, registered a crime case under Section 363, IPC.

8. Subsequently the police took P.W.3 to the spot where the salwar and the chappal were recovered. Upon a local search of the area with some villagers and relatives, the semi-nude body of the deceased was discovered lying in a supine position in a dry well. The dead body was taken out of the well and it was duly identified by her grandfather, P.W.3. A spot map of the place of occurrence was drawn, and Seizure Panchnama of black colour salwar and one Chappal of the deceased was also prepared.

9. P.W.20 (Harsha Singh, Senior Scientific Officer) advised the policeon handling the body of the deceased and later inspected the decomposing dead body at 9:45 p.m. at the Government Hospital, Chichli. After noticing various injuries including ligature marks on the neck, she gave a report that death of the deceased was homicidal. P.W.12 (Dr. Kinshu Jaiswal) conducted postmortem of the body next morning at 9 a.m. Examining the decayed state of the body, P.W. 12 estimated time of death 48-72 hours before. She noted various injuries on the body including a ruptured hymen, congested trachea and pale lungs. Vaginal slides were prepared and sent for inspection. Hyoid bone, femur bone and three jars of the viscera (containing pieces of stomach, small intestine, heart, lungs, liver, spleen, kidney as well as separate salt solution sample) were also sent for examination. Importantly, it was noticed that the skull and vertebrae were intact. The vaginal slides, salwar and fiber chappal of the deceased were sent to Forensic Science Laboratory, Sagar (FSL, Sagar) for DNA profiling, whereas the sealed container(s) with different parts of the deceased's body were sent to the Medico-legal Institute, Bhopal for chemical testing. Subsequently, the dead body of the deceased was handed over to the family for last rites and statements of some witnesses were recorded under Section 164 of Cr.P.C. before a Judicial Magistrate.

10. During the course of investigation, blood samples of various suspects were taken for DNA analysis. As part of the first batch, blood samples of Hargovind Kaurav, Nandi alias Anand Vanshkar and Baba alias Ashok Kaurav were taken and sent to FSL, Sagar for DNA matching on 14thJune, 2015. Later on 22nd June, 2015 samples of the appellant (Baba alias Ravishankar Vishwakarma), Roopram alias Ruppu Kaurav and Manoj alias Halke Yadav was similarly sent for DNA analysis. After confirmation by the FSL stating that only the DNA extracted from the appellant matched with that on the vaginal slide of the deceased, the appellant was arrested on 20th July, 2015. Charge sheets were filed against him by the investigating agency on 18th September, 2015.

Trial Court's Analysis:

11. The Trial Court formulated various questions for consideration including determination of the age of the deceased, factum of kidnapping by accused, commission of rape, causing death by throttling and destruction of evidence by dumping the dead body by the appellant.

12. With a view to bring home the appellant's guilt, the prosecution examined as many as 24 witnesses, whereas none were examined by the appellant in defence. A brief summarisation of the testimonies of important witnesses and evidences has been made hereunder.

13. P.W.1 (Sukhram Kotwar) who was posted as Gram Kotwar at Baglai, admitted to accompanying the grand father of the deceased (P.W.3) to the police station to lodge a missing report of the deceased. He also found location of the deceased's body and was a witness to seizure of the slipper, panchnama and later to the collection of three blood samples and arrest of the appellant by the police.

14. P.W. 2 (Shobhabai ? mother of the deceased) stated in her deposition that she knew the appellant, for she had borrowed money from his family in the past. She claimed to be living in her parental home in village Chargaon, which was separated by a water channel from her matrimonial village of Baglai, since the past few months for treatment of an eye injury. She had returned to her in-laws' house on the morning of 21st May, 2015 with the deceased. When she reached home, the wife and daughter of the accused came and asked her to repay the borrowed money. After some time her daughter (the deceased) told her that she was going to play with her friend Priyanka at her house. The deceased came back from her friend's house and told P.W.2 that she was not feeling good and requested that she be taken back to her maternal uncle's house in Chargaon. At about 3.00 p.m., the witness found that her daughter was not there at their home. Her husband enquired from Priyanka's house but came to know that deceased was not there. P.W.2, thereafter, called her son and sent him to her parental home at Chargaon about 5.00 p.m. Her son came back home and informed that the deceased was not found in Chargaon also. She again sent her son to Chargaon to look out for her properly. It was, however, confirmed that the

deceased had not gone to Chargaon and she could not be found anywhere till 6.00 p.m. Thinking that the deceased might have gone to her parental aunt's house in Aadegaon, P.W.2 and her husband slept for the night. The next morning P.W.2 got a telephonic call made to Satyaprakash's sister in Aadegaon but failed totrace the deceased there as well. A search was made on the motorcycle at the houses of various relatives and while P.W.2 was returning to Baglai from her parental home along with her nephew, Dharmendra, she spotted and identified the salwar and slipper of the deceased which were lying on the roadside on the embankment of the water channel separating Baglai from Chargaon. P.W.2 then informed her father-in-law, P.W.3, and then the matter was reported to the Police. The Police thereafter started looking for her daughter and then she got to know that the dead body of her daughter was located inside the well of one Darshan Kaurav. P.W.2 did not suspect anyone at that time. In cross-examination she admitted that she had told the police that one Abhishek alias Pillu of the village used to offer paan masala to the deceased and that police had also gone to Baba alias Ashok's house for his interrogation and for conducting Narco test but he fled the next day from the village.

15. P.W.3 (Purushottam Kaurav) ? grandfather of the deceased-victim has deposed regarding lodging of the missing report with the Police and also stated that he identified the dead body of his granddaughter upon recovery from a dry well. He too admitted that a person named Baba alias Ashok was called by the Police but he had fled and that some more persons were also interrogated by the Police.

16. P.W.4 (Satyaprakash), the father of the deceased, narrated the efforts put in by him and other relatives for the search of his daughter and how during that search the dead body was found in the dry well constructed in the field of Darshan Kaurav.

17. P.W.5 (Sharda) who is well acquainted with the appellant as well as the family of the deceased is also a crucial prosecution witness. He deposed that on the fateful day at about 3.00 p.m. he, along with his wife Aalop Bai, was going on a bicycle when both of them spotted the appellant with the deceased who was wearing a black frock and black pant 'near the peepal tree, near the field of Natthu Patel'. He has further stated that his statement was recorded by the Police two days after the incident and that "it is true that the Police had committed assault with me also. It is true that Police had stated that they would arrest the rascal and they committed an assault so I had stated out of nervousness." In the very next breath, he, however, denied that the police had assaulted and were forcing him to give false testimony before the Court.

18. P.W.6 (Itta alias Kichchu) has stated that about a year prior to the incident while he had gone to defecate near a reservoir after disposing of some cowdung, he had seen the appellant feeding biscuits to the deceased at the water channel near the shrubs. He told this fact to P.W.7 (Nimma Jeeji), who was harvesting sugarcane in the field of one Shatrughn Patel. In his cross-examination, he admitted that his statement was recorded one and a half months' after

the incident by the Police.

19. P.W.7 (Nimma Bai) endorsed the statement of P.W.6 to the extentthat about one year before the occurrence, P.W.6 had told her that the appellant was feeding biscuits to the deceased. She has admitted in her cross-examination that she herself had not seen the appellant feeding biscuits to the deceased.

20. P.W.10 (Kuldeep Kaurav, a teacher in the Government Middle School, Chargaon) produced school records to prove that the deceased was admitted in 6th standard on 16th June, 2014 and as per the date of her birth she was hardly 13 years old.

21. P.W.13 (Rajesh Kaurav) who was Patwari, testified that he prepared spot map of the place of incident and that afterwards he took signatures of people present in the vicinity and dispatched them to the Station House Officer. In cross-examination, he admitted that details of the well were not mentioned in the spot map, but volunteered that the well was abandoned and had shrubs growing in it and the grass/crops growing outside had hampered the well's visibility from the Baglai-Chargaon road which was situated 20 feet away.

22. P.W.14 (Hargovind Kaurav) was the cousin of the deceased who admitted to seeing the deceased's body in a dry well in a supine position. He stated that the well was not visible from the road and volunteered that he was witness to the appellant's statement(s) before the police and also witnessed seizure of the second slipper from a nearby water channel later.

23. P.W.15 (Prakashchand Mehra) is son of the Kotwar of Chargaon and testified that the spot map and panchnama were prepared before him, blood samples of three suspects (including appellant) were taken in his presence and the missing slipper was seized by the police with him. In cross-examination, however, he admitted that he was not present during interrogation of the appellant by the police.

24. P.W.17 (Sanjay Kumar Nagvanshi) was the Tehsildar at Gadarwara in August, 2015. He stated that he got conducted identification proceedings to match the slipper recovered through the appellant to ensure that it belonged to the deceased. He testified to procuring similar looking black slippers from his staff members and mixing them with the slipper received from the police station. Although both P.W.2 and P.W.3 were called by him, he testified that only P.W.2 came into his office and identified the deceased's slipper correctly.

25. P.W.18 (M.D. Yadav) was posted as Assistant Sub-Inspector at police station Chichli and was the police officer who lodged the missing report on the basis of information given by P.W.3 on the afternoon of 22nd May, 2015. He also testified to seizing the slipper and salwar presented by P.W.2.

26. P.W.19 (CM. Shukla) was posted as S.H.O. who got prepared spot map and was also present during identification proceedings of the deceased's body. Upon being confronted during cross-examination as to why the time of disappearance was recored as 10.00 p.m. in the Roznamcha,

he explained that it was a mistake.

27. P.W.21 (Krishnakant Kaurav) was posted as a Gram Rozgar Sahayak in Gram Panchayat Chargaon and testified to witnessing interrogation of the appellant, especially his disclosure of location of the missing slipper and recovery of the same.

28. P.W.22 (Niyazul Khan) was the Inspector who got blood sample of the appellant extracted at the Government Hospital, Chichli and prepared seizure memo of sealed vials containing blood of the appellant and two others, and forwarded them to FSL Sagar. The Trial Court refused permission to the Defence Counsel to ask questions relating to the FIR, postmortem report and Roznamcha holding that questions relating to investigation only conducted by the witness could be asked from him.

29. P.W.23 (D.V.S. Sagar) was posted as Station House Officer at Police Station Chichli and testified to recording memorandum statement of accused in presence of P.W.15 and P.W.20, on which basis he seized the missing black fibre slipper of right leg from near the shrubs under a tree near the spot of incident in Darshan Kaurav's field.

30. P.W.24 (Rajkumar Dixit) was the Head Constable who seized sealed viscera jars and vaginal slides which were produced by Head Constable Chetram. He admitted to not checking the sealed parcels himself and stated that he safely locked them in a locker at the police station.

31. Over and above the above-mentioned oral testimonies, we may now refer to the medico-scientific evidence led by the prosecution to connect the appellant with the crime.

32. P.W.8 (Dr. R.R. Chaudhary), a Senior Scientific Officer from FSL, Sagar has deposed that on 4th June, 2015 he examined three exhibits; Slide marked as Ex. A , Salwar marked as Ex. B and Chappal marked as Ex. C which belonged to the deceased. In the course of examination, human sperms were found on the slide (Ex. 'A) of the deceased, however, only human blood was found on the salwar (Ex. 'B'). No blood or semen was found on the slipper (Ex. 'C'). The blood group of the blood stained on the salwar could not be detected as a lot of dirt was stuck on it.

33. P.W.9 (Dr. C.S. Jain) was posted as Forensic Expert-Analysis at Medico-Legal Institute, Bhopal on 12th June, 2015 when three viscera jars (Exs. 'D', 'E' and 'F') comprising different parts of the body of deceased were received with their seals intact. However, when opened these viscera samples were discovered in a condition unfit for examination as the liquid had turned stinky and dusty, and the tissues had decayed. After comparing the postmortem report, evaluation of time and the sequence of the events as also the report of the State Forensic Science Laboratory, P.W.9 opined as follows, which could not be discredited at all in his cross-examination:

"12. Opinion :- After the analysis of facts described in the documents which have been examined on the basis of my subject knowledge, articles of books and experience

gained from the 10984 post mortems conducted by me for continuously more than 33 years I am of the opinion that:-

1. The deceased died due to throttling.

2. Sexual intercourse was performed with the deceased before her death which amounted to rape on considering the age.

3. The deceased was dragged before her death and injuries indicating the struggle were also present.

4. The slides and salwar of the deceased were kept for D.N.A. examination. I did not know their result up to the preparation of the report otherwise other opinion could also be expressed. It would be appropriate to enclose the said report in the case after obtaining it immediately. If the person/s performing sexual intercourse with the deceased are known then the D.N.A of their sperms should be matched with the D.N.A. of the sperms present in the vaginal slides because if they matched then it would be scientifically confirmed that the sexual intercourse was performed by them. In this regard my report is ExP-11 which is in 5 pages. The A to A part on it bears my signature."

34. P.W.11 (Dr. Pankaj Srivastava) was posted as Scientific Officer at the DNA Unit of FSL, Sagar during the period, 24th June, 2015 to 20th July, 2015 and he submitted the DNA test report which shows that the DNA extracted from the appellant's blood matched with DNA from the vaginal smear slide and salwar of the deceased. It has been specifically been recorded that bodily fluids of the other five suspects were not found present in the source vaginal slide or salwar of the victim. The witness was subjected to an extremely lengthy cross-examination but nothing that could distract the conclusion he has drawn in the report referred to above. His opinion is extracted hereunder:

"1....

1. Male D.N.A. profile was found on the source vaginal smear slide and salwar of the deceased.....

2. The body fluids of suspect Hargovind Kaurav, suspect Nandi @ Anand and suspect Baba @ Ashok were not found present in the source vaginal slide and salwar of the deceased

3. The body fluids of suspect Roopram and suspect Manoj were not found present in the source vaginal slide and salwar of the deceased.....

4. The D.N.A. profile matching with that of the suspect Baba @ Ravishankar was found present in the source vaginal slide and salwar of the deceased.....

2. The opinion given by me in regard to the suspect Hargovind Kaurav, Nandi @ Anand Kaurav and Baba @ Ashok is ExP-15 which is in 3 pages and the A to A part on it bears my signature. The opinion given by me in regard to the suspect Baba @ Ravishankar, Roopram @ Ruppu Kaurav and Manoj @ Halke Yadav is ExP-16 which is in 2 pages and the A to A part on it bears my signature."

35. P.W.12 (Dr. Kinshuk Jaiswal), who was posted as Medical Officer at Government Hospital Chichli on 23rd May, 2015, at at 9.00 a.m. conducted postmortem on the dead body of the deceased. She has stated that the putrefaction of the body had started and foul smelling odour was present. She estimated time of death at 48-72 hours before or possibly earlier depending upon environmental conditions. She also found chara (fodder) inside the hair of the deceased and deposed that two vaginal slides of the deceased were sent for examination. What she noticed in the postmortem examination was as follows:

"Abrasions present in the whole left portion of the body of the deceased. Extending from lateral aspect of left arm to left forearm 15 cm x 3.5 cm irregular in shape. Left thigh lateral 8 cm x 3 cm. Left leg (lateral) 7.5 cm x 2.5 cm irregular shape. Left buttock 15 cm x 4.5 cm irregular. Neck swollen. Contusions present on anterior aspect of neck both sides. Contusions present over right axillary area 5 cm x 2.5 cm over left supraclavicular area (6 cm x 2 cm), left arm (5 cm x 2.5 cm), left scapular area (8 cm x 2.5 cm). Contusion present over right thigh medical aspect (10 cm x 2.5 cm). Perineal area swollen and edematous. Pubic hair absent. Hymen ruptured. Two vaginal slides prepared and send + for biochemical examination. Feaces passed. Contusion present over left foot (dorsally) 3.5 cm x 1.5 cm and contusion present over right palm (palmar aspect) of size 2 cm x 1.5 cm. ....(sic.)"

36. P.W.16 (Dr. Kshipra Kaurav) was posted as Medical Officer at Government Hospital, Chichli on 8th July, 2015 when she was asked to take the blood sample of the appellant which she kept in a vial, sealed it and handed it over to the SHO who prepared the seizure memorandum Ex. P-5. She has volunteered in her cross-examination that the blood samples of two more persons were also taken prior to that of the appellant on the same day and that photographs of all the persons whose blood samples were taken were duly attested. She further volunteered that the identification Form Ex. P-9 along with photographs of the appellant were also attested by her.

37. Essentially, this is a case of circumstantial evidence which is supported by occular and medico-scientific evidence. The prosecution has effectively proved that deceased was last seen' with the appellant and on earlier occasions too was seen being enticed by the appellant. DNA evidence using the established STR technique has proved that appellant committed sexual intercourse with the deceased. Deceased has been proven to be a minor using school records. Various injuries on her body along with signs of struggle proved that such crime was committed in a barbaric manner. Death has been established as being homicidal and caused by throttling, and has been estimated during the time when the deceased was seen with the appellant. A slipper have been recovered through the appellant which has later been identified as belonging to the deceased, giving finality to the circumstantial chain. The appellant has been unable to offer any alibi and his defence merely rests on deflecting guilt on to the family of the deceased, which is without a shred of evidence. Further, no

effective challenge has been made against any medical or DNA reports. There can thus be no second opinion against the guilt of the appellant and his consequential conviction.

38. The findings of kidnapping, rape, resultant death and destruction of evidence have hence been proven beyond reasonable doubt, as evidenced by concurrent findings of the Courts below. Even this Court on 10th January, 2018 has confirmed the conviction of the appellant keeping in view the fact that DNA typing carries high probative value for scientific evidence, is often more reliable than ocular evidence. It goes without saying that in (i) Pantangi Balarama Venkata Ganesh vs. State of Andhra Pradesh, (2009) 14 SCC 607 and (ii) Dharam Deo Yadav vs. State of Uttar Pradesh, (2014) 5 SCC 509 this Court has unequivocally held that DNA test, even if not infallible, is nearly an accurate scientific evidence which can be a strong foundation for the findings in a criminal case.

Sentencing :

39. The core issue that we are left with to decide is the nature of punishment to be awarded to the appellant. The Trial Court awarded death sentence after drawing a balance-sheet weighing 'mitigating' circumstances against 'aggravating' circumstances. It noted that lack of criminal antecedents and a large number of dependants were outweighed by appellant's mature (40-50) age, heinousness of offence, adverse reaction of society, pre-planned manner of crime, injuries on body of deceased and lack of regret during trial. The High Court noted that there was bleeding due to sexual intercourse and that there was no possibility of reform owing to the appellant's denial of his crimes. Accordingly, it held that awarding death penalty was justified.

40. The question as to why and in what circumstances should the extreme sentence of death be awarded has been pondered upon by this Court since many a decades. The Constitution Bench of this Court in Bachan Singh vs. State of Punjab, (1980) 2 SCC 684 evolved the principle of life imprisonment as the 'rule' and death penalty as an 'exception'. It further mandated consideration of the probability of reform or rehabilitation of the criminal. It, thus, formed the genesis of the 'rarest of the rare' doctrine for awarding the sentence of death.

41. This was further developed in Machhi Singh and others vs. State of Punjab, (1983) 3 SCC 470 where this Court held that as part of the 'rarest of rare' test, the Court should address itself as to whether; (i) there is something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence; (ii) the circumstances are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender. Further, this Court ruled that:

"(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

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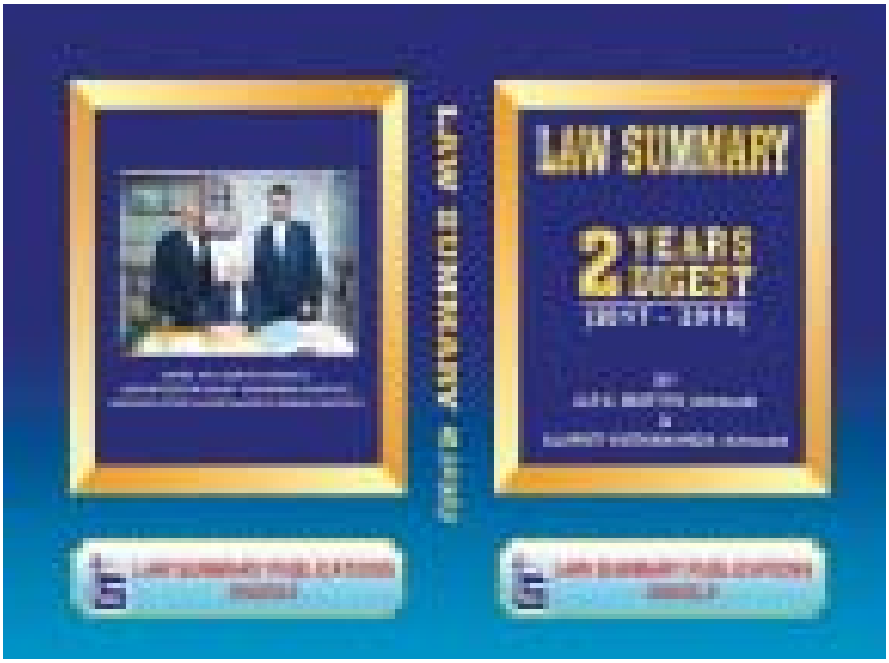

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