Regd.No.PRAKASAM/13/2018-20 R.N.I.No.APENG/2004/15906

Pages:1 to 84

Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

2019 Vol.(3) Date of Publication 31-10-2019 PARTS - 20

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MODE OF CITATION: 2019 (3) L.S

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PART-18 (31ST OCTOBER 2019)

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SUBJECT - INDEX

A.P. RIGHTS IN LAND AND PATTADAR PASSBOOKS ACT, 1971, Sec. 9 - Writ petition filed to declare the action of the 3rd respondent in issuing urgent notice to appear with all records to conduct an enquiry on the appeal filed by the 5th respondent for cancellation of pattadar pass books and title deeds in respect of the land, as arbitrary and illegal.

Held - If a person is aggrieved against the issuance of pattadar passbooks and title deeds, he can file a revision u/Secs.9 of the Act - Impugned notice issued by the Revenue Divisional Officer is set aside - 5th respondent is given liberty to file a revision before the Collector, within a period of four weeks from the date of receipt of a copy of this order, and the Collector is directed dispose of the revision filed by the 5th respondent within a period of four weeks from the date of filing of the revision, after giving notice to the petitioner -The parties are directed to maintain status quo in all respects till an

interim order or final order is passed u/Sec.9 of the A.P. Rights in Land and Pattadar Passbooks Act - Writ petition is allowed accordingly. **(A.P.)** ***114***

ARBITRATION AND CONCILIATION ACT, 1996, Secs.2(1)(e) and 11(6) - Venue of Arbitration - Exercise of power by High court - Where contract specifies jurisdiction of court at particular place, only such court will have jurisdiction to deal with matter and parties intended to exclude all other courts - As parties have agreed that venue of arbitration shall be at Bhubaneswar, Madras High court erred in assuming jurisdiction - Impugned order is liable to be set aside. **(S.R.C.) 7**

CIVIL PROCEDURE CODE, Sec.50, r/w Or.21, Rule 32 - Permanent injunction - Decree against legal heirs - Held that such a decree can be executed against legal representatives when the right litigated upon is heritable, the decree would not normally abate and can be enforced by legal representatives of decree holder and against the judgment debtor or his legal representatives.

PARTNERSHIP ACT - A partnership deed cannot automatically bind on the legal heirs of the deceased partner without acceptance and agreement by them. **(S.R.C.) 5**

CIVIL PROCEDURE CODE, Order VI Rule 17 - Civil Revision Petition arises out of the orderpassed in I.A., whereby lower Court has dismissed the petition filed by the petitioner under Order VI Rule 17 CPC seeking leave of the Court to amend the plaint.

Held - If, the present petition under Order VI Rule 17 CPC is dismissed on the ground of laches and on account of the embargo contained in the proviso under Order VI Rule 17 CPC, petitioner will be left with no legal remedy to recover her 1/3rdshare to which she is legally entitled, according to the case pleaded by her - Justice cannot be lost in technicalities - In the considered opinion of this Court the bar contained in the proviso to Order VI Rule 17 CPC which is procedural in nature cannot be held to be absolute - When the proposed amendment is necessary for bringing to the fore the real question in controversy between the parties, that the amendment can be allowed, despite the fact that the plaintiff is not diligent in seeking the amendment and despite the bar contained in the proviso to Order VI Rule 17 CPC - Civil Revision Petition stands allowed setting aside the impugned order passed in I.A. **(A.P.)** ***105***

CIVIL PROCEDURE CODE, Or.VII, Rule 11(d) - Assailing the Order, passed in I.A. in O.S., whereby lower Court dismissed the application filed for reject the plaint - Suit was originally filed – (a) for a declaration that the registered sale deed executed by the 1st defendant in favour of the 5th defendant in respect of the plaint - A schedule property as void and (b) to declare the registered lease deed executed by the 1st defendant in favour of the 2nd defendant in respect of the plaint-B schedule property is void, and (c) for consequential relief of permanent injunction restraining the defendants 2 to 9 from trespassing into plaint - A and B schedule properties.

Held - Germane facts for deciding an application under Order VII, Rule 11(a) of CPC are the averments in the plaint and not the pleas taken in the written statement - Plea of limitation, is left open to the defendants to raise - In case if any such plea is raised, the trial Court has to decide the same in the final adjudication of the suit on the basis of the evidence adduced by both the parties on the said issue - No valid grounds to reject the plaint - Impugned order is sustainable under law and it warrants no interference in this revision - Civil revision petition stands dismissed. **(A.P.) 102**

CIVIL PROCEDURE CODE, 1908, Order 9, Rule 13 , Sec.115 - Setting aside of exparte decree - Matter arises from a suit for specific performance - Case for respondent that appellant/defendant has actually let out building on rent - Appellant's/defendants case that it is his residential house and matter is a loan transaction - Specific relief is undoubtedly a discretionary relief - Appellant/defendant submitted that he is prepared to deposit entire amount spent by respondent towards getting sale deed executed - Interest of justice demands that opportunity should be given to appellant/defendant to contest case - Impugned order set aside - Conditions issued.

Adjudication of litigation is to be done on merits as far as possible - Litigation should not be terminated by default, either of the plaintiff or the defendant.**(S.R.C.) 8**

CONSUMER PROTECTION ACT - If the commercial use of goods is by the purchaser himself for the purpose of earning his livelyhood by means of self employment, such purchaser of goods is a "consumer". **(S.R.C.)** *7*

CRIMINAL PROCEDURE CODE - Disposing of the appeal filed by the appellant-accused without records of the trial Court is not sustainable. **(S.R.C.)** *6*

CRIMINAL PROCEDURE CODE, Sec.156(3) - Magistrate can invoke power u/Sec.156(3) even at post cognizance stage. **(S.R.C.) 5**

CRIMINAL PROCEDURE CODE, **1973,** Sec.372 & 378 - Acquittal - Leave to appeal - Victim has right to file appeal and in fact no leave has to be sought in such circumstances - Appeal has to be dealt as regular appeal. **(S.R.C.) 8**

DECLARATION OF RIGHTS - The entries in the Revenue records do not confer title to a property, nor do they have any presumptive value on the title. **(S.R.C.)** ***6***

DOMESTIC VIOLANCE ACT - Complaint not maintainable if the parties are not living together in a shared house. **(S.R.C.) 6**

HINDU ADOPTIONS AND MAINTENANCE ACT - Appellant and respondent No.1 are husband and wife respectively - First respondent-wife filed the O.P. before the Family Court, u/Secs.18 and 20 of the Hindu Adoptions and Maintenance Act - Whether the first respondent-wife can be non-suited under the provisions of Section 18 of the Act on the ground that she already availed remedy u/Sec.125 Cr.P.C.?

Held - Neither the provisions of Sec.125 Cr.P.C. nor the provisions of Sec.18 of the Act prohibit the applicant from availing both the remedies under the above said provisions of law - Court below, having found the existence of the element of abandonment, granted maintenance in favour of the first respondent-wife - Therefore, it cannot be said, by any stretch of imagination, that the first respondent-wife failed to establish the necessary ingredients of sub-section (2) of Section 18 of the Act - This Court does not find any valid reason to interfere with the order impugned in the present appeal - Appeal stands dismissed, confirming the order under challenge, and the appellant-husband shall act strictly in accordance with the said order. ***(A.P.) 111***

LAND ACQUISITION ACT, Secs.11 & 13-A - REVIEW - The power of review can be exercised by a statutory authority only when the statute provides for the same. **(S.R.C.) 6**

NARCOTIC AND DRUGS AND PSYCHOTROPIC SUBSTANCE ACT, 1985 - Sec.50 - Merely because there was non compliance of Act as far as "personal search" of the accused was concerned, no benefit can be extended so as to invalidity of the effect of recovery from the search of the vehicle. **(S.R.C.) 5**

NEGOTIABLE INSTRUMENTS ACT, Sec.138 - Criminal Petitions are filed to quash the proceedings pending on the file of JMFC for the offence punishable u/Sec.138 of N.I Act- Whether the cause of action arose for filing complaints for the offence punishable u/Sec.138 of the N.I Act immediately after expiry of 15 days from the date of knowledge about service of notice on the accused or from the date of actual service of notice on the accused?

Held - Even by the date of receipt of information from the postal department, still more than 15 days time is available to file complaint from the date of cause of action arise under clause (c) of the proviso to Sec.138 of the N.I.Act, but the complainant filed compliant beyond one month from the date of cause of action arose as per clause (c) of the proviso to Section 138 of N.I.Act and no petition is filed to condone delay invoking clause (b) of the proviso to Sec.142 of the N.I. Act - In the absence of condonation of delay, when the complaint is field beyond one month from the date of cause of action arose under clause (c) of the proviso to Sec.138 of the N.I.Act, the same are hopelessly barred by limitation and taking cognizance by the Magistrate accepting the allegations made in the complaints on their face value is erroneous – Criminal proceedings against petitioners are liable to be quashed - Criminal Petitions stand allowed. **(A.P.)** ***86***

NEGOTIABLE INSTRUMENTS ACT, Sec.138 - **CRIMINAL PROCEDURE OCDE,**Sec.258 - Three cheques were dishonoured leading to filing of three complaints and an application was filed in each of the cases to discharge the petitioner under Section 258 Cr.P.C, as the application in each of the three matters were dismissed, instant criminal petition was filed.

Held - Procedure u/Sec.258 Cr.P.C. would not apply, as the present case is filed under Section 138 of the NI Act by a complaint u/Sec.200 Cr.P.C - Therefore, this Court is of the firm opinion that the application under Section 258 Cr.P.C. is not maintainable - Section 258 Cr.P.C. is not applicable to the facts and circumstances of the case and to a complaint u/Sec.138 of the NI Act - No merits in the applications - Applications are dismissed. **(A.P.)** ***83***

(INDIAN) PENAL CODE, Sec. 120-B r/w Sec.420 - **PREVENTION OF CORRUPTION ACT,** Sec.8 & 13(2) r/w Sec.13(1)(d) of the - Appeals arise out of the impugned judgment passed by the High Court of Delhi in Bail Application by which the High Court refused to grant bail to the appellant in the case registered by the respondent-CBI - Whether the High Court was justified in declining regular bail to the appellant on the apprehension that there is possibility that the appellant might influence the witnesses.

Held – We are unable to accept the contention of SG that “flight risk” of economic offenders should be looked at as a national phenomenon and be dealt with in that manner

merely because certain other offenders have flown out of the country - The same cannot, in our view, be put in a straight-jacket formula so as to deny bail to the one who is before the Court -Appellant is not a “flight risk” and in view of the conditions imposed, there is no possibility of his abscondence from the trial - Statement of the prosecution that the appellant has influenced the witnesses and there is likelihood of his further influencing the witnesses cannot be the ground to deny bail to the appellant particularly, when there is no such whisper in the six remand applications filed by the prosecution - Impugned judgment passed by the High Court of Delhi in Bail Application is set aside and the appeal arising out of SLP(Crl) No. 9269 of 2019 is allowed - Appellant is ordered to be released on bail if not required in any other case. **(S.C.)** ***81***

(INDIAN) PENAL CODE, Secs. 302 r/w Sec.34 - Appeal aggrieved by the conviction and sentence imposed by Sessions Court - Whether the circumstances relied upon by the prosecution do form a chain of events connecting the accused with the crime.

Held - Prosecution in this case has entirely failed to prove any of the circumstances set up against the accused, and it has not established the chain of circumstances, so as to bring out a nexus between the crime and the accused, beyond all reasonable doubt - Appellants are acquitted for the offences under Section 302 r/ w 34 IPC - Criminal Appeal stands allowed, setting aside the conviction and sentence imposed by Sessions Court. **(A.P.)** ***124***

(INDIAN) PENAL CODE,**1860, Sec.302** - High Court ought not to have disposed of case on merits when there was no representation for accused - Murder - Dismissal of appeal against conviction when no representation for accused - Held, when accused has preferred appeal against conviction, appeal can be disposed of on merits only after hearing accused or his Counsel - When there was no representation for accused, High Court ought not to have disposed of case on merits - Dismissal of appeal set aside - Matter remitted back to High Court. **(S.R.C.) 7**

(INDIAN) PENAL CODE, Sec.306 - To draw the inference of instigation it all depends on facts and circumstances of the case, whether the acts committed by the accused will constitute direct or indirect act of incitement to the commission of suicide is a matter which is required to be considered in facts and circumstances of each case. **(S.R.C.) 5**

SPECIFIC PERFORMANCE - Redemption of mortgage - Non readiness and willingness to perform - Deposition by power of attorney holder on behalf of seller/principal - Competency - Held, power of attorney holder cannot depose for principal in respect of matters of which principal alone can have personal knowledge and in respect of which

principal is entitled to be cross-examined.

SPECIFIC PERFORMANCE - Redemption of mortgage - Non-readiness and willingness and lack of due intimation by seller - Merely because respondent may not have been satisfied by intimation given by appellant regarding release of property from mortgage, it cannot be construed as readiness and willingness on part of respondent and his capacity to perform his obligations under agreement, particularly when he is stated to have subsequently migrated to America and in which circumstance he executed power of attorney in favour of power of attorney holder - therefore, relief of specific performance being discretionary in nature, respondent cannot be held to have established his case for grant of such relief - order of high court regarding redemption of mortgage unsustainable.

Power of attorney holder cannot depose for principal in respect of matters of which principal alone can have personal knowledge and in respect of which principal is entitled to be cross-examined.

No satisfaction by intimation regarding release of property from mortgage cannot be construed as readiness and willingness on part of respondent and his capacity to perform his obligations. **(S.R.C.) 7**

TRANSFER OF PROPERTY ACT - RIGHT TO FAIR COMPENSATION AND TRANS-PARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLE-MENT ACT, 2013 - GPA sales and SA/GPA/WILL transfers are not legally valid modes of transfer and they do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immovable property. **(S.R.C.) 6**

WRIT PETITION is filed by the petitioner to issue a writ in the nature of a Writ of Mandamus or any other appropriate writ, Direction order or orders declaring the action of the respondents in refusing to renew the power purchase and wheeling agreement, entered between the 1st respondent AP TRANSCO and the petitioner as wholly arbitrary.

Held - Writ Court cannot enter into this area of controversy and grant a relief of specific performance -This is a matter which is solely within the jurisdiction by the Civil Court - Extension of the agreement is not mandatory or automatic in the circumstances and is solely dependent upon the consent and the concurrence of both parties -This Court cannot grant the order as prayed for since the relief is claimed for extension/ renewal of the agreement - Petitioner is not entitled to a direction as prayed for - Writ petition stands dismissed. **(A.P.) *119***

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2019 (3) S.R.C. 19 (Supreme Court)

Indu Malhotra S.P.Mishra
R.Subhash Reddy,J.J. Vs.
C.A.No.3311/15 Mohd.Laiquddin
Dated 18-10-2019 Khan

CIVIL PROCEDURE CODE, Sec.50, r/w Or.21, Rule 32 - Permanent injunction - Decree against legal heirs - Held that such a decree can be executed against legal representatives when the right litigated upon is heritable, the decree would not normally abate and can be enforced by legal representatives of decree holder and against the judgment debtor or his legal representatives.

PARTNERSHIP ACT - A partnership deed cannot automatically bind on the legal heirs of the deceased partner without acceptance and agreement by them.

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2019 (3) S.R.C. 20 (Supreme Court)

Uday Umesh Lalit State of Punjab
Indu Malhotra Vs.
Krishna Murari, J.J. Baljindr Singh
Crl.A.No.1565-66/2019
Dated 15-10-2019

NARCOTIC AND DRUGS AND PSYCHOTROPIC SUBSTANCE ACT, 1985 - Sec.50 - Merely because there was non compliance of Act as far as "personal search" of the accused was concerned, no benefit can be extended so as to invalidity of the effect of recovery from the search of the vehicle.

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2019 (3) S.R.C. 21 (Supreme Court)

Indu Malhotra State of W.B.
R.Subhash Reddy,J.J. Vs.
Crl.A.No.2181/2009 Indrajit Kundu
Dated 18-10-2019

INDIAN PENAL CODE, Sec.306 - To draw the inference of instigation it all depends on facts and circumstances of the case, whether the acts committed by the accused will constitute direct or indirect act of incitement to the commission of suicide is a matter which is required to be considered in facts and circumstances of each case.

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2019 (3) S.R.C. 22 (Supreme Court)

R.F.Nariman Vinu Bhai
Surya Kant Hari Bhai
V.Ramasubramanaian, J.J. Malaviya
Crl.A.No.478-479/2017 Vs.
Dated 16-10-2019 State of Gujarat

CRIMINAL PROCEDURE CODE, Sec.156(3) - Magistrate can invoke power u/Sec.156(3) even at post cognizance stage.

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2019 (3) S.R.C. 23 (Supreme Court)

Indu Malhotra Prahlad Pradhan
Krishna Murari, J.J. Vs.
Crl.A.No.478-479/2017 Sonu
Dated 16-10-2019 Kumhar

DECLARATION OF RIGHTS - The entries in the Revenue records do not confer title to a property, nor do they have any presumptive value on the title.

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2019 (3) S.R.C. 24 (Supreme Court)

Arun Mishra Naresh Kumar
Vineet Saran Vs.
S.Ravindra Bhat,J.J. Govt. of
C.A.No.6638/2010 NCT of Delhi
Dated 17-10-2019

LAND ACQUISITION ACT, Secs.11 & 13-A - REVIEW - The power of review can be exercised by a statutory authority only when the statute provides for the same.

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2019 (3) S.R.C. 25 (Supreme Court)

N.V.Ramana Savita
Sanjiv Khanna Vs.
Krishna Murari,J.J. State of
Crl.A.No.187/2019 Delhi
Dated 14-10-2019

CRIMINAL PROCEDURE CODE - Disposing of the appeal filed by the appellant-accused without records of the trial Court is not sustainable.

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2019 (3) S.R.C. 26 (Supreme Court)

Arun Mishra Shiv Kumar
M.R.Shah Vs.
B.R.Gavai,J.J. Union of India
C.A.No.8003/2019
Dated 14-10-2019

TRANSFER OF PROPERTY ACT - RIGHT TO FAIR COMPENSATION AND TRANS-PARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLE-MENT ACT, 2013 - GPA sales and SA/GPA/ WILL transfers are not legally valid modes of transfer and they do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immovable property.

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2019 (3) S.R.C. 27 (Supreme Court)

Indira Banerjee Kamlesh Devi
M.R.Shah, J.J. Vs.
SLP.No.34053/2019 Jaipal
Dated 04-10-2019

DOMESTIC VIOLANCE ACT - Complaint not maintainable if the parties are not living together in a shared house.

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2019 (3) S.R.C. 28 (Supreme Court)

Uday Umesh Lalit
Indira Banerjee
M.R.Shah, J.J.
C.A.No.9004-9005/19
Dated 01-10-2019

Sunil Kohli
Vs.
M/s.Puearth Infrastructure Ltd.

CONSUMER PROTECTION ACT - If the commercial use of goods is by the purchaser himself for the purpose of earning his livelyhood by means of self employment, such purchaser of goods is a "consumer".

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2019 (3) S.R.C. 29 (Supreme Court)

R.Banumathi
A.S.Bopanna, J.J.
C.A.No.5850/2019
Dated 25-7-2019

Brahmani River Pellets
Vs.
Kamachi Industries Ltd.

ARBITRATION AND CONCILIATION ACT, 1996, Secs.2(1)(e) and 11(6) - Venue of Arbitration - Exercise of power by High court - Where contract specifies jurisdiction of court at particular place, only such court will have jurisdiction to deal with matter and parties intended to exclude all other courts - As parties have agreed that venue of arbitration shall be at Bhubaneswar, Madras High court erred in assuming jurisdiction - Impugned order is liable to be set aside.

–X–

2019 (3) S.R.C. 30 (Supreme Court)

R.Banumathi
A.S.Bopanna, J.J.
Crl.A.No.1106/19
Dated 23-7-2019

Shankar
Vs.
State of Maharashtra

INDIAN PENAL CODE,1860, Sec.302 - High Court ought not to have disposed of case on merits when there was no representation for accused - Murder - Dismissal of appeal against conviction when no representation for accused - Held, when accused has preferred appeal against conviction, appeal can be disposed of on merits only after hearing accused or his Counsel - When there was no representation for accused, High Court ought not to have disposed of case on merits - Dismissal of appeal set aside - Matter remitted back to High Court.

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2019 (3) S.R.C. 31 (Supreme Court)

Navin Sinha
Indira Banerjee,J.J.
C.A.No.2869/2010
Dated 1-10-2019

Mohinder Kaur
Vs.
Sant Paul Singh

SPECIFIC PERFORMANCE - Redemption of mortgage - Non readiness and willingness to perform - Deposition by power of attorney holder on behalf of seller/ principal - Competency - Held, power of attorney holder cannot depose for principal in respect of matters of which principal alone can have personal knowledge and in respect of which principal is entitled to be cross-examined.

SPECIFIC PERFORMANCE - Redemption of mortgage - Non-readiness and willingness and lack of due intimation by seller - Merely because respondent may not have been satisfied by intimation given by appellant regarding release of property from mortgage, it cannot be construed as

readiness and willingness on part of respondent and his capacity to perform his obligations under agreement, particularly when he is stated to have subsequently migrated to America and in which circumstance he executed power of attorney in favour of power of attorney holder - therefore, relief of specific performance being discretionary in nature, respondent cannot be held to have established his case for grant of such relief - order of high court regarding redemption of mortgage unsustainable.

Power of attorney holder cannot depose for principal in respect of matters of which principal alone can have personal knowledge and in respect of which principal is entitled to be cross-examined.

No satisfaction by intimation regarding release of property from mortgage cannot be construed as readiness and willingness on part of respondent and his capacity to perform his obligations.

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2019 (3) S.R.C. 32 (Supreme Court)

Navin Sinha — Naval Kishore
Indira Banerjee,J.J. — Mishra
Crl.A.No.979/2010 — Vs.
Dated 5-7-2019 — State of U.P.

CRIMINAL PROCEDURE CODE, 1973, Sec.372 & 378 - Acquittal - Leave to appeal - Victim has right to file appeal and in fact no leave has to be sought in such circumstances - Appeal has to be dealt as regular appeal.

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2019 (3) S.R.C. 33 (Supreme Court)

Ashok Bhushan — Robin Thapa
K.M.Joseph,J.J. — Vs.
C.A.No.4507/2019 — Roht Dora
Dated 8-7-2019

CIVIL PROCEDURE CODE, 1908, Order 9, Rule 13 , Sec.115 - Setting aside of exparte decree - Matter arises from a suit for specific performance - Case for respondent that appellant/defendant has actually let out building on rent - Appellant's/ defendants case that it is his residential house and matter is a loan transaction - Specific relief is undoubtedly a discretionary relief - Appellant/defendant submitted that he is prepared to deposit entire amount spent by respondent towards getting sale deed executed - Interest of justice demands that opportunity should be given to appellant/ defendant to contest case - Impugned order set aside - Conditions issued.

Adjudication of litigation is to be done on merits as far as possible - Litigation should not be terminated by default, either of the plaintiff or the defendant.

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2019(3) L.S. 83 (A.P.)

IN THE HIGH COURT OF
ANDHRA PRADESH

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

M.J.R.College of
Engineering & Anr., ...Petitioners
Vs.
State of A.P., & Anr., ..Respondents

NEGOTIABLE INSTRUMENTS ACT, Sec.138 - CRIMINAL PROCEDURE OCDE,Sec.258 - Three cheques were dishonoured leading to filing of three complaints and an application was filed in each of the cases to discharge the petitioner under Section 258 Cr.P.C, as the application in each of the three matters were dismissed, instant criminal petition was filed.

Held - Procedure u/Sec.258 Cr.P.C. would not apply, as the present case is filed under Section 138 of the NI Act by a complaint u/Sec.200 Cr.P.C - Therefore, this Court is of the firm opinion that the application under Section 258 Cr.P.C. is not maintainable - Section 258 Cr.P.C. is not applicable to the facts and circumstances of the case and to a complaint u/Sec.138 of the NI Act - No merits in the applications - Applications are dismissed.

Mr.V.R.Reddy Kovvuri, Advocate for the petitioners.

CrLP.Nos.4035/2019 etc., Date:31-07-2019

Public Prosecutor, Advocate for the Respondents.

COMMON ORDER

These matters were heard together since common questions of fact and law arise. Three cheques were dishonoured leading to filing of the three complaints and an application was filed in each of the cases to discharge the petitioner under Section 258 Cr.P.C. As the said application in each of the three matters was dismissed, three criminal petitions have been filed.

This Court has heard Sri V.R.Reddy Kovvuri, learned counsel for the petitioner and learned Public Prosecutor appearing for the State.

Crl.P.No.4035 of 2019: This criminal petition is filed under Section 482 Cr.P.C. to call for the records and to discharge the petitioner from CC.No.61 of 2018 on the file of the Judicial Magistrate of First Class, Pakala, Chittoor District. This C.C. was filed under the NI Act with regard to the bouncing of cheque No.309710 dated 03.042.017 for Rs.50 lakhs. A discharge application was filed and was dismissed.

Crl.P.No.4036 of 2019: This application is filed under Section 482 Cr.P.C. in similar circumstances to call for the records and to discharge the petitioner from CC.No.62 of2018, which pertains to cheque No.30971 dated 30.05.2017 for Rs.40 lakhs.

Crl.P.No.4040 of 2019: This application is filed to discharge the petitioner from CC.No.122 of 2018 in relation to cheque No.309707 dated 06.05.2017 for Rs.35 lakhs.

The petitioner is an Engineering College, which is run by the 2nd petitioner-society. They have borrowed money from the Corporation Bank, which is the 2nd respondent in all these matters.

Three cheques issued by the accused/petitioner for Rs.50 lakhs, Rs.40 lakhs and Rs.35 lakhs were dishonoured. Three complaints were filed after the statutory notice was issued. Three applications were filed under Section 258 Cr.P.C. to discharge the petitioners in each of the cases. The same were negatived. Challenging the same; the present criminal petitions.

The primary contention of the learned counsel for the petitioner is that there is no enforceable debt. He submits that the amount covered by the three cheques were discharged and paid and therefore, he argues that there is no debt surviving. He relies upon the account copy that he has filed as an additional paper. He points out to the entries in the said account and argues that in the period 12.05.2017 to 30.06.2019 the debt has been cleared. In addition, he submits that the lower Court committed a mistake in holding that Section 258 Cr.P.C. does not apply.

In reply to this, learned Public Prosecutor submits that the debt is not at all discharged. He strongly opposes the applications. He states that Section 258 Cr.P.C. is not at all applicable and that the criminal petitions should be dismissed *in limine.* He also states that the petitioner is only trying to take advantage of the regular repayments towards the debt to contend that the loan has been discharged. He submits that the petitioner owe a huge debt running into crores of rupees to the Corporation Bank and for the purpose of servicing the said loan, they have been paying the installment and interest. He, therefore, submits that mere fact that there are three payments into the account cannot lead to an irresistible conclusion that there is no enforceable debt. He points out that the power under Section 482 Cr.P.C. should not be used in a case like this.

This Court after hearing both the learned counsel notices that the crux of the submission and the thrust of the argument is that the sum due under the three cheques has been cleared. The details of the dishonoured cheques are given below:

1. Cheque No.309710 dated 03.04.2017 for Rs.50 lakhs.

2. Cheque No.309711 dated 30.05.2017 for Rs.40 lakhs.

3. Cheque No.309707 dated 06.05.2017 for Rs.35 lakhs.

The total amount due under these cheques is Rs.1,25,00,000/-. All the three cheques have bounced. In this contemporaneous period a sum of Rs.12,48,500/-, Rs.1,38,000/- and Rs.86,85,000/- was paid. These are reflected in the account. The sum total of all these are Rs.1,00,71,500/-. This Court cannot accept that these payments are made specifically for the dishonoured cheques because (a) the amounts do not tally. The total of the amounts of the cheques dishonoured is

1,25,00,000/-, whereas the payment is made only for Rs.1,00,71,500/-. (b) In addition, no letter or document is shown to have been sent informing the 2nd respondent that the amounts that are being credited are specifically been given for discharge of the three cheques which have been dishonoured (c) after the cheques have been dishonoured, a statutory notice was given. No reply was given stating that these amounts are paid in discharge of the specific cheques. (d) lastly, the lower Court noticed that when the petitioners were examined under 251 Cr.P.C., they did not state that the dishonoured cheque amounts were cleared by the three payments referred to above.

In addition Section 60 of the Indian Contract Act is to the following effect:

Section 60 in The Indian Contract Act, 1872

> 60. Application of payment where debt to be discharged is not indicated.— Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitations of suits.

Therefore, when the petitioner did not specify how and for what purpose the payment was to be appropriated, the Bank was at liberty to adjust the payment as it deemed fit. In cases of this nature where the dishonour of cheque can lead to prosecution; a greater duty was cast upon the petitioner to specify the manner in which the amount was to be appropriated/adjusted. That the petitioner did not do so is crystal clear.

In the absence of any such evidence, this Court is of the opinion that the main thrust of the petitioner's argument that the amount has been discharged has to necessarily fail.

Equally important is the finding of the lower Court with regard to Section 258 Cr.P.C. Section 258 Cr.P.C. is to the following effect:

> Section 258 in The Code Of Criminal Procedure, 1973
>
> 258. Power to stop proceedings in certain cases. In any summons-case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge.Therefore, it is clear that the procedure under Section 248

> Cr.P.C. would not apply, as the present case is filed under Section 138 of the NI Act by a complaint under Section 200 Cr.P.C. Therefore, this Court is of the firm opinion that the application under Section 258 Cr.P.C. is not maintainable. The judgment of the Karnataka High Court in MANJUNATH C.KAMMAR V. M/S. A.KANTHILAK AND COMPANY (ILR 2003 KAR 2189) is directly on the point. The learned single Judge of Karnataka High Court clearly held in very similar circumstances that Section 258 Cr.P.C. is not applicable to the facts and circumstances of the case and to a complaint under Section 138 of the NI Act.

In that view of the matter, this Court holds that there are no merits whatsoever in the three applications that are filed.

Accordingly, the applications are dismissed. As the applications are dismissed, notice to 2nd respondent is not considered necessary.

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

–X–

2019(3) L.S. 86 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Chokkakula Eswara Rao ....Petitioner
Vs.
Sri Badireddi Suryanarayana & Anr., ...Respondents

NEGOTIABLE INSTRUMENTS ACT, Sec.138 - Criminal Petitions are filed to quash the proceedings pending on the file of JMFC for the offence punishable u/Sec.138 of N.I Act- Whether the cause of action arose for filing complaints for the offence punishable u/Sec.138 of the N.I Act immediately after expiry of 15 days from the date of knowledge about service of notice on the accused or from the date of actual service of notice on the accused?

Held - Even by the date of receipt of information from the postal department, still more than 15 days time is available to file complaint from the date of cause of action arise under clause (c) of the proviso to Sec.138 of the N.I.Act, but the complainant filed compliant beyond one month from the date of cause of action arose as per clause (c) of the proviso to Section 138 of N.I.Act and no petition is filed to condone delay invoking clause (b) of the proviso to Sec.142 of the N.I. Act

Crl.P.No.12162/14 etc., Dt:19-7-2019

- In the absence of condonation of delay, when the complaint is field beyond one month from the date of cause of action arose under clause (c) of the proviso to Sec.138 of the N.I.Act, the same are hopelessly barred by limitation and taking cognizance by the Magistrate accepting the allegations made in the complaints on their face value is erroneous – Criminal proceedings against petitioners are liable to be quashed - Criminal Petitions stand allowed.

Mr.G.L.Nageswara Rao, Advocate for the Petitioners.
Mr.A.Rama Krishna and Sri Saripalli Subramanyam, Advocate for Respondents.

COMMON ORDER

These Criminal Petitions are filed under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the proceedings in C.C.Nos.153, 154 and 155 of 2013 pending on the file of Judicial Magistrate of First Class, Srungavarapu Kota, Vizianagaram District, registered for the offence punishable under Section 138 of Negotiable Instruments Act (for short "the N.I.Act").

The respondent No.1 is the complainant in all the three petitions. Different complainants filed private complaints against the petitioner for the offence punishable under Section 138 of the N.I.ACt, which are registered as C.C.No.153, 154 and 155 of 2013 pending on the file of Judicial Magistrate of First Class, Srungavarapu Kota, Vizianagaram. The details of date of debt, debt amount, cheque number, date of presentation are given in the table given hereunder.

Case No. Crl.P.No.	Date of debt	Debt amount in Rs.	Cheque number and date	Date of return of cheque	Notice date	Dated on which notice served on theaccused
12162 of 2014	20.12.2011	2,50,000/-	926445 25.03.2013	26.03.2013	08.04.2013	10.04.2013
12170 of 2014	16.02.2012	3,00,000/-	306711 19.03.2013	26.03.2013	06.04.2013	08.04.2013
12172 of 2014	10.01.2012	2,00,000/-	992319 12.03.2013	23.03.2013	05.04.2013	08.04.2013

It is the contention of the respondent No.1 - complainant that the petitioner borrowed different amounts on different dates shown in the table for his business purpose and family necessities agreeing to

repay the same together with interest at 24% p.a. and executed promissory notes on the even dates in favour of the complainant. Despite demands made by the respondent No.1 - complainant, the petitioner did not repay the same. The petitioner issued a cheque bearing No.926445 for Rs.2,50,000/- drawn on Indian Overseas Bank, Gajuwaka Branch (old) Visakhapatnam (C.C.No.153 of 2013) and cheque bearing No.306711 for Rs.3,00,000/ - drawn on Karur Vysya Bank, Gajuwaka Branch, Visakhapatnam (C.C.No.154 of 2013) and another cheque bearing No.992319 for Rs.2,00,000/- drawn on Indian Overseas Bank, Gajuwaka Branch (old) Visakhapatnam (C.C.No.155 of 2013) towards principal amount due under the promissory notes.

When the said cqueques were presented for collections, they were returned unpaid due to insufficiency of funds in the account of the petitioner and returned with cheque return memo dated 26.03.2013 (C.C.No.153 and 154 of 2013) and cheque return memo dated 23.03.2013 (C.C.No.155 of 2013). Thereafter, the respondent No.1 demanded for payment of amount covered by dishonoured cheque by registered notice dated 08.04.2013 (C.C.No.153 of 2013), 06.04.2013 (C.C.No.154 of 2013) 05.04.2013 (C.C.No.155 of 2013) within 15 days from the date of receipt of notice in compliance of Section 138 of the N.I.Act, but the complainants have not received the postal acknowledgment from the petitioner/ accused evidencing receipt of notice, thereupon counsel for respondent No.1 - complainants addressed a letter to the Superintendent of Post Offices. On 09.05.2013 the Superintendent of Post Offices addressed a letter to the advocate for the complainants informing that the petitioner/accused received the registered notice on 10.04.2013 (C.C.No. 153 of 2013) 08.04.2013 (C.C.Nos.154 and 155 of 2013). Despite receipt of demand notice, the petitioner did not pay the amount covered by dishonoured cheques within the stipulated time i.e. 15 days from the date of receipt of notice. Thus, the petitioner committed offence punishable under Section 138 of the N.I.Act.

The present petitions are filed raising various contentions and they are similar in all the three petitions.

It is contended that the complaints are barred by limitation, thereby continuation of proceedings against the petitioner is abuse of process of Court, on this ground alone, the proceedings against the petitioner are liable to be quashed.

The petitioner explained as to how the claims of the respondent No.1 - complainant are barred by limitation with reference to date of legal notice, its service, and failure of the petitioner to pay the amount covered by dishonoured cheque, which gives rise to cause of action and the date of filing of complaints is beyond 30 days from the date of receipt of notice and requested to quash the proceedings on the sole ground of limitation.

It is also further contended that the Court at Srungavarapu Kota has no jurisdiction as per the judgment of Apex Court in "Dasarath Rupesingh Rathod v. State of Maharashtra (Criminal Appeal No.2287 of 2009) as the drawee bank is situated at Visakhapatnam. On this ground also the proceedings are liable to be quashed.

During hearing, Sri G.L.Nageswara Rao, learned counsel for the petitioner, demonstrates as to how the complaint is barred by limitation and there is a provision in the N.I.Act to condone delay if for any reason, the respondent No. 1 is unable to file complaint within the limitation, but without filing such petition, the complainant straightaway filed the complaints as if cause of action arose within one month from the date of knowledge as to receipt of notice by the petitioner. In support of his contentions, he placed reliance on the judgment of Apex Court rendered in "Econ Antri Ltd. v. Rom Industries Ltd. and another 2013 (2) ALD (Crl.) 839 (SC)and "Subodh S.Salaskar v. Jayprakash M.ShahAIR 2008 SC 3086.

On the strength of the principles laid down in the above two judgments, learned counsel for the petitioner requested to quash the proceedings while not pressing the ground of territorial jurisdiction based on the principle laid down in "Dasarath Rupesingh Rathod v. State of Maharashtra (Criminal Appeal No.2287 of 2009) in view of amendment to the provisions of the N.I.Act giving retrospective effect.

Learned counsel for the respondent No.1 - complainant Sri A.Ramakrishna contended that unless service of notice in compliance of clause (c) of the proviso to Section 138 of the N.I.Act is not within the knowledge of the complainant and came to know about the service of notice when the Superintendent of Post Offices addressed a letter to the counsel for the respondent No.1 - complainant informing the exact date of service of demand notice on the petitioner and unless the respondent No.1 - complainant had knowledge about service of notice, he cannot file a complaint since the date of service is relevant and failure to pay the amount within 15 days from the date of knowledge as to receipt of notice gives raise to cause of action for filing complaint for the offence punishable under Section 138 of the N.I.Act. Therefore, limitation starts from the date of knowledge about the service of notice and not from the date of actual service on the petitioner/ accused. He placed reliance on the judgment of Kerala High Court in "***Gopalakrishnan Lekshmanan v. Noor-jahan Abdul Azeez***2012 CRI.L.J. 93***",*** judgment of Calcutta High Court in ***"Santa Priya Engineers (Pvt.) Ltd. v. Uday Sankar Das and another***(1993) 2 CALLT 101 HC***"***and another judgment of Madras High Court in "***N.Velayutham v. Sri Ganesh Steel Syndicate***(1995) 83 CompCas 785 (Mad)THE ***"***

Based on the law declared by various High Courts in the above judgments and provisions of the N.I.Act more particularly Section 138 (2) (b) and Section 142 of the N.I.Act. learned counsel for the respondent No.1 - complainant contended that the limitation starts from the date of knowledge as to receipt of notice by the accused for filing complaint under Section 138 of the N.I.Act.

but not from the date of actual service of notice. Therefore, the complaints were filed within the time stipulated i.e. one month from the date of cause of action i.e. from the date of knowledge about the service of notice, consequently the Court cannot quash the proceedings in C.C. Nos. 153, 154 and 155 of 2013 on the file of Judicial Magistrate of First Class, Srungavarapu Kota, Vizianagaram.

Considering rival contentions, perusing the material available

on record, the point that arises for consideration is:

> Whether the cause of action arose for filing complaints for the offence punishable under Section 138 of the Negotiable Instruments Act immediately after expiry of 15 days from the date of knowledge about service of notice on the accused or from the date of actual service of notice on the accused? If it is from the date of expiry of 15 days of actual service, whether the complaints filed by the respondent No.1 on different dates shown in the above table are barred by limitation and liable to be quashed?

In Re POINT:

Section 142 of the N.I.Act deals with cognizance of offence and Sub-Section (1) (b) made it clear that a complaint is made within one month on the date on which the cause of action arises under clause (c) of the proviso to Section 138 of the N.I.Act. Thus, the relevant date for deciding the cause of action for filing the complaint is the date on which 15 days time after service of notice is expired as specified in clause (c) of the proviso to Section 138 of the N.I.Act.

Section 138 of the N.I.Act deals with dishonour of cheque for insufficiency of funds in the account, but the entire provision is unnecessary for deciding the real controversy except clause (c) of proviso to Section 138 of the N.I.Act.

According to clause (c) of proviso to Section 138 of the N.I.Act, drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice. As such, the cause of action for filing complaint commences from 16th day after service of notice for payment of amount covered by the dishonoured cheque on strict interpretation as per contention of the learned counsel for the petitioners.

In the present facts of the case, cheques were dishonoured allegedly on different dates and notices in compliance of clause (c) of the proviso to Section 138 of the N.I.Act. and the complaints were filed on various dates shown the above table. As seen from the details given in the table, cause of action starts from 26.04.2013 (C.C.No. 153 of 2013) 24.04.2013 (C.C.No.154 of 2013) 24.04.2013 (C.C.No.155 of 2013) i.e. 16th day after service of notice issued in compliance of clause (c) of proviso to Section 138 of the N.I.Act as per the contention of the learned counsel for the petitioners.

In the present case though notices

demanding payment of amount covered by dishonoured cheque were issued on various dates, the postal department did not return the acknowledgement evidencing the receipt of notice by the petitioner/accused herein. Thereupon, complainant addressed a letter to the Superintendent of Post Offices, in turn, the postal department intimated that the notices were served on the petitioner on 10.04.2013 (C.C.No.153 of 2013), 08.04.2013 (C.C.Nos.154 and 155 of 2013).

A bare look at clause (c) of the proviso to Section 138 of N.I.Act, limitation starts from the 16th day after service of notice as the accused is entitled to pay the amount covered by the dishonoured cheque within 15 days from the date of receipt of such notice, but the respondent No.1 - complainant had no knowledge about the service of notice issued in compliance of clause (b) of the proviso to Section 138 of the N.I.Act, till the date of receipt of letter from Superintendent of Post Offices on various dates as stated above.

Learned counsel for the respondent No.1 - complainant contended that the limitation starts from the date of knowledge about the service of notice issued in compliance of clause (b) of the proviso to Section 138 of the N.I.Act since it is difficult for the complainant to know about the actual date of service unless notice was served personally and obtained acknowledgment from the accused or postal acknowledgement is received in case notice was sent through Registered Post and if notice was sent by courier on receipt of proof of delivery. No doubt, it is difficult for the complainant to know the exact date of service except acknowledgment is received from the postal authorities or from the courier agent or personal acknowledgment if notice is served in-person. Keeping in mind, such difficulties, the legislature provided certain safeguards to draw certain presumptions as to service of notice when it was sent by registered post, under Section 27 of General Clauses Act. To meet certain exigencies, proviso to Section 142 is incorporated by Amendment Act 55 of 2002 with effect from 06.02.2003, which permits the Magistrate to take cognizance of the complainant after prescribed period, if complainant satisfies the Court that he had sufficient cause for not making such complaint within such period.

The main contentions urged by the learned counsel for the respondent No.1 before this Court is that in the absence of knowledge as to actual service of notice, limitation starts from the date of knowledge only. In support of his contention, he placed reliance on the judgment of Kerala High Court rendered in "***Gopalakrishnan Lekshmanan v. Noor-jahan Abdul AzeeZ*** (referred supra). Learned Single Judge of Kerala High Court considered the scope of Clause (c) of proviso to Section 138 of the N.I.Act and Section 142 of the N.I.Act and recorded his findings.

In view of the controversy, few facts of the said case are necessary.

On presentation of cheque issued by the accused therein, the same was dishonoured on the ground that there are no sufficient funds to the credit of the account of the accused and notice was sent in compliance of clause (b) of the proviso to Section 138

of Negotiable Instruments Act demanding payment of amount covered by dishonoured cheque, but he did not choose to issue any reply.

Neither information nor acknowledgment was received by the complainant. Therefore, advocate sent letter to the postal authorities complaining about non-receipt of postal acknowledgment. The complainant had received letter from the postal authorities and came to know that the registered article/ notice was delivered to the addressee on particular date. Therefore, complaint was filed beyond one month as the complainant had no knowledge about exact service of notice to file a complainant strictly adhering to Section 142 (b) read with clause (c) of the proviso to Section 138 of the N.I.Act.

On considering the above facts and circumstances of the case, the learned Single Judge of Kerala High Court held that "under the provisions of clause (c) of Section 138 of the Act, the cause of action for such-like complaint arises on failure of the drawer ***"to make payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within 15 days of the receipt of the said notice'*** given under clause (b) thereof; and not before that. No such complaint can, therefore, legally be filed before the aforesaid period. That being so, the relevant date for accrual of cause of action for such complaint is the date of receipt of notice by the drawer. The complainant being the sender of the notice cannot clearly know the date of actual service of the same and can only wait for the acknowledgment card. The receipt of the notice under clause (b) of Section 138 of the Act must invariably be by the drawer of the cheque to whom it is given. Knowledge of the sender about the date of receipt of notice by the drawer is, therefore, very much material as regards accrual of the cause of action for making the complaint. Where notice is sent by registered post with acknowledgment due, which is the usual mode of service waiting for the acknowledgment card can, hardly be avoided, if the parties do not belong to the same place or near about places. The knowledge of the sender (complainant) about the fact of date of receipt of such notice by the addressee/accused would invariably be dependent upon the agencies, namely, the Postal Department, which is obliged to return back the postal acknowledgment card to the sender of the registered notice. Acknowledgement card did not reach back the sender, necessitating correspondence with the Postal Department as to the delivery/service of the registered notice or the date of delivery/service of such notice. In such circumstances, the complainant herein cannot be compelled to draw the presumption regarding due service of notice by the addressee/accused as provided under Section 27 of the General Clauses Act. Such presumption in support of service of notice would depend upon the facts and circumstances of each case and such presumption can be raised by the complainant at the trial stage only. Such presumption of due service can be rebutted by the accused. Accordingly, the appellant opted to take the risk for proving that the accused received the notice and preferred the complaint before the postal authorities and obtained certificates regarding the

delivery of notice whereby on 27/10/2000 he knew about the actual receipt of the postal article/statutory notice by the addressee/accused on 05/09/2000."

The finding recorded by the learned Single Judge of Kerala High Court is that "cause of action for such complaint, so far as the complainant in this case is concerned, would accrue on the date of failure of the drawer to make payment within fifteen days from the date of knowledge of the complainant about the receipt of the notice by the drawer/ accused. Such construction would not in any way be prejudicial to the accused. It would rather be beneficial to her as she would get longer time to make payment of the amount and thus avoid criminal liability for non-payment."

Learned Single Judge of Kerala High Court clearly expressed his view that the limitation starts from the date of knowledge of receipt of notice by the accused, issued in compliance of proviso to Section 138 of the N.I.Act and not from the date of actual receipt of notice by the accused, in the absence of receipt of postal acknowledgment or any other material to establish receipt of notice by the accused.

Learned counsel for the respondent No.1 - complainant relied on the principle laid down in "***N.Velayutham v. Sri Ganesh Steel Syndicate"*** (referred supra), learned Single Judge of Madras High Court, almost in identical situation, held as follows:

> "Now, coming to the last submission that the date of service of notice on the accused has not been mentioned in the complaint and so that is an infirmity, which goes to the root of the matter. In this regard, he relied upon the list of documents given in the complaint. In it, item No. 8 is the complainant's advocate notice dated September 25, 1991, and item No. 9 is acknowledgment dated July 1, 1991, and that he would submit that the notice sent on September 25, 1991, cannot be received on an earlier date, viz., July 1, 1991. Obviously, there is some mistake in this regard and that can be clarified during the course of evidence, which will come only at the time of trial. Regarding the date of receipt of notice, there is no mention in the complaint about it. But it is definitely stated that the notice was received by the accused, he had acknowledged it and still he has not paid that amount. As such, the date of receipt of notice is not made clear in the complaint. There is obviously an omission. That will come to light only during the course of trial. If this complaint was filed before the expiry of 15 days from the date of receipt of notice, then it has to be dismissed and if it was filed after the expiry of fifteen days from the date of receipt of notice, then certainly it will be in order, if it was filed within 30 days of the date of receipt of notice and if the cheque amount was not paid within 15 days of the date of receipt of notice. At this stage, when the date of receipt of notice is not specifically stated in the complaint, no presumption can be made either this way or that way. There is a

positive allegation that the accused had received the notice and had acknowledged it. Only for the purpose of computing the period of time as to whether it is filed within time or beyond time, the date is to be fixed. That can be done at the time of trial and so I am unable to quash it at the threshold.

Mr. Ramesh would reply upon Elangovan v. Narayana Iyengar [1991] 2 MWN (Cri.) 87, in which this court occasion to consider the requirements of service of notice on the accused. In that case, the notice sent by the complainant to the accused was returned with a postal endorsement "addressee not available in station". By no stretch of imagination can such an endorsement to taken as service of notice on the accused. Neither was there any averment in the complaint, in that case, about the receipt of notice by the accused, giving him the requisite period of 15 days time. On the facts of that case, it was held that it is not sufficient to satisfy the requirements of the proviso to section 138 of the Act. The facts of the case before me are totally different and hence this ruling is not applicable to this case. Hence this submission made by Mr. Ramesh in this regard, cannot be accepted."

Learned Single Judge of Calcutta High Court also considered to some extent as to when the cause of action arises in ***""Santa Priya Engineers (Pvt.) Ltd. v. Uday Sankar Das and another'*** (referred supra) and held that "under the provisions of Clause (c) of Section 138 of the Act, the cause of action for such-like complaint arises on the failure of the drawer "to make payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within 15 days of the receipt of the said notice" given under Clause (b) thereof, and not before that. No such complaint can, therefore, legally be filed before the aforesaid period. That being so, the material and relevant date for accrual of cause of action for such-like complaint is the date of receipt of notice by the drawer. The complainant being the sender of the notice cannot clearly receive the same. The recipient of the notice under Clause (b) of Section 138 of the Act must invariably be the drawer of the cheque, to whom it is given. Knowledge of the sender about the date of receipt of the notice by the drawer is, therefore, very much material as regards accrual of the cause of action for making like complaint. The sender of the notice could clearly have no personal knowledge about the date of receipt of the same, unless the notice is sent by messenger and the receipt thereof is duly acknowledged by the person to whom it is sent. But in cases (as in the instant case), where notice is sent by registered post with acknowledgment due, which is the usual mode of service, which could, in particular, hardly be avoided if the parties do not belong to the same place or near about places, the knowledge of the sender (complainant) about the date of receipt of such notice would invariably be dependent upon other agencies, namely, the postal department, which is obliged to return back the acknowledgment card to

the sender of the registered notice. But the promptitude and efficiency of the postal department is a matter which is an everyday experience for the people at large. More often than not, acknowledgment card is hardly returned back to the sender (of the registered notice) in time. Not infrequently, the acknowledgment card never reaches back the sender, necessitating correspondence with the postal department as to the delivery/service of the registered notice or the date of delivery/ service of such notice. Not unoften, the somnolence of the postal authority could hardly be shaken within reasonable time in answering such query when the acknowledgment due card does not reach back the sender. In such cases, such complaint is likely to fail for no fault of the complainant, but for the failure/laches on the part of the postal department. The purpose of the Act is, therefore, likely to be frustrated, in such circumstances, which could never possibly have been intended by the makers thereof. The question which thus naturally arises for consideration is whether the literal and mechanical way of construing Clause (c) of Section 138 of the relevant Act would be justified in law, in such circumstances. The knowledge of the sender of the notice about the date of receipt of the same being an essential requirement of fair-play and natural justice, the expression ***"within 15 days of***

the receipt of the said notice', used in the aforesaid provision, should clearly mean the date when the sender acquires the knowledge about the date of the receipt of the notice given by him under Clause (b) of the relevant provision. If a person is given a right to resort to a remedy within a prescribed time, limitation should not be computed from a date earlier than that on which the party aggrieved actually knew about the date of accrual of the cause of action for making a complaint before the competent court for seeking redress therefore, or else, it might be an absurd and unreasonable application of law. On the analogy of the decision of the Supreme Court in K. P. Varghese v. ITO [1981]131ITR597(SC) , we must, therefore, eschew literalness in the interpretation of Clause (c) of Section 138 of the Act and "try to arrive at an interpretation which avoids such absurdity and mischief and makes the provision rational and sensible, unless of course, our hands are tied and we cannot find any escape from the tyranny of literal interpretation." It is now a well- settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result, which could never have been intended by the Legislature, the court may modify the language used by the Legislature, or even "do some violence" to it, so as to achieve the obvious intention of the Legislature and produce a rational construction (vide Luke v. Inland Revenue Commissioners [1964] 54 ITR 692 (HL)). The court may also in such a case read into the statutory provision a condition which, though not expressed, is implicit as constituting the basic assumption underlying the statutory provision. It, therefore, seems to me that having regard to this well recognised rule of interpretation, a fair and reasonable construction of Clause (c) of Section 138 of the Act should be read into it, so, that the expression therein "within

15 days of the receipt of the said notice" should be made to mean within 15 days from the date of knowledge of the sender about the receipt of the notice so that such complaint may not fail for default on the part of the postal department, without any fault on the part of the complainant. On such construction, the cause of action for such complaint, so far as the complainant is concerned, would accrue on the failure of the drawer to make payment within fifteen days from the date of knowledge of the complainant about the receipt of the notice by the former (drawer), which would neither be prejudicial to him (drawer/accused), rather beneficial to him as he would get longer time to make payment of the amount and thus avoid criminal liability for non-payment. It would indeed be in the interest of such complainant to file complaint for such offences within the prescribed period so that the same may not be turned down for having been filed beyond the prescribed period resulting in failure of the remedy available to him under the law on such technical ground. Such complainant would invariably be interested in seeing that the court takes cognizance of the offence and issues process because that would be the culmination of the petition of complaint filed by him on the allegations made and could hardly allow his petition of complaint to be time barred to his own prejudice. At the same time, however, the complainant should exhibit due diligence and promptitude in securing knowledge within a reasonable period about the date of receipt of the notice, sent by registered post acknowledgment due, without sleeping over the matter for an unreasonable period, in case of failure of the postal department to send back the acknowledgment due card and/or intimate the date of receipt of the notice by the addressee within a reasonable period."

In all the above three judgments, the learned Single Judges of different High Courts interpreted Clause (c) of the proviso to Section 138 and Section 142 of N.I.Act and held that on harmonious construction of provisions of Chapter XVII of the N.I.Act, which deals with Penalties in case of dishonour of certain cheques for insufficiency of funds in the accounts, limitation starts from the date of knowledge of service of notice.

Taking advantage of the principle laid down by Single Judge of three different High Courts (referred above) learned counsel for the respondent No.1 - complainant contended that the complaint is within limitation, whereas Sri G.L.Nageswara Rao, learned counsel for the petitioner, contended that even after receipt of letter about the service of notice from the Superintendent of Post Offices, the complainant had sufficient time to file complaint i.e. approximately 15 days to expire one month time from the date of receipt of notice. But the complainant did not choose to file complaint within the time and calculated the time from the date of receipt of information by exhibiting sheer negligence in filing complaint after expiry of limitation.

Learned Single Judge of various High Courts (referred above) has gone to the extreme step to conclude that Section 27 of General Clauses Act has no application in those cases and the cause of action starts from the date of knowledge of receipt of notice, when no acknowledgment was returned by

the postal authorities. All the three judgments of three different High Courts are not binding precedents on this Court except persuasive value.

Learned counsel for the petitioner while contending that the complaint is barred by limitation as the cause of action for filing compliant arose on 26.04.2013 (C.C.No.153 of 2013) 24.04.2013 (C.C.No.154 of 2013) 24.04.2013 (C.C.No.155 of 2013). Even assuming for a moment that postal authorities did not return postal acknowledgment, but communicated to the counsel for respondent No.1 - complainant in writing on the request made by the learned counsel for the respondent No.1 - complainant; even by the date of such communication one month period prescribed under Clause (b) of the proviso to Section 138 of N.I.Act had not expired. But the complainant did not choose to file complaint within one month from the date of cause of action under clause (c) of the proviso to Section 138 of the N.I.Act.

In support of his contention, he placed reliance on the judgment of Apex Court in ***"Econ Antri Ltd. v. Rom Industries Ltd. and another"*** (referred supra). In the said judgment, the Apex Court held that "as the Limitation Act is held to be not applicable to N.I. Act, drawing parallel from Tarun Prasad Chatterjee v. Dinanath Sharma (AIR 2001 SC 36) where the Limitation Act was held not applicable, the Court is of the opinion that with the aid of Section 9 of the General Clauses Act it can be safely concluded in the present case that while calculating the period of one month which is prescribed under Section 142(b) of the N.I. Act, the period has to be reckoned by excluding the date on which the cause of action arose. It is not possible to agree with the counsel for the Respondents that the use of the two different words 'from' and 'of' in Section 138 at different places indicates the intention of the legislature to convey different meanings by the said words." The Apex Court further held that for the purpose of calculating the period of one month, which is prescribed under Section 142(b) of the N.I. Act, the period has to be reckoned by excluding the date on which the cause of action arose.

In the facts of the above judgment, dispute was with regard to applicability of Section 12 of the Limitation Act to exclude the date on which the cause of action arose. The Apex Court concluded that the limitation of one month has to be reckoned by excluding the date on which the cause of action arose. But the question before this Court is not with regard to applicability of Section 12 of the Limitation Act to exclude the date on which the cause of action arose.

The Apex Court in ***"Subodh S.Salaskar v. Jayprakash M.Shah"*** (referred supra) considered an identical question to decide the date of cause of action to calculate the limitation for filing complaint for the offence punishable under Section 138 of the N.I.Act. The Apex Court while considering the aspect of cause of action for filing complaint specified basic ingredients to exist for filing complaint, viz.,

(a) a cheque was issued;

(b) the same was presented;

(c) but, it was dishonoured;

(d) a notice in terms of the said provision was served on the person sought to be made liable; and

(e) despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice.

[See S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr. (2007)4SCC70 , Saroj Kumar Poddar v. State (NCT of Delhi) and Anr. 2007CriLJ1419 and DCM Financial Services Ltd. v. J.N. Sareen and Anr. 2008CriLJ3178]

The Apex Court lucidly discussed cause of action for filing complaint and stated as follows:

"A complaint petition in view of Clause (b) of Section 142 of the Act was required to be filed within one month from the date on which the cause of action arose in terms of Clause (c) of the proviso to Section 138 of the Act which stipulates that "the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice".

The Apex Court also adverted to Section 27 of General Clauses Act, expressed its view that "thirty days" time ordinarily must be held to be sufficient for service of notice. In fact when the service of notice is sought to be effected by Speed Post, ordinarily the service takes place within a few days. Even under Order V, Rule 9(5) of the Code of Civil Procedure, 1908, summons is presumed to be served if it does not come back within thirty days. In a situation of this nature, there was no occasion for the Court to hold that service of notice could not be effected within a period of thirty days. Presumption of service, under the statute, would arise not only when it is sent by registered post in terms of Section 27 of the General Clauses Act but such a presumption may be raised also under Section 114 of the Indian Evidence Act. Even when a notice is received back with an endorsement that the addressee has refused to accept, still a presumption can be raised as regards the valid service of notice. Such a notice, as has been held by a Three-Judge Bench of the Apex Court in "C.C. Alavi Haji v. Palapetty Muhammed and Anr. (2007CriLJ3214)" should be construed liberally."

The Apex Court also noted clause (b) of the proviso to Section 142 of the N.I.Act. incorporated in 2002, concluded that the provisions of the Act being special in nature, in terms thereof the jurisdiction of the court to take cognizance of an offence under Section 138 of the Act was limited to the period of thirty days in terms of the proviso appended thereto. The Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to Clause (b) of Section 142 of the Act in 2002. It confers jurisdiction upon the court to condone the delay. It is, therefore, a substantive provision and not a procedural one. The matter might have been different if the Magistrate could have exercised its jurisdiction either under Section 5 of the Limitation Act, 1963 or Section 473 of the Code of Criminal Procedure, 1976. The provisions of the said Acts are

not applicable. In any event, no such application for condonation of delay was filed. If the proviso appended to Clause (b) of Section 142 of the Act contained a substantive provision and not a procedural one, it could not have been given a retrospective effect. A substantive law, as it is well- settled, in absence of an express provision, cannot be given a retrospective effect or retroactive operation.

Thus, in view of the law declared by the Apex Court after considering Section 27 of the General Clauses Act and Section 142 (b) of the N.I.Act and proviso thereto, clause (c) of the proviso to Section 138 of the N.I.Act the cause of action arose for filing compliant on the 16th day after service of notice on the accused, issued under clause (b) of the proviso to Section 138 of the N.I.Act.

Learned Single Judges of Calcutta, Kerala and Madras High Courts, to avoid prejudice to the accused, interpreted the provisions liberally so as to serve the purpose of filing compliant.

Chapter XVII of the N.I.Act consisting various sections commencing from Sections 138 ends with Section 148. Section 138 of the N.I.Act is a penal provision, whereas other sections deal with other ancillary aspects. Thus, when the penal status prescribes certain rule as to the cause of action, normally the Court cannot interpret the provision in the absence of any ambiguity in the provision.

Normal rule is that every statute, defining an offence against the State, whatever the character of the offence may be, is enforced by criminal remedies. Penal statute must be construed strictly.

When a statute dealing with a criminal offence impinging upon the liberty of citizens, a loophole is found, it is not for Judges to cure it, for it is dangerous to derogate from the principle that a citizen has a right to claim that howsoever much his conduct may seem to deserve punishment, he should not be convicted unless that conduct falls fairly within the definition of crime of which he is charged. The fact that an enactment is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear. There is all the more reason to construe strictly a drastic penal statute with deal with crimes of aggravated nature which could not be effectively controlled under the ordinary criminal law. Such a statute should not ordinarily be resorted to if the nature of the activities of the accused can be checked and controlled under the ordinary criminal law. The duty of the Court is to give effect to the purpose as expressed in clear and unambiguous language and that obligation is not altered because the Act is penal in character. So the application of the rule does not permit the Court in restraining comprehensive language used by the Legislature, the wide meaning of which is in accord with the object of the statute. Even if there be sharp divergence of opinion amongst the High Courts on the construction of a provision in a penal statute, the Supreme Court will not necessarily prefer the narrower view which favours the accused and not the prosecution and may prefer to accept the wider view which is more

consistent with the object of the provision. Thus, the provisions of penal law have to be construed strictly to give effect to the object of enactment.

Therefore, I am completely not in agreement with the view expressed by three Judges of three different High Courts in the judgments (refereed supra).

In other words, if there is any ambiguity, statue should be construed in favour of the subject. But in modern times, it means "unless penalties are imposed in clear terms they are not enforceable (Att.-Gen. v. Till (1910) A.C. 50 at P.51)". While construing a Penal Statute, a question is simply what is the meaning of the words which the statute has used to describe the prohibited act or transaction? If these words have a natural meaning, that is their meaning, and such meaning is not to be extended by any reasoning used on the substance of the transaction. If the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted. ((1962) 2 W.L.R. 51)

Thus, strict construction rule must be applied while interpreting penal statute as a general rule of construction of penal statute.

It appears that the Single Judges of three different High Courts (referred above) applied mischief rule to interpret the provisions.

Mischief Rule is based on *Heydon's* case and is designed to carry into effect the object and purpose of the statute. This method of approach is easy to apply when the objects and reasons of the Act are set out therein as, for instance, in the Statute of Frauds, but difficult to apply when these are wanting. It is, however, a method much resorted to in approaching the construction of all types of statutes.

In the present facts of the case, there is no ambiguity in the language used in clause (c) of the proviso to Section 138 of the N.I.Act. and Section 142 of the N.I.Act. On the other hand, Chapter XVII of the N.I.Act itself is a complete code, which deals with the procedure for filing complaint for the offence punishable under Section 138 of the N.I.Act and in the absence of any ambiguity or giving scope for two different meanings, interpretation is totally unnecessary, but the doctrine of strict construction alone is to be applied and not mischief rule or doctrine of reading down.

Learned single Judges of different High Courts (referred above) did not consider the scope of proviso to clause (b) of Section 142 of the N.I.Act and the effect of Section 27 of the General Clauses Act in a right perspective.

On overall consideration of ***Gopalakrishnan Lekshmanan v. Noor-jahan Abdul Azeez***", ***"Santa Priya Engineers (Pvt.) Ltd. v. Uday Sankar Das and another'*** and "***N.Velayutham v. Sri Ganesh Steel Syndicate'*** (referred above) for different reasons learned Single Judges of three different High Courts concluded that the General Clauses Act has no application, but the same is contrary to the principle laid down in ***"Subodh S.Salaskar v. Jayprakash M.Shah"*** (referred supra). Clause (b) of the proviso to Section 142

of the N.I.Act is added in 2002. Learned Single Judge of Kerala High Court did not advert to the proviso while interpreting Section 142 (b) and clause (c) of the proviso to Section 138 of the N.I.Act.

Similarly, learned Single Judge of Calcutta High Court did not consider the proviso to clause (b) of Section 142 of the N.I.Act and in fact such consideration of proviso in the judgment would not arise as it relates to the period prior to incorporation of Clause (b) to Section 142 of the N.I.Act.

Learned Single Judge of the Madras High Court did not consider various provisions since the judgment is of the year 1994, by that time the clause (b) to the proviso to Section 142 is not on statute book.

In view of the above discussion, I am unable to agree with the view expressed by the learned Single Judges of Kerala, Calcutta and Madras High Courts when the statute itself prescribes date for commencement of cause of action. More so, the statute itself safeguarded the interest of the complainant enabling him to file complaint even after expiry of period of limitation by incorporating clause (b) of the proviso to Section 142 of the N.I.Act. If clause (c) of the proviso to Section 138 and clause (b) of the proviso to Section 142 of the N.I.Act are read together, the cause of action for filing complaint would arise only on the day after expiry of 15 days after service of notice issued in compliance of clause (b) of the proviso to Section 138 of the N.I.Act and not from the date of knowledge. If for any reason, the complainant did not receive acknowledgement when the notice was sent by registered post to the correct address, the Court can draw the presumption contained in Section 27 of General Clauses Act or in the alternative the complainant may seek condonation of delay invoking jurisdiction of Magistrate under the proviso to clause (b) of Section 142 of the N.I.Act. When the statute itself equally safeguarded the interest of both the accused and the complainant, the Court need not interpret the proviso either in favour of the complainant or in favour of the accused by adding or subtracting any words to penal provision, but it must be construed strictly based on principle of strict construction. If any other construction is made, it is against the intention of the legislature in incorporating clause (b) of the proviso to Section 142 and clause (c) of the proviso to Section 138 of the N.I.Act., which renders the Act ineffective to enforce the criminal liability against accused, who committed offence punishable under Section 138 of the N.I.Act, in the Court of law.

Turning to the facts of the present case, as shown in the table, the cheques were allegedly issued by the petitioner and on presentation of the cheques by the complainant, they were dishonoured and notices in compliance of clause (c) of the proviso to Section 138 of the N.I.Act were issued on specific dates and receipt of notices were acknowledged by the petitioner, but for one reason or the other, postal acknowledgments are not returned to the learned counsel for the complainant/ respondent No.1. More diligently, learned counsel for the respondent No.1 addressed letters to the Superintendent of Post Offices complaining lapses of the postal department in returning postal acknowledgment and with

great sense of responsibility, the Superintendent of Post Offices addressed letter intimating exact date of service of notice issued by the complainant to the petitioner within one month. Even by the date of receipt of information from the postal department, still more than 15 days time is available to file complaint from the date of cause of action arise under clause (c) of the proviso to Section 138 of the N.I.Act, but the complainant filed compliant beyond one month from the date of cause of action arose as per clause (c) of the proviso to Section 138 of N.I.Act and no petition is filed to condone delay invoking clause (b) of the proviso to Section 142 of the N.I.Act, which enables the complainant to seek condonation of delay subject to satisfaction of Magistrate. In the absence of condonation of delay, when the complaint is field beyond one month from the date of cause of action arose under clause (c) of the proviso to Section 138 of the N.I.Act, the same are hopelessly barred by limitation and taking cognizance by the Magistrate accepting the allegations made in the complaints on their face value is erroneous. Consequently, the proceedings are liable to be quashed.

In the result, the Criminal Petitions are allowed. The proceedings in C.C.Nos.153, 154 and 155 of 2013 on the file of Judicial Magistrate of First Class, Srungavarapu Kota, Vizianagaram District, are hereby quashed.

Consequently, miscellaneous applications pending if any shall stand closed.

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2019(3) L.S. 102 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Meena Kumari Sahu & Ors., ..Petitioners

Vs.

Palla Bhanu Babu ..Respondent

CIVIL PROCEDURE CODE, Or.VII, Rule 11(d) - Assailing the Order, passed in I.A. in O.S., whereby lower Court dismissed the application filed for reject the plaint - Suit was originally filed – (a) for a declaration that the registered sale deed executed by the 1st defendant in favour of the 5th defendant in respect of the plaint - A schedule property as void and (b) to declare the registered lease deed executed by the 1st defendant in favour of the 2nd defendant in respect of the plaint-B schedule property is void, and (c) for consequential relief of permanent injunction restraining the defendants 2 to 9 from trespassing into plaint - A and B schedule properties.

Held - Germane facts for deciding an application under Order VII, Rule 11(a) of CPC are the averments in the plaint and not the pleas taken in the written statement - Plea of limitation, is left open to the defendants to raise - In case if any such plea is raised, the trial Court has to decide the

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same in the final adjudication of the suit on the basis of the evidence adduced by both the parties on the said issue - No valid grounds to reject the plaint - Impugned order is sustainable under law and it warrants no interference in this revision - Civil revision petition stands dismissed.

Mr.Taddi Nageswara Rao, Advocate for the Petitioners.
Mr.Venkateswara Rao Gudapati, Advocate for the Respondent.

O R D E R

Assailing the order dated 01-4-2019 of the learned

1 Additional District Judge, Srikakulam, passed in I.A.No.151 of 2017 in O.S.No.24 of 2017 whereby he has dismissed the application filed under Order VII, Rule 11(d) of CPC to reject the plaint, the revision petition has been preferred by the petitioners.

2. The petitioners are defendants 4 and 8 to 13 in the said suit. The suit was originally filed - (a) for a declaration that the registered sale deed dated 27-02-1986 executed by the 1st defendant in favour of the 5th defendant in respect of the plaint-A schedule property is void, unenforceable and not binding on the plaintiff, since the 1st defendant got only life estate without any right of alienation and as the plaintiff got vested remainder over the property, (b) to declare the registered lease deed dated 18-01-2002 executed by the 1st defendant in favour of the

2 nd defendant in respect of the plaint-B schedule property is void, unenforceable and not binding on the plaintiff, since the 1st defendant got only life estate without any right of alienation and as the plaintiff got vested remainder over the property and (c) for consequential relief of permanent injunction restraining the defendants 2 to 9 from trespassing into plaint-A and B schedule properties.

3. The contention of defendants is that the suit is barred by time. According to the defendants, as the plaintiff was minor at the time of execution of the sale deeds in question he has to file the suit within 3 years from the date of his attaining the age of majority. As the suit was filed in the year 2009 and as the plaintiff himself declared in the plaint that he is aged about 38 years at the time of filing of the suit in the year 2009, it is evident that he has attained the age of majority long back in the year 1989. As he failed to file the suit within the period of 3 years, in the year 1992, the suit is barred by time. Therefore they prayed to reject the plaint under Order VII, Rule 11 of CPC.

4. The said application is resisted by the plaintiff. He contends that the suit is filed only for declaration that the sale deeds executed by the 1st defendant are not valid and binding on the plaintiff inasmuch as the 1st defendant got only life interest in the said property and the vested remainder is with the plaintiff and as such the contention of the defendants that the suit is to be filed within the period of 3 years after attaining the age of majority cannot be countenanced and thereby prayed for dismissal of the application.

5. After hearing both the parties, the learned I Additional District Judge by the impugned order dismissed the said application holding that the plaintiff did not aver anywhere in the plaint that he was aged 16 years at the time of execution of the sale deeds and moreover the plaintiff has averred that he came to know about the said sale deeds only in the month of June, 2009 and as such it cannot be said that the suit is barred by time and thereby dismissed the application.

6. Aggrieved thereby, the present revision petition is filed questioning the legality and validity of the impugned order.

7. As can be seen from Order VII, Rule 11 of CPC, certain grounds are enumerated therein for rejecting the plaint. Clause (d) is relevant in the context to consider. It ordains that where the suit appears to be from the statement in the plaint to be barred by any law that the same can be rejected. It is now well settled law that in order to decide whether the suit is barred by any law or not to reject the plaint at the threshold under Order VII, Rule 11 of CPC, the Court has to go by the averments made in the plaint and on the basis of the same it has to be ascertained whether the suit is barred by time or not.

8. A plain reading with the contents of the plaint clearly shows that the plaintiff herein has filed the suit for declaration that the two registered sale deeds dated 27-02-1986 and 18-01-2002 executed by the 1st defendant in favour of the defendants 2 and 5 respectively are void and they are unenforceable inasmuch as the 1st defendant got only life interest without any right of alienation and the plaintiff got vested remainder in the said properties.

9. So, it is germane to consider the relevant article in the Limitation Act relating to the suits seeking relief of declaration. Part III of the Act pertains to suits relating to declarations. It contains 3 articles i.e. Articles 56 to 58. Articles 56 and 57 are not relevant for the present purpose as they relate to filing of the suit to declare the forgery of an instrument issued or registered or to obtain a declaration that an alleged adoption is not valid. Article 58 is relevant in the context to decide the present controversy. It pertains to limitation to file suits to obtain any other declaration. The limitation prescribed is 3 years and it starts from the day when the right to sue first accrues to the plaintiff. At the cost of repetition, it is to be mentioned here that as per settled law, on the basis of the averments made in the plaint the plea relating to limitation has to be decided in a petition filed under Order VII, Rule 11 CPC. In fact the said legal position is very much clear from the judgment relied on by the learned counsel for petitioners herein in the case of ***Saleem Bhai v. State of Maharashtra*** (2003) 1 SCC 557**,** wherein the Apex Court held that germane facts for deciding an application under Order VII, Rule 11(a) of CPC are the averments in the plaint and not the pleas taken in the written statement.

10. Therefore, with reference to the averments made in the plaint by the plaintiff, it is to be ascertained as to when the right to sue first accrued to the plaintiff to file

the suit for declaration that the two sale deeds dated 27-02-1986 and 18-01-2002 are void and that they are unenforceable.

11. The plaintiff has clearly pleaded in the plaint that he came to know about the said sale deeds which are in question in the month of June, 2009. So the cause of action for him to file the suit for declaration that the said sale deeds are void and that they are unenforceable arose for him in the month of June, 2009 when he first came to know about the execution of the said sale deeds by the 1st defendant in favour of the defendants 2 and 5 respectively. Therefore, the 3 years period of limitation as contemplated under Article 58 of the Limitation Act has to be reckoned from June, 2009. So reckoned, as this suit is filed in the year 2009 itself, it has to be held that the suit is within the period of limitation. So it cannot be said at this stage that the suit is barred by law. The above finding is recorded only on the basis of the averments made in the plaint.

12. However, as the plea of limitation in suits of like nature is always a mixed question of fact and law, it is left open to the defendants to raise the said plea in the suit. In case if any such plea is raised, the trial Court has to decide the same in the final adjudication of the suit on the basis of the evidence adduced by both the parties on the said issue, without being influenced by any of the observations made by this Court supra.

13. Therefore, at this stage, there are no valid grounds to reject the plaint. Ergo, the impugned order is sustainable under law and it warrants no interference in this revision.

14. In the result, the civil revision petition is dismissed. Pending applications, if any, shall stand closed. No costs.

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2019(3) L.S. 105 (A.P.)

IN THE HIGH COURT OF
ANDHRA PRADESH

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

Hanumanthu Saraswathi ..Petitioner
Vs.
Hanumanthu Mahalakshmi & Ors. ..Respondents

CIVIL PROCEDURE CODE, Order VI Rule 17 - Civil Revision Petition arises out of the order passed in I.A., whereby lower Court has dismissed the petition filed by the petitioner under Order VI Rule 17 CPC seeking leave of the Court to amend the plaint.

Held - If, the present petition under Order VI Rule 17 CPC is dismissed on the ground of laches and on account of the embargo contained in the proviso under Order VI Rule 17 CPC, petitioner will be left with no legal remedy to recover her 1/3rd share to which she is legally entitled, according to the case pleaded by her - Justice cannot be lost in technicalities - In the considered opinion of this Court the bar contained in the proviso to Order VI Rule 17 CPC which is procedural in nature cannot

C.R.P.No.1568/2019 Date:2-8-2019

be held to be absolute - When the proposed amendment is necessary for bringing to the fore the real question in controversy between the parties, that the amendment can be allowed, despite the fact that the plaintiff is not diligent in seeking the amendment and despite the bar contained in the proviso to Order VI Rule 17 CPC - Civil Revision Petition stands allowed setting aside the impugned order passed in I.A.

Mr.M.V. Suresh, Advocate for the Petitioner.
Mr. Gnani Vivek Karra, Advocate for respondents 1 & 2.
Mr.Maheswara Rao Kunchem, Advocate for the Respondents 6 & 7.

O R D E R

This Civil Revision Petition arises out of the order dated 27.03.2019 passed in I.A.No.2 of 2018 in O.S.No.147 of 2012 on the file of the Senior Civil Judge, Sompeta, Srikakulam District, whereby the learned Senior Civil Judge has dismissed the petition filed by the petitioner under Order VI Rule 17 CPC seeking leave of the Court to amend the plaint.

Brief over view of the facts leading to *lis in* this Civil Revision Petition may be stated as follows:

The petitioner is the plaintiff in the above Suit in O.S.No.147 of 2012 on the file of the Senior Civil Judge, Sompeta, Srikakulam District. The respondents herein are the defendants in the said Suit.

Late Hanumanthu Purushotham was an employee of 3rd respondent-Agriculture Market Committee. He died in harness. During his life time, he has taken an L.I.C. policy. The 1st and 2nd respondents are his wife and son respectively. The petitioner herein is his mother. Late Purushotham has shown his wife and son, who are respondents 1 and 2 herein, as his nominees in the said L.I.C. policy and also in his service record. As the petitioner, who is his mother, is also a Class-I legal heir along with respondent Nos.1 and 2, she filed the Suit for recovery of her 1/3rd share along with respondent Nos.1 and 2 from the amount payable under the L.I.C. policy consequent to the death of the policyholder and also from the death benefits payable by the 3rd respondent-Agriculture Market Committee. In the said Suit she sought for recovery of her share from respondent Nos.3 to 9, who are the authorities of the Department, where late Hanumanthu Purushotham worked and the L.I.C. She did not claim any relief for recovery of the said amount from respondent Nos.1 and 2.

Therefore, she has filed the present petition under Order VI Rule 17 CPC seeking permission of the Court to amend the plaint to enable her to claim her share from respondent Nos.1 and 2 on the ground that she subsequently came to know that the amounts were already paid by respondent Nos.3 to 9 to respondent Nos.1 and 2.

The said petition was resisted by respondent Nos. 1 and 2 on the ground that respondent Nos. 1 and 2 have clearly pleaded in their written statement in the year 2013 itself

that they have received the entire amount payable by respondent Nos.3 to 9. So, the petitioner is aware of the fact that the amount is already paid to respondent Nos.1 and 2 in the year 2013 itself. She did not take any steps to amend the plaint to claim the relief against respondent Nos.1 and 2 at that time and now in the year 2018, with an inordinate delay, she has filed this petition when the evidence of the defendants' is almost coming to an end. So, there are several laches on the part of the petitioner in seeking the said relief of amendment to plaint.

After hearing both the parties, the learned Senior Civil Judge has dismissed the said petition by the impugned order.

Aggrieved thereby, the present Civil Revision Petition is preferred by the petitioner assailing the legality and validity of the impugned order.

Heard learned counsel for the petitioner; learned counsel for respondent Nos. 1 and 2 and learned counsel for respondent Nos.6 and 7. None appeared on behalf of respondent Nos.3 to 5 and 8. The petitioner has filed a memo dated 24.07.2019 stating that the 9th respondent is a proforma party and no relief is claimed against it.

As regards material facts of the *lis,* absolutely there is no controversy. Admittedly, respondent Nos.1 and 2 are the wife and the son of late Purushotham and the petitioner is the mother of late Purushotham. He was an employee of 3rd respondent-Agriculture Market Committee. He died in harness. He had taken an L.I.C. policy during his life time and he has shown respondent Nos. 1 and 2, who are his wife and son, as his nominees. Therefore, after his death, the amount payable under the L.I.C. policy was paid to respondent Nos. 1 and 2, who are shown as his nominees in the policy. His service benefits are also paid to respondent Nos.1 and 2, who are shown as his nominees in his Service Register. These facts are incontrovertible facts.

As the petitioner being the mother of late Purushotham, being a Class-I heir, it is her case that she is also entitled to 1/3rd share along with respondent Nos.1 and 2 in the service benefits of late Purushotham and also from the amount payable under the L.I.C. policy. As her share was not paid to her, she has filed the present Suit for recovery of her share from respondent Nos.3 to 8, who are the authorities of Agriculture Marketing Committee and the Life Insurance Corporation.

After the trial in the Suit commenced and when the evidence of defendants' is coming to an end, at that stage, the petitioner has filed the present petition under Order VI Rule 17 CPC seeking permission of the Court to amend the plaint to enable her to claim her 1 / 3rd share from respondent Nos. 1 and 2 on the ground that she subsequently came to know that the amounts were paid to them by the other respondents.

As already noticed supra, the said petition was vehemently opposed by the respondent Nos. 1 and 2 on the ground that they have clearly pleaded in the written statement which was filed long back in the year 2013 that they have received the L.I.C. amount

and also the death benefits of late Purushotham from his employer and the L.I.C. Therefore, the petitioner got sufficient knowledge regarding the said fact long back and she did not take any steps to amend the plaint immediately in the year 2013 and now in the year 2018 that she has filed this petition. Therefore, there are severe laches on her part and she is not diligent in seeking the amendment.

No doubt respondent Nos.1 and 2 have pleaded in their written statement, which was filed in the year 2013, that they have received the amounts. As rightly contended by the learned counsel for respondent Nos.1 and 2, the petitioner ought to have taken steps for amendment of the plaint in the year 2013 itself after knowing the said fact from the pleadings of the written statement. She did not pursue the said remedy at the earliest point of time. After the trial in the Suit commenced and when the evidence of defendants' is about to be closed, she has come up with this petition. Therefore, undoubtedly, there are laches on her part. The same cannot be denied as the same is borne out from the record. Proviso to Order VI Rule 17 CPC also imposes a bar stating that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, party could not have raised the matter before the commencement of trial.

However, despite the laches on the part of the petitioner and despite the bar imposed under the proviso to Order VI Rule 17 CPC, one fact that weighs with the Court in favour of the petitioner-plaintiff to consider her application under Order VI Rule 17 CPC for amending the plaint is that according to her, she being the mother of late Purushotham is entitled to 1/ 3rd share in his death benefits and also in the amount payable under the L.I.C. policy along with respondent Nos.1 and 2. It is settled proposition of law that the nominees of an employee shown in his Service Register and also in the L.I.C. policy are only entitled to receive the amount and they have to receive the said amount on behalf of all the share holders, who are legally entitled to a share in the said amount as heirs of the deceased. As respondent Nos. 1 and 2 are shown as nominees in the Service Register and L.I.C. policy, they have received the amount. So, *prima facie,* it is to be held that there is justification in the contention of the petitioner, being the mother of the deceased employee that she is also entitled to her 1 / 3rd share in the amount paid to respondent Nos.1 and 2. If, the present petition under Order VI Rule 17 CPC is dismissed on the ground of laches and on account of the embargo contained in the proviso under Order VI Rule 17 CPC, she will be left with no legal remedy to recover her 1/3rd share to which she is legally entitled, according to the case pleaded by her. There would be a legal bar on her to file another Suit against respondent Nos.1 and 2, as several technical and legal hurdles may come in her way to pursue the litigation. So, when the facts of the case show that she is *prima facie* entitled for recovery of her 1/3rd share from respondent Nos.1 and 2, this Court is of the considered view, that the petition under Order VI Rule 17 CPC, though belated cannot be rejected on technical grounds. Justice cannot be lost

in technicalities. If the petition is dismissed and if she is not allowed to claim the amount, gross injustice would be caused to her and she would be deprived of her legitimate share to which she is legally entitled. When technicalities and gross injustice that may be caused on account of the technical hurdles are pitted against each other, the Court should always lean in favour of rendering substantial justice to the parties to see that substantial rights are not defeated on technical grounds. That is the only fact which weighed in her favour before this Court to consider her petition despite laches on her part.

It is settled law that procedure is hand maiden of justice. Therefore, liberal interpretation is to be given to the proviso to Order VI Rule 17 CPC. While interpreting the bar engrafted under the proviso to Order VI Rule 17 CPC, it is to be seen that the substantive rights of the parties are not defeated by the said embargo created by procedural law. Interpretation should always be given to sub-serve the ends of justice. So, giving strict interpretation to the bar created by a procedural law would certainly result in travesty of justice. In fit cases, some allowance should always be shown. Discretion always vests with the Courts to exercise the same judiciously in appropriate and exceptional cases. This is one such exceptional case where the said discretion can be exercised in favour of the petitioner.

In fact, the very Order VI Rule 17 CPC which enables the parties to seek amendment of pleadings starts with the words “at any stage” which means it is wide enough to hold that the parties to the Suit can seek amendment of the pleadings even after commencement of trial of the case and even at the later stage also. However, its proviso restricts its application only to the stage before commencement of the trial of the case. Therefore, there appears to be conflict between enacting part of the Order and its proviso. So, it requires harmonious interpretation of the provision to reconcile the enacting part of the Order and its proviso. In the considered opinion of this Court the bar contained in the proviso to Order VI Rule 17 CPC which is procedural in nature cannot be held to be absolute. As observed supra, in appropriate cases where amendment is required for effective adjudication of the controversy involved in the Suit, the same can be ordered.

In the instant case, if ultimately the trial Court comes to conclusion that the petitioner is entitled to 1/3rd share in the said amount along with respondent Nos.1 and 2, there would be difficulty in passing a decree as the claim is made against respondent Nos.3 to 8 in the Suit. Since the death benefits are already paid to respondent Nos. 1 and 2, leave is to be granted to her to amend the prayer in the relief portion of the plaint to claim her share from respondent Nos. 1 and 2. This would avoid technical hurdles in recovery of the amount if ultimately the result in the Suit goes in her favour.

Therefore, the request of the petitioner to accord permission to her to amend the plaint to seek relief against respondents 1 and 2 cannot be rejected on the sole ground that she was not diligent in properly seeking the amendment at the early stage when the defendants 1 and 2 pleaded in their

written statement that they have received the amount from the other respondents and on the ground that there are laches on the part of the petitioner in seeking the amendment.

In the context, it is relevant to consider the two judgments of the Apex Court which throws light on the controversy involved in this revision petition which are apt to consider to drive home the point involved in this revision petition.

The three Judge bench of the Apex Court in the case of **Sajjan Kumar v. Ram Kishan** (2005) 13 SCC 89 held as follows:

> "It is true that the plaintiff-appellant ought to have been diligent in promptly seeking the amendment in the plaint at an early stage of the suit, more so when the error on the part of the plaintiff was pointed out by the defendant in the written statement itself. Still, we are of the opinion that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of execution in the event of the plaintiff-appellant succeeding in the suit."

In the above referred case also, when the proceedings of the Suit were at the final stage, the appellant moved an application for amendment of plaint. Yet, as the proposed amendment is required to bring to the fore the real question in controversy between the parties, despite the fact that there is a delay and that the amendment was sought at the final stage of the Suit, the Apex Court allowed the plaintiff to amend the plaint as the refusal to permit the amendment would create needless complications at the stage of execution in the event of the plaintiff succeeding in the Suit

Following the above referred three Judge bench judgment of the Apex Court, the Supreme Court in another case, in **Usha Devi v. Rijwan Ahmad** AIR 2008 SC 1147**,** also held that the plaintiff who sought correction of description of the suit property by way of amendment of plaint is not diligent as he did not seek amendment at the early stage though wrong description was pointedly brought up by the defendant not only in the written statement but also in course of proceedings, however, proposed amendment is necessary for the purpose of bringing to the fore the real question in controversy between the parties. Therefore, proposed amendment was allowed. It is further held that the merit of amendment is hardly a relevant consideration. It is open to the defendants to raise their objection in regard to the amended plaint by way of any corresponding amendments in their written statement.

Therefore, from the conspectus of law laid down in the aforesaid two judgments of the Apex Court and particularly in the light of the law laid down in the three Judge bench judgment of the Apex Court cited supra, the legal position is very clear that when the proposed amendment is necessary for bringing to the fore the real question in controversy between the parties, that the

amendment can be allowed, despite the fact that the plaintiff is not diligent in seeking the amendment and despite the bar contained in the proviso to Order VI Rule 17 CPC.

Although learned counsel for respondent Nos.1 and 2 contended that the matter was also settled by way of paying a substantial amount to the petitioner, respondents Nos.1 and 2 are at liberty to adduce evidence to that effect during the course of trial and it is a matter for the trial Court to decide in the final adjudication of the Suit. So, in view of the aforesaid discussion, in view of circumstances explained supra, this Court is inclined to allow the Civil Revision Petition and set aside the impugned order giving an opportunity to the petitioner to amend the plaint to claim for the relief against respondent Nos.1 and 2. However, respondent Nos.1 and 2 are to be adequately compensated on account of laches on the part of the petitioner. Therefore, the petition filed under Order VI Rule 17 CPC is allowed on payment of costs of Rs.5,000/- to respondent Nos. 1 and 2.

In the result, the Civil Revision Petition is allowed setting aside the impugned order dated 27.03.2019 passed in I.A.No.2 of 2018 in O.S.No.147 of 2012 on the file of the Senior Civil Judge, Sompeta, Srikakulam District, and the petition filed under Order VI Rule 17 CPC stands allowed on payment of costs of Rs.5,000/- to respondent Nos.1 and 2. The petitioner shall take steps to amend the plaint forthwith without any delay. She has to also rectify the technical defects of seeking consequential amendment as required under Rule 28 of the Civil Rules of Practice. While disposing of the main Suit, the trial Court shall decide the *lis* independently uninfluenced by the observations which are incidentally made in this Civil Revision Petition.

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

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2019(3) L.S.111 (A.P.) (D.B.)

IN THE HIGH COURT OF
ANDHRA PRADESH

Present:
The Hon'ble Mr.Justice
A.V.Sesha Sai &
The Hon'ble Mr.Justice
M. Venkata Ramana

Nallani Sambasiva Rao ...Appellant

Vs.

Smt. Nallami Varalakshmi & Anr., ...Respondents

HINDU ADOPTIONS AND MAINTENANCE ACT - Appellant and respondent No.1 are husband and wife respectively - First respondent-wife filed the O.P. before the Family Court, u/Secs.18 and 20 of the Hindu Adoptions and Maintenance Act - Whether the first respondent-wife can be non-suited under the provisions of Section 18 of the Act on the ground that she already availed remedy u/Sec.125 Cr.P.C.?

Held - Neither the provisions of

FCA.No.383/17 Date:27-6-2019

Sec.125 Cr.P.C. nor the provisions of Sec.18 of the Act prohibit the applicant from availing both the remedies under the above said provisions of law - Court below, having found the existence of the element of abandonment, granted maintenance in favour of the first respondent-wife - Therefore, it cannot be said, by any stretch of imagination, that the first respondent-wife failed to establish the necessary ingredients of sub-section (2) of Section 18 of the Act - This Court does not find any valid reason to interfere with the order impugned in the present appeal - Appeal stands dismissed, confirming the order under challenge, and the appellant-husband shall act strictly in accordance with the said order.

Mr.T.D.Phani Kumar, Advocate for the Appellant.
Mr.Mr.K.V.Muralidhar Patnaik, Advocate for respondent No.1.

J U D G M E N T

(per the Hon'ble Mr.Justice A.V.Sesha Sai)

1. Heard Sri T.D.Phani Kumar, learned counsel for the appellant, and Sri K.V.Muralidhar Patnaik, learned counsel for respondent No.1.

2. The appellant and respondent No.1 are husband and wife respectively. In the present appeal, challenge is to the order dated 22.08.2017 passed by the learned Judge, Additional Family Court, Visakhapatnam, in F.C.O.P.No.1285 of 2013. The first respondent-wife filed the said Original Petition before the Family Court, under Sections 18 and 20 of the Hindu Adoptions and Maintenance Act, 1956 (for short, 'the Act[7]), for the following reliefs:-

> "a) to direct the 1st respondent to pay a sum of Rs.5,40,000/- (Rupees five lakhs and forty thousand only) towards past maintenance from 1-12-2010 to 1-12-2013 to the petitioner?
>
> b) future maintenance @ Rs.15,000/- per month;
>
> c) costs of the petition;
>
> d) such other reliefs for which the Honourable court deems fit and proper, in the interests of justice."

The learned Judge partly allowed the said petition by granting maintenance at the rate of Rs.5,000/- per month, including the maintenance awarded earlier, from the date of filing of the petition i.e., 23.12.2013, and directed the appellant-husband to pay the maintenance amount along with arrears in ten (10) equal monthly instalments. The learned Judge, however, dismissed the claim of the first respondent-wife for past maintenance.3. The principal contention advanced by Sri T.D.Phani Kumar, learned counsel for the appellant-husband, is that when there is an order granting maintenance under Section 125 Cr.P.C. by a competent Court, an application under Section 18 of the Act cannot be maintained by the first respondent-wife. While referring to Section 18 of the Act, it is also vehemently contended by the leaned counsel for the appellant that unless the mandatory

requirements of sub-section (2) of Section 18 of the Act are established, the applicant under the said provision of law is not entitled for the relief. In this regard, learned counsel for the appellant relied upon the judgment of the High Court of Chhattisgarh in **Geeta Soni v/s. Omprakash Soni**[1]**.**

4. On the other hand, it is contended by the learned counsel for the first respondent-wife that there is no provision either under Section 18 of the Act or under Section 125 Cr.P.C., which disentitles the wife to avail the remedies under both the provisions of law as mentioned above. It is also the submission of the learned counsel for the first respondent-wife that having categorically found the existence of the element of abandonment, the Court below granted maintenance.

5. In the above background, now the issues that emerge for consideration of this Court are as follows:

1) Whether the first respondent-wife can be non-suited under the provisions of Section 18 of the Act on the ground that she already availed remedy under Section 125 Cr.P.C.?2) Whether the first respondent-wife established the necessary ingredients of sub-section (2) of Section 18 of the Hindu Adoptions and Maintenance Act?

6. With regard to issue No.1, it is to be noted that neither the provisions of Section 125 Cr.P.C. nor the provisions of Section 18 of the Act prohibit the applicant from availing both the remedies under the above said provisions of law. Therefore, the contention advanced by the learned counsel for the appellant-husband to the contrary is liable to be rejected and is accordingly rejected.

7. Coming to issue No.2 - it would be appropriate and apposite to refer to the provisions of Section 18 of the Act, which read as under:

> "18. Maintenance of wife:- (1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.
>
> (2)A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,-
>
> (a)if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish or of wilfully neglecting her;
>
> (b)if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;
>
> (c)if he is suffering from a virulent form of leprosy;
>
> (d)if he has any other wife living;
>
> (e)if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;
>
> (f)if he has ceased to be a Hindu

by conversion to anotherreligion;

(g) if there is any other cause justifying her living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or cases to be a Hindu by conversion to another religion."

It is required to be noted that the Court below, having found the existence of the element of abandonment, granted maintenance in favour of the first respondent-wife. Therefore, it cannot be said, by any stretch of imagination, that the first respondent-wife failed to establish the necessary ingredients of sub-section (2) of Section 18 of the Act. Thus, having regard to the facts and circumstances of the case on hand, the judgment of the High Court of Chhattisgarh in **Geeta Soni** (1 supra), relied upon by the learned counsel for the appellant, would not render any assistance to the appellant.

8. It is also significant to note that the learned Judge granted maintenance at the rate of Rs.5,000/- per month, by including the amount of maintenance already granted by the learned Magistrate under Section 125 Cr.P.C, and also declined to grant past maintenance. Therefore, this Court does not find any valid reason to interfere with the order impugned in the present appeal.

9. Accordingly, the appeal is dismissed, confirming the order under challenge, and the appellant-husband shall act strictly in accordance with the said order. No order as to costs.

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

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2019(3) L.S. 114 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

Present:
The Hon'ble Smt.Justice Kongara Vijaya Lakshmi

Muralidhar ..Petitioner

Vs.

State of AP & Ors., ..Respondents

A.P. RIGHTS IN LAND AND PATTADAR PASSBOOKS ACT, 1971, Sec. 9 - Writ petition filed to declare the action of the 3rd respondent in issuing urgent notice to appear with all records to conduct an enquiry on the appeal filed by the 5th respondent for cancellation of pattadar pass books and title deeds in respect of the land, as arbitrary and illegal.

Held - If a person is aggrieved against the issuance of pattadar passbooks and title deeds, he can file a revision u/Secs.9 of the Act - Impugned notice issued by the Revenue Divisional Officer is set aside - 5th respondent is given liberty to file a revision before the Collector, within a period of four weeks from the date of receipt of a copy of this order, and the

WP.68/2019 Date:5-9-2019

Collector is directed dispose of the revision filed by the 5th respondent within a period of four weeks from the date of filing of the revision, after giving notice to the petitioner -The parties are directed to maintain status quo in all respects till an interim order or final order is passed u/Sec.9 of the A.P. Rights in Land and Pattadar Passbooks Act - Writ petition is allowed accordingly.

Mr.S.D.Gowd, Advocate for the Petitioner.
GP for Revenue AP, Advocate for the Respondent.

O R D E R

Heard the learned counsel for the petitioner, learned Government Pleader for Revenue appearing for Respondents 1 to 4 and Sri K.V.Raghuveer, learned counsel appearing for the 5th respondent. With their consent, this writ petition is being disposed of at the stage of admission.

This writ petition is filed to 'declare the action of the 3rd respondent in issuing urgent notice vide Rc.E.3997/2018 dt: 10-12-2018 to appear with all records to conduct an enquiry on the appeal filed by the 5th respondent for cancellation of pattadar pass books and title deeds in respect of the land in Sy.No.364/A an extent of Ac.1.58 cents and an extent of Ac.0.12 cents in Sy.No.364/H of Holagonda village & Mandal, Kurnool District, as arbitrary and illegal'.

Case of the petitioner is that, he succeeded the subject land from his father and that his name was also mutated in the revenue records i.e., Adangal and 1-B Register; the fifth respondent without any rights whatsoever over the said property is interfering with the possession of the petitioner and also filed an appeal before the third respondent seeking cancellation of the pattadar passbooks and title deeds issued in favour of the petitioner; the petitioner filed suit in OS No.52 of 2018 on the file of the learned Senior Civil Judge, Adoni seeking permanent injunction and temporary injunction was granted in the said suit; the contention of the petitioner is that the third respondent does not have any jurisdiction to entertain the appeal filed by the fifth respondent and the impugned notice is issued to appear before him with records for enquiry. Hence, the writ petition.

When the matter came up for admission, interim stay was granted for a period of six weeks and it has been extended from time to time. As seen from the record, the petitioner's name was mutated in the revenue records i.e., Adangal and 1-B Register and he was also issued pattadar passbooks and title deeds. While things stood thus, the fifth respondent filed an appeal before the sixth respondent-Revenue Divisional Officer seeking cancellation of the pattadar passbooks and title deeds which were issued in favour of the petitioner for the subject land. Pursuant to the said appeal, the Revenue Divisional Officer issued notice dated 10.12.2018 directing the petitioner to attend for enquiry.

Section 6-A of the A.P. Rights in Land and Pattadar Passbooks Act, 1971 (for short 'the Act') deals with the application to be filed for title deed cum pattadar pass book to the Tahsildar. According to the said Section, on making such an application,

the Mandal Revenue Officer shall cause an enquiry and issue title deed and passbook in accordance with the Record of Rights. According to sub-section (3) of Section 6-A of the Act, the entries in the title deed and pattadar passbook to be corrected on an application made to the Mandal Revenue Officer in the manner prescribed.

Section 5 of the Act deals with amendment and updating of Record of Rights. According to the said action, on receipt of the intimation of the fact of acquisition of any right referred to in Section 4, the Mandal Revenue Officer shall determine as to whether, and if so in what manner, the record of rights may be amended in consequence therefor and shall carryout the amendment in the record of rights in accordance with such determination. According to sub-section (5) of Section 5 of the Act, against every order of the Mandal Revenue Officer, either making an amendment in the record of rights or refusing to make such an amendment, an appeal shall lie to the Revenue Divisional Officer, within a period of sixty days from the date of communication of the said order and the decision of the appellate authority thereon shall subject to the provisions of Section 9, be final. Hence, an appeal is provided to the Revenue Divisional Officer against the order of the Mandal Revenue Officer either making an amendment in the record of rights or refusing to make such an amendment, but no appeal is provided to the Revenue Divisional Officer against the issuance of title deeds and Pattadar Passbooks under Section 6-A of the Act. Pattadar Passbooks and title deeds issued under Section 6-A of the Act does not have any independent standing, but it is a reflection of entry maintained under I-B Register by the Recording Authority or the Revenue Divisional officer, as the case may be, therefore, an irregularity or illegality in issuing pattadar passbooks and title deeds could be examined in revision under Section 9 of the Act.

A Division Bench of this Court in 'Ratnamma vs. Revenue Divisional Officer, Dharmavaram 2015(6) ALD 609 held that the appeal under Section 5(5) of the Act before the Revenue Divisional Officer is not maintainable against mere issuance of pattadar pass book and title deeds under Section 6-A of the Act. In paras 24 and 25, the Division Bench of this Court held as follows:

> "Sections 5-B and 6-A are introduced through Amendment Act 9 of 1994. Through the amendment, remedy of appeal against regularization order under Section 5-A of the Act and provision for issuance of PPB/TD under Section 6-A of the Act is enacted. Sub- section (3) of Section 6-A provides for correction of entries in the PPB/TD by the Mandal Revenue Officer either suo motu or on an application. As already noticed, the record- of- rights is prepared under Section 3 of the Act, updated/ maintained under Sections 4, 5 and also as a consequence of regularization under Section 5-A of the Act. Issuance of PPB is covered by Section 6-A of the Act. The PPB is nothing but a copy or reflection of entries in the record of rights prepared or maintained at one or the other stages under the Act as stated above. The PPB/TD is maintained

and issued in Form No.14-C of the Rules. PPB/TD contains the entries as borne out by 1-B Register. With the issue of pass book to any person whose name in the applicable column is recorded in record of rights, it cannot be said such issuance adversely affects any person. A person is certainly aggrieved by illegal preparation of record of rights and against such illegal preparation the remedy is provided under Section 3(3) of the Act. Likewise, against illegal or erroneous updation of record of rights under Sections 4 and 5 or regularization under Section 5-A of the Act, the remedy of appeal under Section 5(5) or Section 5-B respectively is available to an aggrieved party. On the other hand, Section 6- A(3) provides for correction of erroneous entries in PPB/TD issued by the Mandal Revenue Officer. The reason for not providing any appeal against the issuance of PPB/ TD is manifest from the Scheme of the Act viz., that the issuance of TD/ PPB does not by itself adversely affect the substantive right of a person, who claims or has a right in the property for which PPB is issued. In other words, the issuance of PPB/TD is a consequential act and entries in PPB/TD are mere reflection of entries of 1 -B Register. Mere filing of appeal against issuance of pattadar pass book which is only a copy of 1 -B register is not an efficacious remedy under the scheme of the Act.

According to the above judgment, an appeal is provided against the original proceedings or substantive right of a person under Sections 4, 5 and 5-A of the Act, but no appeal is provided against mere issuance of pattadar passbooks and title deeds under Section 6-A of the Act.

Learned counsel for the 5th respondent submits that in view of the law laid down by this Curt, liberty may be given to the 5th respondent, to file a revision before the Collector under Section 9 of the Act.This Court in 'Kuruva Hanumanthamma vs. State of A.P., rep. by its Principal Secretary, Revenue Department & others CDJ 2017 APHC 649 in WP No. 10122 of 2016 held that, 'if a person is aggrieved against the issuance of pattadar passbooks and title deeds, he can file a revision under Section 9 of the Act'. Relying on Ratnamma's case (supra), this Court further held as follows:

> "The Collector is given power of entertaining revision either suo motu or on an application filed by an aggrieved party. The Collector in a pending revision is entitled to call for and examine the record of order under revision viz. from (a) recording authority, Mandal Revenue Officer or Revenue Divisional Officer under Sections 3, 5, 5A or 5B in respect of any record of right prepared or maintained to satisfy himself as to the regularity, correctness, legality or propriety of any decision taken, order passed or proceedings made in respect thereof. (b) The Collector has jurisdiction to modify, annul,

> reverse or remit for reconsideration of a decision, order or proceedings made in respect of record of rights. From plain construction of Section 9, this Court is of the view that the revisional jurisdiction of Collector embraces different situations warranting interference by him and thus ensures maintenance, preparation or continuation of record of rights on the touch stone of the entries being regular, correct, legal or propriety."

"Having regard to the scope of Section 9 of the Act, a person, if aggrieved against an entry made or maintained in record of rights or continued to be maintained by recording authority can file revision under Section 9 of the Act. Likewise on the same analogy the aggrieved person can file revision against the issuance of PPP/TD. The Collector is obliged by the revisional jurisdiction he enjoys to examine all the aspects namely regularity, correctness, legality or propriety in the issue of PPP/ TD and pass orders on the entries in record of rights and also on the legality or otherwise of PPP/TD against which revision is made before him. This Court is of the view that by adopting the above interpretation to Section 9 and Section 6- A of the Act before a litigant is compelled to work out the remedies under Section 8 of the Act, can avail the remedy within the framework of the Act by filing revision and obtain orders in this behalf. The point is answered by holding that in cases where the PPP/TD is issued either in breach of sub-section (2) of Section 6-A of the Act or otherwise particularly without an order or proceeding under Section 5 of the Act, an aggrieved party is not without remedy and legal wrong can be canvassed by fling revision under Section 9 of the Act. The remedy available under Section 8 of the Act is always independent and a party if advised, whether before filing the revision or after awaiting the outcome of revision, can work out the remedy of establishing title etc before the competent civil Court. The other remedies referred in Ratnamma case are to be understood as held in this order."

In view of the law laid by this Court in the above cases and in view the facts and circumstances of the case, the impugned notice issued by the Revenue Divisional Officer is set aside. In view of the submission of the learned counsel for the 5th respondent, the 5th respondent is given liberty to file a revision before the Collector, by enclosing a copy of this order, within a period of four weeks from the date of receipt of a copy of this order, and the Collector is directed dispose of the revision filed by the 5th respondent herein (as permitted by this Court), within a period of four weeks from the date of filing of the revision, after giving notice to the petitioner, strictly, in accordance with law. The parties are directed to maintain *status quo* in all respects till an interim order or final order is passed under Section 9 of the A.P. Rights in Land and Pattadar Passbooks Act, 1971.

The writ petition is allowed accordingly. No order as to costs. Miscellaneous petitions, if any, pending in the writ petition shall stand closed.

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2019(3) L.S. 119 (A.P.)

IN THE HIGH COURT OF
ANDHRA PRADESH

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

M/s.Sudalagunta Sugars Ltd., ..Petitioner
Vs.
Transmission Corpn., of
A.P., ..Respondent

WRIT PETITION is filed by the petitioner to issue a writ in the nature of a Writ of Mandamus or any other appropriate writ, Direction order or orders declaring the action of the respondents in refusing to renew the power purchase and wheeling agreement, entered between the 1st respondent AP TRANSCO and the petitioner as wholly arbitrary.

Held - Writ Court cannot enter into this area of controversy and grant a relief of specific performance - This is a matter which is solely within the jurisdiction by the Civil Court - Extension of the agreement is not mandatory or automatic in the circumstances and is solely dependent upon the consent and the concurrence of both parties -This Court cannot grant the order as prayed for since the relief is claimed for extension/renewal of the agreement - Petitioner is not entitled to a direction as prayed for - Writ petition stands dismissed.

W.P.No.7700/2019 Date: 22-8-2019

Mr.M.P. Chandramouli, Advocate for the Petitioner.

Mr.N. Shiva Reddy, Advocate for the Respondent.

O R D E R

This Writ Petition, under Article 226 of the Constitution of

India, is filed by the petitioner for the following relief:

> ".. to issue a writ in the nature of a Writ of Mandamus or any other appropriate writ, Direction order or orders declaring the action of the respondents in refusing to renew the power purchase and wheeling agreement, dated 29.01.2000 entered between the 1st respondent AP TRANSCO and the petitioner as communicated in the Lr.No.CGM/ Projects & IPC/APSPDCL/F, Sudalagunta/ D.No.44/2019, dated r respondents 4 to 7.

A counter-affidavit has also been filed on behalf of the contesting respondents. Facts in brief: **-**

The submissions of the learned counsel for the petitioner are that the petitioner is a Company that has been incorporated in the year, 1994 under the Companies Act. It established a Sugar Factory along with captive power generation plant of 3 MW. The petitioner company entered into an agreement with the erstwhile APSEB on 04.03.1998 called power purchase and wheeling agreement. As per this agreement, the power produced by the petitioner company could be consumed; be sold to

third party consumers; it could also be banked with the APSEB, etc. Later, after the advent of the Electricity Reforms Act, 1998, a fresh agreement was entered into with

APTRANSCO on 29.01.2000. This agreement was also agreed by all the statutory authorities. Learned counsel submits that from the year 2000 onwards, the agreement was in-operation. He draws the attention of this Court to Article 9 of the said agreement which is as follows:-

Article 9: Duration of agreement:

“This Agreement shall be effective upon its execution and delivery thereof between parties hereto and shall continue in force from the schedule date of completion and until the twentieth (20 th) anniversary that is for a period of twenty years from the Scheduled Date of Completion, and this Agreement may be renewed for such further period of time and on such terms and conditions as may be mutually agreed upon by the parties, 90 days prior to the expiry of the said period of twenty years”.

Learned counsel submits that basing on the said article the petitioner company exercised its option for a renewal by addressing an appropriate letter, dated 30.01.2019, which, however, was rejected by the 4th respondent by their letter, dated 06.06.2019. In view of the said rejection, the present writ petition came to be filed. Submissions:

The submission of the petitioner is that the petitioner has established an industry at a great cost and that the industry is generating power. It is his contention that the rejection of the request by the 4th respondent by their letter, dated 06.06.2019 is incorrect. He states that any subsequent modification or change in the law will not apply, because, the petitioner has entered into an agreement based on the initial representations and the promises made by the APSEB. He submits that the petitioner is a “co- generator” of power and is not an open access generator of power. He submits that this is clearly spelt out in para-4 of the writ affidavit itself wherein he clearly stated that as a co-generator of power the petitioner is entitled to sell the power to scheduled customers and that the surplus energy can be purchased by the said Electricity Board. In addition, the policy which is referred to in the said paragraph also provides for banking of the unallocated power. He points out that the agreement has to be renewed periodically and it does not contain stipulation limiting it to a fixed period of time. He submits that Article 9 provides for the extension. Therefore, learned counsel submits that as they have established generating facility at a great cost, the agreement should be renewed, as prayed for. as otherwise, he submits that the entire industry will be lost and that the damages and losses would in crores of rupees. Learned counsel for the petitioner relies upon the Hon’ble Supreme Court of India judgment in State of UP and others Vs. Lalji Tandon (Dead) through LRs 2004) 1 Supreme Court Cases and argues when there is a clause for renewal of a lease, the same can be extended by an unilateral act of the lessee and the consent of the lessor is not really necessary. Relying on this judgment learned counsel argued that as the petitioner has exercised its option

for renewal the consent of the 4th respondent is not really necessary and that, therefore, the respondents are bound to extend the lease on the same terms and conditions for another period of 20 years.

In reply to this, learned Standing counsel appearing for the respondents submits that Article 9 states that the agreement “may” be renewed for further period and that, therefore, it is not incumbent upon the respondents to renew the agreement for further period of 20 years. Learned Standing Counsel submits that the extension is at the absolute discretion of the respondents. He points out that this agreement was in force for 20 and odd years and that, therefore, today the petitioner cannot seek the relief on a different interpretations at the same Article.

Learned Standing Counsel also submits that the petitioner is not a co-generator of power. He submits that the power that is generated is consumed by the petitioner’s company and then the same is only sold in the un season to the Distribution Companies. Apart from that the learned Standing Counsel also submits that there is a dispute between the parties about the extension of the agreement. Therefore, without prejudice to any of his contention, he submits that as per Section 86(1)(f) of the Electricity Act, 2003, all disputes are to be adjudicated by the A.P. Electricity Regulatory Commission. Hence, he contends that there is an effective alternative remedy which precludes this Court from granting any relief.

Learned Standing Counsel also submits that assuming for the sake of arguments that the petitioner sustains any loss, the remedy of the petitioner lies elsewhere and the remedy of the writ cannot be invoked.

In reply to this, leaned counsel for the petitioner points out that a learned single judge of this Court in ANDHRA PRADESH STATE ROAD TRANSPORT CORPORATION, HYDERABAD REP. BY ITS EXECUTIVE DIRECTOR (E & IT) AND OTHERS V. CENTRAL POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH LTD., REPTD., BY ITS MANAGING DIRECTOR, HYDERABAD AND OTHERS[1] 2008 (5) ALT 87 has clearly held that the writ is also maintainable in the similar circumstances. He points out that the Power Distribution Company of Andhra Pradesh is a party to this judgment and that a learned single judge of this Court held that a writ not being entertained due to the existence of an effective alternative remedy is a self-imposed restriction imposed upon themselves by the High Courts. He points out that the learned single judge held that the availability of an alternative remedy is not an absolute bar to entertain a writ petition. Therefore, the learned counsel for the petitioner submits that in view of this clear and categorical pronouncement by the learned single judge of this Court, the submission of the learned Standing Counsel appearing for the respondents about the existence of the alternative remedy is not a bar for the writ being entertained.

Points for determination:-

The crux of the matter in this case is the prayer of the petitioner. The petitioner wants a writ of Mandamus for renewal of the agreement, dated 29.01.2000 and a direction to the respondents to renew the said

agreement for a period of 20 years with the same terms and conditions. In effect the petitioner is seeking specific performance of the Article of the agreement. The question that, therefore, arises that;

(a)Whether writ is maintainable to seek this relief?

(b)Whether in view of the terms and conditions agreed upon such a prayer can be granted?

Findings:-

a) The law on the subject is very clear that the Writ Court cannot enter into this area of controversy and grant a relief of specific performance. This is a matter which is solely within the jurisdiction by the Civil Court. The case law on this subject is well settled. Rishi Kiran Logistics Vs. Kandla Port Ltd., 2008 (5) ALT 87

is relied upon, as it is a case on the point.

b) In addition, apart from the legal bar, this Court notices that

the Article 9 is to the following effect:

"This Agreement shall be effective upon its execution and delivery thereof between parties hereto and shall continue in force from the schedule date of completion and until the twentieth (20 th) anniversary that is for a period of twenty years from the Scheduled Date of Completion, and this Agreement may be renewed for such further period of time and on such terms and conditions as may be mutually agreed upon by the parties, 90 days prior to the expiry of the said period of twenty years".

(Emphasis supplied).

Therefore, the renewal that is sought is solely and completely depending upon the agreement of the parties. The Article clearly states that the agreement "may" be renewed for "such further period" and on "such terms and conditions" "as may be mutually agreed". Therefore, from a primary reading of the contract or its plain language interpretation, it is clear that;

(a)Renewal is not automatic;

(b)The period of time/extension has to be agreed;

(c)The terms and conditions have also to be agreed.

As rightly pointed out by the learned Standing Counsel for respondents, that the extension of the agreement is thus not mandatory or automatic in the circumstances and is solely dependent upon the consent and the concurrence of both parties. This Article is clearly distinguishable from the clause considered by the Hon'ble Supreme Court of India in Lalji Tandon's case (1 *supra).* In the clause before the Hon'ble Supreme Court of India it was agreed that the lease would be renewed for further period of 50 years subject to the same conditions and provisions. Thus, the present clause is clearly distinguishable. In this case the consent of both parties is essential; they have to agree upon (a) the period, (b) the terms and

(c) the need for a renewal. Such clauses are clearly uncertain and to

that extent they are void for uncertainty

under Section 29 of the Indian Contract Act. Neither period nor the terms and conditions nor the agreement can be spelt out from the said clause. This is not,therefore, a clause which can be directed to be enforced. The Hon'ble Supreme Court of India in Shanti Prasad Devi Vs. Shankar 2005 5 Supreme Court Cases 543 heldthat a clause where the future rent is to be fixed by "agreement" cannot be enforced by the Court. The Hon'ble Supreme Court held that such rent can be fixed only by an agreement. This Court also derives support for this conclusion from two**other cases reported in** Hitkarini Sabha Vs. Corporation of the City AIR 1961 Madhya Pradesh 324 and M. Suryaprakasha Gupta Vs. T.S.Muthuswami Iyer [3] 1988 (2) Law Weekly 462. In Hitkarini Sabha's case (5 supra) the clause (h) was as follows:

> "(h) The lessee shall, on expiry of the period of this lease, be entitled to have the same renewed on such terms and conditions as may be agreed to between the parties." This was held to be a clause that is bad under Section 29 of the

Contract Act. A clause of this nature cannot, therefore, be enforced.

If the term in the contract said that the agreement can be renewed on the same terms and conditions, such a clause can be enforced; similarly clauses which state that the agreement can be extend onthe same terms, etc., subject to enhancement of rent by 10% etc., can also be enforced. But, whether the agreement is subject to the decision of the owner/lessor and the owner's/lessors consent is required for the period of lease, for the rent and for other conditions, this Court is of the opinion that such a clause is void for uncertainty. Hence, this Court is of the opinion that the pe titioner cannot seek enforcement of this clause.

Apart from the above legal findings, this Court also notices that the prayer that is sought is contrary to the clause of the agreement itself. As mentioned earlier, the Article 9 clearly states that the agreement should be on such terms and conditions as may be decided upon by the parties. This Court cannot grant the order as prayed for since the relief is claimed for extension/ renewal of the agreement for a period of 20 years on the same terms and conditions. This prayer is totally contrary to the Article 9.

For all these reasons, this Court holds that the petitioner is not entitled to a direction as prayed for. Consequently, the writ petition is dismissed. If the petitioner sustains any loss, it is open for him to seek his remedy elsewhere. No order as to costs.

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

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2019(3) L.S. 124 (A.P.) (D.B.)

IN THE HIGH COURT OF ANDHRA PRADESH

Present:
The Hon'ble Mr. Acting Chief Justice C. Praveen Kumar &
The Hon'ble Mr. Justice M.Satyanarayana Murthy

Sugali Dungavath Lakshmma Naik @ Anda & Ors., ..Appellant
Vs.
State of A.P. ..Respondent

INDIAN PENAL CODE, Secs. 302 r/w Sec.34 - Appeal aggrieved by the conviction and sentence imposed by Sessions Court - Whether the circumstances relied upon by the prosecution do form a chain of events connecting the accused with the crime.

Held - Prosecution in this case has entirely failed to prove any of the circumstances set up against the accused, and it has not established the chain of circumstances, so as to bring out a nexus between the crime and the accused, beyond all reasonable doubt - Appellants are acquitted for the offences under Section 302 r/w 34 IPC - Criminal Appeal stands allowed, setting aside the conviction and sentence imposed by Sessions Court.

Mr.Maheswara Rao Kuncheam, Advocate for the Appellants.
The Addl. Public Prosecutor, Advocate for Resoondent.

Crl.A.No.1281/12 Date:6-6-2019

J U D G M E N T

(per the Hon'ble Mr.Acting Chief Justice C.Praveen Kumar)

1. Accused Nos.1 to 4 in Sessions Case No.334 of 2012 filed this appeal aggrieved by the conviction and sentence imposed by the I Additional Sessions Judge, Anantapur.

2. The accused were tried in the above Sessions Case for the offence punishable under Sections 302 read with 34 IPC for causing death of one Boya Gudisi Ramanna alias Ramu on 17.10.2011 at about 10.30 p.m., while he was sleeping on an iron cot. Vide judgment dated 21.11.2012, the learned I Additional Sessions Judge, Anantapur convicted and sentenced accused Nos. 1 to 4 to undergo imprisonment for life and also to pay a fine of Rs.5,000/- each, in default to undergo simple imprisonment for six months.

3. The facts as culled out from the evidence of the prosecution witnesses are as under:

(i) P.W.1 is the mother of the deceased while P.W.2 is the husband of P.W.1. P.W.3 is the son of P.Ws. 1 and 2 and brother of the deceased. P.W.4 is the brother of P.W.2 while P.W.5 is distantly related to P.Ws.1 to 4. P.W.6 is the daughter-in-law of P.Ws.1 and 2 and wife of the deceased. All of them and other related witnesses are the residents of Rayalappadoddi, Bramhasamudram Mandal. The accused are also residents of the same village and

are known to the family of the deceased.

(ii) It is stated that on 17.10.2011 at about 7.30 p.m., when P.W.1 and her daughter-in-law were in the house, A1 came there at about 7 or 7.30 p.m., and enquired about the deceased. P.W.1 informed him that the deceased had gone to the village. At about 8 p.m., while the deceased was having meals, A1 again came to their house and enquired about the deceased. P.W.1 informed that he was taking meals. A1 waited for the deceased, and after completion of the meals, A1 asked the deceased to follow him to go to the fields and from there for hunting. Then, the deceased started his motor bike to go to the fields. A1 informed him that there was no need to take motor bike and that they will go by foot. The deceased went along with A1 towards the fields by walk. He did not return home. As such P.W. 1 started making enquiries. On the next day, in the early hours, P.W.8-Mallikarjun informed P.W.4 about seeing the accused and the deceased in the fields at about 10 p.m. on 17.10.2011 and the same was informed to P.W.1. Thereafter, P.W.1 and P.W.4 went to the fields and found the dead body of the deceased on a country cot in the fields and found the head of the deceased cut off from the body.

(iii) It is stated that at the time of incident, chilli and tomato crop was being grown in the fields and every day, the deceased used to attend the agricultural operations in the fields. At times, he used to go in the night also for watering the crop. It is further stated that after seeing the dead body of the deceased, P.W. 1 went to the police station and lodged a report with P.W.18-Sub Inspector of Police, Bramhasamudram police station, which was registered as a case in Crime No.55 of 2011 under Sections 302 r/w 34 IPC. Ex.P.10 is the FIR. Further investigation in the matter was taken up by P.W.19-Inspector of Police, who instructed the Sub Inspector of police to proceed to the scene of offence along with the copy of FIR. At about 9 p.m., P.W.19 proceeded to the scene of offence and noticed the dead body of the deceased lying on an iron cot with the head completely cut off, but it was hanging with the support of skin. On seeing the dead body, he requested the Superintendent of Police to send clues team and dog squad. He conducted inquest over the dead body of the deceased from 10 a.m., to 12.30 p.m. in the presence of P.W.16 Thippeswamy and other elders. Ex.P.9 is the inquest report. During the inquest, P.W.19 examined P.Ws.1 to 8 and recorded their statements and also noted the injuries found on the dead body. He also seized blood stained woolen bed sheet, pair of chappals, one stick and one plastic bag. M.O.9 is the stick and M.O.10 is the plastic bag. He also collected blood stained earth and controlled earth at the scene of offence, which are marked as M.Os.11 and 12. He also prepared rough sketch of scene of offence. After completing the inquest, he sent the dead body for post-mortem examination. P.W.15 conducted post mortem examination and issued Ex.P.8 post mortem certificate. He found five external

injuries and opined that the death is caused due to acute severe hemorrhage due to major vessels injury, which was caused by a hard sharp object. At about 12.30 hours, dog squad arrived at the scene of offence and they were pressed into service. The dog after roaming at the scene of offence went to the house of A1 and also went to the bathroom of A1 and sat there. But A1 was not there on that day. P.W.19 examined P.Ws.9 to 13 and recorded their statements under Section 161 Cr.P.C., which are marked as Exs.P.2 to P4. On 28.10.2011 at about 2 p.m., he received telephonic information about the movements of the accused and then, he along with Sub-Inspector of Police proceeded to Thimmappakonda and arrested A1 to A4. It is alleged that basing on the confession made by the accused, M.O.8-sickle and M.O.13-blood stained shirt were recovered. Later, the accused were produced before the Court for judicial remand. After collecting all the material papers, a charge sheet came to be filed, which was taken on file as P.R.C.No.41 of 2012 by the Judicial Magistrate of First Class, Kalyandurg.

4. On appearance of the accused, copies of material documents came to be furnished to them under Section 207 Cr.P.C. Since the offence is exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions, Anantapur. The learned Sessions Judge made over the case to the learned I Additional Sessions Judge, Anantapur for trial, who framed a charge for an offence punishable under Section 302 r/w 34 IPC, against the accused, read over and explained to them for which, they pleaded not guilty and claimed to be tried.

5. During the course of trial, the prosecution examined P.Ws.1 to 19 and got Exs.P1 to P12 and M.Os.1 to 13 marked on its behalf. After closure of prosecution evidence, the accused were examined under Section 313 Cr.P.C. in respect of the incriminating material appearing against them in the evidence of prosecution witnesses, to which they denied. The accused did not adduce any oral evidence on their behalf but got Exs.D1 to D6 marked on their behalf.6. Basing on the circumstances relied upon by the prosecution viz., (i) motive for commission of the offence (ii) the deceased being last seen in the company of the accused; (iii) dog squad leading the police to the house of the accused and (iv) recovery of sickle and blood stained shirt; the trial Court convicted the accused as stated supra. Challenging the same, the present appeal came to be filed.

7. Learned Counsel for the appellants would submit that there are no eye witnesses to the incident and the entire case of the prosecution rests upon the circumstantial evidence. According to him, the circumstances relied upon by the prosecution are not proved and even if they are proved, they are not sufficient to base a conviction. Further, the circumstances relied by the prosecution do not form a complete chain of events connecting the accused with the crime. He would mainly

contend that the last seen theory put forth by the prosecution is not trustworthy as there are number of contradictions in the evidence of P.Ws.8, 11 and 12. He would further contend that the prosecution witnesses themselves stated that the accused and the deceased are friends and in the absence of any enmity between the accused and the deceased, no adverse inference can be drawn against the accused. He would also contend that the trial Court has not appreciated the evidence in a proper perspective. Hence pleads that the conviction and sentence imposed by the trial Court on the accused, are liable to be set aside.

8. The learned Additional Public Prosecutor would contend that the evidence of P.W.1 coupled with the fact that the accused and deceased were last seen by P.Ws.8, 11 and 12 is sufficient to base a conviction. He would further contend that though the case is based on circumstantial evidence, but the circumstances i.e., last seen theory and recovery of M.O.8 sickle and blood stained shirt of A1, taken cumulatively, do form a chain of events to conclude that the crime was committed by the accused and none else. Hence, pleads that the conviction and sentence imposed by the trial Court do not warrant any interference.

9. Now, the point that arises for consideration is whether the circumstances relied upon by the prosecution do form a chain of events connecting the accused with the crime.

10. It is not in dispute that there are no eye witnesses to the incident. In the present case the prosecution relied on certain circumstances to bring home the guilt of the accused. When the case of the prosecution rests upon circumstantial evidence, the circumstances should be conclusively proved. The circumstances so proved should not be compatible with any hypothesis except with the guilt of the accused. Law is well settled with regard to circumstantial evidence. In ***Padala Veera*** Reddy Vs State of Andhra Pradesh and others [1] AIR 1990 SC 79***,*** the Hon'ble Apex Court observed as under:

> "...this Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:
>
> (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

In case Dr. Sunil Clifford Daniel Vs. State of Punjab (2012) 11 SCC 205 theHon'ble Apex Court has held :

> "In a case of circumstantial evidence, the prosecution must establish each instance of incriminating circumstance, by way of reliable and clinching evidence, and the circumstances so proved must form a complete chain of events, on the basis of which, no conclusion other than one of guilt of the accused can be reached. Undoubtedly, suspicion, however grave it may be, can never be treated as a substitute for proof. While dealing with a case of circumstantial evidence, the court must take utmost precaution whilst finding an accused guilty, solely on the basis of the circumstances proved before it."

11. Undoubtedly, in a case of circumstantial evidence the prosecution has to show that all the links in the chain of circumstances must be complete and should be proved through cogent evidence. In the instant case, as stated above, the main circumstances relied upon by the prosecution are (i) motive for commission of the offence (ii) the deceased being last seen in the company of the accused; (iii) dog squad leading the police to the house of the accused and (iv) recovery of sickle and blood stained shirt of A1. Now, let us examine whether all the links in the chain of circumstance are complete in the present case.

12. Insofar as the first circumstance i.e., motive for committing the offence viz., illicit intimacy of the deceased with the wife of A2 is concerned, it is necessary to examine the evidence of kith and kin of the deceased.

13. P.W.1, who is the mother of the deceased, in her evidence stated that on 17.10.2011 at about 7.00 or 7.30 p.m., A1 came to their house and enquired about the deceased and then, P.W.1 informed him that the deceased had gone to the village. At about 8 p.m., while the deceased was having meals, A1 again came to their house and enquired about the deceased. He was asked to wait as the deceased was having meals. After completion of the meals, the deceased went along with A1 to the fields and thereafter, he did not return home. On the next day, in the early hours, P.W.8-Mallikarjun informed P.W.4 about seeing the accused and the deceased in the fields at about 10 p.m., which was informed to P.W.1. Thereafter, P.W.1 and P.W.4 went to the fields and found the dead body of the deceased on a country cot in the fields and his head was hanging by skin to the

body. For that reason, P.W. 1 entertained a doubt that the accused might have killed the deceased. The evidence of P.W. 1 as referred to above speaks about the accused being last seen at about 8 p.m., in the company of A1. She never spoke of any motive for committing the offence. P.W. 1 was subjected to lengthy cross-examination. During the course of the same, it has been elicited that 20 houses are situated in between her house and the houses of the accused, and they did not have any enmity with the accused and their families. P.W.1 categorically stated that her son was never having any illicit contacts with anybody in the village, but her son may take alcohol occasionally. It was further elicited that on one occasion, she asked the deceased about the rumors in the village as to his intimacy with the wife of A2, but he denied the same. A2 never complained nor raised any disputes with the family members of the deceased or before the village elders about the illicit intimacy of the deceased with the wife of A2.

14. P.W.2, who is the husband of P.W.1, in his evidence deposed about the deceased going to the fields to water the crop depending on the availability of the electricity during night time. He also deposed about the deceased leaving the house at 8 p.m., along with A1 on the date of incident and also about both of them planning to go for hunting. His evidence is to the effect that on the next day morning A1 to A4 came to their house and informed about killing of the deceased by somebody in the fields. He spoke about the rumors in the village about the deceased having illicit intimacy with another woman. In the cross-examination, he gave a go-bye to the statement about the information furnished that some villagers came to his house and informed him that his son was found killed in the fields. He stated that the deceased and the accused are having friendly relations and they used to attend cultivation in the fields. Insofar as witnessing A1, coming to their house and calling the deceased, though in his chief-examination he stated about the same, but in the cross examination he admitted as if he was informed by his wife about A1 coming to their house. He further stated that he does not know at what time his son went to the fields. He further admits that they came to know about the death of the deceased at 5.30 A.M.

15. P.W.3, who is the brother of the deceased, in his evidence stated about A1 coming to their house at 7 p.m., on the date of incident and informing A1 that the deceased went to the village. He also stated about A1 and the deceased together going to the fields. His evidence in the chief examination is on the same lines as that of P.Ws.1 and 2. In the cross-examination, it was elicited that when he along with others went to the fields to see the dead body of the deceased, the accused were found there.

16. P.W.4, who is the brother of P.W.2, deposed that he knew all the accused present in the court as they belonged to their village. He deposed about the deceased attending cultivation in the land. He deposed

that the accused quarrelling with the deceased on one occasion with regard to the illicit contacts maintained by the deceased with womenfolk of the accused and the villagers spreading rumors about the deceased having illicit contacts with the womenfolk belonging to the family of the accused. He deposed that his son Mallikarjuna informed that on the previous night he had seen the deceased and all the accused in the fields, and the same was informed to P.W.1 and thereafter, all of them went to the fields.

17. P.W.5, who is the relative of P.Ws.1 to 4 and resident of Rayalappadoddi village, deposed that about two months prior to the death of the deceased, he heard some rumors in the village about the illicit intimacy of the deceased with the womenfolk belonging to the family of the accused. He deposed that he never warned the deceased, and P.W.1 told him that the deceased is a nice man and he does not have any such illicit contacts with anybody.18. From the evidence of all these witnesses, the prosecution was able to establish the fact of A1 and the deceased leaving the house after having the meals. Though the evidence of all these witnesses show existence of rumors in the village about the illicit intimacy of the deceased with the womenfolk of the accused family, but the accused and the deceased were said to have close friendship and they used to go together for cultivation. If really, the motive for the offence as alleged by the prosecution is correct, definitely A2, being husband of the woman, with whom the deceased was alleged to have illicit intimacy, would have raised a dispute before the elders of the village. As a matter of fact, the evidence of all these witnesses is not specific and consistent as to whether there were any previous disputes in connection with the deceased having illicit intimacy with the wife of A2 or womenfolk of the accused.

19. P.Ws.1 and 2 admitted in their evidence that the accused was not having illicit intimacy and that the accused was friendly with the deceased. If really, there was any enmity, as alleged by the prosecution, the deceased would not have accompanied the accused for hunting in the night. Apart from that, A1 would not have gone to the house of P.W. 1 and invited the deceased for the purpose of hunting. Coming to Ex.P1-report, though P.W.1 expressed her suspicion on the death of the deceased but she has given a go-bye during the course of her evidence before the Court.

20. Under those circumstances, we hold that this circumstance coupled with the evidence of the prosecution witnesses, particularly the mother of deceased, raises a doubt as to the motive alleged by the prosecution. Therefore, the evidence of these five witnesses which was relied upon by

the prosecution failed to establish motive beyond all reasonable doubt.

21. The next circumstance relied upon by the prosecution is the deceased being last seen in the company of the accused. The settled law with respect to 'last seen theory' has been reiterated in various cases and has been succinctly elucidated in ***State of Karnataka Vs. Chand Basha*** 2015 (9) SCALE 809 **,** wherein the Hon'ble Apex Court has observed as under:

> "This Court has time and again laid down the ingredients to be made out by the prosecution to prove the 'last seen together' theory. The Court for the purpose of arriving at a finding as to whether the said offence has been committed or not, may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that close proximity between the last seen evidence and death should be clearly established."

In Mahavir Singh Vs. State of Haryana2015 (4) SCJ 161**,** the Hon'ble Apex Court observed as follows:

"Undoubtedly, it is a settled legal proposition that last seen theory comes into play only in a case where the time gap between the point of time when the accused and the deceased were seen alive and when the deceased was found dead. Since the gap is very small there may not be any possibility that any person other than the accused may be the author of the crime."

In State of UP Vs Satish (2005) 3 SCC 114 the Apex Court has observed on last seen theory as under:

> "The last seen theory comes into play where the time- gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases...."

22. In the instant case, in order to appreciate as to whether the circumstance of last seen is established beyond all reasonable doubt, it would be necessary to go through the testimony of the prosecution witnesses viz., P.Ws.7, 8, 11 and 12.

23. P.W.7 in his evidence deposed that on the date of incident at about 8.15 p.m., he had seen A1 to A4 going towards the fields along with the deceased while P.W.8 deposed that on the date of incident at about 7 or 7.30 p.m., he along with Ravi went to their fields for watching the fields

as there was ground nut crop and while they were returning to their village, saw A1 and the deceased sitting on a country cot on a bund in the lands of the deceased, while A2, A4 and A3 were sitting on a big stone at a distance of 15 metres.

24. Two aspects crop up for consideration. Firstly, if really there was any illicit intimacy between the deceased and the wife of A2 and if there was any enmity between the deceased and the accused in that regard, definitely all the accused would not have sat along with the deceased on the country cot chitchatting. Further, the aspect that the accused and the deceased were seen together at 9.30 pm., was not spoken to by P.W.8 in the statement recorded under Section 161 Cr.P.C. This omission came to be elicited in the evidence of P.W.19, the Investigating Officer. P.W.19 in his cross- examination admits that P.W.8 did not state before him that he went to the fields and while returning home, found A2 to A4 sitting on a big stone at that time. That being the evidence on record, a doubt has arisen as to whether really P.W.8 went there and found all the accused and the deceased together.

25. Similarly, P.Ws.7, 11 and 12 claimed to have seen the accused and the deceased in the fields at about 9.30 p.m. According to them, on that day, P.Ws.8, 11 and 12 left the village at about 8 p.m., to go to the fields for watching. At about 9.30 p.m., while returning, they saw A1 and the deceased sitting on a cot and the other accused sitting on a stone at some distance. The version of P.Ws.11 and 12 is also on the similar lines. But both of them did not speak to these facts in their earlier statements recorded under Section 161 Cr.P.C. It is relevant to extract the evidence of P.W. 19 on this aspect, which is as under:

> "It is true that P.W.7 Pradeep did not state before me that he went to the fields and returning home on his motor bike at 8.15 p.m., and he saw A1 to A4 along with Ramu going to the fields. It is true that P.w.7 did not state anything about A2 and A3. P.W.8- Mallikarjuna did not state before me that he along with Ravi (P.W.12) and Umesh (P.W.11) went to the fields for watching. P.w.8 Mallikarjuna did not state before me that he found A2 to A4 sitting on a big stone at that time. He did not state before me that he saw A1 sitting on the cot of the deceased. P.W.11 Umesh did not state before me that he along with P.Ws.8 and 12 went to the fields of P.W.12 Ravi first and later, they went to the fields of Mallikarjuna and thereafter, while going to his fields he had seen A1 on the cot of the deceased and A2 and A4 on a big stone at a some distance. P.Ws.8, 11 and 12 did not state before me that they went to the fields for watching."26.

In view of the above, the circumstance of accused and the deceased being last seen at 9.30 p.m., in the fields of the deceased in our view is not

established. What has been stated by the witnesses in the court is a complete improvement to the version before the Investigating Officer. Therefore, much credence cannot be attached to their evidence.

27. In this regard, the circumstance relating to time plays a very important role in evaluation of the weightage to be given to the circumstance of proximity of time while applying the last-seen theory. According to the evidence of P.Ws.1 and 2, the deceased went along with the accused at about 7.30 p.m., or 8.00 p.m., and the dead body was found at 5.30 a.m., on the next day. It is alleged in the charge sheet that the accused killed the deceased at about 10.30 p.m., while the deceased was sleeping. After going through the post mortem report, we are not in agreement with the case of the prosecution. The post mortem report, which is placed on record as Ex.P8, shows that on 18.11.2011 at about 4.30 p.m., post mortem examination was conducted. According to the doctor-P.W.15, the death might have occurred 17 to 20 hours prior to post-mortem examination. If the evidence of the doctor is accepted, the death of the deceased might have occurred at about 8 p.m., on 17.10.2011, which is not the case of the prosecution. As per the charge sheet and the evidence, the accused and the deceased were last seen together alive at 9.30 p.m. If really, the accused are culprits, who committed the crime, it will be very difficult to believe their presence near the dead body on the next day morning at about 5.30 a.m., when P.Ws.1 and 2 and others went there. Further, there is a time- gap between the time when the accused and the deceased were seen last alive and when the deceased was found dead. Therefore, possibility of other circumstances coming into existence cannot be ruled out. In that view of the matter and in view of the contradictory versions of P.Ws.7, 8, 11 and 12 and the discrepancies as to the time of death of the deceased, the circumstance of last-seen as projected by the prosecution cannot be accepted.

28. Yet another circumstance relied upon by the prosecution is the dog squad leading the police to the house of A1. The evidence of dog tracking even if admissible is not ordinarily given much weight. In ***Babu Maqbul Shaikh Vs. State of Maharashtra***[6] it was

held that tracker dog's evidence must pass the test of scrutiny and

reliability as in the case of any other evidence. The following

guidelines were laid down :

"(a) There must be a reliable and complete record of the exact manner in which the tracking was done and a panchnama in respect of the dog tracking evidence will have to be clear and complete. It will have to be properly proved and will have to be supported by the evidence of the handler.

(b) There must be no discrepancies between the version as recorded in the panchnama and the evidence of the handler

as deposed before the Court.

(c) The evidence of the handler will have to pass the test of cross- examination independently.

(d) Some material will have to be placed before the court by the handler, such as the type of training imparted to the dog, its past performance, achievements, reliability, etc. supported, if possible, by documents."

In the instant case, the prosecution failed to bring the master of the dog into the witness box, depriving the right of the accused to cross-examine him, though the investigating Officer in his evidence stated about the dog squad leading them to the house of A1. Further, there is no incriminating material on record to show that there was any positive smelling/ identification of the criminal by the dog. Apart from that, the evidence of the Investigating Officer would show that no articles or finger prints belonging to the accused were found at the scene of offence. There was also no iota of evidence as to the objects, which were smelled by the dog near the dead body of the deceased so as to find out the culprits and to lead the police to the house of A1. Therefore, it will be most unsafe to attach any weight to the evidence adduced by the prosecution, as regards the dog quad tracking the accused.

29. The other circumstance that remains for consideration is recovery of sickle and the blood stained shirt of the accused. These two articles were sent to Forensic Science Laboratory. Item Nos.9 and 10 referred to in letter of advice-Ex.P11 belonged to A1. As per the FSL report-Ex.P12, blood was detected on items No.9 and 10 and origin of blood stains was found as human, but the blood group on blood stains thereon could not be determined. Therefore, mere recovery of articles would not itself indicate that it was the accused, who are the perpetrators of the crime.

30. Having regard to the above, we have no hesitation to hold that the prosecution in this case has entirely failed to prove any of the circumstances set up against the accused, much less, it has not established the chain of circumstances, so as to bring out a nexus between the crime and the accused, beyond all reasonabledoubt. Therefore, the appellants are acquitted for the offences under Section 302 r/w 34 IPC.

31. Accordingly, the Criminal Appeal is allowed setting aside the conviction and sentence imposed by the I Additional Sessions Judge, Anantapur, against the appellants-accused Nos.1 to 4 for the offence under Section 302 r/w 34 IPC in Sessions Case No.334 of 2012 vide judgment dated 21.11.2012. Consequently, the appellants-accused Nos.1 to 4 are acquitted for the offence under Section 302 r/w 34 IPC. The fine amount, if any paid under the above count, shall be refunded to the appellants-accused Nos.1 to 4.

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(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

42. There have been an umpteen number of judgments where this Court has steadily restricted the circumstances for award of death penalty and has increased the burden of showing special reasons before mandating death penalty, as mandated under Section 354(3) of the Cr.P.C.

43. This exercise of drawing a balance sheet of aggravating and mitigating circumstances whilst keeping in mind the peculiarity of facts and circumstances of each case has nevertheless been very tedious. It has resulted in a lack of unanimity of standard amongst different Benches resulting in differential standards for award of capital punishment.

44. Many protagonists of abolishment of death penalty have been passionately urging this Court to not award death in cases of circumstantial proof claiming an inherent weakness in cases without ocular evidence. They highlight an ever-remaining possibility of reform and rehabilitation and ask this Court to be cognizant of social, economic and educational conditions of the accused.

45. Simultaneously, however, a parallel line of thought has strongly advocated that death be imposed to maintain proportionality of sentencing and to further the therories of deterence effect and societal retribution. These people contend that sentencing should be society-centric instead of being judge-centric and make use of a cost-benefit analysis to contend that the miniscule possibility of putting to death an innocent man is more than justified in the face of the alternative of endangering the life of many more by setting a convict free after spending 14-20 years in imprisonment. This possibility, they further state, is already well safeguarded against by a 'beyond reasonable doubt' standard at the stage of conviction.

46. Ostensibly to tackle such a conundrum between awarding death ormere 14-20 years of imprisonment, in Swamy Shraddananda @ Murali Manohar Mishra vs. State of Karnataka, (2008) 13 SCC 767, a three-Judge Bench of this Court evolved a hybrid special category of sentence and ruled that the Court could commute the death sentence and substitute it with life imprisonment with

the direction that the convict would not be released from prison for the rest of his life. After acknowledging that "the truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the Judges constituting the Bench", this Court went on to hold as follows:

"92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] besides being in accord with the modern trends in penology.

94. In the light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be."

47. The special sentencing theory evolved in Swamy Shraddananda (supra) has got the seal of approval of the Constitution Bench of this Court in Union of India vs. Sriharan alias Murugan and others, (2016) 7 SCC 1, laying down as follows:

"105. We, therefore, reiterate that the power derived from the Penal Code for any modified punishment within the punishment provided

for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior court.

106. Viewed in that respect, we state that the ratio laid down in Swamy Shraddananda (2) [Swamy Shraddananda (2) vs. State of Karnataka, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] that a special category of sentence; instead of death; for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the affirmative. We are, therefore, not in agreement with the opinion expressed by this Court in Sangeetv. State of Haryana [Sangeet vs. State of Haryana, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] that the deprival of remission power of the appropriate Government by awarding sentences of 20 or 25 years or without any remission as not permissible is not in consonance with the law and we specifically overrule the same."

48. Regardless of the suggestive middle path this Court has, when the occasion demanded, confirmed death sentences in many horrenduous, barberic and superlative crimes especially which involve kidnapping, rape and cold blooded murder of tender age children.

49. In Mukesh and another vs. State (NCT of Delhi) and others, (2017) 6 SCC 1, faced with an instance of gang rape and brutal murder, this Court found that aggravating circumstances like diabolic nature of the crime, brazenness and coldness with which such acts were committed and the inhuman extent to which the accused could go to satisfy their lust, would outweigh mitigating circumstances.

50. In Vasanta Sampat Dupare vs. State of Maharashtra, (2017) 6 SCC 631, a little child was raped and brutally murdered. The death penalty was confirmed by this Court. Thereafter, a review petition was heard in open court and the death penalty was reconfirmed regardless of the convict having completed a bachelors preparatory programme, having kept an unblemished jail record and acquiring some other reformative qualifications during the course of trial. This Court was of the view that the extreme depravity and barberic manner in which the crime was committed and the fact that the victim was a helpless child of 4 years clearly outweighed the mitigating circumstances in that case.

51. In Khushwinder Singh vs. State of Punjab, (2019) 4 SCC 415 this Court affirmed the death sentence of the accused who had killed six innocent persons including two minors by kidnapping, drugging them with sleeping pills and then pushing them into a canal.

52. In Manoharan vs. Inspector of Police, (2019) SCConline SC 951, a three-Judge Bench (by majority) affirmed the death

sentence of the accused who along with his co-accused was found guilty of gangraping a 10 years' old minor girl and committing her brutal murder along with her 7 years' old brother by throwing them into a canal and causing their death by drowning.

53. Equally, there are several other instances including the recent instance in Rajindra Pralhadrao Wasnik v. State of Maharashtra in Review Petition (Crl.) Nos. 306-307/2013 where this Court commuted death sentence even in the case of rape and murder of tender age children like 3-4 year olds after taking notice of the peculiar facts and circumstances of that case as well as the factor that the convictions were founded upon circumstancial evidence and though DNA Test was held but its report was withheld and not produced by the prosecution for the reasons best known to it.

54. On a detailed examination of precedents, it appears to us that it would be totally imprudent to lay down an absolute principle of law that no death sentence can be awarded in a case where conviction is based on circumstantial evidence. Such a standard would be ripe for abuse by seasoned criminals who always make sure to destroy direct evidence. Further in many cases of rape and murder of children, the victims owing to their tender age can put up no resistence. In such cases it is extremely likely that there would be no ocular evidence. It cannot, therefore, be said that in every such case notwithstanding that the prosecution has proved the case beyond reasonable doubt, the Court must not award capital punishment for the mere reason that the offender has not been seen committing the crime by an eye-witness. Such a reasoning, if applied uniformally and mechanically will have devastating effects on the society which is a dominant stakeholder in the administration of our criminal justice system.

55. Further, another nascent evolution in the theory of death sentencing can be distilled. This Court has increasingly become cognizant of 'residual doubt' in many recent cases which effectively create a higher standard of proof over and above the 'beyond reasonable doubt' standard used at the stage of conviction, as a safeguard against routine capital sentencing, keeping in mind the irreversibility of death.

56. In Rameshbhai Chandubhai Rathod vs. State of Gujarat, (2011) 2 SCC 764, this Court noted that reliance on merely 'plausible' evidences to prove a circumstantial chain and award death penalty would be "in defiance of any reasoning which brings a case within the category of the "rarest of rare cases"." Further, various discrepancies in other important links in the circumstantial chain as well as lack of any cogent reason by the High Court for not accepting the retraction of the confession statement of the accused was noted. Acting upon such various gaps in the prosecution evidence as well as in light of other mitigating circumstances, like the possibility that there were others involved in the crime, this Court refused to confirm the sentence of death despite upholding conviction.

57. Such imposition of a higher standard

of proof for purposes of death sentencing over and above 'beyond reasonable doubt' necessary for criminal conviction is similar to the "residual doubt" metric adopted by this Court in Ashok Debbarma vs. State of Tripura, (2014) 4 SCC 747 wherein it was noted that:

"in our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty, but only beyond reasonable doubt. Criminal Courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt", even though the Courts are convinced of the accused persons' guilt beyond reasonable doubt."

58. Ashok Debbarma (supra) drew a distinction between a 'residual doubt', which is any remaining or lingering doubt about the defendant's guilt which might remain at the sentencing stage despite satisfaction of the 'beyond a reasonable doubt' standard during conviction, and reasonable doubts which as defined in Krishan vs. State, (2003) 7 SCC 56 are "actual and substantive, and not merely imaginary, trivial or merely possible". These 'residual doubts' although not relevant for conviction, would tilt towards mitigating circumstance to be taken note of whilst considering whether the case falls under the 'rarest of rare' category.

59. This theory is also recognised in other jurisdictions like the United States, where some state courts like the Supreme Court of Tennessey in State vs. McKinney, 74 S.W.3d 291 (Tenn. 2002) have explained that residual doubt of guilt is a valid non-statutory mitigating circumstance during the sentencing stage and have allowed for new evidence during sentencing proceedings related to defendant's character, background history, physical condition etc.

60. The above cited principles have been minutely observed by us, taking into consideration the peculiar facts and circumstances of the case in hand. At the outset, we would highlight that the High Court while confirming death has observed that the girl was found bleeding due to forcible sexual intercourse ? which fact, however, is not supported by medical evidence. However, such erroneous finding has no impact on conviction under Section 376A of the I.P.C. for a bare perusal of the section shows that only the factum of death of the victim during the offence of rape is required, and such death need not be with any guilty intention or be a natural consequence of the act of rape only. It is worded broadly enough to include death by any act committed by the accused if done contemporaneously with the crime of rape. Any other interpretation would defeat the object of ensuring safety of women and would perpetuate the earlier loophole of the rapists claiming lack of intention to cause death to seek a reduced charge under Section 304 of I.P.C. as noted in the Report of the Committee on Amendments to Criminal Law, headed by Justice J.S. Verma, former Chief Justice of India:

"22. While we believe that enhanced penalties in a substantial number of sexual assault cases can be adjudged on the basis of the law laid down in the aforesaid cases,

certain situations warrant a specific treatment. We believe that where the offence of sexual assault, particularly 'gang rapes', is accompanied by such brutality and violence that it leads to death or a Persistent Vegetative State (or 'PVS' in medical terminology), punishment must be severe - with the minimum punishment being life imprisonment. While we appreciate the argument that where such offences result in death, the case may also be tried under Section 302 of the IPC as a 'rarest of the rare' case, we must acknowledge that many such cases may actually fall within the ambit of Section 304 (Part II) since the 'intention to kill' may often not be established. In the case of violence resulting in Persistent Vegetative State is concerned, we are reminded of the moving story of Aruna Shanbagh, the young nurse who was brutally raped and lived the rest of her life (i.e. almost 36 years) in a Persistent Vegetative State.

23. In our opinion, such situations must be treated differently because the concerted effort to rape and to inflict violence may disclose an intention deserving an enhanced punishment. We have therefore recommended that a specific provision, namely, Section 376 (3) should be inserted in the Indian Penal Code to deal with the offence of "rape followed by death or resulting in a Persistent Vegetative State"."

61. In the present case, there are some residual doubts in our mind. Acrucial witness for constructing the last seen theory, P.W.5 is partly inconsistent in cross-examination and quickly jumps from one statement to the other. Two other witnesses, P.W.6 and P.W.7 had seen the appellant feeding biscuits to the deceased one year before the incident and their long delay in reporting the same fails to inspire confidence. The mother of the deceased has deposed that the wife and daughter of the appellant came to her house and demanded the return of the money which she had borrowed from them but failed to mention that she suspected the appellant of committing the crime initially. Ligature marks on the neck evidencing throttling were noted by P.W.20 and P.W.12 and in the postmortem report, but find no mention in the panchnama prepared by the police. Viscera samples sent for chemical testing were spoilt and hence remained unexamined. Although nails' scrappings of the accused were collected, no report has been produced to show that DNA of the deceased was present. Another initial suspect, Baba alias Ashok Kaurav absconded during investigation, hence, gave rise to the possibility of involvement of more than one person. All these factors of course have no impact in formation of the chain of evidence and are wholly insufficient to create reasonable doubt to earn acquittal.

62. We are cognizant of the fact that use of such 'residual doubt' as a mitigating factor would effectively raise the standard of proof for imposing the death sentence, the benefit of which would be availed of not by the innocent only. However, it would be a misconception to make a cost-benefit comparison between cost to society owing to acquittal of one guilty versus loss of life of a perceived innocent. This is because the alternative to death does not necessarily imply setting the convict free.

63. As noted by the United States Supreme Court in Herrera vs. Collins, 506 U.S. 390 (1993) “it is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.” However, death being irrevocable, there lies a greater degree of responsibility on the Court for an indepth scruitiny of the entire material on record. Still further, qualitatively, the penalty imposed by awarding death is much different than in incarceration, both for the convict and for the state. Hence, a corresponding distinction in requisite standards of proof by taking note of ‘residual doubt’ during sentencing would not be unwarranted.

64. We are thus of the considered view that the present case falls short of the ‘rarest of rare’ cases where the death sentence alone deserves to be awarded to the appellant. It appears to us in the light of all the cumulative circumstances that the cause of justice will be effectively served by invoking the concept of special sentencing theory as evolved by this Court in Swamy Shraddananda (supra) and approved in Sriharan case (supra).

65. For the reasons aforesaid, the appeals are allowed in part to the extent that the death penalty as awarded by the courts below is set aside and is substituted with the imprisonment for life with a direction that no remission shall be granted to the appellant and he shall remain in prison for the rest of his life.

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2019 (2) L.S. 81 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mrs.Justice R.Banumathi
The Hon'ble Mr.Justice A.S.Bopanna &
The Hon'ble Mr.Justice Hrishkesh Roy

P. Chidambaram ..Appellant
Vs.
Central Bureau of Investigation ..Respondent

INDIAN PENAL CODE, Sec. 120-B r/w Sec.420 - PREVENTION OF CORRUPTION ACT, Sec.8 & 13(2) r/w Sec.13(1)(d) of the - Appeals arise out of the impugned judgment passed by the High Court of Delhi in Bail Application by which the High Court refused to grant bail to the appellant in the case registered by the respondent-CBI - Whether the High Court was justified in declining regular bail to the appellant on the apprehension that there is possibility that the appellant might influence the witnesses.

Held – We are unable to accept the contention of SG that “flight risk” of economic offenders should be looked at as a national phenomenon and be dealt with in that manner merely because certain other offenders have flown out of the country - The same

Crl.A.Nos.1603,1605/2019 Date:22-10-2019

cannot, in our view, be put in a straight-jacket formula so as to deny bail to the one who is before the Court - Appellant is not a "flight risk" and in view of the conditions imposed, there is no possibility of his abscondence from the trial - Statement of the prosecution that the appellant has influenced the witnesses and there is likelihood of his further influencing the witnesses cannot be the ground to deny bail to the appellant particularly, when there is no such whisper in the six remand applications filed by the prosecution - Impugned judgment passed by the High Court of Delhi in Bail Application is set aside and the appeal arising out of SLP(Crl) No. 9269 of 2019 is allowed - Appellant is ordered to be released on bail if not required in any other case.

J U D G M E N T

(per the Hon'ble Mrs.Justice R. Banumathi)

Leave granted.

2. These appeals arise out of the impugned judgment dated 30.09.2019 passed by the High Court of Delhi in Bail Application No. 2270 of 2019 in and by which the High Court refused to grant bail to the appellant in the case registered by the respondent-Central Bureau of Investigation (CBI) under Section 120B IPC read with Section 420 IPC, Section 8 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988.

3. This appeal relates to the alleged irregularities in Foreign Investment Promotion Board (FIPB) clearance given to the INX Media for receiving foreign investment to the tune of Rs. 305 crores against approved inflow of Rs. 4.62 crores. Briefly stated case of the prosecution as per the FIR is as under:- In 2007, INX Media Pvt. Ltd. approached Foreign Investment Promotion Board (FIPB) seeking approval for FDI upto 46.216 per cent of the issued equity capital. While sending the proposal by INX Media to be placed before the FIPB, INX Media had clearly mentioned in it the inflow of FDI to the extent of Rs. 4,62,16,000/- taking the proposed issue at its face value. The FIPB in its meeting held on 18.05.2007 recommended the proposal of INX Media subject to the approval of the Finance Minister-the appellant. In the meeting, the Board did not approve the downstream investment by INX Media in INX News. INX Media committed violation of the recommendation of FIPB and the conditions of the approval as:- (i) INX Media deliberately made a downstream investment to the extent of 26% in the capital of INX News Ltd. without specific approval of FIPB which included indirect foreign investment by the same Foreign Investors; (ii) generated more than Rs. 305 crores FDI in INX Media which is in clear violation of the approved foreign flow of Rs. 4.62 crores by issuing shares to the foreign investors at a premium of more than Rs. 800/- per share.

4. Upon receipt of a complaint on the basis of a cheque for an amount of Rs. 10,00,000/- made in favour of M/s Advantage Strategic Consulting Private Limited (ASCPL) by INX Media, the investigation wing of the Income Tax Department proceeded to investigate the matter and the relevant information was sought from the FIPB, which in turn, vide its letter dated 26.05.2008 sought clarification from the INX Media which justified its action saying that the

downstream investment has been approved and that the same was made in accordance with the approval of FIPB. It is alleged by the prosecution that in order to get out of the situation without any penal provision, INX Media entered into a criminal conspiracy with Sh. Karti Chidambaram, Promoter Director, Chess Management Services Pvt. Ltd. and the appellant-the then Finance Minister of India. INX Media through the letter dated 26.06.2008 tried to justify their action stating that the downstream investment has been approved and the same was made in accordance with approval.

5. It is alleged that INX Media Group in its record has clearly mentioned the purpose of payment of Rs. 10,00,000/- to ASCPL as towards “management consultancy charges towards FIPB notification and clarification”. The FIR further alleges that for the services rendered by Sh. Karti Chidambaram to INX Media through Chess Management Services in getting the issues scuttled by influencing the public servants of FIPB unit of the Ministry of Finance, consideration in the form of payments were received against invoices raised on INX Media by ASCPL. It is further alleged that the very reason for getting the invoices raised in the name of ASCPL for the services rendered by Chess Management Services was with a view to conceal the identity of Sh. Karti Chidambaram. It is stated that Sh. Karti Chidambaram was the Promoter, Director of Chess Management Services whereas ASCPL was being controlled by him indirectly. It is alleged that the invoices approximately for an amount of Rs. 3.50 crores were falsely got raised in favour of INX Media in the name of other companies in which Sh. Karti Chidambaram was having sustainable interest either directly or indirectly. It is alleged that such invoices were falsely got raised for creation of acquisition of media content, consultancy in respect of market research, acquisition of content of various genre of Audio-Video etc. Alleging that the above acts of omission and commission prima facie disclose commission of offence, on 15.05.2017, CBI registered FIR in RC No.220/2017-E-0011 under Section 120B I PC read with Section 420 I PC, Section 8 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 against the accused viz. (i) INX Media through its Director Indrani Mukherjea; (ii) INX News through its Director Sh. Pratim Mukherjea @ Peter Mukherjea and others; (iii) Sh. Karti P. Chidambaram; (iv) Chess Management Services through its Director Sh. Karti P. Chidambaram and others; (v) Advantage Strategic Consulting through its Director Ms. Padma Vishwanathan @ Padma Bhaskararaman and others; (vi) unknown officers/officials of Ministry of Finance, Govt. of India; and (vii) other unknown persons for the alleged irregularities in giving FIPB’s clearance to INX Media to receive overseas funds of Rs. 305 crores against approved Foreign Direct Investment (FDI) of Rs. 4.62 crores.

6. Apprehending arrest, the appellant filed petition under Section 438 Cr.P.C. before the High Court seeking anticipatory bail. Vide order dated 31.05.2018, the High Court granted interim protection to the appellant and the said interim protection continued till 20.08.2019. By the order dated 20.08.2019, the High Court dismissed the application for anticipatory bail to the appellant. Challenging the order declining anticipatory bail to the appellant, SLP(CrL) No. 7525 of 2019 was preferred by the appellant before the Supreme Court on 21.08.2019. In the meanwhile, the appellant

was arrested by the CBI on the night of 21.08.2019 and the appellant has been in custody since then. Since the appellant was arrested in connection with CBI case, the appellant's SLP being SLP(CrL) No.7525 of 2019 was dismissed as infructuous. Insofar as the case registered by Enforcement Directorate, SLP(CrL) No.7523 of 2019 was dismissed by this Court refusing to grant anticipatory bail to the appellant by a detailed order dated 05.09.2019. In the present case, we are concerned only with the case registered by the respondent-CBI in RC No.220/2017-E-0011.

7. The High Court by its impugned judgment dated 30.09.2019 refused to grant regular bail to the appellant and dismissed the bail application. Before the High Court, three contentions were raised by the respondent-CBI:- (i) flight risk; (ii) tampering with evidence; and (iii) influencing witnesses. The learned Single Judge did not accept the objection relating to "flight risk" and "tampering with evidence". Insofar as the objection of "flight risk" is concerned, the High Court held that the appellant was not a "flight risk" and it was observed that by issuing certain directions like "surrender of passport", "issuance of look-out notice" and such other directions, "flight risk" can be secured. So far as the objection of "tampering with evidence", the High Court held that the documents relating to the present case are in the custody of the prosecuting agency, Government of India and the Court and therefore, there is no possibility of the appellant tampering with the evidence. But on the third count i.e. "influencing the witnesses", the High Court held that the investigation was in an advance stage and the possibility of the appellant influencing the witnesses cannot be ruled out.

8. The appellant has challenged the impugned judgment denying bail to him on the court's apprehension that he is likely to influence the witnesses. So far as the findings of the High Court on two counts namely "flight risk" and "tampering with evidence" holding in favour of the appellant, CBI has filed SLP(Crl) No. 9445 of 2019.

9. Mr. Kapil Sibal, learned Senior counsel for the appellant has submitted that the High Court erred in dismissing the bail application on mere apprehension that the appellant is likely to influence the witnesses and there is no supporting material on the possibility of the appellant of influencing the witnesses. Learned Senior counsel further submitted that the reference to the two material witnesses (accused) having been approached not to disclose information regarding the appellant and his son, is not supported by any material and the same lacks material particulars and no credibility could be given to the allegations given in a sealed cover. It was further submitted that the learned Single Judge did not appreciate that in various remand applications filed by the respondent, there was no allegation that any material witnesses (accused) having been approached not to disclose information about the appellant and his son and the above allegation has been made as an afterthought in a sealed cover only to prejudice the grant of bail to the appellant. The learned Senior counsel submitted that the appellant was interrogated by the CBI only once though the CBI had taken appellant's custody for number of days.

10. Dr. A.M. Singhvi, learned Senior counsel submitted that "bail is a rule and jail is an exception" and this well-settled position has

not been kept in view by the High Court. The learned Senior counsel submitted that bail was denied to the appellant based on what was given in a sealed cover and submitted "that the apprehension of CBI-possibility of influencing the witnesses" is an afterthought. Placing reliance upon Mahender Chawla and others vs. Union of India and others 2018 (15) SCALE 497, the learned Senior counsel submitted that if really the appellant approached the witnesses so as to influence them, the prosecution could have taken steps and sought for protection of the witnesses as per the "witnesses protection scheme" laid down in Mahender Chawla's case. The learned Senior counsel further submitted that all other accused are on bail and there is no justifiable reason to deny bail to the appellant. It is also contended that now the charge sheet has been filed and it does not indicate that tampering with evidence or intimidating witness is a charge but the allegation is continued to be made based on something unilaterally recorded and produced in a sealed cover before the High Court which was only to prejudice the mind of the Court.

11. So far as the cross appeal filed by the CBI, the learned Senior counsel for the appellant submitted that after the anticipatory bail was refused to the appellant by the High Court on 20.08.2019, the appellant approached the Supreme Court for urgent hearing on the very same day i.e. on 20.08.2019 and made a mention before the Senior Judge on 21.08.2019 who had directed the matter be listed for urgent hearing after placing the matter before Hon'ble the Chief Justice of India and thereafter, the matter was listed on 23.08.2019. The learned Senior counsel submitted that on 20.08.2019 and 21.08.2019, the appellant had consultation with his lawyers and was preparing the matter for filing SLP and there was no question of his abscondence. It is submitted that the appellant thereafter addressed a press conference and then proceeded to his own house from where he was arrested. It was submitted that the appellant had thus not even attempted to conceal himself or evade the process of law. It was contended that the FIR is of 2017 and the appellant has not left the country ever since, instead he had joined the investigation and co-operated with the investigating agency. It was further submitted that the appellant being a Member of Parliament and a Senior Member of the Bar, there is no question of "flight risk" and the High Court rightly held in favour of the appellant on two counts viz. "flight risk" and "tampering with evidence".

12. Mr. Tushar Mehta, learned Solicitor General submitted that while considering the bail application, the court should look into the gravity of the offence and that the possibility of the accused apprehending his conviction fleeing the country and since many economic offenders have fled from the country and the nation is facing this problem of the "economic offenders fleeing the country". It was submitted that the second test is to find out whether the accused has wherewithal to flee the country and possessing resources and capacity to settle abroad. It was contended that the respondent-CBI has definite material to show that the "witness was influenced" and in order to prevent further possibility of influence and the vulnerability of the witness, the identity and the statement of the said witness cannot be shared with the accused. It was submitted that the statement of the said

witness that he was being approached not to disclose any information regarding the appellant and his son, was produced before the High Court in a sealed cover and based upon the same, the High Court rightly refused to grant bail on the ground of "likelihood of influencing the witnesses". The learned Solicitor General submitted that "likelihood of influencing the witness" is not a mere apprehension but based upon material and there is serious danger of the witnesses being influenced and the mere presence of the accused-appellant would be sufficient to intimidate the witnesses.

13. The learned Solicitor General further submitted that the charge sheet has been filed on 18.10.2019 against the appellant and his son Sh. Karti Chidambaram and others including the officials under Section 120B IPC read with Section 420 I PC, Sections 468 and 471 I PC and under Section 9 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act. It was submitted that the investigation qua I NX is largely over and the investigation reveals that more companies are involved and the investigation qua other companies are going on and if the appellantis granted bail at this stage, it would prejudicially affect the further course of investigation. The learned Solicitor General therefore prayed for dismissal of the appeal filed by the appellant accused and allow the appeal filed by the CBI.

14. We have carefully considered the contentions and perused the impugned judgment and materials on record. The question falling for consideration is when other factors i.e. "flight risk" and "tampering with evidence" are held in favour of the appellant, whether the High Court was justified in declining regular bail to the appellant on the apprehension that there is possibility that the appellant might influence the witnesses.

15. The learned Senior counsel for the appellant submitted that in the High Court, the appellant made submission limited to the applicability of the certain "Press Note" and the correctness of the decision taken by FIPB and the Finance Ministry only to show prima facie for the purpose of grant of bail and to show that the allegations against the appellant are unfounded and incorrect. It was submitted that the learned Single Judge even before the charges being framed and trial being held, had gone into the merits and demerits of the allegations against the appellant and rendered conclusive findings on the merits merely based on the allegations itself causing serious prejudice to the appellant and his defence in the impending trial and the impugned judgment passed by the High Court is completely contrary to the law laid down by the Supreme Court. In support of this contention, the learned Senior counsel placed reliance upon Niranjan Singh and another vs. Prabhakar Rajaram Kharote and others (1980) 2 SCC 559.

16. Refuting the said contentions, the learned Solicitor General submitted that though at the stage of grant or refusal to grant of bail, detailed examination of the merits of the matter is not required, but the court has to indicate reasons for prima facie concluding as to why bail was granted or refused. In support of his contention, the learned Solicitor General placed reliance upon Kalyan Chandra Sarkar vs. Rajesh Ranjan and another (2004) 7 SCC 528 and Puran vs. Rambilas and another (2001) 6

SCC 338. It was contended that the findings recorded by the learned Single Judge is only to record prima facie finding indicating as to why bail was not granted and the reasonings cannot be said to be touching upon the merits of the case.

17. Expression of prima facie reasons for granting or refusing to grant bail is a requirement of law especially where such bail orders are appealable so as to indicate application of mind to the matter under consideration and the reasons for conclusion. Recording of reasons is necessary since the accused/prosecution/ victim has every right to know the reasons for grant or refusal to grant bail. This will also help the appellate court to appreciate and consider the reasonings for grant or refusal to grant bail. But giving reasons for exercise of discretion in granting or refusing to grant bail is different from discussing the merits or demerits of the case. At the stage of granting bail, an elaborate examination of evidence and detailed reasons touching upon the merit of the case, which may prejudice the accused, should be avoided. Observing that "at the stage of granting bail, detailed examination of evidence and elaborate documentation of the merits of the case should be avoided", in Niranjan Singh, it was held as under:-

"3.......Detailed examination of the evidence and elaborate documentation of the merits should be avoided while passing orders on bail applications. No party should have the impression that his case has been prejudiced. To be satisfied about a prima facie case is needed but it is not the same as an exhaustive exploration of the merits in the order itself."

18. In the present case, in the impugned judgment, paras (51) to (70) relate to the findings on the merits of the prosecution case. As discussed earlier, at the stage of considering the application for bail, detailed examination of the merits of the prosecution case and the merits or demerits of the materials relied upon by the prosecution, should be avoided. It is therefore, made clear that the findings of the High Court in paras (51) to (70) be construed as expression of opinion only for the purpose of refusal to grant bail and the same shall not in any way influence the trial or other proceedings.

19. The learned Senior counsel for the appellant has taken us through the dates and events and submitted that in the Enforcement Directorate's case after the dismissal of the appeal by the Supreme Court refusing to grant anticipatory bail, immediately the appellant sought to surrender in the Enforcement Directorate's case; but the same was objected to by the Enforcement Directorate and the Department has sought to arrest the appellant subsequently only on 11.10.2019 and the investigating agencies are prejudicially acting against the appellant to ensure that the appellant is not released on bail and continues to languish in custody.

20. Refuting the said contention of the appellant that the investigating agencies-CBI and Enforcement Directorate are bent upon prolonging the custody of the appellant, the learned Solicitor General submitted that after the anticipatory bail was dismissed by the Supreme Court in Criminal Appeal No. 1340 of 2019 on 05.09.2019, the appellant has filed the petition to surrender

in the Enforcement Directorate's case on 05.09.2019 itself and the Enforcement Directorate objected to the surrender of the appellant. The learned Solicitor General submitted that the Enforcement Directorate wanted to take custody of the appellant in the Enforcement Directorate's case only after examination of witnesses and collecting relevant materials. It was submitted that between 06.09.2019 and 09.10.2019, twelve witnesses were examined and thereafter, the Enforcement Directorate filed an application on 11.10.2019 seeking permission to arrest the appellant in connection with Enforcement Directorate's case and thereafter, application for custodial interrogation of the appellant was filed and the Enforcement Directorate has taken the appellant to custody for interrogation for seven days (vide order dated 17.10.2019). It was therefore contended that no motive could be attributed to the investigating agency be it CBI or Enforcement Directorate on the timing of their action in the case against the appellant.

21. In this appeal, we are only concerned with the question of grant of bail or otherwise to the appellant in the CBI case. We have referred to the submission of learned Senior counsel for the appellant and learned Solicitor General only for the sake of completion of the sequence of the contentions raised. Since the matter pertaining to Enforcement Directorate is pending before the concerned court, we are not expressing any opinion on the merits of the rival contention; lest it might prejudice the parties in the appropriate proceedings.

22. The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case. The following factors are to be taken into consideration while considering an application for bail:- (i) the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution; (ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses; (iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence; (iv) character behaviour and standing of the accused and the circumstances which are peculiar to the accused; (v) larger interest of the public or the State and similar other considerations (vide Prahlad Singh Bhati vs. NCT, Delhi and another (2001) 4 SCC 280). There is no hard and fast rule regarding grant or refusal to grant bail. Each case has to be considered on the facts and circumstances of each case and on its own merits. The discretion of the court has to be exercised judiciously and not in an arbitrary manner. At this stage itself, it is necessary for us to indicate that we are unable to accept the contention of the learned Solicitor General that "flight risk" of economic offenders should be looked at as a national phenomenon and be dealt with in that manner merely because certain other offenders have flown out of the country. The same cannot, in our view, be put in a straight-jacket formula so as to deny bail to the one who is before the Court, due to the conduct of other offenders, if the person under consideration is otherwise entitled to bail on the merits of his own case. Hence, in our view, such consideration including as to "flight risk" is to be made on individual basis being uninfluenced by the unconnected cases, more so, when the

personal liberty is involved.

23. In Kalyan Chandra Sarkar vs. Rajesh Ranjan and another (2004) 7 SCC 528, it was held as under:-

"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay vs. Sudarshan Singh (2002) 3 SCC 598 and Puran vs. Rambilas (2001) 6 SCC 338.)

Referring to the factors to be taken into consideration for grant of bail, in Jayendra Saraswathi Swamigal vs. State of Tamil Nadu (2005) 2 SCC 13, it was held as under:-

"16........The considerations which normally weigh with the court in granting bail in non-bailable offences have been explained by this Court in State vs. Capt. Jagjit Singh AIR 1962 SC 253 and Gurcharan Singh vs. State (Delhi Admn.) (1978) 1 SCC 118 and basically they are the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case......"

24. After referring para (11) of Kalyan Chandra Sarkar, in State of U.P. through CBI vs. Amarmani Tripathi (2005) 8 SCC 21, it was held as under:-

"18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [see Prahlad Singh Bhati vs. NCT, Delhi (2001) 4 SCC 280 and Gurcharan Singh vs. State (Delhi Admn.) (1978) 1 SCC 118].

While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused........".

25. In the light of the above well-settled principles, let us consider the present case. At the outset, it is to be pointed out that in the impugned judgment, the High Court mainly focussed on the nature of the allegations and the merits of the case; but the High Court did not keep in view the well-settled principles for grant or refusal to grant bail.

26. As discussed earlier, insofar as the "flight risk" and "tampering with evidence" are concerned, the High Court held in favour of the appellant by holding that the appellant is not a "flight risk" i.e. "no possibility of his abscondence". The High Court rightly held that by issuing certain directions like "surrender of passport", "issuance of look out notice", "flight risk" can be secured. So far as "tampering with evidence" is concerned, the High Court rightly held that the documents relating to the case are in the custody of the prosecuting agency, Government of India and the Court and there is no chance of the appellant tampering with evidence.

27. The learned Solicitor General submitted that when the accused is facing grave charges and when he entertains doubts of possibility of his being conviction, there is a "flight risk". It was submitted that the appellant has wherewithal to flee away from the country and prayed to refuse bail to the appellant on the ground of "flight risk" also. We find no merit in the submission that the appellant is a "flight risk" and there is possibility of his abscondence. In the FIR registered on 15.05.2017, the High Court has granted interim protection to the appellant on 31.05.2018 and the same was in force till 20.08.2019 - the date on which the High Court dismissed the appellant's petition for anticipatory bail. Between 31.05.2018 and 20.08.2019, when the appellant was having interim protection, the appellant did not file any application seeking permission to travel abroad nor prior to the same after registration of FIR any attempt is shown to have been made to flee. On behalf of the appellant, it is stated that the appellant being the Member of Parliament and a Senior Member of the Bar has strong roots in society and his passport having been surrendered and "look out notice" issued against him, there is no likelihood of his fleeing away from the country or his abscondence from the trial. We find merit in the submission of the learned Senior counsel for the appellant that the appellant is not a "flight risk"; more so, when the appellant has surrendered his passport and when there is a "lookout notice" issued against the appellant.

28. So far as the allegation of possibility of influencing the witnesses, the High Court referred to the arguments of the learned Solicitor General which is said to have been a part of a "sealed cover" that two material witnesses are alleged to have been approached not to disclose any information regarding the appellant and his son and the High Court observed that the possibility of influencing the witnesses by the appellant cannot be ruled out. The relevant portion of the impugned judgment of the High Court in para (72) reads as under:-

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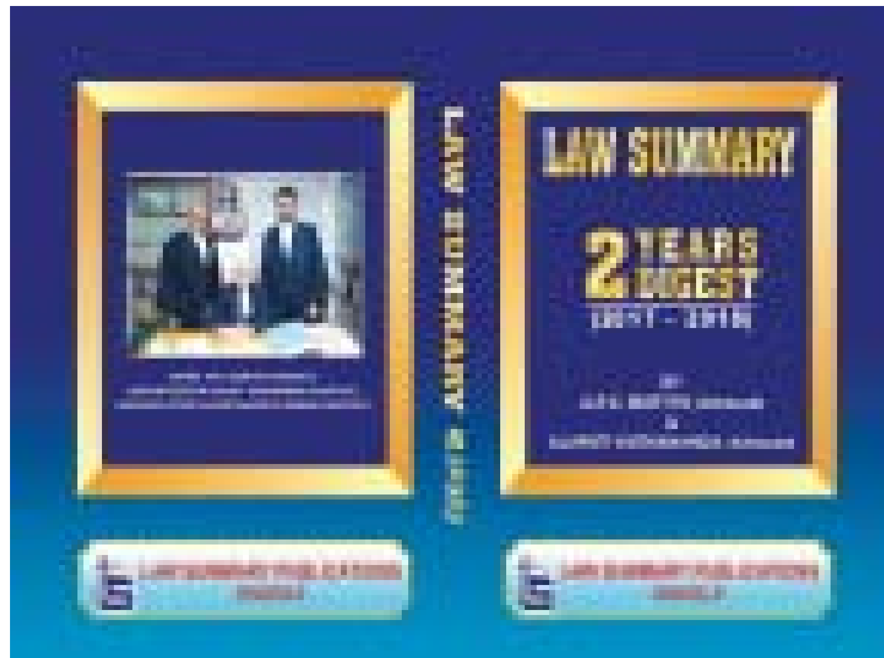

Printed, Published and owned by **Smt.Alapati Sunitha,**

Printed at: Law Summary Off-Set Printers,Santhapeta Ext., Ongole - 523001, Prakasam District. (AP)

Editor: **A.R.K. Murthy,** Advocate.