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PART - 2 (31ST JANUARY 2019)

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SUBJECT - INDEX

CIVIL PROCEDURE CODE, Sec.24 - Powers of Court to withdraw and transfer pending suit from one Court and another.

Petition filed u/Sec.24 CPC to withdraw O.S. pending on file of VIII Addl. District Judge, Chittoor and transfer same to IX Addl. District Judge, Chittoor.

Apex Court has given following factors to be taken in to consideration and also stated duty of Court.

(i) balance of convenience or inconvenience to the plaintiff or the defendant or witnesses;

(ii) convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit;

(iii) issues raised by the parties;
(iv) reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending;

(v) important questions of law involved or a considerable section of public interested in the litigation;
(vi) "interest of justice" demanding for transfer of case, etc.

When property is common in both suits, Court can exercise its discretionary power u/Sec.24 of CPC to withdraw and transfer pending suit fom one Court to another.

In this case, in so far as relief of joint trial is concerned same is rejected as both parties have to aduce evidence. **(Hyd.)** ***55***

CIVIL PROCEDURE CODE, 1908, Sec.100 – THE A.P. (TELANGANA AREA) TENANCY & AGRICULTURAL LANDS ACT, Sec.38-E – Plaintiff sought for partition of suit schedule properties into six equal shares and allot one such share to him and also for future mesne profits – Trial Court dismissed suit – Appellate Court upheld decision of Trial Court.

Held – Person who is not party to suit is not entitled to come on record at time of passing of final decree except in exceptional cases – Non-disclosing of factum of plaintiff having a sister is undoubtedly fatal to case of plaintiff –First Appellate Court has not committed any error while endorsing findings recorded by Trial Court – This Court shall not lightly interfere with concurrent findings of fact recorded by Courts below – First Appellate Court is fact finding final Court – If concurrent findings of fact recorded by courts below are neither found to be contrary to pleadings nor evidence or any provisions of law, or so found perverse, then, such concurrent findings of fact cannot be interfered with – Appeal dismissed. **(Hyd.)** ***63***

CIVIL PROCEDURE CODE, Or.12, R. 6, Or.16, R. 1 - A suit can be disposed of at the initial stage only on an admission inter alia under Order 12 Rule 6 or when the parties are not in issue under Order 16 Rule 1 and the other grounds mentioned therein, none of which are applicable herein. **(S.C.)** ***44***

CIVIL PROCEDURE CODE, Or.XVIII, Rule 17 and Sec.151 - Trial Court dismissed petition filed by defendant to recall PW 1 for further cross-examination to confront certain documents - As few documents were not available at time of cross-examination of PW.1, they were not confonted to him.

Held - Every party has a right to confront his documents to other side for admission or denial in order to establish his case and such a right is inherent in civil administration of Justice - Otherwise no party can establish his case - Courts in such situation cannot act pedantically when valuable rights of parties are at stake - If Courts feel such a right is opted to be exercised belatedly, they can impose costs rather than declining to accede their supplications - Civil Revision Petition is allowed. **(Hyd.)** ***60***

HINDU SUCCESSION ACT, Sec.29 – Whether plaintiff is sole legal heir of deceased – Whether plaintiff is entitled to possession and ownership of plaint schedule properties – Whether document addressed by three daughters of deceased amount to a Will.

Held – Plaintiff and second defendant are claiming suit schedule properties – Lower Court rightly held that there is no devolution of property on Government - Documents are valid and they constitute dedication in favour of second defendant – No devolution of property by virtue of Section 29 of Act – Lower Court correctly noticed that no evidence is placed to show that valuation is incorrect – No infirmities in findings of Lower Court – Appeal stands dismissed. **(Hyd.)** ***82***

INDIAN EVIDENCE ACT, Sec.35 – Appellant preferred instant appeal aggrieved by Judgment passed by High Court of Kerala - By impugned judgment, High Court set aside judgment of District Courts - Suit for partition and possession of 14/16th share in Schedule ‘A’ property and half rights over Plaint Schedule ‘B’ property was filed by the Respondent No. 1/Plaintiff - . It is the case of the defendants that Valliamma was not legally wedded wife of Mohammed Ilias and that she was a Hindu by religion at the time of marriage and She had not converted to Islam at the time of her marriage, and thus the plaintiff being the son of Valliamma, is not entitled to any share in the property of Mohammed Ilias.

Held - Legal effect of a fasid marriage (Irregular) is that in case of consummation, though wife is entitled to get dower, she is not entitled to inherit the properties of husband, but child born in that marriage is legitimate just like in case of a valid marriage, and is entitled to inherit the property of the father - High Court was justified in concluding that though plaintiff was born out of a fasid (irregular) marriage, he cannot be termed as an illegitimate son - Marriage of a Muslim man with a nonMuslim woman who is an idolatress or fire worshipper is not void, but merely irregular – Appeal stands dismissed. **(S.C.)** ***36***

(INDIAN) PENAL CODE, Sec.306 - Arvind committed suicide - According to the prosecution, Arvind was being threatened by accused through telephone conversations - Whether Appellant can be held guilty for committing an offence under Section 306 - Aggrieved by the dismissal of his appeal before High Court, Appellant preferred instant appeal.

Held - Conviction u/Sec.306 IPC is not sustainable on allegation of harassment without there being any positive action proximate to the time of occurrence on part of accused, which led or compelled person to commit suicide - In order to bring a case within the purview of Section 306 IPC, there must be a case of suicide and in commission of said offence, person who is said to have abetted commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate commission of suicide - Therefore,

act of abetment by person charged with said offence must be proved and established by prosecution before he could be convicted under Section 306 IPC – To constitute “instigation”, a person who instigates another has to provoke, incite, urge or encourage the doing of an act by the other by “goading” or “urging forward” - Appeal stands allowed and conviction and sentence of Appellant is set aside. **(S.C.)** ***29***

PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995 - Appellant appeared in selection for post of Civil Judge (Junior Division) under partially blind category–Appellant, a practicing Advocate, submitted online application and mentioned his percentage of disability as “more than 40%” - Disability certificate was also issued to appellant mentioning his disability as 70%. - Name of appellant was not included in the list of successful candidateswho were provisionally admitted to oral test - Appellant filed a writ petition before High Court, which in its interim Order directed that appellant shall be permitted to participate in the viva-voce – State of Tamil Nadu issued letter to the TNPC to go ahead with the notification for the 162 posts of Civil Judge, announcing 40%-50% disability for partially blind and partially deaf for the selection - Appellant, in writ petition filed an application to amend petition by adding a prayer for quashing of letter issued by State Government - Appellant aggrieved by judgment of High Court\ dismissing his writ petition has come up with instant appeal.

Held - A judicial officer in a State has to possess reasonable limit of faculties of hearing, sight and speech in order to hear cases and write judgments and, therefore, stipulating a limit of 50% disability in hearing impairment or visual impairment as a condition to be eligible for the post is a legitimate restriction i.e. fair, logical and reasonable - High Court did not commit any error in dismissing the writ petition filed by appellant -Prescription of disability to the extent of 40%-50% for recruitment for post of Civil Judge (Junior Division) was valid - Appeal stands dismissed. **(S.C.)** ***54***

REGISTRATION ACT, Sec.22-A(1) (a) - Sub Registrar refused to register document presented by petitioner on ground that subject land is assigned land included in list communicated to him prohibiting alienation.

Admittedly the condition prohibiting alienation of assigned lands included first time in G.O.Ms.No.1142, dt.18-6-1954 - Therefore assignment made prior to 18-6-1954 do not contain any prohibition prohibiting alienation and they are freely alienable - In this case, petitioner relied upon endorsement dated 13-12-2016 issued by R4 for purpose of registration of said document as per provisions of Stamp Act and Registration Act - Therefore R4 ought not to have refused registering document presented by petitioner.

Respondent directed to register document presented by petitioner without referring list communicated to him by R2 - W.P is allowed, **(Hyd.)** ***58***

WORKMEN’S COMPENSATION (AMENDMENT) ACT, Secs.4, 4A & 26 – Appellants/ Legal heirs of deceased aggrieved by rejection of their claim for compensation - Deceased was a bus driver under respondent no.1 - He fell off roof of bus accidentally and died – Hence Appeal.

Held - Doctrine of “Notional extension” - Workmen’s Compensation (Amendment) Act, being a welfare legislation, will have to be interpreted in facts of each case and evidence available, to determine if accident took place in course of employment and arose out of employment - Appellants are held to have wrongly been denied compensation under Act - Compen-sation payable to appellants shall be calculated u/Sec.4 along with default penalty u/sec.4A and costs to be awarded u/Sec.26 of Act - Impugned orders are set aside - Appeal stands allowed. **(S.C.)** ***33***

--X--

INJURED WITNESS - STAR WITNESS ; AN EXPOSITION

By
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PREFATORY:

The success of Criminal administration of justice relatively depends on the performance of the witness in the trial. In the Criminal trial, witness is a centre of attraction. The vision of Court, Defense counsel, Public Prosecutor, Police and the entire people in the jampacked court hall will be on the witness. Whether a witness is a maiden witness or regular witness, at all the times he will be in turmoil. The seat of witness is a hot seat practically. In India, generally witnesses can be classified into different categories viz; eye witness, natural witness, chance witness, official witness, sole witness, injured witness, independent witness, interested, related and partisan witness, inimical witness, trap witness, rustic witness, child witness, hostile witness and so on. In this write-up a humble attempt is made to focus, on the importance of the testimony of injured witness with the help of the judgements of the Supreme Court.

IMPORTANCE OF INJURED WITNESSES:

In cases affecting the human body and life, the Injured witnesses are the Star witnesses. Generally the Injured witnesses will play a dual role in the criminal trial while giving their testimony before the court. Firstly, they depose the factum of their receiving injuries in the incident, secondly, vouchsafe the factum of their standing as an eye witness to the incident. Thus, they divulge not only the factum of receiving injuries in the hands of the offenders and also narrate the incident before the court, as how occurred in their presence. Their pen-picture depiction throw an ample light before the court, with which the court proceeds further in determination of the guilt or otherwise of the offenders. Thus, their importance in the criminal administration of justice, so they are called Star witnesses or Stellar witnesses.

PRECEDENTS:

The Supreme Court of India has all along highlighted the importance and significance of the Injured witnesses in the criminal trial through its emphatic phraseology, so that, the trial courts in India take cue of the dictum and proceed in the process of justice delivery.

The Supreme Court in *Rupa Ashok Hurra v. Ashok Hurra*[1] held that "the law declared by the Supreme Court is the law of the land; It is precedent for itself and for all the courts/tribunals and authorities in India." With the above background the importance

of the Injured witness in the criminal administration of justice is analysed hereunder with the judgements of the apex court.

In *Machhi Singh v. State of Punjab*[2], the Supreme Court analysed the role of Injured witness and held that " the evidence of Injured witness entitled to great weight and that there is an inbuilt guarantee for his/her eye witnessing the incident."

In *State of Gujarat Vs. Bharwad Jakshibhai and others*[3] , "the Apex court formulated four points to appreciate the evidence of Injured witness: They are,

(1) Their presence at the time and place of the occurrence cannot be doubted.

(2) They do not have any reason to omit the real culprits and implicate falsely the accused persons.

(3) The evidence of the injured witnesses is of great value to the prosecution and it cannot be doubted merely on some supposed natural conduct of a person during the incident or after the incident because it is difficult to imagine how a witness would act or react to a particular incident. His action depends upon number of imponderable aspects.

(4) If there is any exaggeration in their evidence, then the exaggeration is to be discarded and not their entire evidence.

In *Shivalingappa Kallayanappa v. State of Karnataka* [4], the Apex court has held that, "the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident."

The Apex court in *Bonkya Alias Bharat Shvaji Mane v. State of Maharastra*,[5] depicted the injured witnesses by holding that "these(injured witnesses) are the stamped witnesses whose presence admits of no doubt and being themselves the victims they would not leave out the real assailants and substitute with innocent persons."

From the above dictum, it is clear that the evidence of injured witnesses has to be placed on high pedestal while appreciating their evidentiary value.

In *State of U.P. v. Kishan Chand* [6], the Supreme Court reiterated that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross- examination and nothing can be elicited to discard his testimony, it should be relied upon.

The Apex court in *Dinesh Kumar v. State of Rajasthan*,[7] through Justice Arijith

Pasayat (along with J. Mukundakurn Sharma) propounded the law that "in law, testimony of an injured witness is given importance."

In the leading case on the point, in, *Abdul Saeed Vs. State of Madhya Pradesh*,[8] the Hon'ble Supreme court held emphatically that, "where witness to occurrence was himself injured in the incident, testimony of such witness is generally considered to be very reliable as he is a witness who comes with a inbuilt guarantee of his presence at the scene of crime and is unlikely to spare his actual assailant in order to falsely implicate someone".

The Hon'ble Supreme Court has further held that "deposition of injured witness should be relied upon unless there are strong grounds for rejection of his evidence on basis of major contradictions and discrepancies therein."

In *Bhajan Singh Alias Harbhajan Singh and ors. v. State of Haryana*,[9] the Supreme Court held that, the evidence of the stamped witness must be given due weightage as his presence on the place of occurrence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an Injured witness has it's own relevancy and efficacy as he has sustained injuries at the time and place of occurence and this lends support to his testimony of an injured witness is accorded a special status in law. Such a witness comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. Convincing evidence is required to discredit an injured witness. Thus, the evidence of an injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein.
On cluster reading of above judgements of the Supreme court and the ratio laid down therein, it is clear that, in the criminal trial, the Injured witness is a Star witness and his evidence will be placed on high pedestal.

CONCLUSION:

Amidst, the above significance given to the Injured witness, the chief components of criminal administration of justice i.e., the courts, the public prosecutors, the defence counsel and the investigating agencies have to pay immense attention in securing the attendance of the injured witness before the court and see that testify, so that justice dispensed with, to the needy. In eliciting the truth the Injured witnesses are the Star witnesses, altogether truth shall triumph. The Star witness is a bridge between the court and the truth. The write-up is concluded with the words of Apex court in, *Maria Margarida Sequeira Fernandes v. Erasmo Jack de Sequeira*[10], "Satyameva Jayate" (literally 'truth stands invincible') is a mantra from the ancient scripture Mundaka Upanishad. Upon Independence of India, it was adopted as the national motto of India. It is inscribed in Devnagiri script at the base of the national emblem. The meaning of the full mantra is as

follows: “Truth alone triumphs; not falsehood. Through truth the divine path is spread out by which the sages whose desires have been completely fulfilled, reach where that supreme treasure of truth resides.”

(Footnotes)

1.(2002) 4 SCC 388
2.(1983) 3 SCC 470;
3. 1990 CrLJ 2531
4. 1994 Supp3 SCC 235
5. AIR 1996 SC 257
6. 2004 7 SCC 629
7. (2008) 8 SCC 270
8. (2010) 10 SCC 259;
9. (2011) 7 S.C.R.1
10.(2012) 5 SCC 370

2018(1) L.S. 55 (Hyd.)

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

Present:
The Hon'ble Mr.Justice
M. Satyanarayana Murthy

G.B. Prasanna ..Petitioner

Vs.

M.D. Vedanayaki
(died) & Ors., ..Respondents

CIVIL PROCEDURE CODE, Sec.24 - Powers of Court to withdraw and transfer pending suit from one Court and another.

Petition filed u/Sec.24 CPC to withdraw O.S. pending on file of VIII Addl. District Judge, Chittoor and transfer same to IX Addl. District Judge, Chittoor.

Apex Court has given following factors to be taken in to consideration and also stated duty of Court.

(i) balance of convenience or inconvenience to the plaintiff or the defendant or witnesses;

(ii) convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit;

(iii) issues raised by the parties;

(iv) reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending;

(v) important questions of law involved or a considerable section of public interested in the litigation;

(vi) "interest of justice" demanding for transfer of case, etc.

When property is common in both suits, Court can exercise its discretionary power u/Sec.24 of CPC to withdraw and transfer pending suit fom one Court to another.

In this case, in so far as relief of joint trial is concerned same is rejected as both parties have to aduce evidence.

Mr.S.S. Bhatt, Advocates for the Petitioner.
Mr.P. Venkata Rama Sarma, Advocate For the Respondents: R2.

J U D G M E N T

This petition under Section 24 of C.P.C is filed to withdraw O.S.No.71 of 2014 pending on the file of VIII Additional District Judge, Chittoor and transfer the same to IX Additional District Judge, Chittoor and club with pending A.S.No.69 of 2013, on the ground that in O.S.No.71 of 2014, this petitioner is arrayed as sole defendant and the relief claimed in the said suit is declaration of title and consequential injunction.

Tr.C.M.P. No.424/2017 Date:30-01-2018

Whereas, the second respondent herein filed O.S.No.51 of 2004 for partition of plaint schedule property against the petitioner herein, which ended in dismissal. Aggrieved by the decree and judgment in O.S.No.51 of 2004, the second respondent herein preferred A.S.No.69 of 2013 pending on the file of IX Additional District Judge, Chittoor for adjudication. Further, during pendency of the appeal, the first respondent herein died and the petitioner herein allegedly filed I.A.No.90 of 2014 in A.S.No.69 of 2013 under Order I Rule 10 C.P.C to implead the petitioner who is the proposed legal representative of the second respondent herein. The said I.A.No.90 of 2014 was dismissed by the Court below on 17.02.2017. However, C.R.P.No.2842 of 2017 was preferred against the order in I.A.No.90 of 2017 before this Court, which was disposed of by this Court on 19.09.2017, directing the IX Additional District Judge, Chittoor to conduct an enquiry trial in the said appeal with regard to validity or otherwise of the registered Will dated 15.07.2002 and thereafter to proceed in accordance with law.

Since, the property involved in both the suits is one and the same, though the petitioner is not a party to the appeal, as on today, to avoid conflicting judgments, the petitioner sought for withdrawal of O.S.No.71 of 2014 pending on the file of VIII Additional District Judge, Chittoor and transfer the same to IX Additional District Judge, Chittoor and club with pending A.S.No.69 of 2013, for adjudication.

During hearing, learned counsel for the petitioner Sri S.S. Bhatt reiterated the contentions raised in the affidavit, whereas, the learned counsel for the second respondent Sri P. Venkata Rama Sarma opposed the petition on the ground that, until a decision is given on the interlocutory application, in pursuance of the direction issued by this Court in C.R.P.No.2842 of 2017, both the matters cannot be disposed of simultaneously by one Court. Further, the question of conflicting decisions would not arise even if both the cases were disposed of by two independent Courts separately and prayed for dismissal of this petition.

It is an undisputed fact that, O.S.No.71 of 2014 and A.S.No.69 of 2013 are pending on the file of two different Courts i.e. VIII Additional District Judge, Chittoor IX Additional District Judge, Chittoor, respectively. But, the property involved in both the suits is one and the same.

In A.S.No.69 of 2013 which is filed for partition, the petitioner is not yet impleaded as party. However, the direction issued by this Court in C.R.P.No.2842 of 2017 is not yet complied with by the IX Additional District Judge, Chittoor and the appeal suit is still pending for adjudication about the validity of the Will, as directed in the revision petition.

But, in O.S.No.71 of 2014 which is filed for declaration of title and consequential injunction, this petitioner set up the Registered Will, claiming property by way of testamentary dispossession and therefore, adjudication, if any, as directed by this Court in C.R.P.No.2842 of 2017 will have its own impact on the judgment in O.S.No.71 of 2014. If, for any reason, in

the appeal A.S.No.69 of 2013, the validty of the Will is decided and the defence set up in the suit O.S.No.71 of 2014 is decided on the same Will, the defendant would loose is opportunity to adduce substantive evidence to prove the said will and if, for any reason, two suits are tried by two different Courts, there is every likelihood of conflicting judgments on the Registered Will set up by the petitioner herein.

When the property is common in both the suits, the Court can exercise its discretionary power under Section 24 of C.P.C to withdraw and transfer the pending suit from one Court to another.

In Dr.Reddy's Laboratories Ltd., Hyderabad Vs. Pulletikurhti Varaha Chandra Bose and others (2004 (4) ALD page 719), this Court held as follows:

"Necessity for transfer of suits from one Court to another, would arise if only there exists any similarity of causes of action or commonality of parties. When such situation does not exist, the relief claimed for transfer of the suit, cannot be granted."

In Kulwinder Kaur @ Kulwinder Gurcharan Singh Vs. Kandi Friends Education Trust and others (2008 (3) Supreme Court Cases Page 659), the Supreme Court held as follows:

"Section 24 CPC confers comprehensive power on the court to transfer suits, appeals or other proceedings "at any stage" either on an application by any party or suo motu. Although the discretionary power of transfer of cases cannot be imprisoned within a straitjacket of any cast-iron formula unanimously applicable to all situations, it cannot be gainsaid that the power to transfer a case must be exercised with due care, caution and circumspection.
It is true that normally while making an order of transfer, the court may not enter into merits of the matter as it may affect the final outcome of the proceedings or cause prejudice to one or the other side. At the same time, however, an order of transfer must reflect application of mind by the court and the circumstances which weighed in taking the action. Powers under Section 24 CPC cannot be exercised ipse dixit in the manner in which it has been done in the present case."

It is further held by the Supreme Court that the following factors have to be taken into consideration in a situation in which it is duty of court to transfer the case:

(i) balance of convenience or inconvenience to the plaintiff or the defendant or witnesses;

(ii) convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit;

(iii) issues raised by the parties;

(iv) reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending;
(v) important questions of law involved or a considerable section of public interested in the litigation;

(vi) "interest of justice" demanding for transfer of case, etc.

The Apex Court observed that, the above guidelines are illustrative, but not substantive guidelines."

The Apex Court in Kulwinder Kaur (2 case, specified that when the property is one and the same, the Court may exercise is inherent discretion to avoid conflicting judgments and convenience of parties is one of the consideration to exercise power under Section 24 C.P.C. Hence, I deem it appropriate to withdraw O.S.No.71 of 2014 pending on the file of VIII Additional District Judge, Chittoor and transfer the same to IX Additional District Judge, Chittoor, where A.S.No.69 of 2013 is also pending, so as to enable the Court to decide the validity of the Will in both the cases simultaneously. In so far as the relief of joint trial is concerned, the same is rejected, as both the parties have to adduce evidence in O.S.No.71 of 2014 and A.S.No.69 of 2013 is pending for adjudication.

However, in Dronavajjula Vidyamba Vs Vallabhajosyula Lakshmi Venkayamma (AIR 1958 (A.P.) Page 218), Division Bench of this Court that, under Section 24(2) of C.P.C., special direction may be issued by the Court ordering the transfer either to order the trial denovo or to proceed with the suit from the point at which it was transferred or withdrawn. For whatever reasons convenience or otherwise the order of transfer made under section 24(2) of CPC it does not empower the court or contemplate any directions being given for the joint trial of the transferred suit. So, any violation or contravention of that order of transfer and the separate trial of the transferred suit do not render the proceedings invalid.

Thus, in view of the law declared by the Division Bench of this Court, I am not inclined to order joint trail of both the matters.

In the result, the transfer civil miscellaneous petition is partly allowed, O.S.No.71 of 2014 pending on the file of VIII Additional District Judge, Chittoor is withdrawn and transferred the same to IX Additional District Judge, Chittoor, where A.S.No.69 of 2013 is pending and the Court concerned is directed to decide both the matters simultaneously without clubbing both the matters.

Consequently, miscellaneous applications pending if any, shall stand closed. No costs.

–X–

2019 (1) L.S. 58 (Hyd.)

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

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

K. Rathnamma ..Petitioner
Vs.
State of A.P. & Ors., ..Respondents

REGISTRATION ACT, Sec.22-A(1) (a) - Sub Registrar refused to register

W.P.No.39330/2017 Date: 30-11-2017

document presented by petitioner on ground that subject land is assigned land included in list communicated to him prohibiting alienation.

Admittedly the condition prohibiting alienation of assigned lands included first time in G.O.Ms.No.1142, dt.18-6-1954 - Therefore assignment made prior to 18-6-1954 do not contain any prohibition prohibiting alienation and they are freely alienable - In this case, petitioner relied upon endorsement dated 13-12-2016 issued by R4 for purpose of registration of said document as per provisions of Stamp Act and Registration Act - Therefore R4 ought not to have refused registering document presented by petitioner.

Respondent directed to register document presented by petitioner without referring list communicated to him by R2 - W.P is allowed,

Mr.N. Ranga Reddy, Advocate for the Petitioner.
G.P. for Revenue (Assignment) AP), Advocate for the Respondents.

O R D E R

Heard learned counsel for the petitioner and learned Government Pleader for Assignment (Andhra Pradesh) appearing for respondent No.5.

When the petitioner presented a document for registration, respondent No.5 received it, kept it pending registration and did not release it. Then, the petitioner filed Wit Petition No.2315 of 2017 before this Court. In the said Writ Petition, he relied upon an endorsement dt 13.12.2016 issued by respondent No.4 to one K.Ramakrishna Rao stating that the subject land had been assigned to one Karanam Sanjeeva Rao, vide proceedings, DAR.Dis.No.313/54 dt 08/6/1950. The said Writ Petition was disposed of on 24.01.2017, directing respondent No.5 to take further action on the pending Document No.267 of 2016 presented by the petitioner taking into account the said endorsement dt 13.12.2016 of respondent No.4 for the purpose of registration of the said document as per the provisions of the Stamp Act, 1899 and the Registration Act, 1908 (for short 'the Act').

Thereafter, respondent No.5 passed the impugned refusal order on 01.11.2017, stating that the subject land is classified as assigned land as per the list communicated by revenue authorities in terms of order dt 23.12.2015 of this Court in Writ Appeal No.232 of 2012 and batch and accordingly, the registration of the said land is prohibited under Section-22-A(1)(a) of the Act. Assailing the said refusal order, this Writ Petition is filed.

It is not disputed by learned Government Pleader for Assignment (Andhra Pradesh) that the condition prohibiting alienation of assigned lands was included for the first time in G.O.Ms.No.1142, Revenue Department dt 18.6.1954 in respect of the lands in Andhra area of the then composite State of Andhra Pradesh. Therefore, the assignments made prior to 18.6.1954 do not contain any provision prohibiting

alienation and they are freely alienable. Consequently, the very inclusion of the subject land by respondent No.2 in the list communicated by him to respondent No.5 under Section-22-A(1)(a) of the Act is contrary to law and does not appear to be *bona fide*. Respondent No.5, therefore, ought not to have refused registration of the document presented by the petitioner in respect of the subject land merely because it is included in the list communicated to him by respondent No.2 under Section-22-A(1)(a) of the Act.

Accordingly, the Writ Petition is allowed; the list communicated by respondent No.2 to respondent No.5 under Section- 22-A(1)(a) of the Act insofar as the subject land is set aside; consequently, the order dt 01.11.2017 of respondent No.5 is also set aside; and respondent No.5 is directed to register the said document presented by the petitioner, without reference to the list communicated to him by respondent No.2, strictly in accordance with the provisions of the Stamp Act, 1899 and the Registration Act, 1908. Respondent No.2 shall pay costs of Rs.3,000/- (Rupees Three thousand only) to the petitioner within four weeks from today.

The Registry shall issue show cause notice to respondent No.5 as to why proceedings for contempt of Court shall not be initiated against him for not considering the endorsement dt 13.12.2016 of respondent No.4 while passing the impugned order and thus, acting contrary to order dt 24.01.2017 of this Court in Writ Petition No.2315 of 2017.

As a sequel, Miscellaneous Petitions, if any, pending, shall stand disposed of as infructuous.

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2018(1) L.S. 60 (Hyd.)

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

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

M/s. VINS Bio-Product Pvt. Ltd., & Anr., ..Petitioner

Vs.

M/s. Mastana Constructions Engineers & Contractors, & Anr., ..Respondents

CIVIL PROCEDURE CODE, Or.XVIII, Rule 17 and Sec.151 - Trial Court dismissed petition filed by defendant to recall PW 1 for further cross-examination to confront certain documents - As few documents were not available at time of cross-examination of PW.1, they were not confonted to him.

Held - Every party has a right to confront his documents to other side for admission or denial in order to establish his case and such a right is inherent in civil administration of Justice - Otherwise no party can establish his case - Courts in such situation cannot

CRP.No.4758/17 Date: 05-12-2017

act pedantically when valuable rights of parties are at stake - If Courts feel such a right is opted to be exercised belatedly, they can impose costs rather than declining to accede their supplications - Civil Revision Petition is allowed.

Mr.Dishit Battacharjee, Advocates for the Petitioners.
Mr.S.A. Razak, Advocate for the Respondents.

O R D E R

1. The challenge in this Civil Revision Petition is the order dated 21.08.2017 in I.A.No.1051 of 2017 in O.S.No.274 of 2011 on the file of XI Additional Chief Judge, City Civil Court, Hyderabad, whereunder the learned Judge dismissed the petition filed by the defendant under Order XVIII Rule 17 r/w Sec. 151 CPC to recall PW.1 for further cross-examination to confront certain documents.

2) The respondent/plaintiff filed O.S.No.274 of 2011 for a money decree and the petitioner/defendant is contesting the same. While-so, the defendant filed I.A.No.1051 of 2017 to recall PW.1 for further cross-examination on the ground that during earlier cross-examination before the Advocate Commissioner, he could confront only those documents which were already filed by the defendant along with his written statement and the counter claim. However, during defendant's evidence, some more documents were filed. Those documents could not be confronted to PW.1 during the course of cross-examination as they were filed at a later stage. Unless the subsequently filed documents were confronted to PW.1 by recalling him, the defendant would be put to irreparable loss. The respondent/plaintiff opposed the petition. The Trial Court in its impugned order dismissed the petition on the observation that a petition of this nature ought to have been filed before commencement of the evidence of defendant (DW.1).

Hence the Civil Revision Petition.

3) Heard arguments of Sri Dishit Bhattacharjee, learned counsel for petitioner and Sri S.A.Razak, learned counsel for respondent.

4) Fulminating the order of the Trial Court, learned counsel for petitioner would submit that by the time of cross-examination of PW.1, only some documents which were filed along with written statement were available on record and they were confronted to PW.1 in his cross-examination. Then during the evidence of DW.1, some more documents were filed and marked as exhibits. As those documents were not available by the time of cross-examination of PW.1, they were not confronted to him. Therefore, the petition to recall PW.1 was filed. Unless those documents are confronted to PW.1, the defendant will be put to irreparable loss. Having regard to the fact that the suit is filed for realization of a high amount and also considering the valuable rights of the petitioner/defendant which are at stake in the suit, the petition may be allowed.

5) Per contra, opposing the petition, learned counsel for respondent would submit that

PW.1 was cross-examined by the defendant at length and now at this stage when the matter is posted for arguments, a recall petition which is mainly intended to fill up the gaps, cannot be permitted. He placed reliance on the decision reported in Rami Rati vs. Mange Ram and others (AIR 2016 SC 1343), to canvass that a recall petition cannot be used for filling up the gaps in the earlier evidence.

6) The point for determination is:

“Whether there are merits in the CRP to allow?”

7) POINT: On a careful scrutiny, it must be held, the Trial Court fumbled in appreciating the purpose for which the recall of PW.1 was sought for. It is the clear case of defendant that during the cross-examination of PW.1, only some of the documents which were filed along with the written statement could be confronted to him. However, after evidence of plaintiff was closed and during the evidence of defendant, some additional documents were filed along with DW.1’s chief affidavit and they were marked as exhibits on behalf of the defendant. In this factual backdrop, the subsequently marked documents could not be confronted to PW.1 during his earlier cross-examination and unless those subsequent documents are confronted to PW.1 by recalling him, the petitioner/ defendant will be put to irreparable loss. It appears, neither the Trial Court nor the plaintiff did dispute the aforesaid facts. However, the Trial Court dismissed the petition on the observation that if the defendant wanted to confront PW.1 with his documents, he ought to have filed the present petition before commencement of his evidence (DW.1). This observation is incorrect in the light of the factual position narrated supra. Since the additional documents were filed only along with the chief affidavit of DW.1, the question of filing the recall petition before the commencement of defendant’s evidence does not arise. Therefore, the order of the Trial Court is not sustainable. In Ram Rati’s case (1 supra), the Apex Court considered its earlier decisions on Order XVIII Rule 17 CPC to expound, when a witness can be recalled. It also discussed the question whether a witness can be recalled for further elaboration of aspects left out in the evidence which was already closed. The Apex Court referred the crux of the earlier judgments to the effect that witness can be recalled to clarify any issue or doubt but he cannot be recalled to fill up the lacunae in the evidence of witness which was already recorded. Ultimately the Apex Court held that recall of a witness for further elaboration on the left out points is wholly impermissible in law.

8) There is no demur regarding the above ratio. What is to be seen in this case is whether, the defendant by invoking recall of PW.1 wants to fill up any lacunae in his earlier evidence or wants to make a further elaboration on the left out points. If that be his intention, certainly he does not deserve for recall of PW.1. However, in my considered view, here the intention is altogether a different one. Certain documents which were subsequently filed by him during the course of his evidence were not confronted to PW.1 during his

cross-examination and unless those documents are confronted to PW.1, he cannot establish his case. This, in my view, does not amount to either filling up the lacunae or further elaboration. It must be emphasized that every party has a right to confront his documents to the other side for admission or denial in order to establish his case. Such a right is inherent in civil administration of justice. Otherwise no party can establish his case. The Courts in such situation cannot act pedantically when valuable rights of the parties are at stake. If the Courts feel such a right is opted to be exercised belatedly, they can impose costs rather than declining to accede their supplications.

9) In the result, this Civil Revision Petition is allowed by setting aside the impugned order. Consequently, I.A.No.1051 of 2017 in O.S.No.274 of 2011 on the file of XI Additional Chief Judge, City Civil Court, Hyderabad, is allowed on the condition of petitioner/defendant depositing costs of Rs.2,000/-(Rupees two thousand only) with City Civil Court Legal Services Authority, Hyderabad, within a week from the date of this order. On such deposit, the Trial Court shall recall PW.1 and fix a suitable date convenient for both parties for cross-examination, in which event, the petitioner shall complete the cross-examination on a single day. No costs.

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

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2018(1) L.S. 63 (Hyd.)

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

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

Yeluru Ramakrishna ..Petitioner
Vs.
Yeluru Venkateshwarlu & Ors., ..Respondents

CIVIL PROCEDURE CODE, 1908, Sec.100 – THE A.P. (TELANGANA AREA) TENANCY & AGRICULTURAL LANDS ACT, Sec.38-E – Plaintiff sought for partition of suit schedule properties into six equal shares and allot one such share to him and also for future mesne profits – Trial Court dismissed suit – Appellate Court upheld decision of Trial Court.

Held – Person who is not party to suit is not entitled to come on record at time of passing of final decree except in exceptional cases – Non-disclosing of factum of plaintiff having a sister is undoubtedly fatal to case of plaintiff – First Appellate Court has not committed any error while endorsing findings recorded by Trial Court – This Court shall not lightly interfere with concurrent findings of fact recorded by Courts below – First Appellate Court is fact finding final Court – If concurrent

S.A.No.No.603/2009 Date: 5-1-2018

findings of fact recorded by courts below are neither found to be contrary to pleadings nor evidence or any provisions of law, or so found perverse, then, such concurrent findings of fact cannot be interfered with – Appeal dismissed.

Mr.M.R.K. Chakravarthy, Representing M.V. Durga Prasad, Advocates for the Appellant.
Mr.M. Rajamalla Reddy, Advocates for the Respondents.

J U D G M E N T

1. The plaintiff, who lost the battle for partition in both the Courts, preferred this second appeal under Section 100 CPC, questioning the legality and validity of the judgment and decree dated 08.04.2004 passed in A.S.No.45 of 2002 on the file of the Court of the III Additional District Judge (FTC-II), at Khammam, upholding the judgment and decree dated 05.07.2000 passed in O.S.No.129 of 1991 on the file of the Court of the Senior Civil Judge, Khammam.

2. For the sake of convenience, the parties to this second appeal will, hereinafter, be referred to as they were arrayed in the suit. The first defendant, who is no more, is not arrayed as respondent and defendant Nos.2 to 7 are arrayed as respondent Nos.1 to 6 respectively.

3. The facts leading to the filing of the present second appeal, in nutshell, are as follows:

4. Yeluru Seshaiah and Yeluru Appaiah who are brothers by full blood, owned agricultural land in Gundrathimaduvu village of Khammam Taluq and district and the said land was submerged under Wyra reservoir. The first defendant and one Ramaiah are the sons of Yeluru Seshaiah. Second defendant is elder son and third defendant is the younger son of the first defendant. The plaintiff is the son of second defendant. The plaintiff and defendant Nos.1 to 3 are members of Hindu Mithakshara co-parcenery joint family. At the time of marriage of the first defendant with one Ramulamma, his father-in-law Katta Lakshmi Narsaiah presented Rs.116/- and one cow and one calf to the first defendant. Appaiah the paternal uncle of the first defendant also presented Rs.116/- and one cow and one calf to the first defendant at the time of marriage. The first defendant also got compensation in respect of the land submerged in Wyra reservoir. Ramulamma-the first wife of the first defendant died after she gave birth to the second defendant. The first defendant married one Hanumayamma (defendant No.4), who is the own sister of Ramulamma through whom the first defendant begot one son i.e., defendant No.3 and three daughters (defendant Nos.5 to 7). First defendant is the Kartha of the joint family and he used to manage the entire joint family properties. Second defendant under the guidance of the first defendant performed the marriages of his sisters and brother. First defendant, with the amounts gifted to him at the time of marriage and the amount received towards compensation for the land acquired for Wyra reservoir, has purchased Item No.1 of the suit schedule property admeasuring Ac.9.34 guntas (Wet land of Ac.3.00 and dry land

of Ac.6.34 guntas) from its pattedar Nawab Ahmad Jung Bahadur on 01.11.1955. First defendant was the tenant of the said Nawab prior to the purchase of the Item No.1 of the suit schedule property. Item Nos.2 to 5 of the suit schedule property were purchased by the first defendant with the income derived from Item No.1 of the suit schedule property. Second defendant, being a Government employee, worked at different places. First defendant had become a pawn at the hands of his wife Hanumayamma (defendant No.4). The acts of defendant Nos.1 to 3, at the instance of Hanumayamma, are causing detriment to the interest of the plaintiff. The plaintiff had placed the matter before elders in the month of July 1991, but the defendants have paid deaf ear to the advice of the elders. Hence the plaintiff, having no other alternative, filed the suit for partition of the suit schedule properties into six equal shares and allot one such share to him and also for future mesne profits.

5. First defendant filed written statement admitting the inter-se relationship between the parties, inter alia contending that he had not inherited any property from his ancestors so as to constitute any nucleus for the unfounded joint family of the plaintiff and defendants. Yeluru Appaiah was not having any agricultural land. If at all any gifts were given to the first defendant, they do not constitute the joint family property. First defendant and his brother-Ramaiah had cultivated an extent of Ac.20.00 of land, which belongs to Nawab of that area. First defendant and his brother-Ramaiah were declared as protected tenants and ownership certificates were given to that effect under Section 38-E of The A.P. (Telangana Area) Tenancy & Agricultural Lands Act, 1950 (for short, 'the Act'). Out of Acs.20.00, Acs.10.00 of land got by this defendant and the remaining Acs.10.00 of land was allotted to Ramaiah. Therefore, item No.1 of the suit schedule is the self-acquired property of this defendant. This defendant purchased other items of property with his own money. He gave Acs.3.00 of land to his daughters (defendant Nos.5 to 7) towards pasupu-kunkuma. This defendant bequeathed an extent of Ac.6.30 guntas of dry land in Item No.1 in favour of his second son Yeluru Narasimha Rao i.e., third defendant through a Will. Item No.2 of the suit schedule property was sold by his wife-Hanumayamma (defendant No.4) in favour of wife of Pothu Satyanarayana. First defendant sold an extent of Ac.1.00 in Item No.3 of the suit schedule property to one Pola Rama Sundari, W/o.Mohana Rao in the year 1983. First defendant also sold an extent of Ac.1.00 in favour of Sanka Jagan Mohan Rao, Ac.0.45 guntas in favour of Nerella Satyanarayana, Ac.0.22 guntas in favour of Patipalli Nagaraja Kumari and thus he sold Acs.2.67 guntas in Item No.3 in favour of the aforesaid persons. An extent of Ac.0.20 guntas was acquired for formation of Nagarjuna Sagar Canal. He sold Ac.3.00 in favour of one Saraswathi-wife of third defendant. He gave Acs.2.00 to seventh defendant towards her pasupu kunkuma. So, the first defendant is not having any extent in item No.3 of the suit schedule property. He constructed a tiled house in item No.4 and hence it is his exclusive property. Second defendant purchased house bearing D.No.12-47 in Madhira and house plots at Khammam. Second

defendant also owned an extent of Ac.2.00 of land in Warangal, which was converted into house sites. The plaintiff, in collusion with the second defendant, filed the present suit. Any property acquired with the income derived from item No.1 would become the self acquired property of this defendant and so the plaintiff is not entitled for any share in the suit schedule properties. Hence the suit is liable to be dismissed. During the pendency of the suit, first defendant died and his wife and three daughters were brought on record as defendant Nos.4 to 7.

6. Second defendant did not choose to file written statement and remained ex parte.Third defendant filed separate written statement with almost similar contents with that of the first defendant.

7. Basing on the above pleadings, the following issues and additional were settled by the trial court:

ISSUES

1. Whether the plaintiff and defendants 1 to 3 constituted members of a joint Hindu family?

2. Whether all the suit properties are joint family properties as alleged by the plaintiff?

3. Whether the suit properties are the self-acquired properties of the 1st defendant?

4. Whether the plaintiff is entitled to the relief of partition?

5. Whether the valuation of the suit relief is correct?

6. To what relief?

ADDITIONAL ISSUES DT:05.08.1992

1. Whether Item No.1 of the plaint schedule was already disposed of by the 1st defendant?

2. Whether Item No.2 of the plaint schedule belonged to Hanumayamma, the wife of 1st defendant as pleaded by the 3rd defendant?

ADDITIONAL ISSUES DT:03.11.1998

1. Whether the defendant No.1 had inherited any property from his ancestors to constitute nucleus for the joint family of the plaintiff and defendants in acquiring the suit schedule properties including Part of Item No.1 suit schedule property?

2. Whether the defendant No.1 and his brother Eluri Ramaiah were declared as protected tenants of Item No.1 of the suit schedule property and whether it is the self acquisition of defendant No.1?

3. Whether giving of three acres of wet land of Item No.1 of the suit schedule property by defendant No.1 in favour of his three daughters (one acre each) towards pasupu kunkuma and bequeathing of Acs. 6-30 gts dry land out of Item No.1 of the suit schedule property by the defendant No.1 in favour of defendant No.3 is true and genuine?

4. Whether Item No.2 of the suit schedule property is the property of Eluri Hanumayamma and whether it was sold

by her in favour of wife of Potu Satyanarayana as contended?

5. Whether the alienations with regard to Item No.3 of the suit schedule property as contended are true and correct and genuine?

6. Whether D.1 executed a registered Will to Item No.3 in a sound and disposing state of mind bequeathing properties to D.3, D.4 and Yeluru Sri Phani?

8. To substantiate the case, before the trial Court, the plaintiff got examined himself as P.W.1 and got marked Ex.A.1. To non-suit the plaintiff, on behalf of the contestingdefendants D.Ws.1 to 5 were examined and Exs.B.1 to B.7 and Ex.X.1 were marked.

9. After having a thoughtful consideration to the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that Item No.1 of the suit schedule property is the self acquired property of the first defendant; therefore, he is entitled to bequeath the properties under Ex.B.1 Will and Ex.B.3 Gift deed, and consequently dismissed the suit.

10. Feeling aggrieved by the judgment and decree dated 05.07.2000 passed by the trial Court in O.S.No.129 of 1991, the plaintiff preferred A.S.No.45 of 2002 on the file of the Court of the III Additional District Judge (FTC-II), at Khammam. The first appellate Court, after reappraising the oral and documentary evidence available on record and without being influenced by the findings recorded by the trial Court, arrived at a conclusion that the suit schedule properties are self acquired properties of the first defendant; thus the plaintiff is not entitled to partition of the suit schedule properties and accordingly dismissed the appeal. The first appellate court also believed Ex.B.1-Will and Ex.B.3 Gift deed. Hence the present second appeal by the unsuccessful plaintiff.

11. Heard Sri M.R.K.Chakravarthy, learned Advocate representing Sri M.V.Durga Prasad, learned counsel for the appellant-plaintiff, Sri M.Rajamalla Reddy, learned counsel for the respondents-defendants and perused the material available on record.

12 The substantial questions of law urged by the learned counsel for the appellant are briefly as follows:

(i) Whether the property got by a protected tenant, by virtue of ownership certificate issued under Section 38 E of The A.P. (Telangana Area) Tenancy & Agricultural Lands Act, 1950 would become self acquired property or a joint family property?

(ii) Whether the Courts below have misconstrued Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act while upholding Ex.B.1 Will?

(iii) Whether the Courts below committed any error while placing reliance on Ex.B.3 gift deed without examining one of the attestors?

13. The following admitted facts emerge from the pleadings and evidence. First defendant married one Ramulamma. Unfortunately, Ramulamma died after she

gave birth to the second defendant. First defendant married Hanumayamma (defendant No.4), who is none other than own sister of Ramulamma. Out of their lawful wedlock, first defendant and Hanumayamma (defendant No.4) were blessed with one son i.e., third defendant and three daughters (defendant Nos.5 to 7). First defendant died during the pendency of the suit and his wife-Hanumayamma and three daughters were brought on record as defendant Nos.4 to 7. The plaintiff is the grandson of the first defendant and son of second defendant. Second defendant was a Government employee.

14. The predominant contention of the learned counsel for the plaintiff is that the Courts below proceeded on a wrong premise and arrived at a conclusion that Item No.1 of the suit schedule property is the self acquired property of the first defendant, which finding is contrary to the provisions of Hindu Succession Act and fundamental principles of law. He further contended that the finding, which is contrary to the fundamental principles of law, can be set aside by this Court, while exercising jurisdiction under Section 100 CPC and this is one such case.

15. Refuting the submissions made by the learned counsel for the plaintiff, the learned counsel for the defendants submitted that the plaintiff failed to prove that Item No.1 of the suit schedule property was purchased by the first defendant with joint family income and that aspect was considered by the courts below in right perspective and hence there is no question of law much less substantial question of law to interfere with concurrent findings of fact recorded by the courts below.

16. Establishment of joint family nucleus is sine qua non to treat the property in the hands of kartha of the joint family as joint family property. Suffice it to say, any property purchased by kartha of the joint family from and out of the income derived from the joint family property will automatically become the joint family property regardless of in whose name the property stands. To put it in a different way, mere purchase of the property in the name of one of the joint family members will not confer any vested right in him, if the same was purchased with the income of the joint family property. The burden of proof lies on the person, who asserts a particular fact and desires the court to adjudicate the same in his favour, in view of Section 101 of Indian Evidence Act. In the instant case, the burden of proof lies on the plaintiff to establish that the first defendant purchased Item No.1 of the suit schedule property with the joint family nucleus and thereafter purchased Item Nos.2 to 5 of the suit schedule property with the income derived from Item No.1 of the suit schedule property. Once the plaintiff, prima facie, establishes the stand taken by him, then only the onus of proof shifts on to the defendants to substantiate the stand taken by them. It is a settled principle of law that unlike onus of proof, burden of proof is static.

17. Yeluru Seshaiah and Appaiah, father and the paternal uncle of the first defendant, owned agricultural land admeasuring Ac.10.00 in Gundrathimaduvu village of Khammam Taluq as per Ex.A.1 for the fasli

1951-52. It is an admitted fact that the said land was acquired by the Government for the purpose of Wyra reservoir. There is no specific pleading in the plaint whether the said land was acquired by the Government during the lifetime of the father of the first defendant or not. Except a bald averment in the plaint, no convincing evidence was produced before the trial Court in which year the above said land was acquired by the Government and to whom the compensation was paid viz., either to the first defendant or to his father. Except the self-serving testimony of P.W.1, there is no other evidence, much less cogent and convincing evidence to establish that the first defendant received the compensation from the Government. By the time of alleged payment of compensation by the Government to the first defendant, the father of the plaintiff was also not born. In such circumstances, how the plaintiff got the above information is not properly explained. Second defendant is the competent person, when compared to the plaintiff, to speak about all these things. For the reasons best known to him, second defendant did not choose to file written statement or enter into the witness box either to substantiate or negate the stand of the plaintiff. In view of the same, the testimony of P.W.1 cannot be taken into consideration.

18. The plaintiff has taken a specific plea in the plaint that at the time of the marriage, the kith and kin of the first defendant presented gifts in the shape of cash and live stock and whatever the gifts received by the first defendant at the time of his marriage became the joint family property and that any property purchased by the first defendant with the said amount would automatically become the joint family property.

19. Strictly speaking, the plaintiff is not the competent person to speak about the gifts alleged to have been received by the first defendant at the time of his marriage. There is no mention in the plaint through whom the plaintiff came to know about the said information. There is no provision under the Hindu Succession Act indicating that the gifts given to the bridegroom at the time of marriage will attain the character of joint family property. Whatever the gifts presented at the time of marriage will become personal or self acquired property of the bridegroom. Therefore, the contention of the learned counsel for the plaintiff that the courts below committed error by not treating the gifts presented to the first defendant at the time of his marriage as joint family property is unsustainable either on facts or in law. Absolutely there is no material on record to establish that the first defendant inherited property either in the shape of land or compensation under the Land Acquisition Act. In the absence of the joint family nucleus whatever the property purchased by the first defendant will be treated as his self-acquired property.

20. The learned counsel for the plaintiff submitted that in view of fluid situation, the Court can presume that the first defendant might have received the compensation and purchased Item No.1 of the suit schedule property. As observed earlier, the burden of proof always lies on the plaintiff to establish the specific stand taken by him. Granting of relief in favour of plaintiff, basing

on presumptions and assumptions, without any basis, is not recognized by law. Even if the Court records a finding basing on presumptions and assumptions, such finding is not legally sustainable. The Court can draw an inference or make a presumption basing on facts pleaded and proved. In the absence of pleading and proof thereof, the court on its own motion cannot draw an inference or make a presumption. Therefore, I am very much afraid to accept the submission made by the learned counsel for the plaintiff.

21. The next contention of the learned counsel for the plaintiff is that the first defendant got Item No.1 of the suit schedule property as a protected tenant; therefore, the same will automatically become joint family property and thereby the plaintiff is entitled to a share in it. He further submitted that Item Nos.2 to 5 of the suit schedule property were acquired by the first defendant from and out of the income derived from the Item No.1 of the suit schedule property. Hence the suit schedule property is the joint family property of the plaintiff and the defendant Nos.1 to 3 and hence the plaintiff is entitled to a share therein.

22. To substantiate the submissions, the learned counsel for the plaintiff has drawn the attention of this Court to the ratio laid down in Sada vs. The Tahsildar, Utnoor, Adilabad District (AIR 1988 AP 77 (FB) wherein a Full Bench of the Hon'ble apex Court while dealing with various provisions of the Tenancy Act, made the following observations at Para Nos.29 and 36 as follows:

29. It is clear from Section 38-E that it is for these 'Protected tenants' who are finally declared to be 'protected tenants' and included in the Register prepared for that purpose and for whom protected tenancy certificates have been issued, that ownership rights are envisaged in S.38-E(1), subject of course, to the limitation with regard to extent of holdings as specified in S.38(7) and to the proviso to S.38-E(1). Once persons who held land on the dates or for the periods mentioned in Ss.34, 37 and 37-A and the requirement of physical possession on the dates required in those sections is satisfied, such persons have become 'protected tenants'. Once a person becomes a protected tenant, he earns a qualification to become an owner by force of statute, subject of course to the qualification regarding extent in S.38(7) and to the proviso to S.38-E(1). There is no requirement in the Act that he should also be in possession on the date specified in the notification issued in S.38-E(1). The words 'all lands held by protected tenants' is more a description or the lands with regard to which the right as protected tenant has been declared and there are no words requiring physical possession on the date specified in the notification.

36. For all the aforesaid reasons we hold on point No.1 that for the vesting of the ownership of land 'held' by a protected tenant under S. 38E(1), it is not necessary that the protected tenant should have been in physical possession on the date of notification. It is sufficient if be continued to hold the status of a 'protected tenant' as on the notified date even if not in physical possession and he satisfied the

requirements of S.32(7) of the Act. This is also subject to the proviso to Section 38-E(1).

23. As per the principle enunciated in the case cited supra, the protected tenant has right to obtain Occupancy Rights Certificate in respect of the land physically held by him.

24. In Gaiv Dinshaw Irani vs. Tehmtan Irani (2014) 8 SCC 294) the Hon'ble apex Court held at para Nos.37 to 39 as follows:

37. In H.C. Pandey v. G.C. Paul, (1989) 3 SCC 77, this Court held that:

"4. It is now well settled that on the death of the original tenant, subject to any provision to the contrary either negativing or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant. The incidence of the tenancy are the same as those enjoyed by the original tenant."

38. Furthermore in Parvinder Singh v. Renu Gautam, (2004) 4 SCC 794, it has been held by this Court that;

"6. Tenancy is a heritable right unless a legal bar operating against heritability is shown to exist."

39. The aforementioned cases indicate that in general tenancies are to be regulated by the governing legislation, which favour that tenancy be transferred only to family members of the deceased original tenant. However, in light of the majority decision of the Constitution Bench in Gian Devi Anand v. Jeevan Kumar, (1985) 2 SCC 683, the position which emerges is that in absence of any specific provisions, general laws of succession to apply, this position is further cemented by the decision of this Court in State of West Bengal v. Kailash Chandra Kapur (1997) 2 SCC 387, which has allowed the disposal of tenancy rights of Government owned land in favour of a stranger by means of a Will in the absence of any specific clause or provisions.

25. As per the principle in the case cited above, in the absence of specific provisions in the Act in respect of transfer of tenancy right by testamentary disposition, the general laws of succession are applicable.

26. In N. Padmamma vs. S.Ramakrishna Reddy (2015) 1 SCC 417)the Hon'ble apex Court held at para Nos.15 and 16 as follows:

15. It is evident from the above that the right of partition was held to have been lost by operation of law. Till such time the grant was made no such right could be recognized observed this Court. This Court specifically held that it was not concerned with the consequences that would ensue after grant is made. The suit in the present case was filed after the grant of occupancy rights. The question here is whether the grant of such rights is for the benefit of one of the members of the joint family or for all the heirs left behind by Ramachandra Reddy. Our answer to that question is in favour of the Appellants. In our opinion, the grant of such occupancy rights in favour of Respondent No. 1 was for the benefit of all the legal heirs left behind by Ramachandra Reddy. Reliance upon Lokraj v. Kishan Lal, (1995) 3 SCC 291, therefore,

is of no assistance to the respondents. We are also of the view that the decision in Lokraj's case (supra), does not correctly apply the earlier decision of this Court in Bhubaneshwar Prasad Narain Singh v. Sidheswar Mukherjee, (1971) 1 SCC 556. With utmost respect to the Hon'ble Judges who delivered the decision in Lokraj's case, the law was not correctly laid down, if the same was meant to say that even in the absence of a plea of ouster, a co-heir could merely on the basis of grant of the occupancy rights in his name exclude the other co-heirs from partition of the property so granted.

16. In the result, we allow this appeal and set aside the judgment and order passed by the Courts below to the extent the same hold that inam lands granted in favour of Respondent No. 1 upon abolition of the inam under the Andhra Pradesh (Telangana Area) Abolition of Inams Act, 1955 are not partible among the heirs left behind by Shri Ramachandra Reddy. The suit filed by the Appellants shall resultantly stand decreed even qua the inam land in the same ratio as has been determined by the High Court by the impugned judgment in regard to other items of properties. No costs.

27. As per the principle enunciated in the case cited supra, even though inam grant was given in the name of one person for the benefit of the entire family, the same can be treated as a joint family property.

28. The learned counsel for the defendants has drawn the attention of this Court to the ratio laid down in State of West Bengal vs. Kailash Chandra Kapur (1997) 2 SCC 387) wherein the Hon'ble apex Court held at Para No.12 as follows:

12. In view of the above settled legal position, the question is: whether the bequest made by Mullick in 'favour of the respondent is valid in law and whether the Governor is bound to recognise him? It is seen that Clauses (7), (8) and (12) are independent and each deals with separate situation. Clause (7) prohibits sub-lease of the demised land or the building erected thereon without prior consent in writing of the Government. Similarly, Clause (8) deals with transfer of the demised premises or the building erected thereon without prior permission in writing of the Government. Thereunder, the restricted covenants have been incorporated by granting or refusing to grant permission with right of pre-emption. Similarly, Clause (12) deals with the case of lessee dying after executing a Will. Thereunder, there is no such restrictive covenant contained for bequeath in favour of a stranger. The word 'person' has not been expressly specified whether it relates to the heirs of the lessee. On the other hand, it postulates that if the bequest is in favour of more than one person, then such persons to whom the leasehold right has been bequeathed or the heirs of the deceased lessee, as the case may be, shall hold the said property jointly without having any right to have a partition of the same and one among them should alone be answerable to and the Government would recognise only one such person. In the light of the language used therein, it is difficult to accept the contention of Shri V.R. Reddy; that the word 'person' should be construed with reference to the heirs or bequest should

be considered to be a transfer. Transfer connotes, normally, between two living persons during life; will takes effect after demise of the testator and transfer in that perspective becomes incongruous. Though, as indicated earlier, the assignment may be prohibited and Government intended to be so, a bequest in favour of a stranger by way of testamentary disposition does not appear to be intended, in view of the permissive language used in Clause (12) of the covenants. We find no express prohibition as at present under the terms of the lease. Unless the Government amends the rules or imposes appropriate restrictive covenants prohibiting the bequest in favour of the strangers or by enacting appropriate law. There would be no statutory power to impose such restriction prohibiting such bequest in favour of the strangers. It is seen that the object of assignment of the Government land in favour of the lessee is to provide him right to residence. If any such transfer is made contrary to the policy, obviously, it would be defeating the public purpose. But it would be open to the Government to regulate by appropriate covenants in the lease deed or appropriate statutory orders as per law or to make a law in this behalf. But so long as that is not done and in the light of the permissive language used in Clause (12) of the lease deed, it cannot be said that the bequest in favour of strangers inducting a stranger into the demised premises or the building erected thereon is not governed by the provisions of the regulation or that prior permission should be required in that behalf. However, the stranger legatee should be bound by all the covenants or any new covenants or statutory base so as to bind all the existing lessees.

29. The Act was enacted in order to regulate the relationship of landlord and tenant of the agricultural land and the alienations of such land. It is apposite to refer to certain provisions of the Act in order to appreciate the rival contentions. Section 2 (1) (r): 'Protected' means, a person who is deemed to be a protected tenant under the provisions of this Act. Section 2 (1) (u) 'Tenancy' means the relationship of land holder and tenant. Section 2 (1) (v) 'Tenant' means an 'asami shikami' who holds land on lease and includes a person who is deemed to be a tenant under the provisions of the Act.

30. Chapter IV of the Act deals with the rights of the protected tenant. Section 34 of the Act deals with 'deemed protected tenant'. Section 35 of the Act enables the Tahsildar to decide who is the deemed protected tenant. Section 36 of the Act deals with the recovery of possession by the protected tenant. Section 37A of the Act postulates that the person who is in possession of the agricultural land as tenant at the commencement of the Hyderabad Tenancy and Agricultural Lands (Amendment) Act, 1955 (for short, 'Hyderabad Act') automatically deemed to be protected tenant. Section 38 of the Act confers right on the protected tenant to purchase the land under his cultivation. Sections 38-A to 38-E of the Act deal with the conducting of enquiry and issuance of ownership certificates in favour of the protected tenants, subject to fulfilment of certain limitations. The composite State of Andhra Pradesh issued notification on 01.01.1973 under Section 38-E of the Act

and from the said date, a protected tenant shall be deemed to be the full owner of such land. Section 38-E confers ownership right on the protected tenant.

31. Let me consider the facts of the case on hand in the light of the ratio laid down in the cases cited supra as well as the provisions of the Act.

32. It is an admitted fact that the first defendant and his brother cultivated an extent of Acs.20.00 as tenants which belonged to Nawab Ahmad Jung Bahadur as on the date of commencement of the Hyderabad Act. Therefore, the first defendant has become protected tenant to an extent of Acs.10.00. As per the provisions of the Act, a protected tenant is legally entitled to purchase the land under his cultivation from his landlord and get ownership certificate under Section 38-E of the Act in respect of the land held by him as protected tenant. In the instant case, first defendant purchased the land from Nawab Ahmad Jung Bahadur and consequently,the Tahsildar, after due enquiry, issued ownership certificate in favour of the first defendant to an extent of Ac.10.00. Rule 5 of The Andhra Pradesh (Telangana Area) Protected Tenants (Transfer of Ownership of Lands) Rules, 1973 deals with issuance of certificate, which reads as under:

5. Issue of Certificate: (1) After the declaration of the final list under sub-rule (3) of Rule 4, the Tribunal shall issue a certificate under sub-section (2) of Section 38-E in Form II to every protected tenant included in the final list, declaring him to be the owner of the land specified against him in the final list and shall cause the necessary entries to be made in the relevant or other revenue accounts of the village.

(2) Simultaneously with the issue of certificate under sub-rule (1), a notice in Form II together with a copy of the said certificate shall be issued to every landholder whose land stands transferred to the protected tenant under Section 38-E.

33. The first defendant became the absolute owner to an extent of Ac.10.00 which is the Item No.1 of the suit schedule property. As observed earlier, there is no iota of evidence to establish that the first defendant purchased the Item No.1 of the suit schedule property with the compensation received under Land Acquisition Act. In the absence of such vital and indispensable link, it is not possible for the court to arrive at a conclusion that the first defendant purchased Item No.1 of the suit schedule property with the joint family nucleus. In the absence of such proof, Item No.1 of the suit schedule property cannot be treated as joint family property.

34. The learned counsel for the plaintiff has placed much reliance on N. Padmammacase (3 supra). That case was decided under the provisions of Inam Abolition Act. In the said case, grant was given in favour of one of the family members after the demise of the original inamdar. Inam land cannot be equated with that of the tenancy land. Both lands are governed by different enactments. Moreover, in the instant case, ownership certificate was issued in favour of the first defendant during

his lifetime that too after conducting due enquiry. It is not the case of the plaintiff that issuance of ownership certificate under Section 38E of the Act, in the name of the protected tenant, is not only for the benefit of himself but also for the benefit of his joint family members. Hence the ratio laid down in that case is not applicable to the facts of the case on hand.

35. The learned counsel for the plaintiff strenuously submitted that even assuming but not conceding that it is a self acquired property of the first defendant, he has no right to alienate the property by way of Will or gift. To substantiate the same, he has drawn the attention of this Court to Section 48-A of the Act, which imposes restrictions on permanent alienation or transfer of land acquired by first defendant as a protected tenant. As per the above provision, a protected tenant is not entitled to alienate the property within eight years from the date of issuance of certificate. Section 48-A of the Act enables the Tahasildar to cancel the certificate if the protected tenant alienate the property in gross violation of the provisions of the Act. The first defendant executed Ex.B.3 Gift deed on 27.07.1989 and also executed Ex.B.1 Will on 06.01.1992 i.e. after lapse of eight years from the date of issuance of ownership certificate in his favour. Therefore, the plaintiff is not entitled to challenge the validity of Ex.B.1 and B.3 taking aid of Section 48-A of the Act.

36. The learned counsel for the plaintiff further contended that the tenancy rights are heritable in view of Section 40 of the Act, therefore, the plaintiff along with defendant Nos.2 and 3 has right over the Item No.1 of the suit schedule property. To appreciate this contention, it is not out of place to extract hereunder Section 40 of the Act.

40. Rights of protected tenant heritable:- (1) All rights of a protected tenant shall be heritable.

(2) If a protected tenant dies, his heir or heirs shall be entitled to hold the tenancy on the same terms and conditions on which such protected tenant was holding the land at the time of his death (and such heirs may, notwithstanding anything contained in this Act, sub-divide inter se according to their shares the land comprised in the tenancy to which they have succeeded.)

(3) If a protected tenant dies without leaving any heirs, all his rights shall be extinguished.

(4) The interest of a protected tenant in the land held by him as a protected tenant shall form sixty per cent.

37. A perusal of the above section, at a glance, clearly demonstrates that the legal heirs of the protected tenant inherit the tenancy rights after his death only. This section clearly indicates that during the lifetime of protected tenant, his family members cannot claim right in the tenancy rights. The plaintiff filed the suit during the lifetime of the first defendant. Therefore, the plaintiff is not entitled to take shelter under Section 40 of the Act on the premise that the first defendant died during the pendency of the suit. If the submission of the learned counsel for the plaintiff is accepted, the first

defendant would be a protected tenant as on the date of filing of the suit as well as till his last breath. A person cultivating the land as a tenant, as on the date of commencement of Hyderabad Act, would become a protected tenant. The Act enables the protected tenant to become the absolute owner of the tenancy lands by paying sale consideration to the landlord, as fixed by the Government. Once the ownership certificate is issued under Section 38-E of the Act, after due enquiry, a protected tenant will become the absolute owner of the tenancy land in his individual capacity. A person cannot be treated as protected tenant on one hand and as owner on the other hand in respect of the same land. The submission of the learned counsel for the plaintiff has no basis to treat the first defendant as a protected tenant even after his death in view of Section 38-E of the Act. The right of the protected tenant would merge into ownership right immediately after issuance of ownership certificate. In such circumstances, the question of inheriting the tenancy rights of the first defendant, by his family members, more particularly the plaintiff, is illusion and myth. Viewed from any angle, I am unable to accept the contention of the learned counsel for the plaintiff that the first defendant remained as protected tenant till his death. By no stretch of imagination it can be presumed that the first defendant is the protected tenant of Item No.1 of the suit schedule property so as to press into service Section 40 of the Act.

38. The predominant contention of the learned counsel for the plaintiff is that the courts below have committed grave error while placing reliance on Ex.B.1-Will. In this context, the learned counsel for the plaintiff has drawn the attention of this Court to the ratio laid down in Bhagat Ram vs. Suresh (2003) 12 SCC 35). On the other hand, the learned counsel for the defendants has drawn the attention of this Court to the ratio laid down in Naresh Charan Das Gutpa vs. Paresh Charan Das Gutpa (AIR 1955 SC 363) and Rambai Padmakar Patil vs. Rukminibai Vishnu Vekhande (AIR 2003 SC 3109). From the above three decisions, the following principles can be deduced: 1) the propounder of the Will has to dispel the suspicious circumstances surrounding the execution of the Will, and (2) in order to prove the Will, one of the attestors has to be examined in view of Section 68 of Indian Evidence Act and Section 63 of the Indian Succession Act.

39. Normally, the parties will fight with regard to the validity or otherwise of the Will after the death of the testator or testatrix, as the case may be. The present case is an exception for the simple reason that the grandson challenged the validity of the Will during the lifetime of his grandfather. The first defendant filed written statement, in unequivocal terms, admitting that he executed Ex.B.1 Will on 06.01.1992 bequeathing Item Nos.1, 4 and 5 of the suit schedule property in favour of third defendant and his children.

40. Defendant Nos.3 and 7 who were examined as D.Ws.1 and 5 categorically deposed that the first defendant executed Ex.B.1 Will bequeathing part of the suit schedule properties in favour of the defendant No.4. As seen from the testimony

of D.W.4, he along with one Katta Gopaiah are the attestors of the Will. As per his testimony, the first defendant executed Ex.B.1 bequeathing Acs.6.00 and odd of dry land in favour of the third defendant and the house situated at Wyra in favour of fourth defendant. His testimony further reveals that the first defendant got prepared the Will at the Sub-Registrar Office at Khammam and that he (D.W4) attested the Will in the Sub-Registrar Office in the presence of the first defendant. The testimony of D.W.4 remains unchallenged so far as the execution of Ex.B.1 Will by the first defendant in his presence at the Sub-Registrar Office, Khammam. Ex.B.1 Will was executed on 06.01.1992, whereas the first defendant died during the pendency of the suit. Nothing is elicited in the cross-examination of D.Ws.1, 2 and 4 that the first defendant was not in a sound and disposing state of mind at the time of execution of the Will. The defendants have dispelled the suspicious circumstances surrounding the execution of the Will by the first defendant. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am fully endorsing the concurrent findings of fact recorded by the courts below with regard to the validity of Ex.B.1 Will.

41. The plaintiff is also challenging the validity of Ex.B.3 Gift deed dated 27.07.1989 executed by the first defendant. It is apposite to refer to proviso to Section 68 of the Indian Evidence Act, which reads as under:

68. Proof of execution of document required by law to be attested:-

… …

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

42. In the instant case, the first defendant, who is the donor/executant of Ex.B.3 Gift deed, filed written statement, in unequivocal terms, admitting the same. Under Ex.B.3, he gifted property in favour of his daughter. As per the principle laid down in Annam Uttarudu (died) v. Annam Venkateswararao (2014 (3) ALD 119), Pindiganti Lakshminarayana (died) per L.Rs vs. Pindiganti Venkata Subbarao (2000 (6) ALT 295) and Surendra Kumar vs. Nathulal (2001 (4) ALD 26 (SC) a registered deed of gift can be received in evidence without examining one of the attestors, if the donor / executant admits the same. As per Section 58 of the Indian Evidence Act, admitted facts need not be proved. In Nagindas Ramdas vs. Dalpatram Iocharam alias Brijramand (AIR 1974 SC 471) the Hon'ble apex Court held at Para No.26 as under:

26. From a conspectus of the cases cited at the bar, the principle that emerges is, that if at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could be prima facie satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so

satisfied and the decree for eviction, though apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself, Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties On the other hand evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.

Section 70 of the Evidence Act reads as under:

70. Admission of execution by party to attested document:-

The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document is in the handwriting of that person.

43. A perusal of the above section at a glance clearly demonstrates that if the party to the attestable document admits execution of the same, that itself is sufficient proof of its execution against him. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that the Courts below have not committed any error while placing reliance on Ex.B.3 Gift deed.

44. As seen from the testimony of D.W.3, his wife purchased an extent of Ac.3.00 from defendant Nos.1 and 4 under the original of Ex.X.1. In the cross-examination of this witness, nothing is elicited to disbelieve his testimony. First defendant also categorically admitted, in the written statement, that he sold landed property in favour of the wife of D.W.3. First defendant, being the absolute owner of the suit schedule property, is entitled to sell the same. Therefore, Ex.X.1 is not only binding on the first defendant but also the persons who are claiming right through him.

45. The learned counsel for the defendants submitted that the plaintiff filed the suit without any cause of action. Per contra, the learned counsel for the plaintiff submitted that even after the death of the first defendant, he is entitled to a share in the suit schedule properties, even assuming but not conceding that the suit schedule properties are self acquired properties of the first defendant.

46. This Court has already given a specific finding supra, that the suit schedule properties are the self acquired properties of the first defendant. In that view of the matter, none of the legal heirs of the first defendant is entitled to file a suit against him during his lifetime seeking partition of the suit schedule property. When the second defendant himself has no right whatsoever

to file suit seeking partition of the suit schedule properties, how the plaintiff, who is the son of the second defendant, is entitled to file the suit is a debatable question. Admittedly, the plaintiff will not fall within the ambit of Class-I heirs as contemplated under Hindu Succession Act. A son or a daughter of a predeceased son or daughter being Class-I heir can seek partition of the joint family properties. The plaintiff is not entitled to file the suit as Class I heir, so long as the second defendant is alive. Of course, cause of action consist bundle of facts and basing on one of such facts, a party is entitled to file the suit. In the instant case, the plaintiff filed the suit as if the first defendant purchased the suit schedule properties with the joint family nucleus. The stand taken by the plaintiff so far as the joint family nucleus is without any basis and hence falls to ground. If viewed from this angle, maintainability of the suit is very much doubtful.

47. Another interesting aspect is, the plaintiff is not entitled to challenge the validity of Ex.B.1 Will so long as the first defendant is alive. As observed earlier, the plaintiff filed the suit during the lifetime of the first defendant. Strictly speaking, no cause of action accrued in favour of the plaintiff to challenge the validity of Ex.B.1 as on the date of filing of the suit. Merely because the first defendant died during the pendency of the suit, that itself, will not automatically cure the defect of non-accruing of cause of action in favour of the plaintiff as on the date of filing of the suit. Viewed from this angle also, the plaintiff filed the suit without any cause of action as well as semblance of legal right. Accruing of cause of action in favour of a person is sine qua non to approach the civil court for redressal by filing appropriate suit. It is needless to say that any suit filed without cause of action is nothing but a futile attempt of claiming imaginary relief. This is a classic example of one such case.

48. Even if the court assumes or presumes that the plaintiff filed the suit under a bona fide impression that the suit schedule properties are joint family properties, still the maintainability of the suit is very much doubtful. The plaintiff has not disclosed in the plaint that he is having one sister. During the cross examination, the plaintiff, as P.W.1, admitted that he is having one sister. A partition suit, seeking partition of joint family properties, is not maintainable without impleading all the members of the joint family as well as without including all the properties of the joint family. The learned counsel for the defendants has drawn the attention of this Court to the following decisions:

(i) K.Bhaskar Rao vs. K.A. Rama Rao (2010 (5) ALD 339) wherein this Court held at Para No.22 as under:

22. While the stand of the plaintiff before the trial Court was that it was not necessary, as the sisters were already married and given sufficient share at the time of marriage, in this appeal the appellant has filed an application CMP No.2141 of 2005 to implead the sisters as parties. In view of the stand of the plaintiff that no share need to go to them and in spite of pointing out that their presence is necessary in the suit, the plaintiff has chosen not to implead them. The defect

of non-joinder of necessary parties being fatal, the same cannot be cured by impleading them in appeal. The trial Court, therefore, rightly held that the suit is liable to be dismissed on the ground of non-joinder of necessary parties. I see no reason to take a different view.

(ii) Nalla Venkateshwarlu vs. Porise Pullamma (AIR 1994 AP 87) wherein this Court held at para No.10 as follows:

> 10. Though the provisions of Order I, Rule 9 say that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it, the proviso makes it clear that this rule does not apply to non-joinder of necessary parties. Therefore, if necessary party is not impleaded in a suit or an appeal, it will have to be dismissed on that ground.

49. As per the principle enunciated in the cases cited supra, a suit for partition is not maintainable without impleading all the members of the joint family. The plaintiff filed the suit claiming share in the suit schedule properties as one of the members of the joint family. If that is so, his sister also becomes one of the sharers. The learned counsel for the plaintiff submitted that if ultimately the court decrees the suit, the plaintiff will implead his sister in the final decree proceedings. Suffice it to say, the rights of the parties will be adjudicated while passing the preliminary decree in a suit for partition. To put it in a different way, the rights of the parties over the suit schedule property will be crystal clear in the preliminary decree. In the final decree proceedings the court will allot the shares by metes and bounds as per good and bad qualities to the parties to the preliminary decree. It is needless to say that the final decree shall be passed in consonance with the preliminary decree. The final decree proceedings cannot go beyond the scope of the preliminary decree in the normal course. During the pendency of the final decree, if one of the parties to the preliminary decree dies, his legal representatives have to be brought on record. The shares allotted to the parties in the preliminary decree, as per their entitlement, may vary in the final decree, by operation of law. A person who is not a party to the suit is not entitled to come on record at the time of passing of the final decree except in exceptional cases. When no share was allotted to the plaintiff's sister in the preliminary decree, this court is unable to understand how she will be brought on record during the final decree proceedings. Non-disclosing of the factum of plaintiff having a sister is undoubtedly fatal to the case of the plaintiff. Viewed from this angle also, the suit is not maintainable under law.

50. The findings recorded by the trial Court are based on sound reasoning and logical conclusion and they are supported by evidence, more so, legally admissible evidence. The first appellate Court has not committed any error while endorsing the findings recorded by the trial Court. This Court shall not lightly interfere with the concurrent findings of fact recorded by the

courts below. Suffice it to say that the first appellate court is the fact finding final Court. All the questions rained by the learned counsel for the plaintiff are purely questions of fact, which cannot be gone into by this Court, while exercising jurisdiction under Section 100 CPC.

51. It is needless to say that if the concurrent findings of fact recorded by the courts below are neither found to be contrary to the pleadings nor the evidence or any provisions of law, or so found perverse, then, in my considered view, such concurrent findings of fact cannot be interfered with. I find no merit in any of the arguments advanced by the learned counsel for the appellants, which are only based on facts and evidence. This Court cannot reappreciate the evidence again de novo while hearing this second appeal.

52. In Municipal Committee, Hoshiarpur v. Punjab SEB (2010) 13 SCC 216),while dealing with the scope of Section 100 of C.P.C., the Hon'ble apex Court held at paragraph No.16 as follows:

> 16. … … A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC. … …

53. Having regard to the facts and circumstances of the case and also the principles enunciated in the case cited supra, I am of the considered view that no question of law much less substantial question of law is involved in this second appeal and accordingly the same is liable to be dismissed.

54. For the foregoing discussion, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

–X–

2018(1) L.S. 82 (Hyd.)

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

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

Damera Madhava Vidhyardhi ..Petitioner
Vs.
R. Siva Kumar ..Respondent

HINDU SUCCESSION ACT, Sec.29 – Whether plaintiff is sole legal heir of deceased – Whether plaintiff is entitled to possession and ownership of plaint schedule properties – Whether document addressed by three daughters of deceased amount to a Will.

Held – Plaintiff and second defendant are claiming suit schedule properties – Lower Court rightly held that there is no devolution of property on Government - Documents are valid and they constitute dedication in favour of second defendant – No devolution of property by virtue of Section 29 of Act – Lower Court correctly noticed that no evidence is placed to show that valuation is incorrect – No infirmities in findings of Lower Court – Appeal stands dismissed.

Mr.V.L.N.G.K. Murthy, Advocates for the Petitioners.

AS No.1530/2001 Date: 20-2-2018

Mr.M. Adinarayana Raju, P. Ganga Rami Reddy, P. Ramabhoopal Reddy, Advocates for the Respondent

J U D G M E N T

1. This appeal is filed against the judgment and decree in O.S.No.12 of 1994, dated 31.01.2001 on the file of the Senior Civil Judge, Srikalahasti, Chittoor District.

2. This appeal arises out of the said suit, which has a chequered history. After a long protracted trial, appeal, remand etc., the first appeal has come up for final hearing before this Court.

3. For the sake of convenience, as this is a first appeal, the parties are arrayed and described as plaintiff and defendants only.

4. A tragedy of great propositions is the genesis of the suit and the claim therein. One Sri D.V.S. Tirupati Rao, his wife and three daughters hailing from a well known family committed suicide by setting themselves on fire on 21.02.1994. This mass suicide committed by the members of Tirupati Rao family led to the present claim. Just before the death, the deceased daughters of D.V.S. Tirupati Rao wrote three documents (Exs.B.1 to B.3) by which they purported to give their properties to the deities mentioned therein. Soon after this mass death by suicide, the plaintiff in the suit claiming to be a close relative wanted to perform the necessary last rights of the five people, who died in the tragic circumstances in February, 1994. The first defendant objected to the same.

5. Thereafter began the claims and counter

claims resulting in the suit. The suit was initially filed by Damera Madhava Vidhyardhi against the first defendant-R. Siva Kumar for a declaration that he is the close and sole legal heir to the properties of late D.V.S. Tirupati Rao. Later, the plaint underwent changes and amendments were carried out. The Executive Officer, Tirumala Tirupati Devasthanam (hereinafter called TTD) was added as a second defendant. Defendants 3 to 26 who are the subsequent purchasers of the property after the initial decree dated 15.11.1996 were added as parties along with the State of Andhra Pradesh who was the custodian of the properties for some time. The plaint was also amended for a declaration that the plaintiff was the close and sole legal heir of the properties of late D.V.S. Tirupati Rao, his wife and three daughters.

6. The essential contest in this case is presently by the TTD, who is the second defendant and by the subsequent purchasers of the property.

7. The case of the plaintiff in brief is that he had close family connections with the members of the deceased family. The plaintiff is the son of D.V. Ranga Rayanim varu, the brother of late D.V.S. Tirupati Rao. The said Sri D.V.S. Tirupati Rao, Sri D. Rama Rayanim varu and D.V. Ranga Rayanim varu were the three sons of one Sri D. Kodanda Ramasway Nayanim varu. The three sons of D. Kodanda Rama Swamy Nayanim varu partitioned the properties in 1951 and D.V.S. Tirupati Rao had acquired the plaint schedule properties from and out of the said partition. Therefore, after the death of Tirupati Rao and his family, the plaintiff filed the suit stating that they had no other legal heir left and that as the brothers son, he is the sole legal heir to their properties.

8. The first defendant filed a written statement stating that the plaintiff is not at all related to D.V.S. Tirupati Rao. He did not claim the right of the properties and on the other hand, his intention is that the last wishes and desires of the deceased people should be carried out and the property should devolve on the parties named in the documents executed by the deceased just before the death.

9. The second defendant/TTD filed a written statement which is also subsequently amended. Initially Exs.B.1 to B.3 documents were described as Wills. Later, the title and description of the documents were changed to a dedication in favour of a deity. Based on these three documents, the second defendant claimed to be the owner. This is the gist of the written statement and amended statement filed.

10. After the suit was initially decreed on 15.11.1996 and before the appeal was filed by the contesting second defendant, the successful plaintiff took possession of the lands and building from the Mandal Revenue Officer, who was the custodian of the property. He demolished the existing building, converted the land into plots and sold them to the defendants 3 to 26. Hence, the subsequent purchasers were added as parties and their essential defence is that they are bona fide purchasers for value, without being aware of the litigation. Defendant No.27 also filed a separate written statement raising various defences including the prime defence that the court fee paid is incorrect.

11. The lower Court framed the following 9 issues for determination.

i) Whether the plaintiff is the sole legal heir of late D.V.S. Tirupati Rao?

ii) Whether the plaintiff is entitled to the possession and ownership of the plaint schedule properties?

iii) Whether the letters dt. 27.2.94 addressed by the daughters of late D.V.S. Tirupati Rao to the 2nd defendant Devasthanam constitute Will?

iv) Whether the 2nd defendant is entitled for the plaint schedule property by virtue of the letters dt. 21.2.94 addressed by the daughters of late D.V.S. Tirupati Rao?

v) Whether the plaint schedule properties devolved on the Government of A.P. under Section 29 of Hindu Succession Act, 1956?

vi) Whether the suit for declaration simplicitor without consequential relief of possession is maintainable?

vii) Whether the valuation is made and court fee paid are correct?

viii) Whether the letters dt. 21.2.1994 addressed by the daughters of late D.V.S. Tirupati Rao to 2nd defendant constitute dedications?

ix) Whether the defendants 3 to 26 are bona fide purchasers of suit schedule property from plaintiffs?

12. Based on the above issues, the parties went to trial. On behalf of the plaintiff, PWs.1 to 6 were examined and Ex.A.1 to A.9 were marked. For the defendants, DWs.1 to 3 were examined and Exs.B.1 to B.19 were marked. The main witnesses in this case are PW.1, PW.6.

13. This Court has heard Sri V.L.N.G.K. Murthy, learned senior counsel for the appellant/plaintiff. Sri M. Adinarayana Raju, learned counsel for the second respondent/ second defendant-TTD and Sri P. Ganga Rami Reddy and Sri P. Ramabhoopal Reddy, learned counsels for the subsequent purchasers of subject plots.

14. The learned counsels concentrated their attention on the main issue Nos.1, 2, 3 & 8. In addition, Sri M. Adinarayana Raju, learned counsel appearing for TTD laid heavy emphasis on the order of remand passed by the Honble Division Bench of this Court in A.S.No.258 of 1998, dated 23.12.1988. An appeal in A.S.No.258 of 1998 was filed before this High Court against the judgment and decree of the lower Court dated 15.11.1996 passed in the suit. The Division Bench remanded the matter to the lower Court, which again heard the matter and passed the impugned judgment and decree dated 31.01.2001. The present appeal arises from the subsequent judgment and decree dated 31.01.2001.

15. It is the submission of the learned counsel appearing for TTD that the findings of the Division Bench given while remanding the matter are binding on this Court. Noting this observation, this Court is now proceeding to decide the issues in the same order that they were decided by the lower Court.

16. The first issue is whether the plaintiff is the sole legal heir of late D.V.S. Tirupati Rao and of his family members. The assertion of the plaintiff is that he is the sole legal heir and that there are no other legal heirs. In order to prove his case, the plaintiff produced documentary evidence Exs.A.1 to A.8. Ex.A.1 is an invitation card of the death ceremony for the deceased, dated 01.03.1994, which is subsequent to the death of late Tirupati Rao and others. Ex.A.2 are the death certificates (5 in number). Ex.A.3 is the partition deed amongst Tirupati Rao and his brothers of the year 1951. Exs.A.4 to 6 are receipts issued in favour of the plaintiff by third parties, which state that he cleared the loans/dues of late Tirupati Rao. Exs.A.7 to A.9 are tax receipts; all of February, 1997. All these documents, except Ex.A.3-partition deed are documents subsequent to the death of late Tirupati Rao and others. Exs.A.4 to A.6 documents are ante liten mortem or documents subsequent to the filing of the suit. Therefore, they have to be considered very carefully, since the element of preparation with the litigation in mind cannot be ruled out. The case law reported in Murugan @ Settu v. State of Tamil Nadu (2011) 6 SCC 111) and State of Bihar v. Radha Krishna Singh and others (1983) 3 SCC 118) is relevant for the said purpose. Exs.A.4 to A.6 are receipts issued by three different parties, who were examined as PW.3, PW.4 and PW.2. They merely state that some loans and dues of late D.V.S. Tirupati Rao were discharged by the plaintiffs. This does not support the case of plaintiff that he is the sole legal heir. Exs.A.7 to A.9 are tax receipts in the name of the deceased-Tirupati Rao. Ex.A.2 is collectively the death certificates of all five members of Tirupati Rao family. Ex.A.1 is a death ceremony card printed by PW.1. Therefore, this documentary evidence does not support the case of the plaintiff that he is the sole legal heir. Hence, the oral evidence is to be considered.

17. It is pointed out by the learned counsel appearing for TTD is that the plaintiffs while deposing in the chief examination on 30.08.1999 has deposed that his senior paternal uncle died issueless leaving behind his wife who is alive. This lady who is admittedly alive is not added as party to the proceedings. In addition, the plaintiff also examined one R.L.N.R.K. Ranga Rao as PW.6. This witness deposed on 27.09.1999 and in the cross-examination on that day, he clearly admitted that the plaintiff has a sister, who is now alive. The plaintiff as per the learned counsel suppressed these two facts and filed the suit without adding these two legal heirs. Both these persons are entitled to the share in the property. These two persons were not added as parties to the suit and they are necessary and proper parties, particularly as the present suit is a suit for declaration of status. As per the learned counsels, without adding the said two persons as parties to the suit, an effective decree cannot be passed. The learned counsel appearing for TTD also relied upon Profollo Chorone Requitte AIR (1979 SC 1682) in support of his submission that as necessary parties were not added, the suit is liable to be dismissed on this ground alone. The lower Court also held that these parties should have been added. This Court concurs with the finding of the lower Court on this point and also observes that these legal heirs who are admittedly alive, particularly the

sister of the plaintiff and an aunt should have been added as necessary parties to the suit before claiming the relief. Hence, the plaintiff is not entitled to the relief that he is the sole legal heir of late Tirupati Rao family in the absence of these parties. Therefore, this Court agrees with the finding of the lower Court on issue No.1.

18. Issue No.2 is a corollary and depends on the finding on issue No.1. This issue is as follows:

whether the plaintiff is entitled to the possession and ownership of the plaint schedule properties. As it is held that the plaintiff is not the sole legal heir of late Tirupati Rao, he is not entitled to a finding that he is entitled to the ownership and possession of the plaint schedule properties. In addition, the validity of Exs.B.1 to B.3 documents is also being decided and the subsequent discussion will have impact on this issue also.

19. Issue No.3 whether the document dated 27.02.1994 addressed by three daughters of late Tirupati Rao amount to a Will. Initially, the second defendant took a plea that these three documents which were received by them by post are the last Will and testament of the daughters of late Tirupati Rao, by name D. Geetha, D. Rekha Devi and D. Gayatri respectively. Admittedly on legal advice and realizing that these documents are not a Will, the second defendant amended their pleading and the Court agreed that the amendment and the word Will which was used to describe Exs.B.1 to B.3 were allowed to be deleted.

20. The lower Court also rightly noticed that as per Section 63 of the Indian Succession Act, a Will is a compulsory attestable document and these documents Exs.B.1 to B.3 do not possess or contain the essential characteristics of a Will. These three documents are not attested by a witness as required by law. They do not have the essential pre-requisites to be called a Will. Therefore, the lower Court rightly held in issue No.3 that the documents Exs.B.1 to B.3 are not the last Will and testament of the three daughters of late Tirupati Rao. This Court agrees with the finding of the lower Court on this issue.

21. Issue Nos.4 & 5 and additional issue Nos.3, 4, & 5 as mentioned in para-15 of the judgment are decided together since they involve the decision on the contents of Exs.B.1 to B.3. Exs.B.1 to B.3 are three documents executed by D. Geeta and D. Rekha Devi, which are the crux of the case. These documents were penned by two of the deceased just prior to their deaths. D. Gayatri, one of the sisters did not execute any document. In Ex.B.1, D. Geeta writes that they are merging themselves with Sri Venketeshwara Swamy. She also states that they are voluntarily given up their lives and are succumbing to death by self-immolation/by fire. She states that the property situated in Sri Ramnagar Colony should go to Sri Venkateshwara Swamy varu along with the cows and calves. She also states that in the house, pooja should be performed in the name of the Swamy. It is clearly mentioned in the last line that the said letter is being written in hurry and if there are any minor mistakes, the same should be ignored. In the note at the very end, it is also clearly mentioned that except the five who are contemplating death, there

are no other legal heirs. The last line clearly states that the property should go to Venkateswara Swamy.

22. Ex.B.2 is a letter written by D. Rekha Devi wherein she mentions that she and her family are becoming one with Sri Venkateshwara Swamy. It is also mentioned that out of their own will, they are self immolating themselves. Therefore, her property including two cows and calves should go to Swamy varu. She also mentions that every year in the house belonging to them, pooja should be performed in the name of all family members. The last line sounds a note of caution that as the note is being penned in a hurry, minor mistakes should be excused. She also states at the bottom left corner of Ex.B.2 that except the five of them, there are no other legal heirs. In this document, it is important to note that there is no discussion about any property except cattle. It is also important to note that both Exs.B.1 & B.2 are addressed to Sri Venkateshwara Swamy vari Devasthanam.

23. Ex.B.3 is the document that was the subject matter of long heated arguments on both sides. In this document, D. Rekha Devi mentions that her parents, siblings and herself have voluntarily desired that the property situated in Sri Ramnagar Colony is to be given to Sri Venkateshwara Swamy varu; that because of the difficulties they are facing they are unifying themselves with Sri Venkateshwara Swamy; that the immolation is also being carried out by Sri Venkateshwara Swamy. The other property situated in the Bazar Street is to be given to Eswara Parvathi Devi, as the father of D.V.S. Tirupati Rao lost his mental balance, all the family members who felt that they cannot lead the life without him, decided to become one with Sri Venkateshwara Swamy. They also pray that their last desire should be fulfilled by Sri Venkateshwara Swamy and Lord Eswara of Sri Kalahasti Temple Devasthanam. In the last para, it is clearly mentioned that three daughters are the only legal heirs to the parents and that in fact Lord Venkateshwara Swamy and Sri Kalahasti temple Eswara are the only legal heirs. This document as mentioned earlier is the subject matter of a lot of discussion.

24. A fact that is clear from the evidence is that there is no dispute that these three documents were executed by D. Geeta (Ex.B.1) and D. Rekha Devi (Exs.B.2 & 3) respectively. The deposition of PW.1 is very clear. The same was noted by the lower Court and by the Division Bench. The lower Court noted that there is no doubt about the authorship of three documents and that they are in the custody of the second defendant/TTD. The contents, however, are the subject matter of the dispute.

25. Sri V.L.N.G.K. Murthy, learned senior counsel for the appellant/plaintiff argues that D. Geeta was married prior to Exs.B.1 & B.2; and that she was not a coparcener and does not have any right in the property of her father. It is a fact that was pointed out by Sri M. Adinarayana Raju, learned counsel for TTD that D. Geeta dealt with only her cattle but not any immovables while Exs.B.2 & B.3 talked about the immovable property in Sriram Nagar Colony. The Division Bench of this Court while remanding the matter in A.S.No.258 of 1998 clearly held that as there was no partition

in the family of Tirupati Rao; by virtue of Section 29 of Hindu Succession Act, D. Geeta is a coparcener, who is entitled to the benefit of Section 29 (a) of Hindu Succession Act, as brought into force the A.P. Act 13 of 1996. The Division Bench held that all the three daughters including the divorced Geeta are unmarried and therefore, they are coparceners. This finding, according to the learned counsel for TTD, Sri M. Adinarayana Raju, is binding on this Court. This Court agrees that the said finding is binding on this Court as it a Division Bench of this Court that came to the said conclusion.

26. The next point that is vehemently urged by the learned counsel for the appellant is about the contents of Ex.B.3. As per the learned counsel for the appellant, D. Rekha Devi dedicated or gifted the right in the property, she did not possess. There was no succession by that time and that the succession did not open by that time. Therefore, D. Rekha Devi could not part with property which she did not have a right as per the learned counsel. She only had a right to succeed to the said property and therefore, the principle spes successionis applies and the right of succession cannot be transferred as per Section 6 (a) of the Transfer of Property Act. Therefore, it is argued that the document is not valid. On the other hand, the lower Court noticed that this is a peculiar case where the death of entire family occurred at once or simultaneously on the night of 21.02.1994. The lower Court rightly observed that as per Section 21 of Hindu Succession Act, 1956, in such a case, the younger is supposed to have survived the elder. Therefore, it is the submission of Sri M. Adinarayana Raju, learned counsel for TTD that D. Rekha Devi, the youngest sister survived all other joint family members and therefore, she is entitled to execute Exs.B.2 & B.3.

27. This is a peculiar case where the documents were executed in the light of a decision taken by all the family members to die collectively. All of them jointly entered into a pact and died on the night of 21.02.1994. Their intention is not in doubt. There were no eye witnesses or other evidence to show who died first or who survived the other at least for a few macro seconds. Therefore, the arguments advanced that Exs.B.1 to B.3 were executed when the rest of the family was alive or that the principle spes succession is applies cannot be really applied to a case like this with its own peculiar facts. The lower Court in the opinion of this Court correctly discussed the issues and came to a conclusion that Exs.B.1 and B.3 are validly executed documents. In addition, this Court holds that the essence of coparcenery is the unity of ownership that is vested in all the coparceners. The interest cannot be predicted and it may be in fluctuation depending on births and deaths but it is vested (see Satrughan Isser v. Smt. Subujpari). In the present case, the Court notices the differences between vested interest; contingent interest and spes succession. In Sashi Kantha Acharjee v. Promode Cahndra Roy , the High Court of Calcutta observed in paras- 17 & 18 as follows:

"17. In dealing with this question the distinction between vested interest, contingent interest and spes succession

is has to be carefully noted. An estate or interest is vested, as distinguished from contingent, either when enjoyment of its is presently conferred or when its enjoyment is postponed the time of enjoyment will certainly come to pass; in other words, an estate or interest is vested when there is an immediate right of present enjoyment or a present right of future enjoyment. An estate or interest is contingent if the right of enjoyment is made to depend upon some event or condition which may or may not happen or be performed, or if in the case of a gift to take effect in future, it cannot be ascertained in the meantime whether there will be anyone to take the gift; in other words, an estate or interest is contingent when the right of enjoyment is to accrue, on an event which is dubious or uncertain. And as regards certainty, the law does not regard as uncertain the event of a person attaining a given age or of the death of somebody beyond which his enjoyment is postponed, because if he lives long enough the event, is sure to happen.

18. A spes succession is merely an expectation or hope of succeeding to the property, a chance or possibility which may be defeated by an act of somebody else."

This Court therefore holds that the interest of the deceased in these documents is a vested interest that does not attract the principle of spes succession.

28. It was also argued that as no partition took place amongst family members of Tirupati Rao, a gift of joint family property by a coparcener is void. The learned counsel argued that a gift made without the consent of the other coparceners is void in law. In reply, the learned counsel for TTD, Sri M. Adinarayana Raju argued that the gift to an idol is not really gift and even otherwise, Exs.B.1 to B.3 do not have characteristics of the gift. They are a dedication only as can be seen from the clear language used. The further discussion on this will make this clear.

29. It is a fact that in Exs.B.1 to B.3, there is no mention of the Tirumala Tirupati Devasthanam (TTD). They are addressed to Sri Venkateswara Swami Vari Devasthanam. It is mentioned that the property should go to Sri Venkateshwara Swamy varu. Therefore, the learned counsel for the appellant argued that there was no desire of the deceased to give this property to the TTD specifically. It is his submission that there are hundreds of temples of Sri Venkateshwara Swamy through out the State of Andhra Pradesh and through out the country and therefore, the second defendant/TTD cannot claim to be the exclusive owner of the suit schedule properties. His argument is that these documents are void and uncertain and cannot be relied upon.

30. On the other hand, it is the contention of learned counsel for TTD that the plaintiff is questioning only a part of these documents. The documents consist a dedication to Sri Kalahasti Eswara temple also, along with the dedication to Sri Venkateshwara Swamy varu. Therefore, it is the contention of the learned counsel for TTD that the plaintiff cannot challenge only a part of documents by accepting the other part of the document as valid. He also argued that a liberal interpretation should be given to the last wishes of the family.

It is his contention that out of all the temples in that area, the TTD temple is most popular and well known temple. He states that all the deceased were residents of Sri Kalahasti Town, which is very close to Tirupati. Most pilgrims who visit Tirupati immediately go to Sri Kalahasti to have Darshan of Lord Shiva. Therefore, the preponderance of probabilities is that the reference to Sri Venkateswara Swamy varu is to the Sri Venkateswara Swamy at Tirumala only.

31. In addition, it is a fact that these documents are addressed to Sri Venkateshwara Swamy varu and were sent to the TTD only. This is the reason why the TTD is in custody of the original documents. Therefore, the learned counsel argued that it was the intention of the dying members of late Tirupati Rao family that the property should go to Sri Venkateshwara Swamy varu, who is the famous deity at Tirupati. His forceful submission is that a liberal interpretation should be given to these documents and that they should be given due weight; and that a dedication is made to a God and a hyper technical view should not be taken. The mass death coupled with the fact that letters were sent by the deceased to the TTD and not to others reveals the intention that the property is given to the TTD only. This Court agrees with the contentions of the counsel for the second defendant/TTD and finds that there is force in the same. Exs.B.1 to B.3 are executed by the deceased and were sent to the second defendant/TTD only. This Court also agrees that the wishes of the executants are to be given effect to. These documents are addressed to the TTD only and hence they are not void for uncertainty.

32. The other question that was argued is that these documents do not transfer any property as they are neither a will nor a gift. The court below considered the entire evidence and contents of the documents. From a reading of the documents Exs.B.1 to B.3, it is clear that they were executed just before the family committed suicide. The family was conscious of the fact that the death was imminent. Both the sisters clearly mentioned in their documents that they are self-immolating themselves and unifying themselves with Lord Venkateshwara Swamy. They have also stated clearly that these documents are being written just before their death and if there are any mistakes, the same should be overlooked. It is also mentioned that there are no legal heirs and the property should go to the deities mentioned therein. Therefore, on a plain and liberal reading of these documents, this Court is of the opinion that the finding of the lower Court that these are dedications and not a gift in the legal sense or a will is correct. Even the ultimate survivor, as per the legal fiction of Section 21 of the Hindu Succession Act, is the last sister D. Rekha Devi. By operation of this section, she should be treated as sole surviving coparcener and therefore, the contents of Ex.B.3 by which the entire property is dedicated to Sri Venkateshwara Swamy varu and to Sri Kalahasti Eswara is held to be a valid dedication. This Court agrees with the finding of the lower Court that the letters addressed by the daughters of late D.V.S. Tirupati Rao constitute a dedication to the Tirumala Tirupati Devasthanam/second defendant. The judgment relied upon by the counsel for the second defendant in Kapoor Chands case (AIR 1993 SC 1145) also clearly states that

dedication of property need not be in writing and can be inferred from conduct also. A sequential reading of Exs.B.1 to B.3 makes the intention clear as per this Court.

33. The next issue that arises for consideration is whether the property has devolved on the Government of Andhra Pradesh by virtue of Section 29 of Hindu Succession Act. The lower Court rightly held that there is no devolution of the property on the Government. The plaintiff and the second defendant are claiming the suit schedule properties. This Court agrees that Exs.B.1 to B.3 are valid and that they constitute a dedication in favour of the second defendant. Therefore, in this case, there is no devolution of the property by virtue of Section 29 of Hindu Succession Act.

34. The other issue that arises for consideration is about the subsequent sales made by the plaintiff after the initial decree of the suit and before the earlier appeal. As mentioned earlier, the suit was decreed on 15.11.1996. The plaintiff who was given a decree approached the Mandal Revenue Officer (the custodian) and took possession of the property. The plaintiff during the period from December, 1996 to March, 1997 sold the property by laying out the same into house plots. Defendants 3 to 26 purchased the same from him. The plaintiff argued that as no appeal was filed, more so, within time, he proceeded to enjoy the benefit of decree in his favour. He also sold the property openly and publicly. The alienations were made to defendants 3 to 26 are genuine and valid transfers as per the plaintiff. On behalf of defendants 3 to 27, a plea was raised that the purchase made by them is valid and that their interest should be protected.

35. It is a fact that in between the original decree and subsequent filing of the appeal, there were sales. The registered sales were made to third parties who are now added as parties to the proceedings. The fact remains that there were some delay in preferring the appeal and obtaining subsequent orders. Therefore, the sales made to the defendants 3 to 27 cannot be held to be the sales with a view to defeat the decree. The lower Court also held that these buyers were bona fide purchasers. However, it appears that in the case of defendants 11, 14, 18, 20, 21, 25, 26, 16 and 24, the second defendant collected the market value and agreed for the ratification of the sales. In the case of the other defendants (other than defendants 3, 5, 13 and 16) whose sales were made a little later, a similar benefit was not extended by TTD. Therefore, it is the submission of Sri Gangirami Reddy, learned counsel for the subsequent purchasers/defendants that a similar benefit is to be extended to these purchasers also. He seeks a direction to the second defendant/TTD. Sri M. Adinarayana Raju, learned counsel for TTD, however, disputed the submission. This Court does not wish to enter into this area and merely states that the sales are made bona fide. It is for the second respondent/TTD to consider the representation made by the defendants, if they are willing for regularization of the sale deeds as per the prevalent rules/guidelines/laws applicable to such cases.

36. A point that was urged is about the amendment to the written statement by

which the plea of Will was changed to a dedication and the order passed in I.A.No.234 of 1999 on a plea by the second defendant to amend the written statement. The word Will was deleted and the word dedication was added to the plaint. A lot of argument was advanced on the issue including pleas about the amendment of written statement by which a fundamental change is made in the stand taken by defendants etc. This Court is of the opinion that the order passed by the Division Bench on 23.12.1998 in A.S.No.258 of 1998 precludes this Court from entertaining any further arguments on the amendment. The Division Bench clearly held in para-9 of the order that the amendment sought is valid and that the deletion of the word Will and substitution in its place dedication and donation to an endowment will not cause any prejudice to the plaintiff. This order has become final and is binding on this Court. It is an order of Division Bench of this Court and is binding on this Court also.

37. The matter was also remanded by the Division Bench with a specific direction for retrial on the main issues and also to decide two additional issues viz., a) whether the suit for declaration simplicitor is maintainable; and b) whether the court fee paid is correct or not.

38. During the course of submissions by the learned counsels, the matter was argued but no serious issue was pointed out against the finding of the lower Court on these two additional issues. The lower Court rightly held that the suit for a declaration is maintainable. The possession of the property was no longer with the plaintiff or with the second defendant. Therefore, the Court held that a decree for delivery of possession in favour of the plaintiff and against the defendant does not arise. Even otherwise, a suit for declaration simplicitor can be maintained. The case law cited Deokuer and another v. Sheoprasad Singh and others (AIR 1966 SC 359), which was considered by the lower Court is also relevant. Therefore, this Court concurs with the finding of the lower Court that in the circumstances of the case, a suit for declaration simplicitor is maintainable.

39. The last issue to be decided is about the valuation and the court fee paid. The lower Court framed this issue after the remand. The lower Court correctly noticed that no evidence is placed to show that valuation is incorrect. On the contrary, the court fee paid is according to the valuation certificate that is annexed to the plaint in IA No.234 of 1999. It is also important to note that the valuation portion was amended and IA No.429 of 1999 in OS No.12 of 1994 was allowed. The court fee was paid accordingly. Therefore, this Court is of the opinion that there are no infirmities in the findings of the lower Court on this issue.

40. In view of the above, this Court is of the opinion that the impugned judgment of the lower Court is correct and valid and there are no merits made out to interfere with the same.

41. In the result, the appeal is dismissed. However, there shall be no order as to costs. Miscellaneous petitions, if any, pending in this appeal shall stand closed.

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2019 (1) L.S. 29 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
L. Nageswara Rao &
The Hon'ble Mr.Justice
M.R. Shah

Rajesh ..Petitioner
Vs.
State of Haryana ..Respondent

INDIAN PENAL CODE, Sec.306 - Arvind committed suicide - According to the prosecution, Arvind was being threatened by accused through telephone conversations - Whether Appellant can be held guilty for committing an offence under Section 306 - Aggrieved by the dismissal of his appeal before High Court, Appellant preferred instant appeal.

Held - Conviction u/Sec.306 IPC is not sustainable on allegation of harassment without there being any positive action proximate to the time of occurrence on part of accused, which led or compelled person to commit suicide - In order to bring a case within the purview of Section 306 IPC, there must be a case of suicide and in commission of said offence, person who is said to have abetted commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate

Crl.No.93/2019 Date:18-01-2019

commission of suicide - Therefore, act of abetment by person charged with said offence must be proved and established by prosecution before he could be convicted under Section 306 IPC – To constitute "instigation", a person who instigates another has to provoke, incite, urge or encourage the doing of an act by the other by "goading" or "urging forward" - Appeal stands allowed and conviction and sentence of Appellant is set aside.

J U D G M E N T
(Per the Hon'ble Mr.Justice
L. Nageswara Rao)

Leave granted.

1. The Appellant was convicted under Section 306 of the Indian Penal Code, 1860 (hereinafter referred to as "the IPC") and sentenced to undergo five years rigorous imprisonment. The appeal filed by the Appellant was dismissed by the High Court. Hence, this appeal.

2. According to the complaint filed by Bharat Singh (PW-1), his son Arvind was married to Manju, daughter of Laxmi Narayan on 07.11.2000. Indera is the sister-in-law of Arvind and the Appellant Rajesh is his brother-in-law. Arvind committed suicide on 23.02.2002 by consuming Sulfas tablets. On 01.03.2002 when Bharat Singh and other family members entered into the room of Arvind to sprinkle Gangajal, they found a suicide note on the bed of the deceased. It was stated that Arvind committed suicide due to the behavior of the Appellant, Laxmi Narayan and Indera who made false

allegations against deceased regarding demand of dowry. A Panchayat was held in the village at the instance of the accused during which the Appellant slapped the deceased. The Appellant and his sister Indera used to threaten the deceased on telephone at the instance of their father Laxmi Narayan.

3. In the suicide note, the deceased Arvind stated that false allegations of demand of dowry were made against him and that a Panchayat was also conducted in which there was an attempt to assault him. There were continuous threats from his father-in-law (Laxmi Narayan), his brother-in-law (Appellant) and the sister-in-law (Indera) that his family members will also be implicated in a criminal case. Unable to withstand the harassment, the deceased took the extreme step of committing suicide and held his father-in-law, the Appellant and his sister-in-law responsible for his death.

4. On completion of investigation, a charge-sheet was filed under Section 306 IPC. 12 witnesses were examined on behalf of the prosecution and Manju, wife of the deceased was examined as DW-1. On a consideration of the oral and documentary evidence, the Trial Court held the Appellant, his father and sister guilty of committing the offence under Section 306 IPC. The Appellant and his father Laxmi Narayan were sentenced to imprisonment of five years. Accused Indera was sentenced to three years imprisonment on being convicted for committing of an offence under Section 306 IPC. The Trial Court took note of the Panchayat that was held in September, 2001 which was five months prior to 23.02.2002 on which date Arvind committed suicide. Reference was also made to the evidence of PW-1 (Bharat Singh) who stated that he and his son Arvind (deceased) had forgotten about the Panchayat episode in view of the apology tendered by the accused. However, the Trial Court observed that continuous threats held out by the accused to implicate the deceased and his family members in a false dowry case assume importance. The Trial Court also relied upon the suicide note to hold the accused guilty of the offence of abetment to suicide. The version of the defence that Arvind committed suicide due to his depression, due to unemployment and lack of income, was rejected.

5. The appeal filed by the Appellant was dismissed by the High Court. The conviction and sentence of Laxmi Narayan and Indera were set aside by the High Court by the same judgment. The High Court referred to the suicide note Exhibit 'PA' to conclude that there was no error committed by the Trial Court in convicting the Appellant. The High Court also relied upon the evidence of PW-1 and PW-5 who spoke about the convening of the Panchayat by the accused in September, 2001 during which false allegations were made against the deceased. The High Court upheld the conviction of the Appellant while acquitting his father and sister, only on the ground that the Appellant slapped Arvind during the Panchayat which was conducted in September, 2001.

6. It is no doubt true that Arvind committed suicide on 23.02.2002. He left a suicide note which was found by his family members on 01.03.2002. There is also no dispute

that Arvind blamed his father-in-law (Laxmi Narayan), his sister-in-law (Indera) and the Appellant for harassment and threats that he would be implicated in a false case of demand of dowry. Admittedly, a Panchayat was held in September, 2001 during which the accused leveled allegations of demand of dowry by Arvind. More than five months thereafter, Arvind committed suicide on 23.02.2002. In the meanwhile, according to the prosecution, Arvind was being threatened by the accused through telephone conversations. The point that arises for our consideration is whether the Appellant can be held guilty for committing an offence under Section 306 IPC in the facts and circumstances of the case.

7. It is necessary to refer to Section 306 IPC and Section 107 IPC which reads as under:

"306. Abetment of suicide.—If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

107. Abetment of a thing.—A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing."

8. Conviction under Section 306 IPC is not sustainable on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused, which led or compelled the person to commit suicide. In order to bring a case within the purview of Section 306 IPC, there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC. (See Amalendu Pal alias Jhantu v. State of West Bengal (2010) 1 SCC 707)).

9. The term instigation under Section 107 IPC has been explained in Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi (2009) 16 SCC 605: (2010) 3 SCC (Crl.) 367)) as follows:

"16. Speaking for the three-Judge Bench

in Ramesh Kumar case [(2001) 9 SCC 618 : 2002 SCC (Cri) 1088] , R.C. Lahoti, J. (as His Lordship then was) said that instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of "instigation", though it is not necessary that actual words must be used to that effect or what constitutes "instigation" must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. Where the accused had, by his acts or omission or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, in which case, an "instigation" may have to be inferred. A word uttered in a fit of anger or emotion without intending the consequences to actually follow, cannot be said to be instigation.

17. Thus, to constitute "instigation", a person who instigates another has to provoke, incite, urge or encourage the doing of an act by the other by "goading" or "urging forward". The dictionary meaning of the word "goad" is "a thing that stimulates someone into action; provoke to action or reaction" (see Concise Oxford English Dictionary); "to keep irritating or annoying somebody until he reacts" (see Oxford Advanced Learner's Dictionary, 7th Edn.)."

10. Words uttered in a fit of anger or omission without any intention cannot be termed as instigation. (See Praveen Pradhan v. State of Uttaranchal (2012) 9 SCC 734)).

11. We are of the opinion that the evidence on record does not warrant conviction of the Appellant under Section 306 IPC. There is no proximity between the Panchayat held in September, 2001 and the suicide committed by Arvind on 23.02.2002. The incident of slapping by the Appellant in September, 2001 cannot be the sole ground to hold him responsible for instigating the deceased to commit suicide. As the allegations against all the three accused are similar, the High Court ought not to have convicted the Appellant after acquitting the other two accused.

12. We are not in agreement with the findings of the Trial Court that the deceased (Arvind) committed suicide in view of the continuous threats by the accused regarding his being implicated in a false case of demand of dowry. The evidence does not disclose that the Appellant instigated the deceased to commit suicide. There was neither a provocation nor encouragement by the Appellant to the deceased to commit an act of suicide. Therefore, the Appellant cannot be held guilty of abetting the suicide by the deceased.

13. For the aforementioned reasons, the appeal is allowed and the conviction and sentence of the Appellant is set aside. His bail bonds stands discharged.

2019 (1) L.S. 32 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Arun Mishra &
The Hon'ble Mr.Justice
Navin Sinha

Leela Bai & Anr., ..Petitioners
Vs.
Seema Chouhan & Anr., ..Respondents

WORKMEN'S COMPENSATION (AMENDMENT) ACT, Secs.4, 4A & 26 – Appellants/Legal heirs of deceased aggrieved by rejection of their claim for compensation - Deceased was a bus driver under respondent no.1 - He fell off roof of bus accidentally and died – Hence Appeal.

Held - Doctrine of "Notional extension" - Workmen's Compensation (Amendment) Act, being a welfare legislation, will have to be interpreted in facts of each case and evidence available, to determine if accident took place in course of employment and arose out of employment - Appellants are held to have wrongly been denied compensation under Act - Compensation payable to appellants shall be calculated u/Sec.4 along with default penalty u/sec.4A and costs to be awarded u/Sec.26 of Act - Impugned orders are set aside - Appeal stands allowed.

C.A.No.931/19 Date: 22-01-2019

J U D G M E N T

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

Leave granted.

2. The appellants are the legal heirs of the deceased aggrieved by the rejection of their claim for compensation under the Employee's Compensation Act, 1923 as amended by the Workmen's Compensation (Amendment) Act, 2009 (hereinafter referred to as 'the Act'). The deceased was a bus driver under respondent no.1. He fell off the roof of the bus accidentally and died.

3. Learned counsel for the appellants submits that the deceased suffered an accidental death in the course of, and arising out of the employment, evident from the deposition of PW1 2, Ajay Singh Chauhan. The denial of compensation under the Act to the appellants suffers from grave misappreciation of facts and the evidence available on record. The nature of duty performed by the deceased required him to be with the bus twenty-four hours, failing which the employer's requirement could not be fulfilled. The presence of the deceased on the bus was by compulsion, and not by choice. PW-2 deposed that the deceased was required to be with the bus and was therefore paid salary of Rs.6,000/- p.m. for twenty-four hours. Merely because the accident took place while the deceased was coming down the roof of the bus after having his meals, cannot be sufficient, sans the evidence, to hold that death did not arise out of and was not in the course of employment. The facts of the case adequately reflect notional extension of the

duty, relying on General Manager, B.E.S.T. Undertaking, Bombay v. Mrs. Agnes, (1964) 3 SCR 930.

4. Learned counsel for the respondent contended that the duty of the deceased got over at 7:30 pm. He is stated to have fallen off the bus after duty hours at 8:30 pm. The deceased cannot be said to have died in course of and arising out of the employment. There was no proximity between the death and discharge of duties. The deceased cannot be said to have been on duty while he was eating food on the roof of the bus by choice.

5. We have considered the submissions on behalf of the parties. The deceased, aged around 42 years, was the driver of the public bus belonging to respondent no.1. He met an accidental death on 18.07.2010 at the Burhanpur bus stand while coming down the roof of the bus of which he was a driver, after eating his meal. The salary of the deceased at the time of death was determined by the Tribunal at Rs. 4,275/- per month while dismissing the claim case.

6. The deceased was required to drive the public bus daily, ferrying passengers from Indore to Burhanpur and back from Burhanpur to Indore. The travelling time in one direction was approximately 5 hours, according to PW-2. The bus ferried passengers from Burhanpur at 6:30 AM and reached Indore at about 11:00 AM. The return journey would commence from Indore at 3:00 PM and terminate at Burhanpur on or after 7:30PM. According to PW-2, because of the nature of their duty, the deceased and the conductor of the bus, were required to remain with the bus twenty-four hours. The appellants also deposed that because of the nature of his duty, the deceased at times, would not come home for as long as a week.

7. On the fateful day the deceased had returned from Indore to the Burhanpur terminus at about 7:30 pm. He met an accidental death while he was coming down the roof of the bus after having his meal at about 8:30 pm. The short question for consideration is whether the death occurred during the course of, and arising out of the employment. In the facts of the case, and the evidence available, it is evident that the deceased was present at the bus terminal and remained with the bus even after arrival from Indore not by choice, but by compulsion and necessity, because of the nature of his duties. The route timings of the bus required the deceased to be readily available with the bus so that the passenger service being provided by respondent no. 1 remained efficient and was not affected. If the deceased would have gone home every day after parking the bus and returned the next morning, the efficiency of the timing of the bus service facility to the travelling public would definitely have been affected, dependant on the arrival of the deceased at the bus stand from his house. Naturally that would bring an element of uncertainty in the departure schedule of the bus and efficiency of the service to the travelling public could be compromised. Adherence to schedule by the deceased would naturally inure to the benefit of respondent no.1 by enhancement of income because of timely service. It is not without reason that the deceased would not go home for weeks

as deposed by the appellant. Merely because the deceased was coming down the roof of the bus after having his meal, cannot be considered in isolation and interpreted so myopically to hold that he was off duty and therefore would not be entitled to compensation.

8. The deceased did not remain at the bus stand living in the bus as a member of the public or by choice after arrival at Burhanpur till departure for Indore the next morning. It is not the case of the respondent that the deceased was at liberty to proceed home and return at leisure the next morning after parking the bus at the Burhanpur bus stand at night. The Act being a welfare legislation, will have to be interpreted in the facts of each case and the evidence available, to determine if the accident took place in the course of employment and arose out of the employment. In Agnes (supra) it was observed :-

"...The man's work does not consist solely in the task which he is employed to perform. It includes also matters incidental to that task. Times during which meals are taken, moments during which the man is proceeding towards his work from one portion of his employers' premises to another, and periods of rest may all be included."

9. In the facts of the present case and the nature of evidence, there was a clear nexus between the accident and the employment to apply the doctrine of "notional extension" of the employment considered in Agnes (supra) as follows:-

"It is now well-settled, however, that this is subject to the theory of notional extension of the employer's premises so as to include an area which the workman passes and repasses in going to and in leaving the actual place of work. There may be some reasonable extension in both time and place and a workman may be regarded as in the course of his employment even though he had not reached or had left his employer's premises. The facts and circumstances of each case will have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping in view at all time this theory of notional extension."

10. If the requirement of the deceased to stay with the bus was integrally connected with the efficiency of the service to be provided to the public by respondent no.1 and the deceased was not present at the bus terminal with the bus in his nature as a member of the public by choice, we see no reason why the doctrine of notional extension of the employment will not be applicable.

11. Agnes (supra) has been followed in Manju Sarkar and Ors. v. Mabish Miah and Ors., (2014) 14 SCC 21, observing as follows:

"As rightly contended by the learned counsel appearing for the appellants there is a notional extension in the present case also and we would, therefore, hold that Sajal Sarkar met with the road accident in the course of his employment under Respondents 1 and 2. The courts below

have misdirected themselves while dealing with this question and the finding rendered by them is perverse and unsustainable."

12. The appellants are held to have wrongly been denied compensation under the Act. The impugned orders are accordingly set aside. The Workmen's Compensation Commissioner, Labour Court, Khandwa has already determined the salary of the deceased at the time of death as Rs. 4,275/ per month and which is upheld. The compensation payable to the appellants shall be calculated on the aforesaid basis under Section 4 along with default penalty under Section 4A and costs to be awarded under Section 26 of the Act. The quantum of compensation shall be finally computed after hearing the parties within one month from the date of receipt and/or production of a copy of this order before the Commissioner. Respondent no.2 shall pay the determined amount to the appellants within three weeks from the date of such computation by the Tribunal.

13. The appeal is allowed.

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2019 (1) L.S. 36 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
N.V. Ramana &
The Hon'ble Mr.Justice
Mohan M. Shantanagoudar

Mohammed Salim (D)
& Ors., ..Petitioners
Vs.
Shamsudeen (D) & Ors., ..Respondents

INDIAN EVIDENCE ACT, Sec.35 – Appellant preferred instant appeal aggrieved by Judgment passed by High Court of Kerala - By impugned judgment, High Court set aside judgment of District Courts - Suit for partition and possession of 14/16th share in Schedule 'A' property and half rights over Plaint Schedule 'B' property was filed by the Respondent No. 1/Plaintiff - It is the case of the defendants that Valliamma was not legally wedded wife of Mohammed Ilias and that she was a Hindu by religion at the time of marriage and She had not converted to Islam at the time of her marriage, and thus the plaintiff being the son of Valliamma, is not entitled to any share in the property of Mohammed Ilias.

Held - Legal effect of a fasid marriage (Irregular) is that in case of consummation, though wife is entitled to get dower, she is not entitled to inherit

C.A.No.5158/2013 Date: 22-01-2019

the properties of husband, but child born in that marriage is legitimate just like in case of a valid marriage, and is entitled to inherit the property of the father - High Court was justified in concluding that though plaintiff was born out of a fasid (irregular) marriage, he cannot be termed as an illegitimate son - Marriage of a Muslim man with a nonMuslim woman who is an idolatress or fire worshipper is not void, but merely irregular – Appeal stands dismissed.

J U D G M E N T

(per the Hon'ble Mr.Justice Mohan M. Shantanagoudar)

The judgment dated 05.09.2007 passed in S.A. No. 693 of 1994 by the High Court of Kerala at Ernakulam is the subject matter of this appeal. By the impugned judgment, the High Court set aside the judgment of the District Court, Thiruvananthapuram dated 12.07.1994 passed in AS No. 264/1989 and restored the judgment and decree passed in O.S. No. 144/1984 by the Additional Sub Court, Thiruvananthapuram dated 17.07.1989.

2. The facts leading to this appeal are that a suit for partition and possession of 14/16th share in the Plaint Schedule 'A' property and half the rights over Plaint Schedule 'B' property was filed by the Respondent No. 1 herein (original plaintiff). Defendant No. 1 in the suit, Mohammed Idris, is the brother of Mohammed Ilias, the father of the plaintiff, and Defendant Nos. 2 to 7 are the children of Mohammed Idris. Both the plaintiff's father and Defendant No. 1 are the sons of Zainam Beevi, who expired in 1955. Both Plaint properties belonged to her. Plaint Schedule 'A' property was gifted to Mohammed Ilias, based on a gift deed executed by Zainam Beevi.

The case of the plaintiff is that Defendant No. 8 namely Saidat, was the first wife of Mohammed Ilias, and no issue was born out of the said wedlock. Thereafter, Mohammed Ilias married Valliamma in 1120 M.E. (as per the Malayalam Calendar, which corresponds to 1945 AD in the Gregorian system). Valliamma was a Hindu at the time of her marriage with Mohammed Ilias. Both Mohammed Ilias and Valliamma lived together as husband and wife at Thiruvananthapuram. Later, Valliamma was renamed Souda Beebi. Out of the said wedlock, Shamsudeen (the plaintiff) was born. Subsequent to the death of Mohammed Ilias in 1947 AD, Valliamma (Souda Beebi) married Aliyarkunju.

The plaintiff claimed that he was the only son of Mohammed Ilias and on his death, he became entitled to 14/16th of the share in Schedule 'A' property. He also claimed half the share in Schedule 'B' property through inheritance after the demise of Zainam Beevi, as the same would have devolved upon the plaintiff, being the son of the predeceased son of Zainam Beevi, and Mohammed Idris, Defendant No. 1, being the only surviving son of Zainam Beevi. Hence, the suit was filed.

3. It is the case of the defendants that Valliamma was not the legally wedded wife of Mohammed Ilias and that she was a Hindu by religion at the time of marriage.

She had not converted to Islam at the time of her marriage, and thus the plaintiff being the son of Valliamma, is not entitled to any share in the property of Mohammed Ilias. It is their further case that Mohammed Ilias had died two years prior to the birth of the plaintiff.

4. As mentioned supra, the trial Court decreed the suit and the first appellate Court allowed the appeal and dismissed the suit by setting aside the judgment and decree of the trial Court. However, the High Court by the impugned judgment set aside the judgment passed by the first appellate Court and confirmed the judgment and decree passed by the trial Court. Hence, the instant appeal was filed by the original defendants and the legal representatives of those among them who have since died.

5. Mr. Guru Krishnakumar, learned Senior Counsel, taking us through the material on record, submitted that the Trial Court and the High Court were not justified in decreeing the suit, inasmuch as the plaintiff himself had admitted that he was born in the year 1949, whereas his alleged father Mohammed Ilias expired in the year 1947. Therefore, the plaintiff could not be treated as the son of Mohammed Ilias. He further submitted that since Valliamma was a Hindu by religion, she would not have any right over the property of Mohammed Ilias, and consequently the plaintiff would not get any share in the property of Mohammed Ilias.

6. It is not in dispute that Zainam Beevi gifted Plaint Schedule 'A' property to her son Mohammed Ilias. In view of the gift deed in favour of Mohammed Ilias, upon his death, Schedule 'A' property would have devolved upon his legal heirs as an absolute property as provided under Muslim law. Plaint Schedule 'B' property admittedly belonged to Zainam Beevi and upon her death, it devolved on her legal heirs. Since Zainam Beevi had two sons, both the sons/their respective legal heirs would have inherited half a share each after the death of Zainam Beevi.

7. It is also not in dispute that Defendant No. 8, Saidat is the widow (first wife) of Mohammed Ilias. She has clearly admitted in her written statement that Mohammed Ilias married Valliamma, Defendant No. 9, and out of the said wedlock, the plaintiff was born. Exhibit A3 is the birth register extract of the plaintiff maintained by the statutory authorities, which indicates that the plaintiff is the son of Mohammed Ilias and Valliamma. It is a public document. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law in accordance with which such book, register or record is kept, is itself a relevant fact, as per section 35 of the Indian Evidence Act, 1872. Exhibit A3 being a public document is relevant to resolve the dispute at hand. Additionally, a specific pleading was found in the plaint that Mohammed Ilias and Valliamma were living together as husband and wife in House No. T.C.13 of Poojappura Ward in Thiruvananthapuram, which has not been denied in the written statement of the defendants. As per Exhibit A3 mentioned above, the plaintiff was born on

01.07.1124 M.E. (12.02.1949 as per the Gregorian Calendar) and the same has not been seriously disputed. Admittedly, Mohammed Ilias died on 10.09.1124 M.E. The said date corresponds to 22.04.1949 in the Gregorian Calendar, as seen from the Government Almanac, which cannot be disputed inasmuch as it is a public record maintained by the Trivandrum Public Library (Government of Kerala). Thus, it can be concluded that the plaintiff was born two months prior to the death of Mohammed Ilias.

Under these circumstances, in our considered opinion, the Trial Court and the High Court were justified in concluding, based on the preponderance of probabilities, that Valliamma was the legally wedded wife of Mohammed Ilias, and the plaintiff was the child born out of the said wedlock.

8. The High Court, in our considered opinion, was also justified in concluding that though the plaintiff was born out of a fasid (irregular) marriage, he cannot be termed as an illegitimate son of Mohammed Ilias. On the contrary, he is the legitimate son of Mohammed Ilias, and consequently is entitled to inherit the shares claimed in the estate of his father. The High Court relied upon various texts, including Mulla's Principles of Mahommedan Law (for brevity "Mulla") and Syed Ameer Ali's Principles of Mahommedan Law, to conclude that Muslim law does not treat the marriage of a Muslim with a Hindu woman as void, and confers legitimacy upon children born out of such wedlock.

In the 21st edition of Mulla, at page 338, Section 250, marriage is defined as follows:- "

Marriage (nikah) is defined to be a contract which has for its object the procreation and the legalizing of children."

Thus it appears that a marriage according to Muslim law is not a sacrament but a civil contract. Essentials of a marriage are dealt with in Section 252 at page 340 of Mulla (21st edition) as follows:-

"It is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Mohamedans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. Neither writing nor any religious ceremony is essential."

Section 259(1) at page 345 of the 21st edition deals with difference of religion, providing that marriage of a Muslim man with a nonMuslim woman who is an idolatress or fire worshipper is not void, but merely irregular. It reads:

"A Mahomedan male may contract a valid marriage not only with a Mahomedan woman, but also with a Kitabia, that is, a Jewess or a Christian, but not with an idolatress or a fire-worshipper. A marriage however, with an idolatress or a fire-

worshipper, is not void, but merely irregular."

Before proceeding further, it is crucial to note that under Muslim law, there are three types of marriage-valid, irregular and void, which are dealt with in Section 253 at page 342 of Mulla (21st edition):

"A marriage may be valid (sahih), or irregular (fasid) or void from the beginning (batil)."

The High Court, while dealing with the contention that the correct translation of the Arabic word "fasid" was "invalid", and not "irregular", and that therefore a fasid marriage was a void marriage, considered the changes over time in the interpretation of "fasid". It would be worthwhile for us to refer to these changes as well. In the 6th edition of Mulla, at SectionsSection 197, 199 and 200, fasid marriage is interpreted as "invalid". So also in Sections 197, 199 and 204A of the 8th edition of Mulla, fasid is stated to mean "invalid". For instance, in the 6th edition of Mulla, Section 200 at page 162, dealing with the difference of religion, reads:

"(1) A Mahomedan male may contract a valid marriage not only with a Mahomedan woman but with a Kitabia, that is, a Jewess of a Christian, but not with an idolatress or a fire-worshipper. If he does marry an idolatress or a fireworshipper the marriage is not void (batil), but merely invalid (fasid)."

(emphasis supplied)

Section 204A at page 164 of the same edition deals with the distinction between void (batil) and invalid (fasid) marriage. It provides that a marriage which is not valid may be either void (batil) or invalid (fasid). A void marriage is one which is unlawful in itself, the prohibition against such a marriage being perpetual and absolute. An invalid marriage (fasid marriage) is described as one which is not unlawful in itself, but unlawful "for something else", as here the prohibition is temporary or relative, or when the invalidity arises from an accidental circumstance such as the absence of a witness. Section 204A(3) at page 165 of the 6th edition of Mulla reads:

"..Thus the following marriages are invalid, namely-

(a) a marriage contracted without witnesses, (ss. 196-197);

(b) a marriage by a person having four wives with a fifth wife (s. 198);

(c) a marriage with a woman who is the wife of another, (s. 198A);

(d) a marriage with a woman undergoing iddat (s.199);

(e) a marriage prohibited by reason of difference of religion (s. 200);

(f) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried (s. 204).."

(emphasis supplied)

The reason why the aforesaid marriages

are invalid and not void has also been provided later in the same paragraph. With respect to marriages prohibited by reason of difference of religion, it is stated thus:

"..in cl. (e) the objection may be removed by the wife becoming a convert to the Mussulman, Christian or Jewish religion, or the husband adopting the Moslem faith.."

In the 10th edition, a change has been made to the meaning of fasid marriage. In Section 196A, valid, irregular and void marriages are dealt with. It reads:

"A marriage may be valid (sahih) or irregular (fasid), or void from the beginning (batil)."

(emphasis supplied)

From the 10th edition onwards, fasid marriage has been described as an irregular marriage, instead of invalid, but there has been no change with regard to the effect of a fasid marriage from the 6th edition onwards. The effects of an invalid (fasid) marriage have been dealt with in the 6th edition of Mulla at Section 206 at page 166, clauses (1) and (2) of which read:

"(1) An invalid marriage has no legal effect before consummation.

(2) If consummation has taken place, the wife is entitled to dower ["proper" (s. 220) or specified (s. 218), whichever is less], and children conceived and born during the subsistence of the marriage are legitimate as in the case of a valid marriage. But an invalid marriage does not, even after consummation, create mutual rights of inheritance between the parties."

In the 8th edition of Mulla, the effects of a fasid marriage have been dealt with in Section 206 at page 173. As in the 6th edition, it is stated that children conceived and born during the subsistence of a fasid marriage are legitimate, as in the case of a valid marriage. As noted supra, the same position has been followed in the subsequent editions also, except that fasid has been described as "irregular" from the 10th edition onwards rather than as "invalid".

Irrespective of the word used, the legal effect of a fasid marriage is that in case of consummation, though the wife is entitled to get dower, she is not entitled to inherit the properties of the husband. But the child born in that marriage is legitimate just like in the case of a valid marriage, and is entitled to inherit the property of the father.

9. Evidently, Muslim law clearly distinguishes between a valid marriage (sahih), void marriage (batil), and invalid/irregular marriage (fasid). Thus, it cannot be stated that a batil (void) marriage and a fasid (invalid/irregular) marriage are one and the same. The effect of a batil (void) marriage is that it is void ab initio and does not create any civil right or obligations between the parties. So also, the offspring of a void marriage are illegitimate (Section 205A of the 6th and 8th editions and Sections 205A of the 10th edition, and 266 of the 18th edition of Mulla). Therefore, the High Court correctly concluded that the marriage of Defendant No. 9 with

Mohammed Ilias cannot be held to be a batil marriage but only a fasid marriage.

10. We find that the same position has been reiterated in the 21st edition of Mulla as follows. The distinction between void and irregular marriages has been dealt with in Section 264 at page 349:

"(1) A marriage which is not valid may be either void or irregular.

(2) A void marriage is one which is unlawful in itself, the prohibition against the marriage being perpetual and absolute. Thus, a marriage with a woman prohibited by reason of consanguinity (Section260), affinity (Section261), or fosterage (Section262), is void, the prohibition against marriage with such a woman being perpetual and absolute.

(3) An irregular marriage is one which is not unlawful in itself, but unlawful 'for something else,' as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses. Thus the following marriages are irregular, namely -

(a) a marriage contracted without witnesses (Section 254);

(b) a marriage with a fifth wife by a person having four wives (Section 255);

(c) a marriage with a woman undergoing iddat (Section 257);

(d) a marriage prohibited by reason of difference of religion (Section 259);

(e) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried (Section 263).

The reason why the aforesaid marriages are irregular, and not void, is that in Clause (a) the irregularity arises from an accidental circumstance; in Clause (b) the objection may be removed by the man divorcing one of his four wives; in Clause (c) the impediment ceases on the expiration of the period of iddat; in Clause (d) the objection may be removed by the wife becoming a convert to the Mussalman, Christian or Jewish religion, or the husband adopting the Moslem faith; and in Clause (e) the objection may be removed by the man divorcing the wife who constitutes the obstacle; thus if a man who has already married one sister marries another, he may divorce the first, and make the second lawful to himself."
(emphasis supplied)

The effect of an irregular (fasid) marriage has been dealt with in Section 267 at pages 350-351 of the 21st edition of Mulla as follows:

"267. Effect of an irregular (fasid) marriage.- (1) An irregular marriage may be terminated by either party, either before or after consummation, by words showing an intention to separate, as where either party says to the other "I have relinquished you". An irregular marriage has no legal effect before consummation.

(2) If consummation has taken place- (i) the wife is entitled to dower, proper or specified, whichever is less (Section 286, 289);

(ii) she is bound to observe the iddat, but the duration of the iddat both on divorce and death is three course (see Section 257(2));

(iii) the issue of the marriage is legitimate. But an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife...”

(emphasis supplied)

The Supreme Court, in Chand Patel v. Bismillah Begum, (2008) 4 SCC 774, while considering the question of the validity of a marriage of a Muslim man with the sister of his existing wife, referred to the above passages from Mulla (from an earlier edition, as reproduced in the 21st edition) while discussing the difference between void and irregular marriages and the effects of an irregular marriage.

11. In Syed Ameer Ali’s Mohamedan Law also, the same principle has been enunciated. The learned author, while dealing with the issue of the legitimacy of the children, observed at page 203 of Vol. II, 5th edition:

“The subject of invalid marriages, unions that are merely invalid (fasid) but not void (batil) ab initio under the Sunni Law, will be dealt with later in detail, but it may be stated here that the issue of invalid marriage are without question legitimate according to all the sects.

For example, if a man were to marry a non-scriptural woman, the marriage would be only invalid, for she might at any time adopt Islam or any other revealed faith, and thus remove the cause of invalidity. The children of such marriage, therefore, would be legitimate.”

Tahrir Mahmood in his book Muslim Law in India and Abroad, (2nd edition) at page 151 also affirms that the child of a couple whose marriage is fasid, i.e., unlawful but not void, under Muslim law will be legitimate. Only a child born outside of wedlock or born of a batil marriage is not legitimate.

A.A.A. Fyzee, at page 76 of his book Outlines of Muhammadan Law (5th edition) reiterates by citing Mulla that the nikah of a Muslim man with an idolater or fire-worshipper is only irregular and not void. He also refers to Ameer Ali’s proposition that such a marriage would not affect the legitimacy of the offspring, as the polytheistic woman may at any time adopt Islam, which would at once remove the bar and validate the marriage.

12. The position that a marriage between a Hindu woman and Muslim man is merely irregular and the issue from such wedlock is legitimate has also been affirmed by various High Courts. (See Aisha Bi v. Saraswathi Fathima, (2012) 3 LW 937 (Mad), Ihsan Hassan Khan v. Panna Lal, AIR 1928 Pat 19).

13. Thus, based on the above consistent view, we conclude that the marriage of a Muslim man with an idolater or fireworshipper is neither a valid (sahih) nor a void (batil) marriage, but is merely an irregular (fasid) marriage. Any child born out of such wedlock (fasid marriage) is entitled to claim a share in his father's property. It would not be out of place to emphasise at this juncture that since Hindus are idol worshippers, which includes worship of physical images/statues through offering of flowers, adornment, etc., it is clear that the marriage of a Hindu female with a Muslim male is not a regular or valid (sahih) marriage, but merely an irregular (fasid) marriage.

14. In this view of the matter, the trial Court and the High Court were justified in concluding that the plaintiff is the legitimate son of Mohammed Ilias and Valliamma, and is entitled to his share in the property as per law. The High Court was also justified in modifying the decree passed by the trial Court and awarding the appropriate share in favour of the plaintiff. No issue has been raised before us relating to the quantum of share. Accordingly, the appeal fails and stands dismissed.

–X–

2019 (1) L.S. 44 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Rohinton Fali Nariman &
The Hon'ble Mr.Justice
Navin Sinha

Monsanto Technology ...Appellant
Vs.
Nuziveedu Seeds Ltd.& Ors ....Respondents

CIVIL PROCEDURE CODE, Or.12, R. 6, Or.16, R. 1 - A suit can be disposed of at the initial stage only on an admission inter alia under Order 12 Rule 6 or when the parties are not in issue under Order 16 Rule 1 and the other grounds mentioned therein, none of which are applicable herein.

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

Leave granted.

2. The appellants/plaintiffs in Civil Appeal Nos.4616-4617 of 2018 instituted Civil Suit (Comm) No. 132 of 2016 seeking permanent injunction against the defendants from using the trademark "BOLGARD" and "BOLGARD II" brand cotton technology, violating the registered patent no. 214436 of the plaintiffs, and also to further restrain the defendants from selling and or using seeds/hybrid seeds bearing the patented technology, infringing

C.A.Nos.46164617/18 etc. Date:8-01-2019

the registered patent of the plaintiffs, along with rendition of accounts. The parties shall, for convenience, be referred to by their position in the original suit.

3. The plaintiffs pursuant to their patent rights had entered into a sub-licence agreement dated 21.02.2004 with the defendants for an initial period of ten years. The agreement entitled the defendants to develop "Genetically Modified Hybrid Cotton Planting Seeds" with help of the plaintiffs' technology and to commercially exploit the same subject to the limitations prescribed in the agreement. The agreement also provided for payment of licence fee/trait value by the defendants, for use of the plaintiffs' patented technology. The agreement after extension was ultimately terminated by the plaintiffs on 14.11.2015 due to disputes regarding payment of licence fee/trait value in view of subsequent price control regime introduced by the State, and to which the defendants required adherence by the plaintiffs. The plaintiffs filed an application for injunction under Order 39, Rule 1 and 2 of the Code of Civil Procedure (hereinafter referred to as 'the Code"), to restrain the defendants from using their registered trade mark in violation of the registered patent during the pendency of the suit in view of the termination of the agreement.

4. The defendants in their written statement inter alia contended that their rights were protected under the Protection of Plant Varieties and Farmers' Rights Act, 2001 (hereinafter referred to as 'the PPVFR Act'). The suit patent was bad because claims 1-24 were "process claims" concerning genetic engineering or biotechnology method to insert "Nucleic Acid Sequence" (NAS) into a plant cell as in claim 25-27 practiced in laboratory conditions, unlike the complete biological process adopted by the defendants. The NAS was a chemical composition incapable of reproducing itself and was thus not a microorganism. Only on insertion into a plant, a living organism, it imparts Bt.trait (insect resistance) to the living organism. The defendants also filed a counter claim no.51 of 2016 seeking revocation of the patent under Section 64 of the Act, as being in violation of Section 3(j) of the Patents Act (hereinafter referred to as "the Act") in respect of plants and seeds that contained DNA sequences, denying any infringement.

5. The learned Single Judge on 28.03.2017, while deciding the plaintiffs' application for injunction, observed that the issues arising in the suit necessarily required formal proof, particularly expert opinion, which in complicated matters like that of patent were crucial for ascertaining the breadth of the monopoly granted by the specifications of a patent claim. The nature and extent of the patent claim was more properly a matter to be examined after pleadings were complete and evidence adduced on the issues arising, which did not merit comments at the stage of interim injunction. Considering the existing patent registered under Section 48 of the Act, it was ordered that during the pendency of the suit, the parties shall remain bound by their respective obligations under the sub-licence agreement and that the licence fee/trait value payable by the defendant shall be governed by the laws in force. The learned Single Judge simultaneously only issued

notice on the counter claim no.51 of 2016. The order of injunction dated 28.03.2017, therefore did not deal with or consider the counter claim. It was prima facie observed that the defendants having had the advantage of a sub-licence ever since 2004, appeared unjustified in contending that they were not bound by the obligations under the agreement in view of the claimed statutory protections vis-à-vis the suit patent or the registered trademarks. Prima facie opining that the termination of the sub-licence agreement by the plaintiffs on 14.11.2015 appeared unjustified in view of the statutory price restrictions, the termination was held not to be of any consequence.

6. Aggrieved, both the Plaintiffs and the defendants preferred appeals. The Division Bench dismissed the plaintiffs' appeal upholding the defendants' contention with respect to patent exclusion under Section 3(j) of the Act and that the plaintiffs were at liberty to claim registration under the PPVFR Act, as the two Acts were not complementary, but exclusive in the case of all processes and products falling under Section 3(j) of the Act. Consequentially, the defendants' counter claim succeeded. The suit was, however, permitted to continue with regard to the claim for damages and other reliefs. The plaintiffs were required to continue with their obligations under the sub-licence agreement including payment of licence fee/trait value by the defendants in accordance with law.

7. We have heard learned senior counsel Dr. Abhishek Manu Singhvi, Sri Kapil Sibal, Sri Neeraj Kaul, Sri K.V. Vishwanathan, Sri Arvind P. Datar, Sri Jayant Bhushan, Sri Krishnan Venugopal, Sri Shyam Divan and Sri Sanjiv Sen, and learned counsel Sri Prasahant Bhushan and Ms. Anandita Mitra on behalf of the parties.

8. Dr. Abhishek Manu Singhvi contended that the plaintiffs' suit was for injunction restraining infringement of an existing and valid patent. The lack of patentability was never an issue in the suit. The defendants argued lack of patentability to invalidate the primary issue relating to infringement only. The counter claim for revocation of the patent as unpatentable, was neither argued nor adjudicated by the learned Single Judge. Only notice was issued on the counter claim bearing no.51 of 2016 while counter claim bearing no.50 of 2016 challenging the termination of sub-licence agreement was withdrawn. The issue for existence of the patent, patent exclusion under Section 3(j) of the Act was a heavily mixed question of law and facts requiring formal proof and expert evidence, to be considered at the hearing of the suit, as rightly observed by the Single Judge. The defendants in their memo of appeal themselves contended that the issue regarding existence of the patent and/or its revocation could not have been decided summarily by the learned Single Judge as these were matters which required evidence and could be adjudicated only at the final trial of the suit. The plaintiffs' claims were under 25-27 only. The process claims 1-24 was never an issue in consideration before the Single Judge and yet the Division Bench delved into the same and held the process claims to be bad also.

9. The plaintiffs had never consented to a summary adjudication regarding the validity

of its patent. The consent referred to by the Division Bench, had been given only to decide whether the plaintiffs' patent had been infringed or not, as also the scope of the patent, so as to allow or disallow the relief of injunction. It is incomprehensible that the plaintiffs holding a valid registered patent under the Act nonetheless would have agreed to a summary consideration and validation/invalidation of the patent. The patent comprises of a DNA construct or nucleotide sequence in claim 25-27 comprising of three different components, i.e. (i) a promoter (ii) a man-made gene for the production of Cry2Ab 5endotoxin and, (iii) a third component for the production of a transit peptide 6. The DNA construct so created did not exist in nature and upon insertion into a plant confers insect tolerant trait. A plant is next produced as a "fusion protein" which comprises the Cry2Ab S-endotoxin 7 bonded with the transit peptide. The subject patent claims use of bacillus thuringiensis strain and the development of two genes designated Cry2Aa and Cry2Ab. Each gene sequence is known for its ability to synthesize proteins with pesticidal properties. The NAS is not a living organism but a chemical created in a laboratory. The "event" which is the positioning of the NAS at a unique location in the genome of a plant cell is a separate, subsequent and entirely different invention for which the plaintiffs have obtained a different patent no. 232681 and which is not the subject matter of the present suit. In this case, the invention is the NAS and the target of the invention is its use in a plant cell. The property of the NAS is what makes the plant produce and localize the toxin protein in a specific location in the plant cell so as to make the toxin protein present throughout the plant, in pesticidal effective levels and still produce agronomically stable plants. Relying on "Marker Assisted Recurrent Backcrossing in Cultivar Development" by Guoyou et.al, it was submitted a NAS gene once inserted into a plant, was removable and did not become part of the plant genome, to lose its patentable characteristics. These were matters to be considered in the suit on basis of expert evidence.

10. Shri Vishwanathan and Shri Datar for the defendant have adopted directly and mutually contradictory stands by contending that claims 25-27 are product claims, namely parts of a plant, and subsequently that the said claims are essentially biological process claims. Claims 1-24 are not excluded under Section 3(j) being essentially biological processes as there exists significant human intervention. Dr. Singhvi very fairly admitted that he was not in a position to support the termination of the sub-licence agreement and that the plaintiffs' claims for licence fee/trait value had to be in accordance with the statutory price regime. The seeds from the plaintiffs' patented technology were the highest selling compared to similar other seeds. The plaintiffs have no intention to sue any Indian farmer for violation of patent. It was lastly submitted that either this Court may remand the entire matter for adjudication of the patent issue and infringement or decide the patent issue and then remand the suit for other issues.

11. Shri Kapil Sibbal contended that a chemical/gene/DNA construct is not a plant

variety, and is not eligible for protection under the PPVFR Act. A gene cannot be a plant variety and it would be denied such registration on account of lack of fulfillment of the conditions precedent in Section 2(za) read with Sections 14 and 15. A gene cannot be a "plant grouping", "within a single botanical taxon of the lowest rank", which in simple terms means that it cannot belong to the lowest rank of a plant, namely a species. The PPVFR Act came into effect from 2007 and in the last 11 years, no infringement action has been filed under the same or injunction obtained. The department of bio-technology on their official website has acknowledged the role agro-biotechnology has to play in feeding billion plus mouths in this country and the role that "novel genes" can play to deal with biotic and abiotic stresses, enhance productivity and nutritional quality.

12. Sri Neeraj Kaul submitted that the patented NAS is not the creation of any biological process. The correct admixture of the promoter, the man made gene for the production of Cry2Ab endotoxin and the 3rd component for the production of the transit peptide leading to the DNA construct, is entirely the creation of the human intervention. The Division Bench wrongly holds the invention to be a plant variety. It is only plant varieties and seeds which are covered by the PPVFR Act. The Patent Act and the PPVFR Act are mutually exclusively.

13. Shri Vishwanathan leading the arguments on behalf of the defendants submitted that no patent rights can be exercised with respect to genetically modified cotton planting seeds being developed by the defendants through conventional breeding methods and sold to the farmers. If the patent rights of the plaintiffs be accepted, then the regime provided under the PPVFR Act for plant intellectual property with respect to genetically modified plants would be entirely defeated. The plaintiffs' claim was essentially of a "breeder" for developing a variety and therefore its donor seed containing the NAS was registerable under the PPVFR Act and they were entitled to benefit sharing under Section 26 after such registration. No patent could be granted in a plant, or part of a plant, under Section 3(j) of the Act. Patent infringement analysis involves two steps: the proper construction of asserted claims and the determination as to whether the product infringes the asserted claim as properly construed. The plaintiffs claim to patent was never for a chemical sequence in a vial. The plaintiffs' claimed invention was only an improvement on prior art where it claimed that it had found a way to have a plant produce a higher level of expression of the endotoxin protein by localizing it to the plastid thereby reducing insect tolerance and at the same time producing morphologically normal plants. The plaintiffs were also precluded from claiming rights on the genetically modified Bt. cotton seeds on basis of prosecution history estoppel. The order of the Division bench being based on consent; it is not open for the plaintiffs to contend to the contrary now.

14. Shri Datar submitted that the "product" in claim 25-27 for NAS is a chemical is

false, because any chemical that is inserted into a plant is not capable of being passed on to the seeds of that plant and to the future progeny as the chemical will be metabolized by the plant itself and will never be transmitted to its seeds. Further, the NAS, by the wording of claims 25-27 itself, is a plant gene which is meant to be an inherent, intrinsic and integral part of the plant as it exists at the sub cellular level. The cell after transformation with the gene through the biological process of tissue culture results in a transgenic plant that produces seeds having the essential characteristic of these transgenic plants. Therefore, claims 25 to 27 even if it represents merely a "gene" will manifest as an inseparable and inheritable part of a plant and cannot be patented. The NAS gene inserted into the plant becomes an inseparable part of the plant at the sub-cellular level by an irreversible biological process. It exists in every cell of the transformed plant. It not only expresses in the plant to produce endotoxin but also inherits into progeny plants in perpetuity. It does not result in a "product" which can be put into a vial and sold as such. The claims must be construed so as to give an effective meaning to each of them but the specifications and the claims must be looked at and construed together.

15. Shri Jayant Bhushan submitted that the plaintiffs did not bring the NAS in a vial and but imported plants seeds containing NAS. These seeds were not protected by Patent. Indian seed companies were given donor seeds which already had the NAS/ Bt. Trait integrated in them and was capable of germination. What the Indian Seed companies do is to cross one of the plaintiffs' plants with the plants of their proprietary Indian varieties suitable for cultivation in India, to develop a third/new crossbred cotton variety which would have the Bt. trait from plaintiffs' variety so as to resist Bollworm and other traits from their own developed varieties. Since the Indian Seed Companies do not use the NAS in isolation nor do they use the method of introducing the NAS into the plant through the method described in the patent, there is no infringement of the patent. NAS is an essentially biological process in which the patented product is neither separately used nor the patented process of insertion into a plant is used, the NAS is not being made or used by the Indian Seed Companies. The patent on a gene sequence in a test tube cannot negate/undo the important researchers' and farmers' rights under Sections 30 and 39 of the PPVFR Act. Section 39 relates to Farmer's Rights entitling him to save, use, sow and re-sow his farmed produce including a registered variety protected under the Act. It was lastly submitted that if the Court is not inclined to uphold the order of the Division Bench, the matter may be remanded to the Division Bench for fresh hearing on the injunction matter because the correctness of the injunction order dated 28.03.2017 never came to be tested or considered by the Division Bench.

16. Shri Divan submitted that that there is no inventive step in the plaintiffs' patent claim, until the artificial NAS is inserted into a plant so that the plant starts producing

the delta endotoxin which is toxic to the Bollworms. There is no capability of industrial application of the NAS except to become part of a plant and to develop a transgenic plant. The threshold requirements of an invention in terms of the patents Act are missing until the implant stage. The inventive qualities begin when the NAS is inserted in a plant cell and not before that stage. Once, the NAS is inserted in a plant cell, the exclusion under Section 3(j) applies and the PPVFR Act becomes operative.

17. Shri Venugopal submitted that a conjoint reading of Section 2(j) and Section 3(c) of the Act makes it clear that it excludes patentability both of transgenic plants (invented through recombinant gene technology in the laboratory) and those invented through conventional breeding techniques even where a new plant, variety or species is initially created through genetic manipulation, to the extent that the subsequent production or propagation of the plant, variety or species is done through "an essentially biological process", the biological process would not be patentable under Section 3(j) of the Act. Even if patent exclusion under Section 3(j) was not applicable, still the patent claim could never permit plaintiffs to claim the right to prevent farmers from making, using, offering for sale or selling plants or seeds of the cotton plant that contain Bt. gene. The patent of an artificial gene and the process for inserting it into the genome of a plant, will not entitle the exercise of rights under Section 48 of the Act in respect of a plant that contains the artificial gene on which it has a patent. The protection under Section 48 of the Act is capable of being exercised against other biotechnology companies that seek to replicate the Bt. gene product or the process of insertion of that gene in the genome of the cotton plant. Both the Patents Act and PPVFR Act have a link that is to protect the interests of the farmers so that they are not burdened by exorbitant rates of seeds.

18. Shri Prashant Bhusan, Shri Sanjiv Sen, and Smt. Anandita Mitra on behalf of the interveners submitted that the NAS is not "capable of industrial application" unless it becomes a part of the plant cell where it is expressed by the plant cell through essentially biological processes of transcription, translation, and replication, to produce the desired protein. The Biodiversity Act which prohibits the "use" of any biological resources occurring in India for commercial utilisation and which includes genes used for improving crops and livestock through genetic intervention necessitates prior permission from the National Bio Diversity Authority which has not been taken by the plaintiffs. The NAS only adds a trait to a plant leading to development of a transgenic variety creating donor seeds. The seeds are not patentable under Section 3(j) of the Act though the plaintiffs may be entitled for benefit sharing under the provision of the PPVFR Act as defined under Section 2(h) of the PPVFR Act. The claim of the plaintiffs has ramifications beyond the immediate parties.

19. We have considered the respective submissions made on behalf of the parties. Though very elaborate submissions have been made with regard to facts and the

technical processes involved in the patent in question, the provisions of the Act, the PPVFR Act and a large volume of case laws for construction of patents, the obligations under the World Trade Organisation (WTO), General Agreement on Tariffs and Trade (GATT), Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, leading to the Patents Amendment Act, 2002 on 25.06.2002, in view of nature of the order proposed to be passed, we do not consider it necessary to deal with the same at this stage, and leave open all questions of facts and law to be urged for consideration in appropriate proceedings.

20. The patent claims 1-24 are with regard to the processes while claims 25-27 are with regard to the chemical product called NAS. According to the plaintiffs, the latter was a manmade DNA construct that did not exist in nature and did not otherwise form part of a plant existing in nature. The DNA construct was inserted into a plant which confers the trait of insect tolerance to the plant. It comprises of three different components i.e. (i) A promoter, (ii) A gene for the production of Cry2Ab 5-endotoxin and (iii) a third component for the production of a transit peptide. Of these three, Cry2Ab 5-endotoxin is stated to be a man-made gene. This nucleic acid sequence is then inserted into the cell of the plant at a particular location resulting in the production of "a fusion protein" which comprises the Cry2Ab 5-endotoxin 7 bonded with transit peptide. The production of a fusion protein is critical in this respect for the technology to be effected in plants. The bacillus thuringiensis strain does not produce such a fusion protein. It is the plaintiffs' claim that it is only its technology that allows a cotton plant to produce the Cry2Ab 8-endotoxin protected inter-alia by claims 25-27 of the patented inventions. The subject patent claims the use of Bacillus thuringiensis strain and development of two genes designated Cry2Aa and Cry2Ab. Each gene sequence is known for its ability to synthesize proteins with pesticidal properties.

21. It is the contention of the defendants apart from the unpatentability of the plaintiff's claim, they have not violated patented rights, if any, as:

"a) Nuziveedu sowed seeds of their proprietary cotton varieties alongside the Transgenic Bt. Cotton seed.

b) The Transgenic Bt. Cotton seed and the Nuziveedu's varieties seed yielded different plants, which were cross-pollinated at the flowering stage.

c) The cotton fruits from the Nuziveedu's cotton varieties had cotton seeds, which were carrying the proprietary hybrid ("Bt. cotton hybrids")

d) Nuziveedu conducted extensive agronomic evaluation trials of newly developed Bt. Cotton Hybrids to ascertain their utility to the farmers.

e) Nuziveedu obtained the approval of the GEAC under the Environment (Protection) Act, 1986 for the commercial release of

each new Bt. Cotton Hybrid which were considered satisfactory after internal evaluation, and thereafter produced in mass scale and distributed to the farmers."

22. Manifestly, the counter claim of the defendants was never considered by the learned Single Judge as only notice had been issued on the same. The plaintiffs had preferred an appeal against the nature of the injunctive relief with regard to the issue of licence fee/trait value, now conceded by the plaintiffs. We see no reason to reject the submission of Dr. Singhvi that it stands to reason why the plaintiffs would have consented to a summary adjudication of an existing patent and risk losing the same without any merit adjudication. The defendants themselves had contended in their appeal that the issues were complicated requiring expert evidence to be considered in a full-fledged trial. The Division Bench therefore ought to have confined its adjudication to the question whether grant of injunction was justified or unjustified in the facts and circumstances of the case. The Division Bench ought not to have examined the counter claim itself usurping the jurisdiction of the Single Judge to decide unpatentability of the process claims 1-24 also in the summary manner done. Summary adjudication of a technically complex suit requiring expert evidence also, at the stage of injunction in the manner done, was certainly neither desirable or permissible in the law. The suit involved complicated mixed questions of law and facts with regard to patentability and exclusion of patent which could be examined in the suit on basis of evidence.

23. Section 64 of the Act provides for revocation of patent based on a counter claim in a suit. It necessarily presupposes a valid consideration of the claims in the suit and the counter claim in accordance with law and not summary adjudication sans evidence by abstract consideration based on text books only. The Civil Procedure Code provides a detailed procedure with regard to the manner in which a suit instituted under Section 9, including a counter claim has to be considered and adjudicated. The Code mandates a procedure by settlement of issues, examination and cross examination of witnesses by the parties, including discovery/inspection of documents, culminating in the hearing of the suit and decree. A suit can be disposed of at the initial stage only on an admission inter alia under Order 12 Rule 6 or when the parties are not in issue under Order 16 Rule 1 and the other grounds mentioned therein, none of which are applicable herein. We are therefore satisfied that the Division Bench ought not to have disposed of the suit in a summary manner by relying on documents only, extracted from the public domain, and not even filed as exhibits in the suit, much less examination of expert witnesses, in the facts of the present case. There is no gain saying that the issues raised were complicated requiring technological and expert evidence with regard to issues of chemical process, biochemical, biotechnical and microbiological processes and more importantly whether the nucleic acid sequence trait once inserted could be removed from that variety or not and whether the patented DNA sequence was a plant

or a part of a plant etc. are again all matters which were required to be considered at the final hearing of the suit.

24. The manner in which a suit instituted under Section 9 of the Code is required to be dealt with and decided, fell for consideration in Alka Gupta vs. Narender Kumar Gupta, (2010) 10 SCC 141, observing as follows:

> "27. The Code of Civil Procedure is nothing but an exhaustive compilation-cum-enumeration of the principles of natural justice with reference to a proceeding in a court of law. The entire object of the Code is to ensure that an adjudication is conducted by a court of law with appropriate opportunities at appropriate stages. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the court. There are no shortcuts in the trial of suits, unless they are provided by law. A civil suit has to be decided after framing issues and trial permitting the parties to lead evidence on the issues, except in cases where the Code or any other law makes an exception or provides any exemption.
>
> ……….
>
> 30. But where the summons have been issued for settlement of issues, and a suit is listed for consideration of a preliminary issue, the court cannot make a roving enquiry into the alleged conduct of the plaintiff, tenability of the claim, the strength and validity and contents of documents, without a trial and on that basis dismiss a suit. A suit cannot be short-circuited by deciding issues of fact merely on pleadings and documents produced without a trial.
>
> 31. In this case, the learned Single Judge has adjudicated and decided questions of fact and 25 rendered a judgment, without evidence tested by cross-examination…."

25. The Division Bench ought to have confined itself to examination of the validity of the order of injunction granted by the learned Single Judge only. But we are not inclined to remand the matter for that purpose to the Division Bench as we are satisfied in the facts and circumstances of the case that the nature of the injunctive relief granted by the Single Judge was in order and merits no interference during the pendency of the suit.

26. The order of the Division Bench is set aside. The order of the Single Judge dated 28.03.2017 is restored and the suit is remanded to the learned Single Judge for disposal in accordance with law. In view of the importance of the question involved, we expect the parties to cooperate and facilitate the learned Single Judge in early disposal of the suit.

27. The appeals and the intervention applications stand disposed of.

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2019 (1) L.S. 54 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Ashok Bhushan &
The Hon'ble Mr.Justice
K.M. Joseph

V. Surendra Mohan ..Petitioner
Vs.
State of Tamil Nadu
& Ors., ..Respondents

PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995 - Appellant appeared in selection for post of Civil Judge (Junior Division) under partially blind category– Appellant, a practicing Advocate, submitted online application and mentioned his percentage of disability as "more than 40%" - Disability certificate was also issued to appellant mentioning his disability as 70%. - Name of appellant was not included in the list of successful candidateswho were provisionally admitted to oral test - Appellant filed a writ petition before High Court, which in its interim Order directed that appellant shall be permitted to participate in the viva-voce – State of Tamil Nadu issued letter to the TNPC to go ahead with the notification for the 162 posts of Civil Judge, announcing 40%-50% disability for partially blind and partially deaf for the selection - Appellant, in writ petition filed an application to amend petition by adding a prayer for quashing of letter issued by State Government - Appellant aggrieved by judgment of High Court\ dismissing his writ petition has come up with instant appeal.

Held - A judicial officer in a State has to possess reasonable limit of faculties of hearing, sight and speech in order to hear cases and write judgments and, therefore, stipulating a limit of 50% disability in hearing impairment or visual impairment as a condition to be eligible for the post is a legitimate restriction i.e. fair, logical and reasonable - High Court did not commit any error in dismissing the writ petition filed by appellant - Prescription of disability to the extent of 40%-50% for recruitment for post of Civil Judge (Junior Division) was valid - Appeal stands dismissed.

C.A.No.83/2019 Date:22-01-2019

J U D G M E N T

(per the Hon'ble Mr.Justice
Ashok Bhushan)

The appellant aggrieved by the judgment of Madras High Court dated 05.06.2015 dismissing his writ petition has come up in this appeal. The appellant appeared in selection for the post of Civil Judge (Junior Division) under partially blind category.

2. The brief facts giving rise to this appeal are:

After enactment of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the "Act, 1995") the State of Tamil Nadu vide GO dated 11.04.2005 has identified 117 categories of posts as most suitable in A and B groups in direct recruitment. Item No.102 of the above list of posts identified under group A and B was to the following effect:

"LIST OF POSTS IDENTIFIED UNDER GROUP A & B CATEGORIES

S.No.	Name of Post and Department	Physical requirements	Categories of disabled persons suitable for the job	Group
102	Tamil Nadu State Judicial Service Civil Judge (Junior Division/ Judicial Magistrate-First Class)	S/ST/W/SE/H/RW	PB/PD/ORTHO	A

3. The Government of Tamil Nadu had also issued a notification dated 31.08.2012 in exercise of powers conferred by proviso to Section 33 of the Act,1995 exempting the post of District Judge (Entry Level) and Civil Judge in the Tamil Nadu State Judicial Service from the provision of the said Section 33 in respect of complete blindness and complete impairment.

4. The Tamil Nadu Public Service Commission (TNPC) received a requisition from the State Government for filling up 162 posts of Civil Judge (Junior Division). The TNPC has written a letter dated 04.08.2014 to both the State Government as well as the High Court proposing to notify the percentage of disability as 40%-50% for partially blind and partially deaf for selection of 162 Civil Judge (Junior Division). The High Court communicated its approval to the aforesaid proposal which was also consented by the State of Tamil Nadu. The State of Tamil Nadu issued letter dated 08.08.2014 to the TNPC to go ahead with the notification for the 162 posts of Civil Judge, announcing 40%-50% disability for partially blind and partially deaf for the selection in question. The TNPC issued notification dated 26.08.2014 inviting applications through online for direct recruitment.

5. The appellant, a practicing Advocate, submitted online application in response to the notification No.15/2014 dated 26.08.2014. In the column "percentage of disability" the appellant had mentioned "more than 40%". The disability certificate was also issued to the appellant on 10.10.2014 mentioning his disability as 70%. The written examination was held on 18.10.2014 and 19.10.2014. After examination was completed TNPC issued a letter to the

appellant to submit self-attested copies of the relevant documents which also require certificate of physical disability obtained from the Medical Board specifying that his/her physical disability would not render him/her incapable of efficiently discharging his/her official duties for the post of Civil Judge. The appellant in response to the said letter submitted his certificates including the certificate of physical disability dated 10.10.2014.

6. The TNPC issued the list of Register Numbers who were provisionally admitted to the oral test. The name of the appellant was not included in the list of successful candidates. The appellant filed a writ petition No. 10582 of 2015 in the High Court of Madras. An interim order dated 13.04.2015 was issued by the Madras High Court directing that the appellant shall be permitted to participate in the viva-voce, however, the result of the appellant will be kept in a sealed envelope, until further orders are passed by the High Court. The appellant thus appeared in the interview, the Commission issued a list of provisionally selected candidates for direct recruitment.

7. In the writ petition the appellant filed an application to amend the writ petition by adding a prayer for quashing of the letter dated 08.08.2014 issued by the State Government. The amendment application of the appellant was allowed. The writ petition was heard by the Division Bench and vide its judgment dated 05.06.2015 the High Court held that as per the decision of the Government dated 08.08.2014 and notification issued by the TNPC dated 26.08.2014 partially blind with 40%-50% disability were only eligible and the appellant having 70% disability was not eligible to participate in the selection. The appellant aggrieved by the Division Bench judgment has come up in this appeal.

8. Learned counsel for the appellant submits that post of Civil Judge (Junior Division) having been identified under Section 32 of the Act, 1995 no restriction of disability to the extent of 40%-50% can be put. He submits that exemption having been issued under proviso to Section 33 to the complete blindness, the appellant who is not completely blind but has 70% disability cannot be said to be ineligible for appointment to the post of Civil Judge (Junior Division). He submits that Act, 1995 does not provide for any such restriction that the eligibility is of only those who suffer from disability of 40%- 50%. When the post was identified by letter dated 11.04.2005 there was no restriction for only 40%-50% disability which is now sought to be imposed. He submits that the High Court in its judgment has wrongly relied on the proposed amendment of the Tamil Nadu State Judicial Service (Cadre and Recruitment) Rules, 2007 which having not yet materialised was wholly irrelevant. He submits that there was no determination by any expert committee that it is those who suffer from 40%-50% disability, are able to discharge the functions of the post of Civil Judge (Junior Division). Neither the High Court nor the State Government constituted any expert committee to look into the above aspect of the matter. The High Court is not an expert body to peg the disability to the extent of 40%-50% for the post of Civil Judge (Junior Division). The figure of 40%-

50% which has been put as eligibility for the post of Civil Judge (Junior Division) is an arbitrary figure without there being any basis. He submits that the appellant has been working with 70% disability as Assistant Prosecuting Officer, and hence, he can fully discharge the duties of Civil Judge (Junior Division). He submits that the appellant having wrongly been declared ineligible due to which he has been deprived of his right to get selected as Civil Judge (Junior Division) which he was otherwise entitled as per his marks in the written test and interview.

9. Learned counsel appearing for the State of Tamil Nadu submits that in the writ petition the appellant has challenged only letter dated 08.08.2014 and he had not challenged the notification dated 26.08.2014 issued by the TNPC. He submits that in the notification of the TNPC requirement of disability at 40%-50% having been condition prescribed, without challenging the notification the appellant cannot contend that he is eligible. He submits that the appellant had although referred to notification dated 26.08.2014 in para 3 of the writ petition but failed to challenge the said notification which is a sufficient ground for dismissing his writ petition. He submits that, the appellant being 70% disabled is ineligible to participate in the selection for the post of Civil Judge (Junior Division) and his writ petition has rightly been dismissed.

10. Learned counsel for the High Court opposing the submissions of the appellant contend that although as per clause 4(G) of the advertisement dated 26.08.2014 it was mentioned that the differently abled person was required to upload a copy of certificate of physical fitness specifying the nature of physical handicap and the degree of disability but in the online application filed by the appellant he has not uploaded the disability certificate. He further submits that in his online application, the appellant has only mentioned that his percentage of disability is more than 40%. Referring to the disability certificate relied by the appellant filed as Annexure P6 dated 10.10.2014 learned counsel submits that as per the certificate percentage of disability being 70%, the appellant is ineligible to participate in the selection. He further submits that certificate does not show that the appellant shall be able to discharge the duties of Civil Judge (Junior Division), and hence, the certificate itself makes it clear that the appellant cannot perform the duties of Civil Judge (Junior Division). Learned counsel submits that the proposed amendment of the Rules in 2007 Rules has no relevance with regard to issue raised in the present case, there being already a decision of the State Government after the proposal from TNPC and consent of the High Court that only those physically disabled persons suffering from visual impairment and hearing impairment shall be eligible whose disability is 40%-50%. It is further submitted that looking to the nature of the duties of the Civil Judge (Junior Division) the appellant cannot be said to be a person who can perform the duties of the Civil Judge who is required to hear the cases, record the statement of witnesses, read the documents and then decide. Learned counsel submits that there is no error committed by the High Court in dismissing the writ petition.

11. From the submissions made by the learned counsel for the parties and the pleadings on record following are the issues which arise for consideration in this appeal:

(1) Whether the appellant who was suffering with disability of 70% (visual impairing) was eligible to participate in the selection as per notification dated 26.08.2014 of the Tamil Nadu Public Service Commission?

(2) Whether the condition of 40%-50% disability for partially blind and partially deaf categories of disabled persons is a valid condition?

(3) Whether the decision of the State Government vide letter dated 08.08.2014 providing that physically disabled persons that is partially deaf and partially blind to the extent of 40%- 50% disability are alone eligible, is in breach of the provisions of 1995 Act and deserves to be set aside?

Issue No.1

12. The appointment on the post of judicial service is regulated by Tamil Nadu State Judicial Service (Cadre and Recruitment) Rules, 2007 (hereinafter referred to as "Rules, 2007"). As per Rule 5, which provides for "Method of appointment, Qualification and Age etc.", the post of Civil Judge is filled up by direct recruitment on the basis of Preliminary Examination, Main examination and viva voce test conducted by the Tamil Nadu Public Service Commission in accordance with the procedure prescribed in Annexure-II to the Rules. Annexure-II of the Rules contained the heading "Civil Judge by Direct Recruitment". Sub-clause(1) provides that the Tamil Nadu Public Service Commission (hereinafter referred to as the `Commission') shall invite applications for direct recruitment to the post of Civil Judge, with reference to the vacancies reported by the Government through one English daily and one Tamil daily, having wide circulation in the State. Sub-clause(2) provides that a candidate who applies for direct recruitment to the said post should send along with his application, copies of all the essential certificates and documents specified in the notification issued by the Commission. The Tamil Nadu Public Service Commission issued a notification No. 15/2014 dated 26.08.2014 inviting applications through online mode for direct recruitment to 162 posts of Civil Judge. Sub-clause F and sub-clause G of Clause 4 containing General Information is as follows:-

"F. In G.O.Ms.No.53, Social Welfare & Nutritious Meal Programme Department, dated 11.04.2005, G.O.(Ms) No.642, Home (Courts- I) Department, dated 31.08.2012 and Government letter No.49858/Cts-I/2014-4, dated 08.08.2014 the post of Civil Judge has been identified as suitable for PD/PB/O categories of Differently Abled persons alone [PD- Partially Deaf(40- 50%disability), PB- Partially Blind(40-50% disability), O-Ortho]. The Candidates should upload the documents referred in para 14 (f) of the Commission's `Instructions to the candidates' when called for.

G. The Differently Abled persons should upload a copy of certificate of physical fitness specifying the nature of physical handicap and the degree of disability based on the

norms laid down, from the Medical Board to the effect that his/her handicap will not render him/her incapable of efficiently discharging the duties attached to the post of Civil Judge (to which he/she has been selected before appointment when called for)."

13. Clause F refers to three Government Orders dated 11.04.2005, 31.08.2012 and 08.08.2014. The Government Order dated 11.04.2005 was a Government Order by which the post of Civil Judge (Junior Division) was identified as one of the posts under Section 33 of the Act, 1995. Government Order dated 31.08.2012 was a Government Order by which exemption was granted to the posts of District Judge (Entry Level) and Civil Judge in the Tamil Nadu State Judicial Service from the provisions of the Section 33 in respect of complete blindness and complete hearing impairment. The Government Order dated 08.08.2014 communicated the decision of the Government taken with consultation of the High Court to go ahead with the selection to the post of Civil Judge notifying the percentage of disability as 40-50% for partially blind and partially deaf for the selection for 162 posts of Civil Judge. The relevant portion of Government Order dated 08.08.2014 is as follows: -

"In continuation of the Government letter fifth cited, I am directed to state that in view of the administrative exigencies and not to delay the selection, the High Court has considered the Tamil Nadu Public Service Commission's letter dated 04.08.2014 and accepts the proposal to go ahead with the selection for the posts of Civil Judge notifying the percentage of disability as 40- 50% for partially blind and partially deaf, for the present selection alone. The Registrar General, High Court of Madras has therefore requested to go ahead with the issue of Notification immediately for the 162 posts of Civil Judge announcing 40-50% of disability for partially blind and partially deaf, for the present selection alone. A copy of the D.O. letter seventh is enclosed for your reference.

2. I am to request you to take the necessary steps to notify the 162 vacancies for recruitment to the post of Civil Judge immediately.

Yours faithfully

Sd/-

For Principal Secretary to Government"

14. The advertisement, thus, clearly provided that post of Civil Judge has been identified as suitable for partially deaf/partially blind/ ortho categories of differently abled persons (40%-50% disability). In the online application submitted by petitioner in the column of percentage of disability, he has only mentioned "more than 40%". The certificate of disability, which was submitted by the appellant as required by Rules, 2007 as well as the advertisement dated 26.08.2014 mentioned in Column (3) "(3). Percentage of disability in his/her case is 70%". Thus, according to own case of the appellant, he was suffering with disability of 70%, which made him ineligible for the post of Civil Judge advertised by notification dated 26.08.2014 since the disability

required for the post was only 40%-50%. We, thus, conclude that as per the certificate submitted by the appellant that he suffers from 70% disability, he was ineligible for the post advertised vide notification dated 26.08.2014. The issue is answered accordingly.

15. The appellant in his writ petition filed in the Madras High Court although has noticed the notification dated 26.08.2014 calling for the recruitment to the 162 posts of Civil Judges issued by the Tamil Nadu Public Service Commission, but in the writ petition did not challenge the Clause F of the advertisement in so far it prescribed requirement of 40%-50% for partially blind and partially deaf. Only following prayer was made:

"For the aforesaid reasons, this Hon'ble Court may be pleased to issue any appropriate Writ, Order or Direction and in particular issue a Writ in the nature of Certiorarified Mandamus to call for the records and to quash the impugned Oral Test List dated 01.04.2015 for selection of candidates for the Post of civil Judge(Junior Division) and consequently direct the 2nd Respondent to permit the petitioner to participate in the oral test and pass such other and further orders as may be deemed fit and to meet the ends of justice."

16. During the pendency of the writ petition an amendment application was filed by the appellant to quash the Government letter dated 08.08.2014 which amendment application was allowed by the High Court and even in the amendment application filed by the appellant the notification dated 26.08.2014 issued by the TNPC was not challenged. The appellant cannot be allowed to question the condition of eligibility with regard to partial blindness i.e. 40%-50% when he failed to challenge the advertisement dated 26.08.2014 providing for the said requirement. The appellant applied in pursuance of the above advertisement and participated in the written examination and when he was not called for oral test, he filed writ petition. It was under the interim order of the High Court that he was permitted to participate in oral test but the High Court by interim order had directed not to declare the result of the appellant. The appellant having failed to challenge Clause 4(F) of the notification dated 26.08.2014, he cannot be allowed to challenge the condition of 40%-50% partial blindness. We are in full agreement with the submission of the learned counsel for the High Court that the writ petition was liable to be dismissed on this ground alone.

Issue Nos.2 and 3

17. Issue Nos. 2 and 3 being interconnected are taken together. The Government order dated 08.08.2014 as already extracted above, addressed to the Tamil Nadu Public Service Commission states that the High Court has considered the Tamil Nadu Public Service Commission's letter dated 04.08.2014 and accepts the proposal to go ahead with the selection for the posts of Civil Judge notifying the percentage of disability as 40- 50% for partially blind and partially deaf. Thus, the Government Order was issued after due consultation of the High Court, which had agreed with providing for percentage of disability as 40%-50% for

partially blind and partially deaf for the post of Civil Judge (Junior Division). Whether Condition of 40%-50% for partially blind and partially deaf is a valid condition or the said condition is in breach of provisions of the Act, 1995, are questions to be answered. It is relevant to look at certain provisions of the Act, 1995 in this regard. Section 2(b) defines "Blindness" in following manner: -

(b) "Blindness" refers to a condition where a person suffers from any of the following conditions, namely: -

(i) Total absence of sight. or

(ii) Visual acuity not exceeding 6/60 or 20/200 (Snellen) in the better eye with correcting lenses; or

(iii) Limitation of the field of vision subtending an angle of 20 degree or worse;

18. Section 2(i) defines disability to the following effect: -

(i) "disability" means-

(i) blindness;

(ii) low vision;

(iii) leprosy-cured;

(iv) hearing impairment;

(v) loco motor disability;

(vi) mental retardation;

(vii) mental illness;

19. Section 2(t) of the Act, 1995 defines expression 'person with disability' in the following words:

Section 2(t): "person with disability" means a person suffering from not less than forty per cent of any disability as certified by a medical authority;

20. The above definition clearly means that person with disability is a person who is suffering from not less than 40% of any disability. Thus, benefit of reservation under the Act thus can be claimed only by a person who is suffering from 40% or more of any disability.

21. For the purposes of present case, we are not concerned with complete blindness, since by notification dated 31.08.2012, exemption has already been granted under proviso to Section 33 of the Act, 1995 in reference to the post of Civil Judge (Junior Division) exempting complete blindness and complete hearing impairment for the post. Thus, those candidates, who are completely blind are clearly not eligible for the post. Section 2(u) defines persons with low vision, which is as follows: -

(u) "person with low vision" means a person with impairment of visual functioning even after treatment or standard refractive correction but who uses or is potentially capable of using vision for the planning or execution of a task with appropriate assistive device;

22. The reservation of posts under the Act, 1995 for disabled (differently challenged)

persons is provided in Section 33, which is to the following effect:-

33. Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent. for persons or class of persons with disability of which one per cent. each shall be reserved for persons suffering from- (i) Blindness or low vision; (ii) Bearing impairment; (iii) Loco motor disability or cerebral palsy, in the posts identified for each disability: Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

23. As per the Act, 1995, "one per cent of vacancies were reserved for persons suffering from blindness or low vision". Clause 4(F) of the advertisement refers to Government order dated 11.04.2005, 31.08.2012 and 08.08.2014. By the Government order dated 11.04.2005 post of Civil Judge(Junior Division) had been identified at Item No.102. Item No.102 which has already been extracted above makes it clear that categories of disabled persons suitable for the job are PB/PD/ORTHO (partially blind/ partially deaf/ortho). As noticed above complete blindness being already exempted, the two posts of Civil Judges(Junior Division) have been reserved in the advertisement for partially blind, partially deaf and ortho. The blindness has been defined in Section 2(t) as quoted above. The post has been identified for partially blind and not for completely blind person. As per the definition under Section 2(t) of "person with disability", a partially blind person having more than 40% disability is contemplated to be person who is in the field of eligibility.

24. Partially blind is a word which is not defined in the Act. A disability may be partial or total, a temporary or permanent. We are concerned in this case with partial disability which is not total.

25. One of the submissions of learned counsel for the appellant in this context need to be considered. It is submitted that those who suffer from partial blindness of more than 50% are also partial blind hence how can they be excluded from consideration. The word "partial blind" may be a general concept but where a percentage has been fixed looking to nature of job, it cannot be said that all partially blind are eligible. There is a valid classification with a nexus to object sought to be achieved, when eligibility is fixed 40% to 50% of disability. In this context, it is relevant to notice that when the posts were identified as Item No.102 by Government order dated 11.04.2005 physical requirements were also mentioned by the Government order which requirements were to the following words:

"S/ST/W/SE/H/RW"

26. The Government order dated 11.04.2005 has explained the terms of physical requirements, which are to the following effect:

COMPLAINTS REGARDING MISSING

PARTS SHOULD BE MADE WITHIN

15-DAYS FROM DUE DATE.

THEREAFTER SUBSCRIBER HAS TO

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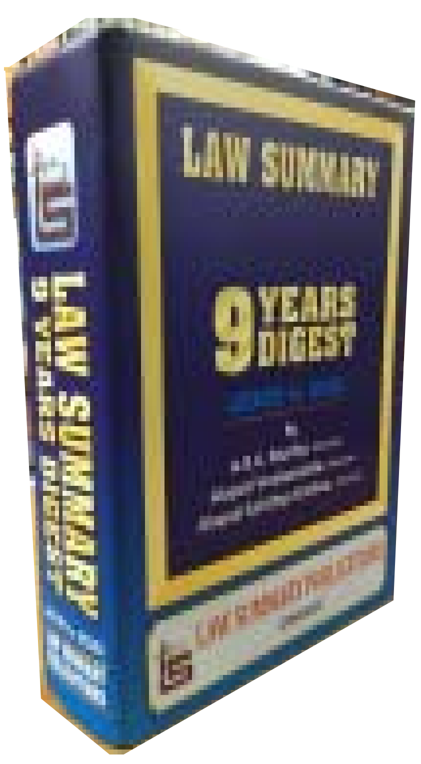

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