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Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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PART-21 (15TH NOVEMBER 2019)

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Held - Manner in which HC entertained the petition u/Sec.482 CrPC is highly improper and uncalled for - There is no power of review granted to the Courts under Cr.PC. - As soon as the High Court had disposed of the original revision petition, upheld the conviction, reduced the sentence to the period already undergone and enhanced the fine, it became functus officio and, as such, it could not have entertained the petition u/Sec.482 CrPC for altering the sentence.

It is well settled law that the High Court has no jurisdiction to review its order either u/Sec.362 or u/Sec.482 of CrPC- High Court in its order directed that the sentence which the accused has already undergone, would not affect his service career - We fail to understand under what authority the High Court could have passed such an order - Appeal stands allowed and the order of the High Court is set aside. **(S.C.) 126**

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Held - Relevant multiplier applicable for the age group of the deceased is '18' – and not '12' - Appeal is allowed and the compensation awarded by the Tribunal is enhanced to Rs. 3,64,000/- from Rs.87,000/- with proportionate costs and interest 7.5% per annum from the date of petition till the date of realization. **(A.P.)** ***145***

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INDIAN PENAL CODE, Secs.302 & 313 - Appellant, husband of the deceased, is aggrieved by his conviction u/Sec.302 of the IPC affirmed by the High Court - There is no eye witness and the case rests only on circumstantial evidence – Appellant contended that the deceased had committed suicide and conviction of the appellant under Section 302 IPC was not justified.

Held - Once the prosecution established a prima facie case, appellant was obliged to furnish some explanation under Section 313, Cr.P.C. with regard to the circumstances under which the deceased met an unnatural death inside the house - His failure to offer any explanation whatsoever therefore leaves no doubt for the conclusion of his being the assailant of the deceased – Appeal stands dismissed. **(S.C.)** ***113***

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Held - Involvement of other persons on the statement of the child of impressionable age does not inspire confidence that the appellant is liable to be proceeded under Section 319 of the Code - The statement of the child so as to involve a person wearing spectacles as an accused does not inspire confidence disclosing more than prima facie to make him to stand trial of the offences - Therefore, we hold that the order of summoning the appellant u/Sec.319 of the Code is not legal.

The fact, that the prosecution after investigations has found no material to charge the present appellant is also cannot be ignored - We are satisfied that there is no prima facie case against the appellant, which warrants his trial for the offences pending before the Court - Appeal is allowed - The order passed by the Trial Court to summon the appellant u/Sec.319 of the Code is set aside and the application is dismissed. **(S.C.)** ***107***

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2019 (3) S.R.C. 34 (Supreme Court)

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--X--

2019 (3) S.R.C. 35 (Supreme Court)

N.V.Ramana
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Dated 4-11-2019

Dr.Syed Afzal (D)
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CIVIL PROCEDURE CODE - Interim mandatory injunction can be granted after giving opportunity to other side.

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2019 (3) S.R.C. 36 (Supreme Court)

Mohan M Shantanagoudar
Ajay Rastogi, J.J.
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Dated 5-11-2019

Bansidhar Sharma
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CIVIL PROCEDURE CODE, Sec.144 - Applies to a situation where a decree or an order is varied or reversed in appeal, revision or any other proceedings or is set aside or modified in any suit instituted for the purpose - In that situation the Court which has passed the decree may cause restitution to be made on an application of any party entitled, so as to place the parties in position which they would have occupied but for the decree or order or such part thereof as has been varied, reversed, set aside or modified - Court is empowered to pass orders which are consequential in nature to the decree or order being varied or reversed.

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2019 (3) S.R.C. 37 (Supreme Court)

Mohan M Shantanagoudar
Ajay Rastogi, J.J.
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Dated 23-10-2019

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MOTOR VEHICLES ACT - Award of compensation - It is in bewteen the family members to make arrangement with regard to the family affairs - Grant of compensation by MACT or by the Court in respect of accidental death of a person will not be affected by the family arrangement of parties in as much as the compensation as per law has to be awaded by the Court in favour of the

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2019 (3) S.R.C. 38 (Supreme Court)

Mohan M Shantanagoudar
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Dated 23-10-2019

Vinod@ Manoj
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INDIAN PENAL CODE - EXTRA JUDICIAL CONFESSION - Merely because extra Judicial confession is proved which is a weak type of circumstance, the accused cannot be convicted for the offence of rape and murder - Prosecution has failed to prove other circumstances relied upon by it beyond reasonable doubt - Hence judgment of trial Court and High Court are liable to be set aside.

--X--

2019 (3) S.R.C. 39 (Supreme Court)

Deepak Gupata
Aniruddha Bose, J.J.
C.A.No.6706/13
Dated 11-9-2019

Mohinder Singh
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Jaswant Kaur

(INDIAN)EVIDENCE ACT, Sec.62 - Signed carbon copy prepared in the same process as the original document is admissible in evidence as the original document as per Sec.62 of Act.

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2019 (3) S.R.C. 40 (Supreme Court)

Uday Umesh Lalit
R.Subhash Reddy,J.J.
C.A.No.8197/19
Dated 22-10-2019

Shaukathussain Mohammed Patel
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CIVIL PROCEDURE CODE, Or.7, Rule 11 - Rejection of plaint - The entirety of the avernments in the plaint have to be taken into account while considering a plea seeking rejection of plaint.

--X--

2019 (3) S.R.C. 41 (Supreme Court)

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M.R.Shah
B.R.Gavai,J.J.
C.A.No.8276-8277/19
Dated 25-10-2019

Suptd. Engineer
Vs.
Excise & Taxatation Officer

LIMITATION ACT, Sec.5 - The power to condone delay u/Sec.5 of Act is applicable to proceedings under special or local laws if it is not expressly excluded by such laws.

--X--

MAGISTRATE HAS NO JURISDICTION TO CONDONE DELAY IN N.I. ACT CASES.

K.Pardha Saradhi Rao
Junior Civil Judge
Sulthanabad

As per the provisions of Section 138 of Negotiable Instruments Act, if any person issued cheque which was dishonoured due to insufficiency of funds in the account of that person, he is liable to be punished.

As per the provisions of Section 142 of the Act, the Magistrate is authorised to take cognizance of the offence punishable under Section 138 of NI Act, which clearly envisages as follows :-

Notwithstanding anything contained in Cr.P.C.

(a)No Court shall take cognizance of any offence punishable under section 138, except upon a complaint, in writing, made by the payee or, as to the case maybe, the holder in due course of the cheque.

(b)Such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138.

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfied the Court that he had sufficient cause for not making a complaint within such period.

The above said proviso is inserted by Act No.55 of 2002, with effect from 06.02.2003 (The Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002.

(c)No Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class shall by any offence punishable under Section 138.

As per the provisions of Section 473 Cr.P.C., and proviso to Section 142 (b) and also Section 5 of Limitation Act, one has to know as to whether proviso to Section 142 (b) of N.I. Act, be given retrospective effect or not. Off course, the said proviso confers Jurisdiction upon Court to condone delay. It is therefore, a substantive provision and not a procedural one. It could not have been given a retrospective effect. A substantive law, in the absence of an express provision, cannot be given a retrospective or retroactive operation. Therefore, Courts below committed a manifest error in applying the proviso to the facts of the case filed under Section 138 of N.I. Act. If complaint petition was barred

by limitation, the Magistrate has no jurisdiction to take cognizance under Section 138 of N.I. Act. (SUBODH S.SALASKAR Vs. JAYAPRAKASH M.SHAH (2009 (2) ALT (Crl) 218 (Sc).

The provisions of N.I. Act being special enactments in nature, in terms thereof the jurisdiction of the Court to take cognizance of an offence under Section 138 of N.I. Act was limited to the period of 30 days.

The Parliament only with a view to obviate the difficulties on the part of the complainant, inserted the above said proviso to Section 142(b). 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 exercise his jurisdiction either under Section 5 of Limitation Act and Section 473 Cr.P.C and the said 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 contained a substantive provision and not a procedural one, it could not have been given a retrospective effect.

Order taking cognizance of belated complaint by condoning delay is liable to be set aside. There cannot be any doubt whatsoever to be set aside that the Courts committed manifest error in applying this provision, if the complaint petition is filed after limitation period, the Magistrate has no jurisdiction to take cognizance under Section 138 by appliying this proviso to the fairness of the particular case. If the complaint petition is valued on limitation, the learned Magistrate has no jurisdiction take cognizance under Section 138. This is also held in the same decision reported in AIR 2008 Supreme Court 3086.

N.I. Act was amended in the year 2002 whereby additional powers have been conferred upon the Court to take cognizance even after expiry of period of the limitation by conferring as it a discretion to waive the period of one month.

A complaint petition in view of clause (b) of Section 142 of N.I. 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 proviso to Section 138 of N.I. Act, which stipulates that :

> " The drawer of such cheque fails to make payment of the said amount payment of the said amount of money to the payee of as the case may be, to the holder in due course of the cheque within 15 days of the receipt of the said notice."

There is nothing in the amendment made to proviso to Section 142(b) by the Act No.55 of 2002 that the same was intended to operate retrospectively.

It was specifically held in the decision reported in ANIL KUMAR GOEL Vs. KISHAN CHAND KAURA (2008 AIR SC W 295)

> " All laws that effect substantive rights generally operate prospectively and there is presumption against their retrospectively, if they affect vested rights and obligations, unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect where the language used necessarily implies that such retrospective operation is impleaded. Hence the question whether a satisfactory provision has retroactive effect and not depends primarily on the language in which it is couched. If the language is clear and unambitious, effect will have to be given to the provision is question in accordance with tenor. If the language is not clear, then the Court has to decide whether in the light of the surrounding circumstances, retrospective effect should be given to it or not (See : Punjab supply co., chandigarh etc., vs central Govt. and Others AIR 1984 SC 87)

The provisions of the Act being special enactment provisions in nature and 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 30 days in terms of the proviso appended thereto. No Application for condonation of delay was otherwise maintainable.

Therefore, the Magistrate has no jurisdiction to take cognizance of the complaint under Section 138 of the Act., if the complaint petition is barred by limitation I.e., by filing of the same, after completion of statutory period of 30 days from the date of cause of action under clause (c) of the proviso to Sec.138 which clearly envisages :

" The drawer of cheque fails to mark the payment of money to the payee, the holder in due course of cheque, certain 15 days of the receipt of the said notice. "

It was clearly held in P.S. AITHALA Vs. GANAPATHI. HEDGE (2009(1) ALD (Crl) NOC 8 KARNATAKA) as follows :-

> " As per the provisions of Sections 138 and 142(b) of a complaint filed with a delay condonation petition by the complainant under Section 5 of Limitation Act read with. Section 142 (b) of N.I. Act, such delay could be condoned in the interests of justice having regard to the nature of delay and amount involved and having regard to sufficient cause thereon for condoning the delay in filing complaint.
>
> " in the ration laid down by Orissa High Court in 1993 Crimes 3485, in the similar situation, while referring as per Court decision was of the view that the application affects of Limitation Act can be maintained.

Despite the fact that due to some exigencies the complaint could not file beyond time. when a specific proviso earmarked under Section142(b) of N.I. Act to condone the delay, the said delay could be condoned in the interests of Justice having regard to the nature of transaction and the amount involved and also having regard to the difficulties expressed by the complainant.

Only a technical ground stating that the delay has not been satisfactory explained,, court has power to reject the petition although the application for limitation was considered at the time of trial disposal by the matter was not considered and on that ground, the complaint itself is not maintainable.

When there is specific provision is inserted in 2002 under Section 142 enabling Courts to exercise its discussion and to entertain complaint by condoning delay and to take cognizance of offence such a rejection of delay condensation petition is unjustified as for the specific holdings of Karnataka High Court in 2009 (1) ALD (CX) (NOC) 8 (Karnataka)

Upon perusal of the above parameters on the subject matter, it is prerogative on the part of Court for enter entertaintaining delay condone Petitions filed by complainant in N.I. Act by invoking the provisions of Section 142(b), such delay can be condoned in the interests of justice having regard to the amount and circumstances involved and also having regard to sufficient cause therein for getting that relief of condonation of delay and having regard to the circumstances faced by the complainant in filing such delay condonation petition in filing the complainant. Hence, the Magistrates are expected to condone the delay, if the complaint shown sufficient cause for such condonation of delay. The Magistrates is at liberty to reject such delay condonation petition by assuining reasons sufficiently for rejection of such delay condonative petition.

The very introduction of specific provision under Section 142(b) is protect the interests of bona fide complainant and also bona fide accused.

--X--

2019(3) L.S. 135 (A.P.)

IN THE HIGH COURT OF
ANDHRA PRADESH

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

Dandu Appala Raju
& Ors., ..Petitioners

Vs.

M.Tata Rao & Ors., ..Respondents

CIVIL PROCEDURE CODE, Or.XXXIX Rules 1 and 2 - Civil revision assailing the order, by virtue of which the lower Court, allowed C.M.A. which was preferred by the plaintiffs, against the order dismissing in I.A filed by the plaintiffs under Order XXXIX Rules 1 and 2 of the CPC.

Held - Copies of the pattedar pass book and the title deed book and also the copy of the ROR proceedings have more probative value and they have to be given due weight - By virtue of proving prima facie possession till 2011, the respondents probablised the possession as on the date of filing of the suit, which would suffice to grant injunction - Civil revision petition stands dismissed.

Mr.K.Sarvabhouma Rao, Advocate for the petitioners.
Mr.A.S.C. Bose, Advocate for the Respondents.

O R D E R

This civil revision petition is filed under Article 227 of the Constitution of India, assailing the order dated 22.8.2017 by virtue of which the Court of Senior Civil Judge, Yellamanchili, allowed C.M.A.No.4 of 2014, which was preferred by the plaintiffs, against the order dated 05.3.2014 dismissing in I.A.No.601 of 2012 filed by the plaintiffs under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC) in O.S.No.125 of 2012 on the file of the Court of Principal Junior Civil Judge, Yellamanchili.

2.Heard the counsel for the petitioners-defendants and the counsel for the respondents-plaintiffs.

3.The counsel for the petitioners submits that the lower Court, having observed that the documents, which are filed by the respondents in order to *prima facie* prove their possession over the suit schedule property are not trustworthy, granted injunction, against the said observation. The counsel for the respondents, on the other hand, submits that the lower Court, though, observed that there are certain corrections in the documents filed by the respondents, felt that *prima facie* possession of the respondents herein over the suit schedule property is proved and granted injunction only in the interest of justice.

4.The order of the lower Court shows that the documents, which are filed, are issued by the Village Revenue Officer (VRO). The competency of the VRO to issue such documents is decided by the Court below at paragraph No.8 of the impugned order,

CrLP.No.605/2018 Date:7-08-2019

which, in the considered opinion of this Court, needs no interference. There is no argument extended by the counsel for the petitioners in that regard. But, as regards the documents, the counsel for the petitioners vehemently contends that they do not inspire confidence and the observations of the Court below that there are corrections in respect of the entries in the documents would not entitle the respondents herein for injunction. But a perusal of the discussion made by the lower Court would show that the Court has very rightly balanced the convenience of the parties by looking into the documents filed by both sides. The documents filed by the respondents, though, consisted of certain errors and corrections, showed the possession of the respondents over the suit schedule property, whereas the documents, which were filed by the petitioners herein, did not show their possession over the suit schedule property. When there is no contra evidence with regard to the possession that is evidenced by the documents, there cannot be any fault found on the part of the Court, which granted injunction in favour of the respondents herein.

5. The counsel for the petitioners assails Ex.P.3 True copy of No.3 adangal for the Fasli 1419 (year 2010) on the ground that it contains the word '*KONUGOLU',* which means 'sale', which is never the case of the respondents. The lower Court held that an opportunity need be given to the petitioners as to why the word came to be mentioned in Ex.P.3. But, however, since the document evidenced the possession of the respondents, it held that the said document can be considered to hold that the respondents are in possession of the suit schedule property. The approach of the lower Court is free from any perversity.

6. The other contention is that the respondents failed to prove that they were in possession of the suit schedule property as on the date of filing of the suit and that the documents filed by them pertain only upto the year 2011. In answer to the said contention, the counsel for the respondents submits that the documents pertaining to the year 2012 would not be available, as it is the current year, but the respondents could however prove that they were in possession in the year 2011 and hence, it can be assumed that the respondents continued their possession in the year 2012, unless it is proved or probablised by the petitioners that they were dispossessed from the suit schedule property. The said contention of the counsel for the respondents is based on sound reasoning.

7. The counsel for the respondents relies upon the following two judgments:

(i) Ganta Chinna Shankaraiah vs. Nadunoori Swamy 2006 (6) ALT 170.

wherein the Court observed that there are certain suspicious circumstances pointed out in the unexhibited document. But the Court held that it is not inclined to express any opinion relating to the said document since it is an unexhibited document. It also observed that the said question, with regard to the suspicious circumstances of the documents, has to be agitated at the appropriate stage i.e., at the time of final disposal of the suit. In the said case, the lower Court also observed that on the

strength of such documents mutation has been obtained.

(ii) J.Balakrishna Raju vs. J.Radhakrishna Raju 2014 (4) ALT 570**,** Wherein the Court held that the copies of the pattedar pass book and the title deed book and also the copy of the ROR proceedings have more probative value and they have to be given due weight. The case of the defendants therein was that the plaintiff colluded with Revenue Authorities and created false documents. The Court met the said contention by observing that no steps are taken by the defendants for cancellation of the entries in the Revenue Records, which is the same position in the case before this Court.

8. By virtue of proving *prima facie* possession till 2011, the respondents probablised the possession as on the date of filing of the suit, which would suffice to grant injunction.

9. Hence, in view of the above, this Court does not find any reason to interfere with the impugned order.

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

--X--

2019(3) L.S. 137 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

Present:
The Hon'ble Mr.Justice G.Shyam Prasad

Burugupalli Kameswara Rao ...Appellant

Vs.

Gamidi Venkata Subba Rao & Ors., ...Respondents

Revision filed by Petitioner/ plaintiff seeking for a direction to the trial Court for speedy disposal of the suit - Petitioner sought an innocuous order of a direction to the trial Court to expedite the matter as the petitioner is old aged person.

Held - It is the duty of the High Courts to give directions to the Subordinate Courts if they are not acting in accordance with law in disposal of the cases - Time and again, this Court has issued various circulars to the Subordinate Judiciary to dispose of the cases by giving priority to the Senior Citizens Cases and also other specific categories – Trial Courts are hereby directed to scrupulously follow the circulars and directions issued by the High Court and dispose of the cases.

Mr.K. Rambabu, Advocate for the Appellant.
Mr.K. Srisai Sanjay, Advocate for respondent Nos. 1 to 3.

C.R.P.No.1481/2019 Date: 23-07-2019

O R D E R

This Civil Revision Petition is filed by the Petitioner/plaintiff seeking for a direction to the trial Court for speedy disposal of the suit bearing No. O.S.No.224 of 2016 on the file of I Additional Junior Civil Judge, Tanuku, West Godavari.

2. Heard Sri K. Rambabu, learned counsel for the petitioner and Sri K. Sri Sai Sanjay, learned counsel for the respondents.

3. Learned counsel for the petitioner submits that the petitioner is aged about 72 years and a chronic kidney patient, who is undergoing treatment continuously, and he is also suffering from other old aged ailments. The suit is of the year 2006 and it is not being taken up on regular basis for disposal. The petitioner has also filed medical certificate in proof of his ill-health. He further submits that the petitioner is seeking an innocuous order of a direction to the trial Courtto expedite the matter as the petitioner is old aged person, a senior citizen.

4. Learned counsel for the respondents submits that the petitioner has already filed I.A.No.18 of 2017 in I.A.No.115 of 2016 in O.S.No.224 of 2016 before the trial Court for advancing of the hearing and therefore, there is no need for the petitioner to approach this Court under Article 227 of the Constitution of India, as the said I.A. is pending before the trial Court for advancing of hearing.

5. Learned counsel for the petitioner further submits that the petitioner is only seeking a direction for expediting disposal of the case before the trial Court, in view of the provisions of Article 227 of the Constitution of India. It is submitted that this Court has supervisory jurisdiction over all the Subordinate Courts and this Court by exercising the said jurisdiction, direction may be given to the trial Court to dispose of the matter expeditiously.

6. The point that arises for consideration in this Petition is :

> **"** Whether this Court can issue a direction to the trial Court for speed disposal of the case by exercising power under Article 227 of the Constitution of India

07. As per Article 227 of the Constitution of India, the High Courts have got supervisory jurisdiction over all the subordinate Courts. It is the duty of the High Courts to give directions to the Subordinate Courts if they are not acting in accordance with law in disposal of the cases. Time and again, this Court has issued various circulars to the Subordinate Judiciary to dispose of the cases by giving priority to the Senior Citizens Cases and also other specific categories. It is a case, which is falling under Senior Citizen Category. Usually, Civil Revision Petitions, like this, are not being entertained by this Court as no specific relief is claimed against any order said to have been passed by the trial Court as illegal, which is under challenge now. This Revision Petition is filed only for a direction to the trial Court to dispose of the matter expeditiously. In the light of the Circulars issued by this Court, the trial Courts are hereby directed to scrupulously follow the circulars and directionsissued by the High Court and

dispose off the cases. It is also pertinent to note that, in the instant case, as I.A.No.18 of 2017 is pending before the trial Court, which is coming up for hearing with regard to advancing of the hearing, as such, the trial Court can dispose of the same appropriately by giving priority, keeping in view the circulars and directions issued by this Court.

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2019(3) L.S. 139 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Peddi Ranga Rao & Ors., ..Petitioners

Vs.

M.Singaiah & Ors., ..Respondents

CIVIL PROCEDURE CODE, Sec.115 - INDIAN LIMITATION ACT - After the dismissal of the appeal and confirmation of the decree of the trial Court, the DHrs filed the E.P., for execution of the decree - JDrs filed their counter in the EP and contended that the EP is barred by law of limitation since it was filed beyond period of three years - Unsuccessful Decree holders /Plaintiffs filed instant civil revision, challenging the order, passed in E.P.

Held - Appeal is considered to be a continuation of suit and a decree becomes executable only when the same is finally disposed of by the Court of appeal - Limitation for filing the execution petition would commence not from the date of the decree of the trial Court but on the date when the appeal was disposed of by the appellate Court by granting a decree confirming the decree of the trial Court – Order of the executing Court brooks interference and is, therefore, liable to be set aside - Civil Revision Petition is allowed and the order in EP is set aside.

Mr.N.Sriram Murthy, Advocate fo the Petitioner.
Mr.Y.Subba Rao, Advocate for the Respondents.

O R D E R

The unsuccessful decree holders - plaintiffs filed this civil revision petition, under Section 115 of the Code of Civil Procedure, 1908, challenging the order, dated 28.02.2019, of the learned Principal Junior Civil Judge, Ponnur, passed in EP.no.24 of 2017 in OS.no.52 of 1996.

I have heard the submissions of Sri N. Sri Ram Murthy, learned counsel appearing for the revision petitioners - DHrs and of Sri Y. Subba Rao, learned counsel appearing for the respondents - JDrs. I have perused the material record.

The core facts, in brief, are as follows:

In the afore-stated suit, the trial Court granted a decree, dated 15.10.2001, in favour of the revision petitioners - plaintiffs - DHrs ['DHRs', for short]

and against the respondents - defendants - JDrs ['JDRs', for short]. The operative portion of the decree of the trial Court reads as under:.

"1. That the 1st defendant be and is hereby directed by way of mandatory injunction to remove the levelled up earth all along X X1 X2 X3 to a length of 850 links, width of 30 links and height of one link and also the 15 and 32 mounds of earth abutting X1 X2 line on northern and eastern sides respectively within 3 (three) months from today ie., 15.10.2001, in default, the same will be done through the process of law;

2. That the 2nd defendant be and is hereby directed by way of mandatory injunction to remove the levelled up earth in M N O P plot to a length of 90 links, width of 60 links and height of four links within 3 (three) months from today i.e., 15.10.2001 failing which the same will be done through the process of law;

3. that the defendants and their men be and are hereby restrained by way of consequential permanent injunction from levelling up their lands in any manner and causing obstruction for free flow of rain water etc., from

plaintiffs land towards east upto the peddivaripalem road as shown in the plaint plan;

4. That the defendants do pay plaintiffs a sum of Rs.3283/- towards costs of the suit and do bear their own costs Rs.8/-."

Aggrieved of the said decree of the trial Court, the defendants preferred an appeal in AS.no.97 of 2001 on the file of the Court of the learned Senior Civil Judge, Bapatla. In the said appeal, pending disposal of the appeal, the JDrs obtained orders of stay of execution of the decree of the trial Court and the stay orders were in force from 16.08.2004 to 01.09.2015. The learned Senior Civil Judge, Bapatla, dismissed the appeal, by decree & judgment, dated 01.09.2015, and therefore, the stay order stood automatically vacated. Thus, by the decree of the appellate Court, the decree of the trial Court was confirmed. After the dismissal of the appeal and confirmation of the decree of the trial Court, the DHrs filed the subject Execution Petition, on 22.08.2017, for execution of the decree insofar as the reliefs of mandatory injunctions. The JDrs filed their counter in the EP and contended that the EP is barred by law of limitation since it was filed beyond period of three years, which is the period of limitation provided under Article 135 of the Indian Limitation Act, 1963, for execution of decrees for mandatory injunctions. The executing Court took the view that the decree of the trial Court is executable after expiry of three months from the date of decree, that is, 15.10.2001, as three months time was granted to the JDrs for compliance of the relief of mandatory injunctions granted by the decree. The executing Court also observed in the impugned order that from the said date viz., 15.10.2001 to 16.08.2004 there are no stay orders granted by the appellate Court during the pendency of the appeal, that is, approximately for a period of two years and seven months and that the said period has to be excluded from the three years period of limitation available

for execution of the decree granting mandatory injunctions and that the EP therefore ought to have been filed within the period of remaining five months from the date of the decree of the appellate court and that the EP, which was filed in the year 2017, is barred by law of limitation. Aggrieved thereof, the present revision petition is filed by the unsuccessful DHrs.

In this backdrop, learned counsel for the DHrs submitted as follows:

> The view taken by the executing Court is erroneous and contrary to the settled legal position. The principle enunciated in the doctrine of merger is applicable to the facts of the case as there cannot be more than one decree or operative order governing the same subject matter at a given point of time. Since the decree of the trial Court was subjected to the remedy of appeal before the appellate Court, its finality is put in dispute. On the dismissal of the appeal, the decree of the appellate Court confirming the decree of the trial Court is the final decree, which is a binding and operative decree. Thus, in view of the doctrine of merger, the period of limitation starts to run from the date of the decree of the appellate Court. In the case on hand, the appellate Court dismissed the appeal of the JDrs by a decree, dated 01.09.2015. The EP is filed admittedly on 22.08.2017, that is, within a period of three years as provided in Article 135 of the Indian Limitation Act.

In support of the said contentions, he placed reliance on the decisions in Kunhayammed and others v. State of Keala and another **[AIR 2000 SC 2587]** and Union of India and others v. West Coast Paper Mills Ltd., and another **[AIR 2004 SC 1596].**

Per contra, learned counsel for the JDrs, while supporting the orders of the Court below, contended that the executing Court, before passing the impugned order, had conducted detailed enquiry and recorded evidence during the course of enquiry and that since a long time had elapsed from the dates of the institution of the suit and of the decrees granted by the trial Court & the appellate court, and as there is a change in the features of the plaint schedule property, the decree for mandatory injunctions is not executable.

However, learned counsel of the DHrs contended that the said contention was rejected by the executing Court and that the EP was dismissed only on the ground of bar of limitation and, therefore, the impugned order is liable to be set aside and the matter requires to be remitted to the executing Court for proceeding with further steps for the due execution of the decree, as per procedure established by law.

I have given earnest consideration to the facts and submissions.

The factual aspects, which are narrated supra, are not in dispute. The decree for the reliefs of mandatory injunctions was granted by the trial Court on 15.10.2001. A time of three months was granted to the JDrs for complying with the terms of the decree insofar as the reliefs of mandatory

injunctions granted by the decree. The JDrs' appeal was dismissed by the appellate Court by a decree, dated 01.09.2015, and accordingly the decree of the trial Court was confirmed. From 15.10.2001 to 16.08.2004, that is, from the date of the decree of the trial Court and for certain period of time, there are no stay orders during the entire period of pendency of appeal; and, stay orders were in force only during the period from 16.08.2004 to 01.09.2015, that is, till the dismissal of the first appeal by the appellate Court. For execution of decree for mandatory injunctions, the period of limitation is three years, as per the provision of Article 135 of the Indian Limitation Act is not in dispute. The executing Court is of the view that in the absence of stay orders for certain period of time during the pendency of the appeal, the decree of the trial Court became executable after three months time that was allowed to the JDrs to comply with the reliefs of mandatory injunction and that therefore, the period for which the stay orders are not in force is excludable from the total period of three years limitation available to the DHrs for executing the decree for mandatory injunctions.

In this backdrop, it is necessary to refer to the legal position obtaining. In the decision in **Kunhayammed and others** (1 supra), a Bench of three Hon'ble Judges of the Supreme Court explained the logic and scope of doctrine of merger as follows:

> "In view of the doctrine of merger, a judgment pronounced by the appellate Court in exercise of its appellate jurisdiction after full fledged hearing would replace the judgment of the trial Court. Thus, the judgment of the appellate Court constitutes the final judgment to be executed in accordance with law by the executing Court. Hence, the limitation for filing the execution petition would commence not from the date of the decree of the trial Court but on the date when the appeal was disposed of by the appellate Court by granting a decree confirming the decree of the trial Court."

The above decision of the Supreme Court was referred to in a later decision rendered by a Bench of three Hon'ble Judges of the Supreme Court in **West Coast Paper Mills Ltd.** [2nd supra]. In this later decision, it is held that even in respect of a civil dispute an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the Court of appeal.

In view of the settled legal position, it is beyond any cavil that the decree for reliefs of mandatory injunctions became executable only on the dismissal of the appeal by the appellate court on 01.09.2015.

For the afore-stated reasons and in the light of the legal position obtaining, it is to be held that the order of the executing Court brooks interference and is, therefore, liable to be set aside.

In the result, the Civil Revision Petition is allowed and the order, dated 28.02.2019, in EP.no.24 of 2017 in OS.no.52 of 1996 on the file of Principal

Junior Civil Court, Ponnur, is set aside and the afore-stated EP is remitted to the said Court for disposal afresh on merits and in strict accordance with the procedure established by law.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

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2019(3) L.S. 143 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

S.Syed Saheb & Ors., ..Petitioners
Vs.
V.Mahaboobn Bee & Ors., ..Respondents

CIVIL PROCEDURE CODE,Or.VI Rule 17 - CIVIL RULES OF PRACTICE, Rule 28 - Revision is filed assailing the order, by virtue of which lower Court, dismissed I.A. in O.S filed by the petitioners/plaintiffs under Order VI Rule 17 CPC read with Rule 28 of Civil Rules of Practice, seeking to amend the plaint - Amendment sought for is, to add relief of declaration and the suit is filed for permanent injunction.

Held - Though it is not mandatory to allow the petition if filed prior to trial, it would not be proper to hold that there is lack of diligence even when the petition is filed prior to commencement of trial - Question of due diligence arises for consideration only when the petition is filed after commencement of trial - On that count, the finding of the lower Court, that there is no due diligence need to be set aside - Civil Revision Petition is allowed and the order under revision is set aside.

Smt.Nimmagadda Revathi, Advocate for the Petitioner.

O R D E R

1. The Civil Revision Petition is filed assailing the order dated 4.5.2018 by virtue of which the learned Junior Civil Judge, Pakala, dismissed I.A.No.106 of 2018 in O.S.No.43 of 2012 filed by the petitioners/ plaintiffs under Order VI Rule 17 CPC read with Rule 28 of Civil Rules of Practice, seeking to amend the plaint.

2. Heard learned Counsel for the petitioners. None appeared for the respondents despite service of notice.

3. The amendment sought for is, to add relief of declaration. The suit is filed for permanent injunction. The lower Court dismissed the petition considering that there was no due diligence on the part of the petitioners.

4. Learned Counsel for the petitioners submits that the petition was filed

prior to commencement of trial and hence, as per Order 6 Rule 17 CPC,

amendment petition shall be allowed. Order 6 Rule 17 CPC reads as follows:

"The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that is spite of due diligence, the party could not have raised the matter before the commencement of trial."

Though it is not mandatory to allow the petition if filed prior to trial, it would not be proper to hold that there is lack of diligence even when the petition is filed prior to commencement of trial. The question of due diligence arises for consideration only when the petition is filed after commencement of trial. On that count, the finding of the lower Court, that there is no due diligence need to be set aside.

It is further seen from the order that the Court below dismissed the petition also holding that the nature of the suit will be changed. In that regard, learned Counsel for the petitioners relied on the judgment of the High Court of Judicature, for the States of Telangana & Andhra Pradesh, at Hyderabad, in VANTIPALLI SURYA VENKATA SATYA PRASAD Vs. GANGUMALLA SURYAKANTHAM {2017(1) ALD 619}, wherein, at Paragraph 11, it was observed as follows:

"The question whether the suit for perpetual injunction can be converted into a suit for declaration of title and recovery of possession has been considered by the Supreme Court of India in the above judgment. The Apex Court held that by permitting the amendment of the plaint as sought by the plaintiff, the basic structure of the suit is not altered and if it was open to the plaintiff to file a fresh suit, there is no reason why the same relief, which could be prayed for in a new suit, cannot be permitted to be incorporated in the pending suit. It observed that allowing the amendment would curtail multiplicity of proceedings. It held that mere delay in-seeking amendment would not be a ground for refusing the amendment if the amendment is sought prior to the commencement of the trial and such amendments should be allowed liberally.

In view of the above decision, the order under revision cannot be sustained.

5. In the result, the Civil Revision Petition is allowed and the order under revision is set aside. No costs

6. Miscellaneous petitions pending consideration if any in the Civil Revision Petition shall stand closed.

SMT T. RAJANIJ

DATED 25th JULY, 2019 Note: LR Copy to be marked (BO) Msnrx

2019(3) L.S. 145 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

Present:
The Hon'ble Mr.Justice Gudiseva Shyam Prasad

Simma Neelam & Anr., ..Appellants

Vs.

B.Chinna Rao & Anr., ..Respondent

MOTOR VEHICLES ACT - Appeal against the Judgment in MVOP - Appellant No.1 is the father and Appellant No.2 is the mother of the deceased who died in a motor vehicle accident that occurred while he was going along with other Kalasis in a tractor - Respondent No.1 is the owner of the tractor trailer and respondent No.2 is the insurer, against whom a claim was made for Rs.2,00,000/- Tribunal, on consideration of the evidence of the witnesses, awarded compensation of Rs.87,000/- with interest at 7.5% per annum from the date of petition till the date of realization - Aggrieved by the impugned Award, this appeal has been filed by the claimants for enhancement of compensation.

Held - Relevant multiplier applicable for the age group of the deceased is '18' – and not '12' - Appeal is allowed and the compensation awarded by the Tribunal is enhanced to Rs. 3,64,000/- from Rs.87,000/- with proportionate costs and interest 7.5% per annum from the date of petition till the date of realization.

Mr.Aravala Ramarao, Advocate for the appellants.
Mr.J. Ravishankar, Advocate for respondent Nos.1 to 3.

J U D G M E N T

This Appeal is directed against the Judgment dt. 08.11.2005 in MVOP No.353 of 2001 passed by the Chairman, Motor Accidents Claims Tribunal-cum-II Additional District Court (FTC), Srikakulam.

2.Appellant No.1 is the father and Appellant No.2 is the mother of the deceased-Simma Apparao. The said Simma Apparao died in a motor vehicle accident that occurred on 28.04.2001 while he was going along with other Kalasis in a tractor trailer bearing No. AP 30 T 84/85. Respondent No.1 is the owner of the Tractor Trailer and respondent No.2 is the insurer, against whom a claim was made for Rs.2,00,000/-.

3.The Tribunal, on consideration of the evidence of the witnesses, awarded compensation of Rs.87,000/- with interest at 7.5% per annum from the date of petition till the date of realization.

4.Aggrieved by the impugned Award, this appeal has been filed by the claimants for enhancement of compensation.

5.Heard arguments of the learned counsel for the Appellants and the learned counsel for Respondents.

6. The Tribunal, on consideration of the evidence on record, has clearly held that there was rash and negligent act on the part of the driver of the crime vehicle and fixed the liability on the respondent Nos. 1 and 2 jointly and severally for payment of compensation to the claimants.

7. The only point that arises for consideration in this appeal is :

> **"** Whether the compensation awarded by the Tribunal is in accordance with law ***?***

8. POINT. Learned Counsel for the Appellants contends that the Tribunal has taken the income of the deceased as Rs.15,000/- per annum and the deceased was a boy aged about 20 years, notional income of Rs.3,000/- has to be taken into consideration as he was working as a labourer for loading and unloading of sand in the said tractor trailor.

9. Learned counsel for the respondents submit that the Appellants have failed to prove the income of the deceased, and therefore, the Tribunal has taken notional income of Rs.15,000/- per annum.

10. The tribunal, on consideration of rival contentions of both parties, has taken the age of the deceased as 20 years as the deceased was unmarried boy. There is also evidence that he died while working as a labourer for loading and unloading of the sand and going in the tractor trailor. Therefore, notional income of Rs.3,000/- per month can be taken into consideration. If the notional income of the deceased is multiplied with '12', his annual income comes to Rs.36,000/ per annum. After deducting half of his income towards his personal expenditure, his contribution to the family would be around Rs.18,000/- per annum. The Tribunal, while calculating the compensation, has applied the multiplier "15", which is not in accordance with the ratio laid down in Sarla Verma and others v Delhi Transport Corporation and another (2009) 6 SCC 121. As per the Decision in Sarla Varma's case, the relevant multiplier applicable for the age group of the deceased is '18'. If the notional income of the deceased is multiplied with relevant multiplier '18', the loss of dependency comes to Rs.18,000/- x 18 = Rs.3,24,000/- .

11. The Tribunal, on consideration of the material on record, has awarded Rs.2,000/- towards funeral expenses and Rs.5,000/- towards loss of love and affection and no amount has been granted for funeral expenses. Therefore, keeping in view the ration laid down in National Insurance Company Limited v. Pranay Sethi and Others AIR 2017 SC 5157 an amount of Rs.15,000/- towards funeral expenses, and Rs.10,000/- towards loss of love and affection and Rs.15,000/- towards loss of estate is awarded. Therefore, in all, the compensation payable to the Appellants under different heads can be detailed as below:

1. Loss of dependency	Rs.3,24,000/
2. Funeral Expenses	Rs.15,000/-
3. Love and Affection	Rs.10,000/-
4. Loss of estate	Rs.15,000/-
Total	Rs.3,64,000/

12. In the result, this Appeal is allowed and the compensation awarded by the Tribunal is enhanced to Rs. 3,64,000/- from Rs.87,000/- with proportionate costs and interest 7.5% per annum from the date of petition till the date of realization. Respondent No.2 is directed to deposit the amount within a period of Eight (08) weeks from the date of receipt of a copy of this Judgment. The amount already deposited by Respondent No.2 shall be given credit to the amount awarded in this appeal. The appellants are directed to pay the Court Fee on the enhanced compensation amount. On such deposit, the Appellants are permitted to withdraw the entire amount, as per the ratio fixed in the Award passed by the Tribunal, without furnishing any security.

Consequently, miscellaneous applications pending, if any, shall stand closed.

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2019(3) L.S. 147 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Penki Aruna Kumari . ..Petitioner

Vs.

Sunkari Tirumala Rao & Ors., ..Respondents

INDIAN PARTNERSHIP ACT, Sec.69 - Whether a partner of an unregistered firm cannot maintain a suit against the other partner - Civil revision assailing the order passed in O.S, by virtue of which the lower Court decided the preliminary issue with regard to maintainability of the suit and held that the suit is maintainable.

Held - Once there is an agreement of partnership, unless it is registered, no suit can be maintained by the partners for enforcing any right accruing from such agreement - Impugned order cannot be sustained - Civil revision petition stands allowed, setting aside the order passed in O.S.

Mr.Rayaprolu Srikanth, Advocate for the Petitioners.

Dr.K.Manmadha Rao, Advocate for the Respondents.

O R D E R

This civil revision petition is filed under Article 227 of the Constitution of India, assailing

the order dated 07.7.2014, passed in O.S. No.80 of 2012 on the file of the Court of District Judge, Vizianagaram, by virtue of which the lower Court decided the preliminary issue with regard to maintainability of the suit and held that the suit is maintainable.

2. Heard the counsel for the petitioner-defendant and the counsel for the respondents-plaintiffs.

3. The counsel for petitioner submits that the suit is not maintainable for the reason that it is hit by Section 69(1) of the Indian Partnership Act, 1932 (for short, the Act). The issue involved is whether a partner of an unregistered firm cannot maintain a suit against the other partner. For the sake of convenience, Section 69(1) of the Act is extracted hereunder:

Section 69: Effect of Non-Registration:

> (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on a behalf of any persons suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm:
>
> Provided that the requirement of registration of firm under this sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of the firm or to realise the property of the firm.

4. The counsel for the respondents-plaintiffs submits that the partnership business is not yet commenced, and in the written statement filed by the petitioner-defendant in the suit, it is categorically mentioned that the business was stopped in the year 2009. The counsel for the petitioner, in answer to the said submission, draws the attention of this Court to the partnership agreement, wherein it is clearly mentioned that the plaintiff is offering partnership to the respondents as she was not able to carry on the business. The reason for closure of the business is immaterial since it is clearly mentioned in the agreement itself that the petitioner-defendant was not in a position to continue the Crusher and hence, she is offering partnership to the respondents. Hence, it has to be understood from the agreement that knowing fully well that the Crusher was not in working condition by the date of the agreement, the respondents entered into the agreement. The judgment of the Lahore High Court in Bishen Narain v. Swaroop Narain AUR 138 LAHORE 43 is to the effect that the fact that the actual business did not commence is immaterial, when the suit is filed by a member of the partnership against another member, and it held that the partnership deed has to be registered in order to maintain a suit against the other partner. This Court is persuaded by the said judgment, since, even looked at from the point of view of equities, the respondents do not deserve to be given any concession on the ground that the business of the partnership has not commenced, as was

done by the lower Court. Once there is an agreement of partnership, unless it is registered, no suit can be maintained by the partners for enforcing any right accruing from such agreement.

5. In view of the above, this Court opines that the impugned order cannot be sustained.

6. Accordingly, the civil revision petition is allowed, setting aside the order dated 07.7.2014, passed in O.S. No.80 of 2012 on the file of the Court of District Judge, Vizianagaram. Consequently, it is held that O.S. No.80 of 2012 on the file of the Court of District Judge, Vizianagaram, is not maintainable.

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

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2019(3) L.S. 149 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Essemm Logistics ..Petitioner

Vs.

DARCL Logistics Ltd., & Anr., ..Respondents

CARRIERS ACT, Sec.10 - CIVIL PROCEDURE CODE, Or.VII Rule 11, r/w Secs.94/151 - Civil revision, assailing the order by virtue of which the lower Court allowed I.A., which was filed by the first respondent-plaintiff, to reject the counter claim - Court below held that notice under Section 10 of the Carriers Act, which is a mandatory, was not issued prior to raising counter-claim and hence, rejected the counter-claim - Petitioner contends that the reliefs claimed have to be dealt with under common law and hence, the Carriers Act cannot be applied to the counter-claim.

Held - If the claim of the plaintiff touches upon the consignment and the services of the carrier in respect of the said consignment, the claim comes within the purview of the Carriers Act, though the claim does not specify that it is filed under Carriers Act and if the claimant is a stranger to the transaction with the carrier, the claim can be brought within the purview of common law - Order impugned does not require any interference - Civil revision petition stands dismissed.

CRP.No.7480/17 Date: 7-8-2019

Mr.Dantu Srinivas, Advocate for Petitioner.
Smt.V.Meenakshi, Advocate for Respondent No.1.

O R D E R

This civil revision petition is filed under Article 227 of the Constitution of India, assailing the order dated 21.9.2017 by virtue of which the Court of VI Additional District Judge, Visakhapatnam, allowed I.A.No.783 of 2014 in O.S. No.79 of 2013, which was filed by the first respondent-plaintiff, under Order VII Rule 11 read with Sections 94 / 151 of the Code of Civil Procedure, 1908 (CPC), to reject the counter claim.

2. The counter claim was filed by the petitioner-first defendant seeking for loss of business opportunity due to diversification of the Cargo from Gangavaram Port to Paradeep Port, loss of reputation and the loss on account of idling of men, machine and overheads. The suit was filed by the first respondent herein seeking for a decree for the specified amount, on the ground that the plaintiff began to transport the goods for the defendants based on their representations of oneness to various destinations, and during the period of October to December 2011, the work orders, to which the suit relates, were placed on the plaintiff and the goods were transported from Visakhapatnam to various destinations in Chattisgarh. The bills and invoices were submitted for payment but the same were not honoured or paid by the defendants. The petitioner herein, who is the first defendant, filed counter-claim, contending that it has been a reputed transporter since nine years, second respondent-second defendant is one of the leading importing agencies. The first defendant works on a back-to-back business with formal work orders, for the second defendant. The first defendant facilitates second defendant to plan and execute all its operations. The plaintiff is a Transporting company. The representatives of the plaintiff approached first defendant and assured that they would regularly arrange the fleet and make arrangement for Cargo transportation without any default. The first defendant entered into a contract with M/s.SEPCO Electrical Power Construction Corporation, which is one of the EPC Contractors, for erecting and commissioning of power projects worldwide. The importer- owner M/s.KSK Mahanandi Power Company Limited purchased Project materials from M/s.SEPCO and the above Project Cargo was signed and dispatched under Bill dated 03.10.2011 through a Vessel, MV Ocean Hero from Shanghai Port, China to Gangavaram Port, Visakhapatnam. The said Project Cargo was received at Gangavaram Port. The second defendant, being the Clearing Agent, was entrusted with the receipt of the Cargo. Out of the total consignment entrusted to the plaintiff, they loaded certain material. Normal duration for transportation of the Cargo from Gangavaram to the destination of the Project site of M/s.KSK was ten days, but the Cargo, in this case, was not delivered within the said time. The customer of the first defendant informed the first defendant that the Cargo covered by the above stated DC was not delivered to them at their Project site located near Nariyara Village, Chattisgarh. But, on enquiries, the representatives of the plaintiff have confirmed about the non-delivery of the Project Cargo and during that time they delivered a copy of the acknowledgement, which states that the New Port Police Station has received a complaint from Mr.Sushil Kumar Tiwari, Branch Manager of plaintiff- company. After receipt of the said copy, the first defendant came to know about the irregularities committed by the representatives of the plaintiff. The first defendant did not initiate any action against the plaintiff, since they were in dialogue with them. The plaintiff was involved in non- compliance of the essential terms of the contract. Due to non-delivery of the Cargo by the plaintiff, the Project works of the first defendant's customer are severely affected and huge loss is caused to them. The first defendant was constrained to raise demand on 04.3.2013 as a final chance, after repeated demands to pay Rs.14,32,27,592/- towards

value of the undelivered Cargo, damages due to loss of business opportunity and loss of reputation on account of non-delivery of the Cargo. In the counter-claim, the first defendant, having stated so, has restricted its claim only for the loss of business opportunity, loss of reputation and loss on account of idling men etc.3. The Court below, by considering that notice under Section 10 of the Carriers Act, 1865, which is a mandatory, was not issued prior to raising counter-claim and hence, rejected the counter-claim.

4. Assailing the said order of rejection, this revision is preferred on the grounds that the counter-claim is not filed to recover the value of any goods lost or damaged and hence Section 16 of the Carriage by Road Act, 2007 is not applicable. The remedy to claim damages is a common law remedy and hence the provision relating to issuing a notice under this Act is not applicable. Filing of counter-claim to recover damages from the plaintiff is governed by the provision of the CPC and hence Section 16 of the Carriage by Road Act is not applicable. The trial Court has mixed up a remedy under the Carriage by Road Act and a common law remedy and got confused about the real issue involved in the counter claim. A combined reading of Sections 10, 12 and 16 of the Carriage by Road Act would clearly show that the period mentioned in Section 16 is applicable only when a suit or other legal proceeding is initiated to recover the value of goods lost or damaged and not to any other cases. The trial Court ought to have seen that in the counter-claim, the second defendant clearly divided the claim for damages into three categories and none of them deal with value of recovery of goods lost or damages. On the above grounds, the revision petitioner seeks to set aside the impugned order.

5. Heard Sri Dantu Srinivas, learned counsel for the petitioner-second defendant and Sri N.Ashwani Kumar, learned counsel for the first respondent-plaintiff. The second respondent herein is shown as not necessary party.

6. The counsel for the petitioner assails the impugned order vehemently, on the ground that the Court below failed to see that the claim made by the petitioner is not in respect of the claims, which are mentioned under Section 16 of the Carriage by Road Act, 2007. The order of the Court below reflects that it considered the case as one under the Carriers Act and held that notice under Section 10 of the Carriers Act, 1865 is mandatory and without the said notice counter-claim cannot be filed. Somehow, in the grounds of appeal, it is mentioned as the Carriage by Road Act, 2007. Even the counsel for the petitioner, at the stage of arguments, also relies on Section 16 of the Carriage by Road Act, 2007 while in fact it is Section 10 of the Carriers Act, 1865, which is relevant. Both the sections, however, mandate that a notice is to be issued prior to filing any suit against the carrier in a civil court.

7. The counsel for the petitioner contends that the reliefs claimed by the petitioner have to be dealt with under common law and hence, the Carriers Act cannot be applied to the counter-claim, and it cannot be rejected on the ground that notice as mandated under Section 10 of the Carriers Act is not issued. A reading of Section 10, no doubt, shows that it applies to a suit, which is instituted against a common carrier for the loss of, or injury

to, goods (including container, pallets or similar article of transport used to consolidate goods) entrusted to him for carriage. But the counsel for the first respondent argues that in the common written statement filed by defendants 1 and 2, the petitioner herein has taken a plea that no notice was served on him as required by the Carriers Act and hence, having invoked the provisions of the Carriers Act, the petitioner cannot now contend that his counter-claim does not come within the purview of the Carriers Act. In the considered opinion of this Court, the said contention does not estop the petitioner from taking the plea that he does not come under the Carriers Act, as, according to him the claim made by the petitioner is under the Carriers Act and hence, his contention might have been that notice as mandated under the Carriers Act is required. But, his contention with regard to his counter-claim is that it does not come within the purview of the Carriers Act. Section 10 of the Carriers Act, as already observed, requires notice to be given if a suit is filed for the loss of, or injury to the goods entrusted to the carrier for carriage. But, the counsel for the respondent relies on a judgment of the Supreme Court in **Arvind Mills Ltd., vs. Associated Roadways 2006 ACJ 441 = (2004) 11 SCC 545 ,** which is rendered in a consumer case. From the said judgment, it can be seen that the claim was made in the Consumer Court by the petitioner therein against the respondent, which is a common carrier, seeking for compensation for the loss suffered by the petitioner because of the respondent effecting delivery of the goods entrusted to it by the petitioner without obtaining the original lorry receipts from the consignee. From the above facts, which are stated in the above judgment, it can be understood that the claim was not for the loss of goods or for the damage of goods. But, it was for the violation of the procedure for delivery of goods, which can be understood to be in obtaining of original lorry receipt from the consignee. The Supreme Court, in the said case, which is not filed for loss of goods or damage of goods, held that notice under Section 10 of the Carriers Act is mandatory. Hence, in the above circumstances, this Court, bound by the judgment of the Supreme Court, has to hold that the notice under Section 10 of the Carriers Act is mandatory even if the claim is not in respect of the loss and damages caused to the goods.

8. The counsel for the petitioner raises a tricky argument by raising a question, "*whether in a case where the house of someone is damaged by a carrier, the victim would be forced to give a notice to the carrier as mandated by Section of the Carriers Act?".* In the light of the above judgment of the Supreme Court, the answer has to be as follows. If the claim of the plaintiff touches upon the consignment and the services of the carrier in respect of the said consignment, the

claim comes within the purview of the Carriers Act, though the claim does not specify that it is filed under Carriers Act and if the claimant is a stranger to the transaction with the carrier, the claim can be brought within the purview of common law. With the above, this Court concludes that the order impugned does not require any interference.

9. Accordingly, the civil revision petition is dismissed. As a sequel, the miscellaneous applications, if any pending, shall stand closed.

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2019(3) L.S. 153 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

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

Grandhi Yugandher & Anr., ...Petitioners

Vs.

M/s. Jyothi Financiers ...Respondent

CONSTITUTION OF INDIA, Art. 227 - Civil Revision filed by the JDrs assailing the order, passed in E.P.

DHr filed a suit against the JDrs for specific performance which was decreed - JDrs filed an appeal which was dismissed - JDrs preferred a second appeal and in the said appeal this Court granted Interim stay.

However DHr filed an execution petition before trial Court, *inter alia* stating that as per decree directions the balance sale consideration deposited into Court and requesting the executing Court to execute the sale deed as per terms of decree - The fact that stay orders granted by High Court in second appeal was brought to the notice of executing Court, however executing Court permission was granted to register the sale deed.

The executing Court ought not to have executed the sale deed and ought not to have permitted for registration of sale deed in view of the stay orders granted in favour of JDRs in second appeal.

DHr is directed to surrender the subject original Sale Deed in question to the executing Court forthwith for safe keeping until any further interlocutory orders are passed in the second appeal or until the disposal of the second appeal, as such a course helps in avoiding any further dealings by the DHr based on the said sale deed and in maintaining *status quo.*

Mr.A.K.Kishore Reddy, Advocate for the Petitioners.

Mr.A.Sai Rohit, Advocate for the 1st respondent.

O R D E R

This Civil Revision Petition, under Article 227 of the Constitution of India, is filed by the Judgment Debtors assailing the order, dated 27.12.2018, of the learned I Additional Senior Civil Judge, Guntur,passed in E.P.no.326 of 2009 in O.S.no.306 of 1999.

2. I have heard the submissions of the learned counsel for the petitioners/ Judgment Debtors ('JDrs', for brevity). Though the 1st respondent/Decree Holder (DHr) is served with notice, it did not enter appearance. However, on the day the matter is listed for pronouncement of orders, the 1st respondent/DHr entered appearance. Hence, on 02.08.2019, further submissions of both the sides are heard. The 2nd respondent is stated to be a formal party.

3. Learned counsel for the JDrs submits as follows:

'The DHr filed a suit against the JDrs for specific performance. The said suit was decreed. The JDrs filed an appeal in A.S.no.330 of 2008 on the file of the Court of the learned III Additional District Judge, Guntur. The said appeal was dismissed. The JDrs preferred a second appeal in S.A.no.965 of 2009 on the file of this Court. In S.A.M.P.no.2108 of 2009 in the said S.A.no.965 of 2009, on 23.10.2009, this Court granted the following interim order: 'Interim stay as prayed for'. However, the DHr filed an execution petition in E.P.no.326 of 2009 *inter alia* stating that as per the decree direction, the balance sale consideration of Rs.50,000/- is deposited into Court, on 21.11.2002, *vide* V.R.no.619 of 2002 and requesting the executing Court to execute the sale deed as per the terms of the decree. The JDrs having entered appearance have not filed a counter. However, it was brought to the notice of the executing Court that the stay orders are granted by the High Court in the second appeal. The fact that the stay orders granted by the High Court in the Second Appeal was brought to the notice of the executing Court is borne out by the docket sheet/ proceeding sheet maintained in the execution petition by the executing Court as the executing Court mentioned about the receipt of copy of the stay orders from the High Court on the proceeding sheet, on 01.12.2009, 29.12.2009 and 02.02.2010.However, on 29.12.2018, the executing Court directed the DHr to file stamp papers. Further, on filing of the non-judicial stamp papers, permission was granted to register the sale deed in accordance with law on deposit of process fee. The said order, impugned in this revision, was passed, on 27.12.2018. Despite the fact that stay orders are granted, as prayed for, in favour of the appellants/JDrs in S.A.M.P.no.2108 of 2009 in S.A.no.965 of 2009, the executing Court directed the DHr for filing stamp papers, engrossing the sale deed on the stamp papers and registration of the sale deed. The executing Court ought not to have executed the sale deed and ought not to have permitted for registration of the sale deed in view of the stay orders granted in favour of the JDrs in their above said second appeal. The orders directing to file stamp papers and the execution and registration of the sale deed are *non est,* in the light of the stay orders granted by this Court and the sale deed that was executed and registered inspite of the stay order by the High Court granted against the execution of the decree had no legal validity and has to be ignored. The DHr played fraud on the Court.The executing Court wrongly applied the orders, dated 28.03.2018, of the Supreme Court in Criminal Appeal nos.1375-1376 of 2013 in **Asian Resurfacing of Road Agency Private Limited v. Central Bureau of Investigation** though the guidance in the said precedent is not applicable to the execution proceedings. In the said decision, the Supreme Court, at paragraph (35) held as follows:

> 'In view of the above, situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy is required not only for corruption cases but for all civil and criminal cases where on account of stay, civil and criminal proceedings are held up. At times, proceedings are adjourned *sine die* on account of stay. Even after stay is vacated, intimation is not received and proceedings are not taken up.

> In an attempt to remedy this situation, we consider it appropriate to direct that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalized. The trial Court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of period of stay, proceedings can commence unless order of extension of stay is produced.'

3.1 Learned counsel for the DHr, having not disputed the facts and the events and also the fact that the stay order was granted in the second appeal; and that it was in force by the time the sale deed was executed in the execution proceedings, had submitted that since the sale deed is already executed, the DHr undertakes not to make any alienations pursuant to the sale deed pending disposal of the second appeal; and hence, no order need be granted in this revision petition, in view of the above undertaking, which the DHr is offering to give, and his further submission to abide by the same.

4. A plain reading of the above precedent indicates that the direction of the Supreme Court is related to all pending cases, where the stay against proceedings of a civil or criminal trial is operating and in such cases only, the stay order operating will come to an end after expiry of six months. Hence, the said direction does not apply to cases other than the cases where trials are in progress. Thus, the stay orders granted in the second appeal are continuing to operate. Further, the stay orders also continue to operate till either they are vacated or till the second appeal is disposed of by the High Court. Since the stay orders are communicated to the executing Court and the executing Court is aware of the stay orders, and the said orders are in operation and are in force, the orders of the executing Court in permitting to file stamp papers and its further actions in executing the sale deed and permitting registration of the sale deed are non-est in the eye of law.

5. I have given thoughtful consideration to the facts & submissions.

6. Before proceeding further it is profitable to refer to the legal position enunciated in the decision in **Mulraj vs. Murti Raghonathji Maharaj AIR 1967 SC 1386**[1] rendered by a Bench of three Hon'ble Judges of the Supreme Court, wherein it was held as follows:

> As we have already indicated, an order of stay is as much a prohibitory order as an injunction order and unless the court to which it is addressed has knowledge of it, it cannot deprive that court of the jurisdiction to proceed with the execution before it. But there is one difference between an order of injunction and an order of stay arising

out of the fact that an injunction order is usually passed against a party while a stay order is addressed to the court. As the stay order is addressed to the court, as soon as the court has knowledge of it, it must stay its hand; if it does not do so, it acts illegally. Therefore, in the case of a stay order as opposed to an order of injunction, as soon as the court has knowledge of it, it must stay its hand and further proceedings are illegal; but so long as the court has no knowledge of the stay order it does not lose the jurisdiction to deal with the execution which it has under the Code of Civil Procedure.

Though the court which is carrying on execution is not deprived of the jurisdiction the moment a stay order is passed, even though it has no knowledge of it, this does not mean that when the court gets knowledge of it, it is powerless to undo any possible injustice that might have been caused to the party in whose favour the stay order was passed during the period till the court has knowledge of the stay order. We are of opinion that section 151 of the Code of Civil Procedure would always be available to the court executing the decree, for in such a case, when the stay order is brought to its notice it can always act under section 151, and set aside steps taken between the time the stay order was passed and the time it was brought to its notice, if that is necessary in the ends of justice and the party concerned asks it to do so. Though, therefore, the court executing the decree cannot in our opinion be deprived of its jurisdiction to carry on execution till it has knowledge of the stay order, the court has the power in our view to set aside the proceedings taken between the time when the stay order was passed and the time when it was brought to its notice, if it is asked to do so and it consider that it is necessary in the interests of justice that the interim proceedings should be set aside. But that can only be done by the court which has taken the interim proceedings in the interest of justice under section 151 of the Code of Civil Procedure provided the order is brought to its knowledge and a prayer is made to set aside the interim proceedings within a reasonable time. Otherwise the interim proceedings in our opinion are not a nullity and in the absence of such exercise of power by the court executing the decree under section 151, they remain good for all purposes.

7. In the instant case it is borne out by the record that the executing Courtis fully aware of the stay orders granted, on 23.10.2009, by the High Court in S.A.M.P.no.2108 of 2009 in S.A.no.965 of 2009, and yet itpassed further orders in the execution petition, despite the stay orders being in force and operation. Hence, I am of the considered view that the subsequent orders of the executing Court with regard to execution and registration of the sale deed in favour of the DHr, are all illegal and that therefore, the same have to be declared as such. However, the validity of the sale deed eventually depends upon the result of the second appeal. In the event of the

success of the DHr in the second appeal, the stay orders granted pending disposal of the second appeal stand terminated and the sale deed though executed with the knowledge of stay orders re-gains its validity and legality in such an event.Even in a case where the executing Court has no knowledge of the orders of stay, this does not mean that when the Court gets knowledge of it, it is powerless to undo any possible injustice that might have been caused to the party in whose favour the stay order was passed during the period till the Court has knowledge of the stay order.In such cases, section 151 of the Code of Civil Procedure would always be available to the Court executing the decree, for in such a case, when the stay order is brought to its notice it can always act under Section 151, and set aside steps taken between the time the stay order was passed and the time it was brought to its notice, if that is necessary in the ends of justice and the party concerned asks it to do so. In such cases the party who suffered injustice may have to go the executing Court and make a prayer to set aside the interim proceedings within a reasonable time. The instant case is not a case where the executing Court has no knowledge of the orders of the stay. As already noted the executing Court is having knowledge of the orders of stay granted in the second appeal and yet the executing Court proceeded to execute the registered sale deed and directed the sale deed to be registered and ultimately the sale deed was registered.Hence, in view of the precedential guidance, it can be said that the executing Court acted illegally. However, the executing Court cannot be faulted as the said acts were done on an erroneous view that the stay orders are not in operation/force. Be that as it may. Though this Court can direct the JDrs to approach the executing Court and seek the remedy, which the law permits, such a course of driving the JDrs to the Court below may not be necessary in the facts and circumstances of the case stated supra. In **Surya Dev Rai vs. Ram Chander Rai and Ors.**AIR2003SC3044**,** the supreme Court held as follows:

> Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.
>
> Therefore, this Court is of the opinion that this revision can be disposed of with appropriate directions.

8. In the result and for the afore said reasons, this Court directs that the sale deed executed by the executing Court in favour of the DHr *vide* document no.653 of 2019, dated 31.12.2018, registered inthe office of the Joint Sub Registrar, Nallapadu, Guntur District, shall remain in abeyance till the stay orders granted in the second appeal are either vacated or till the same stand terminated in the event of the dismissal of the second appeal. Accordingly, and as a sequel to this order, the DHr is directed to surrender the subject original Sale Deed in question to the executing

Court forthwith for safe keeping until any further interlocutory orders are passedin the second appeal or until the disposal of the second appeal, as such a course helps in avoiding any further dealings by the DHr based on the said sale deed and in maintaining *status quo.*

9. The Civil Revision Petition is disposed of accordingly. There shall be no order as to costs.

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2019(3) L.S. 158 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

Present:

The Hon'ble Mr.Acting Chief Justice C. Praveen Kumar

Chittteti Rambabu ..Petitioner

Vs.

Chitteti Maddi Ravamma ..Respondent

CIVIL PROCEDURE CODE, Or.7, Rule 11 - Plaint averments alone to be considered to adjudicate application for rejection of plaint.

Mr.Y.V. Anil Kumar, Advocate for the Petitioner.

Mr.Sai Gangadhar Charmarty, Advocate for the Respondent.

O R D E R

1) Assailing the Order, dated 13.06.2019, passed in I.A.No.860 of 2018 in O.S.No.374 of 2018 on the file of the VII Additional Senior Civil Judge, Vijayawada, wherein an application filed under Order VII Rule 11 of C.P.C., requesting the Court to reject the plaint on the ground that, it does not disclose any cause of action and that it is barred by limitation, came to be rejected, the present Civil Revision Petition is filed under Article 227 of the Constitution of India.

2) The affidavit filed in support of the I.A. by the Petitioner/Defendant would show that, the Respondent/Plaintiff filed a suit for declaration in respect of Item Nos. 1 to 4 of suit schedule properties claiming to be the absolute owner. Along with the said suit, I.A. seeking injunction restraining the defendant and his men from interfering with her possession also came to be filed. It is said that, the husband of the plaintiff executed a registered a Will, dated 21.02.2004, vide Document No. 2282 of 2004, wherein Item No. 1 of the schedule property was given to her for maintenance. However, vested interest in Item No. 1 of the schedule property was created in favor of the petitioner. The structures in the Item No. 1 of the schedule property are under construction and not suitable for dwelling purposes. It is said that, the plaintiff suppressed the material facts and approached the court with unclean hands.

ii) It is said that, the respondent/ plaintiff and the petitioner/defendant executed Agreement of Sale-cum-General Power of Attorney, dated 28.07.2014, in favor of one Bethala Venkata Subba Rao, vide Document No. 2039/2014. As per the said document, Bethala Venkata Subba Rao paid advance amount of Rs.,2,93,000/-, on the date of registration as advance, and a registered Sale Deed came to be executed in his favor, on 07.01.2015. The petitioner/ defendant is said to have purchased the said property again, on 16.05.2017, from Bethala Srinivasa Rao, S/o. Venkata Subba

Rao, who purchased Item No. 1 from the plaintiff and defendant by paying the sale consideration at Rs.5,31,000/-.

iii) Item No. 2 of the plaint schedule property was said to have been sold by the plaintiff and Adapa Venkata Ratnam to the petitioner/defendant, on 31.03.2015, for Rs.,1,07,000/- and got it registered as Document No. 969/2015 in the Office of Sub-Registrar, Nunna.

iv) Similarly, the plaintiff and Adapa Venkata Ratnam executed another Sale Deed, on the very same day, in respect of Item No. 3 of the plaint schedule property, for a sum of Rs., 1,00,000/-, vide registered Document No. 968/2015 in the Office of Sub-Registrar, Nunna.

v) In respect of Item No. 4 of the plaint schedule property is concerned, the same was sold by the plaintiff and Adapa Venkata Ratnam for Rs., 67,000/- under a registered Document No. 970/2015, dated 31.03.2015.

vi) As the entire plaint schedule properties were purchased by the petitioner/ defendant and he being in possession and enjoyment of the properties, coupled with absolute rights; the suit filed by the respondent/plaintiff is barred by limitation. Thus, the application came to be filed for rejection of the plaint.

3) Counter came to be filed disputing the averments made in the affidavit.

i) In sofar as the Document dated 21.02.2004 is concerned, it is said that, it is a Will, as it came into operation after the death of testator. The possession of the property was given to the plaintiff by the testator.

ii) Having regard to the facts, the validity of the Document, dated 21.02.2004, has to be examined in the course of the trial and needs adjudication at this stage.

iii) After analyzing the material on record, the trial Court dismissed the application. Challenging the same, the present Revision is filed.

4) The two points that requires to be considered are,

i. Whether the suit is barred by limitation?

ii. Whether there was any violation of law, for the purpose of court fee and jurisdiction for want of filing the suit?

5) It has to be noted that the dispute is essentially between the mother and son in respect of plaint schedule property. The defendant is no other than the Son of the plaintiff.

6) For the purpose of considering the issue involved, the averments in the plaint alone are required to be taken into consideration and the nature of defence set out in the written statement has no role to play. This legal position is established by the Apex Court in ***Popat and Kotch of Property v. State Bank of India, Staff Association*** 2005 (7) SCC 510 also in ***Hardesh Ores (P) Limited v. Hede and Company*** 2007 (5) SCC 614.

7) Before dealing with the two issues, it would be appropriate to refer to the gist of the allegations made in the plaint.

i) The plaintiff is the second wife of late Chitteti Hanumaiah. His first wife Smt. Manikyam died. Through her, he has a

daughter, by name, Seetha Maha Lakshmi. The plaintiff, Sri. Chitteti Hanumaiah has four sons including the Revision Petitioner and three daughters.

ii) The contents of the plaint show that, the plaintiff as well as her husband were not taken care of by their children properly, though they were made to part with immovable properties. Paragraph No. 7 of the plaint states that, the petitioner induced Chitteti Hanumaiah to execute a registered Will, dated 21.02.2004, in respect of Ac. 0.021/2 in Item No. 1 of the plaint schedule out of Ac.0.05 cents towards north and the remaining Ac.0.021/2 cents belongs to the father of the plaintiff. The above extent of Ac.0.021/2 cents was given towards pre-existing right of maintenance to the plaintiff.

iii) By virtue of a decree in O.S. No. 110 of 1985 relating to the properties of the parents of the plaintiff, she got Ac.0.44 cents of Mango garden apart from 21 square yards in Ac.0.021/2 cents of house site belonged to her father, adjoining Item No. 1 of the plaint schedule. It is said that the petitioner manipulated these properties making the respondent to execute a sale deed in favor of Kotte Sambasiva Rao and took away entire sale proceeds of Rs.,5.85 lakhs. The petitioner is also alleged to have manipulated power of attorney-cum-agreement of sale, under Ex.P3, in favor of B. Venkata Subba Rao, executed by the respondent and the petitioner as if Item No. 1 was sold for Rs., 2.95 lakhs. Thereafter, Ex.P4 sale deed was executed, on 07.01.2015, in favor of B. Srinivasa Rao, which the petitioner claimed to have purchased the same under Ex.P5, on 16.05.2017, under Ex.P4 from one B. Srinivasa Rao.

iv) By virtue of Ex.P6 and Ex.P7 [Sale Deeds], dated 31.03.2015,

A. Venkata Ratnam is said to have sold Item Nos. 2 and 3 of the plaint schedule for consideration. Sale Deeds came to be executed on the same day for consideration of Item No. 4 of plaint schedule, in favor of the petitioner.

v) The averments in the plaint show, as if all the transactions were brought out by the petitioner with a fraudulent intention taking advantage of old-age, illiteracy and loneliness of the respondent.

vi) According to her, Item Nos. 3 and 4 were allotted to her in O.S. No. 110 of 1985, and in respect of Item No. 4 a small asbestos shed was constructed and the respondent is living therein much to her reluctance. Thus, the averments in the plaint set out a case of fraud played by the petitioner on the respondent.

8) The effect of fraud is considered in ***K.D. Sharma v. Steel Authority of India Limited and others*** 2008 (12) SCC 481 the court held:

> 26. It is well settled that "fraud avoids all judicial acts, ecclesiastical or temporal" proclaimed Chief Justice Edward Coke of England before about three centuries before. Reference was made by the counsel to a leading decision of this Court in S.P. Chengalvaraya Naidu (Dead) by Lrs. V. Jagannath (Dead) by Lrs. & Ors., wherein quoting the above observations, this Court held that a judgment/decree obtained by fraud has to be treated as a nullity by every Court.

27.Reference was also made to a recent decision of this Court in A.V. Papayya Sastry & Ors. V. Govt. of A.P. Considering English and Indian cases, one of us (C.K. Thakker, J.) stated:

"22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order — by the first Court or by the final Court— has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings".

The Court defined fraud as an act of deliberate deception with the design of securing something by taking unfair advantage of another. In fraud one gains at the loss and cost of another. Even the most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam.

9) In sofar as the question relating to Ex.P2 is concerned, whether it be treated as a Will or Settlement Deed, the same cannot be decided at this stage. The evidence required to be adduced and thereafter the court will appreciate the issue basing on the evidence available on record. Therefore, the judgment of ***Kirala Vankatamma v. K. Munniswamy and others*** 2018 (4) ALD 675 and also the judgment in ***Suraj Lam and Industries Pvt. Ltd v. State of Hariyana and another*** 2012(1) SCC 656 may not be applicable to this case.

10) In sofar as the question relating to the suit being grossly undervalued is concerned, it is not the case, where the suit has been undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, failed to do so. In the judgment in ***S.N.Balapattabi v Mrs. Balanagalakshmi*** C.R.P. PD No. 3686 of 2016 and C.M.P. No. 18699 of 2016 it is held:-

14. The principle underlying Clause (d) of Order VII Rule 11 is no different. We will refer here to a recent decision of this Court rendered in Popat and Kotecha Property vs. State Bank of India Staff Association (2005) 7 SCC 510 where it was held as under in para 10 of the report:-

"10. Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force."

It was emphasized in para 25 of the reports that the statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11 CPC. The principle is, therefore, well settled that in order to examine whether the plaint is barred by any law, as contemplated

by sub-rule (d) of Order VII Rule 11 CPC, the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence. Applying the said principle, the plea raised by the contesting respondents that the Company Petition was barred by limitation has to be examined by looking into the averments made in the Company Petition alone and any affidavit filed in reply to the Company Petition or the contents of the affidavit filed in support of Company Application No. 113 of 1995 filed by the respondents seeking dismissal of the Company Petition cannot at all be looked into.

4. The three cardinal principles that should be borne in mind while disposing of a question relating to court-fee are : (1) The Court shall accept the plaint averments as correct and apply the appropriate provision in the Act, (b) the court shall not be carried away by the form in which the plaint is dressed but shall peep into the substance to ascertain the base for reliefs claimed and the reliefs really asked for in the action, and (c) the Court is not concerned with the legality or maintainability of the claim as that relates to the merits and falls outside the purview of the Act."

11) Coming to the aspect of limitation, Article 58 of the Limitation Act need not be considered at this stage, since it depends on the evidence let in at the trial, as number of disputed questions are involved. Further, it is a well settled principle that, the question of limitation is a mixed question of fact and law. Under Article 58 of the Limitation Act, the limitation for seeking any declaration is three [3] years, when the right to sue first accrues. The distinction between a suit for declaration simpliciter and a suit for declaration of title of immovable property, for which the period of limitation is 12 years and not 03 years.

12) It is apparent that, the respondent/plaintiff filed the suit not for mere declaration simpliciter but for declaration of title of immovable property and consequential relief of injunction.

Therefore, the claim of the petitioner that the suit is time barred as it is filed on 28.05.2019 basing on the sale of the schedule properties in the year 2014 or 2015, cannot be accepted at this stage. Ergo, *prima facie,* it cannot be said that the suit filed by the respondent/plaintiff is barred by limitation.

13) Since, the issues involved are mixed questions of fact and law, a regular and full dressed trial should necessarily be gone into these disputed facts and this court cannot be asked to decide them at this initial stage. Hence, I see no merits in the revision.

14) Accordingly, the Civil Revision Petition is dismissed. No order as to costs. The Trial Court shall proceed with the matter without being influenced by the observations made in this Order.

15) Consequently, miscellaneous applications pending, if any, shall also stand closed.

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"72. As argued by learned Solicitor General, (which is part of 'Sealed Cover', two material witnesses (accused) have been approached for not to disclose any information regarding the petitioner and his son (co-accused). This court cannot dispute the fact that petitioner has been a strong Finance Minister and Home Minister and presently, Member of Indian Parliament. He is respectable member of the Bar Association of Supreme Court of India. He has long standing in BAR as a Senior Advocate. He has deep root in the Indian Society and may be some connection in abroad. But, the fact that he will not influence the witnesses directly or indirectly, cannot be ruled out in view of above facts. Moreover, the investigation is at advance stage, therefore, this Court is not inclined to grant bail."

29. FIR was registered by the CBI on 15.05.2017. The appellant was granted interim protection on 31.05.2018 till 20.08.2019. Till the date, there has been no allegation regarding influencing of any witness by the appellant or his men directly or indirectly. In the number of remand applications, there was no whisper that any material witness has been approached not to disclose information about the appellant and his son. It appears that only at the time of opposing the bail and in the counter affidavit filed by the CBI before the High Court, the averments were made that".....the appellant is trying to influence the witnesses and if enlarged on bail, would further pressurize the witnesses.....". CBI has no direct evidence against the appellant regarding the allegation of appellant directly or indirectly influencing the witnesses. As rightly contended by the learned Senior counsel for the appellant, no material particulars were produced before the High Court as to when and how those two material witnesses were approached. There are no details as to the form of approach of those two witnesses either SMS, e-mail, letter or telephonic calls and the persons who have approached the material witnesses. Details are also not available as to when, where and how those witnesses were approached.

30. The learned Solicitor General submitted that the statement of witness 'X' who is said to have been approached not to disclose any information regarding the appellant and his son, has been recorded under Section 164 Cr.P.C. in which the said witness 'X' has made the statement that he has been approached. Statement under Section 164 Cr.P.C. of the said witness 'X' is said to have been recorded on 15.03.2018. The said witness allegedly approached or the other witnesses in a case of the present nature, cannot be said to be a rustic or vulnerable witness who could be so easily influenced; more so, when the allegations are said to be based on documents. More particularly, there is no material to show that the appellant or his men have been approaching the said witness so as to influence the witness not to depose against the appellant or his son.

31. It is to be pointed out that the respondent - CBI has filed remand applications seeking remand of the appellant on various dates viz. 22.08.2019, 26.08.2019, 30.08.2019, 02.09.2019,05.09.2019 and 19.09.2019 etc. In these applications, there were no allegations that the appellant was trying to influence the witnesses and that any material witnesses (accused) have been approached not to disclose information about the appellant and his son. In the absence

of any contemporaneous materials, no weight could be attached to the allegation that the appellant has been influencing the witnesses by approaching the witnesses. The conclusion of the learned Single Judge "...that it cannot be ruled out that the petitioner will not influence the witnesses directly or indirectly....." is not substantiated by any materials and is only a generalised apprehension and appears to be speculative. Mere averments that the appellant approached the witnesses and the assertion that the appellant would further pressurize the witnesses, without any material basis cannot be the reason to deny regular bail to the appellant; more so, when the appellant has been in custody for nearly two months, co-operated with the investigating agency and the charge sheet is also filed.

32. The 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. The charge sheet has been filed against the appellant and other co-accused on 18.10.2019. The appellant is in custody from 21.08.2019 for about two months. The co-accused were already granted bail. The appellant is said to be aged 74 years and is also said to be suffering from age related health problems. Considering the above factors and the facts and circumstances of the case, we are of the view that the appellant is entitled to be granted bail.

33. In the result, the impugned judgment dated 30.09.2019 passed by the High Court of Delhi in Bail Application No. 2270 of 2019 is set aside and the appeal arising out of SLP(Crl) No. 9269 of 2019 is allowed. The appellant is ordered to be released on bail if not required in any other case, subject to the condition of his executing bail bonds for a sum of Rs. 1,00,000/- with two sureties of like sum to the satisfaction of the Special Judge (PC Act), CBI-06, Patiala House Courts, New Delhi. The passport if already not deposited, shall be deposited with the Special Court and the appellant shall not leave the country without leave of the Special Court and subject to the order that may be passed by the Special Judge from time to time. The appellant shall make himself available for interrogation as and when required. Consequently, the appeal arising out of SLP(Crl) No. 9445 of 2019 preferred by the CBI stands dismissed. Since the High Court, in the impugned judgment, has expressed its views on the merits of the matter, the findings of the High Court in the impugned judgment shall not have any bearing either in the trial or in any other proceedings. It is made clear that the findings in this judgment be construed as expression of opinion only for the limited purpose of considering the regular bail in CBI case and shall not have any bearing in any other proceedings.

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2019 (3) L.S. 93 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
L. Nageswara Rao &
The Hon'ble Mr.Justice
Hemant Gupta

The Govt.of Tamil Nadu
& Ors., ..Appellants

Vs.

Arulmighu Kallalagar
Thirukoil Alagar Koil
& Ors., ..Respondents

CIVIL PROCEDURE CODE, Order 41 Rule 27 – Respondents/Devotees filed a suit for a declaration that the entire forest area in Alagar Hills belongs to, the Presiding Deity of the Respondent-temple – Suit filed by the Respondent, was dismissed - Appeals filed against the judgments of the trial Court were allowed by the High Court - Aggrieved by the judgment of High Court, the Appellant approached this Court by filing present appeal.

Held - High Court presumed lost grant - The circumstances in which the presumption of lost grant can be made are when a person was found in possession and enjoyment of land for a considerable period of time under an assertion of title without challenge, Courts in England were inclined to ascribe a legal origin to such possession, and when on the facts a title by prescription could not be sustained, it was held that a presumption could be made that the possession was referable to a grant by the owner entitled to the land, but that such grant had been lost - It was a presumption made for securing ancient and continued possession, which could not otherwise be reasonably accounted for - We do not agree that the respondent was in continuous possession under an assertion of title as there is no evidence on record to reach such a conclusion.

Presumption of lost grant is therefore not permissible - Finding recorded by the High Court that there is adequate material to hold that Alagar hills belong to the temple is erroneous -Trial Court is right in holding that the Respondent miserably failed in producing any material to prove its title – Judgement of HC is set aside and appeals stand allowed.

J U D G M E N T

(per the Hon'ble Mr.Justice
L. Nageswara Rao)

H.H. Sri Sundara Ramanuja Periya Jeer Swamigal of Periya Jeer Swamigal Mutt, Tirupati and five others (hereinafter referred to as "devotees") filed O.S.No.178 of 1982 in the Court of Subordinate Judge, Madurai for a declaration that the entire forest area in Alagar Hills belongs to Sri Arulmighu Kallalagar also called Sri Sundarajasami or Sundara Bahu or Paramasamy, the Presiding Deity of the Respondent-temple. A consequential relief of possession of the

C.A.Nos.559- 560/2008 Date:6-11-2019

said forest area was also sought. O.S. No.171 of 1987 was filed by Arulmigu Kallalagar Thirukoil Alagar Koil (for short "the Respondent") in the Court of Subordinate Judge, Madurai for a direction to the Government of Tamil Nadu (for short "the Appellant") to deliver possession of the schedule mentioned property i.e. Alagar hills. Relief of permanent injunction restraining the Defendant i.e. the Appellant-herein and the Chief Conservator of Forest Department from disturbing the underground water reserves by digging wells or in any other manner was also sought. The schedule mentioned property is to an extent of 15,838.4 acres at Sellappa Naickenpatti Village. O.S. No.171 of 1987 filed by the Respondent, was dismissed by a judgment dated 14.03.1988 and O.S. No.178 of 1982 filed by the devotees was dismissed on 28.09.1995. The Appeals filed against the judgments of the trial Court were allowed by the High Court of Judicature at Madras vide judgment dated 27.06.2003. Aggrieved by the judgment, the Appellant approached this Court by filing the above Appeals.

2. In O.S. No.178 of 1982 filed by the devotees, it was averred that the entire Alagar Malai was the property of Lord Sri Kallalagar. The devotees further pleaded that from the historical records and Sthalapurana that the Government which was in management of the temple handed over the temple to the Manager or the temple Committee members but failed to hand over the forest area which is the subject matter of the dispute. The devotees contended that the provisions of the Madras Forest Act, 1882 (for short "the Act") were not complied with before declaring Alagar Hills as a reserved forest. Claiming themselves to be members of the Vaishnava Community who are deeply interested in the preservation of the entire Alagarmalai as the property of Lord Sri Arulmighu Kallalagar, the devotees filed a comprehensive suit for declaration of title.

3. The Appellant filed a written statement contending that the entirety of Alagar Hills belongs to the Government. According to the Appellant, Alagar Hills have been classified as reserved forest by the Government Notification No. 187 dated 11.10.1883. It was argued that the entire suitschedule property i.e. Alagar Hills was in possession, control and management of the Forest Department.

4. The trial Court dismissed the suit filed by the Respondent by holding that no evidence was produced to show that the suit property belonged to the Respondent-temple. The contention of the Government that the suit property was declared as a reserved forest in 1881 was accepted by the trial Court. The Notification dated 11.10.1883 under Section 25 of the Act was relied upon by the trial Court to hold that the Respondent-temple cannot claim any right over the forest land on Alagar Hills.

5. The suit filed by the devotees was also dismissed by the trial Court on the ground that the Notification dated 11.10.1883 under Section 25 of the Act was valid and it was issued after following the procedure prescribed by the Act. The trial Court also held that no evidence has been produced by the devotees to show that the temple had any right over the Alagar Hills. As the issue was substantially the same as that

in O.S. No.171 of 1987, the trial Court held that O.S. No.178 of 1982 is hit by res judicata.

6. The High Court heard the Appeals filed against the two judgments of the trial Court together and disposed them off by a common judgment. The High Court framed the following questions for determination:

"1. Whether Azhagar Hills belong to Azhagar Temple?

2. Whether they were in the possession and management of the first defendant Government in their capacity as trustee and therefore, Section 10 of the Limitation Act would apply?

3. Whether the Government Order dated 11.10.1883 had been properly issued or is illegal and invalid for non observance of the provisions of the Tamil Nadu Forest Act, 1882? "

7. The Applications filed by the Respondent under Order 41 Rule 27 of the Civil Procedure Code, 1908 (CPC) were allowed and the documents produced by the Respondent were marked as Exhibit A-46 to A-56. While referring to Section 25 of the Act, the High Court held that there is no order of reservation as contemplated in Section 25 of the Act. It was further observed by the High Court that the procedure prescribed under Sections 6 and 8 of the Act was not complied with. The Notification dated 11.10.1883 under Section 25 of the Act was held to be illegal and void. It was held that the suits were not barred by limitation as Section 10 of the Act would apply. The submission that the Appellant had willfully suppressed material documents and so the presumption of lost grant arises, was accepted by the High Court. Being of the opinion that adequate material has been produced by the Respondent-temple to prove its title of the temple over Alagar Hills, the High Court held that the Respondent was entitled to succeed. The entire land in Alagar Hills which was hitherto being treated as a reserved forest was directed to be reverted to the Respondent-temple.

8. We have heard Mr. Balaji Srinivasan, learned Additional Advocate General for the State of Tamil Nadu, Mr. Mohan Parasaran, learned Senior Counsel for the Respondent-temple and Mr. V. Ramasubramanian, learned counsel for the devotees.

9. It is the case of the Respondent that the entire land in Alagar Hills belongs to the temple. The Appellant denied the title of the Respondent over the Alagar Hills. According to the Appellant, Alagar Hills Reserved Forest was notified by Notification No.187 of 11.10.1883. Merely because a temple was situated at the foothill of the Alagar Hills, the Respondent cannot claim title or possession over the reserved forest. According to the Appellant, all the grazing land and other leases, revenue and expenditure in the Alagar Hills Reserved Forest have been under the control of the Forest Department.

10. It is not necessary for us to delve into the events prior to 1881 for the purpose of determining the controversy in this case. We proceed to examine the material on record. The first document of relevance is

Proceeding No.85 dated 20.01.1881 of the Board of Revenue. The Conservator of Forests, Colonel R.H. Beddome inspected the forest tracks and found that the area of the hills and forest in Madura Forest Division was 1,098 sq. miles. An area of 305.48 sq. miles was selected for reservation. Alagarmalai having an area of 20.37 sq. miles was included in the proposed reserves. The recommendation of the Conservator of Forests was sent to the Superintendent of Revenue Survey by the Board of Revenue to prepare the outline map as suggested by the Conservator of Forests. By Proceeding No.626 dated 09.04.1881, the Board of Revenue proposed 20.37 sq. miles of Alagarmalai, "all Government property and hill tracks" to be reserved for climatic reasons as well as for fuel demands of the future. By an Order No.1284 dated 29.08.1881, the proposal made by the Committee to reserve 305.48 sq. miles in Madura District was approved. The statement showing the area of reserves in Madura District is annexed therewith, which includes Alagarmalai.

11. The Madras Forest Act, 1882 was promulgated for the protection and management of forests in the Presidency of Madras which came into effect on 01.01.1883. A Notification was issued on 13.11.1883 under Section 25 of the Act, declaring the blocks of forests described in the schedule thereto as reserved forests. Alagarmalai is found at Serial No.XXI. At this point, it is relevant to refer to Section 25 of the Act which is as follows:

"25. The "Government may, by notification4 in the 3 (Official Gazette) declare any forest which has been reserved by order of the Government previous to the day on which this Act comes into force to be a reserved forest under this Act:

Provided that if the rights of the Government or of private persons to or over any land or forest produce in such forest have not been inquired into, settled and recorded in manner which the Government thinks sufficient, the same shall be inquired into settled and recorded in the manner provided by this Act for reserved forest, before the date on which the notification declaring the forest to be reserved takes effect.

All questions decided, orders issued and records prepared in connection with the reservation of such forest shall be deemed to have been decided, issued and prepared he re under, and the provisions of this Act relating to reserved forest, shall apply to such forests."

12. For a better understanding of Section 25, it is necessary to refer to the other relevant provisions of the Act. Section 3 of the Act empowers the Government to constitute a reserved forest. Section 4 provides that a notification shall be published by the Government in the Official Gazette of the district whenever it is proposed to constitute any land as reserved forest by specifying the details of such land. According to Section 6, the Forest Settlement Officer shall publish a proclamation after issuing the notification under Section 4 specifying the particulars of the property and fixing the time for receiving objections from interested persons. Section 16 of the Act postulates issuance of a notification declaring the forest as

reserved after disposal of the claims pursuant to the proclamation under Section 6, specifying the limitations of the forests which are intended to be reserved from a date to be fixed by the notification. As per Section 25, the Government may issue a notification in the Official Gazette declaring the area which was already reserved by the Government prior to the Act coming into force to be a reserved forest under the Act. Unsettled claims shall be considered before the notification takes effect, according to the proviso to Section 25 of the Act.

13. While examining the contention of the Respondent that the Notification dated 11.10.1883 was issued without complying the requirements of Section 25 of the Act, the High Court committed an error in finding that there is no order of Reservation prior to 01.01.1883. The High Court referred to Exhibit B-6 which contains Order No.187 issued under Section 4 of the Act, to arrive at a conclusion that there is no order of reservation. Exhibit B-6 also contains the Notification dated 13.11.1883 by which certain blocks of forest land described in the Schedule annexed thereto have been declared as reserved forests. Serial No.XXI of the said Schedule covers Alagar Hills which is the subject matter of the suit. Order No.189 was issued under Section 4 of the Act notifying the proposal to constitute certain area in Madura District as reserved forest. The area mentioned therein pertains to Aggamalais. Mr. F.E Robinson, Assistant Collector, was appointed as the Forest Settlement Officer and District Forest Officer of Madura to conduct the inquiry under Section 4. The Notification pertaining to the suit schedule land i.e. Alagarmalai was under Section 25 of the Act whereas the Notification in respect of Aggamalais was issued under Section 4 of the Act.

14. The High Court mixed-up the two Notifications to hold that a reservation was not made in respect of Alagarmalai prior to the Act coming into force. Relying on Order No.189 pertaining to Aggamalais, the High Court erroneously held that the notification under Section 4 of the Act relates to Alagarmalais. On such basis the High Court held that there was no order passed by the Government declaring the Algarmalai as reserved forest prior to 01.01.1883 i.e. the date on which the Act came into force. Proceeding No.1284 dated 23.08.1881 would clearly demonstrate that the proposal for reserving forest area in Alagarmalai was approved by the Government prior to the commencement of the Act.

15. Due to the misconception that Order No.189 issued under Section 4 of the Act is applicable to Alagarmalai, the High Court proceeded further to hold that the inquiry under Sections 6 and 8 have not been conducted. Section 6, as stated above, provides for an inquiry to be conducted pursuant to the notification issued under Section 4. Section 8 is connected to the inquiry to be conducted under Section 6. Neither Section 6 nor Section 8 are applicable to a notification issued under Section 25 of the Act which deals with forests which were already reserved by the Government prior to the Act. Therefore, the finding of the High Court that mandatory requirements of the Act were not complied with before issuing Notification dated 11.10.1883 under Section 25 is not correct.

The judgments relied upon by the High Court in Sri Perarula Ramanuja Jeer Swami vs. The Secretary of State for India in Council through the Collector of Tinnevelly, (1910) VI Indian Cases 691 and Mysore Balakrishna Rao vs. The Secretary of State for India in Council, (1915) XXIX M.L.J. 276 are not applicable to the facts of this case.

16. As the suit filed by the respondent was not dismissed as barred by limitation, it is not necessary for us to examine the point relating to Section 10 of the Limitation Act. Another point decided in favour of the Respondent is that lost grant has to be presumed. On the basis that the Respondent-temple had been in long and continuous possession of Alagar hills, the High Court was of the opinion that lost grant was to be presumed. The High Court observed that the Respondent-temple had been exercising acts of ownership over the suit hills for several centuries. The Application filed under Order 41 Rule 27 of the C.P.C. by the Respondent was allowed and the documents produced by them were marked as Exhibits A-46 to A-56. We have carefully examined those documents which only show that honey and other forest produce were being collected by those who were permitted by the Respondent-temple. The right, title or possession of the temple over Alagar hills cannot be determined on the basis of the above documents.

17. An adverse inference was drawn against the Appellant for not producing the relevant material. The High Court was of the opinion that the Appellant was guilty of suppression of the documents which were available. Hence, the High Court presumed lost grant. The circumstances in which the presumption of lost grant can be made has been settled by this Court in a judgment reported in Sri Manohar Das Mohanta vs. Charu Chandra Pal & Ors, (1955) 1 SCR 1168 as under;

"7. The circumstances and conditions under which a presumption of lost grant could be made are well settled. When a person was found in possession and enjoyment of land for a considerable period of time under an assertion of title without challenge, Courts in England were inclined to ascribe a legal origin to such possession, and when on the facts a title by prescription could not be sustained, it was held that a presumption could be made that the possession was referable to a grant by the owner entitled to the land, but that such grant had been lost. It was a presumption made for securing ancient and continued possession, which could not otherwise be reasonably accounted for. But it was not a presumptio juris et de jure, and the Courts were not bound to raise it, if the facts in evidence went against it. "It cannot be the duty of a Judge to presume a grant of the non-existence of which he is convinced" observed Farwell, J. in Attorney-General vs. Simpson [(1901) 2 Ch D 671, 698]. So also the presumption was not made if there was any legal impediment to the making of it. Thus, it has been held that it could not be made, if there was no person competent to be the recipient of such a grant, as where the right is claimed by a fluctuating body of persons. That was held in Raja Braja Sundar Deb vs. Moni Behara [1951 SCR 431, 446] . There will likewise be no scope for this presumption, if there is no person capable of making a grant: (Vide Halsbury's Laws

of England, Vol. IV, p. 574, para 1074); or if the grant would have been illegal and beyond the powers of the grantor. (Vide Barker vs. Richardson [4 B & Ald 579 : 106 ER 1048 at 1049] and Rochdale Canal Company v. Radcliffe [18 QB 287 : 118 ER 108 at 118])."

18. We do not agree that the respondent was in continuous possession under an assertion of title as there is no evidence on record to reach such a conclusion. The presumption of lost grant is therefore not permissible.

19. The finding recorded by the High Court that there is adequate material to hold that Alagar hills belong to the temple is erroneous. The trial Court is right in holding that the Respondent miserably failed in producing any material to prove its title.

20. On 02.04.2019, we were informed that the parties were attempting a settlement. This Court directed the Member Secretary, Hindu Religious and Charitable Endowments Board (HR & CE) to convene a meeting with all the stakeholders to facilitate a settlement. A meeting was conducted on 03.08.2019 in the Office of the Commissioner, HR & CE in which all the stakeholders participated. The significant proposals of the Respondent were that the title in respect of the Alagar Hills should be with that of the presiding deity of the Respondent-temple and that the income from the forest shall be shared equally by the Respondent-temple and the Forest Department. The Appellant did not accept the said proposals. After joint inspection by the Forest Department and the HR & CE Department, the Appellant was willing to divert an area of 18.3032 hectares of land including the various religious spots for ease of movement of the devotees. The Forest Department was willing to permit 50 ft. of pathway to reach all the spots and shrines from the foothill. The Forest Department was of the view that the temple should undertake very strict vigil on the ecosystem and environment and no non-forest activities shall be permitted within the 18.3032 hectares, except religious activities. We are in agreement with the proposal made by the Appellant. The Forest Department shall permit 50 ft. of pathway to reach all the spots and shrines from the foothills for which the earmarked area of 18.3032 hectares of land can be used. No non-forest activities shall be permitted to be undertaken by anybody, including the Respondent-temple administration within the 18.3032 hectares of land which is diverted for ease of movement of devotees to reach all the spots and shrines from the foothill.

21. In view of the above, the judgment of the High Court is set aside and the Appeals are allowed.

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2019 (3) L.S. 100 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Ms.Justice
Indu Malhotra &
The Hon'ble Mr.Justice
Sanjiv Khanna

Oriental Kuries Ltd. ..Appellant
Vs.
Lissa & Ors., ..Respondents

CHITS FUNDS ACT - INDIAN CONTRACT ACT - Issue which has arisen for consideration in the present Appeal is with respect to the jural relationship between a chit fund entity and the subscribers, created by a chitty agreement and whether it is a debt in prasenti or a promise to discharge a contractual obligation.

Held - When a prized subscriber is allowed to draw the chit amount, which is in the nature of a grant of a loan to him from the common fund in the hands of the foreman, with the concessional facility of effecting re-payment in instalments; this is subject to the stipulation that the concession is liable to be withdrawn in the event of default being committed in payment of any of the instalments - Relationship between a chit subscriber and the chit foreman is a contractual obligation, which creates a debt on the day of subscription - On default taking place, the foreman is entitled to recover the consolidated amount of future subscriptions from the defaulting subscriber in a lump sum - Impugned judgment passed by the Division Bench of the High Court is set aside - Civil Appeal stands allowed.

C.A.No.5401/2009 Date:6-11-2019

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

The issue which has arisen for consideration in the present Civil Appeal is with respect to the jural relationship between a chit fund entity and the subscribers, created by a chitty agreement; and whether it is a debt in prasenti or a promise to discharge a contractual obligation.

2. The present Appeal arises out of a Chit Fund conducted by the Appellant, a chit fund entity. The duration of the chit fund was from 1978 to 1990. The Respondents were subscribers of the chit fund. During the subsistence of the chit fund, the Respondents defaulted in the payment of 12 installments from 24.11.1981 to 24.11.1984.

2.1 The Appellant - chit foreman instituted two Suits against the Respondent - subscribers before the Subordinate Judge, Thrissur, Kerala. The first Suit bearing O.S. No. 323/1984 was filed for recovery of 12 installments for the period 24.11.1981 to 24.11.1984; and, the second Suit bearing O.S. No. 548/1987 was filed for recovery of future subscriptions due under the chit fund after 24.11.1984.

2.2 The Subordinate Judge, Thrissur, Kerala decreed both the Suits in favour of the Appellant - Company on 09.04.1990.

In O.S. No. 323/1984, the Respondents were directed to pay the Appellant - Company a sum of Rs. 40,915/- with Interest @12% on the sum of Rs. 34,800/- from the date of filing the Suit till the date of decree, and thereafter Interest @6% per annum from the date of the decree till the date of realization.

In O.S. No. 548/1987, the Respondents were directed to pay the Appellant - Company a sum of Rs. 83,820.68/- with Interest @12% on a sum of Rs. 63,800/- from the date of filing of the Suit till the date of decree, and thereafter Interest @6% per annum from the date of the decree till the date of realization.

2.3 Aggrieved by the aforesaid Judgment and Decree dated 09.04.1990 passed by the Subordinate Judge, Thrissur, the Respondents herein filed two Appeals bearing A.S. No. 326/1992 and A.S. No. 346/1992 before the Single Judge of the Kerala High Court.

The learned Single Judge of the High Court dismissed both the Appeals filed by the Respondents vide a common Judgment and Order dated 27.06.1994.

The Single Judge held that the Kerala Chitties Act, 1975 does not apply to the Chit Fund in question, since the same was started from Mangalore, Karnataka. The Appellant being a trading company, was exempted under Section 13(1)(e) of the Companies Act, 1956 from specifying the States to which the objects would extend in the Memorandum and Articles of Association.

Reliance was placed by the Single Judge on the Full Bench decision of the Kerala High Court in P.K. Achuthan and Anr. vs. State Bank of Travancore, Calicut, AIR 1975 Ker 47 wherein it was held that a chit fund is essentially a debt in praesenti, but permitted to be paid in installments. The facility of this debt is available to the debtor so long as the installments are regularly paid. The nature of the transactions under a chit fund are essentially that of a debtor-creditor relationship.

It was noted that the judgment in P.K. Achutan (supra) had been affirmed by the Supreme Court in K.P. Subbarama Sastri and Ors. vs. K.S. Raghavan and Ors. (1987) 2 SCC 424

2.4 Aggrieved by the common Judgment and Order dated 27.06.1994 passed by the learned Single Judge, the Respondent filed two Second Appeals bearing AFA Nos. 84 of 1994 and 85 of 1994 before the Division Bench of the Kerala High Court.

The Division Bench vide the impugned Judgment and Order dated 15.01.2009, allowed AFA No. 84 of 1994, and dismissed AFA No. 85 of 1994.

The division bench noted that the decision of the full bench in P.K. Achutan (supra) had been over-ruled in Janardhana Mallan

& Ors. vs. Gangadharan & Ors. AIR 1983 Ker 178 wherein a five-judge bench of the Kerala High Court held that future installments payable by a chit subscriber are not a debt owed to the chit foreman, and therefore, could not be recovered in case of default in payment of an installment. The subsequent larger bench decision of five judges in Janardhana Mallan (supra) was evidently not brought to the notice of the Supreme Court in K.P. Subbarama Sastri (supra). The decision in Achutan's case would no longer hold the field, since it had been over-ruled by the larger bench in Janardhana Mallan's case.

The Division Bench held that by entering into a chitty agreement, a debt is not created at once by the subscriber in respect of payment of all future installments, as the chitty variola only contains a promise to pay, which is not a promise to repay an existing debt, but only to pay and discharge a contractual obligation. The execution of the security bond is to ensure fulfillment of the terms of the contract by the parties. If the subscriber fails to pay future installments in terms of the contractual obligations, then the subscriber would become a defaulter, he would incur a debt to the foreman, and would not be a liability to pay in future of an existing liability.

On the facts of the case, the division bench held that the Appellant - Company was entitled to recover 12 installments from the Respondents for the period from 24.11.1981 to 24.11.1984. However, future installments could not be recovered.

2.5 Aggrieved by the judgment of the Division Bench, the Appellant - chit fund company filed the present Special Leave Petition. This Hon'ble Court vide Order dated 10.08.2009 granted special leave to appeal. The dispute between the parties got resolved during the pendency of the present appeal.

This Court vide Order dated 13.11.2009 noted the submission made by the Counsel for the Appellant that several suits had been filed by the Appellant -Company against the subscribers, which had been dismissed on the basis of the impugned judgment. In these circumstances, the present Appeal was pressed for determination.

3. Discussion and Analysis

At the time when modern banking was not fully developed in small towns and rural areas, chit fund institutions emerged to cater to the financial needs of low-income households. A conventional chit fund is an old indigenous financial institution involving periodic subscriptions by a group of persons. It is, in law, a contract between the subscribers and the foreman, which provides that the subscribers shall subscribe a certain sum by way of regular installments for a specified period of time. Each subscriber in his turn, as determined by lot, or auction, or in any other manner specified, is entitled to the prize amount. The number of subscribers in a chit fund would constitute the number of installments, so that every subscriber is assured of receiving the prize amount. As there is a mutuality of interest amongst the subscribers to each chit fund, it constitutes a convenient instrument which

combines savings and borrowings.

The duties of the foreman of the chit fund include enrolling subscribers, and drawing up the terms and conditions of the scheme in the form of an agreement. For these services, the foreman charges a commission, on which a ceiling is fixed.

Each prized subscriber must furnish acceptable security against the remaining installments, so as to be eligible to receive the lumpsum payment. The security is to be furnished by the subscriber directly to the foreman. In the event of default by a subscriber to pay his installments on the due date, the chit fund scheme may provide for forfeiture of dividend, or levy of penal interest.

4. A full bench of the Kerala High Court in P.K. Achutan (supra), held that it is manifest that what actually transpires when a prized subscriber is allowed to draw the kuri amount is the grant of loan to him from the common fund in the hands of the foreman with the concessional facility of effecting repayment in installments, which is subject to the stipulation that the said concession is liable to be withdrawn in the event of default being committed in payment of any of the installments. It is a debt in praesenti, but permitted to be paid in installments, for the benefit of the debtor so long as the installments are regularly paid. This being the true nature of the, the stipulation for furnishing a security bond which would enable the foreman to recover from the prized subscriber, the whole of the balance amount due from him in a lump sum when default occurs in payment of any of the installments. Such a stipulation cannot be regarded as a penalty clause. It is necessary for the foreman of a chit who occupies a special relationship with all the subscribers of the chit fund, which would justify stringent provisions being incorporated in the agreement for safeguarding the interest of all the subscribers. Without punctual payments by the individual subscribers, the foreman will not be in a position to discharge his obligations to the other subscribers. It is therefore necessary that the foreman should reserve to himself the power to recover in a lump sum, the entire balance amount due in respect of future installments, on a default being committed by a prized subscriber. In the context of the special features and incidents of chit fund transactions, the incorporation of a stipulation in the chitty hypothecation bond, cannot be regarded to be unconscionable or penal in nature.

5. In Janardhana Mallan (supra), a five-judge bench of the Kerala High Court overruled the decision in P.K. Achutan (supra), and held that it would not be possible to say that on entering into the chitty agreement a debt is incurred by the subscriber for the amount of all the future installments, and in respect of such amount there is a debtor - creditor relationship. The chitty variola embodies a promise to pay on future dates. It is not a promise to repay an existing debt, but in discharge of a contractual obligation. The prize amount is not received as a loan, but by virtue of the terms of the contract between the parties.

6. The Chits Funds Act, 1982 (hereinafter referred to as "the 1982 Act") was enacted by Parliament, and came into force on 19.08.1982. The issue of the applicability of the 1982 Act to the State of Kerala was considered by a Constitution Bench of this Court in State of Kerala and Ors. vs. Mar Appraem Kuri Company Ltd. and Ors. (2012) 7 SCC 106. The Constitution Bench held that on the enactment of the Chit Funds Act, 1982 which covered the entire field of "chits" under Entry 7 of List III of the Constitution, the Kerala Chitties Act, 1975 stood impliedly repealed. As a consequence, the Central Act became applicable forthwith in the State of Kerala, even though the Kerala legislature notified the 1982 Act on 30.04.2012.

7. The constitutional validity of the Chit Funds Act, 1982 was challenged before this Court in Shriram Chits & Investment (P.) Ltd. vs. Union of India & Ors. AIR 1993 SC 2063. The challenge to the vires of the various provisions under the 1982 Act was repelled. This Court held that all the provisions under the 1982 Act are relevant and material to protect the interest of the subscribers. The three-judge bench held that:

"15. We were referred to the decision of this Court in K.P. Subbarama Sastri and Ors. vs. K.S. Raghavan and Ors. : [1987] 2 SCR 767 wherein a contract providing for payment of money in installments and stipulating that on default in payment of any of the installments all the future installments shall be payable at a time with interest was held not penal in nature in the case of kuri transaction under the Kerala Chitties Act, 1975. While upholding the transaction a Bench of this Court approved the decision of the earlier Full Bench decision of the Kerala High Court in the case P.K. Achuthan (supra) wherein the Kerala High Court had upheld such a transaction and held it, to be of not a penal nature. In this context Eradi, J. (as His Lordship then was) speaking for the Full Bench observed that a subscriber truly and really becomes a debtor for the prized amount paid to him. It will be noticed that the later Full Bench decision of the Kerala High Court in Janardhana Mallan and Ors. (supra) was not brought to the notice of this Court and the Court was referred to the over-ruled decision of the Kerala High Court. The fact remains that the question involved before us as to the true nature of transaction for the purpose of finding out the relevant entry in the Constitution into which it may fall, was not involved in that case.

16. It appears to us, but for the discordant note struck by the other Full Bench of the Kerala High Court in the aforesaid case of P.K. Achuthan (Supra), the consistent view of all the High Courts has been that it is not a money lending transaction and that there is no relationship of debtor and creditor for the purpose of it being treated as a money lending transaction." (emphasis supplied)

The reference made to the judgment in P.K. Achutan (supra) and Janardhana Mallan (supra) was in passing, and this Court did not either affirm, or reject the ratio laid down in either of these cases.

8. Where a contract provides for payment of money in installments, and contains a stipulation that on default being committed in paying any of the installments, the whole sum shall become payable at once, such a stipulation would not be in the nature of a penalty.

9. The division bench in the impugned Judgment dated 15.01.2009, held that by entering into a chitty agreement, a debt is not created at once by the subscriber with respect to the amount of all the future installments. The chitty agreement embodies a promise to pay and discharge a contractual obligation, and not a promise to repay an existing debt.

10. We do not agree with the view expressed by the division bench. When a prized subscriber is allowed to draw the chit amount, which is in the nature of a grant of a loan to him from the common fund in the hands of the foreman, with the concessional facility of effecting re-payment in installments; this is subject to the stipulation that the concession is liable to be withdrawn in the event of default being committed in payment of any of the installments.

The chit subscriber at the time of subscription, incurs a debt which is payable in installments. If a subscriber is permitted to withdraw the collected sum on his turn, without being bound to pay the future installments, it would jeopardize the interest of all other subscribers, and the entire mechanism of the chit fund system would collapse.

11. A perusal of the provisions of Chapter V of the 1982 Act makes it clear that if a prized subscriber defaults in making payment of an installment, the chit foreman has the right to recover the amount covering all future subscriptions from the defaulting subscriber as a consolidated amount.

Section 32 of the 1982 Act empowers the foreman to recover the consolidated payment of all future subscriptions forthwith in the case of a default.

Chapter V of the Chit Funds Act, 1982 prescribes the rights and duties of prized subscribers. Section 31 to 33 in Chapter V read as follows :

"31. Prized subscriber to furnish security.- Every prized subscriber shall, if he has not offered to deduct the amount of all future subscriptions from the prize amount due to him, furnish, and a foreman shall take, sufficient security for the due payment of all future subscriptions and, if the foreman is a prized subscriber, he shall give security for the due payment of all the future subscriptions to the satisfaction of the Registrar.

32. Prized subscriber to pay subscriptions regularly. - Every prized subscriber shall pay his subscriptions regularly on the dates and times and at the place mentioned in the chit agreement and, on his failure to do so, he shall be liable to make a consolidated payment of all the future subscriptions forthwith.

33. Foreman to demand future subscriptions by written notice.- A foreman shall not be entitled to claim a consolidated payment from a defaulting prized subscriber under Section 32 unless he makes a demand to that effect in writing.

(2) Where a dispute is raised under this Act by a foreman for a consolidated payment of future subscriptions from a defaulting prized subscriber and if the subscriber pays to the foreman on or before the date to which the dispute is posted for hearing the arrears of subscriptions till that date together with the interest thereon at the rate provided for in the chit agreement and the cost of adjudication of the dispute, the Registrar or his nominee hearing the dispute shall, notwithstanding any contract to the contrary, make an order directing the subscriber to pay to the foreman the future subscriptions on or before the dates on which they fall due, and that, in case of any default of such payments by the subscriber, the foreman shall be at liberty to realise, in execution of that order, all future subscriptions and interest together with the costs, if any, less the amount, if any, already paid by the subscriber in respect thereof:

Provided that if any such dispute is on a promissory note, no order shall be passed under this sub-section unless such promissory note expressly states that the amount due under the promissory note is towards the payment of subscriptions to the chit.

(3) Any person who holds any interest in the property furnished as security or part thereof, shall be entitled to make the payment under sub-section (2).

(4) All consolidated payments of future subscriptions realised by a foreman shall be deposited by him in an approved bank mentioned in the chit agreement before the date of the succeeding instalment and the amount so deposited shall not be withdrawn except for payment of future subscriptions.
(5) Where any property is obtained as security in lieu of the consolidated payment of future subscriptions, it shall remain as security for the due payment of future subscriptions."(emphasis supplied)

12. The object is to empower the foreman to recover the amount in a lump sum from a defaulting subscriber, so as to secure the interest of the other subscribers, and ensure smooth functioning of the Chit Fund. Such a provision would not amount to a penalty.

13. The relationship between the foreman and the subscribers in a chit fund transaction is of such a nature that there is a necessity and justification for making stringent provisions to safeguard the interest of the other subscribers, and the foreman. If a prized subscriber defaults in payment of his subscriptions, the foreman will be obliged to obtain the equivalent amount from other sources, to meet the obligations for payment of the chit amount to the other members, who prize the chit on subsequent draws. For raising such an amount, the foreman may be required to pay high rates of interest.

14. The stipulation of empowering the

foreman to recover the entire balance amount in a lump sum, in the event of default being committed by a prized subscriber, is to ensure punctual payment by each of the individual subscribers of the chit fund. Without punctual payments, the system would become unworkable, and the foreman would not be in a position to discharge his obligations to the other members of the chit fund.

15. In view of the aforesaid discussion, the relationship between a chit subscriber and the chit foreman is a contractual obligation, which creates a debt on the day of subscription. On default taking place, the foreman is entitled to recover the consolidated amount of future subscriptions from the defaulting subscriber in a lump sum.

16. The impugned judgment dated 15.01.2009 passed by the Division Bench of the High Court in AFA No. 85 of 1994 is set aside. The Civil Appeal is allowed in the aforesaid terms. All pending Applications, if any, are accordingly disposed of. Ordered accordingly.

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2019 (3) L.S. 107 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
L. Nageswara Rao &
The Hon'ble Mr.Justice
Hemant Gupta

Mani Pushpakjoshi ..Appellant

Vs.

State of Uttarakhand & Anr., ..Respondents

POCSO ACT - CRIMINAL PROCEDURE CODE, 1973 - Section 319 - Challenge in the present appeal is to an order passed by the High Court, whereby, revision against an order of summoning of appellant under Section 319 of the Code of Criminal Procedure, remained unsuccessful.

Held - Involvement of other persons on the statement of the child of impressionable age does not inspire confidence that the appellant is liable to be proceeded under Section 319 of the Code - The statement of the child so as to involve a person wearing spectacles as an accused does not inspire confidence disclosing more than prima facie to make him to stand trial of the offences - Therefore, we hold that the order of summoning the appellant u/Sec.319 of the Code is not legal.

The fact, that the prosecution after investigations has found no

material to charge the present appellant is also cannot be ignored - We are satisfied that there is no prima facie case against the appellant, which warrants his trial for the offences pending before the Court - Appeal is allowed - The order passed by the Trial Court to summon the appellant u/Sec.319 of the Code is set aside and the application is dismissed.

J U D G M E N T

(per the Hon'ble Mr.Justice Hemant Gupta)

The challenge in the present appeal is to an order passed by the High Court of Uttarakhand at Nainital on April 3, 2019 whereby, revision against an order of summoning of appellant under Section 319 of the Code of Criminal Procedure, 1973 (for short, 'Code') remained unsuccessful.

2. An FIR was lodged by Harpreet Singh, father of prosecutrix (aged about 6 years), on April 19, 2017 at 1:23 p.m., about sexual assault on her daughter. The FIR reads as under:

"My daughter xxxx who is 6 years old has been mentally and physically harassed for 4-5 months in her school Aurum the Global School Haldwani. My daughter was very upset mentally for several days and would cry bitterly when asked to go to School. On my asking several times, she told me and my wife that in her School a teacher touched her private parts deliberately. He would take her to the bathroom, close her eyes and then would insert a stick like object in her vagina. This teacher had frightened her and he had instigated her not to talk about this matter to anyone. My daughter even told me that, whenever she went to the bathroom, he would follow her, and molest her there. Today, we showed the picture of this teacher to our daughter by the medium of facebook, she recognized him, and as a result we came to know that the name of this teacher is Bablu Bisht. Sir, the owner of the School Ankit Joshi, Principal Gauri Vohra and Class Teacher Nameeta Joshi are equally guilty (at fault) in this case. It is there pleaded of you, to kindly take stern action against the culprits."

3. After FIR was lodged, the statement of the victim was recorded by the Investigating Officer under Section 161 of the Code on April 19, 2017. Some of the relevant extracts from the statement read as under:

"When father enquired so I told my father about Bablu Uncle's incident, my mother was also there. Bablu Uncle did these things earlier also - 3 days earlier he did the same thing. Ever since, I came to class first, he has done the same thing thrice.

Question: Do you recall any earlier instance when Bablu Uncle or somebody from house or school did something like this with you?

Answer: Aunty when I study in Lkg and Ukg then also sometimes Bablu Uncle did these things with me, apart from this nobody else has ever done anything with me."

4. Later, another statement of the prosecutrix was recorded under Section 161 of the Code on April 22, 2017 wherein, she stated that after she returned from washroom, two Uncles came and picked

her away. In response to another question, the child responded that these two persons work outside school. In respect of a question whether she has seen these persons earlier, the answer was that they used to roam in the School. Relevant extract of the statement read as under:

"On showing print photographs, which were taken from school website by the parents of the kid, the girl said yes to the photo of Bablu Bisht and pointed towards one more photograph of another person. When we asked her whether she has told to her madam about this incident, she replied that she has told four times."

5. It is thereafter, statement of the prosecutrix was recorded under Section 164 of the Code on April 24, 2017 where she deposed, for the first time, that after she returned to her classroom, two men came; one of them wore spectacles and other did not. They took her out from there. She deposed that two men had touched her before also. She also deposed that she has told her parents about the incident and that two persons assaulted her five times earlier secretly in the garden. The appellant is said to be the person who was wearing spectacles. On the basis of the evidence collected by the investigating team, charge sheet was filed against Bablu Bisht alias Balwant Singh. The prosecution has examined Harpreet Singh, father of the prosecutrix as PW-1 who has deposed as under:

"When I asked her what had happened, she did not tell anything. After I took her in confidence and asked her what had happened, she asked me to promise that I would not take her to the school and on this she told me that in school one teacher uncle harassed her and touched her in her private parts (place of urination) and inserts and exerts a rod like object in my place of urination. Saying this, the witness said that I had nothing left to console her. I assured her that we would not be sending her to that school now. After this, I and my family wept for a long time, (stating the above matter, the witness wept in the court as well).After this, my wife took my daughter to a separate place, while I searched the profile of the male members of the school. Four male members were found. I enlarged these photos individually and showed it to my child; three of these people she refused and when the photo of Bablu Bisht was shown to her, she would not speak and become silent (quite). When I asked her again, she again insisted that she will not go to school, only then with fear she said that he harassed her.

After this I did not speak further to my daughter on this matter. I talked to her about other things to assure her that we would not send her to that school. After this I went to my brother Manpreet Singh's house and told him everything about the incident that had happened with Harleen. Then I registered a complaint report about the incident in Haldwani police station on 19.04.2017.

The witness on seeing the document no. 3A/2, a printed complaint, said that this report was prepared by me and I had submitted it in the police station after putting my signatures on this. The witness endorsed his signature on this document. This document was marked as exhibit A-1. After this, keeping her security in consideration

we sent her to another school for her studies.

The witness himself stated today that the invigilator had asked him to bring the print out of the photographs taken out from the face book. On this, we extracted the picture of the teacher, owner and the principal, and showed them to the child, she said that the man wearing spectacles also held her hands and harassed her. The man in spectacles was the owner of the school."

6. The prosecutrix appeared as PW-2. The witness identified two persons, one with spectacles when the photographs were shown to her.

7. Supreet Kaur (PW-10), mother of the prosecutrix, stated that her daughter told her that two persons troubled her, one of them was wearing spectacles.

8. Gauri Vohra (PW-11) is the Principal of the School in which the prosecutrix was the student. The extract from her statement relevant for the present controversy reads as under:

"I called the Grievance cell members, which is comprised of myself, Vice Principal Mrs. Ashu Pant and Priyanka. The Victim's family members asked us to call Balwant and other staff members. When I asked Pandeyji about Balwant then he replied that he was on leave that day. After this, I informed Mani Sir, who is the Manager of our School, about the entire incident over phone.

Just then, the victim's father entered the office and started shouting at us. Although I assured them that I would be the first person to file a report against Balwant. In response, the family members of the victim got furious alleging that we had helped Balwant Singh to escape from there and wanted to speak to Mani Sir.

I told them that Mani Sir was in Dehradun at that moment and was returning back from there. Meanwhile several people gathered in the School. Many of whom had come to take their children back home. The family members of the victim now started inciting these people. We requested them to let the children go back home safely. But the victim's family started shouting that we won't let the children go back home. Very soon, Deepak Balutia and Sumit Tikku came to the School. Soon after this, the victim's family members and the mob started breaking and vandalizing the school property."

9. The father of the prosecutrix filed an application to summon the person who wears spectacles, as identified by the victim. Such application was allowed by the learned Trial Court on February 20, 2019 which order was not interfered with by the High Court in a revision petition.

10. Learned counsel for the appellant argued that the prosecutrix has improved her statement time and again. The appellant is identified by the Spectacles from the photograph taken from the website of the School or from the Facebook though the appellant is not a member of the teaching faculty but part of the Management. The FIR has been lodged after the details of occurrence have been shared by the prosecutrix with her father. The allegations in the first version are against only one

person. In the first statement recorded under Section 161 of the Code, again the allegations are against one person. In fact, the prosecutrix has stated categorically that except Bablu, nobody else has ever done anything to her. In the second statement under Section 161 of the Code, recorded after three days, the assailants became two and that both work outside the School. She identifies the photo of Bablu taken from the website of the School and points out one photograph of another person. It is thereafter in her statement under Section 164 of the Code recorded on April 24, 2017, the other person is said to be wearing spectacles.

11. A Constitution Bench of this Court in Hardeep Singh vs. State of Punjab & Ors, (2014) 3 SCC 92 while examining the scope of Section 319 of the Code, held as under:

"100. However, there is a series of cases wherein this Court while dealing with the provisions of Sections 227, 228, 239, 240, 241, 242 and 245 CrPC, has consistently held that the court at the stage of framing of the charge has to apply its mind to the question whether or not there is any ground for presuming the commission of an offence by the accused. The court has to see as to whether the material brought on record reasonably connect the accused with the offence. Nothing more is required to be enquired into. While dealing with the aforesaid provisions, the test of prima facie case is to be applied. The court has to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed against the accused further.....

xx xx xx

105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

12. In Labhuji Amratji Thakor and Others

vs. State of Gujarat and Others, AIR 2019 SC 734, this Court held that the Court has to consider substance of the evidence, which has come before it and has to apply the test, i.e., "more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. It was held as under:-

"The High Court does not even record any satisfaction that the evidence on record as revealed by the statement of victim and her mother even makes out a prima facie case of offence against the appellants. The mere fact that Court has power under Section 319 Cr.P.C. to proceed against any person who is not named in the F.I.R. or in the Charge Sheet does not mean that whenever in a statement recorded before the Court, name of any person is taken, the Court has to mechanically issue process under Section 319 Cr.P.C. The Court has to consider substance of the evidence, which has come before it and as laid down by the Constitution Bench in Hardeep Singh (supra) has to apply the test, i.e., "more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction." Although, the High Court has not adverted to test laid down by the Constitution Bench nor has given any cogent reasons for exercise of power under Section 319 Cr.P.C, but for our satisfaction, we have looked into the evidence, which has come on record before the trial court .....The observations of the trial court while rejecting the application having that the application appears to be filed with mala fide intention, has not even been adverted by the High Court."

13. Having heard the learned counsel for the parties at some length, we find that the order summoning the appellant for the offences under Section 376(2) of the Indian Penal Code, 1860 (for short, 'IPC)read with Sections 5/6 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act') is not sustainable in law.

14. The prosecutrix is a small child. It is parents of the child who have taken the photographs either from the website of the School or from the Facebook to introduce a person with spectacles as an accused. The initial version of the father of the prosecutrix and of the prosecutrix herself, as disclosed by her father in the FIR, is assault by one person. But in view of statement of Gauri Vohra (PW-11), the anger was directed against the Management of the School of which the appellant is a part. Even if the father of the child has basis to be angry with the Management of the School but, we find that no prima facie case of any active part on the part of the appellant is made out in violating the small child. The involvement of other persons on the statement of the child of impressionable age does not inspire confidence that the appellant is liable to be proceeded under Section 319 of the Code. In fact, it is suggestive role of the family which influences the mind of the child to indirectly implicate the appellant.

15. Obviously, the father of the child must have anger against the Management of the School as his child was violated when she was studying in the School managed by the appellant but, we find that the anger

of the father against the Management of the School including the appellant is not sufficient to make him to stand trial for the offences punishable under Section 376(2) of the IPC read with Sections 5/6 of the POCSO Act.

16. The statement of the child so as to involve a person wearing spectacles as an accused does not inspire confidence disclosing more than prima facie to make him to stand trial of the offences. Therefore, we hold that the order of summoning the appellant under Section 319 of the Code is not legal. The fact, that the prosecution after investigations has found no material to charge the present appellant is also cannot be ignored. The heinous crime committed should not be led into prosecuting a person only because he was part of the Management of the School. We have extracted the evidence led by the prosecution only to find out if there is any prima facie case against the appellant. We are satisfied that there is no prima facie case against the appellant, which warrants his trial for the offences pending before the Court.

17. Consequently, the appeal is allowed. The order passed by the Trial Court to summon the appellant under Section 319 of the Code is set aside and the application is dismissed.

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2019 (3) L.S. 113 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Navin Sinha &
The Hon'ble Mr.Justice
B.R.Gavai

Kalu Alias Laxminarayan ..Appellant
Vs.
State of Madhya Pradesh ..Respondent

INDIAN PENAL CODE, Secs.302 & 313 - Appellant, husband of the deceased, is aggrieved by his conviction u/Sec.302 of the IPC affirmed by the High Court - There is no eye witness and the case rests only on circumstantial evidence – Appellant contended that the deceased had committed suicide and conviction of the appellant under Section 302 IPC was not justified.

Held - Once the prosecution established a prima facie case, appellant was obliged to furnish some explanation under Section 313, Cr.P.C. with regard to the circumstances under which the deceased met an unnatural death inside the house - His failure to offer any explanation whatsoever therefore leaves no doubt for the conclusion of his being the assailant of the deceased – Appeal stands dismissed.

67 Crl.A.No.1677/2010 Date:7-11-2019

J U D G M E N T

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

The appellant, husband of the deceased, is aggrieved by his conviction under Section 302 of the Indian Penal Code (in short, 'IPC') affirmed by the High Court. There is no eye witness and the case rests only on circumstantial evidence.

2. The deceased was married to the appellant approximately six to seven years back. Both of them were living alone in the house with their minor child. On 14.10.1994, late in the evening, the family members of the deceased, who resided about 35-40 kms. away, received a telephone call that their daughter had died. They came the next morning at 06.00 AM and found the body of the deceased in the middle room of the house, lying on the ground covered with a white sheet. The first information report was lodged at about 07.00 AM, the inquest report was prepared same day as also the post mortem was done in the afternoon. The police after completing investigation submitted charge sheet under Section 306 and 498A, IPC. During the course of the trial, considering the nature of evidence that emerged, the Sessions Judge also added Section 302, IPC in the charges. The Sessions Judge held the charge under Section 302 to be established as the deceased had been strangulated to death. The High Court in appeal opined that the deceased had been hanged to death. Both the courts have unanimously held that the deceased did not commit suicide but that it was a homicidal death.

3. Learned senior counsel Shri Vinay Navare, appearing for the appellant, submitted that the deceased had committed suicide. The conviction of the appellant under Section 302 IPC was not justified. The appellant has been acquitted of the charge under Section 498A. It was impossible for the appellant to have alone forcibly hanged the deceased from a height of 11 feet. The fact that the body was found lying on the ground in the house, does not detract from the appellant's defence that she was brought down from the noose after she committed suicide and the body laid on the ground. If the appellant had strangulated the deceased, nothing prevented him from concealing the dead body or cremating her in the night itself. His conduct is not conducive of his guilt. The mere fact that the deceased died in unnatural circumstances inside the matrimonial home cannot by itself be sufficient to shift the onus on the appellant under Section 106 of the Indian Evidence Act, 1872 (hereinafter called as "the Act"). The onus first lies on the prosecution to establish a prima facie case of a homicidal death ruling out all possibilities of a suicide. Reliance was placed on Shambu Nath Mehra vs. The State of Ajmer, 1956 SCR 199; Sawal Das vs. State of Bihar, (1974) 4 SCC 193 and Jose vs. The Sub-Inspector of Police, Koyilandy and Ors., (2016) 10 SCC 519.

4. Shri Sunil Fernandes, learned Addl. Advocate General appearing on behalf of the respondent State, submitted that all the circumstances in the case inevitably point towards the guilt of the appellant. Death was homicidal in nature. The nature of oral, physical and medical evidence completely rules out the defence of a suicide by the

deceased.

5. We have considered the submissions on behalf of the parties and have also gone through the evidence and other materials on record. The deceased lived alone with the appellant and their minor child. The evidence of the relatives of the deceased, PW 2, PW 4 and her parents PWs.6 and 8 reveal that all was not well between the appellant and the deceased. Because of the strained relations between them, the deceased had stayed at her parents' home for nearly 10 months prior to the occurrence and had returned barely a month before the fateful day after her father-in-law had come to take her back. We find no reason to disbelieve this part of evidence of PWs. 6 and 8.

6. PW 5 had deposed that he had seen cow dung on the hands of the deceased indicating that she was working when the homicidal assault had been made on her. He deposed having said so in his statement under Section 161, Cr.P.C. When the omission was pointed out to him in cross examination, he reiterated the same. This omission in his police statement was put to PW 17, the Investigating Officer, under Section 145, Cr.P.C. The witness replied that he did not remember the statement made to him and not that PW 5 had not made such a statement. The question was specifically put to the appellant under Section 313, Cr.P.C. also, to which he only gave a stock denial. The only defence taken by the appellant under Section 313 Cr.P.C. was that he had been falsely implicated. The prosecution has therefore sufficiently established that there was cow dung on the hands of the deceased indicating that she was engaged in house hold chores when the assault was made.

7. The inquest report of the deceased noticed that her hair was open and scattered, both eyes were closed and froth was coming out of the nose and mouth, the tongue was inside and the teeth visible. The right hand was on the stomach and the left hand was on the floor with the fist half open. There was a ligature mark at the back. On turning over the body, there was blackening on the back and in the loin area. The post mortem report estimated the age of the deceased as 22 years and noticed the following:

a) Froth marks blood is seen at the mouth and nostrils. The saliva is seen running out from left side of mouth and neck is tilted to left side. Ante mortem injuries were present. Abrasions varying in left from 1/4" to 1/2" and varying in width from 1/8" to 1/4" situated on dorsum of fingers of right hand are present.

b) Abrasions on right forearm, upper dorsum signs 1/2" x 1/2"

c) On dissection of the subcutaneous at the ligature mark, it is dry, and the M.M. of troches is red and congested and contain forth tinged with blood. The right chamber of heart contained blood and left chamber empty. The tongue caught between teeth.

d) There is well defined ligature mark, situated above the thyroid cartilage between larynx and chin 1" width and 1/2" deep directed obliquely upwards following the line

mandible and reaching the mastoid process. The mark is interrupted at the back. The base of the mark is pale and hard and the margins are red and congested. The wound with crust and scan on left knee which appears to 7 to 12 days old.

All the injuries were ante mortem in nature opining that the deceased had died of asphyxia following hanging.

8. The injuries on the person of the deceased, as noticed in the inquest report as also in the post mortem report, are clearly indicative of a struggle or resistance put up by the deceased in the last hour. It is unusual that if the deceased had committed suicide by hanging herself, her right hand would be lying on the stomach and the left hand would be on the ground with both fists half open. This is more of a probability if the deceased was strangulated when life ebbed out of her slowly. The fact that the neck of the deceased was not found stretched and elongated, considering that the body was still fresh, rules out any possibility of suicide by the deceased. The tongue was not protruding. Scratches and abrasions would not be present in case of a suicide. There is no fracture or dislocation of the bones in the neck area. The saliva was not running down the face or chest of the deceased but had flowed out at the left of the mouth.

9. The High Court opined that the deceased had been hanged to death. Suicide was ruled out as the wooden log in the room used for storing grains from which a piece of a rope was found hanging was 11 ft. 2 inches in height from the floor. The deceased was of 5'4" and assuming that she would stretch out another one foot six inches it would still leave gap of 4 feet between her and the log, therefore suicide was an impossibility. We find no reason to differ with the reasoning. The conclusion of the High Court, to our mind, also does not help the appellant in the defence of a suicide. The views taken by the Trial Court and the High Court nonetheless both point towards a homicidal death clearly. We would rather be inclined to accept the view of the Sessions Court that the deceased was strangulated to death as it would not also be possible for the appellant to hang the deceased alone. The body has also been found lying on the ground.

10. The aforesaid factors leave us satisfied that the prosecution has been able to successfully establish a case for a homicidal death inside the house where the deceased resided with the appellant alone. The conduct of the appellant, in the aforesaid background, now becomes important. If the deceased had committed suicide, we find it strange that the appellant laid her body on the floor after bringing her down but did not bother to inform anyone living near him much less the parents of the deceased. There is no evidence that the information was conveyed to the family members of the deceased by the appellant or at the behest of the appellant. The appellant was also not found to be at home when her family members came the next morning. The appellant offered no defence whatsoever with regard to his absence the whole night and on the contrary PW 3 attempted to build up a case of alibi on behalf of the appellant, when he himself had taken no

such defence under Section 313, Cr.P.C.

11. The occurrence had taken place in the rural environment in the middle of the month of October when it gets dark early. Normally in a rural environment people return home after dusk and life begins early with dawn. It is strange that the appellant did not return home the whole night and was taken into custody on 21.10.1994.

12. In the circumstances, the onus clearly shifted on the appellant to explain the circumstances and the manner in which the deceased met a homicidal death in the matrimonial home as it was a fact specifically and exclusive to his knowledge. It is not the case of the appellant that there had been an intruder in the house at night. In Hanumant and Ors. vs. State of Madhya Pradesh, AIR 1952 SC 343, it was observed

"10.....It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused...."

13. In Tulshiram Sahadu Suryawanshi and Ors. vs. State of Maharashtra, (2012) 10 SCC 373, this Court observed:

"23. It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilised. We make it clear that this section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. It is useful to quote the following observation in State of W.B. v. Mir Mohammad Omar

"38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed

to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambhu Nath Mehra v. State of Ajmer the learned Judge has stated the legal principle thus:

'11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

14. In Trimukh Maroti Kirkan vs. State of Maharashtra, 2006 (10) SCC 681, this Court was considering a similar case of homicidal death in the confines of the house. The following observations are considered relevant in the facts of the present case:

"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland vs. Director of Public Prosecutions ? quoted with approval by Arijit Pasayat, J. in State of Punjab vs. Karnail Singh). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

"(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give

a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

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22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

15. In view of our conclusion that the prosecution has clearly established a prima facie case, the precedents cited on behalf of the appellant are not considered relevant in the facts of the present case. Once the prosecution established a prima facie case, the appellant was obliged to furnish some explanation under Section 313, Cr.P.C. with regard to the circumstances under which the deceased met an unnatural death inside the house. His failure to offer any explanation whatsoever therefore leaves no doubt for the conclusion of his being the assailant of the deceased.

16. We find no merit in the appeal. It is dismissed. The appellant is stated to be on bail. His bail bonds are cancelled and he is directed to surrender within two weeks for serving out his remaining period of sentence.

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2019 (3) L.S. 119 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Ms.Justice
Indu Malhotra &
The Hon'ble Mr.Justice
R. Subhash Reddy

Dayaram & Anr., ..Appellants

Vs.

State of Madhya Pradesh ..Respondent

INDIAN PENAL CODE, Sec.302 - Appellants have filed the present Criminal Appeal to challenge the order of conviction under Section 302, IPC and sentence of Life Imprisonment passed vide Judgment of High Court in Criminal Appeal - High Court has affirmed the Judgment passed by the Sessions Court - High Court held that death of the deceased was homicidal, and caused by grievous injuries on the head and other parts of the body- Dying declaration was corroborated by the medical evidence that the Appellants had inflicted grievous injuries on the deceased, which caused his death.

Crl.A.No.1522/2009 Date:7-11-2019

Held - The F.I.R lodged by the deceased clearly states the names of both the Appellants, as being the assailants, and gives clear details of the incident - As per Section 32(1) of the Evidence Act, the F.I.R should be treated as a Dying Declaration - Two dying declarations made by the deceased, which are both consistent with each other and the ocular evidence is corroborated by the medical evidence - Prosecution has proved the case beyond reasonable doubt - Chain of circumstances is complete - Judgment passed by the Sessions Court and the High Court stands affirmed – Appeal dismissed.

J U D G M E N T

(per the Hon'ble Mr.Justice Indu Malhotra)

The appellants have filed the present Criminal Appeal to challenge the order of conviction under Section 302, IPC and sentence of Life Imprisonment passed vide Judgment and Order dated 04.12.2008 by the Jabalpur Bench of the Madhya Pradesh High Court in Criminal Appeal No.206/1994. The High Court has affirmed the Judgment passed by the Sessions Court.

2. The present appeal arises out of FIR No. 86/1991 lodged on 19.12.1991 at 4:20 p.m. under Sections 341, 323, 325, 307 read with 34 IPC by the deceased - Ghansu himself.

Ghansu, in his F.I.R, stated that on 19.12.1991 he had gone to Ishanagar Police Station to file a Report against appellant No.1 - Dayaram Yadav for having beaten his son Chandu. On his way back from the Police Station, at about 3:00 p.m., near Nahar ki Puliya, both the accused viz. Dayaram and Parsu Yadav were hiding in the bushes with lathis. Both of them waylaid him started hitting the deceased with lathis on his head, hands, legs and body which led to severe bleeding. Ghansu fell unconscious. The accused assumed that the Ghansu had died, and threw his body into the canal, and fled from the scene. While Ghansu was in the water, he regained consciousness and cried for help. Ghansu stated that Chouda Chamar - P.W.9, Thakur Sunla Kumar, Lula Kumhar and Ramlal Kumhar reached the site of occurrence and rescued him. Ghansu stated that the beating was given with a motive to eliminate him completely.

3. Ghansu was taken to the Ishanagar Police Station where the F.I.R was lodged. Thereafter, he was taken to the Primary Health Centre, Ishanagar for treatment.

The Executive Magistrate - P.W. 19 recorded the dying declaration of Ghansu at 4:55 p.m. on 19.12.1991, which reads as follows:

"I, Ghansu Yadav son of Judhiya Yadav, aged about 50 years, occupation -cultivation, resident of Pahargaon do hereby state on oath that when I was returning back to my village from Ishanagar, then, in the afternoon at nearby place of the culvert (puliya) of canal in village Pahargaon, Dayaram and

Parsu, sons of Durju Yadav, both brothers, assaulted me with lathis.

Even prior to it, my son Chandu was assaulted by Dayaram. I had gone to the Police Station to register a Report. But, the Report could not be registered. Thereafter, I, with my son Chandu, was coming back and at that time, Dayaram and Parsu have assaulted me."

The medical examination of Ghansu was conducted by P.W. 14 - Dr. Ramakant Chaturvedi who certified that the dying declaration was recorded in his presence and Ghansu was fully conscious and well-oriented to the time and place at the time of giving his statement.

4. Ghansu was referred to the District Hospital, Chhattarpur due to his critical condition. He succumbed to his injuries at the Hospital.

5. The Post Mortem examination of the deceased was conducted by Dr. Hari Aggarwal - P.W. 17 who recorded the following injuries:

(i) Wound on the right forearm - 1/2 x 1/ 2 inch - underlying bone broken in pieces.

(ii) Wound on left forearm with contusion on medial border forearm lower 1/3 - underlying bone broken in pieces.

(iii) Deep Wound on right III of 2 x 1 x 1 inches. Underlying bone of II, IV and V metacarpal broken.

(iv) Deep Lacerated Wound on scalp - 2 x 1/2 inches -underlying parietal bone broken, and haematoma collection, subdural and epidural.

(v) Lacerated wound - 1/2 x 1/2 inches size on right leg.

(vi) Parietal bone broken. The medical report recorded that the cause of death was shock due to head injury and other injuries.

6. The case was registered as Case No. 20/ 1992 before the Sessions Judge, Chhatarpur, Madhya Pradesh (Sessions Court).

P.W.3 - Ram Lal, P.W.4 - Balwant Singh, P.W.7 - Asha Ram, P.W.8 - Arjun, P.W.9 - Chouda Chamar and P.W. 15 -Vijay Singh deposed that they heard pother of screaming and shouting of Ghansu. They went towards the canal where Ghansu was lying with severe injuries all over his body. Ghansu told P.W.4 - Balwant Singh and other people who had gathered there that Durju Nata (father of the accused) had got the assault done on him.

In the statement of P.W.3 and P.W.4 before the Police, they deposed that when they rescued Ghansu from the canal, Ghansu told them that the present accused have injured him with lathis. The statements given by P.W.3 and P.W.4 were confirmed by the I.O - P.W. 11.

However, at the time of evidence, P.W.s 3,

4, 7, 8, 9 and 15 were declared hostile by the Prosecution.

7. The Sessions Court vide Judgment and Order dated 05.02.1994 convicted the Appellants for murder under Section 302 IPC and sentenced them to Life Imprisonment.

The Sessions Court held that:

(i) The deceased - Ghansu had lodged the F.I.R [Ex-P-20] wherein the Appellants were specifically mentioned as the assailants. The F.I.R was recorded by P.W. 16 - N.D Mishra who certified that the F.I.R contained the thumb impression of the deceased.

(ii) The deceased was in a state of consciousness at the time of filing the F.I.R, which is corroborated by the medical evidence of P.W. 14 - Dr. Ramakant Chaturvedi, who has deposed that the medical certificate appended to the Dying Declaration was true and correct.

The F.I.R was recorded 1 hour and 15 minutes prior to the death of the deceased.

The F.I.R was treated as the first dying declaration of the deceased.

(iii) The statement made by the deceased before the Executive Magistrate - P.W.19 [Ex-P-19], was considered to be the second dying declaration. Even though the second dying declaration does not bear the thumb impression of the deceased, the contents of the same are consistent with the F.I.R lodged by the deceased himself which bears the thumb impression of the deceased.

(iv) The dying declaration recorded by the Executive Magistrate - P.W19 and the F.I.R recorded by P.W16 are consistent and credible.

(v) The Sessions Court convicted the Accused /Appellant No.1 and Appellant No.2 under Section 302 IPC and sentenced them to Life Imprisonment.

8. Aggrieved by Judgment dated 05.02.1994 passed by the Trial Court, the Appellants filed a common appeal being Criminal Appeal No. 206/1994 before the Madhya Pradesh High Court.

8.1. The High Court vide the impugned Judgment and Order dated 04.12.2008 dismissed the Appeal filed by the Appellants, and affirmed the Judgment and Order of Conviction passed by the Sessions Court. The High Court held that death of the deceased was homicidal, and caused by grievous injuries on the head and other parts of the body.

8.2. From the depositions of the Executive Magistrate - P.W.19 and P.W.14 - Dr. Ramakant Chaturvedi, it is evident that the deceased was conscious at the time of recording the dying declaration. The Medical certificate was issued by P.W.14 - Dr. Ramakant Chaturvedi which was appended at the foot of the Dying Declaration that the deceased was fully conscious at the time of recording his dying declaration.

8.3. The High Court relied on the Judgment of this Court in Laxman vs. State of Maharashtra, (2002) 6 SCC 710, wherein this Court held that:

"3...What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore, the voluntary and truthful nature of the declaration can be established otherwise." (emphasis supplied)

8.4. The High Court found that there was no inconsistency in the statement made by the deceased in the F.I.R lodged by the deceased before P.W. 16 and the dying declaration recorded by Executive Magistrate - P.W. 19.

The substratum of both the Dying Declarations remained consistent to the effect that both the Appellants had assaulted the deceased with lathis on his head, hands and legs when he was returning from Ishanagar Police Station.

The dying declaration was corroborated by the medical evidence that the Appellants had inflicted grievous injuries on the deceased, which caused his death.

The High Court dismissed the Appeal filed by the Appellants and affirmed the conviction of the Appellants under Section 302 of IPC and the sentence of Life Imprisonment.

9. The Appellants have filed a common Special Leave Petition, against the Judgment and Order of the Madhya Pradesh High Court dated 04.12.2008. Leave to Appeal was granted vide Order dated 13.08.2009.

10. FINDINGS AND ANALYSIS

We have carefully perused the record of the case and considered the submissions made by the Counsel for the parties.

10.1. The motive for the crime was established by the prosecution from the dying declaration of the deceased, and the deposition of the P.W.6 - son of deceased. Chandu - P.W.6 has deposed that, on the date of the incident, the Accused/ Appellant No. 1 -Dayaram had abused and beaten him up and then picked up an axe to assault him, when he ran away. The assault took place since the buffaloes belonging to Chandu had got mixed up with the buffaloes of Appellant No.1 - Dayaram. Thereafter, Chandu - P.W.6 along with his father - Ghansu went to lodge a Report at the Ishanagar Police Station. While returning from the Police Station, appellant No.1 attacked his father with a lathi on his head, while Appellant No.2 attacked Chandu - P.W.6 on his hand with a lathi. P.W.6 then ran to inform Sullu and others about the incident. P.W.6 - Chandu returned to the site of occurrence, and saw his father - Ghansu lying on a cot, surrounded by Sullu

and Balwant Singh - P.W.4, who then took him to Ishanagar Police Station.

The motive behind the attack is established from the evidence of P.W.6 - Chandu.

10.2. The F.I.R was lodged by the deceased and bears his thumb impression. The F.I.R is treated as the 1st dying declaration of the deceased.

10.3. The deceased was admitted to the Primary Health Centre, Ishanagar. The deceased gave his 2nd Dying Declaration before the Executive Magistrate - P.W. 19.

10.4. The examination-in-chief of P.W.s 3, 4, 7, 8, 9 and 15 records that on the date of the incident, they had heard the cries of the deceased. The deceased was found lying in the canal in an injured condition. The deceased told them of the attack by the assailants. These prosecution witnesses took the deceased to the hospital.

From their examination-in-chief it is evident that the deceased was conscious and, in a state to lodge the F.I.R. In their cross-examination, these witnesses denied having any knowledge about the persons who attacked the deceased. They were declared hostile during their cross-examination. The testimony, prior to cross-examination can be relied upon.

Reliance is placed on the decisions of this Court in Bhagwan Singh vs. State of Haryana, (1976) 1 SCC 389, Rabindra Kumar Dey vs. State of Orissa, (1976) 4 SCC 233 and Syad Akbar v. State of Karnataka, (1980) 1 SCC 30, wherein it has been held that the evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution witnesses turned hostile. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on careful scrutiny. This Court in Khujji vs. State of M.P, (1991) 3 SCC 627 in paragraph 6 of the Judgment held that:

"6...The evidence of PW 3 Kishan Lal and PW 4 Ramesh came to be rejected by the trial court because they were declared hostile to the prosecution by the learned Public Prosecutor as they refused to identify the appellant and his companions in the dock as the assailants of the deceased. But the counsel for the State is right when he submits that the evidence of a witness, declared hostile, is not wholly effaced from the record and the part of the evidence which is otherwise acceptable can be acted upon."

(emphasis supplied)

This position in law was reiterated in Vinod Kumar vs. State of Punjab, (2015) 3 SCC 220, wherein the court held that:

"31. The next aspect which requires to be adverted to is whether testimony of a hostile witness that has come on record should be relied upon or not. Mr. Jain, learned Senior Counsel for the appellant would contend that as PW 7 has totally resiled in his cross-examination, his evidence is to be discarded in toto. On a perusal of the testimony of the said witness, it is

evincible that in examination-in-chief, he has supported the prosecution story in entirety and in the cross-examination, he has taken the path of prevarication. In Bhagwan Singh vs. State of Haryana, (1976) 1 SCC 389, it has been laid down that even if a witness is characterised as a hostile witness, his evidence is not completely effaced. The said evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence..."

(emphasis supplied)

The F.I.R lodged by the deceased was prompt. As per the statement of the deceased, the incident occurred at 3:00 p.m., and the F.I.R was lodged at 4:20 p.m. by the deceased. The distance between the Police Station and the site of occurrence is about 4 kilometres. The F.I.R was lodged with promptness and the appellants were named in the F.I.R along with details of their weapons.

As per Section 32(1) of the Evidence Act, the F.I.R should be treated as a Dying Declaration.

This Court in Dharam Pal & Ors. vs. State of U.P, (2008) 17 SCC 337, held that:

"17... The report dictated by the deceased fully satisfied all the ingredients for being made admissible as a dying declaration. To ascertain this aspect, we may refer to some of the general propositions relating to a dying declaration. Section 32(1) of the Indian Evidence Act deals with dying declaration and lays down that when a statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, such a statement is relevant in every case or proceeding in which the cause of the person's death comes into question. Further, such statements are relevant whether the person who made them was or was not at the time when they were made under the expectation of death and whatever may be the nature of the proceedings in which the cause of his death comes into question.

18. The principle on which a dying declaration is admissible in evidence is indicated in the Maxim "Nemo Moriturus Praesumitur Mentire", which means that a man will not meet his maker with a lie in his mouth. Thus it is clear that a dying declaration may be relating to :-

(a) As to the cause of death of the deceased

(b) As to "any of the circumstances of the transaction" which resulted in the death of the deceased"

"20. ...If we look at the report dictated by the deceased in the light of the aforesaid propositions, it emerges that the names of the accused and the important features of the case have been clearly mentioned in the report. It contains a narrative by the deceased as to the cause of his death, which finds complete corroboration from the testimony of eyewitnesses and the medical evidence on record..."
(emphasis supplied)

From the testimonies of P.W.3, P.W.4,

P.W.7, P.W.8, P.W.9 and P.W. 15, prior to cross-examination and the evidence of the Executive Magistrate - P.W. 19 who recorded the dying declaration of the deceased in the Hospital and P.W. 14 - Dr. Ramakant Chaturvedi, it is evident that the deceased was conscious, and in a state to give a dying declaration.

The F.I.R lodged by the deceased clearly states the names of both the Appellants, as being the assailants, and gives clear details of the incident.

10.5. The Learned Counsel for the Appellants contended that the second dying declaration, recorded by the Executive Magistrate - P.W. 19 did not contain the thumb impression of the deceased, and hence could not be relied upon. The Executive Magistrate - P.W. 19 has stated that the signature or thumb impression could not be taken since there were injuries on both his hands. P.W. 17 - Dr. Hari Agrawal who conducted the post mortem on the body of the deceased.

Reliance is placed on the decision of this Court in Sukanti Moharana vs. State of Orissa, (2009) 9 SCC 163 wherein the Court took the view that there is no reason why a dying declaration which is otherwise found to be true, voluntary and correct should be rejected only because the person who recorded the dying declaration could not affix his signatures or thumb impressions on the dying declaration.

11. Considering the totality of the evidence including the two dying declarations made by the deceased, which are both consistent with each other and the ocular evidence is corroborated by the medical evidence, we are satisfied that the prosecution has proved the case beyond reasonable doubt. The chain of circumstances is complete. We affirm the Judgment passed by the Sessions Court and the High Court.

In view of the aforesaid, the appeal fails and is hereby dismissed.

--X--

2019 (3) L.S. 126 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

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

State of Madhya Pradesh ..Appellant
Vs.
Man Singh ..Respondent

CRIMINAL PROCEDURE CODE – INDIAN PENAL CODE, Secs.419, 468 and 471 - Whether a Judge of the High Court can exercise powers u/Sec.482 of the Code of Criminal Procedure to alter the sentence which has been passed by the High Court itself is the issue involved in this appeal.

Held - Manner in which HC entertained the petition u/Sec.482 CrPC is highly improper and uncalled for - There is no power of review granted

Crl.A.No.410/2011 Date:4-11-2019

to the Courts under Cr.PC. - As soon as the High Court had disposed of the original revision petition, upheld the conviction, reduced the sentence to the period already undergone and enhanced the fine, it became *functus officio* and, as such, it could not have entertained the petition u/Sec.482 CrPC for altering the sentence.

It is well settled law that the High Court has no jurisdiction to review its order either u/Sec.362 or u/Sec.482 of CrPC- High Court in its order directed that the sentence which the accused has already undergone, would not affect his service career - We fail to understand under what authority the High Court could have passed such an order - Appeal stands allowed and the order of the High Court is set aside.

J U D G M E N T

(per the Hon'ble Mr.Justice Deepak Gupta)

Whether a Judge of the High Court can exercise powers under Section 482 of the Code of Criminal Procedure, 1973 (for short 'CrPC') to alter the sentence which has been passed by the High Court itself is the issue involved in this appeal.

2. The respondent, Man Singh was prosecuted for having committed offences punishable under Sections 468, 471 and 419 Indian Penal Code, 1860 (for short 'IPC'). The allegation against him was that he had used a transfer certificate of one Kalu Singh and forged the certificate to show that it bore his name and date of birth. Using this certificate, he had procured appointment to the post of Buffalo Attendant in the Veterinary Department. The trial court convicted the accused for the offences punishable under Sections 468, 471 and 419 IPC. On the issue of sentence, it was specifically urged before the trial court that benefit of Probation of Offenders Act, 1958 (for short 'the Act') may be given to the respondent, Man Singh. The trial court came to the conclusion that the accused had got service on the basis of forged documents depriving a deserving unemployed person of getting such employment and, therefore, according to the trial court, this is not a fit case to grant probation. Accordingly, the trial court imposed punishment under various provisions of IPC for different offences but essentially the accused was to undergo rigorous imprisonment for one year and was to pay a total fine of Rs.2000/-.

3. The accused-respondent, Man Singh filed an appeal. The Sessions Judge dismissed the appeal. On the issue of sentence he found that the accused had been dealt with leniently and refused to interfere with the sentence. A criminal revision was filed in the High Court. The High Court affirmed the conviction but reduced the substantive sentence from one year to the period already undergone and enhanced the fine to Rs.10,000/-.

4. The accused-respondent, Man Singh deposited the fine and then filed a petition under Section 482 of CrPC praying that the fine had been deposited and since he is in Government job, he may be granted benefit of the Act. The learned Judge, without giving any other reasons, directed as follows:-

"After having heard learned counsel for the parties, prayer is allowed and the benefit of Probation of Offenders Act is extended to the petitioner for the purpose that the sentence, which has already undergone would not affect service career of the petitioner. With the aforesaid observations petition stands disposed of C.C. today."

This order is challenged before us. At the outset, we note that the manner in which the learned Judge entertained the petition under Section 482 CrPC is highly improper and uncalled for. There is no power of review granted to the Courts under CrPC. As soon as the High Court had disposed of the original revision petition, upheld the conviction, reduced the sentence to the period already undergone and enhanced the fine, it became *functus officio* and, as such, it could not have entertained the petition under Section 482 CrPC for altering the sentence.

5. It is well settled law that the High Court has no jurisdiction to review its order either under Section 362 or under Section 482 of CrPC1. The inherent power under Section 482 CrPC cannot be used by the High Court to reopen or alter an order disposing of a petition decided on merits2. After disposing of a case on merits, the Court becomes *functus officio* and Section 362 CrPC expressly bars review and specifically provides that no Court after it has signed its judgment shall alter or review the same except to correct a clerical or arithmetical error3. Recall of judgment would amount to alteration or review of judgment which is not permissible under Section 362 CrPC. It cannot be validated by the High Court invoking its inherent powers4.

6. We have, therefore, no doubt in our mind that the High Court had no power to entertain the petition under Section 482 CrPC and alter the sentence imposed by it. We may also add that

1State of Kerala v. M.M. Manikantan Nair, (2001) 4 SCC 752

2State Rep. by D.S.P., S.B.C.I.D., Chennai v. K.V. Rajendran & Ors., 2009 CriLJ 355 SC

3Hari Singh Mann v. Harbhajan Singh Bajwa & Ors. (2001) 1 SCC 169

4Sooraj Devi v. Pyare Lal & Anr., AIR 1981 SC 736 the manner in which the probation has been granted is not at all legal. The trial court had given reasons for not giving benefit of probation. When the High Court was deciding the revision petition against the order of conviction, it could have, after calling for a report of the Probation Officer in terms of Section 4 of the Act, granted probation. Even in such a case it had to give reasons why it disagreed with the trial court and the first appellate court on the issue of sentence. The High Court, in fact, reduced the sentence to the period already undergone meaning thereby that the conviction was upheld and sentence was imposed. After sentence had been imposed and served and fine paid, there was no question of granting probation.

7. Another error is that the order quoted hereinabove has been passed in violation of the provisions of Section 4 of the Act which mandates that before releasing any offender on probation of good conduct, the Court must obtain a report

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LAW SUMMARY

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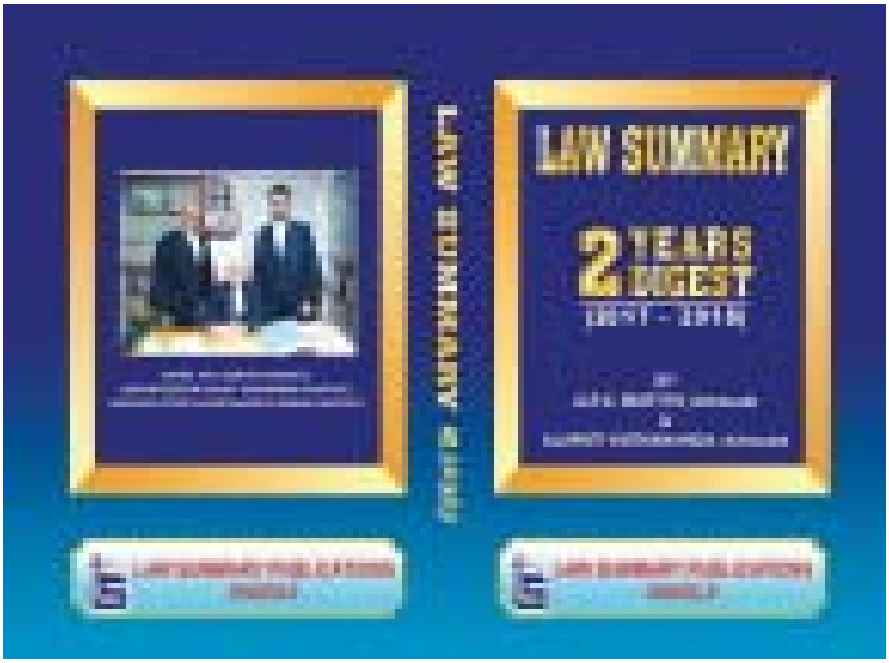

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