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

Pages:1 to 84

Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

2019 Vol.(1) Date of Publication 15-2-2019 PART - 3

MODE OF CITATION: 2019 (1) L.S

LAW SUMMARY PUBLICATIONS

SANTHAPETA EXT., 2ND LINE, ANNAVARAPPADU , (☎:09390410747)

ONGOLE - 523 001 (A.P.) INDIA,

URL : www.thelawsummary.com E-mail: lawsummary@rediffmail.com

WE ARE HAPPY TO RELEASE

THE DIGITAL VERSION OF THE

LAW SUMMARY JOURNAL

TO ALL OUR SUBSCRIBERS

AT FREE OF COST

visit : www.thelawsummary.com

Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

PART - 3 (15TH FEBRUARY 2019)

Table Of Contents

Interested Subscribers can E-mail their Articles to

lawsummary@rediffmail.com

NOMINAL - INDEX

SUBJECT - INDEX

CIVIL PROCEDURE CODE, Sec.100 - Whether the High Court was justified in dismissing the plaintiff's second appeal on the ground that it does not involve any substantial question(s) of law within the meaning of Section 100 of the Code.

Held - It cannot be disputed that the interpretation of any terms and conditions of a document (such as the agreement dated 08.08.1984 in this case) which constitutes a substantial question of law within the meaning of Section 100 of the Code - It is more so when both the parties admit the document - it is now for the High Court to examine the issue afresh on merits after framing the substantial question(s) of law – Appeal stands allowed. **(S.C.) 71**

CIVIL PROCEDURE CODE, Or.21, R.34 - REGISTRATION ACT, Sec.22-A - Jurisdiction of executing Court for presentation of document relating to decree in a suit for specific performance under Or.21, Rule 34 - Powers of Sub Registrar to consider whether schedule of property in document presented attracts circumstances referred u/Sec.22-A of Registration Act - Executing Court directed to register document.

Merely because document is presented when Court, Sub Registrar is not under obligation to mechanically accept such document for registration - Sub Registrar refused to register document - When positive direction issued by executing Court under Or.21, Rule 34 Sub Registrar takes into consideration fact, requirement of law passes an order leaving it open to Sub Registrar to challenge order.

Documents presented for registration is subject to legal and procedural requirements under Registration and Stamp Act - Therefore once document is presented for registration, executing Court ought to allow authority registration and stamp Act to discharge their duty and function - In this case directions of executing Court are beyond power and jurisdiction of executing Court and therefore order of executing Court under revision is liable to be set aside - Directions of executing Court under revision are liable to be set aside - Revision filed by Sub Registrar against order of executing Court is allowed - Order of executing Court is set aside. **(Hyd.) *93***

CIVIL PROCEDURE CODE, Or.II Rule 2 & Order VII Rule 11 – URBAN LAND (CEILING AND REGULATION) ACT – INCOME TAX ACT – INDIAN EVIDENCE ACT, Sec.13 – TRANSFER OF PROPERTY ACT, Sec.53-A - LIMITATION ACT, Article 54 – Grant of injunction – Trial Court allowed applications of Respondent/Plaintiff and granted injunction restraining Appellants/ Defendants in respect of plaint schedule properties.

Held – Once there is stipulation in very Agreement of Sale, of outer time limit of one year period and after notice given, it shows agreement cancelled – Plaintiffs cannot claim to

be in possession of any portion of property covered thereunder – There is nothing for Trial Court to hold that Plaintiffs got prima facie case of entitlement to enforcing of Sale Agreement to go for trial irrespective of plaint rejection application dismissed of limitation aspect – Granting of injunction by Trial Court in allowing applications is unsustainable for no prima facie case as sinequonon – Common order of trial Court are set aside – Appeal stands partly allowed. **(Hyd.)** ***118***

CIVIL PROCEDURE CODE, Or.6, R.17 - LIMITATION ACT, Sec.65 -Amendment of written statement - Application filed under Or.6, Rule 17 for amendment of written statement after commencement of trial.

In this case, reasons submitted by petitioner/defendant for delay is at time of drafting written statement defendant instructed her counsel to take plea of adverse possession also but by oversight such plea was not taken in written statement.

The plea of adverse possession being important one it is difficult to believe that defendant and her counsel by oversight could not take that plea.

At any rate defendant has not shown plausible cause to overcome mandate of proviso to Or.6, Rule 17 CPC.

Amendment petition can be considered provided petitioner defendant could establish that inspite of exercising due diligence he could not file petition before commencement of trial - In this case petitioner could not show any plausable clause for inordinate delay hence petition merits for no consideration - Further having pleaded title it is not permissible for defendant to plead adverse possession as both pleas are mutually inconsistent - Petition cannot be allowed - CRP dismissed. **(Hyd.)** ***106***

FAMILY COURTS ACT, 1984, Sec.7(1)(e) - HINDU MARRIAGE ACT, 1955, Secs.5,7 & 11 - Family Court dismissed petition filed by appellant u/Sec.7(1)(e) of Family Court Act to declare appellant as legally wedded wife of one late D.G.Rao and for consequential relief that she is entitled to receive pension and medical benefits etc. and all other emoluments payable by 2nd respondent, Railway Department and 1st respondent, wife is not entitled to any amount.

In this case, husband also filed for dissolution of marriage with 1st respondent which was dismissed by order on merits and appeal filed against said order also dismissed - 1st respondent, wife also filed petition as legally wedded wife of D.G. Rao, claiming pension and other emoluments of late D.G. Rao - Family Court dismissed petition filed by appellant holding that deceased late DG Rao is not competent to nominate appellant to claim family pension from 2nd respondent, Railway Department as marriage between him and 1st respondent is subsisting till death of DG Rao.

Appellant contends that her marriage with DG Rao was valid one - But when marriage of 1st respondent was subsisting with DG Rao appellants marriage with DG Rao is not valid and she is not entitled to claim any relief.

During subsistence of marriage a second marriage whatever be circumstances whether customary marriage or legally contracted marriage is barred under provisions of Hindu Marriage Act - Appellant failed to produce any evidence that marriage between 1st respondent and late D.G. Rao has been dissolved - On other hand evidence let in by 1st respondent wound clinchingly prove that proceedings initiated by late DG Rao to dissolve marriage ended in dismissal

Therefore mere fact woman abandoned by her husband because of fact that she

--X--

WHY ARE THE PARTIES RELUCTANT TO COME TO CIVIL COURT TO FILE TORT BASED CASES?

By
Y. SRINIVASA RAO,
M.A (English Litt.)., B.Ed., LL.M.,
(Ph.D) Research Scholar in Torts.
Senior Civil Judge cum Assistant
Sessions Judge, Avanigadda

'Law of Tort concentrates more to the victim and his harm than to the mental element of wrongdoer.'

In India, damages recovered in tort cases have no comparability to those awarded by the American Courts. In USA, lawyers encourage filing tortious claims for high compensation. The reason is that they will get a share in the damages awarded to the parties to the lis. In India, delay in getting relief from the civil courts has also obstructed the propensity to approach the Civil Courts for filing tort based cases.

"The Courts in India are not an adequate alternative forum in which litigation may be resolved, delays in the resolution of these cases (Tort cases) in India, and India's Court system lacks the procedural and practical capability to handle this litigation." – Union of India admitted in Bhopal Tragedy case.

Introduction:- Law of tort is comparatively common law development in India. It is supplemented by systematising (codification) statutes including statutes having authority to grant damages and compensation. Where there is tort, there is remedy. If there is no remedy, there is no tort. ''*ubi ius, ibi remedium*'' (Roman legal maxim) says ''where there is a right, there is a remedy''. More often than not, the law will not countenance a situation where a person has a legal right but no means of enforcing it. If legal right is infringed, tort comes into play. My poignant theses concentrates about the lack of the procedural and practical capability to handle this litigation in India when compared to other countries because Union of India admitted in Bhopal Tragedy case "The Courts in India are not an adequate alternative forum in which litigation may be resolved, delays in the resolution of these cases (Tort cases) in India, and India's Court system lacks the procedural and practical capability to handle this litigation."

Is it is safe to the society to simply overlook law of torts? The development of the ''theory of absolute liability'' in the M.C. Mehta's case is a significant factor to say the law of torts in India has not been overlooked. Importance of law of torts have been recognized

in India is clear from the recent rulings of the Supreme Court of Indian and High Courts on tortious liability of multinational corporations in India, findings on constitutional torts, evolution of tort of sexual harassment, victim compensation schemes, and award of damages for violation of human rights under the head of Writ jurisdiction by the superior Court , including a recent Rs.20 crore exemplary damages in the Upahaar Theatre fire tragedy case by the Delhi High Court are also significant changes in the tort law of India, a fortiori, In Bhopal Gas leak case, the primary financial restitution paid by UCC was negotiated in 1989, when the Supreme Court of India approved a settlement of US$470 million (Rs. 1,055 crore (equivalent to Rs. 80 billion or US$1.1 billion in 2017)). This amount was immediately paid by UCC to the Indian government. These are all examples showing the importance of Tort law in India.

If a person goes to police station and lodges a report, police usually calls the person against whom the report is lodged, of course, in course of investigation. If a party files a civil suit seeking remedy under tort law alleging that his legal right is infringed, there are instances that such plaint is being returned in the first instance on the ground that how the suit is maintainable. Of course, there is heap of miscellaneous instances for such judicial act. Here, the point is why are most of the people in India so enthusiastic to seek remedy under Penal law instead of remedy under civil law? Poverty, lack of awareness of tort law, requirement of court-fee to seek tort based relief, delay in disposal of civil suits, cumbersome procedure, and even if relief is ordered after long years, it is very low to the expectations of the parties etc may be some of the reasons for which the people of India are hanging back to approach a civil court to file tort based cases. In fact, 'Torts concentrate more to the victim and his harm than to the mental element of wrong doer.'

Law of torts in Indian is borrowed from English law of torts. The '**broader theory**' of *Winfied* says that it is law of tort but not law of torts. On the other hand, according to '**pigeon hole**' theory of *Salmond*, there is law of torts. Of course, both these theories seems to have recognized some support.

1. Asbhy Vs. White – (In 1702, the principle ''ubi jus ibi remedium'' is recognized)

2. Pasley Vs. Freeman (1789) – Origin of the concept of ' Tort of deceit')

3. Lumley Vs. Gye - (1853) 2 E & B 216 – (Inducement of breach of contract)

4. Rylands Vs. Fletcher – (1868) LR 3 HL 330 – (The rule of Srtict liability. Considred 'neglgience' as a separate tort).

5. Rookes Vs. Barnard (1964) A.C.1129 – (The tort of intimidation is discussed)

6. Winsome Vs. Greenbank (1745) – (Considered that inducement to a wife by husband is a tort).

As was observed in M.C. Mehta v. Union of India (A.I.R. 1987 S.C. 1099), the Indian courts are now prepared even to move ahead of the English Courts in ensuring better welfare conditions to the Indian people. Has the laxity to sue for tort based remedies obstructed the complete codification of civil wrongs in India? Of course, nevertheless many aspects of law of torts were codified in separate enactments, it is one of the main reasons. The Consumer Protection Act,1986 is also one of such enactments.

According to Maine, the group, not the individual, is the primary unit of social life. With the progress of civilisation, this condition gradually gives way to a social system based on contract. This is the age of the standardised contract & of collective bargaining (trade unions, business associations, etc.). Even the contracts, which an individual enters into in everyday life, have been standardised as contract for water, electricity or contract for a carriage with a railway company. The freedom of contract is, thus, being curtailed every day. Thus, Maine's theory of 'Status to Contract' does not have much force in the modern age. In India, the policy of 'mixed economy' has assumed greater control over individual liberty & freedom. The State can impose reasonable restrictions in the interest of the public . See. Article 19(6) of the Indian Constitution . According to Pollock that this theory is limited only to laws of property because personal relations like marriage, minor's capacity, etc. are still matters of status and not of contract.

As per Analytical School, custom is not law, until its validity has been established by a judicial decision/by an Act of legislature. But, according to Historical School, Custom is law by itself. It does not require State recognition to become a law.

Tort and Crime:- If a tort is a private/civil wrong, crime is public wrong. Mostly, intention is irrelevant but there are some exceptions. As to defamation and malicious prosecution etc, intention is relevant even in torts. But, in criminal cases, '*Mens rea*'' is the most essential factor. Presently, tort law is uncodified whereas criminal law is codified law (Example: IPC).

Despite crime may be a tort (civil wrong), the cause of legal action in civil tort is not necessarily the result of criminal action. In torts, If a legal right is infringed owing to negligence, such negligence does not amount to criminal negligence. In civil side, the person who committed the act is called as 'tortfeasor''. In criminal side, the person committed the act is known as ''accused''. The difference between Civil and Criminal law:- 1. Who the parties are. (In civil, plaintiff Vs. defendant; In criminal, State Vs. Accused) 2. What the possible outcomes are. 3 The applicable stand of proof. (In civil, Preponderance of evidence; In criminal, beyond a reasonable doubt). 4. The consequences for the defendant. (In civil, Liable or not liable; In criminal, Guilty or not guilty). 5. The procedural rules that apply. (In civil, Civil Procedure Code; In criminal , Criminal Procedure Code).

How to know whether it is a civil wrong or criminal act to impose liability. If a person legal

right is infringed by an act outcome of either by intentional action or by reckless behaviour or by carelessness or under head of strict liability or under the head of product liability, tort law as well as criminal law comes into play. It means that liability can be imposed under tort law and criminal law. Example:- A a person commits an accident by his negligence driving, he would be prosecuted for the offence under section 304-A of IPC. Besides this, civil action follows for claiming compensation to the victim. Coming to torts are concerned, 'Torts concentrate more to the victim and his harm than to the mental element of wrong doer.' In fact, the word 'Tort' was introduced in 1580. Indian Fatal Accidents Act, 1855 is an Act to provide compensation to families for loss occasioned by the death of person caused by actionable wrong. The Motor Vehicles Act was passed in the year 1988 by Parliament of India and regulates almost all the aspects of road transport vehicles.

Tort and Contract:- A particular act is tort or contract is to be found by observing whether it is a tortious act or contract; whether it comes under civil law or criminal law; to impose liability, whether common law principles apply or statutory law. After observation of these principles, it can be found out whether it is tort or contract. Tort law dictates the relationship between the parties who ave not had an opportunity to agree to a set of rules. Contracting around the tort law default rules are concerned, the parties agreeing to a different set of rules other than the default tort rules. Torts is the law of civil wrongs.

Tort and Specific Relief Act:- In order to provide reliefs in cases relating to contracts, torts and other cases Specific Relief Act, 1877 was enacted. Now, it is the Specific Relief Act,1963. The remedies under this Act can be summed up as follows:

1. Recovery of possession of the property. (See. Sections 5 and 6 of S.R.Act which deal with specific immovable property whereas sections 7 and 8 of S.R.Act deal with movable property.)

2. Rectification of instrument (See. Section 26 of the S.R. Act)

3. Injunction (See. Sections 36 to 42 of S.R.Act,1963)

4. Rescission of contract (See. Sections 27 to 30 of Chapter IV of Part II of S.R.Act,1963)

5. Cancellation of Instrument/deed (See. Sections 31 to 33 of the S.R.Act, 1963)

6. Declaratory decree (See. Sections 34 and 35of the S.R.Act,1963)

7. Specific performance of contract. (See. Chapter 2 of Part II of Specific Relief Act, 1963)., etc.,

Consumer Protection under the Tortious law:- Consumer protection Act is to provide for better protection of the interests of consumers and for that purpose to make provision

for the establishment of consumer councils and other authorities for the settlement of consum-ers' disputes and for matters connected therewith. In welfare state, like India, tortious liability is very essential because Tort law is a fundamental law for consumer protection. Why are the people of India reluctant to take aid of tortious law remedies available to them ? For some inexplicable reasons score out, they are reluctant to pursue the tortious remedies. The problem is that poverty, illiteracy and unawareness, about tort law and its remedies which prevailing amongst the Indian people. Payment of court-fee , to seek tort law remedy is anohter significant factor to mull over as to availing tortious liability.

1914- 1965 - 613 tort cases dealt by Appellate Courts

1975-1984 - 56 tort cases (only 22 involved product liability cases), which were reported cases.

Though the Consumer Protection Act,1986 is also one of such enactments, as seen from the provisions of the Consumer Protection Act, many situations were left over under which the consumer will have to again approach under law of torts for the redressal of his grievances. What about the remaining issues which were not covered under this Consumer Protection Law? To fix the product liability, the plea of ''negligence'' is one grounds available to consumer. ''Breach of duty' is also essential factor to discuss about product liability. Product liability appears to have been transformed from negligence based liability to strict liability base. So, strict liability is also one of the important to factor for discussion.

On close observation of the language in section 14 of the Consumer Protection Act 1986 and the rulings to that effect, it is evinced that our Court are recognizing the negligence based liability with a mixture of fault based theory. Significantly enough, to know the scope of consumer related civil wrongs,it is very essential to understand the difference between tort and crime as well as contract and tort.

In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quantity and value as the goods bailed. (See. Section 151 of Indian Contract Act). In addition to this, it is seminal to see Latin maxim '' Qui facit per alium facit per se'' which means "He who acts through another does the act himself." Further, Section 154 of the Indian Contract Act deals with ''liability of bailee making unauthorized use of goods bailed''. In such a case, in the given, as it is tortious act, ''Y'' is liable to pay damages to the plaintiff who sent his car for servicing to Y's garage.

To say in short, If the bailor's claim comes under the purview of specific provisions of Indian Contract Act, it is not a tortious act. If such bailor's claim rests upon a breach by bailee, the liability of bailee is tortious act. The reason is it is the claim of a visitor against the occupier of premises under the Occupier's Liability Act. In English law, occupiers'

liability towards visitors is regulated in the Occupier' Liability Act,1957.

The process of co modification and communication through tort law is being criticised because those are commonly used terms in Marxist literature. It appears that the reason for such criticism is Martxist literature relates to the tendency of seeing everything in terms of money value.

Torts concentrate more to the victim and his harm than to the mental element of wrong doer.It is , therefore, the expected standard of behavior of the citizens is essential in the Society. Other reason is that tortious liability differs the contractual liability strikingly. The liability under the Contract Act based upon breach of a moral principle to uphold the promises and criminal liability. Therefore, Pollock analysed certain grounds of tortious liability and started the lines saying "Every tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract …''. Hundreds of years back, Salmond also pointed out that with regard to the province the function of torts, also deserves to be discussed.

From the view of Salmond as to torts are concerned, in succinct, it makes it clear that

1. Law of torts is not a static body of rules;

2. Law of torts is capable of alteration to meet the needs of changing society

3. Tortious liability is flexible;

4. It is difficult to furnish a general formula or criterion like a guide for the decision of the doubtful tort cases in future. Similarly, it is not possible to explain all tort cases arise in past in which tortious liability can be imposed;

5. A decision of a court may depend based on number of factors to impose liability in tort cases.

6. It is thus established that historical development; vengeance; deterrence; ability to bear the loss and economic social background of the case are also relevant factors to impose liability in tort cases.

The theory of ''the sanctity and freedom of contract'' was sound slogan in 19th century whereas '' the concept of duty to take care'' is sound slogan in 21st century. Social value of liability from being negligent encourages the taking of care. The concept of tort of negligence is very essential to the present society because it Society would be worse off in case of this liability does not recognize. If the consumer is injured by a defective product, it comes under the head of negligence in Torts (whether it may be negligence of mind or of conduct or a negligent act itself) for his safety and protection. Although the Consumer Protection Act,1986 was introduced, the concept of negligence was already broadly covered under Tort Law. The present pattern of legal rules is an amalgam of

contract and tort and also of strict liability and negligence. It is thus clear that all this amalgam of introducing news rules, and Acts is outcome of delay in codification of torts in India.

The defect in consumer protection Act prima facies appears is that it only protects the consumer. What about the victims of mishaps against the manufacturer? Where is the remedy in consumer protection Act for this situation? Curiously enough, the liability for defective product is still not a coherent legal theory and it is not our law in India. Similarly, the significance of law of product liability is not yet developed in India. For some inexplicable reasons scored out, most of the people of India were unaware of these concepts of liability for defective product and law of product liability.

Why have Indian consumers been reluctant to file civil cases under the law of torts for breach of warranties in spite of the fact that remedies have also been available to them under law of torts? See. The definition of ''deceit'' in section 40 of the Draft Civil Wrongs Bill, prepared by Pollock. In this section, it was also included cases of innocent

and deliberate representations. But, this was not yet codified. Despite Consumer is being protected under the Consumer law, the possibility of action for the tort of breach of statutory duty cannot be ignored. The liability of a defective product is broadly covered under the head of negligence in tort law. To say in short, the liability for defective product is a potent factor for consideration. Standard of Duty of Care (See. ''Duty of care'' as propounded by Lord Atkin); pecuniary and Economic Losses resulting from careless acts ; liability of State for negligence; economic losses resulting from careless statement; disclaimer of liability; Duty of owners of Land or Building ; development of the Concept of Strict Liability in Relation to consumer Torts;

Curiously enough, we must not forget that in *M.C. Mehta v. Union of India* (1987 SC 1086) and *Bhopal Gas Tragedy cases* that Indian Courts have gone much ahead with respect to concept of ''product liability'' because in these cases, Hon'ble Supreme Court of India did not apply the exceptions to the concept of ''the strict liability'' observed by the English Court in *Ryland v. Fletcher*.

Conclusion:- To sum up this article, it is to be remembered that although certain some fields of law of torts are codified by way of some statutes such as the Consumer Protection Act, 1986, The Motor Vehicles Act,1988, The Fatal Accident Act, etc. Further more, the India Penal Code,1860 criminalises certain areas of tort law.

The problem to understand the solutions for these situations is that in Indian, the courts are following English law of torts because all civil wrongs were not codified. In USA, they are seeking solutions following both contract and tort principles. The German Law seeks for contractual solutions. But, in India, there is no such express formulation. Now, the

problem, we are now facing is such that we cannot depend on English law completely nor can we codify the all branch of tor law. In Bhopal Tragedy case, our courts did not agree English law principle of strict liability and the Apex Court introduced new theory as ''Absolute liability''. In some cases, we follow the English law of trot principles. Therefore, expansion of law of torts , especially by codifying torts, at least the issues which are essential for public, is acceptable. Indian Courts can therefore provide for better protection and remedies to the Consumers by applying absolute liability concept and strict liability where the facts of the case demand it. This approach will be required especially in such cases where the consumer will not get proper relief under the C.P. Act 1986 due to negligence based liability recognized there. Then only the consumer's interest will get proper recognition and protection but it shall be very difficult for the consumers to move to the ordinary courts under law of torts due to the requirement of court fees.

Inasmuch as the Courts in India are not an adequate alternative forum in which litigation may be resolved, delays in the resolution of these cases (Tort cases) in India, and India's Court system lacks the procedural and practical capability to handle this litigation, it is time to mull over for taking effective steps to codification of torts, to reduce delays in the resolution of these cases, and to invent new procedural laws. I strongly believe that if there is any rebate or waive or exemption in payment of court-fee and simple procedure laws to disposal of the civil suit, people will approach civil courts to file tort based cases.

-x-

Negotiable Instruments (Amendment) Act,2018

– Negotiation.

By

Author of Law Books & Research Scholar in Water Rights

Guinness World Records Certificate Holder

Dr. POTHARAJU VENKATESWARA RAO

B.Sc., B.Ed., B.Com., M.L., PGDST., Ph.D.(Law)

ADVOCATE

The Negotiable Instruments (Amendment) Bill was put forth before the Lok Sabha by the Finance Minister on January 2, 2018. It received the assent of the President of India and was notified in the Official Gazette on **02-08-2018** to become as Act called **"The Negotiable Instruments (Amendment) Act, 2018 (No.20 of 2018).**

The amendment act aims to meet reducing the undue delay in the cheque dishonour cases and provision for payment of interim compensation to the complainants.

The object of Amendment act is ease of doing business basing on the several representations received by the Central Government from the public including trading community relating to pendency of dishonour of cheques cases. This is because of delay tactics of unscrupulous drawers of dishonoured cheques due to easy filing of appeals and obtaining stay on proceedings.

The customs, usages, practices of the merchants and traders, adopted by the legislature and ratified by the decisions of courts, is in short, the **Negotiable Instruments Act, 1881** as we see it now.

Rule of Law giving way to **Rule of commerce** is a worldwide vogue and it should not be embarrassing if the same phenomenon happens in case of a law which was introduced for the sake of commercial expediency. The question is, whether the set of rules and judicial principles considered as inviolable essentials of legal jurisprudence is worthy to be discarded, as they have become a burden on the commercial philosophy of business.

If, we follow the history of amendments in the Negotiable Instruments Act, probing for a reason for their necessity. It's apparent that the law was always responding to the challenges espoused by the trading community through these amendments. The fact that 2018 amendment is not an exemption to this rule is no reason to be amazed. This time legislative off-roading is at the base of the garden of Justice. Let's examine the damage.

The Negotiable Instruments Amendment Act, 2018 introduces to the legislative book, two new sections. **Section 143 A and Section 148** which reads as follows:-

Section 143 A – Power to direct interim compensation.

(1) Notwithstanding anything contained in code of criminal procedure, 1973 (2 of 1974) the court trying an offence under Section 138 may order the drawer of the cheque to pay interim compensation to the complainant.

a. In a summery trial or a summons case, where he pleads not guilty to the accusation made in the complaint.

b. In any other case upon framing charge.

(2) The interim compensation under sub-section (1) shall not exceed twenty percent of the amount of the cheque.

(3) The interim compensation shall be paid within sixty days from the date of the order under Sub-Section (1), or within such further period not exceeding thirty days as may be directed by the court on sufficient cause being shown by the complainant.

(4) If the drawer of the cheque is acquitted, the court shall direct the complainant to repay the drawer of the amount of interim compensation, with interest at the bank rate as published by the Reverse Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the court on sufficient cause being shown by the complainant.

(5) The interim compensation payable under this Section may be recovered as if it were a fine under Section 421 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) The amount of fine imposed under Section 138 or the amount compensation awarded under Section 421 of the Code of Criminal Procedure 1973 (2 of 1974) shall be reduced by the amount paid or recovered as interim compensation under this Section.

Section 148. Power of Appellate Court to order payment pending appeal against conviction-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) in an appeal by the drawer against conviction under Section 138, the appellate court may order the appellant to deposit such sum which shall be a minimum of twenty percent of the fine or compensation awarded by the trial court.

Provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant under Section 143 A.

(2) The amount referred to in Sub-Section (1) shall be deposited within sixty days from the date of the order, or within such further period not exceeding

thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

(3) The appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal:

> Provided that if the appellant is acquitted, the court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reverse Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the Complainant.

The purport and purpose of these two Sections is to give "**Interim compensation"** to the payee of the cheque, both at the trial stage and at the appellate stage. The reason for the amendment may sound harmless and perfectly in tune with the Justice of trade. But what militates against the concept of legal justice is the statutory condition enabling the court to impose a monetary burden on the accused based on the allegation made against him, before trial. It seems that the Legislature, intoxicated by the overdose of commercialization has lost sight of the fact that **Section 138** coming under **Chapter XVII of the Negotiable Instruments Act, 1881** is a penal provision in which the accused cannot be made to suffer, even for a temporary period, the consequence of his alleged illegal act before trial. The payment **Interim Compensation**, in effect is a sentence, teaser trailer, and is against the basic principle of Criminal Jurisprudence, that the accused shall be presumed innocent until found guilty by a competent court.

It is true that there are legislations creating absolute liability, doing away with the need of a guilty mind and negating the requirement of "**mens rea"** in

Criminal offences, like Section 29 of the **PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT 2012 (POCSO ACT) etc.** Such legislations presume a guilty mind and it is for the accused to prove the contrary, that he is innocent. Courts have tolerated and upheld such legislations as valid, even though literarily against the judicial doctrine of presumed innocence of the accused, only considering the sociology of law, that such legislation was need of the hour. It was an active judiciary overlooking the damage to the doctrine of innocence for a larger social purpose and such an approach is perfectly justified considering the object to be achieved through such legislations.

The situation here is different. It is not the presumption of guilt that matters. An accused is made to suffer an advance punishment before trial. This pre-delivery of legal consequence before a lawful climax of a judicial process is perfectly alien to the judicial system we follow. The aforementioned practice does not seem to be supported by any authoritative precedent, practice or judicial doctrine. Rather it seems to be a new rule conceived for commercial compulsion. The pre-trial payment, the accused has to make,

as a token of proposed punishment in advance, is a blatant violation of natural law, justice and against the very spirit of Criminal Jurisprudence.

When offended by a travesty of a statue, on criminal jurisprudence, every lawyer becomes an instinctive critic, goggling for anomalies within the legislation to taint it to trash and when viewed from this angle some more provisions seems ambiguous and meaningless.

The fact that the accused is made to make a pre-trial payment of **Interim compensation** as a token of proposed punishment, in advance, can be ordered to be retuned, if the accused is acquitted by the Court, does not mitigate the gross injustice which is done to the cherished rights of the accused and also to the essential of judicial principles.

Further **Section 143 A (5)** provides that the "INTERIM COMPENSATION" payable ***under this section*** may be recovered as if it were a fine under Section 421 of the Code of Criminal Procedure, 1973 (2 of 1974), keeping at an equal footing the complainant and the accused in the matter of recovery of the amount paid by them as per the ordered by the Court. There is no such provision in the Appellate state under **Section 148** making it absolutely ambiguous as to how the amount deposited by the Appellant and released to the complainant/respondent as "**Interim compensation"** shall be recovered if the appellant is acquitted. The word "**Under this Section"** appearing in **Section 143 A (5)** is a conscious deliberation by the legislature, confining the relief of recovery of **"Interim Compensation"** paid as per the order of the court, only to the amount deposited at the trial stage. The reason or this discrimination doesn't seem to have any bearing on the object of the amendment.

It is true that every aspect of the society is intruded by commercial interest, which is course of time, sets a benchmark for human conduct and later for the law to follow. There seems to be no escape for the **"rule of law"** from this **"rule of commerce".** It is also acceptable that in a globalised economy banking system should be strong and cheques should be given a commercial sanctity at par with cash or other modes of cashless payment and **Dishonour of Cheques** should be treated as a disagree to healthy commerce and has to be eradicated as if a disease. What is Unacceptable is the possibility of this commercial crusade against dishonour of cheques culminating as a "**Dishonour"** and **"disgrace"** to the legal system.

--X--

2019(1) L.S. 93 (Hyd.)

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

Present:
The Hon'ble Mr.Justice
S.V. Bhatt

The Sub-Registrar,
Mydkur, Kadapa ..Petitioner

Vs.

K. Raja Sekhara
Chari & Anr., ..Respondents

CIVIL PROCEDURE CODE, Or.21, R.34 - REGISTRATION ACT, Sec.22-A - Jurisdiction of executing Court for presentation of document relating to decree in a suit for specific performance under Or.21, Rule 34 - Powers of Sub Registrar to consider whether schedule of property in document presented attracts circumstances referred u/Sec.22-A of Registration Act - Executing Court directed to register document.

Merely because document is presented when Court, Sub Registrar is not under obligation to mechanically accept such document for registration - Sub Registrar refused to register document - When positive direction issued by executing Court under Or.21, Rule 34 Sub Registrar takes into consideration fact, requirement of law passes an order leaving it open to Sub Registrar to challenge order.

Documents presented for registration is subject to legal and procedural requirements under Registration and Stamp Act - Therefore once document is presented for registration, executing Court ought to allow authority registration and stamp Act to discharge their duty and function - In this case directions of executing Court are beyond power and jurisdiction of executing Court and therefore order of executing Court under revision is liable to be set aside - Directions of executing Court under revision are liable to be set aside - Revision filed by Sub Registrar against order of executing Court is allowed - Order of executing Court is set aside.

G. Gayathri, Advocates gor the Petitioner.
Mr.K.S.R. Murthy, Advocate for the Respondents.

O R D E R

Heard Ms.G.Gayathri, the learned Assistant Government Pleader for revision petitioner and Mr.K.Sai Ram Murthy for 1st respondent. The Civil Revision Petition is dismissed for default against the 2nd respondent vide order dated 19.12.2011.

The circumstances relevant for disposal of the civil revision petition stated thus:-

The Sub-Registrar, Mydkur, Kadapa District

is the revision petitioner. The 1st respondent herein filed O.S.No.115 of 2006 against the 2nd respondent for specific performance of the agreement of sale dated 07.02.2005. On 10.07.2006, the suit was decreed ex-parte. The 1st respondent filed E.P.No.123 of 2008 under Order 21 Rule 34 of Civil Procedure Code for execution of regular sale deed in terms of ex-parte decree dated 10.07.2006. The sale deed executed by the court on behalf of J.Dr/respondent No.2 after complying with routine formalities was forwarded to revision petitioner for registration.

The Sub-Registrar having been confronted with the information on the plaint schedule property as belonging to Government or that the plaint schedule attracts the prohibition envisaged under Section 22-A of the Registration Act, 1908 kept the document sent for registration in W.P.No.123 of 2008 as P.No.3 of 2010.

From the order dated 11.11.2009 impugned in the C.R.P., it is evident that the non registration of documents presented by the Executing Court under Rule 34 was on account of the two circumstances already stated above. The Executing Court without a decision being communicated on P.No.3 of 2010 by revision petitioner, considers the complaint of respondent No.1 against non-registration and on such information, the executing court assumes that the document presented by the Court ought not to be firstly kept as pending document and secondly on facts, in the case on hand, in view of the earlier presentation and the registration of document for the same Survey number held that the registration should be completed. The Sub-Registrar hence has filed CRP with the leave of the Court and challenges each one of the reasons given by the executing Court as exceeding the procedure provided under Rule 34 of Order 21. For convenience also, to appreciate the contentions of both the parties on the findings recorded by the order impugned, this Court finds it convenient to excerpt the operative portion of the order under challenge which reads thus:

> "In this case the respondents remained exparte and the Hon'ble Court has already drafted a registered sale deed and send the same to the Sub-Registrar, Mydukur for registration by following due process of law. But the Sub- Registrar, Mydukur did not register the same stating that the property is a Government property and that he has specific Instruction from the Government not to register the properties pertaining to Government and file the records showing that the property is an assigned land and as such it cannot be registered and after the said submission of records by the Sub-Registrar Mydukur the matter was posted for hearing of the counsel for the petitioner and the counsel for the petitioner submitted that the registration authority has been registering the said land since last 50 years and to prove the same he has filed a encumbrance certificate issued by the Sub-Registrar, Mydukur pertaining to the petition schedule property for 50 years and it shows that the said land was sold in the

year 1973 on 27.06.1973 to the A.Subbamma and again on 18.2.1983 there was another transactions and the said A.Subbamma sold the same to B.Salamma who is the J.Dr. in this petition. So the E.P. filed by the petitioner clearly reveals that the property under dispute is being registered by the registering authority since in the year, 1973 and to prove his contention the petitioner relied on a decision of the A.P. Hon'ble High Court in P.Suresh and another Vs. the A.P.State represented by District Collector, Kadapa and others reported in 2009 (1) Law Summary page 421, wherein it was held that several transactions have taken place since 1932 and it is in possession of private individuals and the registering authority have registered the same for the transactions since 1932 and it is in the hands of private individual and that the action of the registering authority in not accepting documents presented by the petitioner could be arbitrary and the 3rd respondents i.e., the Sub-Registrar is directed to entertain the sale presented by petitioners. So the above facts of the case are squarely applicable to the present case as the Encumbrance certificate filed by the petitioner clearly reveals that the land under dispute is being registered by the registering authority since 1973 in the name of private individuals and so at this stage the Sub-Registrar, Mydukur cannot reject the registration of sale deeds sent by this Court and in view of the above legal position the Sub-Registrar is directed to entertain the sale deed presented by this court for registration and accordingly the petition is allowed and the office is directed to send a copy to this citation along with the order and the sale deed to the Sub-Registrar, Mydukur for registering the same."

Hence, the Civil Revision Petition.

The Assistant Government Pleader contends that the document is presented by the executing Court as the defendant in a suit filed for specific performance inspite of decree did not comply with the direction issued by the Court for executing regular sale deed. For all the purposes, the executing Court presents the document for and on behalf of the judgment debtor and the mere presentation by the executing court cannot be understood as complete obligation on the part of revision petitioner to admit the document for registration. According to her, the revision petitioner is bound by the duties and functions under Registration Act and Rule 34 of CPC in no way grants privilege presented by the executing court for registration. She refers to Rule 34 which reads thus:

> "34. Decree for execution of document, or endorsement of negotiable instrument**:**-(1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment – debtor neglects or refuses to obey the decree, the decree-holder

may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering draft, s it thinks fit.

(4) the decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may appointed in this behalf shall execute the document so delivered.

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely:-

"*C.D.,* Judge of the Court of

(*or as the case may* be), for A.B., in a suit by *E.F.* against *A.B",*

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same. [(6)(a) Where the registration of the document is required under any law for the time being in force, the Court, or such officer of the Court as may be authorized in this behalf by the Court, shall cause the document to be registered in accordance with such law.

(b) Where the registration of the document is not so required, but the decree-holder desires it to be registered, the Court may make such order as it thinks fit.

(c) Where the Court makes any order for the registration of any document, it may make such order as it thinks fit as to the expenses of registration.]

She further contends that after the decree holder completes procedure under Order 21 and Rule 34, the document is placed before the Sub-Registrar and the document is independently considered by the registering authorities under the Stamp Act, 1899 and the Registration Act, 1908. The schedule of property in the document presented under Rule 34 if attracts one or other circumstances referred under Section 22-A of the Registration Act, the Assistant Government Pleader contends that merely because the document is presented by the Court, the Sub-Registrar is not under obligation to mechanically accept such document for registration. She finally contends that the authority and jurisdiction

of Registering Authority under the Stamp Act and the Registration Act continue to remain with those authorities and the executing Court ought not to compel registering authorities to register the document presented by the Court in execution of a decree for specific performance. The Assistant Government Pleader fairly contends that assuming without admitting that the refusal endorsement or reasons for refusal are factually untenable, the remedy of a party in such a situation is to challenge the order of refusal but not in the pending execution petition and get adjudication on the applicability of prohibition under Section 22-A of the Act to the subject document.

Mr.Sai Ram Murthy on the other hand contends that in the case on hand, inspite of 1st respondent complying with the requirements of stamp duty and registration, the document is kept as pending document and such step is impermissible. When the non registration of the document is brought to the notice of executing Court, the executing Court has merely clarified the position facilitating process of P.No.3 of 2010 and hence no exception to the direction issued by the executing Court can be taken by the registration department. He alternatively contends that, without proper material, the schedule of property covered by P.No.3 of 2010 is treated as Government land and if an order is passed and communicated to 1st respondent, 1st respondent will work out appropriate legal remedies against such refusal by revision petitioner. This Court is of the view that the positive direction issued by the executing Court, if does not fit within the jurisdiction of executing court under Order 21 Rule 34, at best, it will have to be stated that the Sub-Registrar/revision petitioner takes into consideration the fact situation, requirement of law, passes an order leaving it open to 1st respondent to challenge the order if circumstances warrant in accordance with law before competent forum.

I have carefully considered the respective submissions and perused the record. Now the point for consideration is whether the direction issued by the executing Court for executing P.No.3/2010 is valid and tenable? Whether the revision petition has made out a case for interference under Section 115 of Civil Procedure Code. Both the points are answered in favour of the petitioner for the following points:

The executing court in the instant E.P. is merely concerned with executing sale deed in terms of the decree and the judgment in O.S.No.115 of 2011. Either in the judgment in O.s.No.115/2011 or in the E.P., the title and right to the property is an issue. The presentation of document by the court below for registration before the revision petitioner does not take with its fold any privilege for registration. The document so presented for registration is subject to the legal and procedural requirements under the Registration and Stamp Act. Therefore, once the document is presented for registration, the executing court ought to allow the authority under Registration and Stamp Acts to discharge their duty and function. The directions of the executing court already excerpted are beyond the power and jurisdiction of executing court vis-à-vis P.No.3 of 2010. Therefore, these findings in the order under revision are liable

to set aside and accordingly set aside. Civil Revision Petition is allowed and the order impugned in the revision is set aside. The order of this Court ought not to be understood as this Court is expressing a final view on either the consideration of pending document or the remedy available to the 1st respondent in the event of refusing to register the document by revision petitioner. The 1st respondent examines the record and communicates his decision on P.No.3 of 2010 within four (04) weeks from the date of receipt of this order. No order as to costs.Miscellaneous petitions, if any, pending, shall stand closed

--X--

2019(1) L.S. 98 (Hyd.)

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

Present:
The Hon'ble Mr.Justice Suresh Kumar Kait &
The Hon'ble Mr.Justice P. Keshava Rao

D. Nirmala ..Petitioner

Vs.

S. Padmavathi & Ors., ..Respondents

FAMILY COURTS ACT, 1984, Sec.7(1)(e) - HINDU MARRIAGE ACT, 1955, Secs.5,7 & 11 - Family Court dismissed petition filed by appellant u/Sec.7(1)(e) of Family Court Act to declare appellant as legally wedded wife of one late D.G.Rao and for consequential relief that she is entitled to receive pension and medical benefits etc. and all other emoluments payable by 2nd respondent, Railway Department and 1st respondent, wife is not entitled to any amount.

In this case, husband also filed for dissolution of marriage with 1st respondent which was dismissed by order on merits and appeal filed against said order also dismissed - 1st respondent, wife also filed petition as legally wedded wife of D.G. Rao, claiming pension and other emoluments of late D.G. Rao - Family Court dismissed petition filed by appellant holding that deceased late DG Rao is not competent to nominate appellant to claim family pension from 2nd respondent, Railway Department as marriage between him and 1st respondent is subsisting till death of DG Rao.

Appellant contends that her marriage with DG Rao was valid one - But when marriage of 1st respondent was subsisting with DG Rao appellants marriage with DG Rao is not valid and she is not entitled to claim any relief.

During subsistence of marriage a second marriage whatever be circumstances whether customary marriage or legally contracted marriage is barred under provisions of Hindu Marriage Act - Appellant failed to produce any evidence that marriage between 1st respondent and late

F.C.A. No. 13/2012 Date: 29-12-2017

D.G. Rao has been dissolved - On other hand evidence let in by 1st respondent wound clinchingly prove that proceedings initiated by late DG Rao to dissolve marriage ended in dismissal

Therefore mere fact woman abandoned by her husband because of fact that she was necked out of house by him or another woman living with him would not lead to any inference that marriage between first respondent and late DG Rao was dissolved - In circumstances this Court do not find any merits in Appeal and same is liable to be dismissed - Accordingly family Court appeal is hereby dismissed.

Mr.V.S.R. Anjaneyulu, Advocates for the Appellant.
Mr.K.V. Simhadri, Advocate for the Respondents.

J U D G M E N T
(per the Hon'ble Mr.Justice
P. Keshava Rao)

1. Heard the counsel for the appellant as well as the respondents.

2. The present appeal is filed by the appellant who is the petitioner in the Court below aggrieved by the orders passed in O.P.No.658 of 2006 dated 8.09.2011 on the file of the Court of Family Judge, Visakhapatnam in dismissing the petition filed under Section 7(1)(e) of the Family Court Act to declare the appellant herein as the legally wedded wife of one late D.Govinda Rao and for consequential relief that she is entitled to receive pension, family pension and medical benefits and all other emoluments payable by second respondent and first respondent is not entitled to any amounts.

3. Originally the appellant herein filed the above said petition to declare that she is the legally wedded wife of late Govinda Rao whose marriage was performed on 10.05.1985 according to the Hindu Customs and Rights at Visakhapatnam. They had no children. Late D. Govinda Rao was employed as Junior Engineer in the second respondent-Railway Department. Late D. Govinda Rao was a chronic diabetic patient, his leg was amputated below the knee and retired on medical grounds, on 11.11.2000. He executed all necessary documents for family pension nominating the appellant to receive the family pension and he expired on 5.10.2004. When the appellant approached the second respondent, she was surprised to receive a letter from the second respondent dated 26.10.2005 calling upon her to produce the succession certificate. She also said that the marriage between late D. Govinda Rao and the first respondent already ended in divorce and they were living separately since 1975-76. Her marriage with late D. Govinda Rao who belongs to Yadava caste was according to the caste customs. In those circumstances, she filed the petition claiming that she is entitled for the family pension and other retiral benefits from the second respondent-Railway Department and the first respondent is not entitled for any claim.

4. Per contra, the first respondent herein filed a counter denying the material averments made in the petition and

contended inter alia that she is the legally wedded wife of late D. Govinda Rao. Their marriage was solemnized on 29.10.1976 as per the caste customs at Simhachalam, Visakhapatnam. Out of wedlock, they were blessed with two sons namely Ravi Kumar and Shanker Rao respectively. In the month of August, 1977 when the first respondent was pregnant with the second child, she was beaten up by late D.Govinda Rao and her mother and driven out of the house. Thereafter, she was living with her parents. She filed M.C.No.143 of 1978 for maintenance on the file of the Judicial Magistrate of First Class, Durg District, Bhilai. Whereunder, by orders dated 2.12.1981 maintenance was awarded at Rs.100/- for the first respondent and Rs.75/- per month each to her sons. Later, her husband filed petition in O.P.No.411 of 1995 for dissolution of marriage which was dismissed by orders dt. 3.10.1996 on merits. Aggrieved by the same, late D. Govinda Rao preferred an appeal in C.M.A.No.1552 of 1996 in this Court and the same was also dismissed on 07.06.2000. The same has become final. She also said that her deceased husband took voluntary retirement on 11.11.2000. Thereafter, he was paid the retiral benefits by second respondent and subsequently, on 5.10.2004 he died leaving behind the first respondent, and their two sons to succeed his estate. The first respondent applied for family pension on 13.10.2004 and got issued a legal notice on 14.03.2005 to respondents 2 and 3 claiming the pension and other benefits. Being the legally wedded wife, it is her specific case that she is entitled for family pension, medical bills and other emoluments from the respondents 2 and 3 and the marriage between the appellant and late D.Govinda Rao is null and void as her marriage with late D.Govinda Ro was subsisting.

5. The second respondent also filed a counter which was adopted by the third respondent, denying material averments made in the petition against them and contended that late D.Govinda Rao took voluntary retirement on 11.11.2000 on medical grounds and he did not submit any nomination in favour of his family members during his life time or at the time of his retirement. He declared in Form No.6 that his wife and children are living separately and their names are not included and hence, pension papers were processed as per rules in the year 2001. However, on 12.08.2004 late D.Govinda Rao submitted a representation to the second respondent-Railway Department requesting to sanction family pension to the appellant on the ground that he married her on 15.03.2001. Later, he never persuaded the matter and subsequently he died. After his death, the first respondent submitted representation along with the documents to grant family pension to her claiming as widow along with the legal heir certificate and also the copies of the orders passed by the Court below. The appellant gave representation, dated 18.08.2005 seeking family pension being the legally wedded wife of late D.Govinda Rao along with the notarized affidavit said to have been issued by late D.Govinda Rao and copy of the marriage certificate. As they have received two rival claims, the second respondent- Railway Department directed them to produce the succession certificate issued by competent

Court of law and till such orders are produced, the pension cannot be processed in favour of any claimant. It is also said in the counter that when the marriage of the first respondent was subsisting with the deceased D.Govinda Rao, the marriage between the appellant and late Govinda Rao though registered under Hindu Marriage Act, is not valid marriage as well as under the Railway Rules since that marriage is a void marriage, the appellant is not entitled to claim any relief.

6. The appellant to substantiate her contention, examined herself as PW-1 and examined two other witnesses as PWs.2 and 3 and marked Exs.A-1 to A-12. On behalf of the respondents, the first respondent herself was examined as RW-1 and Exs.B-1 to B-5 are marked. Though a counter is filed on behalf of the respondents 2 and 3, they have not adduced any evidence on their behalf and no documents are marked on their side. After enquiry, the Court below was pleased to dismiss O.P.No.658 of 2006 by orders dated 08.09.2011 holding that the deceased late D.Govinda Rao is not competent to nominate the appellant to claim family pension from the second respondent-Railway Department as the marriage between him and the first respondent is subsisting till the death of late D. Govinda Rao.

7. Aggrieved by the above said orders, the present appeal is filed.

8. The learned counsel appearing for the appellant would contend that the appellant's marriage with the respondent was performed on 10.05.1985 as per the Hindu Customs and Rights at Quarter No. RE.3/4 Marripalem, Visakhapatnam. After the wedlock, they had no children. Since the date of marriage, the appellant was taking care of late D.Govinda Rao and she was serving him althrough till his death. The learned counsel emphasized the aspect that during the trouble period of late D.Govinda Rao when his leg was amputated and when he lost his vision, the appellant alone had served him by taking proper care. Alternatively, he also submitted that since the appellant as well as the first respondent are claiming the family pension and other benefits, this Court, on humanitarian grounds as well as on equities can consider granting of pension to both of them even though the marriage between the appellant and late D.Govinda Rao is not a valid marriage. Further, since she had a long living relationship with him, she is entitled for pension. To substantiate his contentions, he relied on **IN RE MATRIMONIAL MATTERS (**2011 (5) ALD 799(DB). Basing on the said decision, he tried to persuade this court that in the present facts and circumstances of the case, the case of the appellant can be considered based on the guidelines framed therein. This Court can also try for a settlement where the appellant as well as the first respondent may be considered for sanction of pension. He also relied on **VIDHYADHARI AND OTHERS v. SUKHRANA BAI AND OTHERS** (2008) 2 SCC 238) and the relevant observation in the above said judgment is as under:

"This Court in a reported decision in Rameshwari Devi s case (supra) has held that even if a Government Servant had contracted second marriage during the

subsistence of his first marriage, children born out of such second marriage would still be legitimate though the second marriage itself would be void. The Court, therefore, went on to hold that such children would be entitled to the pension but not the second wife. It was, therefore, bound to be considered by the High Court as to whether Vidhyadhari being the nominee of Sheetaldeen could legitimately file an application for Succession Certificate and could be granted the same. The law is clear on this issue that a nominee like Vidhyadhari who was claiming the death benefits arising out of the employment can always file an application under Section 372 of the Indian Succession Act as there is nothing in that Section to prevent such a nominee from claiming the certificate on the basis of nomination. The High Court should have realised that Vidhyadhari was not only a nominee but also was the mother of four children of Sheetaldeen who were the legal heirs of Sheetaldeen and whose names were also found in Form A which was the declaration of Sheetaldeen during his life-time. In her application Vidhyadhari candidly pointed out the names of the four children as the legal heirs of Sheetaldeen. No doubt that she herself has claimed to be a legal heir which status she could not claim but besides that she had the status of a nominee of Sheetaldeen. She continued to stay with Sheetaldeen as his wife for long time and was a person of confidence for Sheetaldeen who had nominated her for his Provident Fund, Life Cover Scheme, Pension and amount of Life Insurance and amount of other dues. Under such circumstances she was always preferable even to the legally wedded wife like Sukhrana Bai who had never stayed with Sheetaldeen as his wife and who had gone to the extent of claiming the Succession Certificate to the exclusion of legal heirs of Sheetaldeen. In the grant of Succession Certificate the court has to use its discretion where the rival claims, as in this case, are made for the Succession Certificate for the properties of the deceased. The High Court should have taken into consideration these crucial circumstances. Merely because Sukhrana Bai was the legally wedded wife that by itself did not entitle her to a Succession Certificate in comparison to Vidhyadhari who all through had stayed as the wife of Sheetaldeen, had born his four children and had claimed a Succession Certificate on behalf children also. In our opinion, the High Court was not justified in granting the claim of Sukhrana Bai to the exclusion not only of the nominee of Sheetaldeen but also to the exclusion of his legitimate legal heirs."

Basing on the said judgment of the Apex Court, he contended that in spite of the first respondent being the legitimate wife, yet this Court can grant family pension to both of them basing on the equities as the appellant served and taken care of the deceased late D. Govinda Rao from the date of the marriage i.e. 10.05.1985.

9. The learned counsel for the first respondent contended that the alleged marriage between the appellant and late D.Govinda Rao is not a valid one. The living relationship in treating both the appellant and late D.Govinda Rao as wife and husband is possible only when there is no existing valid marriage between the first respondent and late D.Govinda Rao. He also brought

to the notice of the Court that the marriage of the appellant with late D.Govinda Rao was not performed on 10.05.1985. But, according to marriage certificate Ex.A-1, their marriage is performed only on 15.03.2001 even according to the appellant herself. Therefore, it cannot be presumed that there is a long cohabitation between the appellant and late D.Govinda Rao whereby she can claim the family pension. Further, the maintenance case in M.C.No.143 of 1978 filed by the first respondent against late D.Govinda Rao was ordered on 02.12.1981 awarding maintenance of Rs.100/- and Rs.75/- each per month to herself and her two minor sons. The petition in O.P.No.411 of 1995 field by late D.Govinda Rao for dissolution of marriage with the first respondent was dismissed by the Family Court vide orders dated 3.10.1996 on merits. The appeal filed against the said orders, vide C.M.A.No.1552 of 1996 in this Court was also dismissed on 7.06.2000 and same has become final. Therefore, the marriage between first respondent and late D.Govinda Rao, was subsisting till the date of his death i.e. 05.10.2004. Therefore, the 3appellant is not entitled for any claim much less the claim as sought for in the present appeal and he prayed to dismiss the same since it is bereft of merits.

10. To support his contention, learned counsel for the respondent relied on the judgment of this Court reported in **GETTAM ISRAIL v. M. SIROMANI AND OTHERS (**AIR 2002 A.P. 279). In the judgment of this Court, was pleased to consider a similar issue cropped up in the facts and circumstances of that case and observed as under:

"Lot of oral and documentary evidence was adduced by the parties with regard to the marriage between the 1st defendant and Koteswaramma, and also the paternity of Jhansi, the daughter of the plaintiff and wife of DW.6 and the plaintiff living with M.Radhakrishna Murthy. All that evidence is of little relevance for determining the status of the plaintiff vis—vis the 1st defendant. The fact that the plaintiff is shown as the wife of M.Radhakrishna Murthy in the Service Register maintained by 2nd defendant and in the wedding card printed at the time of the marriage of Jhansi, the daughter of plaintiff with DW.6, is also not relevant for deciding the question whether the plaintiff is the wife of 1st defendant or not. If the plaintiff and 1st defendant, during the subsistence of their marriage, think it fit to live with some other man and woman respectively, without obtaining a divorce from the Court as contemplated by law, their marriage would not get dissolved automatically. Even assuming that Jhansi is not the daughter of the 1st defendant, then also the marriage between the plaintiff and 1st defendant would not automatically get dissolved. Plaintiff or 1st defendant have to approach a competent Court, and obtain a decree for dissolution of their marriage, and till such time as they get their marriage dissolved, it subsists, irrespective of the fact whether they are faithful to each other or not, or are living a life or their own, with some other man or woman respectively, and so it has to be held that plaintiff continues to the wife of 1st defendant. The point is answered accordingly.

Since plaintiff continues to be the wife of

1st defendant and since as per the Regulations of the 2nd defendant, family members can only be nominated to receive the death or retiral benefits, 1st defendant nominating Koteswaramma as his wife is not proper. The 1st defendant, after taking steps to get the marriage between him and the plaintiff dissolved, only can make such a nomination, but till such time as the marriage between him and the plaintiff is subsisting, he cannot nominate a woman who is not his wife or a family member to receive the death or retiral benefits."

11. He also relied on a decision in **SMT. DALJIT KAUR ALIAS TONY v. SMT. AMARJIT KAUR AND OTHERS (**AIR 2009 PUNJAB AND HARYANA 118) and the relevant observation is as under:

"During the subsistence of a marriage, a second marriage, whatever be the circumstances, is barred under the provisions of the Hindu Marriage Act. Appellant No.1 has failed to adduce any evidence, much less prima facie, to suggest that Mohinder Singh obtained a decree of divorce, prior to his marriage to her. The documents Ex.D-1 to D-3 and the birth of Sukhbir Kaur would not by themselves negate Amarjit Kaur's marriage with Mohinder Singh. A decree of divorce can only be granted by a court of competent jurisdiction, exercising powers under the Hindu Marriage Act. The mere fact that a woman is abandoned by her husband or that a woman after being abandoned by her husband live with another man, would not raise an inference that their marriage stands dissolved."

12. Perusal of the contents of the petition as well as counters filed by the parties and the material placed on record, the undisputed facts are that the marriage of the first respondent was performed with late D. Govida Rao on 29.10.1976 as per the Hindu Caste Customs and Rights at Simhachalam, Visakhapatnam. Out of the wedlock, they were blessed with two sons. Since the first respondent was driven out of the matrimonial house, when she was pregnant with the second child, she filed maintenance case as stated above, resulting award of maintenance in her favour and her two minor sons. That apart, the proceedings initiated by late D. Govinda Rao for dissolution of marriage between him and the first respondent vide O.P.No.411 of 1995, was dismissed and the appeal filed against the said orders was also dismissed by this Court on 07.06.2000. These facts clinchingly prove that the marriage between first respondent and late D.Govinda Rao was subsisting till he died on 05.10.2004. Basing on the same, the contentions advanced by the appellant that her marriage with late D.Govinda Rao was performed on 10.05.1985 when the marriage between late D.Govinda Rao and first respondent is subsisting, is a void marriage and it has no sanctity in the eye of law. However, as pointed out by the counsel for the first respondent that even according to Ex.A-1 the marriage certificate produced by the appellant herself, the marriage between the appellant and late D.Govinda Rao was performed only on 15.03.2001. Ex.A-1 being a public document, it belies the contention raised by the appellant that her marriage with late D.Govinda Rao was performed on 10.05.1985. Even in the counter filed by the second respondent-Railway Department,

it is brought on record that late D. Govinda Rao retired voluntarily on 11.11.2000 on medical grounds and he did not submit any nomination in favour of his family members during his life time or at the time of his retirement. In fact, in Form No.6 he declared that his wife and children are living separately since 1977, hence their names are not included in the pension papers which were processed as per rules in the year 2001. On 12.08.2004, he submitted representation to the second respondent-Railway Department requesting to sanction family pension to the appellant claiming that he married her on 15.03.2001 which matter was never persuaded till he died. Immediately thereafter, the first respondent has submitted a representation to the second respondent-Railway Department along with relevant documents claiming the family pension. Thereafter, the appellant submitted her representation on 18.08.2005 seeking sanction of family pension claiming that she is the legally wedded wife of late D. Govinda Rao along with notarized affidavit alleged to have been given by late D.Govinda Rao. Basing on the averments in the counter filed by the Railway Department, it can be safely inferred that even according to late D.Govinda Rao, he married the appellant only on 15.03.2001 as mentioned in Ex.A-1. This fact totally negatived the arguments advanced by the counsel for the appellant that the appellant married late D. Govinda Rao on 10.05.1985 and since then she was taking care and served him when he was suffering with acute diabetic resulting in amputation of leg and when he was blind.

13. Even the contention raised on behalf of the appellant that her marriage with late D. Govinda Rao was a valid one, since the marriage was performed as per customs of Yadava community is not correct for the reason that the customs cannot have precedence over the established principles of law. In the absence of law, long practice of following family traditions and other ceremonies prevalent in their community since time immemorial will be treated as custom and have the force of law and is relevant. Any activity taken up as per the said usage have got the validity and sanctity of law in the form of custom. But, in the case on hand, when the marriage of the first respondent was subsisting with late D. Govinda Rao, the appellant's marriage with late D. Govinda Rao is void and she is not entitled to claim any relief much less the relief as sought in the petition on the ground that she is the wife of late D.Govind Rao. That apart, in the cross-examination also PW-1 has categorically admitted that her marriage with late D. Govinda Rao was performed on 15.03.2001 contrary to the fact mentioned in the petition that the marriage took place on 10.05.1985. In Ex.A-3 the copy of the letter sent to the second respondent-Railway Department by the appellant, she mentioned the date of marriage as 01.04.2004 leading to give three different dates in three different proceedings by the appellant herself. This fact itself proves that the appellant has not come to the court with clean hands and with true version. Therefore, the case set up by the appellant cannot be believed. Ex.A-1 which is a public document has got creditworthiness and reliable. It gives the date of marriage as 15.03.2001. If the same is taken into consideration, the contention of the appellant that she was serving late D. Govinda Rao from 10.05.1985 cannot be

accepted and the same is hereby rejected. Therefore, the judgments relied on by the appellant, are not applicable to the facts of the present case.

14. It is relevant that during the subsistence of marriage, a second marriage in whatever be the circumstances whether customary marriage or a legally contracted marriage, is barred under the provisions of the Hindu Marriage Act. The appellant failed to produce any evidence much less prima facie to suggest that the marriage between first respondent and late D. Govinda Rao has been dissolved. On the other hand, the evidence let in by the first respondent would clinchingly prove that the proceedings initiated by late D. Govinda Rao to dissolve his marriage with the first respondent, ended in dismissal by this Court vide C.M.A.No.1552 of 1996 and their marriage is subsisting. Therefore, the mere fact that a woman abandoned by her husband because of the fact that she was necked out of the house by him or with another woman living with him would not lead to an inference that the marriage between the first respondent and late D. Govinda Rao was dissolved and the marriage between the appellant and late D. Govinda Rao, gets validated. In these circumstances, we do not find any merits in the appeal and the same is liable to be dismissed.

15. Accordingly, the family court appeal is hereby dismissed. There shall be no order as to costs.
Interim order, if any, shall stand vacated. Miscellaneous petitions, if any, shall also stand closed.

--X--

2019(1) L.S. 106 (Hyd.)

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

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

Ankam Govindamma ..Petitioner
Vs.
Syed Shafeeullah ..Respondent

CIVIL PROCEDURE CODE, Or.6, R.17 - LIMITATION ACT, Sec.65 - Amendment of written statement - Application filed under Or.6, Rule 17 for amendment of written statement after commencement of trial.

In this case, reasons submitted by petitioner/defendant for delay is at time of drafting written statement defendant instructed her counsel to take plea of adverse possession also but by oversight such plea was not taken in written statement.

The plea of adverse possession being important one it is difficult to believe that defendant and her counsel by oversight could not take that plea.

At any rate defendant has not shown plausible cause to overcome mandate of proviso to Or.6, Rule 17 CPC.

CRP.No.1500/2018 Date: 27-6-2018

Amendment petition can be considered provided petitioner defendant could establish that inspite of exercising due diligence he could not file petition before commencement of trial - In this case petitioner could not show any plausable clause for inordinate delay hence petition merits for no consideration - Further having pleaded title it is not permissible for defendant to plead adverse possession as both pleas are mutually inconsistent - Petition cannot be allowed - CRP dismissed.

Mr.Y. Ashok Raj, Advocate for the Petitioner
Mr.T.Sreedhar, Advocate for the Respondent.

J U D G M E N T

1. This CRP is filed by the petitioner/ defendant aggrieved by the order dated 22.02.2018 in I.A.No.86 of 2018 in O.S.No.8 of 2012 passed by the Principal Junior Civil Judge, Deverakonda, dismissing the application filed by the defendant under Order VI Rule 17 CPC seeking to amend the written statement by adding the plea of adverse possession.

2. Heard.

3. At the outset I find no illegality or perversity in the order impugned. The Trial Court dismissed the application on two main observations, firstly, that the petition is a belated one in the sense, the suit was filed on 04.01.2012, written statement was filed on 09.04.2012 and the I.A.No.86 of 2018 seeking amendment of written statement was filed on 17.02.2018 at the stage when the suit was posted for cross-examination of PW.1 and the petitioner has not shown any bonafides as she has not submitted satisfactory explanation for the delay of nearly six(6) years in filing the petition. Secondly, it was observed that originally in the written statement the defendant took the plea that she is the owner of the suit schedule property and now she wants to introduce an inconsistent plea of adverse possession which is impermissible.

4. I have gone through the impugned order which is a reasoned one. As rightly observed by the Trial Court, proviso to Order VI Rule 17 CPC emphatically lays down that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of the trial. In the instant case, the reason submitted by the petitioner/defendant for the delay is that at the time of drafting written statement, she in fact instructed her counsel to take the plea of adverse possession also but by oversight such plea was not taken in the written statement and the said mistake could be detected only when they were preparing for the trial. It is a far-fetching and fallacious explanation. Every party and counsel are required to meticulously go through the pleadings prepared by them and then the party has to sign on the pleadings and submit to the Court. The plea of adverse possession being an important one, it is difficult to believe that the defendant and her counsel by oversight could not take that plea and further, they did not detect such omission before filing the written statement into Court. At

any rate, the defendant has not shown a plausible cause to overcome the mandate of proviso to Order VI Rule 17 CPC.

5. In this regard, the decision of this High Court in **Dhulipalla Srinivasa Rao v. Kandula Govardhan Rao and others (**2018(1) ALT 420 = 2018 (2) ALD 315), relied upon by the petitioner can be distinguished. In that case, the plaintiff filed the suit initially for cancellation of the sale deed executed by 1st defendant in favour of 2nd defendant. During pendency of suit, plaintiff sought for amendment of the plaint to add relief of declaration of title and recovery of possession. The Trial Court allowed the said petition. The defendant preferred CRP No.433 of 2016, wherein a learned Judge of this Court dealt with the aspect as to whether amendment of plaint cannot be permitted on the ground of delay. Relying upon the judgment of Apex Court in **Sampath Kumar v. Ayyakannu** (2002) 7 SCC 559), the learned Judge held that on the ground of mere delay, however long it may be, an application for amendment cannot be rejected provided the facts of the case warrant allowing of the amendment. In **Sampath Kumar (supra)**, the Apex Court allowed the amendment sought for about 11 years after the institution of the suit on the ground that the plaintiff in that case was not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as were pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction which was pending. Thus it would appear, the Apex Court tested the amendment petition on the touchstone of whether or not a separate suit for the same relief and on the same facts as mentioned in the amendment petition is barred by limitation. If answer is negative, the Apex Court opined, the amendment could be allowed to avoid multiplicity of proceedings.

There is no demur about the aforesaid ratio. However, it must be noted, **Sampath Kumar (supra)**, appeared to have been decided without reference to the amended provision of Order VI Rule 17 CPC. It is to be noted that with a view to shorten litigation and speed up the trial of cases, Order VI Rule 17 CPC was omitted by Amendment Act, 46 of 1999. The prominence of the said rule was such that there was hardly a suit or proceeding where this provision had not been used. Its omission therefore created commotion leading to protest in the legal community. In that view, this rule was restored in its original form by Amendment Act 22 of 2002 with a rider in the shape of proviso limiting the power of amendment to some extent. Order VI Rule 17 CPC now reads thus:

"**Rule 17. Amendment of pleadings**:

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."

The new proviso lays down that no application for amendment shall be allowed after commencement of the trial unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before commencement of the trial. Whether a party has acted with due diligence or not would depend upon the facts and circumstances of each case. The Apex Court in **Salem Advocate Bar Association, Tamil Nadu v. Union of India (**AIR 2005 SC 3353), observed thus:

> "Para 26: Order 6 Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 3 7 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision."

So with the amendment of Order VI Rule 17 CPC and introduction of proviso, the petitioner seeking amendment after commencement of trial shall, convince the Court that inspite of due diligence, he could not have raised the matter before commencement of trial. So in my considered opinion, the yardstick for considering the amendment petition filed after commencement of trial is not only whether a separate suit on same facts and for same relief is not time barred as laid down in **Sampath Kumar (supra)**, but also whether the petitioner could show plausible cause that inspite of due diligence, he could not raise the matter before commencement of the trial. So to sum up, the amendment petition filed after commencement of trial no doubt can be considered, provided, the petitioner could establish that inspite of exercising due diligence he could not file the petition before commencement of the trial and a separate suit on same cause of action for the same relief could be maintainable. In the instant case, as already observed, the petitioner could not show any plausible cause for the inordinate delay. Hence the petition merits no consideration.

6. The next lacunae in petitioner's case is that the plea of adverse possession, which was sought to be taken through the amendment is mutually inconsistent with the original plea of title setup by the petitioner/defendant in her written statement by way of purchase of the suit property. In **Dagadabai (dead) by LRs v. Abbas** (2017) 13 SCC 705), the Apex Court observed thus:

"Para 18: In this case, we find that the defendant did not admit the plaintiff's ownership over the suit land and, therefore, the issue of adverse possession, in our opinion, could not have been tried successfully at the instance of the defendant as against the plaintiff. That apart, the defendant having claimed the ownership over the suit land by inheritance as an adopted son of Rustum and having failed to prove this ground, he was not entitled to claim the title by adverse possession against the plaintiff."

A learned Judge of this Court in **Kasa Muthanna and others v. Sunke Rajanna and others (**2015 (6) ALD 713), has opined that having pleaded title, it is not permissible for the defendant to plead adverse possession as both pleas are mutually inconsistent. In view of the aforesaid case laws also, the petition cannot be allowed.

7. Accordingly, this C.R.P is dismissed.

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

--X--

2019(1) L.S. 110 (Hyd.)

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

Present:
The Hon'ble Mr.Justice
S.V. Bhatt

Chebrolu Srinivasa Rao & Ors., ..Petitioners

Vs.

Ravi Venkata Ratna Vara Prasad & Ors., ..Respondents

STAMP ACT, Art.47-A & 35 - REGISTRATION ACT, Sec.17 - Suit filed by respondents/plaintiffs for specific performance of agreement to sell allegedly executed by defendants 1 to 4 - Revision petitioners defendants 5 to 14 raised objection on admissibility of suit agreement - Trial Court rejecting objection holding that rival contentions of parties discloses that plaintiff is not in possession of suit property - Contention that duty to pay stamp duty is dependant on recitals of agreement but not to pleadings in suit.

Cl.6 in agreement clearly states that sellers of agreement have handedover peaceful physical possession of schedule property to purchaser.

Therefore decision on payment required stamp duty on suit agreement

by reference to very recitals in agreement but not pleadings - Therefore order under revision is set aside giving liberty to take steps for getting agreement impounded - Revision petition, allowed.

Mr.K. Suresh Reddy, Advocates for the Petitioners.
Mr.M. Sudhir Kumar, Advocate for the Respondents: R1.

O R D E R

Heard Mr.K.Suresh Reddy for revision petitioners and Mr.M.Sudhir Kumar for 1st respondent.

Defendant Nos.5 to 14 in O.S.No.210 of 2011 in the Court of III Additional District Judge, Ongole, are the revision petitioners.

The 1st respondent filed O.S.No.210 of 2011 for specific performance of agreement dated 09.06.2007 said to have been executed by defendants 1 to 4 (respondents 2 to 5 herein), permanent injunction restraining the defendants from alienating plaint schedule, creating third party interest etc. The revision is directed against the docket order dated 19.11.2012. The 1st respondent tendered the suit agreement in evidence as Ex.A-1 and the revision petitioner raised objections on admissibility of suit agreement in evidence.

The revision petitioners objected to marking the suit agreement by contending that the suit agreement is written on the stamp paper of Rs.100/-. The agreement refers to delivery of possession under the agreement by the executants in favour of 1st respondent. The recitals of suit agreement attract the bar under Section 17 of the Registration Act read with Section 35 of the Indian Stamp Act and therefore the suit agreement is inadmissible in evidence for any purpose. The trial Court held as follows:

"In the aforesaid decision i.e., **B. Bhaskar Reddy v. Bommireddy Pattabhi Rami Reddy (died) by LRs and others,** as per the case of plaintiff, possession of subject matter of suit agreement of sale was not delivered to plaintiff as per the recitals of that agreement and the case of defendant therein was that he never executed any such agreement of sale and he was in possession of subject matter of that agreement of sale. Considering those facts, the Hon'ble High Court of A.P., observed as "wherever the agreement holder is not in possession of the property under agreement of sale, even though there is a recital in the agreement as to delivery of possession, he need not pay proper stamp duty as required. It shall be treated as a simple agreement of sale falling outside the scope of Explanation I to Article 47-A of Schedule I of the Indian Stamp Act. Various situations may arise for consideration on this aspect. The purpose of the Act is to see that a person, who is in physical possession and enjoyment shall not avoid to pay proper stamp duty as required under Explanation I to Article 47-A of the Stamp Act. Otherwise, the document shall not be admissible in evidence as required under Section 35 of the Stamp Act."

In this particular case on hand, the rival contentions of the parties in this petition

discloses that petitioner is not in possession of suit property despite the recitals of suit agreement of sale evidencing the delivery of possession of suit property to petitioner on the date of said document. Therefore, the observations of the Hon'ble High Court in the aforesaid referred decision are squarely applicable to the facts of case on hand."

Learned counsel appearing for parties in the Civil Revision Petition made submissions on the legal infirmity under the Stamp Act. Therefore, the Civil Revision Petition is considered and decided by referring to the rival contentions made in this behalf.

Mr.Suresh Reddy contends that the order under revision is followed on the decision of this Court reported in **B.Bhaskar Reddy Vs. Bommireddy Pattabhi Rami Reddy (**2010 (6) ALD 307). According to him, the ratio laid down in **P.Bhasker Reddy's** case (1 supra) is not applicable to the facts and circumstances of the case. Secondly, the necessity to pay stamp duty is dependant on the recitals incorporated in the document but not by reference to the averments either in the plaint or in the written statement. According to him, in the case on hand, the plaint is silent about the possession whether it is claimed as taken or still continued with the executants. Under those circumstances, the 1st respondent if intends to introduce suit agreement atleast as an agreement of sale, the 1st respondent is under obligation to pay deficit stamp duty and penalty on Ex.A1. He further contends that in view of the ratio laid down by the Apex Court in **OM PRAKASH Vs. LAXMINARAYAN AND OTHERS** (2014) 1 Supreme Court Cases 618) the recitals are the deciding factor in determining whether the document is liable for stamp duty under Article 47-A etc. He finally contends that the ratio of this Court in **P.Bhasker Reddy's** case (1 supra) no more is good law and prays for declaring accordingly.

Mr.Sudhir Kumar refers to statement of objects and reasons of Act No.21 of 1995 and contends that according to him, the stamp duty is payable if under the agreement power of attorney is created, total consideration is paid, possession is delivered to vendee but not in a case where the agreement is between the vendor and vendee. Therefore, according to him, payment of Rs.100/- stamp duty would be sufficient.

Article 47-A of Stamp Act reads thus:

47-A Sale as defined in Section 54 of the Transfer of Property Act, 1882 :
(a) in respect of property situated in any local area comprised in a Municipal Corporation:

(i) Where the amount or value of the consideration for such sale as set forth in the

instrument or the market value of the property which is the subject matter of the sale whichever is higher but does not exceed Rs.1,000/-.	Eight rupees for every one hundred rupees or part thereof.
(ii) where it exceeds Rs.1,000/-.	The same duty as under Clause (i) for the first Rs.1,000/- and for every Rs.500/- or part thereof in excess of Rs.1,000 forty rupees.
(b) in respect of property situated in any local area comprised in the Selection Grade or in Special Grade Municipality :	
(i) where the amount or value of the consideration for such sale as set forth in the instrument or the market value of the property which is the subject matter of the sale whichever is higher but does not exceed Rs.1,000/-.	Seven rupees for every one hundred rupees or part thereof.
(ii) where it exceeds Rs.1,000/-.	The same duty as under Clause (i) for the first Rs.1,000/- and for every Rs.500/- or part thereof in excess of Rs.1,000 Thirty-five rupees.
(c) where the property is situated in any area other than those mentioned in Clauses (a) and (b) :	
(i) where the amount or value of the consideration for such sales as set forth in the instrument or the market value of the property which is the subject matter of the sale, whichever is higher but does not exceed Rs.1,000/-.	Six rupees for every one hundred rupees or part thereof.
(ii) where it exceeds Rs.1,000/-.	The same duty as under Clause (i) for the first Rs.1,000/- and for every Rs.500/- or part thereof in excess of Rs.1,000 thirty rupees.
(d) if relating to a multi-unit house or unit of apartment/flat/portion of a multistoried building or part of such structure to which the provisions of Andhra Pradesh Apartments (Promotion of Construction and Ownership) Act, 1987, apply :	

This Court in **B. Bhaskar Reddy** case (1 supra) on payment of stamp duty/penalty, held as follows:

> "It is admitted fact that though an agreement of sale was executed reciting as to delivery of possession, possession was not delivered and there was exchange of notices for delivery of possession under the agreement. Whereas, the defendants denied the very execution of the agreement and also stated that the question of delivery of possession does not arise since there was no agreement executed between the parties. In the plaint it was pleaded that though there is a recital in the agreement, possession was not delivered in spite of issuance of legal notice. In the written statement, defendants stated that they are in possession of the property. Under those circumstances, the Court is of the considered view that an agreement to sell followed by or evidencing delivery of possession of the property agreed to be sold shall be chargeable as sale and not otherwise and, in the case on hand, agreement of sale is not followed by or evidencing delivery of possession of the property agreed to be sold. The pleadings, nature of the documents and the recitals and the surrounding circumstances must be taken into consideration for the purpose of Explanation I to Article 47-A of Schedule I-A of the Indian Stamp Act, in the interest of justice. Therefore, agreement of sale in question does not fall within the scope of Explanation I to Article 47-A of Schedule 1-A of the Indian Stamp Act; thus, impounding of such document does not arise.
>
> In a situation like this, the aid of purposive interpretation needs to be taken into consideration. The purpose to insist upon payment of proper stamp duty is to earn revenues to the State. If a person, being in physical possession and enjoyment of the property under the agreement of sale, wherein there is a recital as to delivery of possession or evidencing delivery of possession, avoids to pay proper stamp duty, such document is inadmissible under Section 35 of the Indian Stamp Act, 1899. In nutshell, wherever the agreement holder is not in possession of the property under agreement of sale, even though there is a recital in the agreement as to delivery of possession, he need not pay proper stamp duty as required. It shall be treated as a simple 8 agreement of sale falling outside the scope of Explanation I to Article 47-A of Schedule I of the Indian Stamp Act. Various situations may arise for consideration on this aspect. The purpose of the Act is to see that a person, who is in physical possession and enjoyment shall not avoid to pay proper stamp duty as required under Explanation I to Article 47-A of the Stamp Act. Otherwise, the document shall not be admissible in evidence as required under Section 35 of the Stamp Act."

The above paragraph from **B. Bhaskar Reddy's case** reads that the recitals in the document are not conclusive but also

Chebrolu Srinivasa Rao & Ors., Vs. Ravi Venkata Ratna Vara Prasad & Ors.,115

averments etc., are looked into while determining the payment of stamp duty and penalty. The other reason recorded by the learned Judge is that purposive interpretation needs to be taken into consideration while determining the issue of payment of stamp duty/penalty. The Revision Petitioner assails these findings both by reference to Stamp Act and also the precedents on the point.

The petitioner relies on **Om Prakash** case (2 supra) to contend that the legal duty to pay stamp duty is dependent on the recitals in the document, which record a particular state of affair but not the pleadings in the suit. The circumstances in **Om Prakash** case (2 supra) are substantially similar, hence for appreciating the ratio laid down by the Apex Court the following paras are excerpted.

"The appellant-defendants executed a deed of agreement to sell the suit land to the respondent-plaintiffs. It was inter alia clearly recited in the agreement to sell that the seller, having received a part of the sale consideration as a token amount, has handed over possession of the land to the purchaser and that after receiving the remaining sale consideration amount from the purchaser within a year, the seller would get the sale deed registered in the name of the purchaser."

The respondent filed a suit for specific performance of the agreement to sell, possession and permanent injunction in respect of the land. It was the case of the respondents that the suit land was delivered to them on payment of a part of the consideration money in pursuance of the agreement to sell. The defendants in the written statement, however, denied the assertion of the plaintiffs and stated that no agreement to sell was ever executed and no possession was given.

During the course of the trial the agreement to sell was sought to be proved and admitted in evidence by the Plaintiffs. But its admissibility was questioned by the defendants on the ground that the agreement to sell contains a recital that possession has been handed over to the purchaser and, therefore, it is a deemed conveyance in terms of the Explanation appended to Article 23 of Schedule 1-A of the Stamp Act as substituted by Section 6 of Act 22 of 1990, in the State of M.P. over which the stamp duty as indicated in Schedule 1-A of the Stampt Act, 1899, as substituted by M.P.Act 22 of 1990, is required to be affixed. It is pointed that the agreement to sell in question is executed on a stamp paper of Rs.50 only. The submission made by the defendants found favour with the trial court and it held the agreement to sell to be inadmissible in evidence as it has not been sufficiently stamped. It further observed that if the plaintiffs want to produce the said document in evidence then they can make proper application as envisaged under Section 35 of the Stamp Act.

The plaintiffs challenged the trial court's order in a writ petition filed under Article 27 of the Constitution contending that when the defendants themselves had asserted that possession of the property was not delivered and the plaintiffs too had claimed the relief of possession, this meant that they were not in possession, then the recital

in the agreement was of no consequence and the view taken by the trial court was erroneous. The Single Judge of the High Court accepted this contention and held the agreement to sell to be admissible in evidence.

Thus the question which fell for consideration by the Supreme Court in this appeal was : whether the admissibility of a document produced by the party would depend upon the recitals in the document or on the pleadings raised by the parties in the suit or the factual situation, and whether the document in question was a deemed conveyance in terms of the Explanation appended to Article 23 of Schedule 1-A of the Stamp Act as substituted by Section 6 of Act 22 of 1990 in the State of M.P. and is duly stamped. At the time of considering the question of admissibility of a document, it is the recital(s) therein which shall govern the issue. It does not mean that the recital(s) in the document shall be conclusive but for the purpose of admissibility of a document it is the terms and conditions incorporated therein which shall hold the field. In this case, the agreement to sell clearly acknowledges payment of a part of the consideration money and further, the giving of actual physical possession to the purchaser by the seller.

If in a document certain recitals are made then the Court would decide the admissibility of the document on the strength of such recitals and not otherwise. For example, in a given case, if there is an unregistered absolute sale deed and the parties say that the same is not required to be registered then the court would not be entitled to admit the document simple because the parties say so. The jurisdiction of the ocurt flows from Sections 33, 35 and 38 of the Stamp Act and the court has to decide the question of admissibility. Whether the possession in fact was given or not in terms of the agreement to sell in question: it is the recitals contained in the document that are decisive of admissibility."

Let me now refer to the following decisions of our High Court. In **B. Ratnamala v. G. Rudramma (**1999 (6) ALD 160 (DB)**,** it was held as follows:

"The main question that falls for consideration is the interpretation of the expressions "followed by or evidencing delivery of possession". These expressions cannot be read in isolation and one has to find the true meaning by reading the entire Explanation and more so in conjunction with the earlier expression i.e., "agreement". Even if these two expressions are looked independently, it means an agreement to sell followed by delivery of possession and an agreement to sell evidencing delivery of possession. In the first case, i.e., "followed by delivery", possession cannot be disjuncted from the basic source i.e., agreement to sell. Therefore, the expression followed by delivery of possession should have a direct nexus to the agreement and should be read in juxtaposition to the word 'agreement' and it cannot be independent or outside the agreement. Therefore, the delivery of possession should follow the agreement i.e., through the agreement. It takes in its sweep the recital in the agreement itself that delivery of possession

Chebrolu Srinivasa Rao & Ors., Vs. Ravi Venkata Ratna Vara Prasad & Ors.,117 is being handed over. It will also cover cases of delivery of possession contemporaneous with the execution of agreement, even if there is no specific recital in the agreement. In other words, the delivery of possession should be intimately and inextricably connected with the agreement. And in the second type, i.e., agreements evidencing delivery of possession, if the document contains evidence of delivery of possession by a recital in that behalf, that is sufficient. Such delivery of possession can be prior to the date of agreement and need not be under the agreement. If the Agreement records the fact that the possession was delivered earlier and such recital serves as evidence of delivery of possession, though prior to the Agreement, it falls under the second limb. Therefore, on a proper interpretation of the said expressions, it would follow that an agreement containing specific recital of delivery of possession or indicating delivery of possession even in the past is liable for stamp duty as a 'sale' under the said Explanation."

Ponnapola Seetha Ramaiah v. Sanagala Sreenivasulu (2012 (6) ALD 766)**,** has applied the ratio laid down in B.Ratnamala's case and held as follows :

"In the instant case, it is not in dispute that the agreement, as it was originally drafted, did not contain the recital relating to delivery of possession of the property. However, on the back of the agreement, several endorsements were made relating to receipt of money by the respondent. Two endorsements were found against the date 28.5.2005. In the later endorsement, it is stated that on that day Rs.6,19,000/- was received towards the amount under the agreement and the property was delivered. This recital would clearly show that the delivery of possession has taken place a few months after entering into the agreement and in pursuance thereof. Thus, delivery of possession is directly connected with and traceable to the agreement of sale. Hence, the ratio laid down by the Division Bench of this Court in **B. Ratnamala's** case (supra), clearly applies to this case."

Ratnamala's case is followed in **Gankidi Venkateshwar Reddy Vs. Podem Veeraiah and others (**2016 (6) ALT 594) and for brevity, the same view is not referred to.

The above discussion takes this Court to the recitals in the suit document dated 09.06.2007, and are as follows:

"4. The balance payment of Rs.15,00,000/- will be paid by the purchaser to the sellers at the time of execution of the absolute sale deed and thus complete the sale transaction.

5. The sellers confirms with the purchase that they have not entered into any agreement of sale, mortgage or exchange whatsoever with any other person relating to the schedule property of this agreement except with A.P.S.F.C., Ongole Branch.

6. Sellers today handed over the peaceful physical possession of the schedule of property to the purchaser."

The plaint admittedly silent on the recitals

referred to above. Therefore, it is but legal to refer to the primary clauses on which the objection on non-payment of stamp duty/ penalty is raised.

The clause (6) in clear terms states that the sellers under the agreement on 09.06.2007 have handed over the peaceful physical possession of the schedule of property to the purchaser.

Therefore the decision on payment of required stamp duty on suit agreement is to be decided by reference to the very recitals in the agreement but not the pleadings. The ratio of Apex Court and this Court in the decisions referred to above lays down the binding principles.

Therefore, it is held that the view taken by this Court in **B.Bhasker Reddy's** case (1 supra) cannot be treated as good law in view of the ratio in **Om Prakash's case** (2 supra) and **PONNAPOLA SEETHA RAMAIAH's case** (4 supra).

Keeping in view the above decisions, the order under Revision is set aside. The 1st respondent is given liberty to take steps as are required in law for getting the agreement dated 09.06.2007 impounded. The objection if any under the Registration Act is left open for consideration as and when the document is tendered in evidence.

The Civil Revision Petition is allowed accordingly. No costs.

--X--

2019(1) L.S. 118 (Hyd.)

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

Present:
The Hon'ble Dr.Justice
B. Siva Sankara Rao

P. Narsing Rao & Ors., ..Appellants
Vs.
K. Lalitha & Ors., ..Respondents

CIVIL PROCEDURE CODE, Or.II Rule 2 & Order VII Rule 11 – URBAN LAND (CEILING AND REGULATION) ACT – INCOME TAX ACT – INDIAN EVIDENCE ACT, Sec.13 – TRANSFER OF PROPERTY ACT, Sec.53-A - LIMITATION ACT, Article 54 – Grant of injunction – Trial Court allowed applications of Respondent/ Plaintiff and granted injunction restraining Appellants/Defendants in respect of plaint schedule properties.

Held – Once there is stipulation in very Agreement of Sale, of outer time limit of one year period and after notice given, it shows agreement cancelled – Plaintiffs cannot claim to be in possession of any portion of property covered thereunder – There is nothing for Trial Court to hold that Plaintiffs got prima facie case of entitlement to enforcing of Sale Agreement to go for trial irrespective of plaint rejection application dismissed of limitation aspect – Granting of

C.M.A. Nos.1044/2017 etc.Date: 01-02-2018

injunction by Trial Court in allowing applications is unsustainable for no prima facie case as sinequonon – Common order of trial Court are set aside – Appeal stands partly allowed.

Mr.Challa Dhanamjaya, Advocate for the Appellants.

Mr.K.Laxmaiah, Mohd.Asifuddin, Advocate for the Respondents.

C O M M O N J U D G M E N T

1. The appellants 1 to 5 in the present Civil Miscellaneous Appeals are the defendants in O.S.No.316 of 2014 pending on the file of the V Senior Civil Judge, City Civil Court, Hyderabad, whereas the respondents are the plaintiffs 1 to 3 in the said suit. These two appeals are arising out of the impugned common order in I.A.Nos.209 & 210 of 2014 in O.S.No.316 of 2014, dated 18.08.2017, passed by the learned V Senior Civil Judge supra, which applications are filed for the relief sought by the plaintiffs 1 to 3 against six defendants, of whom besides defendants 1 to 5-appellants herein supra defendant No.6 is the Star Homes Infratech India (P) Ltd., represented by its Managing Director S.Narender Reddy, added as per the orders in I.A.No.621 of 2015 & I.A.No.619 of 2015 respectively and as per the order dated 18.04.2016 in I.A.No.1619 of 2015 in the plaint. In fact, in the plaint originally three plaintiffs filed the suit vis-a-vis the two injunction applications in I.A.Nos.209 & 210 of 2014 supra. After filing of the suit the plaintiffs 4 and 5 viz., K.Y.Shalini @ Mukka Shalini and K.Pavani @ Borra pavani were impleaded as per the orders in I.A.No.957 of 2014. Undisputedly, but for in the suit they were not impleaded as co-petitioners or co- respondents to I.A.Nos.209 and 210 of 2014 covered by the impugned common order of the lower Court. In the present appeals, the array impugning the common order of the learned V Senior Civil Judge supra was showing the five appellants-defendants and three respondents-plaintiffs. The plaintiffs 4 and 5 impleaded in the suit as per the orders in I.A.No.957 of 2014 being not parties to I.A.Nos.209 & 210 of 2014 covered by the impugned common order, rightly not impleaded in the two appeals. It is therefrom those plaintiffs 4 & 5 sought for impleadment in the two appeals by filing applications in C.M.A.M.P.No.1912 of 2017 and C.M.A.M.P.No.1880 of 2017 as to add them as respondents 5 and 6 in the present appeals. It is not even their case that they were impleaded in I.A.Nos.209 & 210 of 2014 and what they stated in the respective affidavits of one Sri K.Laxmaiah, Advocate, G.P.A. holder of two persons in claiming that they are his daughters and residents of U.S.A. and in their childhood he purchased the house under the registered Sale Deed, dated 14.08.1986, bearing municipal numbers 1-2-62, 1- 2-62/1, 1-2-63 admeasuring 544 square yards consisting of 244 square yards constructed area with 300 square yards open appurtenant site to it from the defendants 1 to 5 and their deceased father late P.Pandit Rao and deceased brother P.Prabhunath and in possession and enjoyment and the same described as B schedule property in the plaint and even they were impleaded as plaintiffs 4 and 5, due to inadvertence they have not been impleaded in I.A.Nos.209 &

210 of 2014 and as the defendants 1 to 5 are disputing the area as 300 square yards sold to them under the registered Sale Deed, though never questioned the registered Sale Deed they are interested in the dispute raised in the appeals and thereby to be impleaded.

2. Once they were not parties to the injunction applications in I.A.Nos.209 & 210 of 2014 covered by the impugned order, the question of their impleadment in the present miscellaneous appeals against the injunction order does not arise as rightly contended by the appellants- defendants and thereby, these petitions are liable to be dismissed and dismissed accordingly.

3. Now, coming to the two appeals in question, the prayer in I.A.No.210 of 2014 sought by the three plaintiffs was to grant ad-interim injunction restraining the defendants and their men from interfering with peaceful possession and enjoyment of plaintiff No.1-Lalitha and her husband Laxmaiah on behalf of their daughters in respect of the A & B schedule property described therein pending disposal of the suit. I.A.No.209 of 2014 was also with the prayer to grant ad- interim injunction restraining the defendants and their men from interfering with peaceful possession and enjoyment of plaintiff No.1-Lalitha and her husband Laxmaiah on behalf of their daughters in respect of the schedule property described therein pending disposal of the suit. The other plaintiffs 2 and 3 in the suit are K.Harinarayan and K.Murali. The defendants 1 to 5-appellants are by name P.Narsing Rao, P.Amarnath, P.Vaidyanath, P.Satyam and P.Sarala, the sons and daughter of late P.Pandit Rao.

4. As referred supra the prayer in I.A.Nos.209 & 210 of 2014 is self-same against the self-same parties filed by self-same persons-plaintiffs 1 to 3. The prayer in the suit filed for the relief of permanent injunction and for direction to the defendants to execute the registered Sale deed in favour of the plaintiffs or their nominees is as follows:

(i) Grant perpetual injunction, restraining the Defendants and their henchmen, agents, servants or any other person or persons claiming through them, from interfering with the peaceful possession and enjoyment of the 1st plaintiff and her husband on behalf of their daughters in respect of the suit B schedule property bearing municipal No.1-2-62, 1-2- 62/1, 1-2-63 admeasuring 544 square yards (ground area constructed on 244 sq.yds. and open area dilapidated structure 300 sq. yds) situated at Domalguda, Hyderabad.

(ii) Direct the defendants to execute the registered sale deed in favour of the plaintiffs or their nominees or assignees in respect of the A schedule property i.e. H.No.1-2-64, 1-2-65, 1-2-65/1, 1-2-65/2 admeasuring 302 sq.yds. situated at Northern side of the B schedule property situated at Domalguda, Hyderabad, and deliver peaceful possession of the same and in the event of the defendants failure to register and deliver the same in respect of said A schedule property in favour of the plaintiffs, this Honble Court may be pleased to register the same and on behalf of the defendants and deliver the possession by passing the

Judgment and decree in favour of the plaintiff.

(iii) Award costs of the suit.

(iv) Grant such other relief or reliefs to which the plaintiff is entitled to.

5. The averments in the two injunction applications in I.A.Nos.209 & 210 of 2014 covered by the impugned common order of the learned V Senior Civil Judge, City Civil Court, Hyderabad, dated 18.08.2017, between three plaintiffs and six defendants including the impleaded defendant No.6-Star Homes Infratech India (P) Ltd., are in describing the plaint A schedule property as 302 square yards situated at Domalguda, Hyderabad with H.Nos.1-2-64, 1-2-65, 1-2-65/1 and 1-2-65/2 respectively within the boundaries of East-House of Narsimha Reddy & Postal and Telegraph Hostel (now apartments), West 30 wide road, North Road and South H.Nos.1-2-62, 1-2- 62/1, 1-2-63 of B schedule property, whereas the plaint B schedule property described as house bearing Nos.1-2-62, 1-2- 62/1 and 1-2-63 admeasuring 544 square yards (ground area constructed on 244 square yards and open area dilapidated structure 300 square yards) situated at Domalguda, Hyderabad, bounded by East-House of Narsimha Reddy & Postal and Telegraph Hostel (Now apartments), West 30 wide road, North A schedule property supra and South Nala and House of Ranganath.

6. Coming to the averments, defendants 1 to 5 and their father late P.Pandit Rao and brother late P.Prabhunath offered to sell the plaint A and B schedule properties and the plaintiffs 1 to 3 agreed to purchase the same and consequently the said vendors have executed the Sale Agreement, dated 16.12.1983, agreeing to sell the plaint A and B schedule properties to the three plaintiffs. When the three plaintiffs paid Rs.3.00 lakhs as advance, the possession delivered to the plaintiffs by them except H.No.1-2-65, in which the defendants 1 to 5 are residing. Late P.Pandit Rao only signed the Sale Agreement on his behalf and also on behalf of his sons Prabhunath and Satyam and daughter Sarala as their guardian as they were minors by then. As per the terms of the Sale Agreement, the vendors have to take necessary permissions to alienate the property of minors by the guardian and also the clearance under the Urban Land (Ceiling and Regulation) Act and the clearance under the Income Tax Act for execution of the registered Sale Deed by showing readiness in writing to the plaintiffs and within one month thereafter the plaintiffs have to pay the balance sale consideration to obtain the registered Sale Deed. In the meanwhile, the plaintiffs are permitted to repair the A and B schedule properties delivered to them and the plaintiffs repaired the same except H.No.1-2-65, which is in occupation of the defendants 1 to 5 supra. It is further averred that late P.Pandi Rao filed O.P.No.136 of 1984 before the Chief Judge, City Civil Court, Hyderabad seeking permission to alienate the minors property and he issued a notice on 10.12.1984 asking the plaintiffs to handover the original Agreement of Sale, dated 16.12.1983, for filing of the same in O.P.No.136 of 1984 supra and the plaintiffs accordingly, handed over the original Sale Agreement to P.Pandit Rao. Thereafter the defendants 1 to 5 were postponing the

execution of Sale Deed on one or other pretext, despite the plaintiffs expressing their readiness by telegraphic and written letters. On repeated demands, the defendants 1 to 5 agreed to register the B schedule property, owned by the defendants 1 and 2 and Prabhunath, and they accordingly registered the said property vide registered Sale Deed, dated 14.08.1986, in the names of the daughters of plaintiff No.1 (plaintiffs 4 and 5 added in the suit) by receiving Rs.5.00 lakhs as consideration, but mentioning the same as if Rs.2.00 lakhs only in the Sale Deed and the daughters of plaintiff No.1 thereby become the owners of the B schedule property and plaintiff No.1 is in possession and enjoyment on their behalf. The plaintiffs are ready and willing to perform their part of contract in respect of the plaint A schedule property, but the defendants did not obtain necessary permissions and did not come forward to execute the Sale Deed. On the other hand, the defendants entered into two Sale Agreements one with P.Jamuna and G.Lavanya and another with K.Damodar and K.Rajamani in respect of the A schedule property by obtaining loans from them fraudulently and as they did not repay the said amounts, the said vendees filed two suits in O.S.No.1138 of 1991 and O.S.No.1139 of 1991 before II Senior Civil Judge, City Civil Court, Hyderabad, for specific performance and the matter went up to the Supreme Court. The plaintiffs finally issued a legal notice on 12.01.2014 demanding the defendants 1 to 5 to execute Sale Deed in respect of the plaint A schedule property by receiving the balance consideration and instead of complying with the same the defendants 1 to 5 issued a reply notice on 31.01.2014 stating the lis in O.S.Nos.1138 & 1139 of 1991 was ended in the Supreme Court holding that the agreements in the said suits are outcome of a money transaction and therefore, they need not execute any registered Sale Deed. The Sale Agreement, dated 16.12.1983, executed by the defendants 1 to 5 and their father late P.Pandit Rao and their brother late P.Prabhunath is in existence and the defendants are liable to execute the Sale Deed in respect of the suit A schedule property either in favour of the plaintiffs or their nominees, however, they are trying to interfere with the possession and enjoyment of plaintiff No.1 and her husband, on behalf of their daughters, over the suit B schedule property and also trying to alienate the suit A schedule property to third parties to defeat the rights and interests of the plaintiffs over the said property and thereby, they are to be restrained by temporary injunction.

7. The averments in the counter-affidavit, filed by defendant No.2 in opposing both the applications, in nutshell are that the plaintiffs failed to fulfill their part of contract by producing the original Agreement of Sale for seeking permission of the Court to alienate the minors share in the property and the defendants 1 to 5 have already cancelled the Agreement of Sale, dated 16.12.1983, in respect of the suit A schedule property in the year 1984 itself and therefore, the question of enforcing the said Agreement of Sale does not arise. The plaintiffs filed the suit as well as the petitions after thirty years from the date of Sale Agreement, dated 16.12.1983, and hence, the claims are barred by time. The defendants 1 and 2 and their brother late Prabhunath have

executed the registered Sale Deed, dated 14.08.1986, in favour of the daughters of plaintiff No.1 for 300 square yards only, but not for 544 square yards and plaintiff No.1 and her husband are at best thereunder in possession of 300 square yards only. After canceling the Agreement of Sale, dated 16.12.1983, the defendants 1 to 5 and their father P.Pandit Rao have entered into three agreements viz., (i) Agreement dated 04.01.1986 with plaintiff No.1 in respect of H.Nos.1-2- 62, 1-2-63 and part of 1-2-62/ 1 admeasuring 300 square yards (B schedule property) (ii) Agreement dated 04.01.1986 with P.Jamuna and G.Lavanya in respect of H.No.1-2-64, part of 1- 2-62/ 1 and part of 1-2-65/1 admeasuring 300 squards and (iii) Agreement dated 20.03.1989 with K.Damodar and K.Rajamani in respect of H.Nos.1-2-65, part of 1-2-65/ 1 and 1-2-65/2 admeasuring 302 square yards. Defendants 1 to 5 and their father late Pandit Rao did not pay the amounts as agreed under the second and third agreements. P.Jamuna and G.Lavanya, in whose favour the second agreement entered, have filed O.S.No.1139 of 1991, and K.Damodar and K.Rajamani, in whose favour the third agreement entered, have filed O.S.No.1138 of 1991 for specific performance of their respective agreements. The said suits were decreed on 17.09.2001 by the learned II Senior Civil Judge, City Civil Court, Hyderabad. Against which, the defendants 1 to 5 and their father Pandit Rao and their brother Prabhunath preferred appeals in C.C.C.A.No.224 of 2001 and C.C.C.A.No.223 of 2001 respectively before the High Court and the High Court allowed the said appeals on 08.07.2005 by setting aside the trial Courts decrees and judgments. Aggrieved of the same, P.Jamuna and G.Lavanya filed Civil Appeal No.3125 of 2007 before the Supreme Court, and K.Damodar and K.Rajamani filed Civil Appeal No.3127 of 2007 before the Supreme Court, and the Supreme Court, by judgment dated 25.08.2011, dismissed the said appeals confirming the judgments of the High Court. Later, P.Jamuna and G.Lavanya (plaintiffs in O.S.No.1139 of 1991) have settled the matter before the Legal Services Authority in P.L.C.No.180 of 2013 and delivered the possession of property admeasuring 300 square yards covered by the Sale Agreement to defendants 1 to 5 on 30.11.2013. So far as the Sale Agreement, dated 04.01.1986, executed by the defendants 1 to 5 and their father Pandit Rao with Prabhunath to plaintiff No.1 for 300 square yards (B schedule property) is concerned, a regular Sale Deed was executed on 14.08.1986 by defendants 1 and 2 and Prabhunath in favour of the daughters of plaintiff No.1. It is the averment that the present plaintiffs in O.S.No.316 of 2014 are guilty of the suppression of material facts. Defendant No.2 from the said counter contest sought for dismissal of the injunction petitions. Defendants 1, 3, 4 and 5 adopted the said counter of defendant No.2 supra. Defendant No.6, who came on record for claim to the Development Agreement-cum-G.P.A., dated 10.01.2014, entered into with defendants 1 to 4 in respect of 610 square yards out of the suit schedule property also adopted the counter filed by defendant No.2 supra. It is therefrom the lower Court in passing the common order in I.A.Nos.209 & 210 of 2014 marked for reference exhibits P1 to P32 on behalf of the plaintiffs and exhibits R1 to R7 on behalf of the

defendants. After hearing both sides, by the common order the lower Court observed that Ex.P7 is the certified copy of the registered Sale Deed bearing document No.299/1987 dated 14.08.1986 executed by the defendants 1 and 2 and Prabhunath in favour of the daughters of plaintiff No.1. According to the plaintiffs, the property sold under Ex.P7-Sale Deed is for H.Nos.1-2-62, 1-2-62/1 and 1-2-63 totaling 544 square yards, of which 244 square yards is the built-up area and 300 square yards appurtenant land to it; whereas according to the counter of defendant No.2 supra, the defendants 1 and 2 and Prabhunath sold 300 square yards only under Ex.P7 and plaintiff No.1 for and on behalf of the daughters thereunder is in possession and enjoyment for only 300 square yards. The Sale Deed-Ex.P7 describes only 300 square yards site with building constructed bearing municipal Nos.1-2-62, 1-2-62/1 and 1-2-63 and it further speaks the vendors 1 to 3 could not complete the construction, for which the permission was obtained in the name of their father, due to financial difficulties and they offered to sell the 300 square yards for Rs.2.00 lakhs to the purchasers, who are already in possession, and the vendors convey the property with door numbers supra admeasuring 300 square yards, that is shown in red colour in the plan annexed to the Sale Deed. Thus, as per the schedule appended to Ex.P7-Sale Deed the extent of property sold is 300 square yards with buildings therein. It is the contest of plaintiffs in seeking to read Ex.P7 as a whole saying the property sold by defendants 1 and 2 and Prabhunath under Ex.P7 covers H.Nos.1-2-62, 1-2-62/1 and 1- 2-63 together with the open land admeasuring 300 square yards appurtenant to it and if it is calculated, it comes to 544 square yards. Ex.R1-Agreement of Sale executed by the defendants 1 to 5 and their father P.Pandit Rao and their brother P.Prabhunath describes the possession of entire property except the portion bearing No.1-2-65 admeasuring 300 square yards was delivered to the plaintiffs. Prabhunath examined as DW1 in O.S.No.1138 of 1991 and P.Amarnath examined as DW1 in O.S.No.1139 of 1991, whose depositions referred in the impugned order of the lower Court as exhibits P24 & P25 where they stated that they cancelled Ex.R1- Agreement of Sale in 1984 itself and the property covered thereunder redelivered to them. Ex.P19-certified copy of the proceedings in P.L.C.No.180 of 2013, dated 30.11.2013, also speaks P.Jamuna and G.Lavanya handed over the possession of property bearing H.No.1-2-64, part of 1-2-62/1 and part of 1- 2-65/1 admeasuring 300 square yards, which forms part of the suit schedule property to the defendants 1 to 5. However, B.Pavani, who is one of the daughters of plaintiff No.1, filed objection by affidavit, that was not considered by the Legal Services Authority saying that the award is binding only on the parties. The lower Court therefrom observed in paragraph No.16 of the impugned common order that once the Sale Agreement-Ex.R1 speaks of 600 square yards has delivered and there is no record to show the property delivered back, it is not known as to how 300 square yards out of it delivered to P.Jamuna and G.Lavanya under the Sale Agreement and under the proceedings in P.L.C.No.180 of 2013Ex.P19 redelivered back by them and therefrom held the B schedule property is 544 square

yards and plaintiff No.1 and her husband are in possession and enjoyment on behalf of their daughters (plaintiffs 4 and 5 added in the suit). The defendants 1 to 4 entered into a Development Agreement-cum-G.P.A-Ex.P31, dated 10.01.2014, with defendant No.6 for 610 square yards, which, according to the plaintiffs, forms part of the plaint B schedule property and under the guise of that the defendants are trying to interfere and are to be restrained by temporary injunction. The said Ex.P31 is not in dispute so also the Supplementary Development Agreement-cum-G.P.A. further executed on 28.05.2015. Sri K.Laxmaiah, Advocate, the husband of plaintiff No.1, presented the police complaint under exhibits P14 & P15 in December 2013 and January 2014 to the Chikkadpally Police complaining of the defendants are trying to interfere with the possession over the B schedule property. The plaintiffs apprehend therefrom of the defendants will dispossess them.

8. Coming to the prima facie case, balance of convenience and the irreparable injury concerned, to the entitlement of injunction by the plaintiffs in the case of Kashi Math Samsthan v. Srimad Sudhindra Thirtha Swamy (AIR 2010 SC 296) the Apex Court observed that the party, who seeks injunction, has to prove that he has made out a prima facie case to go for trial, the existence of balance of convenience in his favour and he will suffer irreparable injury unless the injunction is granted, and when the party fails to prove the same for any of them, it is not open to the Court to grant injunction, particularly the prima facie case as sinequonon. In Mahadeo Salvaram Shelke v. Pune Municipal Corporation (1995) 3 SCC 33) it is observed that no injunction can be granted against the original owner and in favour of a person even in unlawful possession. In the case of Surendra Kumar Baid v. Rajendra Kumar Baid (2002 (2) Raj LW 900) it was held the granting of injunction ignoring the possession with defendant in favour of the plaintiff is unsustainable. The trial Court referring to the three expressions in paragraph Nos.19 to 24 observed that the Mahadeos case (supra 2) concerned states the injunction cannot be granted against the original owner, however, when Ex.P7-Sale Deed shows the defendants 1 and 2 and another executed the Sale Deed in favour of the daughters of plaintiff No.1, still it cannot be said the defendants are the owners. So far as the Kashi Maths case (supra 1) is concerned, plaintiff No.1 is able to show of she and her husband including of her daughters are in possession of the B schedule property in claiming under Ex.P7, right over it and Sudrenda Kumar Baids case (supra 3) has no application to the facts for the defendants not shown in possession and thereby, the plaintiffs are entitled to temporary injunction in respect of the B schedule property. It was held thereafter from paragraph No.25 onwards of the common order that the defendants 1 to 5 and their father Pandit Rao and their brother Prabhunath entered Ex.R1-Sale Agreement, dated 16.12.1983, with the plaintiffs for 902 square yards and the plaint A schedule property forms part of it and the defendants 1 and 2 and Prabhunath sold the B schedule property to the daughters of plaintiff No.1 under Ex.P7-Sale Deed, dated 14.08.1986, and the plaintiffs have filed the suit for specific performance of Ex.R.1-Sale Agreement,

dated 16.12.1983, for A schedule property and I.A.No.210 of 2014 for temporary injunction in respect of the A schedule property. Ex.P2, the copy of legal notice, issued by the plaintiffs to the defendants 1 to 5 to execute the Sale Deed in terms of Ex.R1. The said legal notice was dated 14.12.1984 and the telegraphic notices a day prior to that covered by exhibits P3 to P6 to produce the documents in terms of Ex.R1. Ex.P16 is the copy of notice dated 12.01.2014 issued by the plaintiffs to the defendants 1 to 5 to execute the regular Sale Deed. The apprehension of the plaintiffs is that if the defendants construct any building pursuant to exhibits P31 and P32 agreements and sell the same to the third-parties, which may lead to multiplicity of litigation. If defendant No.6 is allowed to construct the building, pursuant to the said development agreements, the purpose of filing the suit will be defeated. In this regard, in the case of Ahmed Bin Sayeed v. Kamala Bai (2014 (6) ALD 505 (DB) this Court held of the trial Court granted injunction restraining the defendants from changing the nature of property and making construction till disposal of the suit and the High Court confirmed the same. In the case of Julien Educational Trust v. Sourendra Kumar Roy (2010 (2) ALD 55 (SC) it is observed that in a suit for specific performance of the contract for sale, the trial Court granted temporary injunction restraining the defendants from selling and alienating or changing the nature and character of the suit property pending the suit, and the High Court set aside the said order and the Supreme Court set aside the order of the High Court saying if the suit property is allowed to be commercially exploited by raising multi-storied structures, the object of the suit will be rendered meaningless and thereby, the existing status quo can be ordered to be maintained without expressing any opinion on merits and demerits of the suit claim. With these references the lower Court observed that under Ex.R1-Sale Agreement the time stipulated is one year or till obtaining of the permission, whichever is earlier and as per the defendants contest the Sale Agreement that was barred by law from 1983-84 of the notice issued and the suit filed in 2014, which is 30 years later and the claim is hopelessly barred and they sought for rejection of the plaint by filing I.A.No.285 of 2014 under Order VII Rule 11 C.P.C. and the said petition was dismissed holding that it is a mixed question of facts and law which can be decided by framing specific issue in regard to the limitation during the trial. Once such is the case, the claim barred by limitation or not to decide the prima facie case and need not be gone into is the observation. Leave about the other contention of Ex.R1-Sale Agreement is not in subsistence since cancelled in the year 1984 itself through Ex.R2-legal notice dated 15.12.1984, and later entered Ex.R3-Agreement dated 04.01.1986 with plaintiff No.1, Ex.R4-agreement of even date with P.Jamuna and G.Lavanya and Ex.R7-Agreement of Sale dated 20.03.1989 with K.Damodar and K.Rajamani for the property, which is part of the cancelled Sale Agreement-Ex.R1. However, it is the question to be gone into during the trial. It is observed on another contention of in the earlier round of litigation in O.S.Nos.1138 & 1139 of 1991, particularly in O.S.No.1139 of 1991 filed by P.Jamuna,

who is the sister of plaintiff No.1 herein, the matter went upto the Supreme Court and K.Laxmaiah, the husband of plaintiff No.1, represented P.Jamuna and G.Lavanya as their G.P.A. holder in O.S.No.1139 of 1991 supra and it operates as resjudicata to the present claim of plaintiffs. However, it is a matter to be decided during trial because the plaintiffs or their representatives are not parties to those proceedings and therefrom observed that it is just and necessary to preserve the property till disposal of the suit by granting injunction as prayed for. It is crystal clear from the above that the impugned order of injunction granted in respect of the plaint A and B schedule properties respectively.

9. The contentions in the grounds of appeals against the impugned common order are that the impugned common order of the Court below is contrary to law and outcome of ill- appreciation of facts and ignorance of the requirements of existence of prima facie case, balance of convenience and irreparable injury to grant the discretionary relief of injunction and also in ignorance of no prima facie case from the Sale Agreement the claim is barred by limitation long back, also in ignorance of the fact that the said Sale Agreement was cancelled including by notice and by subsequent agreements and still claiming as if in possession is untrue and unsustainable and the earlier round of litigation run by K.Laxmaiah as G.P.A. of Lavanya in O.S.No.1139 of 1991 and after that delivered back the possession to the defendants covered by the award in P.L.C.No.180 of 2013. It is also the contention while answering that the B schedule property admeasuring 300 square yards (56 yards constructed area (G.F.+F.F+244 square yards of appurtenant land) only as per the registered Sale Deed-Ex.P7 and the plaintiffs cannot claim for 544 square yards or any thing beyond 300 square yards supra, that too which is part of 902 square yards covered by the Sale Agreement, dated 16.12.1983, and the impugned order of the Court below is unsustainable and is liable to be set aside.

10. Learned counsel for the appellants-defendants reiterated the same, whereas the learned counsel for the respondents-plaintiffs supported the order of the lower Court.

11. Heard both sides and perused the material on record.

12. The facts need not require repetition in deciding the appeals so also the legal position covered by the expressions referred by the lower Court, but for to decide the impugned common order of the lower Court is sustainable in granting the injunction or not.

13. What is meant by the prima facie case is covered by the expression of the Apex Court referred in the order of the lower Court of Kashi Maths case (supra 1). It is settled law that the prima facie case means not the ultimate chance of success, but something more than the bona fide contention or tribal issue and as held in Kashi Maths case (supra 1) it must be shown of existence of prima facie case between the parties for the plaintiff to go for trial. The balance of convenience is in computing the pros and cons from the

contentions of the parties to decide as to in whose favour the scale tilts and the irreparable injury need not always be not capable of compensation in money, but injury to the existing right itself is suffice.

14. From the above, coming to the facts the very Sale Agreement-Ex.R1 dated 16.12.1983 is for 902 square yards that covers the entire property. Ex.R2 is the copy of notice, dated 15.12.1984, canceling the said Sale Agreement. Ex.P1 is the notice, dated 10.12.1984, and Ex.P2 is the copy of notice, dated 14.12.1984, and exhibits P3 to P6 are the telegraphic notices dated 13.12.1984 sent to Prabhunath and the defendants 1, 2 and 4. From it is coming to Ex.P7-Sale Deed, dated 14.08.1986, a perusal of the Sale Deed as reproduced in the impugned common order of the Court below clearly speaks the extent is only 300 square yards and not 544 square yards. Paragraph Nos.12 & 13 of the lower Court order reproduces the contents are crystal clear as referred in paragraph No.14 of the order also the contention of the defendants in this regard that is also covered by the discussion by the lower Court.

15. Once such is the case, there is nothing to ignore the same by the lower Court. Further once there is stipulation in the very Ex.R1-Agreement of Sale, dated 16.12.1983, of the outer time limit of one year period and after exhibits P1 to P6 notices Ex.R2-notice given and it shows the agreement cancelled. The plaintiffs cannot claim still they are in possession of any portion of the property covered thereunder. Further, irrespective of what is the extent mentioned in the Agreement and its schedule once the subsequent Sale Deed executed is crystal clear of the area, particularly covered by Ex.P7 supra, which is subsequent to that on 14.08.1986 for 300 square yards and the other agreement holder of O.S.No.1139 of 1991 for 300 square yards is no other than the sister of plaintiff No.1, represented by K.Laxmaiah, husband of plaintiff No.1, Advocate as G.P.A. holder and after the litigation went upto the Supreme Court unsuccessfully in O.S.Nos.1138 & 1139 of 1991 in respect of 300 and 302 square yards excluding Ex.P7-Sale Deed 300 square yards, out of 902 square yards covered by Ex.R1, and it is said Laxmaiah that represented the plaintiffs in O.S.No.1139 of 1991 as their G.P.A. holder being the close relative to them and Ex.P7-Sale Deed is in favour of the daughters of plaintiff No.1 and said Laxmaiah when the Sale Deed is very clear of 300 square yards and not specifically of 544 square yards, it is difficult to accept the said contention of the plaintiffs atleast in deciding the existence of prima facie case or not of still after cancellation of the agreement they are in possession, leave about the P.L.C.No.180 of 2013 covered by Ex.P19 dated 30.11.2013 the pre-litigation settlement and re-delivery of 300 square yards cited by said G.Lavanya and P.Jamuna. As referred supra, G.Lavanya represented earlier by Laxmaiah as G.P.A. holder and these clearly show the plaintiffs have no prima facie case. Leave about the suit Sale Agreement claim is on its face otherwise in subsistence if any, apart from the same is cancelled as referred supra, once hopelessly barred by limitation, the question of seeking specific performance of the contract does not arise and even sought from the cause of action set up with

claim within limitation, there is nothing for the trial Court to hold that still the plaintiffs got prima facie case of entitlement to the enforcing of the Sale Agreement to go for trial irrespective of the plaint rejection application dismissed of the limitation aspect the mixed question of fact and law can be decided in the suit by framing specific issue, that is not be all and end all, nor that order allowed to shurk the duty of the Court to consider the existence of prima facie case or not in this regard.

16. Having regard to the above, the granting of injunction by the trial Court in allowing the two applications in I.A.Nos.209 & 210 of 2014 is unsustainable for no prima facie case as a sinequonon. Further, as held by the Apex Court in Tirumala Tirupati Devasthanams v. K.M.Krishnaiah (1998) 3 SCC 331) under Section 13 of the Indian Evidence Act of the judgment not inter parties is even admissible in evidence in assertion of a right to property in dispute in the subsequent suit in deciding entitlement to the injunction or not from the earlier finding even though the subsequent suit party to the claim is not party to the earlier proceedings. Therefrom also the plaintiffs have no prima facie case.

17. As held by this Court in Saraswathi v. Dr. Jaganmohana Rao (1985 (1) APLJ 277) and reiterated by this Court the said principle referring to several expressions of the Apex Court, in Dasari Laxmi v. Bejjenki Sathi Reddy (2011 (5) ALD 317) (C.R.P.No.76 of 2014, dated 21.10.2014) held at paragraph Nos.24 to 26 as follows:

24. This Court in Saraswathi supra way back held that even the Court holds that the temporary injunction relief pending suit cannot be granted within the discretion, it can impose terms on the party in possession to deposit income from the property to the credit of the suit till disposal of the suit or the like and the terms may be modified or varied from time to time and the Court also can appoint a receiver or Commissioner in a temporary injunction application pending suit, for taking possession of the property and management pending suit by restraining both the parties from interference with possession as a custodia legis to entrust the property to the party ultimately succeeded.

25) This Court way back held in Dulichand V. Khaja Mohammad Ibrahim Khazi [AIR 1975 APHN 207] that the imposing of terms from non-entitlement to the injunction within the judicial discretion may include restraining both parties from entering the suit land or doing any particular act for maintaining and protecting the subject matter of the lis pending suit.

26. In fact in Halsburys Laws of England, 2nd edition, Volume 18 Para No.49 and Volume 21, Para 775 it was stated that it is within the powers of the Court of equity for sole purpose of effective justice between the parties while granting or refusing injunction to impose terms on the parties. Courts will take care that the order is so framed that neither party will be deprived of the benefit he is entitled to, if in the event it turns out that party in whose favour, it was made is the wrong, for the purpose it will be necessary to impose terms if required on the party as a condition in

granting or refusing injunction.

18. As held by this Court in Kuruvakotapaty Chinna Linganna v. Alla Mallikarjuna Reddy that in a suit for specific performance based on the possession of Sale Agreement of the suit land for specific performance shown barred by limitation that Doctrine of scope of part performance under Section 53-A of the Transfer of Property Act does not confer any title on person even shown in possession, pursuant to the written contract of sale, but for a protection as a shield subject to satisfying with the legal requirements of it. There it is observed Order II Rule 2 C.P.C. also applies if initially the specific performance not asked, but injunction simplicitor and even amended subsequently for specific performance. It is also observed Article 54 of the Limitation Act clearly speaks the period of limitation to compute from the terms of the agreement fixing time on its expiry or where no time fixed from date of demand and refusal.

19. Even from the expression of this Court in Pattamsetty Vital Srinivasa Rao v. Pattamsetty Venkateswara Rao (2017 (2) ALD 102) wherein referring to the expression of the Apex Court in Skyline Education Institute (India) Private Ltd. v. S.L.Vaswani (2010 (2) SCJ 344), it observed that the Court of first instance exercised its discretion to grant or refuse to grant the relief of temporary injunction based on the objective consideration of material placed before it and is supported by cogent reasons, the appellate Court will be loath to interfere. However, in the facts discussed supra, the order of the lower Court is unsustainable and the reasons assigned are unsustainable and baseless and without proper application of mind to the facts and thereby, the appellate Court can interfere even as can be seen from the expression of the Apex Court in Skyline Educations case (supra 10) that is referred in Pattamsetty Vital Srinivasa Raos case (supra 9).

20. In fact, the impugned order of the lower Court at paragraph No.27 refers the expression of the Apex Court in Julien Education Trusts case (supra 5) of paragraph No.17 therein that the existing status quo of the suit property pending the suit for specific performance with a direction for expeditious disposal of the suit can be ordered without expressing further merits of the matter. With the above observations, these Civil Miscellaneous Appeals are allowed in part by setting aside the common order of the trial Court in I.A.Nos.209 & 210 of 2014, however, by ordering both the parties to maintain the existing status quo only as to any alienations or any constructions pending disposal of the suit and the trial Court is directed to give expeditious disposal of the suit as early as possible preferably within a period of six (6) months from the date of receipt of a copy of this order. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

--X--

Sl.No.	Code	Physical Requirements
1	S	Work performed by sitting
2	ST	Work performed by standing
3	RW	Work performed by Reading/Writing
4	W	Work performed by Walking
5	B	Work performed by Bending
6	SE	Word performed by seeing
7	H	Work performed by Hearing/Speaking

Thus, partially blind and partially deaf having physical requirements, as noticed above, were identified for the post of Civil Judge(Junior Division). The physical requirements were specified looking to the nature of the job of Civil Judge(Junior Division). Partially blind and partially deaf disability of 40%-50% has been pegged to achieve the object of appointing such partially blind and partially deaf physically disabled persons who are able to perform the duties of Civil Judge(Junior Division). As noticed above Government order dated 08.08.2014 was issued by the State Government after consultation with the High Court and the TNPC specifying the partially blind and partially deaf as 40%-50% taking into account all relevant considerations. In this context, it is relevant to notice that the physical requirements which were identified by the Government by order dated 11.04.2005 for the post of Civil Judge (Junior Division) ultimately has been incorporated into the statutory Rules. The Tamil Nadu State Judicial Service (Cadre and Recruitment) Rules, 2007 have been amended by the Government Order dated 03.04.2018. Amended Rule 10 is as follows:

*10. Reservation of appointments:-

Section 27 of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016 (Tamil Nadu Act 14 of 2016) relating to reservation of appointment and Section 34 of the Rights of Persons with Disabilities Act, 2016 (Central Act 49 of 2016) shall apply for appointment to the cadres of District Judge (Entry Level) and Civil Judge, by direct recruitment.

Provided that four percent of vacancies shall

be reserved for the following persons with "benchmark disabilities", namely:-

(i).One percent for the persons in the following category of disabilities under the category of 'Locomotor disability' (as defined in the Schedule appended to the Rights of Persons with Disabilities Act, 2016):-

(a) Locomotor disability of One Arm, One Leg and Both Legs;

(b) Leprosy cured person;

(c) Dwarfism;

(d) Acid attack victims;

(ii) One percent for the persons with 'Low vision' under the category of 'Visual Impairment' (as defined in the Schedule appended to the Rights of Persons with Disabilities Act 2016);

(iii) One percent for the persons with 'hard of hearing' under the category of "Hearing Impairment" (as defined in the Schedule appended to the Rights of Persons with Disabilities Act, 2016);

(iv). Remaining One percent for the persons mentioned in the above clauses (i), (ii) & (iii), above, on rotation basis.

Explanation:- The roster points meant for the candidates with benchmark disabilities mentioned in clauses (d) and (e) of sub section (1) of Section 34 of the said Central Act, shall be allotted to the candidates in categories (i) to (iii) mentioned above, in the same order:

Provided further that the candidates who perform the following physical activities alone are Eligible:-

(a) - Work Performed by Sitting - S

(b) - Work Performed by Standing - ST

(c) - Work Performed by Writing - W

(d) - Work Performed by Seeing - SE

(e) - Work Performed by Hearing - H

(f) - Work Performed by Reading and Writing - RW

(g) - Communicating (Communicating would also include verbal or non-verbal communication) - C.

27. The explanation of the Rule 10 contains the physical requirements which were earlier noticed in the Government order dated 11.04.2005. It is true that the amendment made in Rule 10 by the Government order dated 03.04.2018 has no application and not relevant for determining the issue in the present case but incorporation of a proviso into the explanation of Rule 10 manifests the intention of Rule making authority which was earlier manifested in the executive order dated 11.04.2005.

28. There is another important aspect of the matter, which needs to be dealt with. Under Constitution of India, control over judicial services is vested with the respective High Court. Articles 233, 234 and 235 of the Constitution of India may be referred

in this context. The present case is a case of recruitment to the post of Civil Judge (Junior Division), which recruitment is undertaken in accordance with Rules, 2007 framed in exercise of the powers conferred by Articles 233, 233A, 234, 235 and proviso to Article 309 of the Constitution of India by the Governor of Tamil Nadu in consultation with the High Court of Madras and Tamil Nadu Public Service Commission, which is clear from the opening words of the Rules as given below:-

"In exercise of the powers conferred by Article 233, 233A, 234, 235 and the proviso to Article 309 of the Constitution of India, the Governor of Tamil Nadu in consultation with the High Court, Madras and Tamil Nadu Public Service Commission, wherever necessary, hereby makes the following Rules:"

29. The Judicial service being public service is included in Entry 41 List II of the Seventh Schedule of the Constitution. The State having competence to legislate on Entry 41, i.e. State public Services; State Public Service Commission, it has also executive power under Article 154 of the Constitution of India. Thus, the State Government was fully competent to take any executive decision with regard to recruitment on the post of Civil Judge (Junior Division), supplementing the Statutory Rules, 2007.

30. At this stage, we may deal with one of the submissions, which has been raised by the learned counsel for the appellants. Learned counsel for the appellant submits that High Court has relied on proposed amendments to Rules, 2007, which was undertaken by the State Government with the High Court on its administrative side in pursuance of a Division Bench judgment of Madras High Court in Writ Petition No. 27089 of 2008. The High Court in Paragraph No. 22(xii) has noticed the Government Order dated 14.03.2013 by which the Government of Tamil Nadu has sent a letter dated 06.02.2013 to the High Court seeking approval for an amendment to the Recruitment Rules especially Rule 10. A draft of the amendment proposed to the Rules 5 and 10 was also extracted in Paragraph No. 22(xii).

31. Learned counsel submits that the proposed amendment was under consideration of the High Court and several correspondences took place between the High Court and the State of Tamil Nadu but amendments could not be finalised till the completion of selection hence reliance by the High Court on the proposed amendments was wholly uncalled for. High Court has also noticed that by resolution of the Full Court dated 05.07.2014, the matter was referred to the Rule Committee but before the Rule Committee could take a decision, the process of selection of 162 posts had begun. High Court after noticing the aforesaid fact has further noticed the latter dated 04.08.2014 sent by the Public Service Commission to the Government seeking consent of the Government to issue a Notification for recruitment, fixing 40%-50% disability for partially blind and partially deaf candidates. Relevant facts in this context have been noticed in Paragraph No. 22(xviii), which is to the following effect:-

"(xviii) Therefore, the Public Service

Commission sent a letter dated 4.8.2014 to the Government seeking the consent of the Government to issue a Notification for recruitment, fixing 40-50% disability for partially blind and partially deaf candidates. The Government sought the opinion of the High Court and the High Court gave no objections. Thereafter, the Government issued the impugned communication dated 8.8.2014 directing the Service Commission to initiate the process of selection of 162 Civil Judges, by notifying the percentage of disability as 40-50% for partially blind and partially deaf, for the present selection alone. This is why paragraph 4.F was incorporated in the Notification bearing No. 15/2014 dated 26.8.2014 issued by the Public Service Commission."

32. High Court, thus, was well aware that the notification dated 26.08.2014 issued by the Public Service Commission was initiated on the basis of the Government Order dated 04.08.2014 and the amendment of the Rules as proposed had nothing to do with the advertisement issued by the Public Service Commission. The advertisement dated 26.08.2014 also has specifically referred to the G.O. of the Government dated 08.08.2014. Thus, in the recruitment in question the proposed amendment in the Rules neither played any role nor had any relevance. High Court has noticed the aforesaid facts, for the completion of facts. It is clear that the proposed amendments had no relevance with regard to recruitment in question. The submission of the learned counsel for the appellants that High Court has relied on the proposed amendments, thus, has no substance.

33. We now again revert back to the Constitutional Scheme with regard to subordinate judiciary. Section 33 of the Act, 1995 provides that reservation for persons or class of persons with classes of disability, which is referable to Article 16(1) of the Constitution of India. This Court had occasion to consider a State Legislation referable to Article 16(4) of the Constitution of India in State of Bihar and Another v. Bal Mukund Sah and Others, (2000) 4 SCC 640. A Constitution Bench in the above case had occasion to consider a question of recruitment of District Judge and other judicial officers in the State of Bihar in context of a State Legislation namely Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1991. By the aforesaid Act, 1991 reservation for direct recruitment to the posts in the judiciary of the State were provided for. Advertisement was issued reserving posts as per the Act, 1991, which was challenged in the High Court. High Court has struck down the terms of advertisement holding it ultra vires to the provision of Article 233 of the Constitution. The State of Bihar took the matter to this Court. A Constitution Bench of this Court in the above case came to examine the issue of recruitment to the judicial service in context of the reservation as provided by the State Act. After noticing the Constitutional Scheme under Articles 233, 234, 235 and 309 and the Rules framed by the Governor for recruiting judicial officers, this Court laid down following in Paragraph No. 29:-

"29. .....But so far as the entry points are concerned, namely, recruitment and

appointment to the posts of Presiding Officers of the courts subordinate to the High Courts, only Articles 233 and 234 would govern the field. Article 234 lays down the procedure and the method of recruiting judicial officers at grass-root level being Subordinate Judges and Munsifs as laid down by the 1955 Rules. These Rules are also framed by the Governor of Bihar in exercise of his powers under Article 234 obviously after the consultation of the High Court and the Public Service Commission. Rules regarding the procedure of selection to be followed by the State Public Service Commission as found in Rules 4 to 17 deal with the method to be adopted by the Public Service Commission while selecting candidates who offer their candidature for the posts advertised to be filled in. These Rules obviously require consultation with the Commission on the procedural aspect of selection process. But so far as the High Court is concerned, its consultation becomes pivotal and relevant by the thrust of Article 233 itself as it is the High Court which has to control the candidates, who ultimately on getting selected, have to act as Judges at the lowest level of the Judiciary and whose posting, promotion and grant of leave and other judicial control would vest only in the High Court, as per Article 235 first part, once they enter the Judicial Service at grass-root level. Thus consultation of the Governor with the High Court under Article 234 is entirely of a different type as compared to his consultation with the Public Service Commission about the procedural aspect of selection....."

34. This Court has laid down that both Articles 309 and 245 will have to be read subject to Articles 233 and 234. In Paragraph No. 32, following has been laid down:-

"32. It is true, as submitted by learned Senior Counsel, Shri Dwivedi for the appellant State that under Article 16(4) the State is enabled to provide for reservations in services. But so far as "Judicial Service" is concerned, such reservation can be made by the Governor, in exercise of his rule-making power only after consultation with the High Court. The enactment of any statutory provision dehors consultation with the High Court for regulating the recruitment to the District Judiciary and to the Subordinate Judiciary will clearly fly in the face of the complete scheme of recruitment and appointment to the Subordinate Judiciary and the exclusive field earmarked in connection with such appointments by Articles 233 and 234. It is not as if that the High Courts being constitutional functionaries may be oblivious of the need for a scheme of reservation if necessary in appropriate cases by resorting to the enabling provision under Article 16(4). The High Courts can get consulted by the Governor for framing appropriate rules regarding reservation for governing recruitment under Articles 233 and 234. But so long as it is not done, the Legislature cannot, by an indirect method, completely bypassing the High Court and exercising its legislative power, circumvent and cut across the very scheme of recruitment and appointment to the District Judiciary as envisaged by the makers of the Constitution. Such an exercise, apart from being totally forbidden by the constitutional scheme, will also fall foul on the concept relating to

"separation of powers between the Legislature, the Executive and the Judiciary" as well as the fundamental concept of an "independent Judiciary". Both these concepts are now elevated to the level of basic structure of the Constitution and are the very heart of the constitutional scheme."

35. From the facts as noticed above, the State Government has consulted both the Public Service Commission as well as the High Court in reference to appointment of disabled persons on the post of Civil Judge (Junior Division). There is consensus in the view of State Government, Public Service Commission and the High Court that partially blind and partially deaf persons suffering with disability be allowed to participate in the recruitment, who has disability of 40%-50%. The High Court being well aware about the requirements for the appointment in the judicial service and it being guardian of subordinate judiciary, has a say in the eligibility of a person, who seeks appointment on the post of Civil Judge (Junior Division). Judicial service being part of Public Service, the State in consultation with the High court is fully empowered to lay down the eligibilities for selection on the post of Civil Judge (Junior Division). The Government Order dated 08.08.2014 supplements the Rules, 2007 and in no manner contravene any of the provisions of the Rules. The condition of having 40%-50% disability was prescribed by the Public Service Commission as per the Government Order issued by the State of Tamil Nadu after consultation with the High Court. The above condition in no manner can be said to be invalid. Learned counsel for the appellant has submitted that restricting the disability to 40%-50% in reference to persons having partial blindness is clearly denying the of reservation as provided under Section 33 of the Act, 1995 and is not in accord with Section 33 of the Act.

36. Section 33 of the Act, 1995 requires that every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from Blindness or low vision. This Court in Government of India v. Ravi Prakash Gupta and Another, (2010) 7 SCC 626, in Paragraph No. 29 laid down that a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33. Following was observed in Paragraph No.29:-

"29. .....In other words, reservation under Section 33 of the Act is not dependent on identification, as urged on behalf of the Union of India, though a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33 of the Act in respect of persons suffering from the disabilities spelt out therein....."

37. This Court in Union of India and Another v. National Federation of the Blind and Others, (2013) 10 SCC 772 has elaborately examined the objects and reasons of the Act, 1995 and laid down following in Paragraph No. 24:-

"24. Although, the Disability Rights Movement in India commenced way back in 1977, of which Respondent 1 herein was an active participant, it acquired the requisite sanction only at the launch of the Asian and Pacific Decade of Disabled Persons in 1993-2002, which gave a definite boost to the movement. The main need that emerged from the meet was for a comprehensive legislation to protect the rights of persons with disabilities. In this light, the crucial legislation was enacted in 1995 viz. the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which empowers persons with disabilities and ensures protection of their rights. The Act, in addition to its other prospects, also seeks for better employment opportunities to persons with disabilities by way of reservation of posts and establishment of a special employment exchange for them. For the same, Section 32 of the Act stipulates for identification of posts which can be reserved for persons with disabilities. Section 33 provides for reservation of posts and Section 36 thereof provides that in case a vacancy is not filled up due to non-availability of a suitable person with disability, in any recruitment year such vacancy is to be carried forward in the succeeding recruitment year. The difference of opinion between the appellants and the respondents arises on the point of interpretation of these sections."

38. In the above case, this Court has occasion to consider Section 33 of the Act, 1995. This Court dealt with the manner of computing 3% reservation for the persons with the disabilities as per Section 33 of the Act. Another issue which was considered as to whether post-based reservation must be adhered to or vacancy-based reservation. Learned counsel for the appellant has relied on the above judgment in support of his submission that objective of the Act, 1995 as noticed by this Court have to be fulfilled and restricting the disability to 40%-50% for purpose of eligibility for the post of Civil Judge (Junior Division) shall frustrate the provisions of Section 33 as well as the object of the Act.

39. The legal position with regard to reservation of posts for persons with disability is now well established that every appropriate Government is obliged to reserve posts for persons or class of persons with disability. In the present case, we are concerned with partial disability. The present is not a case where the respondent has not reserved the post for partial disability as required by Section 33 of the Act, 1995. Thus, requirement of reservation as mandated by Section 33 is clearly fulfilled. The issue is regarding eligibility of appellant to participate in the selection and as to whether the requirement in the advertisement that only those, who suffer from disability of 40%-50% are eligible, is contrary to the Act, 1995 or is in breach of any statutory provision. The State, which is appointing authority of Public Service in consultation with the High Court with reference to post of Civil Judge (Junior Division) can very well lay down the essential eligibilities and requirement for the post. When the State, High Court and Public Service Commission are of the view that disability, which is suitable for appointment on the post of Civil Judge should be between 40%-50%, the

said prescription does not violate any statutory provision nor contravene any of the provisions of the Act, 1995. It is well within the power of appointing authority to prescribe eligibility looking to the nature of the job, which is to be performed by holder of a post.

40. A judicial officer in a State has to possess reasonable limit of the faculties of hearing, sight and speech in order to hear cases and write judgments and, therefore, stipulating a limit of 50% disability in hearing impairment or visual impairment as a condition to be eligible for the post is a legitimate restriction i.e. fair, logical and reasonable. The High Court in its additional statement has incapsulated the functions and duties of Civil Judge in following words:-

"7. That in so far as the area of discharge of functions and duties of the judicial officers viz., Civil Judges is concerned this involves performances of strenuous duties:- they have to read documents, pleadings and ascertain facts and issues; monitor proceedings to ensure that all applicable rules and procedures are strictly followed without any violation; advise advocates, litigants and Court personnel regarding conduct, issues, and proceedings; participate in judicial proceedings to help in resolving disputes; preside over hearings and hear allegations made by plaintiffs and defendants to determine whether the evidence supports the charges or the averments made; write decisions on cases independently after reading and analysing evidence and documents; while recording evidence observe the demeanour of witnesses etc. Impaired vision can only make it extremely difficult, even impossible, to perform any of these functions at all. All these apart, he/she has to perform duties such as conducting inquiries, recording dying declarations, going through identification parades, record statements of victims, conduct in-camera proceedings, passing orders on remand and extension and other administrative functions. In so far as District judges are concerned, apart from performing their usual judicial duties, they have to perform a myriad administrative duties also. Therefore, creating any reservation in appointment for those with disabilities beyond the 50% level is far from advisable as it may create practical and seemingly other avoidable complications. Moreover, given the need to prepare judgments based on the case papers and other material records in a confidential manner, the assistance of a scribe or the like completely takes away the secrecy and discreetness that come with the demands of the post."

41. The reasons as given above by the respondent No.3 fully justified the requirement of disability to the extent of 50% which is reasonable, just and fair. High Court did not commit any error in dismissing the writ petition filed by the appellant. In view of the foregoing discussions, we, thus, came to the conclusion that prescription of disability to the extent of 40%-50% for recruitment for the post of Civil Judge (Junior Division) was valid and does not contravene any of the provisions of the Act, 1995 or any other statutory provision. Issue Nos. 2 and 3 are answered accordingly. We, thus, do not find any merit in this appeal and the same is accordingly dismissed.

--X--

2019 (1) L.S. 71 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Abhay Manohar Sapre &
The Hon'ble Mr.Justice
Dinesh Maheshwari

Rajendra Lalitkumar
Agrawal ..Petitioner

Vs.

Ratna Ashok Muranjan
& Anr., ..Respondents

CIVIL PROCEDURE CODE, Sec.100 - Whether the High Court was justified in dismissing the plaintiff's second appeal on the ground that it does not involve any substantial question(s) of law within the meaning of Section 100 of the Code.

Held - It cannot be disputed that the interpretation of any terms and conditions of a document (such as the agreement dated 08.08.1984 in this case) which constitutes a substantial question of law within the meaning of Section 100 of the Code - It is more so when both the parties admit the document - it is now for the High Court to examine the issue afresh on merits after framing the substantial question(s) of law – Appeal stands allowed.

C.A.No.1331/2019 Date:31-01-2019

J U D G M E N T

(per the Hon'ble Mr.Justice
Abhay Manohar Sapre)

Leave granted.

2. This appeal is directed against the final judgment and order dated 06.08.2018 of the High Court of Judicature at Bombay in Second Appeal No. 44 of 2017 whereby the High Court dismissed the second appeal filed by the appellant herein.

3. In order to appreciate the short controversy involved in this appeal, few relevant facts need mention hereinbelow.

4. The appellant is the plaintiff whereas the respondents are the defendants in the civil suit out of which this appeal arises.

5. The appellant filed a civil suit against the respondents for specific performance of the contract in relation to the suit property. The said suit was based on an agreement dated 08.08.1984. The respondents filed their written statement and denied the appellant's claim. The Trial Court by judgment/decree dated 05.07.2004 decreed the appellant's suit and passed a decree for specific performance of the contract against the respondents.

6. The respondents felt aggrieved and filed first appeal before the District Judge, Pune. By judgment/decree dated 10.11.2016, the first Appellate Court allowed the respondents' (defendants') appeal and dismissed the suit. The appellant (plaintiff) felt aggrieved and filed second appeal before the High Court.

7. By impugned order, the High Court dismissed the second appeal holding that the appeal does not involve any substantial question of law as is required to be made out under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") which has given rise to filing of the present appeal by way of special leave by the plaintiff in this Court.

8. The short question, which arises for consideration in this appeal, is whether the High Court was justified in dismissing the plaintiff's second appeal on the ground that it does not involve any substantial question(s) of law within the meaning of Section 100 of the Code.

9. Heard learned counsel for the parties.

10. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal and while setting aside the impugned order remand the case to the High Court for deciding the second appeal on merits in accordance with law after framing appropriate substantial question(s) of law arising in the case.

11. Having perused the record and the judgments of the Trial Court, first Appellate Court and the impugned order, we are of the considered view that the High Court was not right in holding that the appeal does not involve any substantial question of law within the meaning of Section 100 of the Code. In our view, the appeal did involve the substantial question of law and the same, therefore, should have been framed at the time of admission of the second appeal as provided under Section 100 (4) of the Code for its final hearing. Indeed Section 100 (5) of the Code provides that the appeal shall be heard only on the substantial question of law framed by the High Court under Section 100 (4) of the Code.

12. It cannot be disputed that the interpretation of any terms and conditions of a document (such as the agreement dated 08.08.1984 in this case) constitutes a substantial question of law within the meaning of Section 100 of the Code. It is more so when both the parties admit the document.

13. As mentioned above, since the interpretation of documents constitutes the substantial question of law, the High Court should have first framed appropriate substantial question(s) arising in the case especially on the questions in relation to the true intent, rights and obligations arising from Clauses 3, 5 and 15 of the agreement dated 08.08.1984 in the context of pleadings and the reversing findings of the two Courts below and then should have called upon the respondents to reply to the questions framed keeping in view its jurisdiction under Section 100(5) of the Code and its proviso.

14. In addition, the High Court also could have framed questions on the issues, which are material for grant or refusal of specific performance keeping in view the requirements of Section 16 of the Specific Relief Act, pleadings of the parties, and the reversing findings of the two Courts below on such issues with a view to find out as to which finding is more preferable.

15. From the reading the impugned order, we find that, on one hand, the High Court went on interpreting the terms of the document after hearing the argument of both sides (see appearance of both parties through lawyers) and on the other hand, in conclusion, held that it does not involve any substantial question of law. It virtually, therefore, decided the second appeal bipartite like the first appeal without keeping in view the scope of its jurisdiction conferred by Section 100 (4) and (5) of the Code. In our view, the approach of the High Court while deciding the second appeal was not in conformity with the requirements of Section 100 of the Code.

16. Learned counsel for the respondents(defendants), however, vehemently argued that the findings of the High Court, which are of affirmance, do not call for any interference which rightly resulted in dismissal of the suit on material issues but, in our view, it is now for the High Court to examine the issue afresh on merits after framing the substantial question(s) of law. We, therefore, express no opinion on the merits of the issues urged.

17. In the light of the foregoing discussion, we refrain from entering into the merits of the case having formed an opinion to remand the case and while allowing the appeal and setting aside the impugned order remand the case to the High Court with a request to admit the appeal and frame appropriate substantial question(s) of law which arise(s) in the case in terms of Section 100 (4) of the Code and then decide the second appeal on merits by answering the question(s) framed as per Section 100 (5) of the Code in accordance with law without being influenced by any of our observations on merits.

18. The appeal is accordingly allowed. The impugned order is set aside.

--X--

2019 (1) L.S. 73 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Uday Umesh Lalit &
The Hon'ble Mr.Justice
R. Subhash Reddy

Sumit Kumar Saha ..Petitioner
Vs.
Reliance General
Insurance Co., Ltd. ..Respondent

MOTOR VEHICLES ACT, Sec.146 – Section 146 of Motor Vehicles Act, 1988 casts an obligation on the owner of a vehicle to take out an insurance policy as provided under Chapter XI of Act and any vehicle driven without taking such a policy invites a punishment u/Sec.196 - It is, therefore, obvious that in light of this stringent provision and being in a dominant position insurance companies often act in an unreasonable manner and after having accepted value of a particular insured good disown that very figure on one pretext or other

C.A.No.1299/2019 Date:30-01-2019

when they are called upon to pay compensation - "take it or leave it" attitude of Insurance companies is clearly unwarranted not only as being bad in law but ethically indefensible - Unable to accept the submission that it was for the appellant to produce evidence to prove that the surveyor's report was on the lower side in the light of the fact that a price had already been put on the vehicle by the Company itself at time of renewal of the policy - Except in cases where agreement on part of the Insurance Company is brought about by fraud, coercion or misrepresentation or cases where principle of uberrima fide is attracted, the parties are bound by stipulation of a particular figure as sum insured – Appeal stands allowed.

J U D G M E N T

(per the Hon 'ble Mr.Justice Uday Umesh Lalit)

1. Leave granted.

2. This appeal arises out of final judgment and order dated 16.02.2018 passed by the National Consumers Disputes Redressal Commission ('the National Commission', for short) in First Appeal No.182 of 2014.

3. On 27.03.2007 the appellant purchased one Volvo Hydraulic Excavator for a sum of Rs.49,75,000/- with VAT amounting to Rs.1,99,000/-, the total purchase value thus being Rs.51,74,000/-. Immediately after the purchase said Hydraulic Excavator was insured with the respondent vide "Contractor, Plants & Machinery Insurance Policy" bearing number 150719225001168. The insurance policy thereafter stood renewed. For the period 22.07.2009 to 21.07.2010, the sum insured was Rs.46,56,600/- on payment of premium of Rs.33,700/-. The column regarding 'coverage' mentioned the 'year of make' of said Excavator as '2007'. Under the caption – PROVISIONS, the policy contained following stipulations:-

"**1. SUM INSURED –**

It is a requirement of this insurance that the sum insured shall be equal to the cost of replacement of the insured property by new property of the same kind and same capacity, which shall mean its replacement cost including freight, dues and customs duties if any and erection costs.

2. BASIS OF INDEMNITY –

a) In cases where damage to an insured item can be repaired the Company will pay expenses necessarily incurred to restore the damaged machine to its condition immediately prior to the accident/loss plus the cost of dismantling and re-erection incurred for the purpose of effecting the repairs as well as ordinary freight to and from a repair-shop, customs duties and dues if any, to the extent such expenses have been included in the sum insured. If the repairs are executed at a workshop owned by the insured, the Company will pay the cost of materials and wages incurred for the purpose of the repairs plus a reasonable percentage to cover overhead charges.

No deduction shall be made for depreciation in respect of parts replaced, except those with limited life, but the value of any salvage will be taken into account. If the cost of repairs as detailed hereinabove equals or exceeds the actual value of the machinery insured immediately before the occurrence of the damage, the settlement shall be made on the basis provided for in (b) below.

b) In cases where an insured item is totally destroyed the Company will pay the actual value of the item immediately before the occurrence of the loss, including costs for ordinary freight, erection and customs duties if any, provided such expenses have been included in the sum insured, such actual value to be calculated by deducting proper depreciation form the replacement value of the item. The Company will also pay any normal charges for dismantling of the machinery destroyed but the salvage shall be taken into account.

Any extra charges incurred for overtime, night-work, work on public holiday, express freight, are covered by this insurance only if especially agreed to in writing.

In the event of the Makers' drawing, patterns and core boxes necessary for the execution of a repair, not being available, the Company shall not be liable for the cost of making any such drawings, patterns and core boxes.

The cost of any alteration, improvements or overhauls shall not be recoverable under this Policy.

The cost of any provisional repairs will be borne by the Company if such repairs constitute part of the final repairs, and do not increase the total repair expenses.

If the sum insured is less than the amount required to be insured as per Provision-I herein above, the Company will pay only in such proportion as the sum insured bears to the amount required to be insured. Every item, if more than one, shall be subject to this condition separately.

The Company will make payments only after being satisfied, with the necessary bills and documents, that the repairs have been effected or replacement have taken place, as the case may be. The Company may, however, not insist for bills and documents in case of total loss where the insured is unable to replace the damaged equipment for reasons beyond their control. In such a case claims can be settled on 'Indemnity Basis'."

4. Said Hydraulic Excavator was hired and was to be used at a different location. The appellant duly intimated the change of location. On 30.06.2010 the Hydraulic Excavator was badly damaged in a fire while it was at such changed location. An FIR was lodged on 01.07.2010 with the local police and the respondent was also immediately intimated about the damage and was requested to survey the damage and settle the claim.

5. On 07.07.2010 a surveyor came to be appointed by the respondent to survey and assess the loss and damage. Though the survey was undertaken, the claim of the appellant was not getting settled and as such reminders were sent by the appellant

on 18.08.2010 and 10.02.2011. Thereafter, on 13.04.2011 the appellant was intimated that the loss was assessed by the surveyor at Rs.25,24,273/-. The relevant portion from the report of the surveyor Cunningham Lindsey was to the following effect :-

"GROSS LOSS - Both types of claim settlement possibilities viz. in Partial Loss and Constructive Total Loss basis were explored. Finally, it was established that PL i.e. repairing of the whole excavator will involve much higher than its insured value. Hence, we have considered it as case of Constructive Total Loss.

Considering the above, the Gross Loss comes around Rs.5,100,000.00, which is the present new replacement cost of same type and capacity of excavator. Refer attached quotation for new machine.

MARKET VALUE OF LOSS

Since procurement, i.e. 27th March 2007 and the date of loss i.e. 30th June 2010 the subject excavator was in operation for 3 years and 3 months. As such, considering the life of such excavator as 10 years, the depreciation for 3 years and 3 months works out to 32.5%. Hence, the depreciated value or Market Value of the excavator is Rs.3,442,500.00

SALVAGE REALISATION

The matter of salvage was first discussed with the insured, who refused to retain the same. Immediately, we informed all the details of the affected machine to the insurer for appropriate action on the salvage disposal through their concerned department. As a result of the same, the insurer vide their mail dated 21st February 2011, confirmed that they had recovered Rs.650,000 from the subject excavator, which we opine to be extremely fair and reasonable considering the extent of damage to the excavator and remoteness of the location of loss.

ASSESSED LOSS - Rs.2,792,500.00 (as net of salvage)

UNDER INSURANCE - The present new replacement cost of an excavator of same type and capacity is Rs.5,100,000.00, whereas the sum insured taken for the same is of Rs.4,656,000.00. On comparing those two, it is worked out that the property is under insured by 8.71%.

ADJUSTED LOSS - Rs.2,549,273.25 (as net of under insurance)

DEDUCTIBLE - For Individual Value over Rs.25 lakhs upto Rs.50 lakhs Rs.25,000.00 (Flat Excess) for claims arising out of perils other than AOG perils.

NET ADJUSTED LOSS - Rs.2,524,273.00 (as net of policy excess)

RECOMMENDATION - We recommend payment of the net adjusted amount of Rs.2,524,273 under Policy No.1507192215001168 in full discharge of the claim subject to Agreed Bank Clause."

6. The appellant being aggrieved, filed case No.CC/18/11 before the State Consumer Disputes Redressal Commission, West

Bengal ('the State Commission', for short). The appellant submitted that the Excavator was a total loss and that he was entitled to the insured amount of Rs.46,56,600/- along with interest @ 12% p.a. and compensation as claimed in the complaint. During the pendency of the matter, the appellant placed on record the report of a surveyor appointed by him. Said surveyor had assessed the loss on two counts, namely "loss assessed on repairing basis" at Rs.94,64,357.70 and on "total loss basis" at Rs.41,90,940.00. The relevant portion from the report of said surveyor named Subbiah Jeyakarthigesan was as under :-

"LOSS ASSESSED ON REPAIRING BASIS Rs.9,464,357.70

(Rupees Ninety four lacs sixty four thousand three hundred fifty seven & seventy only).

ASSESSMENT ON TOTAL LOSS BASIS

Present depreciated cost of the Excavator as declared to the Insurance Company and accepted by them Nu. 4,656,600.00

Less: 10% Depreciation for usage from the date of insurance to the date of accident Rs. 465,660.00 _____

Assessed on Total Loss Basis Rs. 4,190,940.00

(Rupees Forty one lacs ninety thousand nine hundred forty only.)

UNDER INSURANCE

In my opinion the under insurance in this case will not be applicable as the total machine has been totally burnt. The machine has been insured for Rs.46,56,600.00 which is after application of depreciation from the period of purchase to the last renewal of the insurance policy, as such I have not applied any under insurance in this case."

7. The State Commission allowed the complaint. The relevant portions of its order dated 04.12.2013 are as under :-

"Thirdly, the loss assessed by the Surveyor appointed by the insurance company has taken into consideration the depreciation value @ 32% of the original purchase value of Rs.51,74,000/- only, but the premium as on 7th July 2009 was made after fixing depreciation value. It is quite reasonable that the depreciation value, as pointed out by the surveyor appointed by the insured in reply to question No.8 of the OP, that the depreciation has been applied by the OP at the time of renewal of policy and depreciation can be applied only once, only from the period from the date of renewal of insurance to the date of accident. Again, in reply to question No.9 of the OP, it has been held that under insurance @ 8.71% is incorrect as the insurance company has put in their own value at the time of renewing the policy without obtaining the proposal form from the owner of the excavator machine. We also agree with the view taken by the surveyor appointed by the insured as stated in his reply to question No.10 of the OP that salvage wreck is the property of the insurance company and it cannot be forced upon the owner of the damaged machine……..

Ordered

That the complaint be and the same is allowed on contest against O.P.Nos. 1 & 2 who are hereby directed to pay a sum of Rs.41,90,940/- (Forty one lakh ninety thousand nine hundred and forty only) with interest @ Rs.8% p.a. from the date of filing of the claim. The said OPs. are also directed to pay a sum of Rs.1,00,000/- (One lakh only) as compensation for harassment, mental agony and financial loss, apart from another sum of Rs.5,000/- (Five thousand only) as costs. The entire amount shall be paid by OP Nos.1 & 2 within 45 days from the date of this order in default whereof, interest @9% p.a. shall be payable till full realisation."

8. The respondent, being aggrieved filed First Appeal No.182 of 2014 which was partly allowed by the National Commission vide its judgment and order dated 16.02.2018. The National Commission held as under:

"… … …The Insurance Company is responsible to indemnify the loss on the basis of the replacement of the damaged machine in the same condition at which it was at the day of the accident. In the present case, though IDV of Rs.46,56,000/- was mentioned in the policy and was agreed between the parties, however, if the new machine is available for Rs.51,00,000/- then on that basis the same machine of 3.25 years age could be available on the approximate price being arrived at by deducting the depreciation for 3.25 years from the current price of the new machine. Obviously, the insurance Company shall go for this price for replacement as this is less than the IDV. On this basis, the surveyor has calculated depreciated price of the new machine fit for replacement as Rs.34,42,500/- after applying depreciation of 10% p.a. since the purchase of the machine on the current price of new machine till the date of accident."

The National Commission further observed that the salvage value to the tune of Rs.6,50,000/-, which was realized by the respondent could not have been deducted from the aforesaid sum of Rs.34,42,500/. The National Commission, thus directed the respondent to pay a sum of Rs.34,17,500/- for settlement of the insurance claim of the appellant. It was found that since the respondent was willing to settle the matter for Rs.25,42,273/-, the respondent would be liable to pay interest on the differential amount of Rs.8,93,227/- @ 8% p.a.

9. The decision of the National Commission is presently under appeal. We heard Mr. Soumya Roop Sanyal, learned Advocate for the appellant and Mr. Joy Basu, learned Senior Advocate for the respondent. The appellant contended that it was a case of a total loss as accepted by both the surveyors and going by the "sum insured" as agreed by the parties, the appellant was entitled to Rs.46,56,000/-. It was submitted that the Insurance Company was well aware that the Excavator was of 2007 make and after deducting appropriate depreciation the value that was arrived at for the purposes of cover of insurance was Rs.46,56,600/-. Countering said submission, the respondent submitted that despite

stipulation of such amount as sum insured, the Insurance Company would not be disentitled in the present case from contending that the actual value after suffering appropriate depreciation ought to be one that was indicated by its surveyor. Reliance was placed upon the decision of this Court in **Sikka Papers Limited** v. **National Insurance Company Limited and others** (2009)7 SCC 777).

10. It is common ground that as a result of fire, the Excavator was a "total loss" and the insured would be entitled to the replacement cost of the Excavator. The point, however, is what is the amount or value that the insured is entitled to.

11. The policy in question indicates that the "year of make" of the Excavator was "2007" while the policy was for the period 22.07.2009 to 21.07.2010. The parties were aware that the Excavator was purchased in the year 2007 for Rs.51.74 lakhs. If the contract mentioned the sum insured to be Rs.46,56,600/- the parties must be deemed to be aware about the significance of that sum and the fact that it represented the value of the Excavator as on the date when the coverage was obtained. In this regard the conclusion arrived at and the observations made in **Dharmendra Goel** v. **Oriental Insurance Company Limited** (2008) 8 SCC 279)are noteworthy. In that case a vehicle was bought in the year 2000 and the relevant period of coverage was 2002-2003. The vehicle met with an accident. The surveyor found it to be a total loss which was assessed at Rs.1,80,000/-. In an action instituted in the Consumer Forum, the National Commission had granted compensation at said level of Rs.1,80,000/- with interest. Questioning such assessment, the insured was in an appeal and submitted, inter alia, that he was entitled to the sum insured, namely, Rs.3,54,000/-. Paragraphs 5 and 7 of the decision bring out the principle that the Insurance Company having accepted the value of the vehicle to be Rs.3,54,000/-, was bound by that value. Said paragraphs 5 and 7 were as under:

"5. We have heard the learned counsel for the parties and have gone through the record very carefully. The facts as narrated above remain uncontroverted. Admittedly, the accident had happened on 10-9-2002 during the validity of the insurance policy taken on 13-2-2002 insuring the vehicle for Rs 3,54,000 on a premium of Rs 8498. It is also the admitted position that the vehicle had been declared to be a total loss by the surveyor appointed by the Company though the value of the vehicle on total loss basis had been assessed at Rs 1,80,000. We are, in the circumstances, of the opinion that as the Company itself had accepted the value of the vehicle at Rs 3,54,000 on 13-2-2002, it could not claim that the value of the vehicle on total loss basis on 10-9-2002 i.e. on the date of the accident was only Rs 1,80,000.

… … …

7. It must be borne in mind that Section 146 of the Motor Vehicles Act, 1988 casts an obligation on the owner of a vehicle to take out an insurance policy as provided under Chapter XI of the Act and any vehicle driven without taking such a policy invites

a punishment under Section 196 thereof. It is, therefore, obvious that in the light of this stringent provision and being in a dominant position the insurance companies often act in an unreasonable manner and after having accepted the value of a particular insured good disown that very figure on one pretext or the other when they are called upon to pay compensation. This "take it or leave it" attitude is clearly unwarranted not only as being bad in law but ethically indefensible. We are also unable to accept the submission that it was for the appellant to produce evidence to prove that the surveyor's report was on the lower side in the light of the fact that a price had already been put on the vehicle by the Company itself at the time of renewal of the policy. We accordingly hold that in these circumstances, the Company was bound by the value put on the vehicle while renewing the policy on 13-2-2002."

12. Mr. Basu, learned Senior Advocate, however relied upon the decision of this Court in **Sikka Papers** (supra). In that matter a diesel generating set purchased in the year 1997 for Rs.45 lakhs was insured for Rs.35 lakhs for the period from 08.04.1999 to 07.04.2000. Said diesel generating set broke down. The complainant demanded what it had paid i.e. Rs.25 lakhs for the repairs but the insurer, relying upon the report of the Surveyor, did not agree. According to the Surveyor the net loss was Rs.14,45,000/-. But the Surveyor found that the generating set was under insured and as such the figure of net loss that was assessed ought to suffer deduction of 25.71%. The net assessed loss was, therefore, at the level of Rs.10,47,491/-. This Court raised two questions:

"(1) Whether the insurer was justified in accepting report dated 15-5-2000 submitted by the surveyor who had assessed the loss of Rs.14,45,000/- after deducting about Rs.10,55,000/- from Rs.25,00,000/- i.e. actual amount paid by the complainant for repairing the diesel generating set?

(2) Whether the insurer was justified in deducting an amount of Rs.3,71,509.50 (25.71%) as under insurance from the loss assessed at Rs.14,45,000/- by the surveyor in its report dated 15-5-2000?"

As regards first question, this Court found that insurer would not be liable in respect of wearing out of machinery from normal use or exposure and the cost of replacement of insured property by new property of the same kind and same capacity would be subject to the exception that repair or replacement would not extend to the machinery or parts which had undergone normal wear and tear. With regard to the second question, on facts it was found that there was an element of under insurance and the surveyor was justified in deducting 25.71%.

13. We do not see how the decision in **Sikka Papers** (supra) could be of any relevance in the present matter. The cases of "under insurance" stand on a completely different footing. In such cases the Insurance Company stands denied of appropriate premium. If the sum insured is, in any way, lesser than the real value of the subject matter of insurance, and if there be cases of partial replacement or partial loss, it is

well accepted that the Insurance Company is entitled to proportionate deduction representing the proportion of undervaluation. It is this facet of the matter which weighed with the Court in **Sikka Papers** (supra) in affirming the surveyor's report in so far as 25.71% deduction was concerned. Even in the present matter under the caption "Provisions", the stipulation in para 2 is to the effect that if the sum insured "is less than the amount required to be insured ……. the company will pay only in such proportion as the sum insured bears to the amount required to be insured."

14. It is not the case of the Insurance Company that there was any "under insurance" in the present matter. On the other hand, the contention is that as against the sum insured which was Rs.46,56,600/- the depreciated value was Rs.34,42,500/-. So according to the Insurance Company, if at all it was a case of over insurance. If we go by the idea of receipt of premium, then the Insurance Company had received more than what according to it the real value would have justified.

15. It is precisely in this set of facts that the question in the present matter arises. If both the sides, with their eyes open, had arrived at a particular figure to be the real value of the subject matter of insurance, is it open to any party to dispute said sum and contend that the real value was something different from what was declared by the parties to be the sum insured. One may understand cases where there is non-disclosure of material facts which may go to the root of the matter and as such the sanctity of the agreement itself may get affected. But if both the parties had agreed and arrived at an understanding, which understanding was otherwise not vitiated by any misrepresentation, fraud or coercion, the parties must be held bound by stipulation of such figure. This was the idea and the underlying principle in **Dharmendra Goel** (supra)

16. The relevant stipulation in the present case, namely clause (b) of Provision -Basis of Indemnity speaks of calculation of actual value by deducting "proper depreciation". The Surveyor of the Insurance Company has worked the figure of depreciation by starting with the figure of Rs.51 lakhs as the cost of a new Excavator and then deducting 32.5% by way of depreciation assuming the life of Excavator to be 10 years. In his assessment, therefore, the stipulation of the figure of Rs.46,56,600/- on the day the contract was entered into, had no significance. Was he right and justified and how could he assume the life of the Excavator to be 10 years? If that was the understanding between the parties, the figure of sum insured could have been different. If the surveyor was calculating the depreciation from the day when the policy was entered into till the date when the accident occurred, such exercise could certainly be justified. But the exercise undertaken was in the nature of not only considering the depreciation post the policy but even including the period prior thereto. That exercise was already undertaken by the parties and in their assessment the real value of the Excavator as on the day when the policy was taken out was Rs.46,56,600/-. In the face of such agreement and understanding, the surveyor could not have

calculated depreciation for a period prior to the date of policy or contract. The purport of aforesaid clause was to arrive at proper valuation as on the day when there was total destruction. He could have undertaken the exercise post the date of policy to assess the real value of the insured property as on the date when the fire actually took place. And for such purposes, the assessment must start with the amount described as "sum insured" on the day when the contract was entered into. It was not open to the Surveyor or to the Insurance Company to disregard the figure stipulated as 'sum insured'. The loss had to be assessed in the present case, keeping said figure in mind.

17. Having considered the entire matter, in our view, except in cases where the agreement on part of the Insurance Company is brought about by fraud, coercion or misrepresentation or cases where principle of uberrima fide is attracted, the parties are bound by stipulation of a particular figure as sum insured. Therefore, the surveyor and the Insurance Company were not justified in any way in questioning and disregarding the amount of "sum insured". Further depreciation, if any, can always be computed keeping the figure of "sum insured" in mind. The starting figure, therefore, in this case had to be the figure which was stipulated as "sum insured". Since Excavator, after the policy was taken out was used for eleven months, there must be some reasonable depreciation which ought to be deducted from the "sum insured". The surveyor appointed by the insured was right in deducting 10% and in arriving at the figure of Rs.41,90,940/-. The other issue which weighed with the surveyor appointed by the Insurance Company regarding deduction of salvage value was rightly answered by the National Commission and as such does not require any elaboration. We, thus, find that the assessment made by the State Commission was quite correct and that made by the National Commission was completely incorrect.

18. We, therefore, allow this appeal, set aside the decision of the National Commission and restore the judgment and order passed by the State Commission. No costs.

--X--

2019 (1) L.S. 82 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

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

Poona Ram ..Appellant

Vs.

Moti Ram (D)
Th.L.Rs. & Ors., ..Respondents

LIMITATION ACT, 1963, Sec.64 - Whether plaintiff had better title over the suit property and whether he was in settled possession of the property.

Held - A person who asserts possessory title over a particular

C.A.No.4527/2009 Date:29-01-2019

property will have to show that he is under settled or established possession of the said property - Merely stray or intermittent acts of trespass do not give such a right against true owner - Settled possession means such possession over the property which has existed for a sufficiently long period of time, and has been acquiesced to by true owner - Casual act of possession does not have the effect of interrupting possession of the rightful owner - Settled possession must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of owner or without any attempt at concealment by trespasser - There cannot be a straitjacket formula to determine settled possession - Conclusion arrived by the High Court and the reasons assigned for same are not correct - Absolutely no material in favour of the case of the plaintiff to show possessory title – Appeal stands allowed.

J U D G M E N T

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

The judgment dated 28.08.2006 passed by the High Court of Judicature of Rajasthan at Jodhpur in Civil Second Appeal No. 97 of 1984 and the concurrent judgment dated 10.10.2006 in Civil Review Petition No. 18 of 2006, dismissing the same, are called in question in this appeal by the unsuccessful defendants.

2. The brief facts leading to this appeal are as under:

A suit came to be filed for declaration of title and for possession by Respondent No. 1 herein. Undisputedly, the plaintiff Moti Ram had no document of title to prove his possession, but claimed possessory title based on prior possession for a number of years. However, according to the plaintiff, he had been wrongly dispossessed by defendants on 30.04.1972, which was within the 12 years preceding the filing of the present suit. The Trial Court decreed the suit and the First Appellate Court reversed the findings of the Trial Court. The First Appellate Court dismissed the said suit on the ground that the defendants had proved their title and possession over the suit property.

3. As mentioned supra, the plaintiff did not have any title deed with respect to the suit property. He based his claim mainly on his alleged long possession over the property, and claimed that there was nobody with better title over it than him. Per contra, the defendants relied on two sale deeds, viz., Ex. A-6 dated 06.02.1956, executed by the original owner Khoom Singh in favour of Purkha Ram, and Ex. A-2 dated 21.06.1966, executed by Purkha Ram in favour of the appellant/Defendant No. 1. It was also not disputed that the plaintiff did not have possession as on the date of filing of the suit, inasmuch as he has alleged that he was wrongly dispossessed by the defendant on 30.04.1972, prior to filing the suit.

4. The only questions to be decided in this appeal are whether the plaintiff had better title over the suit property and whether he was in settled possession of the property,

which required dispossession in accordance with law.

5. Ms. Christi Jain, learned counsel appearing for the appellant/Defendant No. 1, taking us through the material on record, contends that there is nothing on record to show that the plaintiff was in possession of the property at any point of time, much less for a longer time lawfully. There is no material to show that the plaintiff has possessory title over the suit property. Additionally, she argues that the sale deeds mentioned supra relied upon by the defendants would clearly reveal that the defendants were in possession of the property as owner thereof, from the date of purchase of the suit property.

6. Undisputedly and as duly admitted by both parties, the property in question originally belonged to Jagirdar Khoom Singh of Barmer. The property in question is part of a larger property under the Jagirdari system, a few parts of which were rented out or sold. After the system of Jagirdari was abolished, these jagirs were resumed in the year 1955-56. While a few persons continued in illegal possession, others had purchased parts of the land from the Jagirdar, and the remaining land vested in the State Government and municipalities. After the resumption of the jagir, it seems that the Barmer Municipality established a planned and well-managed colony named Nehru Nagar on the said land. Ex.12, Ex. 13 and Ex. 14 are the survey maps of the Municipality. A perusal of Ex. 12 (first survey) reveals that Moti Ram was in possession of the land, the plot to the east of which was possessed by Nawala Harijan and in the east of Nawala Harijan's plot, possession of Purkha Ram (to recall, predecessor-in-interest of the defendants) on the site has been indicated. Further, the possession of Purkha Ram has also been indicated on a plot to the south of the land duly possessed by Moti Ram. Thus, it is clear that the plots of land owned by Khoom Singh, in possession of these persons, were not uniformly situated. However, after the Municipality took over possession, it seems that orderly formation of the plots was undertaken. Though there was some confusion raised by the plaintiff with regard to the boundaries of the property in question, the First Appellate Court being the final court of fact, on due appreciation of the entire material on record, gave a definite finding that the Trial Court was not justified in decreeing the suit, and observed that Purkha Ram was in possession of the property in question even prior to 1966, and had sold the same through registered sale deed in June 1966 vide Ex. A-2. This sale deed shows the measurement of the land, which corresponds to the plots in question approximately. The judgment of the First Appellate Court reveals that the Municipality had let out only three plots to the Jagirdar, and those three plots together measured 32 x 66 hands (unit of measurement). Thus, each plot measured 32 x 22 hands. These were numbered as Plot No. 4, Plot No. 5 and Plot No. 7. The disputed site is Plot No. 7.

7. The official record (survey map), Ex. 14, which relates to the plot in question, i.e., Plot No. 7, reveals that it was owned by

Poona Ram, who is Defendant No. 1 and the appellant herein. It is also relevant to note that sanction for constructing the house was given to Purkha Ram in the year 1957. Obviously, such sanction would have been accorded only on the basis of title and possession of the property.

8. Section 64 of the Limitation Act, 1963 contemplates a suit for possession of immovable property based on previous possession and not on title, if brought within 12 years from the date of dispossession. Such a suit is known in law as a suit based on possessory title as distinguishable from proprietary title. It cannot be disputed and is by now well settled that 'settled possession' or effective possession of a person without title entitles him to protect his possession as if he were a true owner.

9. The law in India, as it has developed, accords with jurisprudential thought as propounded by luminaries like Salmond. Salmond on Jurisprudence (12 Edn. at paras 5960) states:-

"These two concepts of ownership and possession, therefore, may be used to distinguish between the de facto possessor of an object and its de jure owner, between the man who actually has it and the man who ought to have it. They serve also to contract the position of one whose rights are ultimate, permanent and residual with that of one whose rights are only of a temporary nature.

x x x x x

In English law possession is a good title of right against any one who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself. Many other legal systems, however, go much further than this, and treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law.

Legal remedies thus appointed for the protection of possession even against ownership are called possessory, while those available for the protection of ownership itself may be distinguished as proprietary. In the modern and medieval civil law the distinction is expressed by the contrasted terms petitorium (a proprietary suit) and possessorium (a possessory suit)."

10. As far back as 1924, in the case of Midnapur Zamindary Co. Ltd. v. Naresh Narayan Roy, AIR 1924 PC 144, the learned Judge observed that in India, persons are not permitted to take forcible possession;

they must obtain such possession as they are entitled to through a court. Later, in the case of Nair Service Society Ltd. v. K.C. Alexander, AIR 1968 SC 1165, this Court ruled that when the facts disclose no title in either party, possession alone decides. It was further held that if Section 9 of the Specific Relief Act, 1877 (corresponding to the present Section 6) is employed, the plaintiff need not prove title and the title of the defendant does not avail him. When, however, the period of six months has passed, questions of title can be raised by the defendant, and if he does so the plaintiff must establish a better title or fail. In other words, such a right is only restricted to possession in a suit under Section 9 of the Specific Relief Act (corresponding to the present Section 6) but does not bar a suit on prior possession within 12 years from the date of dispossession, and title need not be proved unless the defendant can provide one.

11. It was also observed by this Court in Nair Service Society Ltd (supra) that a person in possession of land in assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against the entire world except the rightful owner. In such a case, the defendant must show in himself or his predecessor a valid legal title and probably a possession prior to the plaintiff's, and thus be able to raise a presumption prior in time.

12. In the case of Rame Gowda (dead) by Lrs. v. M. Varadappa Naidu (dead) by Lrs. and another, (2004) 1 SCC 769, a three-Judge Bench of this Court, while discussing the Indian law on the subject, observed as under:-

"8. It is thus clear that so far as the Indian law is concerned the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases,

the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner."

13. The crux of the matter is that a person who asserts possessory title over a particular property will have to show that he is under settled or established possession of the said property. But merely stray or intermittent acts of trespass do not give such a right against the true owner. Settled possession means such possession over the property which has existed for a sufficiently long period of time, and has been acquiesced to by the true owner. A casual act of possession does not have the effect of interrupting the possession of the rightful owner. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. Settled possession must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. There cannot be a straitjacket formula to determine settled possession. Occupation of a property by a person as an agent or a servant acting at the instance of the owner will not amount to actual legal possession. The possession should contain an element of animus possidendi. The nature of possession of the trespasser is to be decided based on the facts and circumstances of each case.

14. As mentioned supra, Purkha Ram had purchased three plots from Jagirdar Khoom Singh. In sale deed Ex. A-6, three plots have been mentioned as plots of three houses. One of these, being Plot No. 7, was sold by Purkha Ram to the appellant, one plot being Plot No. 4 was sold to Teja Ram and the third plot being Plot No. 5 was retained by Purkha Ram.

15. In order to prove possession of the property, the plaintiff relied upon the rent note Ex. 1, which shows that the plot in question was let out by the plaintiff to one Joga Ram in the year 1967. On 12.05.1967, a fire broke out and the entire fodder stored on the plot got burnt. Thereafter, the plot was kept vacant. DW-7, who has been referred to in order to establish spreading of the fire, stated that the fire started due to sparks coming from a railway engine. But there was no railway line adjacent to the disputed land which could have caused a fire. Even otherwise, the rent note Ex. 1 does not refer to the plot in question, and its boundaries have also not been mentioned. Merely on doubtful material and cursory evidence, it cannot be held that the plaintiff was ever in possession of the property, and that too in settled possession.

16. The plaintiff/Respondent No. 1 makes much of the old body of a motor vehicle belonging to him lying on the property. Ex. 2 clearly reveals that one part of the motor vehicle was lying on the disputed property and another part was lying on the plot of the plaintiff. The said body of the motor vehicle is about 3 to 4 feet in length only and the same was lying on the boundary of the disputed property. But the plaintiff/ Respondent No. 1 claims possession of the entire plot based on such fact. Absolutely no material is found to show that the plaintiff/

Respondent No. 1 was in actual possession, much less continuous possession, of the property for a longer period which may be called settled possession or established possession. As mentioned supra, mere casual possession, that too relying on a motor vehicle body lying on a part of the property, would not prove settled possession of the plaintiff.

17. The plaintiff has to prove his case to the satisfaction of the Court. He cannot succeed on the weakness of the case of the defendant. Even otherwise, there is no confusion at all regarding the identity of the property in question and on the basis of material on record, the First Appellate Court has correctly ruled that the appellant/ Defendant No. 1 has proved his title and possession over the suit property since the date of his purchase of the property. Prior to the purchase, his predecessor-in-interest was in possession of the same.

18. Having regard to the position of law and facts of the case, we are of the considered opinion that the High Court was not justified in interfering with the judgment of the First Appellate Court, which has come down very heavily on the procedure adopted by the trial Judge in deciding the matter, more particularly when no fault can be found on facts with the judgment of the First Appellate Court.

Generally, it is not open to the High Court to interfere with the findings of fact recorded by the First Appellate Court when such findings are based on the evidence on record, and are not perverse or against the material on record.

19. The conclusion arrived at by the High Court and the reasons assigned for the same are not correct inasmuch as there is absolutely no material in favour of the case of the plaintiff to show possessory title. In order to claim possessory title, the plaintiff will have to prove his own case, and also will have to show that he has better title than any other person. Since there is no documentary proof that the plaintiff was in possession of the suit property, that too for a long period, he cannot be allowed to succeed based on minor discrepancies in the evidence of the defendants. Accordingly, the appeal succeeds and is allowed.

20. The impugned judgment of the High Court dated 28.08.2006 and its review stands set aside and the judgment of the First Appellate Court is restored. Consequently, suit stands dismissed.

--X--

LAW SUMMARY

BACK	VOLUMES	AVAILABLE
2010	(In Three Volumes)	Rs.2,275/-
2011	(In Three Volumes)	Rs.2,500/-
2012	(In Three Volumes)	Rs.2,500/-
2013	(In Three Volumes)	Rs.2,800/-
2014	(In Three Volumes)	Rs.2,800/-
2015	(In Three Volumes)	Rs.2,800/-
2016	(In Three Volumes)	Rs.3,000/-
2017	(In Three Volumes)	Rs.3,000/-
2018	(In Three Volumes)	Rs.3,500/-

2019 YEARLY SUBSCRIPTION Rs.3200/- (In 24 parts)

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

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

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