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(Founder : Late Sri G.S. GUPTA)

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PART - 4 (28TH FEBRUARY 2018)

Table Of Contents

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NOMINAL - INDEX

SUBJECT - INDEX

CIVIL PROCEDURE CODE, Or.I Rule 9 & Sec.100 – **A.P (TELANGANA AREA) TENANCY & AGRICULTURAL LANDS ACT, 1950,** Sec.38-E – Suit for partition – Non-disclosure of factum of plaintiff having a sister - Aggrieved by Judgment and Decree passed by Trial Court and First Appellate Court, instant Second Appeal.

Held – A suit for partition is not maintainable without impleading all the members of joint family - Though provisions of Order I Rule 9 say that no suit shall be defeated by reason of misjoinder or non-joinder of parties but proviso makes it clear that if necessary party is not impleaded in a suit or an appeal, it will have to be dismissed on that ground – During pendency of final decree, if one of the parties to preliminary decree dies, his legal representatives have to be brought on record – Shares allotted to parties in preliminary decree, as per their entitlement, may vary in final decree by operation of law – Second appeal is dismissed. **(Hyd.)** ***183***

CIVIL PROCEDURE CODE, Or.VI Rule17 r/w Sec.151 – Petitioner preferred instant revision against Order of Trial Court permitting respondent to amend plaint – Amendment is being sought for almost 11 years after date of institution of suit.

Held – On ground of mere delay, however long it maybe, an application for amendment cannot be rejected provided facts of case warrant allowing of amendment – Order of Trial Court is sustainable both under facts and law – Impugned Order brooks no inference – Civil Revision Petition is dismissed. **(Hyd.)** ***175***

HINDU MARRIAGE ACT, 1955 Sec.12 - Aggrieved by dismissal of petition for annulment of marriage and grant of a decree for restitution of conjugal rights at instance

of his Wife/Respondent, Husband/Petitioner has come with present appeal – Appellant contended that respondent did not allow him to have conjugal relationship and when he took her for treatment she was found to be suffering from schizoform illness which makes her unfit for sexual relationship.

Held – Appellant failed to establish any of grounds mentioned in Section 12 of Hindu Marriage Act, to enable him to get a decree of annulment of marriage and therefore decree for restitution of conjugal rights is also confirmed – Husband's appeal stands dismissed. **(Hyd.)** ***200***

MOTOR VEHICLES ACT, Secs. 2(30) & 50 – First respondent was owner of vehicle involved in accident – First respondent contended that he had already sold vehicle to second respondent prior to accident and handed over documents including registration certificate – Second respondent further contended that he had sold vehicle to third respondent who in turn sold it to petitioner – Tribunal held that first respondent jointly liable together with driver of vehicle – High Court has allowed appeal of first respondent and held that there was evidence that first respondent transferred vehicle and appellant who is last admitted owner is liable to pay compensation – Hence present appeal.

Held – Person in whose name motor vehicle stands registered, would be treated as owner – Person whose name is reflected in records of registering authority is the owner - However, where a person is a minor, guardian of minor would be treated as owner and where a motor vehicle is subject to an agreement of hire purchase, lease or hypothecation, person in possession of vehicle under agreement is treated as owner – In present case, first respondent was 'owner' of vehicle involved in accident within meaning of section 2(30) of the act and is liable to pay compensation – Appeal is allowed and Judgment of High Court is set aside. **(S.C.)** ***60***

MOTOR VEHICLES ACT, Secs. 146, 147 and 149 – It is a Case of driver not having appropriate driving licence - Appellant/Claimant by way of instant appeal assails Judgment of Court below on ground that Court erred in not directing insurance company to pay award amount and to recover the same from insured.

Held – Driver had driving licence to drive light motor vehicle and he was driving a heavy goods vehicle – Not a case where insurer can be made absolutely liable – But it is a case where insurer can be directed to pay and recover compensation from insured – Appeal is allowed in part and Compensation amount awarded by Court below shall be paid by second respondent and then recover from first respondent.

(Hyd.) ***216***

(INDIAN) PENAL CODE, Secs.120-B, 201 & 498-A – Appellant's wife committed suicide by hanging – Appellant in appeal was acquitted of offence u/Sec.498-A but conviction u/s 201 was maintained on ground that appellant did not give intimation to police of unnatural death and no post-mortem was conducted

Held – High Court is not justified in maintaining conviction u/s 201 of IPC only on ground that no communication was given to police and post-mortem had not been performed – Prosecution has not been able to satisfy ingredients u/s 201 of IPC – Sessions Court is not justified in convicting appellant u/Sec. 201 of IPC and High Court maintaining the same – Appeals are allowed and conviction of appellant u/s 201 IPC is set aside. **(S.C.)** ***53***

PROVINCIAL INSOLVENCY ACT, Secs.10(2), 37, 43 and 45 – Instant Second appeal preferred against Decree and Judgment of Lower Appellate Court – Whether sale deed obtained by respondent in an auction held by official Receiver is legally valid or sale deeds obtained by appellants in a private sale are valid.

Held – All sales and dispositions of property and payments duly made and all acts done by Insolvency Court or Receiver, will remain valid despite subsequent annulment of adjudication – Second Appeal stands dismissed confirming Judgment and Decree of first appellate Court. **(Hyd.)** ***224***

TENANCY ACT – Sub-letting - Eviction suit-Ground for eviction - Held- landlord is able to make out only one ground of several grounds of eviction, he is entitled to seek the eviction of his tenant from the suit premises on basis of that sole ground which he made out under Rent Act - There is no need for the landlord to make out all grounds which he has taken in plaint for claiming eviction of tenant under Act - Appeal allowed..

(S.C.) ***47***

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An overview of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

By
Kamalakara Rao Gattupalli, B.AL, LL.B,
Advocate, Guntur, A.P.

Obects and Reasons for passing the Act:

Narasimham Committee I and II and Andhyarjina Committee constituted by the Government of India for the purpose of examining banking sector reforms have considered the need for changes in the legal system inrespect of these areas.These interalia, have suggested enactment of a new legislation for securitization and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the Court. Acting on these suggestions the Government of India made the Act.

Need of the Act:

The financial sector is one of the key drivers in India's efforts to achieve success in rapidly developing it's economy. While the banking sector in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitization of financial assets of banks and financial institutions . Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. The existing legal frame work relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non performing assets of banks and financial institutions.

The Act comprises VI chapters and 42 sections. For the effective implementation of the Act, the Government of India also made the Security Interest (Enforcement) Rules 2002. TheAct comprises the substantive law whereas the procedural aspect is described in the Rules. We can say that chapterIII is the heart of the Act,which confers all rights to the bankers and financial institutions. Chapter III contains 10 sections i.e., sections 13 to 19. Section 13 of the Act confers ample powers on the secured creditor for enforcement of security interest.

According to section 13- Any security interest created infavour of any secured creditor may be enforced without the intervention of the court or tribunal by the secured creditor in accordance with the provisions of the Act.

As per section 13(2) of the Act- where any borrower, who is under a liability to a secured creditor under a security agreement , makes any default in repayment of secured debt or

any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non performing asset, then the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within 60 days from the date of notice, failing which the secured creditor shall be entitled to exercise all or any of the rights under sub section (4) of Section 13.

Section 13(3) deals with what are the details to be contained in the notice referred in section 13(2) –

(a) the notice shall contain the details of the amount payable by the borrower and (b) the secured assets intended to be enforced by the secured creditor in the event of non payment of secured debts by the borrower.

Sub section (4) of section of the Act bestows vast powers on the secured creditor i.e., on the Bankers and Financial Institutions. According to section 13(4) of the Act, in case the borrower fails to discharge his liability in full within the period of 60 days as specified in section 13(2), the secured creditor may take recourse to one or more of the measures to recover their secured debt viz., @ take possession of the secured assets of the borrower including the right to transfer by way of lease ,assignment or sale for realizing the secured asset , (b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset, (c) subject to certain exceptions appoint any person (Manager) to manage the secured assets, the possession of which has been taken over by the secured creditor , (d) require at any time by notice in writing , any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower , to pay the secured creditor, so much of the money as is sufficient to pay the secured debt and so many powers are conferred on the secured creditor.

Section 14 of the Act confers right on the secured creditor to approach Chief Metropolitan Magistrate or District Magistrate in taking possession of the secured asset. This provision does not confer any right on the Chief Metropolitan Magistrate or District Magistrate to adjudicate the dispute, their duty is mere to assist the secured creditor in taking possession of the secured asset or other documents realting thereto.

Section 17 of the Act deals with the right to appeal-Any aggrieved person (Including the borrower) by the measures referred to in subsection (4) of section 13 taken by the secured creditor or his authorized officer may make an appeal with proper court fee as may be prescribed to the Debts Recovery Tribunal (DRT) having jurisdiction in the matter within 45 days from the date on which such measures had been taken. The Debts Recovery Tribunal has power only to consider whether any of the measures referred in section 13(4), taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made there under i.e., to consider the procedural irregularities in obtaining the possession.

Section 18 deals with appeal to Appellate Tribunal : any person aggrieved by any order made by the Debts Recovery Tribunal under section 17 may prefer an appeal along with such as may be prescribed , to the Appellate Tribunal within 35 days from the date of the order of the Debts Recovery Tribunal. No appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal 50% of the amount of debt due from him as claimed by the secured creditor or determined by the Debts Recovery Tribunal, whichever is less provided also that the Appellate Tribunal may , for reasons to be recorded in writing reduce the amount to not less than 25% of the amount of debt referred above.

Section 31 of the Act says about the exceptions to the Act. Section 34 bars the intervention of the civil court. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Debts Recovery Tribunal or Appellate Tribunal is empowered by or under this Act to determine.

The conjoint reading of section 13 (1) and section 34 of the Act gives clarity that the secured creditor has right to enforce any security interest created, in it's favour , without the intervention of the court or tribunal and section 34 expressly bars the intervention of the civil court and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act,1993.

Constitutional validity of the Act:

Vesting judicial powers on the secured creditor i.e., on bankers or financial institutions i.e., one of the litigating parties/disputing parties//rival parties –How far it is justifiable ? The makers of the legislation have conferred vast powers on the secured creditors under section 13 of the Act, even the civil courts are not conferred/enjoying that much of powers. Section 13(4) of the Act empowers the secured creditor not only to possess and to sale the secured asset but also to transfer by way of lease and assignment.

Now the point for consideration is without adjudicating the dispute by the competent court of law , conferring, enforcing/executing powers straight away on the secured creditor i.e., on Bankers and Financial Institutions is not against the principles of natural justice/ equity? Which is not arbitrary and against the concept of equality as ensured under Article 14 of the Indian Constitution? Though the Act provides right to appeal under section 17 the same is confined only to the procedural irregularities in taking possession or sale of the secured asset .Then what about the title dispute with regard to the secured asset? The Act is silent with regard to this.

The Hon'ble Supreme Court in the case of **Mardia Chemicals Ltd., Vs Union of India 2004 (17) AIC P.35 (SC)** has upheld the validity of the Act and it's provisions except sub section 2 of section 17 of the Act, which was declared as ultravires of Article 14 of the Indian Constitution.

Necessity to confer at least appellate jurisdiction on the Distrct Courts:

How many litigant public/aggrieved parties are in affordable position to approach the Debts Recovery Tribunals? one side the state is campaigning for the need of justice to the doors of the litigant public and on the other hand justice is like a sore grape to the needy people especially for the poor litigant people.

As per section 17 of the Act appeal from the measures taken by the secured creditor under section 13(4) lies to the Debts Recovery Tribunals in all the states except the state of Jammu and Kashmir. Whereas section 17 -A of the Act confers appellate jurisdiction on the District Courts in the state of Jammu and Kashmir, from the measures taken under section 13(4) . Whatever the reason behind this i.e., conferring appellate jurisdiction on District Courts in the state of Jammu and Kashmir by way of section 17-A, the need for the same in other states is also to be considered so as to render justice to the to the litigant public/needy people. And it is also the voice of the people, though the Act is passed to strengthen the Indian economy, the Act suffers with lack of effective implementation , more particularly in case of wealthy people (Best example King Fisher Managing Director Mr.Vijay Malya).

--X--

2018(1) L.S. 175

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

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

Dhulipalla Srinivas Rao ..Petitioner
Vs.
Kandula Govardhan Rao & Anr., ..Respondents

CIVIL PROCEDURE CODE, Or.VI Rule17 r/w Sec.151 – Petitioner preferred instant revision against Order of Trial Court permitting respondent to amend plaint – Amendment is being sought for almost 11 years after date of institution of suit.

Held – On ground of mere delay, however long it maybe, an application for amendment cannot be rejected provided facts of case warrant allowing of amendment – Order of Trial Court is sustainable both under facts and law – Impugned Order brooks no inference – Civil Revision Petition is dismissed.

Mr.K.Subba Rao, Advocate for the Petitioner.
Y.Narapa Reddy, Advocate for the Respondents.

J U D G M E N T

This Civil Revision Petition, under Article 227 of the Constitution of India, is filed by the unsuccessful respondent/2nd defendant assailing the order, dated 04.01.2016, of the learned Principal Junior Civil Judge, Chirala, passed in IA.no.1264 of 2015 in OS.no.55 of 2010 filed by the petitioner-plaintiff under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908, ['the Code', for brevity] requesting to permit the plaintiff to amend the plaint as stated in the petition list.

2. I have heard the submissions of Sri K.Subba Rao, learned counsel appearing for the revision petitioner-2nd defendant, and of Sri Y.Narapa Reddy, learned counsel appearing for the 1st respondent-plaintiff. I have perused the material record.

2.1 The parties shall hereinafter be referred to as the plaintiff and the defendants for convenience and clarity.

3. The facts, which are required to be stated as a preface to this order, in brief, are as follows:

The plaintiff brought the suit against the defendants including the revision petitioner/ 2nd defendant for cancellation of a sale deed, dated 26.02.2008, executed by the 1st defendant in favour of the 2nd defendant and for costs pleading inter alia that the transaction under the sale deed is null and void. The 2nd defendant filed a written statement resisting the suit. During the pendency of the suit, the plaintiff filed aforesaid interlocutory application to permit the plaintiff to amend the plaint and carry out consequential amendments to enable the plaintiff to seek the reliefs of declaration of ownership of the plaintiff over the plaint schedule property and recovery of vacant possession of the said property, viz., Ac.00.06 cents (=0.024 hectares = 291

square yards) situated at Epurupalem village, Vadarevu Panchayat, Chirala Mandal, more fully described in the schedule annexed to the plaint. The 2nd defendant filed a counter resisting the said application. On merits and by the orders impugned in this revision, the trial Court allowed the petition of the plaintiff. Hence, the unsuccessful 2nd defendant is before this Court.

4. Before proceeding further, it is necessary to refer to the pleadings of the parties.

4.1 The case of the plaintiff and the submissions made on his behalf, in brief, are as follows: 'The plaintiff filed the suit for cancelation of registered sale deed, dated 26.02.2008, executed by the 1st defendant in favour of the 2nd defendant. The 1st defendant sold the plaint schedule property of an extent of Ac.00.06 cents to the plaintiff for a valuable consideration of Rs.4,365/- under registered sale deed, dated 21.05.1988, duly registered in the Sub Registrar's office, Chirala, vide Document bearing no.1413/1988, by clearly mentioning the measurements as well as extent. Suppressing the said fact, the defendants in collusion with each other created another sale deed in respect of the plaint schedule property in favour of 2nd defendant on 26.02.2008, and got the same registered in the office of the Sub Registrar, Chirala. The said sale deed was brought into existence with a view to defeat the valuable rights of the plaintiff over the plaint schedule property. Recently, the plaintiff came to know that the 2nd defendant ploughed the plaint schedule property. Thus, the plaintiff lost possession over the plaint schedule property. Hence, the learned counsel for the plaintiff advised the plaintiff to seek amendment of the plaint. Hence, the present petition is filed to permit the plaintiff to seek amendment and consequential amendments of the plaint.'

4.2 Per contra, the case of the 2nd defendant and the submissions made on his behalf, in brief, are as follows: 'The material allegations in the plaint as well as in the affidavit filed in support of the petition are false. The same are specifically denied. The plaintiff recently came to know that this defendant ploughed the plaint schedule land and that the plaintiff thus lost possession and that therefore, he was advised to seek amendment of the plaint are false and invented allegations. This defendant has been in possession and enjoyment of Ac.2.50 cents in Epurupalem village, Chirala Mandal, from the date of purchase under the agreement of sale, dated 26.09.1992. Later, a registered sale deed was executed in favour of this defendant. There is no cause of action clearly mentioned in the proposed amendment. As the plaintiff is aware that he will not succeed in the suit, the present amendment petition is intentionally filed belatedly though the written statement of this defendant was filed about four years back. The proposed amendment, if allowed, changes the cause of action. The limitation to seek the relief of declaration of title is three years. The suit is filed in the year 2010. The relief of declaration of ownership is barred by law of limitation. Hence, the amendment petition cannot be allowed.

5. At the hearing, learned counsel for both

the sides made submissions in line with the respective pleaded cases of the parties.

5.1 Learned counsel for the 2nd defendant contended as follows: 'The 2nd defendant is in possession and enjoyment of the subject property since 26.09.1992 and hence, the relief of declaration of ownership, which the plaintiff wants to seek by way of proposed amendment, is barred by limitation. Hence, the application seeking amendment of the plaint is untenable and not maintainable. The Court below having noted the delay in filing the application for amendment and laches on the part of the plaintiff in seeking the amendment ought not to have allowed the application of the plaintiff. The Court below failed to note that the proposed amendment, if permitted, changes the nature of the suit. Hence, the revision may be allowed by setting aside the order impugned in this revision.

5.2 The learned counsel for the plaintiff supported the orders of the Court below inter alia stating that the order impugned is justified under facts and in law.

6. I have given earnest consideration to the facts and submissions.

7. At the outset, it is necessary to refer to the proposed amendments being sought for by the plaintiff. They read as under:

> "1) Add in para-C of the plaint: "The plaintiff recently came to know that the 2nd defendant ploughed the plaint schedule property and the plaintiff lost possession over the same.
>
> 2) add in the 5th line of last para of the particulars of the plaint "and to declare that the plaintiff is the owner of the plaint schedule property."
>
> 3) add in the 6th line of the Cause of Action para "and when the 2nd defendant plough the plaint schedule property,
>
> 4) add after 4th para as 5th para in the Valuation portion: "The plaintiff values the relief of declaration pertaining to the Plaint Schedule Property the value of the same is Rs.1,74,300/- - 3/4th of the same is valued at Rs.1,30,950/- over which a court fee of Rs.3,826/- is paid under Section 24(b) of A.P.S.V & C.F. Act."
>
> In lieu of the court fee stamps the plaintiff deposited the amount of Rs.3,826/- in the Andhra Bank, Gavinvaripalem Branch, Chirala S.B.A/c No.18813 and the counterfoil is herewith filed."
>
> 5) add in the fifth line of para-a of the Relief portion as "and to declare the plaintiff is the owner of the plaint schedule property and consequential vacant possession of the said land from the defendants directing them to handover possession of the land to the plaintiff within stipulated time, failing which the same may be done through process of law, by fixing the boundaries with the help of qualified surveyor."
> [Reproduced verbatim]

8. Since by way of the proposed amendment, the plaintiff intends to claim the relief of declaration of ownership/title in addition to the relief of cancellation of a registered sale deed, the first aspect to be dealt with is as to 'whether such an amendment of plaint as sought for can be permitted?'. In Pankaja v. Yellappa (2004 (6) SCC 415), the Supreme Court while holding that though the plaint is initially filed for permanent injunction there is no bar for permitting the amendment of the plaint to seek the relief of declaration of title in respect of plaint schedule property, had set aside the order of the trial Court rejecting the application seeking amendment as confirmed by the High Court and had permitted the amendment, holding inter alia that the question – 'whether or not the suit seeking the relief of declaration is barred by limitation' can be gone into in the main suit. Following the same analogy it can safely be held that the plaintiff's request for the amendment of the plaint can be granted.

9. The next aspect to be dealt with is as to 'whether such an amendment of plaint as sought for cannot be permitted on the ground of delay?'. Dealing with the aspect of delay in seeking the amendment, it is to be noted that in Sampath Kumar v. Ayyakannu (2002) 7 SCC 559), the facts disclose that the trial Court had rejected the application for amendment of pleadings on the ground of delay and the Madras High Court while dismissing the revision had confirmed the said order of the trial Court; However, the Supreme Court while setting aside the orders of the said two courts and permitting the amendment of the plaint, which was sought for about 11 years from the date of institution of the suit, had held as follows:

In the present case, the amendment is being sought for almost 11 years after the date of the institution of the suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits, it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment.

Therefore, 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.

10. Dealing next with the aspect that the relief of declaration of title now being sought to be introduced by way of the proposed amendment is barred by law of limitation and the submission of the learned counsel for the 2nd defendant that the period of limitation for seeking declaration of title is 3 years as per the provision of the Article 58 of the Indian Limitation Act, what is to be noted is that issue of limitation is blend

of fact and law and is not a pure question of law. This question need not detain this Court for long as in Pankaja v. Yellappa (1 supra), the Supreme Court while holding that though the plaint is initially filed for permanent injunction there is no bar for permitting the amendment of the plaint to seek the relief of declaration of title in respect of plaint schedule property, had set aside the order of the trial Court rejecting the application seeking for amendment as confirmed by the High Court and had permitted the amendment holding inter alia that the question – 'whether or not the suit seeking the relief of declaration is barred by limitation' can be gone into in the main suit. Further, in the decision in M.Chokka Rao v. Sattu Sattamma (2006(1) ALD 16), this Court having exhaustively dealt with provisions of law under the Indian Limitation Act and the relevant precedents had laid down that when the suit is not for a simple declaration but is for a declaration coupled with further relief, the limitation is 12 years but not 3 years and that Article 58 is not applicable to such suits. While the learned counsel for the 2nd defendant pleaded that under Entry 58 of the Schedule to the Limitation Act, the declaration sought for by the 1st respondent/plaintiff in this case ought to have been done within 3 years when the right to sue first accrued, the plaintiff contends that the same does not fall under the said Entry but falls under Entry 64 or 65 of the said Schedule of the Limitation Act, which provides for a limitation of 12 years. Therefore, according to the plaintiff the prayer for declaration of title is not barred by limitation. Be that as it may, as already noted, the issue of limitation will have to be gone into by the trial Court at an appropriate stage in the main suit, it being a mixed question of fact and law. As a result, in the well considered opinion of this Court, on the ground of limitation, the application seeking amendment of the plaint is not liable for rejection as in the case on hand, the trial Court has to consider at an appropriate later stage the aspect whether suit for declaration seeking further relief is governed by Article 58 or Articles 64 and 65 of the Indian Limitation Act.

11. Before proceeding further, it is necessary to note the proviso to Order VI Rule 17 of the Code, which reads as under:

> "Provided that no application for amendment shall be 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."

In the case on hand, issues were framed way back, on 17.08.2012, and the suit is coming up for adduction of evidence. In Usha Devi v. Rijwan Ahamd (2008) 3 Supreme Court Cases 717), a contention was advanced that the trial of the suit would commence with the settlement of the issues; and, in support of the said contention that the framing of issues marked the commencement of the trial of the suit, reliance was placed on the decision in Ajendraprasadji N.Pandey v. Swami Keshavprakeshdasji [(2006) 12 SCC1]. However, while meeting the said contention, the attention of the Supreme Court was invited to the decision of the Supreme Court in Baldev Singh v. Manohar Singh [(2006)6

SCC 498] wherein it was held as follows:

> "Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial Court. That apart, commencement of trial as used in proviso to Order VI Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents; we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order VI Rule 17 CPC which confers wide power and unfettered discretion on the Court to allow an amendment of the written statement at any stage of the proceedings.

Further, the Supreme Court having referred to a three-judge Bench decision in Sajjan Kumar v. Ram Kishan (2005) 13 SCC 89), had held as follows:

> "Having heard the learned Counsel for the parties, we are satisfied that the appeal deserves to be allowed as the trial Court, while rejecting the prayer for amendment has failed to exercise the jurisdiction vested in it by law and by the failure to so exercise it, has occasioned a possible failure of justice. Such an error committed by the trial Court was liable to be corrected by the High Court in exercise of its supervisory jurisdiction, even if Section 115 CPC would not have been strictly applicable. It is true that the Plaintiff-Appellant ought to have been diligent in promptly seeking the amendment in the plaint at an early stage of the suit, more so when the error on the part of the plaintiff was pointed out by the defendant in the written statement itself. Still, we are of the opinion that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of the execution in the event of the plaintiff-appellant succeeding in the suit."

Thus in Usha Devi's case (Supra), the Supreme Court, keeping in view of the decision in Sajjan Kumar (supra), held as follows:

> "We may clarify here that in this order we do not venture to make any pronouncement on the larger issue as to the stage that would mark the

commencement of trial of a suit but we simply find that the appeal in hand is closer on facts to the decision in Sajjan Kumar and following that decision the prayer for amendment in the present appeal should also be allowed."

In the case on hand also, the trial has not yet commenced and the suit is coming for adduction of evidence. Therefore, in the well considered view of this Court, the facts of the present case are akin to the facts of the cases in the decisions in Usha Devi, Baldev Singh and Sajjan Kumar (supra). Therefore, the contention that the application seeking amendment of the plaint is barred under the proviso to Order VI Rule 17 of the Code is devoid of merit and needs no countenance.

12. In REVAJEETU BUILDERS V/s NARAYANA SWAMY (2009) 10 SCC 84), on an analysis of English and Indian case law, the Supreme Court carved out the following principles which should weigh with the Court while dealing with an application for amendment:

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) Whether the application for amendment is bonafide or malafide;

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

The Supreme Court, however, clarified that the above principles were illustrative and not exhaustive. Further, in the decision in Abdul Rehman and Another v. Mohd. Ruldu and Others (2013(1) ALD 1(SC), the Supreme Court, having taken note of the above provision of law had laid down that it is clear that the parties to the suit are permitted to bring forward amendment of the pleadings at any stage of the proceeding for the purpose of determining the real question in controversy between them and that the Courts have to be liberal in accepting the same, if such application for amendment is made prior to the commencement of the trial and that if such application is made after the commencement of the trial, in that event, the Court has to arrive at a conclusion that, inspite of due diligence, the party could not have raised the matter before the commencement of the trial. In the above decision the Supreme Court reiterated the following proposition:

"All amendments which are necessary for the purpose of determining real questions

of controversy between the parties should be allowed if it does not change the basic nature of the suit. A change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties."

In the above decision the Supreme Court further referred to the ratio in the decision in Pankaja and another v. Yellapa (1 supra), which runs as follows:

"If the granting of amendment really sub-serves the ultimate cause of justice and avoids further litigation, the same should be allowed."

13. One of the contentions of the plaintiff is that recently he came to know that the 2nd defendant ploughed the plaint schedule property and thus, he lost possession over the same and that his counsel advised him to seek amendment of the plaint and hence, seeking of the amendment of the plaint was necessitated. Even as per the guidance in the decision of the Supreme Court an amendment can be permitted if it is intended to determine the real question in controversy and that all amendments, which are necessary for the purpose of determining real questions of controversy between the parties, shall be allowed if such amendments sought for do not change the basic nature of the suit. A change in the nature of relief claimed shall not be considered as a change in the nature of the suit. The power of amendment should be exercised in the larger interests of doing full and complete justice between the parties and that all amendments, which are necessary for the purpose of determining the real question in controversy, should be allowed. Further, if the granting of amendment really sub-serves the ultimate cause of justice and avoids further litigation, the same should be allowed. The Court has also to consider whether the proposed amendment is intended to determine the real dispute between the parties. The law is well settled that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Further, as the refusal of the request seeking amendment does not preclude the plaintiff from instituting a fresh suit, the refusal of the request leads to multiplicity of the litigation. In the well-considered view of this Court, if the amendment is permitted, though sought belatedly also helps in avoiding the multiplicity of the proceedings and in setting at rest the dispute between the parties. Be it noted that the law is well settled that the merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment. Therefore, for all the aforesaid reasons, granting of amendment of the plaint really sub-serves the ultimate cause of justice and avoids further litigation and therefore, the amendment sought for by the plaintiffs deserves to be allowed.

14. Viewed thus, this Court finds that the order of the trial Court is sustainable both under facts and in law. On a careful consideration of the facts, submissions and the legal position obtaining, this Court is

satisfied that the Trial Court is justified in allowing the amendment of the plaint and that therefore, the impugned order brooks no interference.

15. In the result, the Civil Revision Petition is dismissed.

There shall be no order as to costs.

Pending miscellaneous petitions, if any, in this revision shall stand closed.

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2018(1) L.S. 183

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

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

Yeluru Ramakrishna ..Petitioner
Vs.
Yeluru Venkateswarlu & Ors. ..Respondents

CIVIL PROCEDURE CODE, Or.I Rule 9 & Sec.100 – A.P (TELANGANA AREA) TENANCY & AGRICULTURAL LANDS ACT, 1950, Sec.38-E – Suit for partition – Non-disclosure of factum of plaintiff having a sister - Aggrieved by Judgment and Decree passed by Trial Court and First Appellate Court, instant Second Appeal.

Held – A suit for partition is not maintainable without impleading all the members of joint family - Though provisions of Order I Rule 9 say that no suit shall be defeated by reason of misjoinder or non-joinder of parties but proviso makes it clear that if necessary party is not impleaded in a suit or an appeal, it will have to be dismissed on that ground – During pendency of final decree, if one of the parties to preliminary decree dies, his legal representatives have to be brought on record – Shares allotted to parties in preliminary decree, as per their entitlement, may vary in final decree by operation of law – Second appeal is dismissed.

M.M.R.K.Chakravarthy, representing M.V.Durga Prasad, Advocate for the Petitioner.
M.Rajamalla Reddy, Advocate for the Respondents.

J U D G M E N T

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

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

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

4. Yeluru Seshaiah and Yeluru Appaiah who are brothers by full blood, owned agricultural land in Gundrathimaduvu village of Khammam Taluq and district and the said land was submerged under Wyra reservoir. The first defendant and one Ramaiah are the sons of Yeluru Seshaiah. Second defendant is elder son and third defendant is the younger son of the first defendant. The plaintiff is the son of second defendant. The plaintiff and defendant Nos.1 to 3 are members of Hindu Mithakshara co-parcenery joint family. At the time of marriage of the first defendant with one Ramulamma, his father-in-law Katta Lakshmi Narsaiah presented Rs.116/- and one cow and one calf to the first defendant. Appaiah the paternal uncle of the first defendant also presented Rs.116/- and one cow and one calf to the first defendant at the time of marriage. The first defendant also got compensation in respect of the land submerged in Wyra reservoir. Ramulamma-the first wife of the first defendant died after she gave birth to the second defendant. The first defendant married one Hanumayamma (defendant No.4), who is the own sister of Ramulamma through whom the first defendant begot one son i.e., defendant No.3 and three daughters (defendant Nos.5 to 7). First defendant is the Kartha of the joint family and he used to manage the entire joint family properties. Second defendant under the guidance of the first defendant performed the marriages of his sisters and brother. First defendant, with the amounts gifted to him at the time of marriage and the amount received towards compensation for the land acquired for Wyra reservoir, has purchased Item No.1 of the suit schedule property admeasuring Ac.9.34 guntas (Wet land of Ac.3.00 and dry land of Ac.6.34 guntas) from its pattedar Nawab Ahmad Jung Bahadur on 01.11.1955. First defendant was the tenant of the said Nawab prior to the purchase of the Item No.1 of the suit schedule property. Item Nos.2 to 5 of the suit schedule property were purchased by the first defendant with the income derived from Item No.1 of the suit schedule property. Second defendant, being a Government employee, worked at different places. First defendant had become a pawn at the hands of his wife Hanumayamma (defendant No.4). The acts of defendant Nos.1 to 3, at the instance of Hanumayamma, are causing detriment to the interest of the plaintiff. The plaintiff had placed the matter before elders in the month of July 1991, but the defendants have paid deaf ear to the advice of the elders. Hence the plaintiff, having no other alternative, filed the suit for partition of the suit schedule properties into six equal shares and allot one such share to him and also for future mesne profits.

5. First defendant filed written statement admitting the inter-se relationship between the parties, inter alia contending that he had not inherited any property from his ancestors so as to constitute any nucleus for the unfounded joint family of the plaintiff and defendants. Yeluru Appaiah was not having any agricultural land. If at all any gifts were given to the first defendant, they do not constitute the joint family property. First defendant and his brother-Ramaiah

had cultivated an extent of Ac.20.00 of land, which belongs to Nawab of that area. First defendant and his brother-Ramaiah were declared as protected tenants and ownership certificates were given to that effect under Section 38-E of The A.P. (Telangana Area) Tenancy & Agricultural Lands Act, 1950 (for short, 'the Act'). Out of Acs.20.00, Acs.10.00 of land got by this defendant and the remaining Acs.10.00 of land was allotted to Ramaiah. Therefore, item No.1 of the suit schedule is the self-acquired property of this defendant. This defendant purchased other items of property with his own money. He gave Acs.3.00 of land to his daughters (defendant Nos.5 to 7) towards pasupu-kunkuma. This defendant bequeathed an extent of Ac.6.30 guntas of dry land in Item No.1 in favour of his second son Yeluru Narasimha Rao i.e., third defendant through a Will. Item No.2 of the suit schedule property was sold by his wife-Hanumayamma (defendant No.4) in favour of wife of Pothu Satyanarayana. First defendant sold an extent of Ac.1.00 in Item No.3 of the suit schedule property to one Pola Rama Sundari, W/o.Mohana Rao in the year 1983. First defendant also sold an extent of Ac.1.00 in favour of Sanka Jagan Mohan Rao, Ac.0.45 guntas in favour of Nerella Satyanarayana, Ac.0.22 guntas in favour of Patipalli Nagaraja Kumari and thus he sold Acs.2.67 guntas in Item No.3 in favour of the aforesaid persons. An extent of Ac.0.20 guntas was acquired for formation of Nagarjuna Sagar Canal. He sold Ac.3.00 in favour of one Saraswathi-wife of third defendant. He gave Acs.2.00 to seventh defendant towards her pasupu kunkuma. So, the first defendant is not having any extent in item No.3 of the suit schedule property. He constructed a tiled house in item No.4 and hence it is his exclusive property. Second defendant purchased house bearing D.No.12-47 in Madhira and house plots at Khammam. Second defendant also owned an extent of Ac.2.00 of land in Warangal, which was converted into house sites. The plaintiff, in collusion with the second defendant, filed the present suit. Any property acquired with the income derived from item No.1 would become the self acquired property of this defendant and so the plaintiff is not entitled for any share in the suit schedule properties. Hence the suit is liable to be dismissed. During the pendency of the suit, first defendant died and his wife and three daughters were brought on record as defendant Nos.4 to 7.

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

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

ISSUES

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

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

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

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

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

6. To what relief?

ADDITIONAL ISSUES DT:05.08.1992

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

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

ADDITIONAL ISSUES DT:03.11.1998

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

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

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

4. Whether Item No.2 of the suit schedule property is the property of Eluri Hanumayamma and whether it was sold by her in favour of wife of Potu Satyanarayana as contended?

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

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

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

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

10. Feeling aggrieved by the judgment and decree dated 05.07.2000 passed by the trial Court in O.S.No.129 of 1991, the plaintiff preferred A.S.No.45 of 2002 on the file of the Court of the III Additional District Judge (FTC-II), at Khammam. The first appellate Court, after reappraising the oral and documentary evidence available on record

and without being influenced by the findings recorded by the trial Court, arrived at a conclusion that the suit schedule properties are self acquired properties of the first defendant; thus the plaintiff is not entitled to partition of the suit schedule properties and accordingly dismissed the appeal. The first appellate court also believed Ex.B.1-Will and Ex.B.3 Gift deed. Hence the present second appeal by the unsuccessful plaintiff.

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

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

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

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

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

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

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

15. Refuting the submissions made by the learned counsel for the plaintiff, the learned counsel for the defendants submitted that the plaintiff failed to prove that Item No.1 of the suit schedule property was purchased by the first defendant with joint family income and that aspect was considered by

the courts below in right perspective and hence there is no question of law much less substantial question of law to interfere with concurrent findings of fact recorded by the courts below.

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

17. Yeluru Seshaiah and Appaiah, father and the paternal uncle of the first defendant, owned agricultural land admeasuring Ac.10.00 in Gundrathimaduvu village of Khammam Taluq as per Ex.A.1 for the fasli 1951-52. It is an admitted fact that the said land was acquired by the Government for the purpose of Wyra reservoir. There is no specific pleading in the plaint whether the said land was acquired by the Government during the lifetime of the father of the first defendant or not. Except a bald averment in the plaint, no convincing evidence was produced before the trial Court in which year the above said land was acquired by the Government and to whom the compensation was paid viz., either to the first defendant or to his father. Except the self-serving testimony of P.W.1, there is no other evidence, much less cogent and convincing evidence to establish that the first defendant received the compensation from the Government. By the time of alleged payment of compensation by the Government to the first defendant, the father of the plaintiff was also not born. In such circumstances, how the plaintiff got the above information is not properly explained. Second defendant is the competent person, when compared to the plaintiff, to speak about all these things. For the reasons best known to him, second defendant did not choose to file written statement or enter into the witness box either to substantiate or negate the stand of the plaintiff. In view of the same, the testimony of P.W.1 cannot be taken into consideration.

18. The plaintiff has taken a specific plea in the plaint that at the time of the marriage, the kith and kin of the first defendant presented gifts in the shape of cash and live stock and whatever the gifts received

by the first defendant at the time of his marriage became the joint family property and that any property purchased by the first defendant with the said amount would automatically become the joint family property.

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

20. The learned counsel for the plaintiff submitted that in view of fluid situation, the Court can presume that the first defendant might have received the compensation and purchased Item No.1 of the suit schedule property. As observed earlier, the burden of proof always lies on the plaintiff to establish the specific stand taken by him. Granting of relief in favour of plaintiff, basing on presumptions and assumptions, without any basis, is not recognized by law. Even if the Court records a finding basing on presumptions and assumptions, such finding is not legally sustainable. The Court can draw an inference or make a presumption basing on facts pleaded and proved. In the absence of pleading and proof thereof, the court on its own motion cannot draw an inference or make a presumption. Therefore, I am very much afraid to accept the submission made by the learned counsel for the plaintiff.

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

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

observations at Para Nos.29 and 36 as follows:

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

36. For all the aforesaid reasons we hold on point No.1 that for the vesting of the ownership of land 'held' by a protected tenant under S. 38E(1), it is not necessary that the protected tenant should have been in physical possession on the date of notification. It is sufficient if be continued to hold the status of a 'protected tenant' as on the notified date even if not in physical possession and he satisfied the requirements of S.32(7) of the Act. This is also subject to the proviso to Section 38-E(1).

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

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

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

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

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

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

39. The aforementioned cases indicate that in general tenancies are to be regulated by the governing legislation, which favour that tenancy be transferred only to family members of the deceased original tenant.

However, in light of the majority decision of the Constitution Bench in Gian Devi Anand v. Jeevan Kumar, (1985) 2 SCC 683, the position which emerges is that in absence of any specific provisions, general laws of succession to apply, this position is further cemented by the decision of this Court in State of West Bengal v. Kailash Chandra Kapur (1997) 2 SCC 387, which has allowed the disposal of tenancy rights of Government owned land in favour of a stranger by means of a Will in the absence of any specific clause or provisions.

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

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

15. It is evident from the above that the right of partition was held to have been lost by operation of law. Till such time the grant was made no such right could be recognized observed this Court. This Court specifically held that it was not concerned with the consequences that would ensue after grant is made. The suit in the present case was filed after the grant of occupancy rights. The question here is whether the grant of such rights is for the benefit of one of the members of the joint family or for all the heirs left behind by Ramachandra Reddy. Our answer to that question is in favour of the Appellants. In our opinion, the grant of such occupancy rights in favour of Respondent No. 1 was for the benefit of all the legal heirs left behind by Ramachandra Reddy. Reliance upon Lokraj v. Kishan Lal, (1995) 3 SCC 291, therefore, is of no assistance to the respondents. We are also of the view that the decision in Lokraj's case (supra), does not correctly apply the earlier decision of this Court in Bhubaneshwar Prasad Narain Singh v. Sidheswar Mukherjee, (1971) 1 SCC 556. With utmost respect to the Hon'ble Judges who delivered the decision in Lokraj's case, the law was not correctly laid down, if the same was meant to say that even in the absence of a plea of ouster, a co-heir could merely on the basis of grant of the occupancy rights in his name exclude the other co-heirs from partition of the property so granted.

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

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

28. The learned counsel for the defendants

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

12. In view of the above settled legal position, the question is: whether the bequest made by Mullick in 'favour of the respondent is valid in law and whether the Governor is bound to recognise him? It is seen that Clauses (7), (8) and (12) are independent and each deals with separate situation. Clause (7) prohibits sub-lease of the demised land or the building erected thereon without prior consent in writing of the Government. Similarly, Clause (8) deals with transfer of the demised premises or the building erected thereon without prior permission in writing of the Government. Thereunder, the restricted covenants have been incorporated by granting or refusing to grant permission with right of pre-emption. Similarly, Clause (12) deals with the case of lessee dying after executing a Will. Thereunder, there is no such restrictive covenant contained for bequeath in favour of a stranger. The word 'person' has not been expressly specified whether it relates to the heirs of the lessee. On the other hand, it postulates that if the bequest is in favour of more than one person, then such persons to whom the leasehold right has been bequeathed or the heirs of the deceased lessee, as the case may be, shall hold the said property jointly without having any right to have a partition of the same and one among them should alone be answerable to and the Government would recognise only one such person. In the light of the language used therein, it is difficult to accept the contention of Shri V.R. Reddy; that the word 'person' should be construed with reference to the heirs or bequest should be considered to be a transfer. Transfer connotes, normally, between two living persons during life; will takes effect after demise of the testator and transfer in that perspective becomes incongruous. Though, as indicated earlier, the assignment may be prohibited and Government intended to be so, a bequest in favour of a stranger by way of testamentary disposition does not appear to be intended, in view of the permissive language used in Clause (12) of the covenants. We find no express prohibition as at present under the terms of the lease. Unless the Government amends the rules or imposes appropriate restrictive covenants prohibiting the bequest in favour of the strangers or by enacting appropriate law. There would be no statutory power to impose such restriction prohibiting such bequest in favour of the strangers. It is seen that the object of assignment of the Government land in favour of the lessee is to provide him right to residence. If any such transfer is made contrary to the policy, obviously, it would be defeating the public purpose. But it would be open to the Government to regulate by appropriate covenants in the lease deed or appropriate statutory orders as per law or to make a law in this behalf. But so long as that is not done and in the light of the permissive language used in Clause (12) of the lease deed, it cannot be said that the bequest in favour of strangers inducting a stranger into the demised premises or the building erected thereon is not governed by the provisions of the regulation or that prior permission should be required in that behalf.

However, the stranger legatee should be bound by all the covenants or any new covenants or statutory base so as to bind all the existing lessees.

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

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

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

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

5. Issue of Certificate: (1) After the declaration of the final list under sub-rule (3) of Rule 4, the Tribunal shall issue a certificate under sub-section (2) of Section 38-E in Form II

to every protected tenant included in the final list, declaring him to be the owner of the land specified against him in the final list and shall cause the necessary entries to be made in the relevant or other revenue accounts of the village.

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

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

34. The learned counsel for the plaintiff has placed much reliance on N. Padmammacase (3 supra). That case was decided under the provisions of Inam Abolition Act. In the said case, grant was given in favour of one of the family members after the demise of the original inamdar. Inam land cannot be equated with that of the tenancy land. Both lands are governed by different enactments. Moreover, in the instant case, ownership certificate was issued in favour of the first defendant during his lifetime that too after conducting due enquiry. It is not the case of the plaintiff that issuance of ownership certificate under Section 38E of the Act, in the name of the protected tenant, is not only for the benefit of himself but also for the benefit of his joint family members. Hence the ratio laid down in that case is not applicable to the facts of the case on hand.

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

36. The learned counsel for the plaintiff

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

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

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

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

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

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

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

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

40. Defendant Nos.3 and 7 who were examined as D.Ws.1 and 5 categorically deposed that the first defendant executed Ex.B.1 Will bequeathing part of the suit schedule properties in favour of the defendant No.4. As seen from the testimony of D.W.4, he along with one Katta Gopaiah are the attestors of the Will. As per his testimony, the first defendant executed Ex.B.1 bequeathing Acs.6.00 and odd of dry land in favour of the third defendant and the house situated at Wyra in favour of fourth defendant. His testimony further reveals that the first defendant got prepared the Will at the Sub-Registrar Office at Khammam and that he (D.W4) attested the Will in the Sub-Registrar Office in the presence of the first defendant. The testimony of D.W.4 remains unchallenged so far as the execution of Ex.B.1 Will by the first defendant in his presence at the Sub-Registrar Office, Khammam. Ex.B.1 Will was executed on 06.01.1992, whereas the first defendant died during the pendency of the suit. Nothing is elicited in the cross-examination of D.Ws.1, 2 and 4 that the first defendant was not in a sound and disposing state of mind at the time of execution of the Will. The defendants have dispelled the suspicious circumstances surrounding the execution of the Will by the first defendant. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am fully endorsing the concurrent findings of fact recorded by the courts below with regard to the validity of Ex.B.1 Will.

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

> 68. Proof of execution of document required by law to be attested:-
>
> … …
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

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

> 26. From a conspectus of the cases cited at the bar, the principle that emerges is, that if at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could be prima facie satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction, though apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself, Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties On the other hand evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.

Section 70 of the Evidence Act reads as under:

> 70. Admission of execution by party to attested document:-
>
> The admission of a party to an attested

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

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

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

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

46. This Court has already given a specific finding supra, that the suit schedule properties are the self acquired properties of the first defendant. In that view of the matter, none of the legal heirs of the first defendant is entitled to file a suit against him during his lifetime seeking partition of the suit schedule property. When the second defendant himself has no right whatsoever to file suit seeking partition of the suit schedule properties, how the plaintiff, who is the son of the second defendant, is entitled to file the suit is a debatable question. Admittedly, the plaintiff will not fall within the ambit of Class-I heirs as contemplated under Hindu Succession Act. A son or a daughter of a predeceased son or daughter being Class-I heir can seek partition of the joint family properties. The plaintiff is not entitled to file the suit as Class I heir, so long as the second defendant is alive. Of course, cause of action consist bundle of facts and basing on one of such facts, a party is entitled to file the suit. In the instant case, the plaintiff filed the suit as if the first defendant purchased the suit schedule properties with the joint family nucleus. The stand taken by the plaintiff so far as the joint family nucleus is without any basis and hence falls to ground. If viewed from this angle, maintainability of the suit is very much doubtful.

47. Another interesting aspect is, the plaintiff is not entitled to challenge the validity of Ex.B.1 Will so long as the first defendant is alive. As observed earlier, the plaintiff filed the suit during the lifetime of the first defendant. Strictly speaking, no cause of action accrued in favour of the plaintiff to challenge the validity of Ex.B.1 as on the

date of filing of the suit. Merely because the first defendant died during the pendency of the suit, that itself, will not automatically cure the defect of non-accruing of cause of action in favour of the plaintiff as on the date of filing of the suit. Viewed from this angle also, the plaintiff filed the suit without any cause of action as well as semblance of legal right. Accruing of cause of action in favour of a person is sine qua non to approach the civil court for redressal by filing appropriate suit. It is needless to say that any suit filed without cause of action is nothing but a futile attempt of claiming imaginary relief. This is a classic example of one such case.

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

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

22. While the stand of the plaintiff before the trial Court was that it was not necessary, as the sisters were already married and given sufficient share at the time of marriage, in this appeal the appellant has filed an application CMP No.2141 of 2005 to implead the sisters as parties. In view of the stand of the plaintiff that no share need to go to them and in spite of pointing out that their presence is necessary in the suit, the plaintiff has chosen not to implead them. The defect of non-joinder of necessary parties being fatal, the same cannot be cured by impleading them in appeal. The trial Court, therefore, rightly held that the suit is liable to be dismissed on the ground of non-joinder of necessary parties. I see no reason to take a different view.

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

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

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

50. The findings recorded by the trial Court are based on sound reasoning and logical conclusion and they are supported by evidence, more so, legally admissible evidence. The first appellate Court has not committed any error while endorsing the findings recorded by the trial Court. This Court shall not lightly interfere with the concurrent findings of fact recorded by the courts below. Suffice it to say that the first appellate court is the fact finding final Court. All the questions rained by the learned counsel for the plaintiff are purely questions of fact, which cannot be gone into by this Court, while exercising jurisdiction under Section 100 CPC.

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

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

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

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

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

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2018(1) L.S. 200 (D.B.)

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

Present:
The Hon'ble Mr. Justice V.Ramasubramanian &
The Hon'ble Mr. Justice N. Balayogi

Tallam Suresh Babu ..Petitioner

Vs.

T.Swetha Rani ..Respondents

HINDU MARRIAGE ACT, 1955 Sec.12 - Aggrieved by dismissal of petition for annulment of marriage and grant of a decree for restitution of conjugal rights at instance of his Wife/ Respondent, Husband/Petitioner has come with present appeal – Appellant contended that respondent did not allow him to have conjugal relationship and when he took her for treatment she was found to be suffering from schizoform illness which makes her unfit for sexual relationship.

Held – Appellant failed to establish any of grounds mentioned in Section 12 of Hindu Marriage Act, to enable him to get a decree of annulment of marriage and therefore decree for restitution of conjugal rights is also confirmed – Husband's appeal stands dismissed.

Mr.Y.V.N. Narayana Rao, Advocate for the Petitioner.

F.C.A.Nos.105/2014&134/15 Dt.24.1.2018

Mr.P.Veera Reddy, Senior Counsel representing Karri Murali Krishna, Advocate for the Respondents.

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

(Per the Hon'ble Mr.Justice V. Ramasubramanian, J.)

1. Aggrieved by the dismissal of his own petition for annulment of marriage and the grant of a decree for restitution of conjugal rights at the instance of his wife, the husband has come up with the above appeals.

2. We have heard Mr. Y.V.N. Narayana Rao, learned counsel appearing for the appellant (husband) in both the appeals and Mr. P.Veera Reddy, learned Senior Counsel appearing for the respondent (wife).

3. The marriage of the petitioner and the respondent was solemnized on 31-01-2007 according to Hindu customary rites. Within 18 months of the solemnisation of the marriage, the appellant/husband filed a petition in O.P.No.95 of 2008 seeking annulment of the marriage on the ground that the respondent/wife did not allow him to have conjugal relationship and that when he took her for treatment, she was found to be suffering from Schizoform illness and that the enquiries revealed that the respondent/wife had been taking treatment for schizoid, making her unfit for sexual relationship and that the suppression of the same tantamounted to fraud, making the marriage liable to be annulled under Section 12 of the Hindu Marriage Act, 1955.

4. The respondent/wife resisted the petition for annulment on the ground that the families of the appellant and the respondent were known to each other for more than 50 years; that they were also related on the maternal side of the appellant; that right from the childhood, both families had decided to have them married; that the respondent even stayed in the house of the appellant when she was studying Intermediate; that after the death of the appellants father, the mother and brother of the appellant started looking for an alliance elsewhere, which resulted in some sort of a depression for the respondent; that in that connection, the respondent was taken to Apollo Hospitals, Chennai, for treatment; that some time later, the attitude of the brother and mother of the appellant changed and they came forward to perform the marriage; that the betrothal took place in May, 2006 and the marriage was solemnized on 31-01-2007; that during this interregnum of about 7 to 8 months, the appellant used to talk to the respondent regularly on phone and they also used to attend parties and functions; that after marriage, the appellant was not interested in regular sexual relationship, but was interested only in oral sex; that the behaviour of the appellant again created disturbances in the mind of the respondent and hence her parents took both of them to a Neuro Psychiatrist by name Dr. Seshadri Harihar on 06-12-2007 and 07-12-2007 for consultation; that the appellant and the respondent were subjected to clinical examination by one Dr. Sabiha Sultana and they were also advised to consult a Sexologist; that the appellant refused to have any consultation; that the abnormal behaviour of the appellant resulted in the revival of her Schizoform illness; that Schizoform illness is a curable disease and

hence it cannot be a ground for annulment of marriage.

5. Before the Family Court, the appellant examined himself as P.W.1. He examined his elder brother as P.W.2, his paternal uncle as P.W.3 and a Psychiatrist working as Assistant Professor in Kurnool Medical College as P.W.4. The Wedding Card and Wedding photographs were marked on the side of the appellant as Exs.A-1 and A-2. The treatment record of the respondent issued by Apollo Hospitals, Chennai, was filed as Ex.A-3. The Neuro Psychological Report, dated 07-12-2007, of the respondent was filed as Ex.A-4. The Death Certificate of the appellants father was filed as Ex.A-5.

6. On the side of the respondent, she was examined as R.W.1, her father was examined as R.W.2 and a Psychiatrist from Channai by name Dr. S.Nambi was examined as R.W.3. 15 documents were marked on the side of the respondent. Ex.B-1 was a prescription given by Dr. Seshadri Harihar on 01-4-2006. Two referral letters issued by Dr. Seshadri Harihar on 06-12-2007, one addressed to Dr. Sabiha Sultana and another addressed to Dr. Reddy were filed as Exs.B-2 and B-3. The Neuro Psychological reports issued by Dr. Sabiha Sultana in respect of the appellant and the respondent were marked as Exs.B-4 to B-6. The call data relating to the mobile phone number of the respondent for the month of November, 2006 was filed as Ex.B-7. The photographs taken in the house of the appellant, on the occasion of a birthday party when the respondent was a student of Intermediate, were filed as Ex.B-14. Another set of photographs taken at the time of marriage of one Veena Kumari were filed as Ex.B-15.

7. The Certificate issued by Dr. S.Nambi (R.W.3) on 08-6-2009 was taken on record as Ex.X-1. The Discharge Summary issued by St. Isabels Hospital on 08-6-2009, was taken on record as Ex.X-2. The investigation record was filed as Ex.X-3.

8. On the basis of the pleadings and the oral and documentary evidence, the Family Court came to the conclusion that the families of the appellant and the respondent were known to each other very closely for a long time and that there were even money transactions between the families and that therefore it cannot be said that the ill health of the respondent was not known to the appellant. On the basis of Ex.A-4, the Family Court also came to the conclusion that though the respondent was treated for depression at Apollo Hospitals, Chennai, in March, 2004, she became better by November, 2004 and that there was development in the health of the respondent within a month as per Ex.A-4. Hence, the Family Court concluded that the ailment suffered by the respondent cannot be said to be incurable.

9. The Family Court held that the appellant ought to have had knowledge about the mental health of the respondent even before marriage, as otherwise he could not have taken her to the very same hospital for treatment after marriage.

10. On the evidence of P.W.4, the Family Court concluded that P.W.4 had prior

acquaintance with the appellant and that the failure of the appellant to take steps to examine the doctor who treated the respondent was fatal to his case.

11. After rejecting the evidence of P.W.4, the Family Court analysed the evidence tendered by R.W.3 and the documents produced by him Exs.X-1 to X-3 and came to the conclusion that there was no mental illness as on 08-6-2009. The Family Court also concluded that even the appellant exhibited abnormal behaviour as per Ex.B-4.

12. Ultimately, placing reliance upon the decision of a Division Bench of this Court in Dr. Kollam Padma Latha v. Dr. Kollam Chandra Sekhar (2007 (1) ALT 177), the Family Court concluded that Schizophrenia has to be put on par with diseases like hypertension and diabetes and that therefore it cannot be taken to be incurable so as to enable the appellant to seek annulment of the marriage. The non-examination of Dr. Seshadri Harihar and Dr. Sabiha Sultana was also put against the appellant and the Family Court dismissed the petition for annulment.

13. After the dismissal of the petition for annulment of marriage, the respondent/wife filed F.C.O.P.No.41 of 2012 for restitution of conjugal rights. The said petition was allowed by the Family Court by a judgment dated 13-4-2014.

14. As against the dismissal of his petition for annulment, the husband filed F.C.A.No.105 of 2014. As against the order for restitution of conjugal rights, the husband has come up with the other appeal F.C.A.No.134 of 2015.

15. We think that a decision on the appeal arising out of the petition for annulment of marriage, would naturally decide the fate of the appeal arising out of the petition for restitution of conjugal rights. Therefore, we shall take up F.C.A.No.105 of 2014 for consideration first. As we have indicated earlier, the appellant sought annulment of marriage on the sole ground that the respondent had been suffering from schizoid for about three years prior to the marriage and that by playing fraud upon the appellant and his family, the parents of the respondent got her married to him. The petition filed by the appellant in O.P.No.95 of 2008 contained certain averments, which formed the foundation for him to seek annulment. These averments, in brief, were:

(i) that after marriage, the respondent never allowed the appellant to have sexual intercourse;

(ii) that she was not even able to cook food and kept herself inside the bedroom by bolting the door;

(iii) that suspecting her behaviour, the appellant took her to Apollo Hospitals, Chennai and got her examined by a Neuro Psychiatrist by name Dr. Seshadri Harihar;

(iv) that it was at that time that the appellant came to know that the respondent was taking treatment for schizoid from March, 2004; and

(v) that since the disease is incurable and it was suppressed at the time of marriage, the appellant was forced to seek annulment.

16. Therefore, the appellant will have to stand or fall only on the strength of the above averments. Hence, it is necessary for us to see, both in terms of the art of law and the science of medicine, as to whether an annulment of marriage could be granted on the above pleadings.

17. Under Section 12(1) of the Hindu Marriage Act, 1955, the annulment of marriage can be sought only on any of the following grounds viz.,

(i) the non-consummation of the marriage owing to the impotence of the respondent,

(ii) the contravention of any of the conditions specified in Section 5(ii) of the Act,

(iii) the consent for the marriage was vitiated by force or fraud and

(iv) the pregnancy of the respondent through some other person at the time of marriage.

18. There is complete lack of clarity in the petition filed by the appellant in O.P.No.95 of 2008 as to the specific provision under which he was seeking annulment of the marriage. In paragraph-5 of the petition, the appellant claimed that the respondents parents suppressed the treatment taken by the respondent in March, 2004 for Schizoid and that the same tantamounted to a fraud upon the appellant. This averment was followed by yet another averment to the effect that the respondent was not fit for sexual intercourse on account of Schizoid and that the same tantamounted to impotence of the respondent. These averments were followed by another averment to the effect that the disease suffered by the respondent is incurable.

19. Therefore, the appellant was not sure as to whether his case would fall under Clause (a) or Clause (b) or Clause (c) of sub-section (1) of Section 12. Section 12(1) reads as follows:

> "12. Voidable marriages. (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely: (a) that the marriage has not been consummated owing to the impotence of the respondent; or (b) that the marriage is in contravention of the condition specified in Clause (ii) of Section 5; or (c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978), the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner."

20. Certainly the case of the appellant would not come within Clause (d) of sub-section (1) of Section 12. Unfortunately for the appellant, his case would not also fall under Clause (a), since the entire evidence, oral and documentary was focussed only on the mental health condition of the respondent and the non-consummation of the marriage. There was no attempt to prove that the non-consummation of the marriage was due to the impotence of the respondent. There is no proof, oral or documentary, to establish the impotence of the respondent. Therefore, the case of the appellant would not fall under Clause (a).

21. To make the case fall under Clause (c), the appellant had to prove that his consent for the marriage was obtained by force or by fraud. This is not a case where the appellant pleads that his consent was obtained by force. At the most the case may fall only under the category of fraud.

22. But the fraud pleaded by the appellant so as to make the case come under Clause (c), should be either as to the nature of the ceremony or as to any material fact or the circumstance concerning the respondent.

23. If a case is sought to be brought within the parameters of Clause (c), then the person attempting to do so, should also satisfy the conditions prescribed in Clause (a) of sub-section (2) of Section 12. This is why the appellant pleads that the fraud was discovered in December, 2007 and that within one year, he presented the petition for annulment of marriage in June, 2008.

24. The claim of the appellant that he discovered the fraud as to a material fact or as to a circumstance concerning the respondent only in December 2007, after 11 months of marriage, is belied by circumstances. In paragraph-4 of his petition, the appellant claimed that he took the respondent to Apollo Hospitals, Chennai and got her examined by a Neuro Psychiatrist by name Dr. Seshadri Harihar and that it was only then that he came to know about the ailment suffered by the respondent. This averment was reiterated by the appellant in paragraph-3 of the Affidavit filed in lieu of chief- examination as P.W.1.

25. Even according to the appellant, the respondent took treatment for schizoid from the very same Neuro Psychiatrist viz., Dr. Seshadri Harihar at Apollo Hospitals, Chennai. Therefore, the decision of the appellant to take the respondent in December, 2007 to the very same Neuro Psychiatrist at the very same hospital, cannot be by mere coincidence. Considering the fact that the families of the appellant and the respondent were known to each other for decades and that they were also related to each other, the claim that the discovery took place only in December, 2007 is completely unbelievable. As rightly pointed out by the Court below, the appellant completely denied the friendship/ relationship between the two families, even in the Affidavit filed in lieu of chief-examination. But in the course of cross- examination, the close connections between the two families were elicited from the appellant as P.W.1. Therefore, the appellants claim that he discovered the past history of the respondent only in December

2007, has to be taken with a pinch of salt, as he had completely denied even the relationship and friendship between the families for a long time.

26. As seen from Section 12(1)(c), the fraud that vitiated the consent of the petitioner to the marriage, should be in connection with the nature of the ceremony or as to any material fact or circumstance concerning the respondent. Even if we go by the pleadings and evidence let in by the appellant, a solitary instance of the respondent taking treatment in March, 2004 from Dr. Seshadri Harihar of Apollo Hospitals, Chennai, may not be a material fact or circumstance concerning the respondent, so as to assume the character of fraud that could vitiate the consent of the appellant.

27. The material fact or circumstance concerning the respondent, the suppression of which could tantamount to a fraud in terms of Section 12(1)(c) should be of such a nature that the respondent thought fit to suppress the same from the petitioner, lest it may affect his consent. One solitary instance of a treatment in March, 2004 cannot assume such a proportion. Moreover, the respondent filed Ex.B-1 Certificate dated 01-4-2006 issued by Dr. Seshadri Harihar of Apollo Hospitals, Chennai. It was recorded therein that the respondent did not have any complaints. Therefore, it was possible that the respondent did not consider this as a material fact or circumstance, the suppression of which may tantamount to fraud. Hence, we do not think that the case on hand would fall under Clause (c) of sub-section (1) of Section 12.

28. Having excluded Clauses (a), (c) and (d), what remains, is only Clause (b) of sub-section (1) of Section 12. Under Clause (b), the annulment of a marriage can be sought if the marriage was in contravention of the condition specified in Section 5(ii). Section 5(ii) reads as follows:

> 5. Conditions for a Hindu marriage: A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:
>
> (i) .....
>
> (ii) at the time of the marriage, neither party
>
> (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
>
> (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
>
> (c) has been subject to recurrent attacks of insanity;

29. To make a case fall within Section 5(ii), the party seeking annulment should establish any of the following: (i) that either of the parties was incapable of giving a valid consent to the marriage, in consequence of unsoundness of mind, (ii) that either of the parties, though capable of giving a valid consent, has been suffering from mental

disorder of such a kind or to such an extent as to be unfit for marriage and procreation of children, or

(iii) that either of the parties has been subject to recurrent attacks of insanity.

30. In the case on hand, it is not the case of the appellant that he was suffering from any one of the above. It is not the case of the appellant that the respondent was incapable of giving a valid consent to the marriage in consequence of unsoundness of mind. Therefore, the case would not fall under Section 5(ii)(a).

31. It is not the case of the appellant that the respondent has been subject to recurrent attacks of insanity. Therefore, the case would not fall under Section 5(ii)(c).

32. To make the case fall under Section 5(ii)(b), the appellant should have pleaded and proved two things viz.,

(a) that the respondent was suffering at the time of marriage from a mental disorder and (b) that the mental disorder was of such a kind and to such an extent that made her unfit for marriage and the procreation of children.

33. Let us assume for the sake of argument that the respondent had been suffering from mental disorder, at the time of marriage. But even then the appellant failed either to plead or to prove that the mental disorder suffered by the respondent was of such a kind and to such an extent as to make her unfit for marriage and the procreation of children.

34. Therefore, the appellant could not even make the case come under Section 5(ii)(b), so as to invoke Section 12(1)(b) for its annulment.

35. It must be remembered that the tests for annulment of a marriage are more stronger than the tests for dissolution of a marriage. To make a case fall under Section 12(1)(b), a person should establish either unsoundness of mind affecting consent or mental disorder of such a kind and extent that made the respondent unfit for marriage and procreation of children or the recurrent attacks of insanity. To make a case fall under Section 13(1)(iii), it is enough if the petitioner proves that the respondent has been incurably of unsoundness of mind or that the respondent had been suffering continuously or intermittently, a mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

36. A clear distinction is maintained between Section 12(1)(b) and Section 13(1)(iii) of the Hindu Marriage Act, 1955. This is in view of the fact that serious consequences flow out of annulment of marriage.

37. The evidence on record shows that the respondent received treatment for Schizoid. According to literature, Schizoid is not the same as Schizophrenia. While Schizophrenia may manifest itself in the form of persistent psychotic symptoms, Schizoid does not. Therefore, Schizophrenia is serious in nature than Schizoid.

38. According to Stedmans Medical Dictionary - Schizoid means a person who

is socially isolated, withdrawn, having few (if any) friends or social relationships; resembling the personality features characteristic of schizophrenia, but in a milder form. In Comprehensive Textbook of Psychiatry (6th ed, Vol.2) -the learned authors Kaplan and Sadock point out that Schizoid Personality Disorder is distinguished from schizophrenia, delusional disorder, and affective disorder with psychotic features based on periods with positive psychotic symptoms, such as delusions and hallucinations. In Psychiatry for Medical students by Robert J. Waldinger it is stated that Schizoid Personality Disorder must be differentiated from Schizophrenia. The presence of a thought disorder with persistent hallucinations and/or delusions at some time during the course of schizophrenia differentiates it from the schizoid personality disorder. Also, schizoid individuals usually function better than schizophrenic people in work situations.

39. In fact, history is replete with instances of persons suffering from even paranoid schizophrenia, becoming great achievers. One such case has found its way even to the law books (if not to the law courts, about which there are no records), with the Karnataka High court referring to the same in one of its judgments. In Para 24 of its decision in Shilpa vs. Praveen (AIR 2016 Kant 169), the Karnataka High Court, recorded the following: At this stage, we are reminded of a story of success portrayed by Sylvia Nasar in the Biography, A Beautiful Mind (published by Simon & Schuster, as well as a Film of the same name) of John Forbes Nash Jr., an American Mathematician, born on June 13, 1928. He started showing symptoms of mental illness and spent several years at Psychiatric Hospitals and was treated for paranoid schizophrenia. After 1970, he refused further medication and his condition improved. Thereafter he was never committed to Hospital again. He recovered gradually with the love and care of his divorced wife whom he remarried in 2001. He gradually returned to academic work by mid-1980s. He was awarded the 1994 Nobel Memorial Prize in Economic Sciences for the thesis, which earned him Ph.D. Degree in 1950. He was both a Mathematician and Economist. He made groundbreaking work in the area of real algebraic geometry. He published number of theorems to his credit and was awarded prestigious Abel Prize in 2015.

40. One of the earliest cases to come up before an Indian court, for the dissolution of marriage on the ground of paranoid schizophrenia, was in Gnanambal vs. O.R. Selvaraj (1970) 2 MLJ 429). In that case, the husband filed an Application for dissolution of marriage on the ground that the wife was incurably of unsound mind as she was suffering from paranoid schizophrenia. The Trial Court granted a decree and the same was confirmed on appeal by the Additional Judge, City Civil Court, Madras. The wife filed a second appeal on the file of the Madras High Court. Tracing the history behind section 13(1) (iii) of the Hindu Marriage Act, 1955 and the usefulness of the English precedents on the question, the Madras High Court made the following observations : The framers of this Provision have taken into account the provisions of the English Matrimonial Causes Act, 1950. The English Act of 1950 reproduced what

was contained in the Matrimonial Causes Act, 1937, and has been reproduced in the Matrimonial Causes Act, 1965. According to the English Act, a petition for divorce can be presented on the ground that the respondent is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. In as much as important phrases found in the Indian enactment have been taken from the English enactment, English decisions would be of valuable guide in interpreting the Indian enactment, as Indian case law on the Indian enactment is not much. It would be seen from a perusal of the Indian enactment that three essential things should be established by the party seeking divorce, and they are (1) that the other party to the marriage is of unsound mind; (2) that the unsoundness of mind is incurable and; (3) that the incurable unsound mind was there for a period of not less than three years immediately preceding the presentation of the petition for divorce.

41. After pointing out the rationale behind looking towards the west for precedents in matters of this nature, the Madras High court took note of the following decisions of the English Courts. The first case was that of Swettenham vs. Swettenham (1938) 3 A.E.R.185). In that case, the parties got married in the year 1878 and thereafter from time to time the wife was certified and re-certified to be insane. The husband petitioned for divorce under the Matrimonial Causes Act, 1937. The Court held that the wife was incurably of unsound mind since Inspite of two considerable periods, during which the wife had been restored to mental health, she continued to be insane. The next case cited by the Madras High court was that of Randall vs. Randall (1938) 4 A.E.R 696), where the court held that it is not necessary to lay down any test about the degree of unsoundness of mind for the purposes of the Matrimonial Causes Act, 1937. The case next in line was of Swymer vs. Swymer (1954) 3 A.E.R 502), where one of the important questions considered was as to what would constitute continuous period of five years within the meaning of the Matrimonial Causes Act, 1950. There, the husband was admitted to a Mental Hospital in 1925 and was discharged 26 years later and was later re-admitted to the same hospital as a voluntary patient. In 1953, he broke his leg in an accident and owing to lack of suitable facilities for treatment at the mental hospital he was sent to a general hospital which was not an institution or a place approved for the purposes of the Mental Treatment Act, 1930. He returned to the Mental Hospital in May 1953. In October 1953, the wife presented a petition for divorce on the ground that the husband was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. On account of the period during which the husband was having treatment in a general hospital, the trial court rejected the wifes petition holding that the husband was not continuously under the care and treatment for at least five years immediately preceding the presentation of the petition. Reversing that decision it was held in appeal that the word continuously should be read not merely with a common sense approach but also keeping in mind the true object

and intention of the Act. The fourth English decision referred to by the Madras High court in Gnanambal was Whysall vs. Whysall (1961) 1 W.L.R 1481). This decision laid down the test to be applied in deciding the question whether a person is incurably of unsound mind. The court held that in deciding whether a person is incurably of unsound mind, the test to be applied is whether by reason of his mental condition he is capable of managing himself and his affairs and if not, whether he can hope to be restored to a state in which he will be able to do so. Finally, the Madras High court also took note of the decision in Chapman vs Chapman relied upon by the wifes counsel. In that case the husband was suffering from paranoid schizophrenia. The evidence established that after the discharge from the hospital he was no longer subject to any reception order. He was no longer under any medical treatment or care. He was able substantially to control his condition by taking drugs. He was able to work and earn wages and was capable of securing work. It was therefore, held that the wife had failed to establish that her husband was incurably of unsound mind.

42. If Madras High court can be said to have taken a liberal view in the aforementioned judgment, the other High courts appear to have taken both views. In Asha Srivastava v. R.K. Srivastava (AIR 1981 Del. 253), the husband sought annulment on the ground of suppression of Schizophrenia by the wife. The Trial Court granted annulment. The Delhi High Court held that a marriage cannot be annulled on the basis of any and every misrepresentation or concealment. But the concealment about the ailment of Schizophrenia was held by the court as amounting to fraud, since it was opined by the doctor that the said mental illness was not curable.

43. In Ram Narain Gupta v. Rameshwari Gupta (1988) 4 SCC 247), the husband sought dissolution of marriage under Section 13(1)(iii) on the ground that the wife was suffering from Schizophrenia. The Trial Court granted dissolution. But the High Court reversed the decision on the ground that the husband failed to establish that the mental illness of the wife was of such a kind and intensity as to justify a reasonable apprehension that it would not be possible or safe for the appellant to live with the respondent. To come to the said conclusion, the High Court relied upon a judgment of the Calcutta High Court in Rita Roy v. Sitesh Chandra (AIR 1982 Cal 138) wherein it was held that each case of Schizophrenia had to be considered on its own merits. When the matter was taken to the Supreme Court by the husband, the Supreme Court pointed out that all mental abnormalities are not recognized as grounds for the grant of divorce and that if mere existence of any degree of mental abnormality could justify the dissolution of a marriage, very few marriages would indeed, survive in law. Insofar as Schizophrenia is concerned, the Supreme Court made certain observations in paragraphs-25 to 27 of its judgment in Ram Narain Gupta. It may be useful to extract paragraphs-25 to 27 of the decision of the Supreme Court as follows:

> 25. Schizophrenia, it is true, is said to be difficult mental affliction. It is

said to be insidious in its onset and has hereditary predisposing factor. It is characterized by the shallowness of emotions and is marked by a detachment from reality. In paranoid states, the victim responds even to fleeting expressions of disapproval from others by disproportionate reactions generated by hallucinations of persecution. Even well meant acts of kindness and of expression of expression of sympathy appear to the victim as insidious traps. In its worst manifestation, this illness produces a crude wrench from reality and brings about a lowering of the higher mental functions.

26. Schizophrenia is described thus: A severe mental disorder (or group of disorders) characterized by a disintegration of the process of thinking, of contact with reality, and of emotional responsiveness. Delusions and hallucinations (especially of voices) are usual features, and the patient usually feels that his thoughts, sensations, and actions are controlled by, or shared with, others. He becomes socially withdrawn and loses energy and initiative. The main types of schizophrenia are simple, in which increasing social withdrawal and personal ineffectiveness are the major changes; hebephrenic, which starts in adolescence or young adulthood (see hebephrenia); paranoid, characterized by prominent delusion; and catatonic, with marked motor disturbances (see catatonia). Schizophrenia commonly but not inevitably runs a progressive course. The prognosis has been improved in recent years with drugs such as phenothiazines and by vigorous psychological and social management and rehabilitation. There are strong genetic factors in the causation, and environmental stress can precipitate illness.

27. But the point to note and emphasise is that the personality disintegration that characterises this illness may be of varying degrees. Not all schizophrenics are characterised by the same intensity of the disease. F.C. Redlich and Daniel X. Freedman in The Theory and Practice Psychiatry (1966 edn.) say: Some schizophrenic reactions, which we call psychoses, may be relatively mild and transient; others may not interfere too seriously with many aspects of everyday living. (p. 252) Are the characteristic remissions and relapses expressions of endogenous processes, or are they responses to psychosocial variables, or both Some patients recover, apparently completely, when such recovery occurs without treatment we speak of spontaneous remission. The term need not imply an independent endogenous process; it is just as likely that the spontaneous remission is a response to non-deliberate but nonetheless favourable psychosocial stimuli other than specific therapeutic activity. (p. 465)
(emphasis supplied)

44. Therefore, it is clear from the earliest decision of the Supreme Court on this issue that not all Schizophrenics are characterised by the same intensity of the disease and that some patients recover, apparently completely.

45. In Princy v. Dominic (2005 (43) Civil CC (S.C.), the Supreme Court was concerned with yet another case of Schizophrenia. The Court held that Schizophrenia, commonly but not inevitably, runs a progressive course and that the prognosis has been improved in recent years with drugs and by vigorous, psychological and social management and rehabilitation.

46. In Vinita Saxena v. Pankat Pandit (2006) 3 SCC 778), the wife sought dissolution of marriage on the ground that the husband suffered from insanity and was guilty of mental and physical cruelty. The Supreme Court devoted a full paragraph expounding what Schizophrenia is about, its causes, symptoms and how the same may affect the marital tie. But eventually, the Supreme Court granted dissolution of marriage on certain humane considerations listed out in the fourth last paragraph of the report.

47. In Pankaj Mahajan v. Dimple (2011) 12 SCC 1), the husband sought divorce on the ground that the wife was suffering from incurable form of Schizophrenia. The Trial Court granted divorce, but the High Court reversed the same. When the husband appealed to the Supreme Court, the Supreme Court predominantly went by the evidence relating to cruelty and granted dissolution of marriage.

48. In Kollam Chandra Sekhar v. Kollam Padma Latha (2014) 1 SCC 225), the husband sought divorce on the ground of Schizophrenia. The Supreme Court refused relief on the ground that there was no sufficient evidence and that any person may have bad health, for no fault of theirs. However, this decision turned down facts and not really on the purport of Schizophrenia.

49. In Challa Surya Prabha v. Challa Diwakar Venkata Ram (2017 (1) ALD 134), the husband sought divorce both on the ground of cruelty and on the ground that the wife was suffering from Schizophrenia. The Trial Court granted a decree of dissolution of marriage. While confirming the same, a Division Bench of this Court held on facts that the wife was suffering from an aggravated form of Schizophrenia causing injuries to the body of the petitioner and that therefore he cannot reasonably be expected to live with the wife.

50. As we have pointed out elsewhere, the statutory prescription in the Hindu Marriage Act is a replica of the English Matrimonial Causes Act, 1937 (which later got revamped in 1950 and 1965). This is why our courts have cited the English precedents where some useful tests were laid. In Whysall v. Whysall, (which was cited by the Madras High court as well as the Supreme court) the husband who was suffering from Paranoid Schizophrenia, was certified to be insane and he entered a mental hospital in 1952. In 1958, the wife filed a petition for divorce on the ground that the husband was incurably of unsound mind. Relying upon

the decision in Randall v. Randall, the Court held in Whysall that the test to be applied to the word incurably is to see whether that spouse could hope to be restored to a state in which he/she was capable of managing his/her self and his/her affairs. The decision in Whysall was followed in Chapman v. Chapman.

51. Keeping the principles of law laid down in the English as well as Indian decisions, if we come back to the case on hand, it could be seen that the appellant/husband did not produce any convincing evidence to show that the wife was suffering from a Schizophrenic disorder of such an extent that the case would pass the test in Whysall and Chapman. In fact, the evidence of the wife as R.W.1 in the petition for annulment, is cogent and appears to be that of a person who was on the path to recovery.

52. In an article titled Schizophrenia and Divorce, Prof. P.M.Bakshi, has stated the following: One type of mental ill health is called "schizophrenia" a much misunderstood word. It is derived from Greek schizein = to divide -rphren - mind. It comprises a group of diseases identified by symptoms of emotional abnormality, thought disorder, disturbances of motivation, stupor or catatonia and delusions often associated with hallucinations. Its causes are unknown and it is not curable. Schizophrenia is not fatal, but about 20 per cent of all schizophrenics attempt suicide and life expectancy amongst schizophrenics is probably less than half of that of the general population. Roughly one quarter of all schizophrenics suffer only one acute attack and are thereafter normal. In about one half, there are remissions or symptom-free periods, but the illness recurs. After the third or fourth recurrence, the patient is usually chronically ill for the rest of his life. The remaining 25 per cent of schizophrenics are chronically ill from the outset and must be continuously hospitalised (Richard B. Fisher, Dictionary of Medical Health 217,218 (1980)) Schizophrenia can be diagnosed only because of its symptoms. Despite its relative severity, there are borderline cases of people with schizoid characteristics who are able to carry on relatively normal lives given a measure of support from those close to them. Schizophrenia was identified by Kraepel in 1896. He called it "dementia praccox (early madness), because the symptoms appear more often in adolescents and young adults than in other age groups. In 1911, Bleuler established the name schizophrenia. He compared studies of many patients by various doctors in different countries, and found that one symptom, the splitting of intellectual activity from emotional response, seemed to be almost, if not absolutely, universal. Typically, the patient s intellect is relatively unclouded. He is aware of the nature of pain, fear, anger or love, and when he senses these emotions himself, he is alive to their content and object. But he cannot feel the emotions of others. Inflicting pain on others is meaningless. Only a minority of schizophrenics are aggressive or dangerous, and those few act only occasionally. But when they strike, they do so with utter ruthlessness. Schizophrenia means a division of facets of a normal mind, rather than the presence of two or more

personalities, though multiple-personality may also betoken the disease. On the whole, the incidence of the disease is higher in fraternal twins than in the general population, and much higher in identical twins. Fraternal twins develop from two ova and are likely to develop the same traits as any other siblings. Identical twins develop from a single ovum and can be genetically identical individuals. Thus, if a characteristic is inherited, both the identical twins are likely to have acquired it, and fraternal twins are about as likely to inherit it as any other brother or sister. One more curious extraneous fact has never been explained: a majority of schizophrenics are born in the first half of the year, (At Pg. 223 of Richard B. Fisher, Dictionary of Medical Health (1980) It is thus clear that schizophrenia, speaking medically, can, at times, be a serious disease. Nevertheless, to enable a spouse to obtain matrimonial relief on the ground of this or any other type of mental ill health, the law (as incorporated in Hindu Marriage Act) requires that the disease should be of such a quality that the petitioning spouse cannot be reasonably expected to live with the person suffering from the disease. This legislative approach has a rationale. Matrimonial law is concerned with human conduct or human situation, only if, and insofar as, it affects matrimonial happiness. In assessing the effect on matrimonial happiness the legislature has adopted the test of reasonableness. This keeps the statute free from rigid, mechanical tests. It also leaves the judiciary an element of elasticity which, inter alia, enables the court to adjust the relief according to (i) developments in medical science; (ii) appearance of new or aggravated disease; and unexpected or unusual mental symptoms. The context in which the idea of unsoundness of mind as "mental disorder "occur in matrimonial law as grounds for dissolution of a marriage, requires the assessment of the degree of the " mental disorder". Its degree must be such that the spouse seeking relief cannot reasonably be expected to live with the other. All mental abnormalities are not recognised as grounds for the grant of divorce.

53. Therefore, we are of the considered view that the appellant failed to establish any of the grounds mentioned in Section 12 of the Hindu Marriage Act, 1955, to enable him to get a decree of annulment. Hence, the husbands appeal F.C.A.No.105 of 2014 is dismissed confirming the judgment and decree of the Family Court in O.P.No.95 of 2008.

54. Coming to F.C.A.No.134 of 2015 arising out of the decree for restitution of conjugal rights, it is seen that the main ground on which the husband refused to take the wife was that she was suffering from Schizoid and that the same made her incapable of performing conjugal obligations. But the petition for annulment filed by the husband on the very same ground has been rejected by us. Therefore, there is no alternative but to confirm the decree for restitution of conjugal rights. Hence, F.C.A.No.134 of 2015 is dismissed. The miscellaneous petitions, if any, pending in these appeals shall stand closed. No costs.

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2018(1) L.S. 216

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

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

Smt.Susheela V.Pawar ..Appellant
Vs.
Smt.Chintapalli Sarojini & Anr., ..Respondents

MOTOR VEHICLES ACT, Secs. 146, 147 and 149 – It is a Case of driver not having appropriate driving licence - Appellant/Claimant by way of instant appeal assails Judgment of Court below on ground that Court erred in not directing insurance company to pay award amount and to recover the same from insured.

Held – Driver had driving licence to drive light motor vehicle and he was driving a heavy goods vehicle – Not a case where insurer can be made absolutely liable – But it is a case where insurer can be directed to pay and recover compensation from insured – Appeal is allowed in part and Compensation amount awarded by Court below shall be paid by second respondent and then recover from first respondent.

Mr.V.Atchuta Ram, Advocate for the Appellant.
Mr.M.Kondala Rao, Advocate (Not present) for Respondent No.2.

O R D E R

1.This appeal is preferred by the appellant, who is the claimant before the Court below, assailing the judgment of XXII Additional Chief Judge, City Criminal Court, Hyderabad in O.P.No.1597 of 2006, dated 04.01.2008, on the ground that the Court below erred in not directing the insurance company to pay the award amount and recover the same from the insurer.

2. Heard the learned counsel for the appellant. Learned counsel for the respondents does not appear.

3. The Court below did not fix any liability on the insurance company as it was proved that the driver of the vehicle did not have valid driving license on the date of accident.

4. Learned counsel for the appellant only seeks for a direction to the insurance company to pay the award amount and recover the same from the owner.

This is not a case of no licence. It is a case of the driver not having appropriate driving licence. Cases of this sort went to the Supreme Court several times. The anguish about the insurers approaching the Supreme Court, without minding the rulings of the Court, was expressed by the Supreme Court in Lehru's case, (2003(2) SCR 495) in the following words "As is indicated hereafter the question whether an Insurance Company can avoid liability to a third party who is involved in the accident is no longer res Integra. It is fully covered by decisions of this Court. We find that in spite of the point being fully covered, in a large number

of matters the Insurance Companies are still seeking to get out of liability to third parties on the ground that the licence was fake. We have noticed that many matters are still being brought to this Court on this point. It is therefore necessary to again reiterate the legal position." saying so the Supreme Court held as follows: "The law may provide for compensation to victims of the accidents who sustain injuries in the course of an automobile accident a compensation to the dependants of the victims in the case of a fatal accident. However, such protection would remain a protection on paper unless there is a guarantee that the compensation awarded by the courts would be recoverable from the persons held liable for the consequences of the accident. A court can only pass an award or a decree It cannot ensure that such an award or decree results in the amount awarded being actually recovered, from the person held liable who may not have the resources. The exercise undertaken by the law courts would then be an exercise in futility. And the outcome of the legal proceedings which by the very nature of things involve the time cost and money cost invested from the scarce resources of the community would make a mockery of the injured victims, or the dependants of the deceased victim of the accident, who themselves are obliged to incur not inconsiderable expenditure of time, money and energy in litigation. To overcome this ugly situation the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force. To use the vehicle without the requisite third party insurance being in force is a penal offence. The legislature was also faced with another problem. The insurance policy might provide for liability walled in by conditions which may be specified in the contract of policy. In order to make the protection real, the legislature has also provided that the judgment obtained shall not be defeated by the incorporation of exclusion clauses other than those authorised by Section 96 and by providing that except and save to the extent permitted by Section 96 it will be the obligation of the insurance company to satisfy the judgment obtained against the persons insured against third party risk (vide Section 96). In other words, the legislature has insisted and made it incumbent on the user of a motor vehicle to be armed with an insurance policy covering third party risks which is in conformity with the provisions enacted by the legislature. It is so provided in order to ensure that the injured victims of automobile accidents or the dependants of the victims of fatal accidents are really compensated in terms of the money and not in terms of promise. Such a benign provision enacted by the legislature having regard to the fact that in the modern age the use of motor vehicles notwithstanding the attendant hazards, has become an inescapable fact of life, has to be interpreted in a meaningful manner which serves rather thus defeats the purpose of the legislation. The provision has therefore to be interpreted in the twilight of the aforesaid perspective." Section 96(2)(b)(ii) extends immunity to the insurance company if a breach is committed of the condition excluding driving by a named person or persons or by any person -who is not fully licensed, or by any person who has been disqualified for 'holding or obtaining a driving licence during the period of

disqualification. The expression 'breach' is of great significance. The dictionary meaning of 'breach' is 'infringement or violation of a promise or obligation". It is therefore abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of a promise that a person who is duly licensed will have to be in charge of the vehicle. The very concept of infringement or violation of the promise that the expression 'breach' carries within itself induces an inference that the violation or infringement on the part of the promisor must be a wilful infringement or violation. If the insured is not at all at fault and has not done anything he should not have done or is not amiss in any respect how can it be conscientiously posited that he has committed a breach? It is only when the insured himself placed the vehicle in charge of a person who does not hold a driving licence, that it can be said that he is 'guilty' of the breach of the promise that the vehicle will be driven by the licensed driver. It must be established by the insurance company that the breach was on the part of the insured and that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a breach the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that the promisor (the insured) committed a breach of his promise. Not when some mishap occurs by some mischance. When the insured has done everything within his power inasmuch as he has engaged a licensed driver and has placed the vehicle in charge of a licensed driver, with the express or implied mandate to drive himself it cannot be said that the insured is guilty of any breach. And it is only in case of a breach or a violation of the promise on the part of the insured that the insurer can hide under the umbrella of the exclusion clause..,, xxx xxx xxx xxx xxx xxx To construe the provision differently would be to rewrite the provision by engrafting a rider to the effect that in the event of the motor vehicle happening to be driven by an unlicenced person, regardless of the circumstances in which such a contingency occurs, the insured will not be liable under the contract of insurance. It needs to be emphasised that it is not the contract of insurance which is being interpreted. It is the statutory provision defining the conditions of exemption which is being interpreted. These must therefore be interpreted in the spirit in which the same have been enacted accompanied by an anxiety to ensure that the protection is not nullified by the backward looking interpretation which serves to defeat the provision rather than to fulfil its life-aim. To do otherwise would amount to nullifying the benevolent provision by reading it with a non-benevolent eye and with a mind not tuned to the purpose and philosophy of the legislation without being informed of the true goals sought to be achieved. What the legislature has given, the Court cannot deprive of by way of an exercise in interpretation when the view which renders the provision potent is equally plausible as the one which renders the provision impotent. In fact it appears that the former view is more plausible apart from the fact that it is more desirable. When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependants on the one

hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity, there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obeisance to the doctrine of 'reading down' the exclusion clause in the light of the ' main purpose' of the provision so that the 'exclusion clause' does not cross swords with the 'main purpose' highlighted earlier. The effort must be to harmonize the two instead of allowing the exclusion clause to snipe successfully at the main purpose."

5. In Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan (1987) 2 SCC 654), this Court observed as under:-"

> In order to divine the intention of the legislature in the course of interpretation of the relevant provisions there can scarcely be a better test than that of probing into the motive and philosophy of the relevant provisions keeping in mind the goals to be achieved by enacting the same. Ordinarily it is not the concern of the legislature whether the owner of the vehicle insures his vehicle or not. If the vehicle is not insured any legal liability arising on account of third party risk will have to be borne by the owner of the vehicle. Why then has the legislature insisted on a person using a motor vehicle in a public place to insure against third party risk by enacting Section 94? Surely the obligation has not been imposed in order to promote the business of the insurers engaged in the business of automobile insurance. The provision has been inserted in order to protect the members of the community travelling in vehicles or using the roads from the risk attendant upon the user of motor vehicles on the roads. The law may provide for compensation to victims of the accidents who sustain injuries in the course of an automobile accident or compensation to the dependants of the victims in the case of a fatal accident. However, such protection would remain a protection on paper unless there is a guarantee that the compensation awarded by the courts would be recoverable from the persons held liable for the consequences of the accident. A court can only pass an award or a decree. It cannot ensure that such an award or decree results in the amount awarded being actually recovered, from the person held liable who may not have the resources. The exercise undertaken by the law courts would then be an exercise in futility. And the outcome of the legal proceedings which by the very nature of things involve the time cost and money cost invested from the scarce resources of the community would make a mockery of the injured victims, or the dependants of the deceased victim of the accident, who themselves are obliged to incur not inconsiderable expenditure of time, money and energy in litigation. To

overcome this ugly situation the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force. To use the vehicle without the requisite third party insurance being in force is a penal offence. The legislature was also faced with another problem. The insurance policy might provide for liability walled in by conditions which may be specified in the contract of policy. In order to make the protection real, the legislature has also provided that the judgment obtained shall not be defeated by the incorporation of exclusion clauses other than those authorised by Section 96 and by providing that except and save to the extent permitted by Section 96 it will be the obligation of the insurance company to satisfy the judgment obtained against the persons insured against third party risk (vide Section 96). In other words, the legislature has insisted and made it incumbent on the user of a motor vehicle to be armed with an insurance policy covering third party risks which is in conformity with the provisions enacted by the legislature. It is so provided in order to ensure that the injured victims of automobile accidents or the dependants of the victims of fatal accidents are really compensated in terms of money and not in terms of promise. Such a benign provision enacted by the legislature having regard to the fact that in the modern age the use of motor vehicles notwithstanding the attendant hazards, has become an inescapable fact of life, has to be interpreted in a meaningful manner which serves rather than defeats the purpose of the legislation. The provision has therefore to be interpreted in the twilight of the aforesaid perspective."

6. In **S.Iyyapan vs M/S United India Insurance** (2013) 7 SCC 62), the Supreme Court summarized it's findings to the various issues as raised in the petitions dealt with by it, as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object. (ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a)(ii) of the said Act.(iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving

licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.(iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefor would be on them.(v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer underSection 149(2) of the Act.(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section

174 of the Act for enforcement and execution of the award in favour of the claimants.(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions ofSection 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub- section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.(xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

7. In the case of National Insurance Co. Ltd. v. Kusum Rai and Others (2006) 4 SCC 250), the respondent was the owner of a jeep which was admittedly used as a taxi and thus a commercial vehicle. One Ram Lal was working as a Khalasi in the said taxi and used to drive the vehicle some times. He had a driving licence to drive light motor vehicle. The taxi met with an accident resulting in the death of a minor girl. One of the issues raised was as to whether the driver of the said jeep was having a valid and effective driving licence. The Tribunal relying on the decision of this Court in New India Assurance Co. v. Kamla (supra) held that the insurance company cannot get rid of its third party liability. It was further held that the insurance company can recover this amount from the owner of the vehicle. Appeal preferred by the insurance company was dismissed by the High Court. In appeal before this Court, the Insurance Company relying upon the decision in Oriental Insurance Co. Ltd. v. Nanjappan (2004(13) SCC 224), argued that the awarded amount may be paid and be recovered from the owner of the vehicle. The Insurance Company moved this Court in appeal against the judgment of the High Court which was dismissed.8. In the case of National Insurance Company Ltd. v. Annappa Irappa

Nesaria alias Nesaragi and Others (2008 (3) SCC 464), the vehicle involved in the accident was a matador having a goods carriage permit and was insured with the insurance company. An issue was raised that the driver of the vehicle did not possess an effective driving licence to drive a transport vehicle. The Tribunal held that the driver was having a valid driving licence and allowed the claim. In appeal filed by the insurance company, the High Court dismissed the appeal holding that the claimants are third parties and even on the ground that there is violation of terms and conditions of the policy the insurance company cannot be permitted to contend that it has no liability. This Court after considering the relevant provisions of the Act and definition and meaning of light goods carriage, light motor vehicles, heavy goods vehicles, finally came to conclusion that the driver, who was holding the licence duly granted to drive light motor vehicle, was entitled to drive the light passenger carriage vehicle, namely, the matador. This Court observed as under:

> "20. From what has been noticed hereinbefore, it is evident that "transport vehicle" has now been substituted for "medium goods vehicle" and "heavy goods vehicle". The light motor vehicle continued, at the relevant point of time to cover both "light passenger carriage vehicle" and "light goods carriage vehicle". A driver who had a valid licence to drive a light motor vehicle, therefore, was authorized to drive a light goods vehicle as well."

9. The heading "Insurance of Motor Vehicles against Third Party Risks" given in Chapter XI of the Motor Vehicles Act, 1988 (Chapter VIII of 1939 Act) itself shows the intention of the legislature to make third party insurance compulsory and to ensure that the victims of accident arising out of use of motor vehicles would be able to get compensation for the death or injuries suffered. The provision has been inserted in order to protect the persons travelling in vehicles or using the road from the risk attendant upon the user of the motor vehicles on the road. To overcome this ugly situation, the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force.10. Reading the provisions of Sections 146 and 147 of the Motor Vehicles Act, it is evidently clear that in certain circumstances the insurer's right is safeguarded but in any event the insurer has to pay compensation when a valid certificate of insurance is issued notwithstanding the fact that the insurer may proceed against the insured for recovery of the amount. Under Section 149 of the Motor Vehicles Act, the insurer can defend the action inter alia on the grounds, namely,(i) the vehicle was not driven by a named person,(ii) it was being driven by a person who was not having a duly granted licence, and(iii) person driving the vehicle was disqualified to hold and obtain a driving licence. Hence, in our considered opinion, the insurer cannot disown its liability on the ground that although the driver was holding a licence to drive a light motor vehicle but before driving light motor vehicle used as commercial vehicle, no endorsement to drive commercial vehicle was obtained in the driving licence. In any case, it is the statutory right of a third party

to recover the amount of compensation so awarded from the insurer. It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation of any condition of the insurance policy.11. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment is, therefore, liable to be set aside."12. The trend of the above rulings is in favour of protecting the interest of the third parties, by not considering the breaches which are not fundamental. In this case the driver had driving licence to drive light motor vehicle, as evidenced by Ex.B.2, driving licence extract. He was driving a lorry which is a heavy goods vehicle. The expertise required to drive light and heavy vehicles may differ. Hence this is not a case where the insurer can be made absolutely liable, by considering that the vehicles, though are different would require same driving licence. But it is a case where the insurer can be directed to pay and recover the compensation from the insured, as it is held as such in Iyyappan's case.13. In the result, the appeal is allowed in part and the judgment of the lower Court is set aside and the compensation amount awarded by the Court below shall be paid by the second respondent and then recovered from the first respondent. No costs. Miscellaneous petitions, if any pending, shall stand closed.

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2018(1) L.S. 224

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

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

Ponamalla Koteswara Rao
& Ors., ..Appellants

Vs.

A.V.Raja Gopala Rao (died)
& Ors., ..Respondents

PROVINCIAL INSOLVENCY ACT, Secs.10(2), 37, 43 and 45 – Instant Second appeal preferred against Decree and Judgment of Lower Appellate Court – Whether sale deed obtained by respondent in an auction held by official Receiver is legally valid or sale deeds obtained by appellants in a private sale are valid.

Held – All sales and dispositions of property and payments duly made and all acts done by Insolvency Court or Receiver, will remain valid despite subsequent annulment of adjudication – Second Appeal stands dismissed confirming Judgment and Decree of first appellate Court.

SA.No.847/2007 Dt:13-11-2017

Mr.C.Nageswara Rao, Senior Advocate for Smt:K. Aruna, Advocate for the Petitioners.
Mr.Bodduluri Srinivasa Rao, Smt.G. Jhansi, Advocate for the Respondents.

J U D G M E N T

.This Second Appeal is preferred by the appellants/respondent Nos.2 and 3 in I.P.No.56/1975 aggrieved by the Decree and Judgment dated 04.06.2007 in A.S.No.7 of 2004 passed by the VII Additional District and Sessions Judge (Fast Track Court), Vijayawada, whereby and whereunder the learned Judge allowed the appeal filed by the petitioners and set aside the order in I.A.No.5079 of 1991 in I.P.No.56 of 1975 on the file of II Additional Senior Civil Judge, Vijayawada, filed for delivery of schedule property.

2. The factual matrix of the case is thus:

a) The case of the petitioners in I.A.No.5079 of 1991 before the Insolvency Court is that one Namburi Sridhara Rao was adjudicated as an insolvent in I.P.No.56 of 1975 and his properties were handed over to the Official Receiver, Krishna, Machilipatnam, for administration of estate of the insolvent. The schedule property was sold in public auction on 18.01.1980 subject to two mortgages. In the said auction held by the Official Receiver, A.V.Raja Gopal Rao—the 1st petitioner, happened to be the highest bidder and auction was knocked down for Rs.1650/- subject to the above mortgages and he subsequently deposited entire sale consideration and also discharged the above mortgages and the said sale was also ratified by the proceedings of the Insolvency Court on 14.10.1980.

b) It is the further case of petitioners that whenever 1st petitioner approached the Official Receiver to register the sale deed, he postponed the same on the ground that Urban Ceiling Authority has to accord permission for registering the document as the properties were covered under the agglomeration of Vijayawada Sub-registry and that he applied for permission. However, permission could not be secured as there was no follow-up action by Official Receiver. Subsequently, 1st petitioner suffered heart attack and his boy used to go to the office of Official Receiver and finally he was informed that adjudication orders were annulled under Section 43 of Provincial Insolvency Act (for short “the Act”) as per the proceedings of the Insolvency Court dated 07.03.1981. Then the 1st petitioner filed two petitions i.e, I.A.No.5660/1989 to set aside the annulment order dated 07.03.1981 and I.A.No.5661/1989 to direct the Official Receiver, Krishna to execute the sale deed and both the petitions were allowed on 26.06.1990 and thereafter the Official Receiver, executed the sale deed and registered on 22.08.1991 in favour of 1st petitioner.

c) It is further contended that on 07.09.1991, respondents 2 and 3 got issued legal notice to the 1st petitioner with all false and concocted allegations alleging that they have purchased 1900 sq.yards of site in R.S.No.14 of Machavaram with an old tiled house belonging to the insolvent from his wife and daughter by a registered sale deed dated 07.12.1987 and that they were in

possession of the same since then. It is contended that the alleged sale deeds neither bind the 1st petitioner nor do they confer any rights or title over the schedule property in favour of respondents 2 and 3. Hence, the petition—I.A.No.5079/1991.

d) The 1st respondent—Official Receiver, Krishna filed counter and contended that what all done by him was under due process of law and the sale deed executed by him in favour of 1st petitioner is valid and binding and the sale deeds executed in favour of the respondents 2 and 3 by the wife and daughter of the insolvent were not valid and hence they need to be rejected.

e) The 2nd respondent by filing counter, contended that in I.P.No.56/1975, Namburi Sridhar Rao was adjudged as an insolvent and the said adjudication was annulled without imposing any conditions and without vesting the property to any person and hence the effect of annulling adjudication was to wipe out the effect of insolvency altogether and restoring the prior state and thereby, the property vested in the insolvent with retrospective effect. Sridhar Rao died on 27.10.1983 i.e, long after the annulment of adjudication leaving behind him, his wife Kanakadurga Tayaramma and daughter Dr.Durga Bhramara Voona Kumari. They sold the property on 02.12.1997 in favour of respondents 2 and 3 with a dilapidated thatched house, after obtaining the Urban Ceiling Permission and since then they were in possession and occupation of the same paying taxes and enjoying as their own. Hence, prayed to dismiss the petition.

f) Basing on the above pleadings, the Trail Court framed the following point for determination:

"Whether the petitioners are entitled for delivery of property as per sale deed executed by the Official Receiver in favour of 1st petitioner and for removing the constructions of the respondents 2 and 3 in the schedule property?"

g) During trial, PWs.1 to 4 were examined and Exs.A.1 to A.19 were marked on behalf of petitioners. RWs.1 to 3 were examined and Exs.B.1 to B.17 were marked on behalf of respondents.

h) It should be noted that pending I.A.No.5079/1991, the 1st petitioner died and his son was brought on record as petitioner No.2.

i) After hearing both sides, basing on the oral and documentary evidence, the Insolvency Court dismissed the petition on the observation that there was ample evidence on record to show that respondents 2 and 3 were in possession and enjoyment of petition schedule property even prior to Exs.B.1 and B.2—registered sale deeds and that they are bonafide purchasers from the legal heirs of the insolvent.

j) Aggrieved, the petitioners filed A.S.No.7 of 2004 before the VII Additional District and Sessions Judge (Fast Track Court), Vijayawada, which was allowed and respondents 2 and 3 were directed to deliver the schedule property to the petitioners.

Hence the instant Second Appeal by respondents 2 and 3.

2018 (1) L.S. 47 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
P.K. Agrawal &
The Hon'ble Mr.Justice
Abhay Manohar Sapre

Flora Elias Nahoum
& Ors., ..Appellants

Vs.

Idrish Ali Laskar ..Respondent

TENANCY ACT – Sub-letting - Eviction suit-Ground for eviction - Held- landlord is able to make out only one ground of several grounds of eviction, he is entitled to seek the eviction of his tenant from the suit premises on basis of that sole ground which he made out under Rent Act - There is no need for the landlord to make out all grounds which he has taken in plaint for claiming eviction of tenant under Act - Appeal allowed.

J U D G M E N T
(per the Hon'ble Mr.Justice
Abhay Manohar Sapre)

1. This appeal arises from the final judgment and final order/decree dated 07.07.2005 passed by the High Court of Calcutta in F.A. No.416 of 1984 whereby the Division Bench of the High Court dismissed the eviction suit filed by the appellants against the respondent and set aside the decree for eviction passed by the Trial Court in their favour and against the respondent.

2. In order to appreciate the issues involved in this appeal, it is necessary to set out the facts in detail herein-below.

3. The appellants are the plaintiffs (landlords) whereas the respondent is the defendant (tenant) in the eviction suit out of which this appeal arises.

4. The appellants (plaintiffs) are the owners/ landlords of one shop (room) bearing premises No.1, Hartford Lane, Calcutta (hereinafter referred to as "the suit shop"), which was originally owned by Late Nahoum Elias and Miss Resmah Nahoum. The present appellants are the successors-in-interest of the suit shop. They had let out the suit shop to one - Alfajuddin Laskar on a monthly rent of Rs.40/-. In the suit shop, Alfajuddin Laskar used to do the business of sale of eggs under the name "24, Parganas Egg Stores".

5. Alfajuddin Laskar expired in 1976. The respondent being his son became the tenant of the appellants on same terms and conditions. The respondent, however, closed his father's business of selling of eggs and started his tailoring business under the name "New India Tailors" in the suit shop.

6. In 1978, the appellants filed an Eviction Suit against the respondent under the provisions of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as "the Act". The eviction was claimed on four grounds, viz., default in payment of monthly rent, bona fide need, sub-letting and lastly, making of unauthorized

construction in the suit shop by the respondent.

7. The respondent filed the written statement and denied all the four grounds. Parties adduced their evidence. The Trial Court, by order dated 30.01.1984, partly decreed the suit. It was held that so far as the grounds relating to default of rent and bona fide need are concerned, both are not made out whereas the other two grounds, namely, sub-letting and making of unauthorized construction in the suit shop, both stood made out against the respondent.

8. In this view of matter, the appellants' suit was decreed in part against the respondent and the decree for eviction on the ground of sub-letting and unauthorized construction made by the respondent in the suit shop was passed. The respondent was granted six months' time to vacate the suit shop and handover its vacant possession to the appellants.

9. Being aggrieved by the said order, the respondent filed appeal before the High Court at Calcutta. The appellants, however, did not file any cross appeal or cross-objection against that part of the order by which two grounds, viz., default in payment of rent and bona fide need were held not made out. The judgment of the Trial Court thus became final to that extent.

10. Therefore, the only question before the High Court was whether the Trial Court was justified in decreeing appellants' suit on the grounds of sub-letting and making of unauthorized construction in the suit shop.

11. In other words, the question was whether the Trial Court was right in holding that the ground of sub-letting and making of unauthorized construction in the suit shop was made out.

12. The High Court, by impugned judgment, allowed the respondent's appeal and dismissed the appellants' eviction suit. The High Court held that no ground of either sub-letting or an unauthorized construction was made out, hence, the suit was liable to be dismissed in its entirety. It was accordingly, dismissed.

13. Against this judgment, the landlords felt aggrieved and filed this appeal by way of special leave in this Court.

14. Heard Ms. Daisy Hannah, learned counsel for the appellants and Mr. Zakiullah Khan, learned senior counsel for the respondent.

15. 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 of the impugned judgment, we restore that of the Trial Court and, in consequence, decree the appellants' suit in part, as indicated below.

16. There can be no dispute to the legal proposition that even if the landlord is able to make out only one ground out of several grounds of the eviction, he is entitled to seek the eviction of his tenant from the suit premises on the basis of that sole ground which he has made out under the Rent Act.

17. In other words, it is not necessary for the landlord to make out all the grounds which he has taken in the plaint for claiming eviction of the tenant under the Rent Act. If one ground of eviction is held made out against the tenant, that ground is sufficient to evict the tenant from the suit premises.

18. As mentioned above, the Trial Court held that the appellants were able to make out two grounds for respondent's eviction, namely, sub-letting and unauthorized construction made by him in the suit shop. The High Court, accordingly, reversed the findings on these two grounds and dismissed the suit.

19. We consider it proper to examine first, the ground of sub-letting with a view to find out as to whether the plaintiffs (appellants) were able to make out this ground against the respondent. In other words, let us first examine as to whether the Trial Court was right or the High Court was right on this issue.

20. In order to examine, whether the ground of sub-letting is made out or not, it is necessary to see as to how this ground was pleaded and sought to be proved by the parties.

21. The appellants, in Para 4 of the plaint, pleaded the case of sub-letting as under:

"4. The defendant after acquiring right of tenancy in respect of the said shop room after his father's death, wrongfully transferred possession of the said shop room to one Joynal Mallick evidently for creating a sub-tenant in his favour in respect of the suit shop room without obtaining the permission and consent of the plaintiffs."

22. The respondent, in reply to Para 4 of the plaint, gave the following reply in Para 9 of his written statement as under:

"9. The defendant denies the allegations made in paragraph 4 of the plaint and in particular denies the allegations that he has transferred possession of the shop under his tenancy to one Joynal Mullick or anybody as falsely alleged."

23. It is clear from the perusal of the pleadings that the case of the appellants was that the respondent has sub-let and parted with possession of the suit shop to one Joynal Mullick without appellants' consent.

24. So far as the respondent is concerned, he simply denied the appellants' case in para 9 saying that he has not sub-let the suit shop to anyone, much less to Joynal Mullick, as claimed by the appellants.

25. The respondent examined himself as witness No.1 and examined Joynal Mullick as witness No.2.

26. In examination-in-chief, the respondent changed his stand and said that he has not sub-let the suit shop to Joynal Mullick but he is in his employment. This is what he said:

"It is not a fact that I sublet the shop room in suit to one Jainal Mullick. Jainal Mullick is in my employment."

27. The respondent further in his cross-examination again changed his stand and in answer to a specific question put to him as to whether he has employed any person in his tailoring business said "no". This was his reply:-

"No. In the tailoring business I have no employee but the work is done on contract basis."

28. The respondent then in answer to another question put to him as to how many persons work for you on contract basis in his tailoring business, his reply was- four persons and out of four, Joynal Mullick and Jahangir Mullick were his employees. This is what he said:-

"Najrul Islam and Sayed, Volunteers – Besides these persons there are two other persons who look after the business in my absence. They are Jainal Mullick and Zahangir Mullick volunteers. These two persons are my employee."

29. The respondent then was asked another question, viz., Did he disclose the name of any of his employee while submitting the declaration form under the Shops and Establishment Act, his reply was "no". This is what he said:-

"I am the owner of the tailoring shop. Volunteers – fresh declaration has been submitted about 10/12 days back. In that declaration I have not declared that these two persons Jainal and Zahangir are my employees."

30. The respondent was then asked last pointed question - whether Joynal Mullick is doing business in the suit shop. To this, his reply was that Joynal Mullick is his business partner. This is what he said:-

"I obtained the trade license from the Corporation of Calcutta for the business carried in the shop showing Jainal Mullick and Zahangir Mullick as my partners in the business. It is not a fact that Jainal and Zahangir are not my employees."

31. Joynal Mullick then in his evidence said that he is an employee of the respondent for the last 7/8 years and whatever the respondent (his owner) tells him to do, he does it while sitting in the suit shop. He stated that, in his presence, the respondent had constructed "Macha" in the suit shop. He said that he joined the business under the name "New India Tailor".

32. Keeping in view the statements of the respondent and Joynal Mullick, the question arises as to whether a case of sub-letting and parting of possession of the suit shop in favour of Joynal Mullick, whether whole or in part, is made out.

33. Section 13(1)(a) of the Act deals with the ground of sub-letting and provides that where the tenant or any person residing in the premises let to the tenant without the previous consent in writing of the landlord transfers, assigns or sublets in whole or in part the premises held by him, then it is a ground for the tenant's eviction from the tenanted premises.

34. In our considered opinion, keeping in view the pleadings and the nature of the

evidence adduced by the parties, the ground of sub-letting, as contemplated under Section 13(a) ibid, is made out. This we say for the following reasons.

35. In the first place, we find that the respondent (tenant), since inception, was taking inconsistent stand on the question of sub-letting.

36. To begin with, he denied having sub-let the suit shop to anyone in his written statement. Then, contrary to what he alleged in the written statement, he said in his examination-in-chief that Joynal Mullick was his employee. Then, again contrary to this statement, he said, in next breath, that Joynal Mullick is his partner in tailoring business.

37. So far as Joynal Mullick is concerned, he admitted that he has been sitting in the suit shop for the last 7/8 years but he has been sitting in a capacity as an "employee" of the respondent.

38. In our opinion, the contradictory stand of the respondent and that too without any evidence clearly leads to an inference that the respondent was unable to prove, in categorical terms, as to which capacity, Joynal Mullick was sitting in the suit shop - whether as an "employee" or a "business partner" or in any "other capacity".

39. It seems that the respondent was not sure as to what stand he should take to meet the plea of sub-letting. He, therefore, went on changing his stand one after the other and could not prove either.

40. In our view, since the respondent had admitted the presence of Joynal Mullick in the suit shop, the burden was on him to prove its nature and the capacity in which he used to sit in the suit shop.

41. In other words, if Joynal Mullick was the respondent's employee then, in our view, he should have proved it by filling a declaration form, which he had submitted under the Shops and Establishment Act to the authorities. But it was not done. Rather he admitted that he did not disclose the name of Joynal Mullick in the declaration form. That apart, the respondent could have proved this fact by filing payment voucher, or any other relevant evidence to show that Joynal Mullick was his employee and that he used to sit in the suit shop in that capacity only. It was, however, not done.

42. Second, if Joynal Mullick was a partner of the respondent in the tailoring business then the respondent could have proved this fact by filing a copy of the partnership deed. However, he again failed to produce the copy of partnership deed. In this way, he failed to prove even this fact.

43. Now so far as the appellants are concerned, they appear to have discharged their initial burden by pleading the necessary facts in Para 4 and then by proving it by evidence that firstly, they let out the suit shop to the respondent and secondly, the respondent has sub-let the suit shop to Joynal Mullick, who was in its exclusive possession without their consent.

44. In a case of sub-letting, if the tenant is able to prove that he continues to retain

the exclusive possession over the tenanted premises notwithstanding any third party's induction in the tenanted premises, no case of sub-letting is made out against such tenant.

45. In other words, the sin qua non for proving the case of the sub-letting is that the tenant has either whole or in part transferred or/and parted with the possession of the tenanted premises in favour of any third person without landlord's consent.

46. This Court in Bharat Sales Ltd. vs. Life Insurance Corporation of India (1998) 3 SCC 1, while dealing with the case of sub-letting succinctly explained the concept of sub-letting and what are its attributes.

47. Justice Sagir Ahmad, speaking for the Two Judge Bench, held as under:

"4. Sub-tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement or understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession over the demised property. It is the actual, physical and exclusive possession of that person, instead of the tenant, which ultimately reveals to the landlord that the tenant to whom the property was let out has put some other person into possession of that property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump sum in advance covering the period for which the premises is let out or sub-let or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sub-let."

48. In our considered opinion, the aforesaid principle of law fully applies to the case at hand against the respondent due to his contradicting stand and by admitting Joynal Mullick's presence in the suit shop but not being able to properly prove the nature and the capacity in which he was sitting in the suit shop.

49. In view of the foregoing discussion, we

have formed an opinion that the appellants were able to prove the case of sub-letting against the respondent.

50. We cannot thus concur with the reasoning and the conclusion arrived at by the High Court and instead prefer to agree with the conclusion of the Trial Court insofar as it relates to the ground of sub-letting. In view of this, it is not necessary to examine the other ground relating to making of unauthorized construction by the respondent in the suit shop.

51. In the result, the appeal succeeds and is allowed. The impugned judgment is set aside and that of the Trial Court is restored.

52. The respondent is, however, granted three months' time to vacate the suit shop, subject to the respondent filing in this Court a usual undertaking that he will deposit the entire arrears of rent up to the date as per the agreed rate within one month and will also deposit the mesne profits for a period of three months up to the date of vacation in advance at the agreed rate and would vacate the suit shop on or before 30.04.2018.

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2018 (1) L.S. 53 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Kurian Joseph &
The Hon'ble Mr.Justice
Amitava Roy

Dinesh Kumar Kalidas Patel. ..Appellant
Vs.
The State of Gujarat ..Respondent

INDIAN PENAL CODE, Secs.120-B, 201 & 498-A – Appellant's wife committed suicide by hanging – Appellant in appeal was acquitted of offence u/Sec.498-A but conviction u/s 201 was maintained on ground that appellant did not give intimation to police of unnatural death and no post-mortem was conducted

Held – High Court is not justified in maintaining conviction u/s 201 of IPC only on ground that no communication was given to police and post-mortem had not been performed – Prosecution has not been able to satisfy ingredients u/s 201 of IPC – Sessions Court is not justified in convicting appellant u/Sec. 201 of IPC and High Court maintaining the same – Appeals are allowed and conviction of appellant u/s 201 IPC is set aside.

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

Leave granted.

Crl.A.Nos.265-266/18 Dt:12-2-2018

2. The appellant was convicted by the Sessions Judge, Mehsana (State of Gujarat) for offences under Sections 498A and 201 of the Indian Penal Code, 1860 (hereinafter referred to as "the IPC"). A sentence of one year rigorous imprisonment and a penalty of Rs.1,000/- with a default sentence of three months was awarded under Section 498A and six months and Rs.500/- with a default sentence of one month for the offence under Section 201 of the IPC.

3. This is a case where the appellant's wife committed suicide by hanging. The incident took place on 26.12.1990. The information was conveyed to the family of the deceased. The father and brother of the deceased, who is a doctor by profession, attended the last rites. After more than three months, the father of the deceased filed a complaint before the Judicial Magistrate at Kadi on 01.04.1991. The same was investigated, and the appellant was charged under Sections 304B, 306, 498A and 201 read with Section 120B of the IPC and Section 4 of the Dowry Prohibition Act, 1961. Along with the appellant, seven other persons also faced the trial. By judgment dated 12.09.1995, the Sessions Judge convicted the appellant under Sections 498A and 201 of the IPC but acquitted the seven others.

4. The appeals filed in 1995 were heard in the year 2015 and, as per the impugned judgment, the appellant was acquitted of the offence under Section 498A of the IPC but conviction under Section 201 of the IPC was maintained. Thus aggrieved, the appellant is before this Court.

5. Heard learned Counsel appearing for the appellant and learned Counsel appearing for the State.

6. Several contentions have been raised on merits. That apart, the appellant has also raised a question of law as to whether the conviction under Section 201 of the IPC could have been maintained while acquitting him of the main offence under Section 498A of the IPC.

7. Learned Counsel have placed reliance on the decisions of this Court in **Palvinder Kaur v. State of Punjab (**AIR 1952 SC 354), **Smt. Kalawati and Ranjit Singh v. State of Himachal Pradesh (**AIR 1953 SC 131), and **Suleman Rehiman Mulani and another v. State of Maharashtra (**AIR 1968 SC 829).

8. In **Palvinder Kaur** (supra)**,** this Court held as follows:

"14. In order to establish the charge under Section 201 of the Indian Penal Code, it is essential to prove that an offence has been committed, — mere suspicion that it has been committed is not sufficient, — that the accused knew or had reason to believe that such offence had been committed and with the requisite knowledge and with the intent to screen the offender from legal punishment causes the evidence thereof to disappear or gives false information respecting such offences knowing or having reason to believe the same to be false."

The conviction in this case was ultimately set aside on the aforementioned legal position and the facts.

9. The Constitution Bench decision in **Kalawati** (supra) may not be of much assistance in this case since the facts are completely different. The co-accused was convicted under Section 302 of the IPC for the main offence, and in the peculiar facts and circumstances of that case, this Court deemed it fit to convict Kalawati only under Section 201 of the IPC.

10. Relying on **Palvinder Kaur** (supra), this Court in **Suleman Rehiman** (supra), made the following observation:

"6. The conviction of Appellant 2 under Section 201 IPC depends on the sustainability of the conviction of Appellant 1 under Section 304-A IPC. If Appellant 1 was rightly convicted under that provision, the conviction of Appellant 2 under Section 201 IPC on the facts found cannot be challenged. But on the other hand, if the conviction of Appellant 1 under Section 304-A IPC cannot be sustained, then, the second appellant's conviction under Section 201 IPC will have to be set aside, because to establish the charge under Section 201, the prosecution must first prove that an offence had been committed not merely a suspicion that it might have been committed — and that the accused knowing or having reason to believe that such an offence had been committed, and with the intent to screen the offender from legal punishment, had caused the evidence thereof to disappear. The proof of the commission of an offence is an essential requisite for bringing home the offence under Section 201 IPC — see the decision of this Court in Palvinder Kaur v. State of Punjab."

It is necessary to note that the reason for acquittal under Section 201 in the above case was that there was no evidence to show that the rash and negligent act of appellant No.1 caused the death of the deceased. Hence, the court acquitted appellant No. 2 under Section 201. The observation at paragraph 6 has to be viewed and analysed in that background.

11. In **Ram Saran Mahto and another** v. **State of Bihar (**1999) 9 SCC 486), this Court discussed **Kalawati** (supra) and **Palvinder Kaur** (supra). It has been held at paragraphs-13 to 15 that conviction under the main offence is not necessary to convict the offender under Section 201 of the IPC. To quote:

"**13.** It is not necessary that the offender himself should have been found guilty of the main offence for the purpose of convicting him of offence under Section 201. Nor is it absolutely necessary that somebody else should have been found guilty of the main offence. Nonetheless, it is imperative that the prosecution should have established two premises. The first is that an offence has been committed and the second is that the accused knew about it or he had reasons to believe the commission of that offence. Then and then alone the prosecution can succeed, provided the remaining postulates of the offence are also established.

14. The above position has been well stated by a three-Judge Bench of this Court way back in 1952, in Palvinder Kaur v. State of Punjab:

"In order to establish the charge under

Section 201, Penal Code, it is essential to prove that an offence has been committed, — mere suspicion that it has been committed is not sufficient — that the accused knew or had reason to believe that such offence had been committed and with the requisite knowledge and with the intent to screen the offender from legal punishment causes the evidence thereof to disappear or gives false information respecting such offences knowing or having reason to believe the same to be false."

15. It is well to remind that the Bench gave a note of caution that the court should safeguard itself against the danger of basing its conclusion on suspicions however strong they may be. In Kalawati v. State of H.P a Constitution Bench of this Court has, no doubt, convicted an accused under Section 201 IPC even though he was acquitted of the offence under Section 302. But the said course was adopted by this Court after entering the finding that another accused had committed the murder and the appellant destroyed the evidence of it with full knowledge thereof. In a later decision in Nathu v. State of U.P. this Court has repeated the caution in the following words: (SCC p. 575, para 1)

"Before a conviction under Section 201 can be recorded, it must be shown to the satisfaction of the court that the accused knew or had reason to believe that an offence had been committed and having got this knowledge, tried to screen the offender by disposing of the dead body."

12. In **V.L. Tresa** v. **State of Kerala** (2001) 3 SCC 549), this Court has discussed the essential ingredients of the offence under Section 201 of the IPC at paragraph 12:

"**12.** Having regard to the language used, the following ingredients emerge:

(I) committal of an offence;

(II) person charged with the offence under Section 201 must have the knowledge or reason to believe that the main offence has been committed;

(III) person charged with the offence under Section 201 IPC should have caused disappearance of evidence or should have given false information regarding the main offence; and

(IV) the act should have been done with the intention of screening the offender from legal punishment."

13. In **Sukhram** v. **State of Maharashtra** (2007) 7 SCC 502), this Court discussed **Kalawati** (supra), **Palvinder Kaur** (supra), **Suleman Rehiman** (supra) and **V.L. Tresa** (supra) among others. The essential ingredients for conviction under Section 201 of the IPC have been discussed at paragraph 18:

"**18.** The first paragraph of the section contains the postulates for constituting the offence while the remaining three paragraphs prescribe three different tiers of punishments depending upon the degree of offence in each situation. To bring home an offence under Section 201 IPC, the ingredients to be established are: (i) committal of an offence; (ii) person charged with the offence

under Section 201 must have the knowledge or reason to believe that an offence has been committed; (iii) person charged with the said offence should have caused disappearance of evidence; and (iv) the act should have been done with the intention of screening the offender from legal punishment or with that intention he should have given information respecting the offence, which he knew or believed to be false. It is plain that the intent to screen the offender committing an offence must be the primary and sole aim of the accused. It hardly needs any emphasis that in order to bring home an offence under Section 201 IPC, a mere suspicion is not sufficient. There must be on record cogent evidence to prove that the accused knew or had information sufficient to lead him to believe that the offence had been committed and that the accused has caused the evidence to disappear in order to screen the offender, known or unknown."

In **Sou Vijaya @ Baby** v. **State of Maharashtra** (2003) 8 SCC 296), though this Court held that the decision in **V.L. Tresa** (supra) was of no assistance to the State in the particular facts, it re-iterated that "there is no quarrel with the legal principle that notwithstanding acquittal with reference to the offence under Section 302 IPC, conviction under Section 201 is permissible, in a given case."

14. The decisions in **Sou Vijaya** (supra) and **V.L. Tresa** (supra) were noticed in **State of Karnataka** v. **Madesha** (2007) 7 SCC 35)**.** While the appeal of the State was dismissed, this Court in unmistakeable terms held that:

"9. It is to be noted that there can be no dispute that Section 201 would have application even if the main offence is not established in view of what has been stated in V.L. Tresa and Sou. Vijaya cases…"

15. Thus, the law is well-settled that a charge under Section 201 of the IPC can be independently laid and conviction maintained also, in case the prosecution is able to establish that an offence had been committed, the person charged with the offence had the knowledge or the reason to believe that the offence had been committed, the said person has caused disappearance of evidence and such act of disappearance has been done with the intention of screening the offender from legal punishment. Mere suspicion is not sufficient, it must be proved that the accused knew or had a reason to believe that the offence has been committed and yet he caused the evidence to disappear so as to screen the offender. The offender may be either himself or any other person.

16. Having thus analysed the legal position, we shall revert to the factual matrix and see whether the conviction in the facts and circumstances of the case under Section 201 of the IPC could be sustained.

17. An analysis of the judgment of the Sessions Judge in this context would be quite relevant. At paragraph-16, having analysed the facts and having referred to the minute details of the alleged commission of the offence, the court has entered the following finding:

"**16**....In this manner this entire case suggest that the behaviour of the accused no. 1 was very suspicious. He has not undertaken the process for the PM of the dead body. He has not declared the facts before the police and the last rites of the dead body have been performed before the maternal family reaches from Ahmedabad. In this manner, while considering the facts on record I come at a conclusion that the accused no. 1 has failed in his duty as a husband. The husband has kept the wife in a bungalow and has most of the time remained away from her. This is very torturing and harassing for a wife. Thus as per my opinion it is proved by the prosecution on the basis of the facts on record and especially the chit at 0-1 that there was mental harassment upon the deceased Lila, from the side of the accused no.1. The fact remains that the accused no.1 has not informed the police even though an unnatural death has occurred and the last rites have also been performed without performing the post-mortem and without informing the police. Thus as per my opinion the accused no. 1 is prima facie guilty of the crime under section 498(a) and 201 of the IPC and therefore the prosecution has proved the case partly in affirmation."

18. The High Court, in appeal, however, took the view that the appellant was not liable to be convicted under Section 498A of the IPC. However, his conviction under Section 201 of the IPC was liable to be maintained. To quote:

"5... We have re-appreciated and re-evaluated the evidence on the touchstone of the latest decisions of the Hon'ble Apex Court. Taking into consideration the fact that the complaint was lodged almost after a period of four months of the incident in question, the fact remains is that no post mortem was performed of the deceased. Even if the case of defence is accepted, it was a premature and unnatural death and therefore the mandatory requirements under the law, at least to inform the police of the death and to get the post mortem of the deceased done, were not fulfilled. Admittedly, nothing has come on record to show that the post mortem was carried out and/or the police complaint was immediately filed. Considering the said aspect, we have all reasons to believe that the offence is made out under section 201 of the IPC. However, so far as offence punishable under Section 498A of the IPC is concerned, we believe the contention of Mr. Anandjiwala, learned senior advocate for the accused No.1, that almost after a period of four months, the complaint was lodged and there is nothing on record to substantiate the case of the prosecution qua cruelty being perpetrated to the deceased for want of dowry and on the contrary, the accused No.1 had helped the father of the deceased and gave Rs.1 lakh. Under the circumstances, we are of the opinion that the learned trial judge has rightly convicted the accused No.1 for the offence punishable under Section 201 of the IPC, however, has committed an error in holding conviction of the accused No.1 for the offence punishable under Section 498A of the IPC and same is not sustainable."

19. Thus, the only ground for maintaining the conviction under Section 201 of the IPC is that the appellant did not give intimation to the police of the unnatural death and

that no post-mortem was conducted.

20. We are afraid, the High Court is not justified in maintaining the conviction under Section 201 only on the ground that no communication was given to the police and that the post-mortem had not been performed. The Trial Court has taken note of the fact that the father of the deceased and her brother (who is a doctor) had attended the last rites of the deceased and neither of them had any complaint or suspicion at that time of the commission of any offence. The Sessions Court has also taken note of the suicide note left by the deceased wherein she had taken the entire blame on herself. Yet the court has taken the view, from the consideration we have extracted from paragraph-16 of the Sessions court judgment, that the deceased might have been in a state of depression having remained alone for most of the time and it amounted to torture. The appellant has been acquitted of the offence under Section 498A by the High Court, and rightly so. The prosecution has also not been able to satisfy the ingredients under Section 201 of the IPC. Neither the Sessions Court nor the High Court has any case that there is any intentional omission to give information by the appellant to the police. It is also to be noted that prosecution has no case under Section 202 of the IPC against the appellant.

21. As held by this Court in **Hanuman and others v. State of Rajasthan (**1994 Supp (2) SCC 39)**,** the mere fact that the deceased allegedly died an unnatural death could not be sufficient to bring home a charge under Section 201 of the IPC. Unless the prosecution was able to establish that the accused person knew or had reason to believe that an offence has been committed and had done something causing the offence of commission of evidence to disappear, he cannot be convicted.

22. There is no such allegation against the appellant. The last rites of the deceased were performed in the presence of the members of her family. They had no suspicion at that time of the commission of any offence. The private complaint was lodged after more than three months. There is no charge under Section 202 of the IPC of intentionally omitting to give information of the unnatural death to the police. It is also not the case of the complainant that he had requested for post-mortem of the body and that intimation should have been given to the police before the last rites were performed.

23. In the above facts and circumstances, we are of the view that the Sessions Court is not justified in convicting the appellant under Section 201 of the IPC and the High Court maintaining the same. Accordingly, the appeals are allowed. The conviction of the appellant under Section 201 of the IPC is set aside.

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

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Chief Justice of India Dipak Misra
The Hon'ble Mr.Justice A.M.Khanwilkar &
The Hon'ble Dr.Justice D.Y.Chandrachud

Naveen Kumar ..Petitioner
Vs.
Vijay Kumar & Ors., ..Respondents

MOTOR VEHICLES ACT, Secs. 2(30) & 50 – First respondent was owner of vehicle involved in accident – First respondent contended that he had already sold vehicle to second respondent prior to accident and handed over documents including registration certificate – Second respondent further contended that he had sold vehicle to third respondent who in turn sold it to petitioner – Tribunal held that first respondent jointly liable together with driver of vehicle – High Court has allowed appeal of first respondent and held that there was evidence that first respondent transferred vehicle and appellant who is last admitted owner is liable to pay compensation – Hence present appeal.

Held – Person in whose name motor vehicle stands registered, would be treated as owner – Person whose name is reflected in records of registering authority is the owner - However, where a person is a minor, guardian of minor would be treated as owner and where a motor vehicle is subject to an agreement of hire purchase, lease or hypothecation, person in possession of vehicle under agreement is treated as owner – In present case, first respondent was 'owner' of vehicle involved in accident within meaning of section 2(30) of the act and is liable to pay compensation – Appeal is allowed and Judgment of High Court is set aside.

C.A.No.1427/18 Dt:6-2-2018

J U D G M E N T

(per the Hon'ble Dr.Justice D.Y. Chandrachud, J.

1. An accident took place at about 7:30 pm on 27 May 2009 when Smt. Jai Devi and her nephew Nitin were walking down a street in their village. A motor vehicle driven by Rakesh in the reverse gear hit them. Nitin was run over by the rear wheel of the car and died on the spot. Smt. Jai Devi received multiple injuries. Two claim petitions were filed before the Motor Accident Claims Tribunal ('the Tribunal'). One of them was by Smt. Jai Devi. The second was by Somvir and Smt. Saroj, the parents of Nitin. The vehicle involved in the accident (a Maruti-800 bearing Registration DL-3CC-3684) was registered in the name of Vijay Kumar, the First respondent. According to the First respondent, he had sold the vehicle to the Second respondent on 12 July 2007 prior to the accident and had handed over possession of the vehicle together with relevant documents including

the registration certificate, and forms 29 and 30 for transfer of the vehicle. The Second respondent stated before the Tribunal that he sold the vehicle to the Third respondent on 18 September 2008. The Third respondent in turn claimed before the Tribunal to have sold the vehicle to the petitioner. The petitioner, in the course of his written statement claimed that he had sold the vehicle to Meer Singh. The succession of transfers was put forth as a defence to the claim.

2. By its award dated 6 October 2012, the Tribunal granted compensation in the amount of Rs 10,000/- to Smt. Jai Devi and of Rs.3,75,000/- on account of the death of Nitin, to his parents. The Tribunal noted that the registration certificate of the offending vehicle continued to be in the name of the First respondent. The Tribunal held the First respondent jointly and severally liable together with the driver of the vehicle. The vehicle was uninsured on the date of the accident.

3. The award of the Tribunal was challenged by the First respondent in appeal before the High Court of Punjab and Haryana. A learned Single Judge of the High Court allowed the appeal on 25 January 2016 on the ground that there was no justification for the Tribunal to pass an award against the registered owner when there was evidence that he had transferred the vehicle and the last admitted owner was the appellant herein. In the view of the High Court, the Tribunal ought to have passed an award only against the appellant as the owner. In coming to this conclusion the High Court relied upon two decisions of this Court : **HDFC Bank Limited** v **Reshma** (2015) 3 SCC 679)and **Purnya Kala Devi** v **State of Assam** (2014) 14 SCC 142).

4. On behalf of the appellant, it has been submitted that the High Court has proceeded on a manifestly erroneous construction of the legal position. It has been urged that Section 2(30) of the Motor Vehicles Act, 1988 indicates that the person in whose name a motor vehicle is registered is the owner and the only two exceptions to that principle are where such a person is a minor or where the subject vehicle is under a hire purchase agreement. The decision of this Court in **Purnya Kala Devi** (supra), it has been submitted, related to a situation where the offending vehicle had been requisitioned by a state government. Similarly, the decision in **Reshma** (supra) dealt with a situation where the vehicle had been financed against a hypothecation agreement. It was in this background that this Court held that the person in possession of the vehicle under a hypothecation agreement was to be treated as the owner. Having regard to the definition contained in Section 2(30), it was urged that the High Court was in error in foisting the liability on the appellant who is not the registered owner of the vehicle. Learned counsel appearing on behalf of the appellant submitted that in **Pushpa alias Leela** v **Shakuntala** (2011) 2 SCC 240), the position has been clarified by holding that where notwithstanding the sale of a vehicle, neither the transferor nor the transferee have taken any step for change in the name of owner in the certificate of registration, the person in whose name the registration stands must be deemed to continue as the owner of the

vehicle for the purposes of the Act.

5. On the other hand, learned counsel appearing on behalf of the First respondent supported the judgment of the Tribunal by submitting that the appellant as the person in physical possession and control of the vehicle was liable. Learned counsel appearing on behalf of the First respondent also relied on the decisions of this Court in **Purnya Kala Devi** and **Reshma**. Learned counsel submits:

(i) "The sale of a vehicle also results in a presumable change of physical possession and control of the vehicle from the vendor to the vehicle. The registered owner at the best can be regarded as an ostensible owner of the vehicle but not the real owner after the sale of the vehicle, even if his name is there on the Registration Certificate of the vehicle;

(ii) The definition of owner in the Section 2(30) of the Act, is not a complete code and the exceptions contained therein are not exhaustive;

(iii) The Court/Tribunal should apply the test whether the registered owner has, through legitimate means, fully relinquished his possession and control over the vehicle or not. If the answer is in the affirmative, he cannot be made liable and the person who is in physical possession and control of the vehicle should be made liable; and

(iv) Section 50 casts the onus of changing the name in the registration certificate, on both the transferor as well as the transferee, and hence the transferor (the registered owner) cannot be made liable, and the transferee who has control over the use of vehicle should be made liable."

6. The expression 'owner' is defined in Section 2(30) of the Act, 1988, thus:

"2(30) "owner" means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement."

The person in whose name a motor vehicle stands registered is the owner of the vehicle for the purposes of the Act. The use of the expression 'means' is a clear indication of the position that it is the registered owner who Parliament has regarded as the owner of the vehicle. In the earlier Act of 1939, the expression 'owner' was defined in Section 2(19) as follows:

"11…**2. (19) 'owner'** means, where the person in possession of a motor vehicle is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, the person in possession of the vehicle under that agreement."

Evidently, Parliament while enacting the Motor Vehicles Act, 1988 made a specific change by recasting the earlier definition. Section 2(19) of the earlier Act stipulated that where a person in possession of a motor vehicle is a minor the guardian of

the minor would be the owner and where the motor vehicle was subject to a hire purchase agreement, the person in possession of the vehicle under the agreement would be the owner. The Act of 1988 has provided in the first part of Section 2(30) that the owner would be the person in whose name the motor vehicle stands registered. Where such a person is a minor the guardian of the minor would be the owner. In relation to a motor vehicle which is the subject of an agreement of hire purchase, lease or hypothecation, the person in possession of the vehicle under that agreement would be the owner. The latter part of the definition is in the nature of an exception which applies where the motor vehicle is the subject of a hire purchase agreement or of an agreement of lease or hypothecation. Otherwise the definition stipulates that for the purposes of the Act, the person in whose name the motor vehicle stands registered is treated as the owner.

7. Section 50 deals with the procedure for transfer of ownership, and provides as follows:

"50. Transfer of ownership.—(1) Where the ownership of any motor vehicle registered under this Chapter is transferred ,— (a) the transferor shall,—

(i) in the case of a vehicle registered within the same State, within fourteen days of the transfer, report the fact of transfer, in such form with such documents and in such manner, as may be prescribed by the Central Government to the registering authority within whose jurisdiction the transfer is to be effected and shall simultaneously send a copy of the said report to the transferee; and

(ii) in the case of a vehicle registered outside the State, within forty-five days of the transfer, forward to the registering authority referred to in sub-clause (i)—

(A) the no objection certificate obtained under section 48; or

(B) in a case where no such certificate has been obtained,—

(I) the receipt obtained under sub-section (2) of section 48; or

(II) the postal acknowledgement received by the transferred if he has sent an application in this behalf by registered post acknowledgement due to the registering authority referred to in section 48,

together with a declaration that he has not received any communication from such authority refusing to grant such certificate or requiring him to comply with any direction subject to which such certificate may be granted;

(b) the transferee shall, within thirty days of the transfer, report the transfer to the registering authority within whose jurisdiction he has the residence or place of business where the vehicle is normally kept, as the case may be, and shall forward the certificate of registration to that registering authority together with the prescribed fee and a copy of the report received by him from the transferor in order that particulars of the transfer of ownership may be entered

in the certificate of registration.

(2) Where—

(a) the person in whose name a motor vehicle stands registered dies, or

(b) a motor vehicle has been purchased or acquired at a public auction conducted by, or on behalf of, Government,

the person succeeding to the possession of the vehicle or, as the case may be, who has purchased or acquired the motor vehicle, shall make an application for the purpose of transferring the ownership of the vehicle in his name, to the registering authority in whose jurisdiction he has the residence or place of business where the vehicle is normally kept, as the case may be, in such manner, accompanied with such fee, and within such period as may be prescribed by the Central Government.

(3) If the transferor or the transferee fails to report to the registering authority the fact of transfer within the period specified in clause (a) or clause (b) of sub-section (1), as the case may be, or if the person who is required to make an application under sub-section (2) (hereafter in this section referred to as the other person) fails to make such application within the period prescribed, the registering authority may, having regard to the circumstances of the case, require the transferor or the transferee, or the other person, as the case may be, to pay, in lieu of any action that may be taken against him under section 177 such amount not exceeding one hundred rupees as may be prescribed under sub-section (5):

Provided that action under section 177 shall be taken against the transferor or the transferee or the other person, as the case may be, where he fails to pay the said amount.

(4) Where a person has paid the amount under sub-section (3), no action shall be taken against him under section 177.

(5) For the purposes of sub-section (3), a State Government may prescribe different amounts having regard to the period of delay on the part of the transferor or the transferee in reporting the fact of transfer of ownership of the motor vehicle or of the other person in making the application under sub-section (2). 32

(6) On receipt of a report under sub-section (1), or an application under sub-section (2), the registering authority may cause the transfer of ownership to be entered in the certificate of registration.

(7) A registering authority making any such entry shall communicate the transfer of ownership to the transferor and to the original registering authority, if it is not the original registering authority."

8. The decision of the Bench of two judges of this Court in **Pushpa alias Leela** (supra) was in a case where the offending vehicle was registered in the name of J who had sold it to S on 2 February 1993 and had given possession to the transferee. On the date of the transfer the truck was covered by a valid policy of insurance. Despite the

sale of the vehicle the change of ownership was not reflected in the certificate of registration. The policy of insurance expired on 24 February 1993. Subsequently S took out an insurance policy in the name of the registered owner and it was valid and subsisting when the accident took place on 7 May 1994. The Tribunal held that no liability to pay compensation attached to J since he had ceased to be the owner of the vehicle after its sale on 2 February 1993. S alone was held to be liable for the payment of compensation to the claimants. On these facts the Bench of two judges of this Court held as follows:

"11. It is undeniable that notwithstanding the sale of the vehicle neither the transferor Jitender Gupta nor the transferee Salig Ram took any step for the change of the name of the owner in the certificate of registration of the vehicle. In view of this omission Jitender Gupta must be deemed to continue as the owner of the vehicle for the purposes of the Act, even though under the civil law he ceased to be its owner after its sale on 2-2-1993." (Id at page 244)

In the course of its decision, the two judge Bench referred to the earlier decision in **Dr T V Jose** v **Chacko P M** (2001) 8 SCC 748), which had arisen under the Motor Vehicles Act 1939. In that context, this Court had held thus:

"12…There can be transfer of title by payment of consideration and delivery of the car. The evidence on record shows that ownership of the car had been transferred. However, the appellant still continued to remain liable to third parties as his name continued in the records of RTO as the owner. The appellant could not escape that liability by merely joining Mr Roy Thomas in these appeals." (Id at page 244)

The decision in **Dr T V Jose** was followed in **P P Mohammed** v **K Rajappan** (2008) 17 SCC 624). Noticing that the decision in **Dr T V Jose** was rendered under the Motor Vehicles Act, 1939, the Court in **Pushpa** held that the ratio of the decision "shall apply with equal force to the facts of the cases arising under the 1988 Act" in view of the provisions of Section 2(30) and Section 50. Consequently, the view of this Court was that the person whose name continues in the record of the registering authority as the owner of the vehicle is equally liable together with the insurer.

9. The decision of a three judge Bench of this court in **Purnya Kala Devi** (supra) involved a situation where the registered owner of a vehicle involved in an accident denied his liability to compensate the legal heirs of the deceased victim on the ground that the state government had requisitioned the vehicle. On the date of the accident, the vehicle stood requisitioned under the Assam Requisition and Control of Vehicles Act, 1968. The state failed to establish that the vehicle was released from requisition after service of a notice in writing to the owner, to take delivery, as required by Section 5(1) of the state Act. Under the Assam Act, it was only upon the service of a notice to that effect that no lability for compensation would lie with the requisitioning authority. The High Court absolved the state government on the basis

of the definition of the expression 'owner' in Section 2(30) of the Motor Vehicles Act, 1988. Reversing the judgment, this Court held thus :

"16..the High Court, without adverting to Section 5 of the Assam Act, merely on the basis of the definition of "owner" as contained in Section 2(30) of the 1988 Act, mulcted the award payable by the owner of the vehicle. The High Court failed to appreciate that at the relevant time the offending vehicle was under the requisition of Respondent 1 State of Assam under the provisions of the Assam Act. Therefore, Respondent 1 was squarely covered under the definition of "owner" as contained in Section 2(30) of the 1988 Act. The High Court failed to appreciate the underlying legislative intention in including in the definition of "owner" a person in possession of a vehicle either under an agreement of lease or agreement of hypothecation or under a hire-purchase agreement to the effect that a person in control and possession of the vehicle should be construed as the "owner" and not alone the registered owner. The High Court further failed to appreciate the legislative intention that the registered owner of the vehicle should not be held liable if the vehicle was not in his possession and control. The High Court also failed to appreciate that Section 146 of the 1988 Act requires that no person shall use or cause or allow any other person to use a motor vehicle in a public place without an insurance policy meeting the requirements of Chapter XI of the 1988 Act and the State Government has violated the statutory provisions of the 1988 Act. The Tribunal also erred in accepting the allegation of Respondent 2 that the vehicle was released on the date of the accident at 10.30 a.m. and the accident occurred at 10.30 a.m. without any evidence even though in the claim petition, it was stated that the accident had occurred at 10.15 a.m." (Id at page 147)

10. The above observations would indicate that a combination of circumstances cumulatively weighed with this Court. Significantly, for the purposes of the present discussion, what emerges from the above judgment is the circumstance that the motor vehicle was on the date of the accident requisitioned by the state government. Requisitioning by its very nature is involuntary insofar as the person whose property is requisitioned is concerned. This Court observed that it is the person in control and possession of a vehicle which is under an agreement of lease, hypothecation or hire purchase who is construed as the owner and not the registered owner. The same analogy was drawn to hold that where the vehicle had been requisitioned, it was the state and not the registered owner who had possession and control and would hence be held liable to compensate. **Purnya Kala Devi** does not hold that a person who transfers the vehicle to another but continues to be the registered owner under Section 2(30) in the records of the registering authority is absolved of liability. The situation which arose before the court in that case must be borne in mind because it was in the context of a compulsory act of requisitioning by the state that this Court held, by analogy of reasoning, that the registered owner was not liable.

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