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# Law Summary

( Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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PART - 6 (31ST MARCH 2019)


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***--X--***

# GUIDING PRINCIPLES APROPOS OF PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 AND TORTUOUS LIABILITY

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Sessions Judge, Avanigadda

''**One might expect that the discontinuation of interspousal tort immunity and the societal recognition of domestic violence, which opens up new spheres of harm to analysis, would have prompted some reflection among mainstream tort scholars about tort issues involving domestic violence. But this largely has not happened. A limited legal literature discusses torts of domestic violence, but sustained attention to issues such as deterrence or compensation related to such torts largely is lacking..**''

**Introduction:-** While the Complex dynamics often involved in domestic violence may make development of certian ideas particularly challenging, it is important to remember that serious consideration of these issues has only just begun. Persons harmed by domestic violence torts would be more likely to receive compensation than they are now. More broadly, it is time to address, rather than take for granted, the relative lack of deterrence and compensation that the tort and insurance systems provide for domestic violence torts. In this context, it is seminal to see the difference between under Protection Women from Domestic Violence Act, 2005 PWDV Act and Torts**.** Crimes are different from torts in that those who have committed a crime have acted against society rather than just an individual person. In Giduthuri Kesari Kumari's case, it was held that the cases under Protection Women from Domestic Violence Act, 2005 PWDV Act are purely civil in nature. Now, the point is that besides domestic violence case under the Act of 2005, whether one can file a civil suit or not. In paragraph Nos.61 and 66 of Indra Sarma (AIR 2014 SC 309) it was observed that wife and children of marriage party i.e., live-in-relationship with a married person under the tortuous liability can sue for damages by civil suit. See also. G. Venkata Mutya Venu Gopal Vs. G. Venkata Ramanamma, Vijayawada and another-2016 (3) Andhra Law Times (Crl.)(A.P) 179.

''Lack of conjugal relationship between the spouses knocks down the very substratum

upon which the *edifice* of the institution of marriage exists'' is a sound principle of law. Recently, the Hon'ble Apex Court in Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade and others: 2011 (3) SCC 650 considered the definition of ''Respondent'' defined under Section 2(q) of the Act of 2005, and held that "although Section 2(q) defines a respondent to mean any adult male person, who is or has been in a domestic relationship with the aggrieved person, the proviso widens the scope of the said definition by including a relative of the husband or male partner within the scope of a complaint. See also. Kaniz Fatima Vs. State of Rajasthan and another - **2012 (2) ALT (Criminal) (NRC) 32 ( D.B)**. The Protection of Women from Domestic Violence Act, 2005 is an Act to provide for effective protection of the rights of women guaranteed under the constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. The object of this Act was considered in 2017 (3) Andhra Law Times (DNSC) 7 (DB), Hiral P. Harsora and others Vs. Kusum Narottamdas Harsora and others observing that a reading of the statement of objects and reasons makes it clear that the phenomenon of Domestic Violence against women is widely prevalent and needs redressal The idea is to provide various innovative remedies in favour of women who suffer from Domestic Violence, against the perpetrators of such violence. In fact, the Act 2005 Act is to provide for effective protection of the rights of women who are victims of violence of any kind occurring within the family.

> *Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violenceagainst women is one of the crucial social mechanisms by which women are forced into subordinate position compared with men* – Declaration on Elimination of Violence against Women, 1993.

> ''Action under Civil Law for intentional torts such as battery, assault, and intentional infliction of emotional distress are rare, particularly in relation to the high rate of domestic violence in our society.''

**Live-in-relationship**:- Apex court held that appellants status is lower than the status of a wife and that relationship does not fall within the definition of domestic relationship under Section 2(f) of the Act Consequently, any act, omission or commission or conduct of respondent in connection with that type of relationship would not amount to domestic violence under Section 3 of the Act If any direction is given to respondent to pay maintenance or monetary consideration to appellant, that would be at the cost of the legally-wedded

wife and children of respondent, especially when they had opposed that relationship and have a cause of action against appellant for alienating the companionship and affection of husband/parent, which is **an intentional tort**. See. Indra Sarma's case - **2014 (1) ALT(Criminal)(SC) 1 ( D.B. )**.

**SALIENT FEATURES OF PWDV ACT ARE AS FOLLOWS**: -

1. A clear declaration of the basic intent of the law, namely the prevention of domestic violence.
2. A clear and unambiguous statement of the right of women to be free from domestic violence and the recognition of domestic violence as violation of the human rights of women.
3. A definition of domestic violence that captures women's experience of abuse in its manifold form.
4. A recognition of a woman rights to reside in the shared household and her protection from illegal dispossession.
5. Access to immediate orders to prevent further acts of violence, to provide remedies for violence faced and to prevent destitution of women.
6. Infrastructure available to women to facilitate access to justice both in terms of court mandated remedies and other support services.
7. Provision for coordinated response to domestic violence by recognizing and building upon the experience of other agencies that have traditionally provided assistance to women in distress.

**Definitions:-**

1. **'Aggrieved person'** –defines who can initiate proceedings under the PWDVA. This includes:

1. Any women who allege that they have faced domestic violence from the respondent/s
2. Any woman on behalf of the child
3. Any other person on behalf of the aggrieved person including the Protection officer. For the purpose of this section: Child being defined as "any person below the age of eighteen years and includes any adopted, step or foster child", and is gender neutral.
4. For scope of the term "Aggrieved person", See. Kusum Lata Sharma Vs. State and another – 2012 (1) Andhra Law Times (Crl) (NRC) page 22 and Kishor Shrirampant Kale Vs. Sou. Shalini Kishor Kale and others.

2. '**Domestic Relationship**' – The elements of domestic relationship are: 1) The relationship must be between two persons who

a) live or

b) have at any point lived together in a shared household.

The Hon'ble Division Bench in **2018 (1) ALT 339 DB** - Union of India, rep. by its Secretary, Ministry of Consumer Affairs, Food & Public Distribution, New Delhi and another Vs.

Lakshmi Suri, it was observed that if there was no lawfully wedded wife, then the person in a relationship with the Government servant may also have a right to seek pension But where there is already a lawfully wedded wife living at the time of death of the Government servant and the marriage between her and the deceased had not been dissolved or annulled, then it is that wife who will get the family pension We are of the considered view that the respondent is not entitled to family pension.

3. **Shared household** is the household where the aggrieved person lives or at any stage has lived in a domestic relationship either singly or along with the respondent. (See. V. D. Bhanot v. Savita Bhanot, Supreme Court in Special Leave Petition (Crl) No. 3916 of 2010.) Shared household includes households: 1. That are owned or tenanted either jointly by the AP and the Respondent, or by either of them;
2. Where either aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity or
3. Which may belong to the joint family of which the respondent is a member, irrespective of whether either of them have any right, title or interest in the shared household.

**MECHANISMS FOR IMPLEMENTATION**:-
1. DVC Application:
The Magistrate may receive an application under section 12 of the PWDVA with or without the DIR from (See. Milan Kumar Singh & Anr V State of Uttar Pradesh, 2007 Cri LJ 4742 [ MANU/UP/0827/2007]):
1. Aggrieved person
2. Protection officer
3. Service provider
4. Woman on behalf of the child
5. Any other person on behalf of the Aggrieved person Since the PWDVA is in addition to and not in derogation of any other law, the aggrieved person can also make an application for reliefs under PWDVA, in any pending litigation. Section 26.

**2. Service of Notice:-**
i) Once the application is filed, the Court shall issue notice to the Respondent to appear in the court.
Section 13(1) of the PWDVA prescribes that the notice shall be given by the Magistrate to the PO, who will get it served by means as prescribed. The means are further prescribed under Rule 12(2), which provide that the notice can be served either by the PO or any other person on her/ his behalf. The Rule specifically states that for service of notice, the procedure prescribed under the CPC or CrPC, as far as practicable, may be adopted. Rule 12 (2) (c).

In view of the above, the court may direct the notice to be served upon the Respondent, either :

a). By the PO, with assistance from police officer of the concerned police station. In such cases, the PO shall provide a declaration of such service. Rule 13(2).

b). Directly by the Police officer of the concerned Police station. In view of the unambiguous mandate in Section 13(1), the courts should not direct the Aggrieved person to handover the notice to the PO or the Police officer of the concerned police station, as the case may be. The notice should be directly sent to the Po/ Police officer of the concerned Police station, as the case may be.

ii) For the Respondents staying abroad or for interstate service, notice served through email / fax shall suffice and print out/acknowledgment of the same shall be adequate proof of notice. See. The Delhi High Court in its Practice Direction (No. 29/Rules/DHC) dated 9th September, 2010 has stated that where email addresses of parties are available, process shall also be sent through email, in addition to other modes of service.

**3.Time limit for service**: a. The notice must be served, not later than two days, from the date on which it was received by the PO/Police. See. Section 13 (1) of PWDVA. b. That the Police officer of the concerned police station or PO, as the case may be, is required to submit acknowledged copy of the Form VII to the Court before the next date of hearing.

**4.Next date of hearing:** a) The court should fix the next date of hearing within three days from the court's receipt of application under section 12. See. Section 12 (5). b) In case where the parties are from different states, fifteen days time should be fixed and notice should be served at least 3-5 days prior to date of hearing.

**5.Ex parte or interim orders should be passed, after service of notice:** a) On non-appearance of the Respondent: If the notice is duly served and the Respondent fails to appear or file his written statement, the Court may pass an exparte order on the basis of affidavit. See. section 23(2) r/w Form III. b) On appearance of the Respondent: On the first date of appearance, he/ they shall file the written reply/ proceed to argue orally to the notice to show cause issued by the Court. After hearing the party/ies the Magistrate shall pass interim orders on the basis of affidavits. See. Interim orders are the orders which are passed at the appearance of the Respondent as provided under section 23 (1) of the PWDVA.

In Morgan Stanley Mutual Fund v. Kartick Das with Arvind Gupta v. Securities and Exchange Board of India and Ors, Supreme Court, [MANU/SC/0553/1994], it was held that while passing interim orders, the following factors may be taken into considerations:-

1. Whether irreparable or serious mischief will ensue to the aggrieved person if the application is not granted.
2. Whether refusal to grant orders would involve greater injustice than grant of it would entail.

**6. Counseling and/or mediation:-** 1. Section 14 (1) of PWDVA empowers the Magistrate to direct either or both parties to counseling at any stage of proceedings. Rule 14 further lays down the conditions under which such counseling is to be conducted.
2. As part of this scheme for court-directed counseling, subrules (7), (9), (11), (12), (13) & (14) of Rule 14 envisage efforts to arrive at a settlement between the parties, only if the aggrieved woman so desires.

**7. While passing final orders:** 1. The courts shall follow summary procedure as prescribed under Sections 262-264 CrPC. Towards this, for purposes of the proceedings; it shall as far as possible, pass orders on the basis of affidavits.
2. While passing final orders, where facts have already been admitted, no cross-examination may be required. See. Section 156, CrPC.
3. The Magistrate should record substance of evidence in all cases, tried summarily. Particular care must be taken in this regard in cases in which appealable sentence are likely to be passed. (As seen from Chapter 3, Maharashtra Criminal Manual, 2007).
4. The Magistrate should record the order/judgment with a brief statement of supporting reasons. See. Section 265(1), CrPC.
5. The Magistrate should endeavor to dispose off the application within 60 days from the date on which it was filed under Section 12 of the PWDVA. See. Section 12(5).

**8. Enforcement of orders:-** The following measures shall be adopted by the Courts to ensure enforcement of orders passed under PWDVA:
1) Rule 15 (7) provides that any resistance to the enforcement of the orders of the court under the Act by the Respondent or any other person purportedly acting on his behalf shall be deemed to be breach of the protection order or an interim protection order covered under the Act. Thus every order shall state that the breach of the order/s shall be deemed to be criminal offence under section 31 of PWDVA. See. Rule 15(7). For details on Breach of protection order, see the following subsection VIII) Breach of Protection Order under Section 31 PWDVA.
2. The Magistrate may direct the Police officer of the concerned police station to give protection to the aggrieved person and her dependants. See. Section 19(7).

**9. For the purpose of implementation of orders** :-
1.The Magistrate may direct the Police officer of the concerned police station to assist the aggrieved person and/ or PO in the implementation of orders. See. P. Babu Venkatesh and Ors V. Rani, Madras High Court, [ MANU/TN/0612/2008] wherein it was held that residence order is one of the protection order and the Police was directed to break open the lock of the house and provide protection to the aggrieved person to reside in the shared household. Also see. Section 19(5) .

2. May direct the Protection officer, to restore the possession of personal effects belonging to the aggrieved person with specific direction to the police officer of the concerned police station to assist in the implementation of order. See. Section 19(8).
3. May direct the Protection officer to assist the aggrieved person to regain custody of her children or supervise the visits with specific direction to the Police officer of concerned police station to assist in the implementation of order. See. Rule 10(1)(d).
4. May direct the Respondent/s to execute bond, with or without sureties, for preventing domestic violence. See. Section 19(3).

**10. Breach under section 31 of the PWDVA**: -

1. Sections 18 – 22 of PWDVA should be read together, a violation of any order shall be considered to be cognizable offence and resistance to enforcement shall be considered as breach under section 31 of PWDVA. See. Rule 15 (7).
2.Complaint under section 31 of PWDVA shall be tried by the same Magistrate without affecting the proceedings of the main application under PWDVA. See. Mrs. Pramodini Vijay Fernandes V. Vijay Fernandes, Bombay High Court, Writ Petition No. 5252 of 2009.
3. All such breach proceedings shall be separated from the main application under section 12 of PWDVA.
4. Proceedings under section 31 of PWDVA shall be tried summarily in accordance with the provisions of Chapter XXI of the Code of Criminal Procedure, 1973 (2) of 1974. See. Rule 15 (6).
5. Sole testimony of the aggrieved person under section 32(2) of the PWDVA shall be adequate and PO may also be examined, for the limited purpose of any reports that he/ she might have filed in the Court.
6. Where the complaint of breach under section 31 discloses an offence under section 498A, • IPC or any other cognizable offence not summarily triable, the Magistrate should first frame the charges as mandated under section 31 (3) of PWDVA and separate the proceedings. See. Rule 31(6).
7. The other offences other than section 31 shall be tried in manner ordinarily prescribed under the law.

**11. Appeal**:- The courts shall not halt the proceedings and/ or stop the execution of the order/s in the lower court, unless the higher Judiciary has granted a specific stay order. In **2018 (2) ALT (2) (Criminal) (A.P) 70 (**Jallarapu Laxman Rao Vs. Jallarapu Pedda Venkateswarlu and others**)**, His Lordship *Hon'ble Sri Justice M.Satyanarayana Murthy J*. held that a regular appeal would lie either against an ad interim order or an order passed by way of interim relief under Clause (2) of Section 23 of the Act is maintainable.

**12. Service Providers (Section 2 (r ))**:-

1. Organizations, registered under the PWDVA, that provide assistance to aggrieved persons in terms of shelter, counseling, legal aid, medical aid, vocational training, etc. Section 10.

2. Service Providers are also authorized to receive and record complaints of domestic violence and to conduct Court directed counseling as provided under Rule 14.

**13. Medical Facilities (MF)**:-
1.Those facilities notified under the PWDVA by State Governments. Section 2(j).
2. Notified medical facilities cannot refuse to provide medical aid to an aggrieved person. (Section 7). They are also authorized to record DIRs. Rule 17(3).

**14. Shelter Homes** :- Those notified under the PWDVA by the State Governments under the PWDVA. Notified shelter homes cannot refuse to provide shelter to an aggrieved person. Rule 16 (2).

**15. Police:** Police are duty bound to provide information to the aggrieved person about the rights and remedies provided under PWDVA, facilitate her access to the PO (Section 5), initiate criminal proceedings when needed and act on the directions of the Court to provide protection and to assist in the enforcement of orders. See. Section 19(5) & (7).

**16.Legal aid :** 1. To provide free legal aid to the aggrieved person. Rule 5(d).
2. To ensure effective legal representation in the court to effectuate her rights under PWDVA.

**I. Some important judicial pronouncements on the aspect of the aggrieved person has the right to reside in the shared household:**
1. Where the property is in the name of husband and the in-laws, the wife has a right to reside. See. Jyotsana Sharda v. Gaurav Sharda, Delhi High Court [ Criminal Revision petition No. 132 and 133/2009, MANU/DE/3520/2009].
2. Where the property was owned by the husband but has subsequently been transferred in the name of the in-laws, with intention to deny the wife's rights, the women has a right to reside in shared household. See. P. Babu Venkatesh and Ors V. Rani, Madras High Court, [ MANU/TN/0612/2008].
3. Where the husband has a right, title or interest in the property for the purpose of section 17 of PWDVA, Rajkumar Rampal Pandey v. Sarita Rajkumar Pandey, Bombay High Court [ MANU/MH/1295/2008], is shared household and hence the aggrieved person has a right to reside in the shared household.
4. In Eveneet Singh v. Prashant Choudhury and Kavita Choudhury v. Eveneet Singh, MANU/DE/3497/2010, the Delhi High Court, while distinguishing the facts from Batra v. Batra, also pointed out that "in Batra, the dispute did not emerge or emanate from any provisions of the Domstic Violence Act;"
**II. ORDERS UNDER PWDV ACT:-**
**1. Protection orders (Section 18):-** a) Injunctive orders to prevent domestic violence or

the commission of any act that adversely affects the aggrieved person's right within home b) Protection orders are chiefly in the nature of the "Stop Violence" orders designed to put an end to additional acts of violence by the Respondent against the Aggrieved person and/ or acts that adversely impact on her rights as recognized under PWDVA. c) Threat of violence is sufficient (Section 3 ( c ) defines "domestic violence" to include an act or conduct that ' has the effect of threatening the aggrieved person or any person related to her') for granting Protection Order Thus protection order can be issued upon a bonafide threat of violence or the reasonable apprehension of its occurrence. It is not necessary that the domestic violence has already occurred. d) Protection order should be granted in addition to the other reliefs under PWDVA.

2. . **Residence orders:-** Section 17 recognizes right to reside and 19 of PWDVA provides residence orders to prevent the aggrieved person's dispossession as well as to prevent any act that adversely affects her peaceful occupation of the shared household. In Vandana V. T. Srikant Krishnamachari and Anr, (2007) 6 MLJ 205 (Mad), Madras High Court has held that where the husband has a right, title or interest in the property for the purpose of section 17 of PWDVA is shared household, it is immaterial whether the parties have cohabitated in the said property. In such cases, by virtue of being wife, the aggrieved woman has a dejure right of residence in shared household.

3. **Monetary relief**:- Section 20 of PWDVA 1. Provides for monetary orders. 2. The aim of this provision is to ensure that women facing domestic violence have adequate financial support and are not rendered vulnerable due to their financial dependence on male members of the family. 3. It is powerful tool for ensuring gender equality in economic terms. It does not contain any exception in favour of husband and in fact it recognizes moral and legal duty of the husband to maintain his wife. See. Sukrit Verma and ANr V. State of Rajasthan, Rajasthan High Court (Jaipur Bench) [ MANU/RH/0337/2011], Om Prakash v. State Rajasthan, Rajasthan High Court (Jaipur Bench) [MANU/RH/0324/2011].

**4. Orders granting temporary custody of children:**- The PWDVA deals only with temporary custody of children as an urgent measure to ensure that the Aggrieved person is not harassed by denying access to the children

1. To protect the children
2. To ensure that they are not used pawns to coerce the woman to stay in a violent domestic relationship.

It is important to emphasize that custody orders are temporary in nature and that issues of permanent custody have to be decided in accordance with provisions of the Personal law applicable to the aggrieved person or the Guardianship and Wards Act. The best interest of the child shall be of paramount consideration to decide the temporary custody of the child.

In Purvi Mukesh Gada Vs. Mukesh Popatlal Gada and another - **2017 (3) ALT(CRI.)(SC) 265 ( D.B. )** , it was held that *Custody of Child Custody will lie with mother, respondent father can access on weekends as well as half of the vacations.*

**5. Compensation order:-** For mental and emotional distress caused to the aggrieved person, which are in addition to orders for monetary relief. The amount of compensation can be determined by the Court after assessing the facts and circumstances of the case and the extent of injuries sustained.

III. IMPORTANT RULINGS ON DVC:-

1. Section 10 says that the aggrieved person can file a complaint directly to the Magistrate concerned. The learned Judge pointed out that the word. Indra Sarma Vs. V.K.V. Sarma (SC) Whether a "live-in relationship" would amount to a "relationship in the nature of marriage" within the definition of "domestic relationship".

2. Under Section 12 of the Act provides choice to the aggrieved person to approach the Magistrate for taking cognizance in the matter.

3. It is for the Magistrate concerned to take the help of the protection officer or service provider after receiving the complaint, provided he feels it necessary for final disposal of the dispute between the parties.

4. The Magistrate can take the help of the protection officer, he will submit a domestic incident report to the Magistrate concerned.

5. the expression 'domestic relationship' includes not only the relationship of marriage but also a relationship 'in the nature of marriage' to be akin to common law marriage. See. D.Velusamy vs D.Patchaiammal (2010), CRIMINAL APPEAL NOS. 2028-2029__OF 2010 [Arising out of Special Leave Petition (Crl.) Nos.2273-2274/2010]. Supreme court ruling.

6. In Chandra Rekha vs. State of A.P 2010(2) ALD (Crl.) 689 (AP) is to the effect that mere impleadment of petitioners in domestic violence case does not give rise to criminal offence to quash the proceedings at the initial stage. See. A. Ashok Vardhan Reddy And Others vs Smt. P. Savitha And Another.

7. In view of Section 36 of the Act, which makes the Act not in derogation of any other law, the domestic violence case and the criminal case are independent of each other, more so, in view of Section 26 of the Act. See. A. Ashok Vardhan Reddy's case.

**8. S.R.Batra vs. Taruna Batra -** 2006 (TLS) 43393 the Supreme Court was dealing with the question whether the daughter-in-law can claim any right of residence in the house belonging to the mother-in-law and not the husband, and not the question as to whether a domestic violence case is maintainable against a woman as a respondent.

9. Courts not powerless to allow amendment to a Complaint under Domestic Violence Act. See. The Apex Court in KUNAPAREDDY @ NOOKALA SHANKA BALAJI VS. KUNAPAREDDY SWARNA KUMARI.

10. Section 2 (f) of D.V.Act provides that "domestic relationship means relationship between two persons who lived or have at any point of time lived together".

11. the provision of Section 31 of the Act of 2005 clearly spells out that the application under Section 31 of the Act of 2005 lies when there is a breach of a protection order or an interim protection order. The term "protection order" is defined Section 2 (o). "Protection order"means an order made in terms of Section 18. Kanchan VS. Vikramjeet Setiya, Raj HC, 123/2010, 2013, Crl. L.J¬85

12. It becomes apparent that Section 31 of the Act of 2005 empowers the Magistrate to prosecute and punish a respondent in the event such respondent breaches the order passed under Section18 of the Act of 2005. Section 18 of the Act of 2005 does not deal with monetary relief. Kanchan VS. Vikramjeet Setiya, Raj HC, 123/2010, 2013, Crl. L.J¬85

13. Monetary relief has been defined inSection 2 (k) of the Act and such reliefs are to be granted by way of proceedings under Section12 and 23 of the Act of 2005. Kanchan VS. Vikramjeet Setiya, Raj HC, 123/2010, 2013, Crl. L.J¬85

14. The Section 12 covers in its application all kinds of reliefs including monetary relief as well as protection order and compensation. The noncompliance of the order under Section 12 can be either of protection orders or of the order seeking monetary relief. Kanchan VS. Vikramjeet Setiya, Raj HC, 123/2010, 2013, Crl. L.J¬85 See. Sunil Madan Vs. Mrs. Rachna Madan & Anr. (Del.HC) Scope of section 12 of PWDVA, 2005.

15. non- compliance of an order of monetary relief does not give rise to the consequence of Section 31 of the Act of 2005. Kanchan VS. Vikramjeet Setiya, Raj HC, 123/2010, 2013, Crl. L.J¬85

16. SC Strikes Down Words 'Adult Male' From The Definition Of "Respondent" Under Section 2(Q) Of DV Act... See. Hiral P Harsora and ors Vs. Kusum Narottamdas Harsora & Ors...

17. Section 23 which enables the court to make ex-parte orders. See. Shambhu Prasad Singh vs Manjari., CRL.M.C. 3083/2011 & CRL.M.A.10914/2011; Date of judgment on 17 May, 2012

18. Giduthuri Kesari Kumari And Others vs State Of Telangana Criminal Petition Nos.7289 of 2014, Judgment dated 16 February, 2015 1. the remedies which are in civil nature and enquiry is not a trial of criminal case 2. the Court need not insist for personal attendance of the parties for each adjournment like in criminal cases. 3. the Magistrate shall issue a notice of the date of hearing fixed under Sec.12 to the Protection Officer for serving on the respondent. 4. Even if the respondents failed to turn up after receiving notice and file their

counter affidavit if any, the Magistrate need not take coercive steps for securing their presence and on the other hand he can treat them as Non-contesting respondents and pass an exparte order by virtue of the power conferred on him under Sec.23 of the D.V.Act.

19. The Act empowers a Magistrate to entertain the complaint of an aggrieved person under Section 12 of the Act and makes it incumbent on the Magistrate to make enquiry of the same under the Code of Criminal Procedure, 1973, reliefs under Section 18 to 22 of the Act are in the nature of civil reliefs only. See. Gundu Chandrasekhar And Others vs 1. The State Of A.P.

20. Deoki Panjhiyara Vs. Shashi Bhushan Narayan Azad & Anr. (SC). In absence of declaration annulling first marriage by competent court, women of second marriage entitled to maintain complaint against second husband. (In view of highly contentious question raised by the appellant in this case).

21. Preeti Satija Vs. Smt. Raj Kumari & Anr. (Del. HC) Whether joint family property come within the definition of 'shared household" as defined under section 2(s) of PWDVA, 2005.

22. Saraswathy Vs. Babu (SC) Whether conduct of the parties before coming into force of PWDVA, 2005 can be considered .

23. Deoki Panjhiyara Vs. Shashi Bhushan Narayan Azad & Anr. (SC). In absence of declaration annulling first marriage by competent court, women of second marriage entitled to aintain complaint against second husband. (In view of highly contentious question raised by the appellant in this case).

24. D. Velusamy Vs. D. Patchaiammal (SC) Expression "domestic relationship" includes not only relationship of marriage but also relationship in the nature of marriage.

25. Preeti Satija Vs. Smt. Raj Kumari & Anr. (Del. HC) Whether joint family property come within the definition of 'shared household" as defined under section 2(s) of PWDVA, 2005 .

26. Kavita Dass Vs. NT of Delhi & Anr. (Del.HC) Court cannot ask the aggrieved person to vacate the house even though on rent.

27. Rakesh Sachdeva & Ors. Vs. State of Jharkhand (JHC) Alternative accommodation to the victim, of the same level as being enjoyed,or rent for the same.

28. Ashok Vardhan Reddy and Ors. Vs. Smt. P. Savitha and Anr. (Andhra HC) Both, the case under PWDVA, 2005 and other criminal case are maintainable and cannot be quashed under section 482 of Cr.P.C.

29. Sambhu Prasad Singh Vs. Manjari (Del.HC) Magistrate is not obliged to call for and consider the DIR before issuing notice to the respondent however if DIR has also been submitted, that should be considered in view of Section 12(1) of PWDVA, 2005.

30. Rulings on Residence Orders: 1) Vandana v. T. Srikanth Krishnamachari and Anr, Madras High Court [(2007) 6MLJ 205 (Mad) 2) Ishpal Singh Kahai V. Mrs. Ramanjeet Kahai, Bombay High Court [ MANU/MH/0385/2011] 3) YamaVs. Ankit Manubhai Patel, Gujarat High Court [ MANU/GJ/0546/2014].

31. Rulings on Monetray relief :-

1. Sukrit Verma and Anr v. State of Rajasthan, Rajasthan High Court (Jaipur Bench) [ MANU/RH/0337/2011.

2. Om Prakash v. State Rajasthan, Rajasthan High Court (Jaipur Bench) [ MANU/RH/0324/2011].

32. Regarding Payment of maintenance: 1) Rajesh Kurre V. Safurabai & others, Chattisgarh High Court at Bilaspur in Criminal Misc Petition No. 274 of 2008 4. Regarding Quantum of maintenance 1) Jasbir Kaur Sehgal v Dist. Judge Dehradun [(1997) 7 SCC 7, MANU/ SC/0835/1997].

32. Decisions on 'Ex-parte ad interim orders': Ex-parte ad interim orders on the basis of affidavit 1) Preceline George @ Antony Preceline v. State of Kerala & ors Kerala High Court at Ernakulum in WP (C ) No. 30948 of 2009 (Q) . 2) Sri Sujoy Kumar Sanyal V. Smt Shakuntala Sanyal (Haldar) and Anr. , Calcutta High Court , (MANU/WB/0597/2010).

33. Decisions on 'Ex-parte ad interim orders':- Ex-parte ad interim orders on the basis of affidavit 1) Preceline George @ Antony Preceline v. State of Kerala & ors Kerala High Court at Ernakulum in WP (C ) No. 30948 of 2009 (Q) . 2) Sri Sujoy Kumar Sanyal V. Smt Shakuntala Sanyal (Haldar) and Anr. , Calcutta High Court , (MANU/WB/0597/2010).

34. Decision on Direction to the Police to implement order:- P. Babu Venkatesh and Ors V. Rani, Madras High Court, [ MANU/TN/0612/2008]

35. Breach of order u/s 31 of PWDVA:- Complaint u/s 31 shall be tried by same magistrate who passed the order: 1) Mrs. Pramodini Vijay Fernandes V. Vijay Fernandes, Bombay High Court, Writ Petition No. 5252 of 2009.

35. Ruling on 'Shared household': 1) V. D. Bhanot v. Savita Bhanot, Supreme Court in Special Leave Petition (Crl) No. 3916 of 2010. 2) SR Batra v. Taruna Batra, Supreme Court, [MANU/SC/007/2007].

36. Rulings on 'Domestic Relationship': Woman who has been in the past in the domestic relationship with the Respondent would be entitled to invoke the provisions of the PWDVA 1) Maroti s/o Dewaji Lande V. Sau Gangubai w/o Maroti Lande and Prashant s/o Maruti Lande, Bombay High Court [Criminal Writ petition No. 542/2010 , MANU/MH/1763/2011] 2) Karim Khan v. State of Maharashtra through PSO and Nahid Akhtar, Bombay High Court [ MANU/MH/0990/2011] B) PWDVA applicable to the Divorced women: 1) Bharti Naik V. Ravi Ramnath Harlarnkar and Anr , Bombay High court [III (2011) DMC 747 2010]

37. Rulings on 'relationship in the nature of marriage': Women who are in relationship of cohabitation or live-in-relationshis: 1) D. Velusamy V. P. Tachaimmal, Supreme Court of India [MANU/ SC/0872/2010 ] 2) Chanmuniya v. Chanmuniya Virendra Kumar Singh Kushwala and Anr., Supreme Court, [2011 (1) ALD (Cri) 370, MANU/ SC/0807/2010].

38. Rulings on 'Right to reside in the shared household':- 1) Where the property is in the name of the husband and the in-laws, the wife has a right to reside 1) Jyotsana Sharda v. Gaurav Sharda, Delhi High Court [ Criminal Revision petition No. 132 and 133/ 2009, MANU/DE/3520/2009] 2) Where the property was owned by the Husband but has subsequently been transferred in the name of the in-laws, with intention to deny the wife's rights, the women has a right to reside in the shared household. 1) P. Babu Venkatesh and Ors v. Rani, Madras High Court, [ MANU/ TN/0612/2008] 3) Where the husband has a right, title or inetrest in te property for the purpose of section 17 of PWDVA is shared household and hence the aggrieved person has a right to reside in the household 1) Rajkumar Rampal Pandey v. Sarita Rajkumar Pandey, Bombay High Court [ MANU/MH/ 1295/2008] D) Eveneet Singh v. Prashant Choudhury and Kavita Choudhury v. Eveneet Singh, MANU/DE/3497/2010.

39. Application under PWDVA 1) Milan Kumar Singh & Anr V State of Uttar Pradesh,2007 Cri LJ 4742.

40. The Magistrate may receive an application under section 12 of the PWDVA with or without the DIR from (See. Milan Kumar Singh & Anr V State of Uttar Pradesh, 2007 Cri LJ 4742 [ MANU/UP/0827/2007]).

41. Non-existence of Domestic Relationship:- Challa Sivakumar and others Vs. Challa Anita and others- 2019 (1) ALT (Criminal) (T.S & A.P) page 66, it was observed that plea of non-existence of domestic relationship at present cannot be taken as an-exception to entertain the quash petition - Criminal Petition is dismissed with the observation that the petitioners shall appear before the Trial Court and vindicate their defence.

42. Burden of proof:- Complainant has to show that she is aggrieved person. See. Kolli Babi Sarojini and others Vs. Kolli Jayalaxmi and another -2014 (3) ALT(Criminal) (A.P) Page 222.

43. Live-in relationship:- Such relationship Whether amounts t domestic violence or not is considered in Indra Sarma Vs. V.K.V. Sarma - 2014 (1) ALT(Criminal) (SC) 1 ( D.B. ).

44. Relative of husband or male person:- Relative of the husband or male person must be one who comes within the ambit of that definition which excludes a relative like the respondent. It was held that Legislature never intended to exclude female relatives of the husband or male partner from the ambit of complaint under Domestic Violence Act.

See. Nagamuthula Kondaiah Vs. State of A.P., rep. by P.P. and another - 2013 (1) ALT(CRI.)(A.P) 5.

45. DVC for recovery of marriage expenses:- In K. Veerabhadra Rao and others Vs. State, rep. by Public Prosecutor, and another - 2012 (2) ALT(CRI.)(A.P) 209, the Andhra Pradesh High Court held that Domestic Violence Case not maintainable for recovery of marriage expenses.

Conclusion:- Apex Court recently held that physical abuse, verbal abuse, emotional abuse and economic abuse can all be by women against other women. See. 2017 (3) Andhra Law Times (DNSC) 7 (DB) (supra). This Act is to provide for effective protection of the rights of women who are victims of violence of any kind occurring within the family. Under Section 12 of the PWDVA, an aggrieved person can present an application for relief/s to the Court. The same Section also allows a Protection Officer or any other person to file an application for relief/s on behalf of the aggrieved person. The law provides that it is the duty of the Protection Officer to make the application to the Magistrate for orders under the PWDVA, if the aggrieved person so requires.

The PWDVA recognises that aggrieved persons have the best knowledge of their own circumstances and need to make their own decisions on the nature of assistance they need. The PWDVA is designed around the recognition that the support of a Protection Officer can be critical for an aggrieved person. The Protection Officer's role is to facilitate the aggrieved person's access to support services of various kinds and to help her navigate the legal system if she chooses to file an application under the Act. The Magistrate may direct the Police officer of the concerned police station to assist the aggrieved person and/ or Protection Officer in the implementation of orders. The psychological and emotional harm caused by domestic violence can be substantial and continue long after a Court has issued relief. But Court intervention should not be the only remedy available to women facing domestic violence. Adults are not the only victims of domestic violence. Children may also be affected, whether at the hands of an abusive father or male relative or simply by experiencing the emotional trauma of witnessing the mother being subjected to domestic violence within the home.

Section 21 provides for the grant of temporary custody of children to the aggrieved woman (or to the person who has applied on their behalf) at the time of granting protection orders. The underlying rationale is twofold: to protect the children and to ensure that they are not used as pawns to coerce the woman to stay in a violent domestic relationship. In its Statement of Objects and Reasons, the PWDVA recognizes domestic violence as a serious

human rights concern and deterrent to development. It further mentions that since existing criminal law does not address this phenomenon in its entirety, there is a need to enact a civil law aimed, “to provide for more effective protection of rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family”.

In G. Venkata Mutya Venu Gopal Vs. G. Venkata Ramanamma, Vijayawada and another - 2016 (3) ALT (Criminal) (A.P) 179, it was held that from the above as per Section 20(1)(d) monetary relief includes maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under Section 125 of Cr.P.C or any other law for the time being in force. It speaks the amount of maintenance awarded by Criminal Court under Section 125 Cr.P.C in a quasi-judicial proceedings if already passed that is to be taken into consideration in fixing the quantum for any amount being entitled to award under the D.V.C claim as part of monetary relief and under Section 20(3) it can be even a lumpsum or by monthly payments of maintenance as nature and circumstances of the case may require. In Sikakollu Chandramohan and others Vs. Sikakollu Saraswathi Devi and another - 2010 (3) ALT (Criminal)(A.P) 108 it was observed that even though separation between the parties was prior to the Act coming into force, still economic abuse by way of deprivation of aggrieved person of right to residence and right to maintenance etc., would continue both before and after the Act coming into force. As was held in paragraph Nos.61 and 66 of Indra Sarma (AIR 2014 SC 309), wife and children of marriage party i.e., live-in-relationship with a married person under the tortuous liability can sue for damages by civil suit. See also. G. Venkata Mutya Venu Gopal Vs. G. Venkata Ramanamma, Vijayawada and another- 2016 (3) Andhra Law Times (Crl.)(A.P) 179. A more effective civil liability arrangement would be different from what we have now in several other ways. Statutes of limitations would be long enough for a woman to disentangle herself from an abusive relationship and still have time to file suit for injuries. Procedural obstacles such as requiring tort claims be brought with a divorce would be absent. These features also would increase the likelihood that tort claims would be brought, and thus increase deterrence and compensation. This proposed approach has practical limitations, but should better deter tortfeasors and compensate victims than the current system. This Article is intended to examine many of barriers and developed ideas to begin to surmount them.

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# LAW SUMMARY

## 2019 (1)

## High Court of Telangana Reports

### 2019(1) L.S. 1 (T.S.)

IN THE HIGH COURT FOR THE STATE OF TELANGANA AT HYDERABAD

Present:
The Hon'ble Mr.Justice
V. Ramasubramanian &
The Hon'ble Mr.Justice
P. Kesava Rao

Universal Logistics ..Appellant
Vs.
Dr. Reddy's Laboratories Ltd. & Ors., ..Respondents

**CIVIL PROCEDURE CODE, 1908 Order VII Rule 11(d) – Instant revision against dismissal of an I.A. application filed under Order VII Rule 11(d) of CPC - Petitioner filed an I.A. to reject plaint on ground that present Court where the suit is instituted has no territorial jurisdiction to entertain the suit as per the provisions of Sec.20 C.P.C.**

**Held - Parties out of their volition, mutually agreed to have jurisdiction of Hyderabad Courts only in case of any dispute arising out of the contract - This is not a case where, by mutual consent, parties have conferred jurisdiction upon a Court which lacked inherent jurisdiction - This is a case where the parties, by consent, have conferred exclusivity of jurisdiction upon a Court within whose territorial limits, a part of cause of action arose - Civil Revision Petition stands dismissed.**

**J U D G M E N T**

1. Heard the learned Counsel appearing for the petitioner.

2. Questioning dismissal of an application in IA No. 495 of 2017 filed under Order VII Rule 11(d) of CPC, the petitioner herein/ defendant No. 3 filed the present revision petition.

3. The facts in brief are that originally the first respondent herein filed a suit in OS No. 101 of 2011 (renumbered as COS No. 259 of 2017) for recovery of a sum of Rs. 1,37,62,520/- against the petitioner herein and two others. It is the case of the first respondent that it entered into agreements with respondent Nos. 2 and 3, who are the clearing and forwarding agents, who undertook to render services to the first respondent for clearance of imported cargo at Chennai Sea-port, Chennai Airport and Chennai CWC. In the course of business, respondent Nos. 2 and 3 have stored 16 Nos. of consignments of imported goods belonging to the first respondent in the custom public bonded warehouse belonging

to the petitioner. However, on 9.10.2008 at about 1300 hours there was a fire accident leading to damage of 13 consignments leaving 3 consignments intact. Because of the said fire accident, the first respondent sustained loss of Rs. 5,93,88,856.06 ps. But, it could recover Rs. 4,44,17,990/- (inclusive of 10% incidental charges) towards the value of 9 consignments under insurance coverage from TATA AIG Insurance Company. Thereby, the first respondent incurred loss to the tune of Rs. 1,37,62,520/- for the 4 uncovered consignments inclusive of 10% incidental expenses. The petitioner also confirmed the loss of the aforesaid consignments to respondent Nos. 2 and 3 through letter dated 18.11.2008. In fact, respondent Nos. 2 and 3 were under an obligation to deliver the aforesaid consignments in Hyderabad by arranging appropriate transportation apart from under legal duty to take reasonable and appropriate care of the goods from the time they were imported into Chennai till delivery of the same to the first respondent. The negligence of the petitioner and false declarations given by the 3rd respondent resulted in the aforementioned loss to the first respondent. Therefore, after issuance of legal notice dated 12.9.2009, the first respondent has come up with the above said suit for recovery of a sum of Rs. 1,37,62,520/- with interest @ 12% per annum from the date of filing of the suit till realization.

4. The petitioner filed written statement denying the material allegations made in the suit and contended inter alia that it had no privity of contract with the first respondent. By way of the agreement, the jurisdiction cannot be conferred on any Court to try a dispute. The first respondent has no agreement with the petitioner and the cause of action arose at Chennai and no part of cause of action has arisen in Hyderabad. The petitioner also stated that the suit is bad for non-joinder of necessary parties since the custom authorities and the Cholamandalam Insurance Company, insurer of the goods, were not made as parties to the suit, apart from other aspects.

5. Pending the suit, the petitioner filed an application in IA No. 495 of 2017 under Order VII Rule 11(d) of C.P.C., to reject the plaint on the ground that the present Court where the suit is instituted has no territorial jurisdiction to entertain the suit as per the provisions of Section 20 C.P.C. The first respondent filed a counter-affidavit opposing the said application. After hearing, the learned XIV Additional Chief Judge, City Civil Court, Hyderabad, dismissed the application by orders dated 15.6.2018 holding that the first respondent has an agreement with respondent Nos. 2 and 3 and there is a specific clause that the Courts at Hyderabad had got jurisdiction. Aggrieved by the said orders, the present revision petition is filed.

6. Learned Counsel appearing for the petitioner strenuously contended that the Court below failed to consider that no part of cause of action arisen against the petitioner within the territorial jurisdiction of Hyderabad and the present Court does not have jurisdiction to try the suit. Even if any such cause of action against the petitioner has arisen, it is only at Chennai since the fire accident occurred in the warehouse of the petitioner at Chennai. Learned Counsel

also contended that the petitioner is not privy to the agreements dated 30.8.2008 and 27.1.2008 which were entered into by the first respondent with respondent Nos. 2 and 3. The petitioner is totally a stranger to those contracts.

7. To support her contentions, the learned Counsel relied on the judgment of the apex Court in Church of Christ Charitable Trust and Educational Charitable Society represented by its Chairman v. Ponniamman Educational Society represented by its Chairperson/Managing Trustee, MANU/SC/0515/2012 : 2012 (6) ALD 36 (SC) : (2012) 8 SCC 706. Based on the said proposition, the learned Counsel contended that the revision may be allowed setting aside the order passed by the trial Court.

8. Having heard the learned Counsel for the petitioner and from the perusal of the material on record, the admitted facts are that the first respondent had entered into agreements, dated 30.8.2008 and 27.1.2008 with respondent Nos. 2 and 3 as clearing and forwarding agents. They undertook to transport the cargo of the first respondent to Hyderabad by truck/train. They stored 16 Nos. of imported consignments belonging to the first respondent in the warehouse belonging to the petitioner. However, in the fire accident, on 9.10.2008 at 1300 hours, 13 consignments out of the 16 consignments of the first respondent got damaged due to the fire leaving 3 consignments intact. In the said fire accident, the first respondent sustained a sum of Rs. 1,37,62,520/- towards loss of the stock. To recover the same, the first respondent filed the above said suit. In the suit, the first respondent has specifically stated that as per the agreements dated 30.8.2008 and 27.1.2008 entered with respondent Nos. 2 and 3, it was agreed that any dispute arising out of the same shall be subject to the jurisdiction of the Courts at Hyderabad only. In fad, during the course of arguments, the learned Counsel for the petitioner placed on record the copies of the said two agreements for perusal of the Court.

9. A perusal of the said agreements makes it clear that any dispute arising out of the contract will be subject to the jurisdiction of Hyderabad only. From a further perusal of the agreements it appears that the discussions with regard to clearance, re-warehousing and ex-bonding of imported material at Chennai Sea-port, Airport, CWC and the charges of various overheads, which are agreed mutually, are decided at Hyderabad. Pursuant thereto the copy of the said agreement, after signing in Hyderabad, sent to respondent Nos. 2 and 3 for acknowledging and to counter-sign the duplicate copy of the contract as a token of acceptance of the above terms and conditions mentioned therein. That apart, even the exclusion clause mentioned therein also confers jurisdiction on any dispute arising out of the contract to the jurisdiction of the Courts in Hyderabad only.

10. Cause of action means every fact which plaintiff will have to prove, if traversed, in order to get his right but not every piece of evidence. It is always open for the parties to choose one of the forums for filing a suit to exclude the jurisdiction of another Court. As per clause 20(c) of CPC, a suit can

be instituted in a Court within the limits of whose jurisdiction the cause of action wholly or in part arises.

11. In the case on hand, by virtue of finalization of terms and conditions and signing of the agreements by the first respondent in Hyderabad gives rise to a part of cause of action in Hyderabad. Even the exclusion clause also makes it amply clear that the parties, by mutual agreement decided to have the jurisdiction of Hyderabad Courts only to resolve the disputes arising out of the contract.

12. In Angile Insulations v. Davy Ashmore India Ltd. and another, MANU/SC/0338/1995 : (1995) 4 SCC 153, the apex Court had an occasion to Section 20 CPC while interpreting a clause in a contract entered into between the appellant and the first respondent therein regarding conferring of jurisdiction to the High Court situated in Bangalore and held as under:

"So, normally that Court also would have jurisdiction where the cause of action, wholly or in part, arises, but it will be subject to the terms of the contract between the parties. In this case, clause (21) reads thus:

This work order is issued subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, fall within the jurisdiction of the above Court only.

A reading of this clause would clearly indicate that the work order issued by the appellant will be subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, be instituted in a Court of competent jurisdiction within the jurisdiction of High Court of Bangalore only. The controversy has been considered by this Court in A.B.C. Laminart Pvt. Ltd. and another v. A.P. Agencies, Salem, MANU/SC/0001/1989 : (1989) 2 SCC 163. Considering the entire case law on the topic, this Court held that the citizen has the right to have his legal position determined by the ordinary Tribunal except, of course, subject to contract (a) when there is an arbitration clause which is valid and binding under the law, and (b) when parties to a contract agree as to the jurisdiction to which dispute in respect of the contract shall be subject. This is clear from Section 28 of the Contract Act. But an agreement to oust absolutely the jurisdiction of the Court will be unlawful and void being against the public policy under Section 23 of the Contract Act. We do not find any such invalidity of clause (21) of the Contract pleaded in this case. On the other hand, this Court laid that where there may be two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen therewith, if the parties to the contract agreed to vest jurisdiction in one such Court to try the dispute which might arise as between themselves, the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague, it is not hit by Sections 23 and 28 of the Contract Act. This cannot be understood as parties contacting against the statute. Mercantile law and practice permit such agreements.

In this view of the law and in view of the fact that the agreement under which clause (21) was incorporated as one such clause,

the parties are bound by the contract. The contract had not been pleaded to be void and being opposed to Section 23 of the Contract Act. As seen, clause (21) is unambiguous and explicit and that, therefore, the parties having agreed to vest the jurisdiction of the Court situated within the territorial limit of High Court of Karnataka, the Court of subordinate Judge, Dhanbad in Bihar State has no jurisdiction to entertain the suit laid by the appellant. Therefore, the High Court was right in upholding the order of the trial Court returning the plaint for presentation to the proper Court."

13. In Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd., 2004 (4) ALD 22 (SC) : (2004) 4 SCC 671 the apex Court held as under:

"The effect of clause 17 of the Purchase Order which mentions-any legal proceedings arising out of the order shall be subject to the jurisdiction of the Courts in Mumbai, has to be examined in the aforesaid background. Under clauses (a) and (b) of Section 20, the place of residence of the defendant or where he carries on business or works for gain is determinative of the local limits of jurisdiction of the Court in which the suit is to be instituted. Clause (c) of Section 20 provides that the suit shall be instituted in a Court within the local limits of whose jurisdiction the cause of action, wholly or in part, accrues. As shown above, in the present case, a part of cause of action had accrued in both the places, viz., Delhi and Bombay. In Hakam Singh v. Gammon (India) Ltd., MANU/SC/0001/1971 : (1971) 1 SCC 286, it was held that it is not open to the parties to confer by their agreement jurisdiction on a Court which it does not possess under the Code. But where two Courts or more have under the Code of Civil Procedure jurisdiction to try a suit or a proceeding, an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. It was also held that such an agreement does not contravene Section 28 of the Contract Act.

The same question was examined in considerable detail in A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, MANU/SC/0001/1989 : (1989) 2 SCC 163 : AIR 1989 SC 1239 (AIR Headnote D) and it was held as under (see SCC Pp. 175-176, Paras 20 & 21):

"When the Court has to decide the question of jurisdiction pursuant to an ouster clause it is necessary to construe the ousting expression or clause properly. Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jurisdiction to the Courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, ipso facto take away jurisdiction of other Courts. Where an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other Courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other Courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like 'alone', 'only', 'exclusive' and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim 'expressio unius est exclusio alterius'-expression of one is the exclusion of another-may be applied. What is an

appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all other from its operation may in such cases be inferred. It has therefore to be properly construed." This view has been reiterated in Angile Insulations v. Davy Ashmore India Ltd. (supra)."

14. In New Moga Transport Co., through its Proprietor Krishanlal Jhanwar v. United India Insurance Co. Ltd. and others, MANU/SC/0398/2004 : 2004 (3) ALD 143 (SC) : (2004) 4 SCC 677, the apex Court held as under:

"By a long series of decisions it has been held that where two Courts or more have jurisdiction under CPC to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in any one of such Courts is not contrary to public policy and in no way contravenes Section 28 of the Indian Contract Act, 1872. Therefore, if on the facts of a given case more than one Court has jurisdiction, parties by their consent may limit the jurisdiction to one of the two Courts. But by an agreement parties cannot confer jurisdiction on a Court which otherwise does not have jurisdiction to deal with a matter. (See Hakam Singh v. M/s. Gammon (India) Ltd. (supra) and M/s. Shriram City Union Finance Corporation Ltd. v. Rama Mishra, MANU/SC/2500/2000 : (2002) 9 SCC 613)."

15. The judgment relied on by the learned Counsel for the petitioner in Church of Christ Charitable Trust and Educational Charitable Society, rep. by its Chairman v. Ponniamman Educational Trust, rep. by its Chairperson/ Managing Trustee (supra), deals with a case where the documents on which cause of action is based are not produced and rejection of a plaint for non-disclosure of cause of action. In those circumstances, it was held that the plaintiff must aver clearly facts necessary to enable him to obtain decree and must produce documents on which cause of action is based. Therefore, the said judgment is not applicable to the facts the case.

16. In the case on hand, the parties out of their volition, mutually agreed to have the jurisdiction of Hyderabad Courts only in case of any dispute arising out of the contract. The first respondent specifically pleaded the agreements as aforementioned conferring the jurisdiction on the Courts at Hyderabad only apart from finalization of discussions regarding clearance, re-warehousing and ex-bonding of the imported material at Chennai. This is not a case where, by mutual consent, parties have conferred jurisdiction upon a Court which lacked inherent jurisdiction. This is a case where the parties, by consent, have conferred exclusivity of jurisdiction upon a Court within whose territorial limits, a part of cause of action arose.

17. Therefore, we have carefully considered the submissions made by the learned Counsel for the petitioner and in the light of the discussion stated supra, this Court is of the opinion that the petition filed under Order VII Rule 11(d) of CPC, is not maintainable.

18. Accordingly, the civil revision petition is dismissed. No costs.

19. Miscellaneous petitions, if any pending, shall also stand dismissed.

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**2019(1) L.S. 205 (D.B.) (Hyd.)**

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

Present:
The Hon'ble Mr.Justice
R.S. Chauhan &
The Hon'ble Mr.Justice
M. Satyanarayana Murthy

Indian National Centre for Ocean Information Sciences ..Appellant

Vs.

Unity Infra Projects Limited ..Respondent

**CIVIL PROCEDURE CODE, Sec. 115, Order XXI Rules 54,64 & 66 of CPC - Civil Revision - Questioning Order passed by District Judge, to attach of immovable properties of petitioner shown in schedule and for realization of Award amount.**

**Held - Order under challenge is only interlocutory in nature which is not amenable revisional jurisdiction - In view of proviso to Sec.115 of CPC and that too the Award passed by the Conciliator is deemed decree within Sec.73, consequently such award can straight away be executed - Though the Award was passed subject to approval by higher authorities of petitioner in view of subsequent conduct accepting terms of the Conciliation Award by complying clause No. 1 of Conciliation Award, petitioners are estopped to raise such contention that the Award was not accepted by the higher authorities when it was not even referred in Counter before Executing Court - Revision petition is liable to be dismissed.**

Mr.Dishit Bhattacharjee, Advocate for Appellant.
Mr.Resu Mahendra Reddy, Advocate for Respondents.

**J U D G M E N T**
(per the Hon'ble Mr.Justice M. Satyanarayana Murthy)

1. This Civil Revision Petition, under Section 115 of CPC, is filed questioning the Order in E.P. No. 50 of 2018 passed by the III Additional District Judge, Rangareddy District at L.B. Nagar, to attach of the immovable properties of the petitioner shown in the schedule and for realization of the Award amount of Rs. 4,63,00,000/-.

2. The respondent herein/DHR filed Execution Petition under Order XXI Rules 54, 64 and 66 of CPC for attachment of schedule property of the petitioner herein/ J.Dr and sell the same for realization of the debt due under the Award of Conciliator dt. 17.05.2017, duly signed by Solomon D.B. Chenji, Conciliator, Deputy Legal Adviser and Head of Ministry of Law and Justice, Department of Legal Affairs, Banguluru.

3. The Conciliator by name Sri Soloman DB Chenji passed the Award by settling

the dispute, against the petitioner herein/ Judgment Debtor, to pay an amount of Rs. 4,63,00,000/- to the respondent/D.Hr within a period of 90 days from the date of settlement and directed the petitioner herein to release a sum of Rs. 75 lakhs together with a sum of Rs. 16.40 lakhs and the said amounts were released and the balance amount was required to be approved and accepted by the competent authority of the petitioner herein/J.Dr. The petitioner/J.Dr mainly contended that the respondent/DHr agreed for the Award subject to acceptance by competent authority of the J.Dr and without waiting for the acceptance and approval of the competent higher authorities of the J.Dr, the Respondent/D.Hr initiated legal proceedings by issuing legal notice dt. 21.11.2017 and filed the Execution Petition against the petitioner/J.Dr.

4. Even according to Section 74 of the Arbitration and Conciliation Act, it has not reached finality and the competent authority not having accepted the settlement, the respondent initiated the proceedings, as per the Conciliation Award and the Execution Petition is premature.

5. It is further contended that the Indian National Centre for Ocean Information Services (INCOIS) is an autonomous body, which provides tsunami early warning to India and 24 countries on Indian ocean rim round the clock. The respondent/DHR attached the schedule property which may lead to closure of the institution and there is heavy risk and loss to the nation and other countries and thereby running of institution and operate the same from the property sought to be attached by the respondent is only a centre to receive communication from satellite and closing the institution in the present premises by shifting to other place shall also not be possible for various reasons, as such opposed the petition for attachment of the property of this Petitioner/JDR on the above grounds.

6. Upon hearing both the counsel, the Executing Court passed the Order which is impugned in this Revision, ordering attachment of the schedule mentioned property under Order XXI Rules 54 CPC.

7. Aggrieved by the impugned Order, the present revision is filed on various grounds, mainly on the ground that the Conciliation Award was passed subject to the appetence/approval by higher authorities and the same cannot be equated with the settlement agreed in terms of Section 73 of Arbitration and Conciliation Act and without approaching the Civil Court to make the Award as decree, the Execution Court will not have any jurisdiction to proceed under Order XXI Rules 54, 64 and 66 of CPC to attach, proclaim and sell the property. Therefore, when the Award is not enforceable as on the date, since, it was not approved by the Higher Authorities of the petitioner/J.Dr, passing an Order under Order XXI Rule 54 is an illegality, committed by the Executing Court.

8. It is further contended that the Conciliation Award is subject to acceptance/approval by the higher authorities, unless, the Conciliation Award was accepted and referred to a Court to make the Award as decree, it is not executable, invoking Section

36 of the Arbitration and Conciliation Act and the Executing Court failed to appreciate the law declared by the Apex Court in Mysore Cement Limited v. Svedala Barmac Limited MANU/SC/0232/2003 : (2003) 10 SCC 375 and committed an error in ordering the attachment of immovable property of the petitioner invoking under Order XXI Rule 54 CPC and requested this Court to set aside the Order passed by the Executing Court.

9. During hearing, Sri Deeptak Bhattacharjee, learned Senior Counsel for the petitioner vehemently contended that the Conciliation Award was not accepted/ approved by the higher authorities of the J.Dr as agreed and therefore, there is no Conciliation Award in the eye of law. In the absence of any enforceable Award, passing an order attaching the immovable property described in the schedule, under Order XXI Rule 54 of CPC, is a serious irregularity committed by the Executing Court. He further contended that unless the said Award is attained finality, in terms of Sections 73 and 74 and enforceable under Section 36 of the Arbitration and Conciliation Act, the execution proceedings are not maintainable and thereby the Executing Court assumed jurisdiction, which is not vested on it and consequently, passed the impugned Order and therefore, the order passed by the Executing Court is liable to be set aside. He further demonstrated that Conciliation Award is not executable one since higher authorities of the J.Dr did not accept the Award and filed additional material papers to substantiate its contention that the Government of India, Ministry of Earth Sciences, did not accept the Conciliation Award, in view of the Letter dt. 20.03.2018 signed by Archna Srivastava, Under Secretary (ICC). In the absence of approval, the said Award is not executable, in view of the law declared by the Apex Court in Mysore Cement's case MANU/SC/0232/ 2003 : (2003) 10 SCC 375 (supra) and prayed to set aside the Order passed by the Executing Court exercising power under Section 115 CPC.

10. Learned counsel for respondent Sri Resu Mahender Reddy would contend that Award was passed by the Conciliator duly signed by the parties to the conciliation, though it is subject to acceptance by the higher authorities, despite notice issued by the D.Hr and payment in compliance of Clause No. 1 of the Conciliation Award, the petitioner did not chose to pay the balance amount covered by other clauses of Conciliation Award, thereby payment of amount itself in compliance of Clause (1) of the Conciliation Award is an implied acceptance and this Petitioner/JDR cannot contend that it was not accepted by applying the principal of estoppel by conduct, thereby the contention of the learned counsel for the petitioner/JDr is without any substance and requested to affirm the Order passed by the Executing Court.

11. Considering rival contentions and perusing the material available on record, the points that arise for consideration are:

i) Whether the Order passed under Order XXI Rule 54 is a final order, which terminates entire proceedings, if not whether revision petition under Section 115 of the CPC is maintainable, in view of the bar to proviso to Section 115 of the CPC?

ii) Whether Conciliation Award is executable in the absence of approval by the higher authorities of the petitioner/JDr and whether in the absence of any approval or consent in writing for the Conciliation Award, can the Award be executed? If not, whether the Order passed under Order XXI Rule 54 CPC is liable to be set aside?

12. In Re Point No. 1: The first and foremost contention of the learned counsel for the petitioner/JDR is that the Executing Court exceeded its jurisdiction, that is not vested on it, since the Conciliation Award is not executable and passing an Order under Order XXI Rue 54 CPC is an illegality committed by the Executing Court. Whereas, the respondent/DHr filed Execution Petition under Order XXI Rule 11, 54, 64, 66 of CPC for attachment of the property and sale of the same for realization of the decree debt under the Conciliation Award. When the Award is passed within two years prior to the date of filing Execution Petition before the Executing Court, a notice under Order XXI Rule 22 CPC is not necessary (i.e., Decree Notice). When an Execution Petition is filed for realization of the debt due under the Conciliation Award by attaching the immovable property and for sale of the same invoking Sections 54, 64 and 66 of Order XXI CPC, the order of attachment is step in aid to proceed further for issuing proclamation for sale of the property. Therefore, the Order passed by the Executing Court under Order XXI Rule 54 CPC is only step in aid to proceed further for realization of the debt. Only when the property was sold and realized the debt due under the Conciliation Award, it will terminate the entire proceedings. Therefore, it is the duty of this Court to examine whether the Order passed under Order XXI Rule 54 CPC is a final order which terminates the proceedings?

13. At this stage it is relevant to extract Section 115 of CPC for better appreciation and it is extracted hereunder:

115 CPC : Revision : (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appeals:

(a) To have exercised a jurisdiction not vested in it by law, or:

(b) To have failed to exercise a jurisdiction so vested, or:

(c) To have acted in the exercise of it jurisdiction illegally or with material irregularity.

The High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this Section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings).

> (2) The High Court shall not, under this Section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.
>
> (3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

14. As per the proviso substituted by Act 46 of 1999, which came into force with effect from 01.07.2002, which is extracted above, the High Court shall not, under Section 115 CPC vary or reverse any order made or any Order deciding an issue, in the course of a suit or other proceeding, except where the Order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. Thus, it means the Court cannot entertain a revision against an Order, which will terminate the entire proceedings. The word 'Proceedings' includes the execution proceedings. Therefore, when the Order passed under Order XXI Rule 54 CPC cannot be described as final Order as it would not terminate the entire proceedings or finally disposes of the suit or other proceedings as contained in proviso to Section 115 of CPC.

15. The word 'Final Order' is not defined anywhere, but the proviso to Section 115 CPC is equivalent to bar under Section 397(3) Cr.P.C. as the language is in pari materia. Though the 'Final Order' was not defined in the CPC, it is appropriate to advert to the definition of Interlocutory Order or Final Order and the law laid down by the Courts.

16. Though the Word Interlocutory is not defined in the Code. According to Webster's New Twentieth Century Dictionary, in law 'interlocutory order' means 'an intermediate'; not final order definitive; as an interlocutory divorce decree. The Corpus Juris Secundum (Volume 60) defines 'interlocutory order' thus: the word 'interlocutory' as applied to rulings and orders by the Trial Court, has been variously defined. It refers to all Orders, rulings, and decisions made by the trial Court from the inception of an action to its final determination. It means, not that which decides the cause, but that which only settles some intervening matter relating to the cause. An interlocutory order is an order entered pending a cause, deciding some point or matter essential to the progress of the suit and collateral to the issues formed by the pleadings and not a final decision or judgment on the matter in issue. An intermediate order has been defined as one made between the commencement of an action and the entry of the Judgment.

17. In Central Bank of India v. Gokul Chand MANU/SC/0053/1966 : 1967 SC 799, 800 the Apex Court while describing the incidents of an interlocutory order, observed as follows:

> "In the context of Section 38(1), the words "every order of the Controller made under this Act", though very wide, do not include interlocutory orders, which are merely procedural and do not affect the rights or liabilities of the parties. In a pending proceeding the Controller, may pass many

> interlocutory orders under Ss. 36 and 37, such as orders regarding the summoning of witnesses, discovery, production and inspection of documents, issue of a commission for examination of witnesses, inspection of premises, fixing a date of hearing and the admissibility of a document or the relevancy of a question. All these interlocutory orders are steps taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding: they regulate the procedure, only and do not affect any right or liability of the parties. "The aforesaid decision clearly illustrates the nature and incidents of an interlocutory order and the incidents given by this Court constitute sufficient guidelines to interpret the connotation of the word "interlocutory order" as appearing in Sub-section (2) of S. 397 of the 1973 Code."

18. Interlocutory orders are steps taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding without affecting the rights and liabilities of the parties.

19. In Webster's Third International Dictionary (Vol. II, p. 1170) the expression 'interlocutory order' has been defined thus:

> "not final or definitive; made or done during the progress of an action; INTERMEDIATE PROVISIONAL".

20. Stroud's Judicial Dictionary (Fourth Edition, Vol. 3, p. 1410) defines the interlocutory order as "'Interlocutory order' (Judicature Act 1873 (c.66), s. 25(8) was not confined to an order made between writ and final judgment, but means an order other than final judgment."

21. According to Stroud, interlocutory order means an order other than a final judgment. This was the view taken in the case of Smith v. Cowell (1880) 6 QBD 75 and followed in Manchester & Liverpool Bank v. Parkinson (1889) 22 QBD 175. Similarly, the term 'final order' has been defined in volume 2 of the same Dictionary (p. 1037) thus:

"The judgment of a Divisional Court on an appeal from a county court in an interpleader issue, was a 'final order" within the old R.S., Ord. 58, r. 3 (Hughes v. Little, 18 Q.B.D. 32); so was an order on further consideration (Cummins v. Herron, 4 Ch. D. 787); unless action was not thereby concluded. But an order under the old R.S.C., ord. 25, r. 3, dismissing an action on a point of law raised by the pleadings was not 'final" within the old Ord. 58, r. 3, because had the decisions been the other way the action would have proceeded."

22. Halsbury's Laws of England (Third Edition, Vol. 22, pp. 743-744) describes an interlocutory or final order thus:

"Interlocutory judgment or order: An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the

declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'. An interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals ....."

23. In general a Judgment or Order which determines the principal matter in question is termed 'final'."

> "At page 743 of the same volume, Blackstone says thus: "Final judgments are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for ..... Four different tests for ascertaining the finality of a judgment or order have been suggested:
>
> (1) Was the order made upon an application such that a decision in favour of either party would determine the main dispute?
>
> (2) Was it made upon an application upon which the main dispute could have been decided?
>
> (3) Does the order, as made, determine the dispute?
>
> (4) If the order in question is reversed, would the action have to go on."

24. Corpus Juris Secundum (Vol. 49 p. 35) defines interlocutory order thus:

> "A final judgment is one which disposes of the cause both as to the subject matter and the parties as far as the court has power to dispose of it, while an interlocutory judgment is one which reserves or leaves some further question or direction for future determination ..... Generally, however, a final judgment is one which disposes of the cause both as to the subject matter and the parties as far as the court has power to dispose of it, while an interlocutory judgment is one which does not so dispose of the cause, but reserves or leaves some further question or direction for future determination ..... .. The term "interlocutory judgment" is, however, a convenient one to indicate the determination of steps or proceedings in a cause preliminary to final judgment, and in such sense the term is in constant and general use even in code states."

25. Similarly, Volume 60 of the same series at page 7 seeks to draw a distinction between an interlocutory and a final order thus:

> "The word "interlocutory", as applied to rulings and orders by the trial court, has been variously defined. It refers to all orders, rulings, and decisions made by the trial court from the inception of an action to its final determination. It means, not that which decides the cause, but that which only settles some intervening matter relating to the cause. An interlocutory order is an order entered pending a cause deciding some point

> or matter essential to the progress of the suit and collateral to the issues formed by the pleadings and not a final decision or judgment on the matter in issue .. An intermediate order has been defined as one made between the commencement of an action and the entry of the judgment."

26. Thus, while determining the order under challenge and impugned in the revision as interlocutory or final, the above tests have to be applied.

27. But, in the case of Ex Parte Moore In Re Faithful, Lord Selbome while defining a final judgment observed as follows:

"To constitute an order a final judgment nothing more is necessary than that there should be a proper litis contestatio, and a final adjudication between the parties to it on the merits.

28. Similarly, Brett, M.R. Observed as follows:

> "The question is whether in the Chancery Division there cannot be a "final judgment" when everything which has to be done by the Court itself is finished. Is that a final judgment which directs certain things to be done and certain inquiries to be made, and certain other things to be done on those inquiries being answered? If the Court ordered the result of the inquiries to be reported to itself before the judgment was given, it would not be a final judgment. But, if the Court orders something to be done according to the answer to the inquiries, without any further reference to itself, the judgment is final."

29. Wharton's Law Lexicon (14th Edition, p. 529) defines interlocutory order thus:

"An interlocutory order or judgment is one made or given during the progress of an action, but which does not finally dispose of the rights of the parties."

30. Summing up the natural and logical meaning of an interlocutory order, the conclusion is inescapable that an order which does not terminate the proceedings or finally decides the rights of the parties is only an interlocutory order. In other words, in ordinary sense of the term, an interlocutory order is one which only decides a particular aspect or a particular issue or a particular matter in a proceeding, suit or trial but which does not however conclude the trial at all. This would be the result if the term interlocutory order is interpreted in its natural and logical sense without having resort to Civil Procedure Code or any other statute. If, interlocutory order in ordinary parlance is construed, it would indicate the attributes, mentioned above, and this is what the term interlocutory order means when used in the Act, examine the true intent and import of an interlocutory order.

31. Coming to the Indian law as to the definition of interlocutory order, in S. Kuppuswami Rao v. The King AIR 1949 FC 175, the Federal Court held that the tests which had to be applied to determine whether an order was a final order were the same

both in respect of orders in civil proceedings as well as orders in criminal proceedings. The Federal Court with the approval of Salaman v. Waner (1891) 1 Q.B. 734, the following interpretation of the expression "final order" is as given:-"If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, we think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but if given in the other, will allow the action to go on, then we think it is not final, but interlocutory.

32. In Mohan Lal Magan Lal thacker v. State of Gujarat (referred supra), the Apex Court drawn distinction between 'final order' and 'interlocutory order', based on the definition of Halsbury's Laws of England (3rd Edition Volume 22 pg 742-742), the following four tests are required to be applied.

(1) Was the order made upon an application such that a decision in favour of either party would determine the main dispute?

(2) Was it made upon an application upon which the main dispute could have been decided?

(3) Does the order, as made, determine the dispute?

(4) If the order in question is reversed, would the action have to go on.

33. In another judgment reported in Ramesh v. Patni MANU/SC/0039/1966 : 1966] 3 S.C.R. 198, the Hon'ble Apex Court expressed similar view, where the question was whether an order passed by the Claims Officer under the Madhya Pradesh Abolition of Proprietary Rights Act, 1950 under Section 22(1) of the Act was questioned before the High Court on the ground that the Commissioner had no jurisdiction to entertain or try the appeal, but High Court dismissed the petition, summarily holding that it was not final order and it did not decide the controversy between the parties and did not of its own force affect the rights of the parties or put an end to the controversy. Thereupon, the Apex Court observed as follows:

1. "that the word 'proceeding' in Art. 133 was a word of a very wide import;

2. that the contention that the order was not final because it did not conclude the dispute between the parties would have had force if it was passed in the exercise of the appellate or revisional jurisdiction of the High Court, as an order of the High Court passed in an appeal or revision would not be final if the suit or proceeding from which there was such an appeal or revision remained still alive after the High Court's order;

3. but a petition under Art. 226 was a proceeding independent of the original controversy between the parties; the question therein would be whether a proceeding before a Tribunal or an authority or a court should be quashed on the ground of want of jurisdiction or on other well recognized grounds and that the decision in such a petition, whether interfering or declining to interfere, was a final decision

so far as the petition was concerned and the finality of such an order could not be judged by co-relating it with the original controversy between the parties. The Court, however, observed that all such orders would not always be final and that in each case it would have to be ascertained what had the High Court decided and what was the effect of the order. If, for instance, the jurisdiction of the inferior tribunal was challenged and the High Court either upheld it or did not, its order would be final."

34. The test laid down by the Constitutional Bench referred in the judgments in Mohan Lal Magan Lal thacker v. State of Gujarat (referred supra) with the approval of principle in S. Kuppuswami v. The King (referred supra), if applied to the order passed as per Order XXI Rule 54 CPC either dismissing or allowing the execution petition, it is clear that, when the order under challenge in a revision if terminates or culminates the entire proceedings, it is a final order. If not, it is only an interlocutory order and remedy available to such person aggrieved is elsewhere.

35. The principle of law laid down in the above judgments is only that if the order under challenge in the revision would terminate or culminates the entire proceedings, which can be described as final, otherwise it is interlocutory order. But in the facts of the present case, the Executing Court upon considering the contentions advanced for attachment of immovable property under Order XXI Rule 54 CPC, which is a step towards proclamation, as such the Order challenged will not terminate or decide the dispute.

36. By applying the principle laid down in the above judgments referred supra, including the definition of 'Interlocutory', the Order passed by the Executing Court under Order 21 Rule 54 CPC is only an Interlocutory Order to proceed further for disposal of the main petition i.e., the main Execution Petition and the proceedings are deemed to have terminated only when the property is sold and realized the amount due under Conciliation Award.

37. A similar question came up before the Apex Court in a Judgment reported in Vinesh Kumar v. Santhi Prasad MANU/SC/0052/ 1980 : AIR 1980 SC 892.

38. In Shiv Shakti Coop. Housing Limited vs. M/s. Swaraj Developers & Ors. 1, the Apex Court held that against an Interlocutory Order, revision under Section 115 of CPC is not maintainable since revisional jurisdiction cannot be exercised unless the requirement of the proviso is satisfied.

39. In Surya Dev Rai vs. Ram Chander Rai & Ors. [MANU/SC/0559/2003 : (2003) 6 SCC 675], the Apex Court held that the effect of erstwhile Clause B of the proviso being deleted and new proviso have been inserted and the revisional jurisdiction in respect of Interlocutory Order passed in a trial Court or other proceedings is substantially curtailed and the revisional jurisdiction cannot be exercised unless the requirement of the proviso is satisfied.

40. The Division Bench of the Karnataka High Court has considered the judgment in Siva Sakthi's case and Suryadevarai's case in K.M. Aliulla Khan v. R. Sarvesh

Murthy (W.A. No. 824 of 2004, Dt: 12.2.2004), came to the conclusion that a writ petition can only be entertained if the impugned order caused grave injustice or failure of justice. The same principle is reiterated in Nagawwa v. Mallapa MANU/KA/0039/2004 : ILR 2004 KAR 1594 : 2004 (3) Karla 1 where similar question came up before the High Court was that whether a revision against an interlocutory was maintainable and the Court concluded that unless the order resulted in injustice or failure of justice, such order is not amenable for revisional jurisdiction under Section 115 of CPC.

41. In the present case, the Court ordered attachment of immovable property under Order XXI Rule 54 CPC and when immovable property was attached, the property cannot be taken away like any immovable property and that the property will remain as it is, but subject to other orders to be passed under Order XXI Rules 64 and sale as per Rule 66 CPC, but on account of attachment, no substantial injustice would be caused to this petitioner and thereby revision is not maintainable against the Order under challenge, in this revision and consequently, no revision is maintainable against the order impugned in this revision, in view of the bar under the proviso to Section 115 of CPC, as the order would not terminate or culminate the entire proceedings, but it is only step in aid to proceed further in termination of the proceedings by invoking Rules 64 and 66 of Order XXI of CPC.

42. One of the contentions of the learned counsel for the petitioner is that when the Court assumed jurisdiction which is not vested on it, in view of Clause (1) of Section 115 CPC, a revision can be maintained. No doubt, this Court can exercise power of Revision under Section 115 CPC when the Court Subordinate Court to the High Court appears to have exercised its jurisdiction not vested on it by law or to have failed to exercise its jurisdiction so vested or to have acted in exercise of its jurisdiction illegality or with material irregularity. But, here the counsel contended that it would fall under Clause (a) of Sub-section 1 of Section 115 of CPC i.e., exercise of jurisdiction not vested on it by law but, the bar under Sub-section 1 of Section 115 of CPC is subject to proviso and proviso is an exception to exercise power under Sub-section 1 of Section 115 of CPC. Even if, the Court appears to have exercised its jurisdiction, which is not vested on it by law, unless such order passed exercising such jurisdiction dispose off the suit or proceedings or terminates or culminate the entire proceedings, revision cannot be maintained under Section 115 of CPC. In view of foregoing discussion, we hold that the Order under challenge is only Interlocutory in nature and not final order and consequently, revision under Section 115 CPC is not maintainable and the Point is answered against the Petitioner and in favour of respondent.

43. In Re Point No. 2: The main contention of the learned counsel for the petitioner is that in this case the Conciliation Award was passed subject to consent/approval by the higher authorities of the petitioner. But, this fact is not disputed by the respondent/D.Hr also and though the Award passed by the Conciliator long back, the petitioner neither

obtained consent nor rejected the Award, intimated the same to the respondent. In the absence of any rejection and intimation of the same in writing to the respondent and more particularly when Clause (1) of the Conciliation Award is complied with, it shall be deemed that the Award is accepted by Tacit Consent due to payment of Rs. 75 Lakhs and Rs. 16.40 Lakhs as final RA bill within a period of one month from the date of signing on the settlement.

44. At this stage, it is apposite to extract the Award passed by the Conciliator and it is extracted hereunder:

> "As a total amount of Rs. 4.63 cr (including refund of LD Rs. 1.48 Cr) is payable by INCOIS to UNITY, an amount of Rs. 75.00 Lakhs and amount of Rs. 16.40 Lakhs pending as Final RA Bill may be released within a period of one month from the date of signing of this statement.
>
> (2) In case the net amount of Rs. 4.63 Cr is not released within 90 days of signing of the statements, it will attract interest at the rate of 12% per annum as per Section 3 of Indian Interest Act."

45. A bare look at the conditions in Clause (1) of the Conciliation Award, it is clear that total amount of Rs. 4.63 crs including the refund of LD Rs. 1.48 crores is payable by INCOIS to UNITY and an amount of Rs. 75.00 lakhs and Rs. 16.40 lakhs pending as final RA Bill shall be released within a period of one month from the date of signing on the statement. The second Clause deals with the net amount payable to the UNITY within 90 days of signing on the settlement and it will attract interest at the rate of 12% per annum as per Section 3 of Indian Interest Act. But, while signing K.K.V. Chary, Deputy Chief Administrative Officer, it is written with pen above signature "subject to acceptance by competent authority." When the settlement is subject to acceptance by the competent authority, compliance of part of the Award and payment of Rs. 75.00 lakhs and Rs. 16.40 lakhs towards final payment of RA Bill due within a month is an implied acceptance of the Award of Conciliator. Payment of Rs. 75.00 and Rs. 16.40 Lakhs is not in dispute and in the Counter filed by the petitioner in the Execution Petition made a categorical admission in para No. 4 and it is as follows:

> "I respectfully submit that, the conciliation settlement reached between the parties was signed by decree holder and judgment debtor accepting the settlement. The Deputy Chief Administrative Officer of the Judgment debtor institution signed the settlement stating that 'Subject to acceptance by the Competent Authority' which is also signed and accepted by the degree holder. The initial amounts of Rs. 75,00,000/- and Rs. 16,40,000/- were released immediately as per the settlement as the release of said amounts was within the ambit of judgment debtor. The balance amount was required to be approved and accepted by the competent authority after the same has been concurred by the Finance Division. The decree holder accepted

for the same by signing the conciliation settlement. The decree holder without waiting for the approval of higher authorities and Ministry initiated legal proceedings by issuing legal notice to the judgment debtor on 21.11.2017 and filed the present execution petition....."

46. This admission relating to release of an amount of Rs. 75 lakhs and 16.45 lakhs is suffice to conclude that the Award passed by the Conciliator was impliedly accepted and the petitioner having accepted and complied with the Clause No. 1 of the Award, now, the petitioner cannot contend that the Award was not accepted, by applying the principle of estoppel by conduct. The petitioner being the Central Government Institution by its act i.e., payment of Rs. 75.00 lakhs and Rs. 16.40 lakhs in terms of the Clause No. 1 of the Award passed by the Conciliator, cannot go back saying that it was not accepted by the higher authorities. More curiously, in the entire Counter filed on 28.06.2018, the petitioner did not contend that the Award was not accepted. For the first time, it was contended before this Court that the Award passed by the Conciliator was not accepted by the competent authority and placed on record the correspondence between the parties to contend that the Award was not accepted on 20.03.2018. A Letter dt. 20.03.2018 in file No. ES/2016/2017-ICC, Government of India, Ministry of Earth Sciences, is placed on record to substantiate his contention i.e., the proposal of INCOIS in agreeing for conciliation for settlement of dispute, is not agreed by the Higher Authorities. The Counter Affidavit was duly singed by Sri S.S.C. Shenol, Director of this Petitioner company. In the entire counter, there was no allegation that by Letter dt. 20.03.2018, under Secretary to ICC, Government of India, Ministry of Earth Sciences, rejected the Conciliation Award. Even otherwise, a bare look at the Letter, it is evident that the authorities did not agree for mode of settlement of dispute by conciliation, but not the Award passed by the Conciliator. If really, this Letter was sent to Director, INCOIS i.e., Shenol, who filed Counter affidavit, it would have been mentioned in the Counter itself. The petitioner is having accepted for the terms, released Rs. 75.00 lakhs and Rs. 16.40 lakhs in compliance of Clause No. (1) of the Conciliation Award, now contending that the Award was not accepted. But, In view of the payment of the amount in compliance of the Clause No. 1 of Award of Conciliator and failure to refer in the Counter alleged rejection by Under Secretary to Ministry of Earth Sciences, creates any amount of suspicion on the contention of this Petitioner/JDr about rejection of the Conciliation Award. In fact, Conciliation Award was passed on 17.05.2017, whereas, the Letter was issued by the Under Secretary on 20.03.2018 though an amount of Rs. 75 Lakhs and Rs. 16.04 Lakhs was released by the petitioner within the time stipulated in terms of Clause No. 1 of the Conciliation Award. Now the petitioner cannot be permitted to approbate and reprobate and they are estopped to raise such contention that the Award was not accepted at this stage even without any pleading in the Counter.

47. The Government is expected to be model litigant maintaining ethical standards in prosecuting the litigation being a compulsive litigant. The Government of India in view of certain observations made in various Judgments by the Apex Court in State of Punjab vs. M/s. Geeta Iron & Brass Works Ltd. MANU/SC/0005/1977 : (1978) 1 SCC 68 and Chief Conservator of Forest v. Collector MANU/SC/0153/2003 : (2003) 3 SCC 472 adopted National Litigation Policy, but it did not yield fruitful results and it totally failed. But, the Government of India being a model litigant is under obligation as common law has not always been clear, but the written policies seek to provide clarity and guidance on what conduct is required of a model litigant. Behind each of the duties is an overarching duty to act honestly, fairly, with complete propriety and in accordance with the highest professional standards. It goes beyond the requirement for lawyers to act in accordance with their ethical obligations and merely acting honestly or in accordance with the law and court rules. The policies all variously refer to the following specific duties, some of which have long been recognised by the Courts.

a) Dealing with claims promptly;

b) Minimising delay in proceedings'

c) Making an early assessment of the prospects of success and potential liability in claims;

d) Paying legitimate claims without litigation;

e) Acting consistently in the handling of claims and litigation;

f) Endeavouring to avoid, prevent or limit the scope of litigation and participating in alternative dispute resolution where appropriate;

g) Missing costs in proceedings;

h) Not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;

i) Not taking technical points unless the agencies interests would be compromised;

j) Not understanding and pursuing appeals unless there are reasonable prospects for success or the appeal is otherwise justified in the public interest; and

k) Apologising when the government or its lawyers have acted wrongfully or improperly.

48. These guidelines as recognised by Common Wealth Governments by model litigation policy of Common Wealth countries. The litigation in the Courts would be minimised though the Government of India adopted the National Litigation Policy, it did not serve any useful purpose. Therefore, the Government being litigant is at least expected to follow the ethical issues and practical considerations while dealing with a citizen in litigation before the Court. The Government being litigant is expected to be honest litigant to minimise the litigation, instead of it, the petitioner herein being the Government Organization as a litigant not acting fairly and prosecuting the proceedings without placing all the facts

before the Court, incorporating those facts in the Counter. Therefore, the way in which the proceedings are being prosecuted by the petitioner being a litigant i.e., Government Organization is dishonest and taking the Court respondent to a ride without maintaining transparency in their functioning. When the petitioner is acting in such manner, the Court cannot accept such contention, more particularly, when the petitioner complied part of the Award passed by the Conciliator, in view of the principle of estoppel contained in Section 115 of Indian Evidence Act, on the basis of principle of approbate and reprobate. When the petitioner having accepted Clause No. 1 of the Conciliation Award and complied the same in toto, now cannot contend that the Award was not accepted by the higher authorities and therefore, the petitioner is debarred from raising such contention by applying the principle of estoppel by conduct. An identical question came up before the Apex Court in Vishnu Bhagwan Agarwal and another v. National Insurance Company Limited MANU/SC/1390/2017 : (2018) 12 SCC 210 wherein the Insurance Company having accepted the changes in the policy of insurance and limit being raised over Rs. 25 lakhs, now cannot contend that the insurance company did not accept the policy and insurance company would be estopped by conduct, because of encashing and adjusting the enhanced insurance premium, which would lead to the limit being raised to over Rs. 25 lakhs. The same principle is applicable to the present facts of the case. Therefore, on this ground, the petitioner is not entitled to claim relief. The conduct of the petitioner, more particularly, about the suppression of certain facts before the Court by the Director, INCOIS, who filed Counter Affidavit made a desperate attempt, suppressing certain facts, more particularly, about the correspondence and passing an order. But, on account of failure to mention about the Letter dt. 20.03.2018 not accepting the mode of settlement of the dispute, creates any amount of suspension on the conduct of the Director, who filed the affidavit before the Executing Court. In any view of the matter, the conduct of the Director of Petitioner is highly reprehensible as he did not approach with clean hands and suppressed important facts, seeking relief from the Court to raise attachment setting aside the Order passed by the Execution Court under Order XXI Rules 54 CPC.

49. The core contention urged before this Court is that in view of the Judgment in Mysore Cements Limited referred supra, when the Award passed by the Conciliator was not referred and the decree was passed in terms of the Award of the Conciliator, it is not executable under Section 36 of the Arbitration and Conciliation Act.

50. In view of the contention urged before this Court, it is relevant to advert to the Arbitration and Conciliation Act from Sections 61 to 63 mentioned in Part No. 3 of the Act. Section 61 deals with application and scope of conciliation of disputes arising out the local relationship whether contractual or not. Section No. 62 of the Act deals with the commencement of conciliation proceedings. Sections 63, 64, 65, 66,67 and 68 to 72of the Act deals with the procedure to be followed in conciliation proceedings, role of Conciliator and Communication, disclosure or non

cooperation of the parties to the Conciliator etc.,

51. Section 73 deals with the Settlement Agreement, it reads thus:

(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

52. In the present facts of the case, the parties to the settlement signed and authenticated the settlement agreement by the Conciliator furnishing a copy to each of the party in strict compliance of Section 73 of the Act. But Section 74 deals with Status and effect of settlement agreement and according to it, the settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30 of the Act..

53. Section 76 deals with Termination of conciliation proceedings.-- The conciliation proceedings shall be terminated--

(a) by the signing of the settlement agreement by the parties on the date of the agreement; or

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

54. In the present case, the parties to the settlement signed on the agreement on the date of preparing settlement agreement and when they signed on the agreement, Conciliation Proceedings are deemed to have terminated. But, none of the provisions of the Act permitted the parties to sign on the agreement, subject to approval by the competent Authority without fixing time. More so, in view of Section 74 of the Act,

such Award of Conciliator is deemed to be on par with an Arbitral Award passed by an Arbitral tribunal under Section 30 of the Act.

55. Section 30 of the Act deals with Settlement by different modes, including the mode of Conciliation, Arbitration and other procedure, which is on par with Section 89 of CPC. But Section 35 of the Arbitration and Conciliation Act deals with finality of arbitral awards. Section 36 of the Act deals with Enforcement of Arbitral Awards. According to Section 35, Arbitral Award shall be final and binding on the parties and the persons claiming their respective rights, subject to the part of the Act. According to Section 36 of the Act, where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

56. A co-joint reading of Sections 74,30,35 and 36 of the Act, the Award of Conciliator is as good as an order passed by Arbitral Tribunal and such Award is final, subject to the provisions of the Chapter and enforceable under Section 36 of the Act after expiry of time permitted to set aside such Award under Section 34 of the Act. But, in the Judgment of the Apex Court in Mysore Cement's case referred supra, the Court considered the scope of Section 73,30,76 of the Arbitration and Conciliation Act and in para No. 16 of the Judgment held that even a compromise petition signed by both the parties and filed in the court per se cannot be enforced restoring to execution proceedings unless such a compromise petition is accepted by the court and the court puts seal of approval for drawing a decree on the basis of compromise petition. In the present case, looking to the Memorandum of Conciliation Proceedings and Letter of Comfort, it is true that parties have agreed to certain terms, but Award cannot be straightaway enforced by taking up execution proceedings.

57. It appears from the facts of the above Judgment that the case pending before the Court appears to have been referred to conciliation and the Conciliator passed the said Award, based on the agreement arrived by the parties. But, the Conciliation Award was not referred to the Court where the proceedings, if any, are pending. Therefore, the Apex Court concluded that it is not an Award, unless, the Conciliation Award is produced before the Civil Court to pass decree in terms of the arbitral award, it cannot be executed. But, the trial Court by following the principle in Sundaram Finance Limited v. Abdul Samad and others2 held that the Award need not be placed to make a decree by the Civil Court.

58. The Apex Court adverted to the earlier judgment of the Apex Court in Dr. S.C. Jain vs. Sahny Securities Pvt. Ltd. MANU/SC/0122/2018 : AIR 2018 SC 965 a vague reference is made regarding the finality of the Award and termination of the proceedings. In para No. 20 of the Judgment, the Apex Court placing reliance in Daelim Industrial Co. Ltd. vs. Numaligarh Refinery Ltd. 2009 159 DLT 579 referred that Section 42 of the Act would apply to the execution of the

Award, which is not arbitral proceedings and Section 38 of the Code would apply to the decree passed by the Court prescribing that the decree may be executed by the Court which passed it, or by the Court to which it was sent for execution. In case of an award, no court passes the decree.

59. The Madras High Court in Kotak Mahindra Bank Limited v. Sivakama Sundari and Others MANU/TN/3588/2011 : (2011) 4 LW 745 referred to Section 46 of the Code which speaks about the precepts but it is not applicable. However, the observations made therein are clear that an Award passed outside the Court need not be referred to a Civil Court for passing a decree in terms of the Award when the reference were not made by the Civil Court. In para No. 19 of the Judgment, the Court made it clear while Award passed by an arbitral tribunal is deemed to be a decree of a civil court under Section 36 of the 1996 of the Act, there is no deeming fiction anywhere to hold that the Court within whose jurisdiction the arbitral award was passed, should be taken to be the Court which passed the decree. Therefore, there is little controversy with regard to the matters referred to the Arbitrator or mediator or conciliator by the Civil Court in exercise of their power under Section 89 of CPC and the awards passed by the Conciliator or Mediator directly without reference of the Court. But, the Awards passed by such Arbitrator or Conciliator or Mediator is deemed to be a decree within Section 73 and it is executable.

60. In view of the recent judgment of the Apex Court in Sundaram Finance's case and persuaded by Madras High Court judgment in Sivakama Sundrai and others MANU/TN/3588/2011 : (2011) 4 LW 745 (supra), the contention of the petitioner based on Mysore Cement's case cannot be accepted.

61. On overall consideration of entire material on record, it is difficult to sustain the contention of the learned counsel for the petitioners as the Order under challenge is only interlocutory in nature, which is not amenable revisional jurisdiction, in view of the proviso to Section 115 of CPC and that too the Award passed by the Conciliator is deemed decree within Section 73, consequently such award can straight away be executed. Though the Award was passed subject to approval by the higher authorities of the petitioner in view of the subsequent conduct accepting the terms of the Conciliation Award by complying clause No. 1 of the Conciliation Award, the petitioners are estopped to raise such contention that the Award was not accepted by the higher authorities when it was not even referred in the Counter before the Executing Court. Therefore, we find no merit in the contention of petitioner and the revision petition is liable to be dismissed, while, unhesitatingly affirming the Order of Executing Court.

62. In view of the above discussion, we find no ground to set aside the Order in E.P. No. 50 of 2018 passed by III Additional District Judge, Rangareddy District at L.B. Nagar.

63. Accordingly, this Civil Revision Petition is dismissed.

64. As a sequel, miscellaneous Petitions, if any, shall stand closed

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## 2019 (1) L.S. 151 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

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

Ganga Prasad Mahto ..Appellant
Vs.
State of Bihar & Anr., ..Respondents

**INDIAN PENAL CODE, Sec.376 - Appeal against Judgment and Order passed by the High Court - Whether the two Courts below were justified in convicting the appellant for an offence punishable under Section 376 IPC.**

**Held - Complainant was not examined by Doctor after alleged incident - In absence of any medical examination done, prosecution did not examine any doctor in trial in support of their case - It was not disputed that similar type of complaints were being made in past by complainant against other persons also and such complaints were later found false and it was also not disputed that there was enmity between the appellant and the husband of the prosecutrix, due to which their relations were not cordial - Prosecutrix was in habit of implicating all the persons by making wild allegations of such nature against those with whom she or/and her husband were having any kind of disputes - No eye witness to alleged incident and one, who was cited as witness, i.e., PW-2 was a chance witness on whose testimony, a charge of rape could not be established; and lastly, so far as PW-1, husband of the complainant, is concerned, he admitted that he was away and returned to village next day morning of incident - Prosecution has failed to prove the case of rape alleged - Appeal stands allowed - Appellant is acquitted from charges leveled against him.**

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

Leave granted.

2. This appeal is directed against the final judgment and order dated 30.01.2014 passed by the High Court of Judicature at Patna in Crl.A. No.251 of 2002 whereby the High Court dismissed the appeal filed by the appellant herein and upheld the order dated 24.04.2002 of the 4th Additional District & Sessions Judge, Samastipur in Sessions Trial No.233 of 1999.

3. The appeal involves a short point as would be clear from the facts stated infra.

4. The appellant was prosecuted and eventually convicted for an offence punishable under Section 376 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and sentenced to undergo rigorous imprisonment for 7 years by the Sessions Judge. The conviction and sentence was upheld by the High Court. The appellant (accused) is now in appeal in this Court against his concurrent conviction/sentence.

5. So, the short question, which arises for consideration in this appeal, is whether the two Courts below were justified in convicting the appellant for an offence punishable under Section 376 IPC.

6. PW-3 lodged a complaint on 15.12.1997 complaining therein that the appellant in the previous night at around 8.00 PM entered into her house when she was alone and threatened her by showing pistol and committed rape on her. This, in substance, was the allegation in the FIR, which was lodged by PW-3 on the next day of the incident.

7. The prosecution examined three witnesses. Hari Narain Singh (PW-1) is the husband of the complainant. Ram Udgar Singh(PW-2) claims to be the person living near the complainant's house and PW-3 is the complainant(prosecutrix).

8. As mentioned above, the Sessions Judge and the High Court convicted the appellant placing reliance on the evidence of three prosecution witnesses.

9. Having heard the learned counsel for the parties and on perusal of the record of the case, we are constrained to allow the appeal and set aside the impugned order.

10. In our considered opinion, the prosecution has failed to prove the case of rape alleged against the appellant at the instance of the complainant(PW-3).

This we say for the following reasons:

11. First, the complainant was not examined by the Doctor after the alleged incident. Second, in absence of any medical examination done, the prosecution did not examine any doctor in the trial in support of their case; Third, it was not disputed that similar type of complaints were being made in past by the complainant against other persons also and such complaints were later found false; Fourth, it was also not disputed that there was enmity between the appellant and the husband of the prosecutrix, due to which their relations were not cordial; Fifth, it had also come in evidence that the prosecutrix was in habit of implicating all the persons by making wild allegations of such nature against those with whom she or/and her husband were having any kind of disputes; Sixth, there was no eye witness to the alleged incident and the one, who was cited as witness, i.e., PW-2 was a chance witness on whose testimony, a charge of rape could not be established; and lastly, so far as PW-1, husband of the complainant, is concerned, he admitted that he was away and returned to village the next day morning of the incident.

12. In the light of the aforementioned seven reasons, we are of the considered opinion that the prosecution has failed to prove the case of rape alleged by the Complainant(PW-3) against the appellant beyond reasonable doubt. In other words, there is no evidence adduced by the prosecution to prove the commission of the offence of rape by the appellant on PW-3 and the evidence adduced is not sufficient to prove the case of rape against the appellant.

13. Both the Courts below were, therefore, not justified in convicting the appellant for an offence punishable under Section 376 IPC and sentenced him to undergo rigorous

imprisonment for seven years. He was entitled for acquittal.

14. In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. The impugned order is set aside. The appellant is acquitted from the charges leveled against him. He is accordingly set free. His bail bonds are accordingly discharged.

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## 2019 (1) L.S. 153 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Chief Justice of India
M.R. Ranjan Gogoi
The Hon'ble Mr.Justice
Sanjay Kishan Kaul &
The Hon'ble Mr.Justice
K.M. Joseph

Senior Divisional Manager,
LIC of India & Ors., ..Appellants
Vs.
Shree Lal Meena ..Respondents

**LIFE INSURANCE CORPORATION OF INDIA (STAFF) REGULATIONS, 1960 - Employees of Life Insurance Corporation of India, United India Insurance Company Limited and a batch of employees of Andhra Bank resigned when the pension schemes in respect of these institutions in question were not in force - Pension schemes came into force subsequently, but with retrospective effect - Question as to whether these employees, who had resigned from service post the date from which the pension schemes were made applicable, but prior to the date on which schemes got notified, would be entitled to the benefit of the pension schemes in question.**

**Held – Present issue cannot be dealt with on a charity principle - When the Legislature, in its wisdom, brings forth certain beneficial provisions in the form of Pension Regulations from a particular date and on particular terms and conditions, aspects which are excluded cannot be included in it by implication - Service jurisprudence, recognising the concept of 'resignation' and 'retirement' as different, and in the same regulations these expressions being used in different connotations, left no manner of doubt that the benefit could not be extended, especially as resignation was one of the disqualifications for seeking pensionary benefits, under the Regulations.**

**J U D G M E N T**
(Per the Hon'ble Mr.Justice
Sanjay Kishan Kaul )

Employees resigned from service. We are concerned with one employee of the Life Insurance Corporation of India; one employee of the United India Insurance Company Limited and a batch of employees of Andhra Bank. These employees resigned when the pension schemes in respect of these institutions in question were not in force. The pension schemes came into force

subsequently, but with retrospective effect. The question, which, thus, arose was whether these employees, who had resigned from service post the date from which the pension schemes were made applicable, but prior to the date on which the schemes got notified, would be entitled to the benefit of the pension schemes in question. A Bench of two Judges of this Court found that there was a divergence of judicial views of this Court, and the matter needed to be examined by a larger Bench. The reference order was passed in CA No.14739/2015 and that is how the matter is before us.

2. We deem it appropriate to set forth the factual matrix, relevant for the determination of the controversy, in respect of the lead matter and thereafter, we will analyse the legal principles and accordingly decide the connected matters.

C.A. No.14739 of 2015

3. Shree Lal Meena, the respondent in the appeal was an employee of the Life Insurance Corporation of India Limited (for short 'LIC'). On completion of more than 20 years of service, he addressed a letter dated 15.6.1990 to the LIC, expressing concerns about the poor health of his wife and himself and the possibility that he may be seeking voluntary retirement on account thereof. There being no response to this letter, Shree Lal Meena followed the said letter with another letter dated 18.6.1990, reiterating the same aspect. Once again, there was no response. Finally, he tendered a letter of resignation on 14.7.1990, for it to take effect immediately, by waiving off the mandatory notice period of three months under Regulation 18 of the Life Insurance Corporation of India (Staff) Regulations, 1960 (hereinafter referred to as the 'Staff Regulations'). The acceptance of the resignation was communicated by the LIC vide letter dated 11.1.1991, to take effect from 14.7.1990, waiving off the statutory notice period.

4. It is pertinent to note that there was no scheme or provision for voluntary retirement applicable to Shree Lal Meena during this period of time. Shree Lal Meena was paid all his dues as were admissible to him. The beneficial scheme operating at the relevant time was a Contributory Provident Fund Scheme under Regulation 76 of the Staff Regulations.

5. More than 5 years later, the Life Insurance Corporation of India (Employees) Pension Rules, 1995 (for short 'Pension Rules') were promulgated, on 28.6.1995, but were brought into force with retrospective effect, from 1.11.1993, unless expressly provided against. The applicability of Section 3(1)(a) of the Pension Rules made the scheme applicable to all the employees who were in service of the LIC on or after 1.1.1986, but had retired before 1.11.1993, given that the employees satisfied the other conditions provided for in the Pension Rules.

6. Shree Lal Meena was in service after 1.1.1986. He had, however, resigned with effect from 14.7.1990. Had he not resigned he would have continued in service and would have retired sometime around the year 2000. He had also made an endeavour, prior to his resignation, proposing voluntary retirement for himself. Shree Lal Meena was, thus, of the view that the Pension

Rules should be made applicable to him and accordingly made a request, which was, however, declined on 6.4.1996 by the LIC on the ground that he had 'resigned' from service. He, thus, issued a notice of demand vide letter dated 28.8.1997, which met with the same fate and finally filed a writ petition before the Rajasthan High Court in 1997 itself, which was decided in his favour, by the learned Single Judge of that Court, vide judgment dated 8.9.2006.

7. The gravamen of the judgment of the learned Single Judge is the request made by Shree Lal Meena for voluntary retirement and that it was the absence of any provision for the same under the Staff Regulations, which had caused him to tender his resignation. This view was sought to be supported by the judgment of this Court in JK Cotton Spinning & Weaving Mills Co. Ltd., Kanpur v. State of U.P., AIR 1990 SC 1808 opining that where an employee voluntarily tenders his resignation, termination of service, post acceptance of such resignation by the employer would fall in the category of 'voluntary retirement', given all other ingredients of voluntary retirement were being met. It may be noted that in the factual contours of the controversy of that judgment, the question really posed was whether in the case of services of an employee being terminated consequent to a voluntary resignation, such termination so brought about would amount to retrenchment within the meaning of Section 2(s) read with Section 6N of the Uttar Pradesh Industrial Disputes Act, 1947. As per the provisions of Section 2(s) of that Act, the definition of 'retrenchment' excludes a case of voluntary retirement. Since the employee had tendered his resignation voluntarily, and had subsequently claimed compensation on account of retrenchment, this Court, in that case had opined against the employee. The learned Single Judge of the Rajasthan High Court also recorded that there was no dispute that Shree Lal Meena had the requisite years of service to be entitled to pensionary benefits if the scheme had existed at the relevant point of time.

8. LIC, aggrieved by this order, appealed to the Division Bench of the High Court, which endeavour, however, failed as the appeal was dismissed vide order dated 16.8.2011. The plea of the LIC, based on the judgment of this Court in Reserve Bank of India & Anr. v. Cecil Dennis Solomon & Anr., (2004) 9 SCC 461 and of the Division Bench of the Punjab & Haryana High Court in J.M. Singh v. Life Insurance Corporation of India & Ors., CWP No.10157/1996 decided on 8.1.2010 was repelled.

9. The present appeal has thereafter been filed by the LIC, in which the reference order was passed.

10. In order to appreciate the reasoning of the Courts below, supported by the respondent in the appeal and the arguments advanced on behalf of the appellant also on the same lines, but repelled by the Courts below, we consider it necessary to first appreciate the Pension Rules, which have been brought into force.

11. Rule 2 is the definition rule, defining the various expressions used in the Pension Rules. The relevant Rule 2(j) reads as under:

"2. Definitions - In these rules, unless the context otherwise requires -

xxxx xxxx xxxx xxxx

(j) "employee" means any person employed in the service of the Corporation on full-time work on permanent basis and who opts and is governed by these rules but does not include an employee retired before the commencement of these rules and who is drawing pension from the Pension Fund of the Oriental Government Security Life Assurance Company Limited in accordance with sub-regulation (2) of regulation 76 of the Life Insurance Corporation of India (Staff) Regulations, 1960, made under the Act;"

12. A reading of the aforesaid clause shows that there is a specific exclusion of an employee in whose case the twin conditions of having 'retired' before the commencement of the Pension Rules and drawing of pension under the Staff Regulations is satisfied. Rule 2(s) reads as under:

"2. Definitions - In these rules, unless the context otherwise requires -

xxxx xxxx xxxx xxxx

(s) "retirement" means,-

(i) retirement in accordance with the provisions contained in sub-regulation (1) or sub-regulation (2) or sub-regulation (3) of regulation 19 of the Life Insurance Corporation of India (Staff) Regulations, 1960 and rule 14 of the Life Insurance Corporation of India Class III and Class IV Employees (Revision of Terms and Conditions of Service) Rules, 1985 made under the Act;

(ii) voluntary retirement in accordance with the provisions contained in rule 31 of these rules;"

13. Thus, the definition of 'retirement' envisages two eventualities - first a person who had retired in terms of the Staff Regulations; and secondly, a voluntary retirement under the provisions of the Pension Rules themselves.

14. Another relevant provision to be taken note of is Rule 23 of the Pension Rules, which reads as under:

"23. Forfeiture of service - Resignation or dismissal or removal or termination or compulsory retirement of an employee from the service of the Corporation shall entail forfeiture of his entire past service and consequently shall not qualify for pensionary benefits."

15. The aforesaid Rules, thus, show that resignation entails forfeiture of the entire past service and consequently would not qualify for pensionary benefits. Rule 31 deals with 'Pension on voluntary retirement', which is admissible on completion of 20 years of qualifying service, with a notice of not less than 90 days in writing.

16. The moot point which, thus, arises for consideration is the effect of the retrospective application of these Rules in the given factual scenario. Had the Pension Rules been only prospective in application, there is no doubt that Shree Lal Meena could not even have endeavoured to prefer a claim. In order to appreciate this aspect, the extent to which retrospectivity applies would have to be

analysed, strictly on the basis of these Pension Rules, which are also contributory in their character.

17. The undisputed fact is that as on the date when Shree Lal Meena was revolving the thought in his mind of voluntary retirement, there was no such provision in the Staff Regulations applicable. Thus, his repeated communications setting forth a thought process for 'voluntary retirement' had no legal backing on that date. It is in these circumstances that no response was forthcoming to his letters, when he talked about a concept which did not exist. Conscious of this aspect and wanting to leave the services of the LIC, Shree Lal Meena took recourse to what was permissible on that date, i.e., 'resignation'. Section 3 of the Staff Regulations has a heading 'Termination'. The other expression used before the relevant Regulation 18 is 'Determination of Service'. The Regulation itself uses the expression 'leave or discontinue' service. In whatever manner these expressions are understood, in legal and common parlance, they amount to, first a unilateral act on the part of an employee, desirous of not continuing with her/his service with the employer and then, the acceptance of the same by the employer, subject to a notice period, which, in the present facts, had been waived at the request of the employee. Thus, on the relevant date he took a conscious decision to disengage himself from the services of the appellant, on the terms & conditions as prevalent on that date. As to what happened five years hence, in our view, would have no bearing on any benefit, which can accrue to such employee as a respondent, except to the extent which is specifically made applicable to him.

18. It is trite to say that statutory provisions must be given their clear meaning unless there is ambiguity in the wordings. (Grundy v. Pinniger (1852) 21 LJ Ch 405; Pinner v. Everett [1969] 3 All ER 257: "In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase".) There is no ambiguity in the Pension Rules in question as to require any import to be given that is different from its plain words. The Pension Rules have been brought into force from a retrospective date of 1.11.1993. Thus, they would logically apply to all employees in service on or after 1.11.1993. The respondent was not such a person. There is only one further twist to the Pension Rules. Rule 3(1)(a) of the Pension Rules refers to applicability of these Pension Rules even to such of the employees who "retired" on or after 1.1.1986 and before 1.11.1993. Even for such of the employees, there is a requirement for an option to be exercised, in writing, that within a period of time of 120 days from the notified date they become member of the Life Insurance Corporation of India (Employees) Pension Fund, and refund within 60 days thereafter, the entire amount of LIC's contribution to the Provident Fund, including interest accrued thereon. This is so, as employees who retired during this period

of time had availed of the contributory provident fund benefit under the then existing Staff Regulations, and would have to surrender the benefits under those Regulations to the extent they were contributed for by the LIC, for the new Pension Rules to be made applicable to them. The expression used in Rule 3(1)(a) is clear and unequivocal - `retired'. It has not used any alternative expression also, for determination of the relationship of employer-employee, like `resignation'. In the same Rules, expressions like `resignation', `dismissal', `removal' have been used, more specifically in Rule 23 of the Pension Rules. When different expressions are used in the same Rules, in different contexts then all of them cannot be given the same meaning. (Member, Board of Revenue v. Arthur Paul Benthall (1955) 2 SCR 842; Kanhaiyalal Vishindas Gidwani v. Arun Dattatray Mehta (2001) 1 SCC 78: "It is true that when the same statute uses two different words then prima facie one has to construe that these two different words must have been used to mean differently.")

19. What is most material is that the employee in this case had resigned. When the Pension Rules are applicable, and an employee resigns, the consequences are forfeiture of service, under Rule 23 of the Pension Rules. In our view, attempting to apply the Pension Rules to the respondent would be a self-defeating argument. As, suppose, the Pension Rules were applicable and the employee like the respondent was in service and sought to resign, the entire past service would be forfeited, and consequently, he would not qualify for pensionary benefits. To hold otherwise would imply that an employee resigning during the currency of the Rules would be deprived of pensionary benefits, while an employee who resigns when these Rules were not even in existence, would be given the benefit of these Rules.

20. Now turning to the discussion of the judicial pronouncements in this behalf, we are of the view that any judgment has to be read for the law it lays down, by reference given to a factual matrix. Lines or sentences here and there should not be read in absolute terms, de hors the factual matrix in the context of which those observations were made. (CIT v. Sun Engineering Works (P.) Ltd. (1992) 4 SCC 363)

21. The judgment in JK Cotton Spinning & Weaving Mills Co. Ltd., Kanpur (supra) has, thus, to be considered in that context. What was the issue in that case? The first paragraph of the judgment itself clarifies that aspect. Whether determination of an employer-employee relationship amounted to retrenchment, within the meaning of the provisions of the Act applicable is what was being looked into. We have already noticed, while referring to the facts of that case hereinbefore, that the employee in question tried to act clever by half. He firstly resigned. The resignation was accepted and the consequent monetary benefit flowed to him. Thereafter, he sought to bring his resignation within the meaning of 'retrenchment' under Section 2(s) read with Section 6N of the Uttar Pradesh Industrial Disputes Act, 1947. The definition of 'retrenchment' itself clearly excluded voluntary retirement of the workman. The employee, having voluntarily resigned, the termination of relationship of

employer and employee could not come within the meaning of 'retrenchment'. This Court analysed the difference between the meaning of resignation and retrenchment. The resignation was voluntary. It is in this context that it was observed that a voluntary tendering of resignation would be similar to voluntary retirement and not retrenchment. Nothing more and nothing less. Thus, in our view, the High Court, both the learned Single Judge and the Division Bench, appeared to have read much more into this judgment than the legal proposition which it sought to propound. The principles in the context of the controversy before us are well enunciated in the judgment of this Court in Reserve Bank of India & Anr. v. Cecil Dennis Solomon & Anr. (supra) On a similar factual matrix, the employees had resigned some time in 1988. The RBI Pension Regulations came in operation in 1990. The employees who had resigned earlier sought applicability of these Pension Regulations to themselves. The provisions, once again, had a similar clause of forfeiture of service, on resignation or dismissal or termination. The relevant observations are as under:

"10. In service jurisprudence, the expressions "superannuation", "voluntary retirement", "compulsory retirement" and "resignation" convey different connotations. Voluntary retirement and resignation involve voluntary acts on the part of the employee to leave service. Though both involve voluntary acts, they operate differently. One of the basic distinctions is that in case of resignation it can be tendered at any time, but in the case of voluntary retirement, it can only be sought for after rendering prescribed period of qualifying service. Other fundamental distinction is that in case of the former, normally retiral benefits are denied but in case of the latter, the same is not denied. In case of the former, permission or notice is not mandated, while in case of the latter, permission of the employer concerned is a requisite condition. Though resignation is a bilateral concept, and becomes effective on acceptance by the competent authority, yet the general rule can be displaced by express provisions to the contrary. In Punjab National Bank v. P.K. Mittal [AIR 1989 SC 1083] on interpretation of Regulation 20(2) of the Punjab National Bank Regulations, it was held that resignation would automatically take effect from the date specified in the notice as there was no provision for any acceptance or rejection of the resignation by the employer. In Union of India v. Gopal Chandra Misra [(1978) 2 SCC 301] it was held in the case of a judge of the High Court having regard to Article 217 of the Constitution that he has a unilateral right or privilege to resign his office and his resignation becomes effective from the date which he, of his own volition, chooses. But where there is a provision empowering the employer not to accept the resignation, on certain circumstances e.g. pendency of disciplinary proceedings, the employer can exercise the power.

11. On the contrary, as noted by this Court in Dinesh Chandra Sangma v. State of Assam [(1977) 4 SCC 441] while the Government reserves its right to compulsorily retire a government servant, even against his wish, there is a corresponding right of the government

servant to voluntarily retire from service. Voluntary retirement is a condition of service created by statutory provision whereas resignation is an implied term of any employer-employee relationship."

22. In our view, the aforesaid principles squarely apply in the facts of the present case and the relevant legal principles is that voluntary retirement is a concept read into a condition of service, which has to be created by a statutory provision, while resignation is the unilateral determination of an employer-employee relationship, whereby an employee cannot be a bonded labour.

23. In UCO Bank & Ors. v. Sanwar Mal, (2004) 4 SCC 412 once again, in the case of a similar pension scheme, the observations were made as under:

"6. To sum up, the Pension Scheme embodied in the regulation is a self-supporting scheme. It is a code by itself. The Bank is a contributor to the pension fund. The Bank ensures availability of funds with the trustees to make due payments to the beneficiaries under the Regulations. The beneficiaries are employees covered by Regulation 3. It is in this light that one has to construe Regulation 22 quoted above. Regulation 22 deals with forfeiture of service. Regulation 22(1) states that resignation, dismissal, removal or termination of an employee from the service of the Bank shall entail forfeiture of his entire past service and consequently shall not qualify for pensionary benefits. In other words, the Pension Scheme disqualifies such dismissed employees and employees who have resigned from membership of the fund. The reason is not far to seek. In a self-financing scheme, a separate fund is earmarked as the Scheme is not based on budgetary support. It is essentially based on adequate contributions from the members of the fund. It is for this reason that under Regulation 11, every bank is required to cause an investigation to be made by an actuary into the financial condition of the fund from time to time and depending on the deficits, the Bank is required to make annual contributions to the fund. Regulation 12 deals with investment of the fund whereas Regulation 13 deals with payment out of the fund. In the case of retirement, voluntary or on superannuation, there is a nexus between retirement and retiral benefits under the Provident Fund Rules. Retirement is allowed only on completion of qualifying service which is not there in the case of resignation. When such a retiree opts for self-financing Pension Scheme, he brings in accumulated contribution earned by him after completing qualifying number of years of service under the Provident Fund Rules whereas a person who resigns may not have adequate credit balance to his provident fund account (i.e. bank's contribution) and, therefore, Regulation 3 does not cover employees who have resigned. Similarly, in the case of a dismissed employee, there may be forfeiture of his retiral benefits and consequently the framers of the Scheme have kept out the retirees (sic resigned) as well as dismissed employees vide Regulation 22. Further, the pension payable to the beneficiaries under the Scheme would depend on income accruing on investments and unless there is adequate corpus, the

Scheme may not be workable and, therefore, Regulation 22 prescribes a disqualification to dismissed employees and employees who have resigned. Lastly, as stated above, the Scheme contemplated pension as the second retiral benefit in lieu of employers' contribution to contributory provident fund. Therefore, the said Scheme was not a continuation of the earlier scheme of provident fund. As a new scheme, it was entitled to keep out dismissed employees and employees who have resigned.

7. In the light of our above analysis of the scheme, we now proceed to deal with the arguments advanced by both the sides. It was inter alia urged on behalf of the appellant bank that under Regulation 22, category of employees who have resigned from the service and who have been dismissed or removed from the service are not entitled to pension, that the pension scheme constituted a separate fund to be regulated on self-financing principles, that prior to the introduction of the pension scheme, there was in existence a provident fund scheme and the present scheme conferred a second retiral benefit to certain classes of employees who were entitled to become the members/beneficiaries of the fund, that the membership of the fund was not dependent on the qualifying service under the pension scheme, that looking to the financial implications, the scheme framed mainly covered retirees because retirement presupposed larger number of years of service, that in the case of resignation, an employee can resign on the next day of his appointment whereas in the case of retirement, the employee is required to put in a certain number of years of service and consequently, the scheme was a separate code by itself, that the High Court has committed manifest error in decreeing the suit of the respondent inasmuch as it has not considered the relevant factors contemplated by the said scheme and that the pension scheme was introduced in terms of the settlement dated 29.10.1993 between the IBA and All-India Bank Employees' Association, which settlement also categorically rules out employees who have resigned or who have been dismissed/ removed from the service."

xxxx xxxx xxxx xxxx xxxx

"9. We find merit in these appeals. The words "resignation" and "retirement" carry different meanings in common parlance. An employee can resign at any point of time, even on the second day of his appointment but in the case of retirement he retires only after attaining the age of superannuation or in the case of voluntary retirement on completion of qualifying service. The effect of resignation and retirement to the extent that there is severance of employment (sic is the same) but in service jurisprudence both the expressions are understood differently. Under the Regulations, the expressions "resignation" and "retirement" have been employed for different purpose and carry different meanings. The Pension Scheme herein is based on actuarial calculation; it is a self-financing scheme, which does not depend upon budgetary support and consequently it constitutes a complete code by itself. The Scheme essentially covers retirees as the credit balance to their provident fund account is larger as compared to employees who resigned from service. Moreover, resignation brings about complete cessation of master-and-servant relationship whereas voluntary

retirement maintains the relationship for the purposes of grant of retiral benefits, in view of the past service. Similarly, acceptance of resignation is dependent upon discretion of the employer whereas retirement is completion of service in terms of regulations/ rules framed by the Bank. Resignation can be tendered irrespective of the length of service whereas in the case of voluntary retirement, the employee has to complete qualifying service for retiral benefits. Further, there are different yardsticks and criteria for submitting resignation vis-a-vis voluntary retirement and acceptance thereof. Since the Pension Regulations disqualify an employee, who has resigned, from claiming pension, the respondent cannot claim membership of the fund. In our view, Regulation 22 provides for disqualification of employees who have resigned from service and for those who have been dismissed or removed from service. Hence, we do not find any merit in the arguments advanced on behalf of the respondent that Regulation 22 makes an arbitrary and unreasonable classification repugnant to Article 14 of the Constitution by keeping out such class of employees. The view we have taken is supported by the judgment of this Court in the case of Reserve Bank of India v. Cecil Dennis Solomon & Anr. (supra). Before concluding we may state that Regulation 22 is not in the nature of penalty as alleged. It only disentitles an employee who has resigned from service from becoming a member of the fund. Such employees have received their retiral benefits earlier. The Pension Scheme, as stated above, only provides for a second retiral benefit. Hence, there is no question of penalty being imposed on such employees as alleged. The Pension Scheme only provides for an avenue for investment to retirees. They are provided avenue to put in their savings and as a term or condition which is more in the nature of an eligibility criterion, the Scheme disentitles such category of employees as are out of it."

24. We may only note that in the above discussed judgement, an argument assailing the Regulation for forfeiture of service, based on Article 14 of the Constitution of India was repelled. The provisions under the new Regulations were held not to be in the nature of penalty, but a dis-entitlement, as a consequence of having resigned from service and, thus, being dis-entitled from having become a member of the fund. There are other judgments also in the same line, but not laying down any additional principles and, thus, it would suffice to just mention them, i.e. M.R. Prabhakar & Ors. v. Canara Bank & Ors., (2012) 9 SCC 671 and J.M. Singh v. Life Insurance Corporation of India & Ors. (supra).

25. There are some observations on the principles of public sectors being model employers and provisions of pension being beneficial legislations. (Shashikala Devi v. Central Bank of India, (2014) 16 SCC 260; Asger Ibrahim Amin v. Life Insurance Corporation of India (2016) 13 SCC 797) We may, however, note that as per what we have opined aforesaid, the issue cannot be dealt with on a charity principle. When the Legislature, in its wisdom, brings forth certain beneficial provisions in the form of Pension Regulations from a particular date and on particular terms and conditions, aspects which are excluded cannot be included in it by implication. The provisions will have to be read as they read unless

there is some confusion or they are capable of another interpretation. We may also note that while framing such schemes, there is an important aspect of them being of a contributory nature and their financial implications. Such financial implications are both, for the contributors and for the State. Thus, it would be inadvisable to expand such beneficial schemes beyond their contours to extend them to employees for whom they were not meant for by the Legislature.

26. We are, thus, of the view that the impugned orders in this case cannot be sustained and are liable to be set aside, and the writ petition filed by the respondent consequently stands dismissed.

C.A. No.10904 of 2016

27. The appellant joined the respondent United India Insurance Company Limited as a Clerk on 13.8.1960 and served for a long period of 32 years. He, however, tendered his resignation on 1.10.1993 for "family reasons", but on his own, termed it as "premature retirement", so as to claim future benefits. Request for waiving of notice period was also made. The letter of resignation was accepted on 30.11.1993, giving effect to such resignation from that day itself. It is relevant to note that at the time the appellant resigned, he was governed by the General Insurance (Termination, Superannuation and Retirement of Officers and Development Staff) Scheme, 1976 (for short `1976 Scheme'), which had no concept of voluntary retirement. However, almost three years after the appellant resigned, an amendment was made to the 1976 Scheme by inserting clause 4(4A), introducing the concept of Voluntary Retirement Scheme on 1.11.1996. This clause, however, was made retrospectively applicable from 1.11.1993. It appears that the object was to have consonance with the General Insurance (Employees') Pension Scheme, 1995 (hereinafter referred to as the `1995 Scheme').

28. It is in the year 2011 that the judicial pronouncement by this Court in Sheel Kumar Jain v. New India Assurance Company Limited, (2011) 12 SCC 197 gave benefit of this scheme to certain employees. The judgment was delivered on 28.7.2011. Once again, almost after two years, the appellant made a representation dated 4.4.2013 seeking pension on the basis of the 1995 Scheme, resting his case on the aforesaid judgment. There was no response to this representation, resulting in the appellant filing a writ petition before the Bombay High Court. The Division Bench of the Bombay High Court, in terms of the impugned judgment dated 07.04.2016 rejected the same. The reasoning of the Division Bench was that the case of the appellant was of resignation and not of voluntary retirement. The appellant had tendered his resignation before 1.11.1993, while the conditions for availing of the benefit were: (i) the employees must have retired on or after 1.11.1993, and before the notified date; and (ii) the employee must have exercised the option to voluntarily retire within 120 days from the notified date, to become a member of the General Insurance Corporation (Employees') Pension Fund while refunding the amount of Provident Fund contributed by the insurance company. These two aspects were stated to be absent in the case of the appellant, who had never opted for voluntary

retirement within the requisite period nor refunded the amount, which were pre-requisites for availing the benefit of the new pension scheme.

29. The opinion of the Division Bench was also based on a relevant fact, that the condition in terms of clause 4(4A) required completion of 55 years of age, while the appellant was not of 55 years of age on the date of his resignation or its acceptance. The said clause reads as under:

"(4A) Not-withstanding anything contained in the foregoing subparagraphs, an Officer or a person of the Development staff may be permitted, subject to vigilance clearance, to seek voluntary retirement, -

(a) on completion of 55 years of age or at any time thereafter on giving ninety days notice in writing to the appointing authority of his intention to retire; or

Provided that on a written request from an officer or a person of the Development Staff, such notice may be waived in full or in part by the appointing authority; or

(b) in accordance with the provisions contained in paragraph 30 of the General Insurance (Employees') Pension Scheme, 1995, made under section 17A of the General Insurance Business (Nationalisation) Act, 1972, (57 of 1972) and published under notification of the Government of India, in the Ministry of Finance (Department of Economic Affairs) Insurance Division number S.O. 585 (E) dated 28th June, 1995."

30. The last relevant aspect is that the 1995 Scheme provided in clause 22 as under:

"22. Forfeiture of service - Resignation or dismissal or removal or termination or compulsory retirement of an employee from the service of the Corporation or a Company shall entail forfeiture of his entire past service and consequently shall not qualify for pensionary benefits."

31. Thus, once again, there is this clause of forfeiture of service in case of resignation.

32. In order to elucidate the legal principle further, we may note that Sheel Kumar Jain (supra) took note of the judgment of the three Judges' Bench in Sudhir Chandra Sarkar v. Tata Iron and Steel Co. Ltd. & Ors., (1984) 3 SCC 369 An uncovenanted employee of respondent-Company, paid on a monthly basis, sought to recover a sum as gratuity, for continued service rendered over 29 years, under the Retiring Gratuity Rules, 1937, after having resigned from service. The employee was paid the provident fund dues. The High Court of Patna opined against the employee. When the matter reached this Court, one of the contentions raised by the respondent-Company was that the employee had resigned and not retired from service. It was noticed that Rule 1(g) defines 'retirement' as "the termination of service by reason of any cause other than removal by discharge due to misconduct." The employee had not been removed by discharge due to misconduct. The termination of service, being on account of resignation, it was held to qualify within the definition of 'retirement' under the Rules. The rest of the judgment, dealing with the principles as to how gratuity should be treated, is not relevant.

33. We, thus, notice that all that was opined by the three Judges' Bench in the aforesaid

case was based on the definition of 'retirement' as per the Retiring Gratuity Rules, 1937, which was expansive and all inclusive, excluding only the removal by discharge due to misconduct. Thus, nothing more could have been read into this judgment.

34. We may also add that there are some observations in the aforesaid case that pension and gratuity are both retiral benefits and an employee, with long years of service should be assured social security to some extent, in the form of either pension or gratuity or provident fund, whichever retiral benefit is operative in the industrial establishment. In the given facts of the appeal before us, the benefit of provident fund has been given as that was the scheme applicable at the relevant stage of time. The principle laid down is not that all of them should be simultaneously be granted, but that, at least one of them should be granted, though there is no prohibition against more than one being granted.

35. In view of what we have discussed aforesaid, all three aspects stated by us are relevant and disentitle the appellant to any relief. We have already explained the difference between resignation and voluntary retirement. Mere categorisation by the appellant himself of his resignation as "premature retirement" is of no avail. The same principle discussed aforesaid, of forfeiture of service, would be applicable here and the appellant did not have the requisite age when he resigned even were the 1976 Scheme to be made applicable.

36. We may also find that the appellant remained silent for years together and that this Court, taking a particular view subsequently, in Sheel Kumar Jain, (supra) would not entitle stale claims to be raised on this behalf, like that of the appellant. In fact the appellant slept over the matter for almost a little over two years even after the pronouncement of the judgment.

37. Thus, the endeavour of the appellant, to approach this Court seeking the relief, as prayed for, is clearly a misadventure, which is liable to be rejected, and the appeal is dismissed.

SLP(C) Nos.5716-5719 of 2016

38. Leave granted.

39. The appellants in this case were employees of the respondent- Bank, viz., Andhra Bank, who resigned from service during the window period of 1991 and 1993 after giving three months' notice. The grounds for resignation varied. The employees were governed by the then existing Service Rules, being the Andhra Bank Officers' Service Regulations, 1982. It was much later that Andhra Bank (Employees) Pension Regulations, 1995 (for short 'Pension Regulations') were introduced, effective from its date of notification. There was no retrospectivity involved in this case. But the Pension Regulations were made applicable for employees, who 'retired' on or after 01.01.1986 but before 01.11.1993.

40. The appellants sought benefit under these Pension Regulations, even though they had 'resigned' from their job, which request was rejected.

41. A Division Bench of the Andhra Pradesh High Court, in terms of the impugned order dated 09.10.2015 rejected the petition filed by the appellants on the ground that when

the appellants resigned, there was no Pension Regulations providing for voluntary retirement in existence, and merely because the Pension Regulations have been made applicable for persons retiring within a past period of window, it would not give the same benefit to the employees who had resigned from service. The reasoning of the judgment is predicated on M.R. Prabhakar & Ors. v. Canara Bank & Ors. (supra)

42. It is relevant to note that M.R. Prabhakar & Ors. (supra) dealt with a similar scheme for employees of the Canara Bank, and the plea was that such of the employees who had resigned must be construed as voluntarily retired, thus, entitling them to pensionary benefits. Suffice to say that, once again, the principle was of differentiation between the concept of 'voluntary retirement' and 'resignation'. Regulation 2(y) as applicable to the employees of Canara Bank, being pari materia to Rule 2(y) under the Pension Regulations of 1995, had brought in 'voluntary retirement' in the definition of 'retirement', but had not considered it appropriate to bring in the concept of 'resignation'. Service jurisprudence, recognising the concept of 'resignation' and 'retirement' as different, and in the same regulations these expressions being used in different connotations, left no manner of doubt that the benefit could not be extended, especially as resignation was one of the disqualifications for seeking pensionary benefits, under the Regulations.

43. In view of the legal principles discussed by us hereinbefore, this appeal, thus, must also fail and, is accordingly dismissed.

44. The net result of the aforesaid discussion is that C.A. No.14739 of 2015 is allowed while C.A.No.10904 of 2016 and C.A. Nos. 3138-3141 of 2019 @ SLP©Nos.5716-5719 of 2016 are dismissed, leaving the parties to bear their own costs.

45. The reference is answered accordingly.

46. We, however, make it clear that for amounts already paid to the respondent in C.A. No. 14739 of 2015, under the interim directions dated 26.11.2015, refund of the same would not be claimed.

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## 2019 (1) L.S. 166 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Dr.Justice
D.Y. Chandrachud &
The Hon'ble Mr.Justice
Hemant Gupta

The Branch Manager
National Insurance Co. Ltd. ..Appellant
Vs.
Mousumi Bhattacharjee &
Ors., ..Respondents

**INSURANCE LAW - Whether a death due to malaria occasioned by a mosquito bite in Mozambique, constituted a death due to accident - Appeal by the insurer has been filed against the Judgment of the National Consumer Disputes Redressal Commission, which upheld the decision**

C.A.No.2614/2019 Date:26-3-2019

**of the State Consumer Disputes Redressal Commission - The State Commission, in first appeal, had upheld the award of a claim under an insurance policy.**

**Held - In a policy of insurance which covers death due to accident, the peril insured against is an accident: an untoward happening or occurrence which is unforeseen and unexpected in the normal course of human events - Death of the insured in the present case was caused by encephalitis malaria - Claim under the policy is founded on the hypothesis that there is an element of uncertainty about whether or when a person would be the victim of a mosquito bite which is a carrier of a vectorborne disease - Submission is that being bitten by a mosquito is an unforeseen eventuality and should be regarded as an accident - We do not agree with this submission - Insured was based in Mozambique - According to the World Health Organization's World Malaria Report 2018, Mozambique, with a population of 29.6 million people, accounts for 5% of cases of malaria globally - It is also on record that one out of three people in Mozambique is afflicted with malaria - In light of these statistics, the illness of encephalitis malaria through a mosquito bite cannot be considered as an accident - It was neither unexpected nor unforeseen - It was not a peril insured against in the policy of accident insurance – Appeal stands allowed and the impugned judgment and order of the National Commission shall stand set aside.**

**J U D G M E N T**

(per the Hon'ble Dr.Justice
Dr. Dhananjaya Y Chandrachud)

1. The present appeal raises an interesting question of law. The Court is tasked with determining whether a death due to malaria occasioned by a mosquito bite in Mozambique, constituted a death due to accident. The appeal by the insurer has been filed against the judgment of the National Consumer Disputes Redressal Commission ("National Commission"), which upheld a decision of the State Consumer Disputes Redressal Commission ("State Commission"). The State Commission, in first appeal, had upheld the award of a claim under an insurance policy.

2. Debashis Bhattacharjee, the spouse of the first respondent and the father of the second respondent applied for a housing loan for an amount of Rs. 13.15 lacs from the Bank of Baroda on 16 June 2011. The loan was sanctioned and was repayable in 113 monthly installments, each of Rs. 19,105/-. Incidental to the loan, he availed of the facility of an insurance scheme called "National Insurance Home Loan Suraksha Bima". On 25 August 2011, a policy was issued to cover the loan amount of Rs. 13.15 lacs with a term of 20 years commencing on 25 August 2011. A single premium was paid against the policy. The policy was a non-life insurance product intended to provide insurance security to a person who obtains a loan for constructing, purchasing or repairing a residential house, flat or apartment. Section I of the policy insured the house against fire and allied perils, including earthquakes. Section II

insured the borrower against personal accidents.

3. The insured was working as a Manager of a Tea Estate in Assam. He thereafter took up employment in 2012 as a Manager of a Tea Factory at Cha-De- Magoma, District Gurue, Province-Zambezia, Republic of Mozambique. During his stay in Mozambique, the insured was admitted to the hospital on 14 November 2012. He was diagnosed with encephalitis malaria and died on 22 November 2012 due to multi-organ failure. His death certificate issued by the Republic of Mozambique spelt out the conditions and causes of death thus:

| VII. Conditions and causes of death | |
|---|---|
| 56. Causes of the Death | WRITE ONE DIAGNOSIS PER LINEa) |
| Direct cause | Multi organ failureb) |
| Intermediary cause | Encephalitis Malariac) |
| Basic Cause | Pnasituria – Malaria." |

4. The heirs of the deceased filed a complaint under the Consumer Protection Act 1986 before the District Consumer Disputes Redressal Forum ("District Forum"), North 24 PGS, Barasat alleging that the insurer had committed a deficiency of service in not settling the claim under the insurance cover. In the written statement filed by the appellant, it set up the plea that Section II of the policy insured the borrower of the loan against personal accident. Death due to malaria caused by a mosquito bite was, in the submission of the insurer, a result of an infection or disease and was not an accidental death under the terms of the insurance policy.

5. By an order dated 28 February 2014, the District Forum allowed the claim and called upon the insurer to pay the entire outstanding EMIs in respect of the loan to the Bank of Baroda. A statutory appeal was filed by the appellant before the State Commission ("the "West Bengal State Commission"). The State Commission by its order dated 2 February 2016 affirmed the order of the District Forum, holding that a "sudden death due to mosquito bite in a foreign land" was an accident; it would be rather silly to say that it was a natural death. The order of the State Commission was assailed in revision before the National Commission. The National Commission observed thus:

"The term "accident" has not been defined in the policy which the deceased had taken and therefore contextual dictionary meaning of the said term has to be taken for the purpose ofdeciding whether the death of the deceased was due to an accident or not. An accident is something that happens unexpectedly and is not planned in advance. It is defined as (i) as unpleasant event, especially in a vehicle, that happens unexpectedly and causes injury or damage, (ii) something that happens unexpectedly and is not planned in advance, in the Oxford Advanced Learner's Dictionary (New 8th Edition). The word 'accident' is defined as (i) as accident, an unforeseen injuries occurrence, something that does not come in the usual course of event or that cannot be reasonably anticipated, (ii) an unforeseen and injurious occurrence due to mistake, negligence, neglect or misconduct; an unanticipated and untoward event that cause(s) harm (In Black's Law Dictionary (Ninth Edition)." (sic)

6. On whether a death as a result of encephalitis malaria was an accident, the National Commission held:

"It can hardly be disputed that a mosquito bite is something which no one expects and which happens all of a sudden without any act or omission on the part of the victim. In Consumer Complaint No. 223 of 2006, Shri Matber Singh versus Oriental Insurance Co. Ltd. decided on 05.09.2014, this Commission noted that as per the information available on the website of the Insurance Company, an accident may include events like snake bite, frost bite and dog bite. Hence, it would be difficult to accept the contention that malaria due to mosquito bite is a disease and not an accident."

During the course of hearing Ms Madhavi Divan, learned Additional Solicitor General submitted that:

(i) Among the perils which were insured against by the policy is 'death due to accident';

(ii) Clause 3(A) of the conditions specified that the insured was required to give immediate notice of any change of business or occupation;

(iii) No intimation was furnished by the insured of having taken a job in Mozambique which was a material breach of the policy condition;

(iv) Malaria is a common occurrence in tropical countries, particularly so in Mozambique;

(v) The death of the insured was hence not accidental, since the expression 'accident' postulates an occurrence which is unnatural, unforeseen or unexpected;

(vi) It is well established that the expression 'accident' does not include disease and other natural causes;

(vii) The insured died of multi-organ failure which may not necessarily be a direct consequence of a mosquito bite;

(viii) The analogy drawn by the National Commission with a snake bite or a scorpion bite is inapposite; and

(ix) A variety of ailments can be caused on account of mosquito bites such as Dengue, Chikungunya and Zika, which if unattended can lead to complications and result in death, but it would be absurd to term the cause of death as an accident.

7. On the other hand, learned Counsel appearing on behalf of the respondents supported the decisions of the District Forum, the State Commission and the National Commission. Counsel submitted that sustaining the mosquito bite is by its very nature a matter of chance or accident since it is unforeseen. Malaria traces its origin to a mosquito bite and hence, it was urged that a death which is caused as a result of malaria must necessarily be construed to be accidental in nature.

8. The rival submissions fall for consideration.

9. Section II of the policy covered the following perils:

"Section II:

1. Death due to accident.

2. Accidental loss of two limbs, two eyes or one limb and one eye.

3. Permanent total disablement or injuries other than that named above."

10. The exclusions from Section II were:

"1. Loss of one limb or one eye

2. Any accidental injury or loss not mentioned under Section-II above

3. Cumulative Bonus

4. Education Fund

5. Cost of transportation of the dead body

6. Persons below the age of 18 years at the time of disbursement of loan, and above 60 years at the end of repayment period

7. People having Hysteria

8. Death or accidental resulting from intentional self injury, suicide or attempted suicide

9. Death or injury from accident while under the influence of intoxicating liquor or drug

10. Death or injury from accident caused by insanity or venereal disease

11. Death or injury from accident arising or resulting from the insured committing

any breach of law with criminal intent

12. War or war like operations

13. Lionising radiations or contamination by radioactivity

14. Loss by delay, loss of market or any other consequential or indirect loss or damage

15. Default in repayment of installments and or loan due to any reason whatsoever except due to the occurrence of insured peril."

In support of the submission that death due to malaria is a common occurrence in Mozambique, Ms Divan has adverted to the World Health Organization's World Malaria Report 2018. According to it, in 2017, there have been an estimated ten million cases of malaria in Mozambique and an estimated 14.7 thousand deaths. According to the World Population Prospects 2017 Report published by the United Nations Department of Economic and Social Affairs, Population Division, nearly one out of three people in Mozambique contracted malaria.

11. In our view, it would be appropriate to approach the issue which has been raised in the present case as a matter of interpreting the conditions contained in the insurance policy.

12. A line of precedents, both of this Court and international, have dealt with the meaning of the expression 'accident'. In **Union of India** v **Sunil Kumar Ghosh (**(1984) 4 SCC 246), this Court held that:

"13…An accident is an occurrence or an event which is unforeseen and startles one when it takes place but does not startle one when it does not take place. It is the happening of the unexpected, not the happening of the expected, which is called an accident. In other words an event or occurrence the happening of which is ordinarily expected in the normal course by almost everyone undertaking a rail journey cannot be called an "accident". But the happening of something which is not inherent in the normal course of events, and which is not ordinarily expected to happen or occur, is called a mishap or an accident."

13. In a subsequent decision in **Regional Director, ESI Corporation** v **Francis De Costa (**1993 Supp (4) SCC 100), the expression 'accident' was defined as follows:

"4…The popular and ordinary sense of the word 'accident' means the mishap or an untoward happening not expected and designed to have an occurrence is an accident. It must be regarded as an accident, from the point of view of the workman who suffers from it, that its occurrence is unexpected and without design on his part, although eitherintentionally caused by the author of the act or otherwise."

The same principle was adopted in **Jyothi Ademma** v **Plant Engineer, Nellore**

**(**(2006) 5 SCC 513), where this Court held:

"7…the expression accident means an untoward mishap which is not expected or designed."

**P Ramanatha Aiyar's Law Lexicon (**3rd Edition, 2012), defines the expression 'accident':

"an event that takes place without one's foresight or expectation; and event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected, chance, causality, contingency."

The above Law Lexicon, relying on **Lovelace** v **Traveler's Protective Association (**47 Am. St. Rep. 638), defines the expression 'death by accident' as:

"Death from any unexpected event, which happens, as by chance, or which does not take place according to the usual course of things."

14. In order to constitute an accident, the event must be in the nature of an occurrence which is unnatural, unforeseen or unexpected. The present case concerns death caused due to a disease being contracted. Section II of the insurance policy covers death caused by accident. Death or injury from accident caused by insanity or venereal disease has been specifically excluded and not covered under the policy. The issue is whether death caused by any other disease not specifically excluded under the policy, is be covered. The issue whether a disease can be covered under the ambit of the expression 'accident' has been analysed in **A W Baker Welford's The Law Relating to Accident Insurance (**2nd Edition, 1932), where it was stated:

"The word "accident" involves the idea of something fortuitous and unexpected, as opposed to something proceeding from natural causes; and injury caused by accident is to be regarded as the antithesis to bodily infirmity caused by disease in the ordinary course of events."

(emphasis supplied)

**Colinvaux's Law of Insurance (**10th Ed.by Robert Merkin)elucidates on the ambit of the expression 'accident':

"Accident excludes disease. It follows from the above principle that a disease cannot be classified as an accident. Although disease proximately caused by an accident, in the absence of any exclusion for disease will be covered by a personal accident policy**,** it is well established that the word "accident does not include disease and other natural causes, and implies that intervention of some cause which is brought into operation by chance and which can be described as fortuitous."

(emphasis supplied)

The expression 'accidental death insurance'

has been explained in **P Ramanatha Aiyar's Advanced Law Lexicon (**3rd Ed. (2005)):

"Insurance that provides coverage in the event of death due to accidental injuries, but not illness. In the event of death, payment is made to the insured's beneficiary. If bodily injury occurs (e.g., the loss of a limb), the insured receives a sum specified by the contract. (insurance)"

The treatises extracted above construe accidents and diseases as distinct concepts. **Baker Welford** regards 'accident' as a term which does not include disease in the ordinary course of events. **Colinvaux** acknowledges that a disease caused as a proximate cause of an accident will be covered by a policy for personal accident, in the absence of an exclusion. But then it is also argued that the term accident does not include disease.

15. Courts across international jurisdictions - including in the UK, US and Canada have interpreted the term 'accident'. There is a fine distinction between the occurrence of a disease which may be considered as an accident and a disease which occurs in the 'natural course of events'. In 1861, the Queen's Bench Division (Sinclair v Maritime Passengers Assurance (1861) 3 E&E 478) in the UK was called upon to consider whether a sunstroke suffered by a person while on board a ship in the course of performing his ordinary duties would amount to an accident. Cockburn C.J., delivering the judgment of the court held:

"It is difficult to define the term "accident", as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from accident, and injury or death from natural causes; such as shall be of universal application. At the same time we think we may safely assume that, in the term "accident" as so used some violence, casualty, or vis major, is necessarily involved. We cannot think disease produced by the action of a known cause can be considered as accidental. Thus diseases or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmosphere influences, cannot, we think properly be said to be accidental; unless at all events, the exposure is itself brought about by circumstances which may give it the character of accident. Thus (by way of illustration), if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although if, being obliged by shipwreck or other disasters to quit the ship and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly be held to be the result of accident. It is true that, in one sense, disease or death through the direct effect of a known natural cause, such as we have referred to, may be said to be accidental inasmuch as it is uncertain beforehand whether the effect will ensue in

any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered, not as accidental, but as proceeding from natural causes."

The Court contrasted the term 'accident' with an event that occurs naturally and held that death due to a sunstroke was not an accident:

"In the present instance, the disease called sunstroke, although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom. The deceased, in the discharge of his ordinary duties about his ship, became thus affected and so died.

"We think, for the reasons we have given, that his death must be considered as having arisen from a "natural cause," and not from "accident," within the meaning of this policy."

16. In **Fenton** v **Thorley & Co. Ltd. (**(1903) AC 443), the House of Lords held that a rupture caused by an act of over-exertion would not fall within the ambit of the term 'injury by accident'. Lord Macnaughten speaking for the House of Lords held thus:

"Now the expression "injury by accident" seems to me to be a compound expression. The words "by accident" are, I think, introduced parenthetically as it were to qualify the word "injury," confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design."

The Court of appeal followed this decision in **Steel** v **Cammel, Laird & Co. (**(1905) 2 K.B. 232), Cozens Hardy L.J. observed:

"The doctor called as a witness by the workman said that the paralysis was an "occupation" disease, which he should expect in a certain number of cases to follow on the work on which the workman was engaged. It was not unforeseen; it was not unexpected…

Injury by disease alone, not accompanied by an accident, is expressly excluded, as pointed out by Lord Macnaughten in Fenton v Thorley & Co."

(emphasis supplied)

In **Co-operators Life Insurance Company** v **Randolph Charles Gibbens (**2009 SCC 59), the Supreme Court of Canada was tasked with determining whether contracting a rare complication of herpes that resulted in paralysis caused due to engagement in unprotected sex would be covered under the definition of 'accident'. The Court held

thus:

"59. In the present case the evidence is that genital herpes is a sexually transmitted virus that spreads by sexual intercourse. Sex is its normal method of transmission. As such, unlike for example an internally developing condition leading to an aneurysm, its transmission requires an outsider's participation. But the same could be said of infectious diseases generally. Viruses and bacteria pass, directly or indirectly, from person to person, and occasionally across species. In the "ordinary language of the people", an individual would not say on coming down with influenza that "I had an accident". We come down with the flu "in the ordinary course of events."

(emphasis supplied)

18. As the law of insurance has developed, there has been a nuanced understanding of the distinction between an accident and a disease which is contracted in the natural course of human events in determining whether a policy of accident insurance would cover a disease. At one end of the spectrum is the theory that an accident postulates a mishap or an untoward happening, something which is unexpected and unforeseen. This understanding of what is an accident indicates that something which arises in the natural course of things is not an accident. This is the basis for holding that a disease may not fall for classification as an accident, when it is caused by a bodily infirmity or a condition. A person who suffers from flu or a viral fever cannot say that it is an accident. Of course, there is an element of chance or probability in contracting any illness. Even when viral disease has proliferated in an area, every individual may not suffer from it. Getting a bout of flu or a viral illness may be a matter of chance. But a person who gets the flu cannot be described as having suffered an accident: the flu was transmitted in the natural course of things. To be bitten by a mosquito and be imbued with a malarial parasite does involve an element of chance. But the disease which is caused as a result of the insect bite in the natural course of events cannot be regarded as an accident. Particularly, when the disease is caused in an area which is malaria prone. On the other hand, there may well be instances where a bodily condition from which an individual suffers may be the direct consequence of an accident. A motor car accident may, for instance, result in bodily injuries, the consequence of which is death or disability which may fall within the cover of a policy of accident insurance. Hence, it has been postulated that where a disease is caused or transmitted in the natural course of events, it would not be covered by the definition of an accident. However, in a given case or circumstance, the affliction or bodily condition may be regarded as an accident where its cause or course of transmission is unexpected and unforeseen.

19. Recently, in **Gloria Wells** v **Minnesota Life Insurance Company (**No. 16-20831 (5th Cir. 2018)), the United States Court

of Appeals, Fifth Circuit, dealt with a case where the question of law before the court was whether death caused by a bite of a mosquito carrying West Nile Encephalitis virus in Texas was covered under an accidental death insurance policy. The Court while remanding the case to the lower court on the disputed issue of facts, observed that the determinate, single act of a mosquito bite was not incidental to a body process and the mosquito, an external force produced an unforeseen result. However, this may be distinguished from the facts in the present case. Malaria is most commonly transmitted to humans through malaria virus infested mosquito bites, and when a virus is contracted through normal means brought about by everyday life it cannot be deemed to be an unexpected or unforeseen accident.

20. In a policy of insurance which covers death due to accident, the peril insured against is an accident: an untoward happening or occurrence which is unforeseen and unexpected in the normal course of human events. The death of the insured in the present case was caused by encephalitis malaria. The claim under the policy is founded on the hypothesis that there is an element of uncertainty about whether or when a person would be the victim of a mosquito bite which is a carrier of a vectorborne disease. The submission is that being bitten by a mosquito is an unforeseen eventuality and should be regarded as an accident. We do not agree with this submission. The insured was based in Mozambique. According to the **World Health Organization's World Malaria Report 2018**, Mozambique, with a population of 29.6 million people, accounts for 5% of cases of malaria globally. It is also on record that one out of three people in Mozambique is afflicted with malaria. In light of these statistics, the illness of encephalitis malaria through a mosquito bite cannot be considered as an accident. It was neither unexpected nor unforeseen. It was not a peril insured against in the policy of accident insurance.

21. We are hence of the view that the interpretation placed on the terms of the insurance policy was manifestly incorrect and that the impugned order of the National Commission is unsustainable.

22. We have been informed during the course of the hearing that the claim under the insurance policy has been paid by the insurer. We direct in exercise of our jurisdiction under Article 142 of the Constitution that no recoveries shall be made. We have embarked on the present exercise since the issue raised in the present case will have a bearing on similar questions of interpretation in policies of insurance envisaging an accident cover.

23. The appeal is allowed and the impugned judgment and order of the National Commission shall stand set aside. There shall be no order as to costs.

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## 2019 (1) L.S. 177 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Dr.Justice
D.Y. Chandrachud &
The Hon'ble Mr.Justice
Hemant Gupta

Varun Pahwa ...Appellant

Vs.

Renu Chaudhary ...Respondent

**CIVIL PROCEDURE CODE, 1908, Order VI, Rule 17- Although power of a Court to amend plaint in a suit should not as a rule be exercised where the effect is to take away from defendant a legal right which has accrued to him by lapse of time, yet there are cases in which that consideration is outweighed by special circumstances of the case - Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice - Procedure should never be made a tool to deny justice or perpetuate injustice by any oppressive or punitive use - Appeal allowed.**

**J U D G M E N T**
(per the Hon'ble Mr.Justice
Hemant Gupta)

Leave granted.

2. The Order dated 20.08.2018 passed by the High Court of Delhi is subject matter of challenge in the present appeal. By the aforesaid order, a petition against an order passed by the learned trial court on 23.01.2018 seeking permission to amend the plaint was dismissed.

3. The appellant as Director of Siddharth Garments Pvt. Ltd. filed a suit for recovery of Rs. 25,00,000/- along with pendente lite and future interest on or about 28.05.2016. The Plaintiff has claimed the said amount advanced as loan of Rs. 25,00,000/- remitted to the defendant through RTGS on 16.06.2013 on HDFC Bank, Delhi. It is also averred that Plaintiff has given Special Power of Attorney to Shri Navneet Gupta and that a copy of the Power of Attorney is enclosed.

4. The defendant raised one of the preliminary objections in the written statement that suit has not been filed by the Plaintiff and even the alleged authorised representative has not filed any document showing that he has been authorised by the above-named Plaintiff. The Special Power of Attorney is neither valid nor admissible.

5. It was on 29.11.2016, Navneet Gupta appeared in Court as power of attorney of the Plaintiff to examine himself as PW1. It was at that stage; an order was passed by the learned trial court to furnish address of the Plaintiff and why the Plaintiff should be examined through an attorney when the Plaintiff is a resident of Delhi. It is thereafter, the appellant filed an application for amendment of the plaint on the ground that the counsel had inadvertently made the title

of the suit wrongly as the loan was advanced through the Company, therefore, the suit was to be in the name of the Company. Therefore, the Plaintiff sought to substitute para 1 and para 2 of the plaint with the following paras which read as under:-

"1. That the Plaintiff is a Private Limited Company having its registered office at: I-VA (property bearing No. XII), Jawahar Nagar, Delhi

2. That the present plaint is filed through the authorised representative of the Plaintiff namely Sh. Navneet Gupta, R/o. 322, Kohat Enclave, Pitam Pura, Delhi who has been authorised vide board resolution dated 12.05.2016 to sign, verify and execute all documents, papers, complaints, applications, plaint, written statement, Counter claim, affidavits, replies revisions, etc. and to institute, pursue and depose in all legal proceedings and court cases on behalf of Siddharth Garments Pvt. Ltd against Mrs. Renu Chaudhary who was given the loan of Rs. 25 Lakhs."

6. The trial court declined the amendment on the ground that the application is an attempt to convert the suit filed by a private individual into a suit filed by a Private Limited Company which is not permissible as it completely changes the nature of the suit. It is the said order which was not interfered with by the High Court.

7. We have heard learned counsel for the appellant as none had appeared on behalf of the respondent.

8. The plaint is not properly drafted in as much as in the memo of parties, the Plaintiff is described as Varun Pahwa through Director of Siddharth Garments Pvt. Ltd. though it should have been Siddharth Garments Pvt. Ltd. through its Director Varun Pahwa. Thus, it is a case of mistake of the counsel, may be on account of lack of understanding as to how a Private Limited Company is to sue in a suit for recovery of the amount advanced.

9. The memo of parties is thus clearly inadvertent mistake on the part of the counsel who drafted the plaint. Such inadvertent mistake cannot be refused to be corrected when the mistake is apparent from the reading of the plaint. The Rules of Procedure are handmaid of justice and cannot defeat the substantive rights of the parties. It is well settled that amendment in the pleadings cannot be refused merely because of some mistake, negligence, inadvertence or even infraction of the Rules of Procedure. The Court always gives leave to amend the pleadings even if a party is negligent or careless as the power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations. In **State of Maharashtra vs. Hindustan Construction Company Limited [**(2010) 4 SCC 518**]**, this Court held as under:-

**"17.** Insofar as the Code of Civil Procedure, 1908 (for short "CPC") is concerned, Order 6 Rule 17 provides for amendment of pleadings. It says that the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in

controversy between the parties.

**18.** The matters relating to amendment of pleadings have come up for consideration before the courts from time to time. As far back as in 1884 in Clarapede & Co. v. Commercial Union Assn. [(1883) 32 WR 262 (CA)]- an appeal that came up before the Court of Appeal, Brett M.R. stated:

"... The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made…."

**19.** In Charan Das v. Amir Khan [(1919-20) 47 IA 255] the Privy Council exposited the legal position that although power of a Court to amend the plaint in a suit should not as a rule be exercised where the effect is to take away from the defendant a legal right which has accrued to him by lapse of time, yet there are cases in which that consideration is outweighed by the special circumstances of the case.

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**22.** In Jai Jai Ram Manohar Lal [(1969) 1 SCC 869] this Court was concerned with a matter wherein amendment in the plaint was refused on the ground that the amendment could not take effect retrospectively and on the date of the amendment the action was barred by the law of limitation. It was held: (SCC p.871, para 5)

"5. …. Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the Rules of procedure. The court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side."

This Court further stated (Jai Jai Ram Manohar Lal case, SCC p.873, para 7):

"7. ...The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations."

10. In **Uday Shankar Triyar v. Ram Kalewar Prasad Singh and Another [**(2006) 1 SCC 75**],** this Court held that procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure should never be made a tool to deny justice or perpetuate injustice by any oppressive or punitive use. The Court held as under:-

**"17.** Non-compliance with any procedural requirement relating to a pleading,

memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well-recognised exceptions to this principle are:

(i) where the statute prescribing the procedure, also prescribes specifically the consequence of noncompliance;

(ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;

(iii) where the non-compliance or violation is proved to be deliberate or mischievous;

(iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court;

(v) in case of memorandum of appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant."

11. Thus, we find that it was an inadvertent mistake in the plaint which trial court should have allowed to be corrected so as to permit the Private Limited Company to sue as Plaintiff as the original Plaintiff has filed suit as Director of the said Private Limited Company. Therefore, the order declining to correct the memo of parties cannot be said to be justified in law.

12. Consequently, the orders passed by the High Court dated 20.08.2018 and by the trial court on 23.01.2018 are set-aside and the application filed by the Plaintiff to amend the plaint is allowed with no order as to costs.

The appeal is allowed.

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## 2019 (1) L.S. 180 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

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

Urvashi Aggarwal
(Since Deceased)
Through Lrs & Anr ...Appellant

Vs.

Kushagr Ansal
& Ors ...Respondent

**INDIAN CONTRACT ACT, 1872, Secs.63 & 55- LIMITATION ACT, 1963, Art.54 - SPECIFIC RELIEF ACT, 1963, Sec.16 - Plea of Defendants that they were pursuing the application filed for permission before the L&DO, it cannot be said that the date fixed for performance of the Agreement stood extended.**

C.A.No.2525/2019 Date:6-3-2019

**J U D G M E N T**

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

Leave granted.

1. The correctness of the judgment of the High Court, affirming the judgment of the Trial Court, by which the suit for specific performance filed by the Appellant and his mother Smt. Urvashi Aggarwal (since deceased) was dismissed, is the issue in the above appeal. The parties are being referred to as they are arrayed in the suit.

**[2]** The plaint averments are that Justice Chander Bhan Aggarwal, father-in-law of the First Plaintiff (Smt. Urvashi Aggarwal) took the first and second floors of the property at 82, Jor Bagh, New Delhi on rent from Smt. Suraj Kumari (since deceased). After the death of Justice Chander Bhan Aggarwal in 1973, the tenancy of first and second floors of the property was transferred to M/s Vinod Industries Limited (of which the First Plaintiff was a Director). On 05.10.1974, the First Plaintiff and her son Rajiv Chander Aggarwal (since deceased) entered into an agreement with Smt. Suraj Kumari (original Defendant No.1) for the sale of the above property ('Agreement'). The consideration for the sale of the property was fixed at Rs.1,85,000/-. The relevant conditions pertaining to the payment of the amount of consideration and the other rights that were conferred on the parties were mentioned in the plaint. According to the Plaintiffs, the sale deed had to be executed by the Defendant No.1-Smt. Suraj Kumari after obtaining permission from the Land and Development Office (L&DO) and from the Income Tax Department. It was stated that the Plaintiffs paid an amount of Rs.20,000/- on 05.10.1974, Rs.40,000/- on 31.01.1975 and Rs.10,000/- on 26.12.1975. According to them, they were put in proprietary possession of the premises on payment of Rs.70,000/- as stipulated in the Agreement.

**[3]** M/S Vinod Industries stopped paying the rent to Smt. Suraj Kumari as it had become a tenant of the Plaintiffs as per the Agreement. The tenant of the ground floor- Shri A.C. Deb had to pay the rent to the Plaintiffs as per the Agreement. The Plaintiffs permitted the First Defendant to collect the rent from Shri Deb, the tenant of the ground floor which would be adjusted later against the balance amount payable by them towards the sale consideration. Shri Deb died in 1985 and his wife continued to live on the ground floor. Mrs. Deb vacated the ground floor premises at the end of September, 1987. After Mrs. Deb vacated the ground floor, the Defendants started making repairs. On an enquiry made by the Plaintiffs, the Defendants informed them that the Defendant No.4 intended to occupy the ground floor for which reason the repairs were being made. The Plaintiffs demanded specific performance of the Agreement on 13.10.1987 but the Second Defendant refused to convey the property which gave rise to a cause of action to file the suit. The Plaintiffs stated that from 1975 onwards the First Plaintiff's husband was continuously enquiring with the Second Defendant about the status of the permission by the L&DO. He was being informed that the permission was not granted. The Plaintiffs pleaded that they were always ready and willing to

perform their part of the Agreement and alleged that the Defendants were guilty of breach of the Agreement. On the basis of the said averments, the Plaintiffs sought a decree for specific performance and a direction to the Defendants to execute the sale deed for the suit property, a prohibitory injunction restraining the Defendants from occupying or permitting others to occupy the ground floor of the said property, and a mandatory injunction to the Defendants to remove the wall constructed on the side gate of the property.

**[4]** The Defendants filed a written statement in which they contended that the suit was barred due to laches and that it was liable to be dismissed as the Plaintiffs were not ready and willing to perform the essential terms of the Agreement. There was no denial about the execution of the Agreement dated 05.10.1974 but the averment pertaining to the Plaintiffs complying with the conditions of the Agreement was seriously disputed by the Defendants. According to the Defendants, time for payment was of the essence of the contract and the Plaintiffs failed to make the payment as stipulated in the Agreement. The allegation made by the Plaintiffs that inquiries were being made about the status of the application before the L&DO was denied. The Defendants categorically stated in the written statement that the Agreement was never changed, varied, or modified. The Defendants asserted that the Plaintiffs were never put in proprietary possession of any part of the property, the tenant on the ground floor continued to pay the rent to the First Defendant, the house-tax, ground rent etc. were being paid by the First Defendant, and M/s Vinod Industries stopped paying rent to the First Defendant. Apart from the other averments, the Defendants also stated in the written statement that a petition for eviction against the tenant on the ground floor was filed by the Defendants and they ultimately settled the matter with Mrs. Deb who vacated in 1987. Finally, the Defendants pleaded that the Plaintiffs were never ready and willing to perform their part of the contract and hence, the suit was liable to be dismissed.

**[5]** The Trial Court framed the following issues:

"1. Whether the suit is within limitation?

2. Whether the suit is not bad for misjoinder of parties in cause of action?

3. Whether the Agreement to sell dated 5/10/74 was amended and varied by the parties with regard to payment of Rs. 50,000/- upto 31/10/74 and the balance sale consideration in installments of Rs.7,000/- commencing from January 1975 till full payment of the sale consideration as alleged? If so, to what effect?

4. Whether the amount of Rs. 10,000 paid by the plaintiffs was towards installment of Rs. 50,000 as alleged by the plaintiff?

5. Whether the plaintiff was put into proprietary possession of the entire suit property by defendant no. 1 as alleged in para 15 of the plaint?

6. Whether there is a subsisting Agreement to sell capable of specific performance as alleged?

7. Whether the defendant committed breach of the contract?

8. Whether the plaintiff has been ready and willing to perform the Agreement to sell?

9. Whether time for payment was not the essence of the contract, as alleged by the plaintiff?

10. Whether the Agreement to sell was breached, repudiated, abandoned, and given up, as alleged by the defendant?

11. Whether the plaintiffs are entitled to specific performance of the Agreement to sell dated 5/10/74 and to what other relief or reliefs are the plaintiffs entitled to and against whom?

12. Relief."

**[6]** The Trial Court dismissed the suit by concluding that time was of the essence of the Agreement. The Plaintiffs were held to be neither ready nor willing to perform their part of the Agreement and that the suit was filed beyond the prescribed period of limitation. The High Court dismissed the Plaintiffs' appeal and affirmed the judgment of the Trial Court agreeing with the submissions of the Defendants that the suit was barred by limitation and that the Plaintiffs failed to prove their readiness and willingness to perform the essential terms of the Agreement.

**[7]** Before embarking upon the adjudication of the dispute, it would be relevant to refer to the relevant terms of the Agreement entered into between the Plaintiffs and the Defendants. The suit property was agreed to be sold at a price of Rs.1,85,000/-. The first instalment of Rs.20,000/- was to be paid at the time of signing the Agreement and the second installment of Rs.50,000/- was due by 31.10.1974. Balance amount was payable in instalments of Rs.7,000/- per month beginning from the 1st week of January, 1975 until the total amount was paid. No interest was payable on the deferred payment schedule till December, 1975. A simple interest at the rate of 12% p.a. was payable on the balance amount from January, 1976 every month along with the installments of Rs.7,000/- per month. The rate of interest was increased from 12% to 24% if all the payments were not made as per the schedule. On payment of the first two installments of Rs.20,000/- and Rs.50,000/-, the Plaintiffs were entitled to receive the rents from Shri A.C. Deb who was residing on the ground floor as a tenant and M/s Vinod Industries. The liability for payment of the house tax, ground rent and all other outgoings had to be borne by the Plaintiffs after the Plaintiffs started receiving the rents from Shri A.C. Deb and M/s Vinod Industries. The Plaintiffs were made responsible for taking steps to evict the tenants. The Defendants had to get the necessary permission to sell the property from the L&DO before the date of execution of the sale deed as well as the necessary permission from the Income Tax Authorities. Clause 10 of the Agreement provided that the sale deed shall be executed before 31.03.1975. In case of failure on the part of the Defendants to execute the sale deed, the Plaintiffs were given the right to get the suit property conveyed by specific performance through the Court.

**[8]** We have heard Mr. Jayant Bhushan, learned Senior Counsel for the Appellants/ Plaintiffs and Mr. Sachin Datta, learned Senior Counsel for the Respondents/ Defendants. Mr. Jayant Bhushan submitted that the suit was filed within the prescribed period of limitation and the findings of the Courts below that the suit was barred by limitation are unsustainable. According to him, no cause of action accrued for filing a suit on 31.03.1975, which was the date fixed for execution of the sale deed, as there was no permission granted by the L&DO for transfer of the property as on that date. He submitted that a sale deed could not have been executed without the permission from the L&DO. He relied upon Section 63 of the Indian Contract Act, 1872 to urge that the date fixed for execution of the sale deed could be extended. There is no dispute about the pendency of the application filed by Smt. Suraj Kumari before the L&DO even on 31.03.1975. He argued that the conduct of both the Plaintiffs and the Defendants after 31.03.1975 would show that the date fixed for execution of the sale deed on 31.03.1975 stood extended. He stated that once the date fixed in the Agreement was extended and no new date was fixed, the second part of Article 54 of the Schedule to the Limitation Act, 1963 (Limitation Act) would apply and the limitation for filing the suit would start from the date of refusal to perform the Agreement. There was no refusal to perform the Agreement by the Defendants until 1987 and thereafter, the suit was filed within the period of limitation. Mr. Bhushan contended that Section 16(c) of the Specific Relief Act, 1963 stood complied with as the Plaintiffs pleaded and proved their readiness and willingness to perform the essential terms of the Agreement. He submitted that there was no doubt about the financial capacity of the Plaintiffs in paying the balance sale consideration due to their affluent background. In view of the friendly relations between Vinod Chander Aggarwal, the husband of the First Plaintiff and Sushil Ansal, Defendant No.2 (not a party to the Agreement), it is submitted by Mr. Bhushan that the Plaintiffs believed that the application for permission before the L&DO was still pending and in any event, the Defendants did not inform the Plaintiffs about the permission granted by the L&DO in the year 1977. Assuming that time is the essence of the Agreement, according to Mr. Bhushan, Section 55 of the Indian Contract Act provides for the contract becoming voidable at the instance of the Plaintiffs which option was not exercised by them. In case, time is not the essence, the Plaintiffs are entitled for damages. He further stated that the Defendants did not terminate the Agreement and did not refund the amount paid by the Plaintiffs toward part of the sale consideration.

**[9]** Mr. Sachin Datta, learned Senior Counsel appearing for the Defendants submitted that the limitation for filing the suit started on 31.03.1975, which was the date fixed for performance of the Agreement. As the suit was not filed within three years from that date, it was barred by limitation. He referred to the findings recorded by the Courts below that the agreement was neither varied nor modified. He further submitted that the non-fulfilment of the condition pertaining to obtaining permission cannot be an excuse for the Plaintiffs to not file a suit for specific

performance within the prescribed period of limitation. According to him, the second part of Article 54 of the Schedule to the Limitation Act is not applicable to this case. He asserted that there was an inordinate delay in filing the suit which by itself is a ground for dismissal of the suit. The torpid silence of the Plaintiffs in not resorting to a legal remedy within a reasonable period tantamounts to their abandoning the Agreement. Finally, Mr. Datta submitted that the findings of fact on the point of readiness and willingness cannot be interfered with by this Court in exercise of its jurisdiction under Article 136 of the Constitution of India.

**[10]** There are essentially two points that arise for our consideration in this case. The first relates to limitation. A specific date i.e. 31.03.1975 was fixed for performance of the Agreement, i.e. execution of the sale deed. As per Article 54 of the Schedule to the Limitation Act, when a date is fixed for performance of the contract, the period of limitation is three years from such date. The cause of action has arisen on 31.03.1975 and the suit ought to have been filed within three years from that date. Admittedly, the suit was filed only in the year 1987. However, the submission of the Plaintiffs is that the date fixed for performance of the Agreement stood extended by the conduct of the parties. It was submitted that even after 31.03.1975, the Defendants were pursuing the application filed for permission before the L&DO with the cooperation of the Plaintiffs. The further submission of the Plaintiffs is that without the permission of the L&DO, the sale deed could not have been executed on 31.03.1975. Therefore, the Plaintiffs submit that the date fixed by the agreement for the execution of the sale deed stood extended. It is settled law that the vendee cannot claim that the cause of action for filing the suit has not arisen on the date fixed in the contract on the ground that certain conditions in the contract have not been complied with. (See: Fateh Nagpal & Co. v. L.M. Nagpal, 2015 8 SCC 390, para 6, Vishwa Nath Sharma v. Shyam Shanker Goela, 2007 10 SCC 595, para 12 and K. Raheja Constructions Ltd. v. Alliance Ministries, 1995 Supp3 SCC 17, para 4).

**[11]** On a detailed consideration of the evidence on record, the Courts below have come to the conclusion that the clauses in the Agreement have neither been amended nor varied. Merely because the Defendants were pursuing the application filed for permission before the L&DO, it cannot be said that the date fixed for performance of the Agreement stood extended. We agree with the findings of the Courts below that the suit ought to have been filed within three years from 31.03.1975 which was the date that was fixed by the Agreement. The submission made on behalf of the Plaintiffs that part II of Article 54 of the Schedule to the Limitation Act applies to this case and that the suit was filed within limitation as the refusal by the Defendants was only in the year 1987 is not acceptable. Moreover, the Plaintiffs have not performed their part of the Agreement within a reasonable period. As per the Agreement, the Plaintiffs were given the right to get the sale deed executed through the Court in case of failure on the part of the Defendants to execute the sale deed

by 31.03.1975. The Plaintiffs filed the suit 12 years after the date fixed for performance. It is relevant to refer to the judgment of this Court in K.S.Vidyanadam v. Vairavan, 1997 3 SCC 1 wherein it was held as follows:

"Even where time is not of the essence of the contract, the plaintiffs must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property."

**[12]** The silence maintained by the Plaintiffs for about 12 years amounted to abandonment of the Agreement and we approve the finding in this regard made by the Trial Court.

**[13]** The Courts below have found that the Plaintiffs failed to prove their readiness and willingness to perform their part of the Agreement. The failure on the part of the Plaintiffs in not paying the monthly instalments of Rs.7,000/-, not collecting the rent from the tenant on the ground floor, not paying the house tax etc., and not taking any action for eviction of the tenant on the ground floor are some of the points held against the Plaintiffs by the Courts below which show that they were not ready and willing to perform their part of the Agreement. There is no compelling reason to re-examine the said findings of fact by the Courts below in exercise of our jurisdiction under Article 136 of the Constitution of India. We are in agreement with the view of the Courts below that the Plaintiffs have not proved their readiness and willingness to perform their part of the Agreement and, therefore, are not entitled to a decree of specific performance.

**[14]** The High Court directed a refund of Rs.70,000/- which was paid by the Plaintiffs to the Defendants in 1975 with interest at the rate of 24% p.a.. In view of the peculiar facts of this case in which the Plaintiffs have paid Rs.70,000/- way back in 1975 and the steep increase in the price of the property over time, we are of the considered opinion that the Plaintiffs are entitled to a higher amount than what was granted by the High Court. Instead of the refund of Rs.70,000/- with interest at the rate of 24% p.a., we direct the Defendants to pay Rs. 2,00,00,000/- (Rupees Two Crores) to the Plaintiffs within a period of eight weeks from today.

**[15]** Subject to the above modification, the appeal is dismissed.

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# LAW SUMMARY

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