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(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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CRIMINAL PROCEDURE CODE, Sec.144 and 151 – **INDIAN PENAL CODE,** Secs.300 and 302 - Writ Petition has been preferred seeking directions to State Governments and the Central Government to take preventive steps to combat honour crimes. Held – Writ allowed - Measures havebeen directed

Preventive Steps :

(a) The State Governments should forthwith identify Districts, Sub-Divisions and/ or Villages where instances of honour killing or assembly of Khap Panchayats have been reported in the recent past, e.g., in the last five years.

(b) The Secretary, Home Department of the concerned States shall issue directives/ advisories to the Superintendent of Police of the concerned Districts for ensuring that the Officer Incharge of the Police Stations of the identified areas are extra cautious if any instance of inter-caste or inter- religious marriage within their jurisdiction comes to their notice.

(c) If information about any proposed gathering of a KhapPanchayat comes to the knowledge of any police officer or any officer of the District Administration, he shall forthwith inform his immediate superior officer and also simultaneously intimate the jurisdictional Deputy Superintendent of Police and Superintendent of Police.

(d) On receiving such information, the Deputy Superintendent of Police (or such senior police officer as identified by the State Governments with respect to the area/district) shall immediately interact with the members of the KhapPanchayat and impress upon them that convening of such meeting/gathering is not permissible in law and to eschew from going ahead with such a meeting. Additionally, he should issue appropriate directions to the Officer Incharge of the jurisdictional Police Station to be vigilant and, if necessary, to deploy adequate police force for prevention of assembly of the proposed gathering.

(e) Despite taking such measures, if the meeting is conducted, the Deputy Superintendent of Police shall personally remain present during the meeting and impress upon the assembly that no decision can be taken to cause any harm

to the couple or the family members of the couple, failing which each one participating in the meeting besides the organisers would be personally liable for criminal prosecution. He shall also ensure that video recording of the discussion and participation of the members of the assembly is done on the basis of which the law enforcing machinery can resort to suitable action.

(f) If the Deputy Superintendent of Police, after interaction with the members of the KhapPanchayat, has reason to believe that the gathering cannot be prevented and/or is likely to cause harm to the couple or members of their family, he shall forthwith submit a proposal to the District Magistrate/Sub-Divisional Magistrate of the District/ Competent Authority of the concerned area for issuing orders to take preventive steps under the Cr.P.C., including by invoking prohibitory orders under Section 144 Cr.P.C. and also by causing arrest of the participants in the assembly under Section 151 Cr.P.C.

(g) The Home Department of the Government of India must take initiative and work in coordination with the State Governments for sensitising the law enforcement agencies and by involving all the stake holders to identify the measures for prevention of such violence and to implement the constitutional goal of social justice and the rule of law.

(h) There should be an institutional machinery with the necessary coordination of all the stakeholders. The different State Governments and the Centre ought to work on sensitization of the law enforcement agencies to mandate social initiatives and awareness to curb such violence. **(S.C.)** ***159***

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Held - In view of Sec.464 Cr.P.C., it is possible for the appellate or revisional court to convict an accused for an offence for which no charge was framed unless the court is of the opinion that a failure of justice would in fact occasion - Conviction of appellant/accused for the offence u/Sec.302 of IPC is set aside - However, appellant is convicted for offence u/Sec. 306 of IPC – Appeal is allowed in part. **(Hyd.)** ***316***

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Held - it is ultimately for High Court to decide as to whether individual case before it requires adherence to self-imposed restraint from entertaining it or warrants deviation therefrom - Sale held by bank fell foul of statutory mandate as petitioners were not afforded required 30 days clear notice to exercise their right of redemption, as requisite gap was not maintained between the date of receipt of Rule 8(6) notice and the publication of Rule 9(1) sale notice whereupon their right of redemption under amended Section 13(8) of SARFAESI Act stood prematurely extinguished - Writ petition is accordingly allowed holding that sale held by bank stands vitiated on grounds more than one - Sale certificate shall also stand cancelled. **(Hyd.)** ***293***

SPECIFIC PERFORMANCE – Trial Court dismissed counter claim preferred by Appellant/Defendant, whereby he prayed for delivery of possession of suit property - Appellant had mortgaged suit property with Bank – Later appellant entered into an agreement intending to sell suit property to respondent No.1/ Plaintiff – Appellant contended that plaintiff has taken illegal possession of suit property and has been in receipt of unlawful gains on account of being in illegal possession and receiving income from the suit property

Held – Court accepted counter claim made by appellant and hold that he was entitled to recovery of possession – On score that Appellant was wrongfully denied and deprived of earnings from suit property for last so many years, he would be entitled to reasonable return – But at same time he had retained and enjoyed said sum which he had received by way of advance from first Respondent/ Plaintiff – Neither would first Respondent be entitled to any interest on sum of which was given by way of advances under suit agreement to Appellant nor would Appellant be entitled to any sum by way of mesne profits of wrongful possession of suit property by first Respondent – Suit for specific performance filed by first Respondent was dismissed – Appeal allowed. **(S.C.)** ***149***

SUIT FOR RECOVERY OF POSSESSION

By
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Introductory:-

The relief of recovery of possession is an independent substantive right under Section 5 of the Specific Relief Act. It does not depend upon any other relief. No provision of the Specific Relief Act mandates that the relief under Section 5 cannot be claimed, except as a corollary or ancillary to a declaration under Section 34. A relief of mere declaration cannot be claimed unless the other consequential reliefs are prayed for. Proviso to Section 34 of the Specific Relief Act makes this aspect very clear. See. *Seth Srenikbhai Kasturbhai vs Seth Chandulal Kasturchand, AIR 1997 Pat 179, 1997 (45) BLJR 1219.* 6. A person, whose land has been trespassed upon by another and any improvements made on it, a suit for mere mandatory injunction for removal of the structures put by the defendant cannot be maintained, unless he seeks relief of possession. See. Balamoni Kistanna v. Narayanna Reddy, 1982 (2) ALT 408. 7. The relief of mandatory injunction can be only a corollary to the relief of perpetual injunction or recovery of possession and not an independent one. Unless the plaintiff in such a suit seeks the relief of either perpetual injunction or recovery of possession, a mere relief of mandatory injunction does not subserve any purpose. (See. ***Rajoji And Anr. vs Patnam Hanmanth Reddy And Ors, 2005 (3) ALD 23***). In this article, I intend to supply some fundamental principles, with fulcrum of rulings of higher courts, relating to suit for recovery of possession for benefit of the judicial officers, advocates, law students and litigant public.

Suit for recovery of possession based on title - Fundamental Principles:- 1. The suit was filed for the relief of recovery of possession of the suit schedule property and mesne profits thereof. Obviously, it is based upon the title. Such a suit can be maintained, when there is no dispute as to the title in the plaint. 2. If the plaintiff is able to disclose the title, beyond any pale of doubt, even in respect of his predecessors, or transferors, then he does not have the necessity to pray for the relief of declaration of title. 3. Where, however, there is serious dispute as to the existence of title in the plaintiff and the same doubt exists as to the title of the predecessors and transferors, the necessity to seek declaration of title exists. See. ***Muddasani Sarojana vs Muddasani Venkat Narsaiah, AIR 2007 AP 50, 2006 (6) ALD 436.***

A distinction between the suits for declaration simpliciter and the suits for declaration with further relief:- *C.Mohammed Yunus vs Syed Unissa And Others, 1961 AIR 808, 1962 SCR (1) 67.* 1. A suit for declaration with a consequential relief for injunction,

is not a suit for declaration simpliciter: it is a suit for declaration with further relief. 2. S. 42 of the Specific Relief Act does not empower the court to dismiss a suit for a declaration and injunction and that an injunction is a further relief within the meaning of S.42 of the Specific Relief Act. (See. Kunj Behari Prasadji v. Keshavlal Hiralal). 3. A suit for declaration of title seeking further relief of recovery of possession or a consequential relief of perpetual injunction is not a suit for declaration simpliciter and it is a suit for declaration with further relief. (See. *Gottumukkala Sundara Narasaraju's case*).

Permanent injunction Vs. Recovery of possession:- *Komatireddy Ramachandra Reddy vs Y. Maramma And Anr. 2004 (3) ALD 243.* The evidence, which was adduced by the parties in the context of the relief of permanent injunction, cannot be treated as adequate for the relief of recovery of possession.

Suit for recovery of possession - Pendency of probate proceedings:- *Vidya Sagar, Goshacut,Jhinsi Chowraha, Hyderabad. Vs. Ram Kishan Singh(Died), Bal Ram Singh & Others, (2014)*. 1. Suit for recovery of possession based on title is required to be instituted within 12 years from the date when the right accrues. 2. Pendency of probate proceedings which is not required, do not put any fetters on the right of the plaintiff to seek recovery of possession. 3. When there is prohibition to seek the relief of recovery of possession in probate proceedings, there is no such limitation on his right to seek the said relief in an independent proceedings. 4. The clock of limitation do not come to a standstill so long as the probate proceedings are pending.

Whether the plaintiff is entitled to withdraw the suit with a leave and permission to file a comprehensive suit for recovery of possession of the land?:- *C. Pratap Reddy vs C. Goverdhan Reddy, AIR 2007 AP 21, 2006 (6) ALD 126, 2006 (6) ALT 95.* 1. The effect of granting permission to withdraw, with liberty to bring a fresh suit, is to place the parties in the same position as they would have been, had the suit been not instituted at all. See. Ammini Kutty And Ors. vs George Abraham, AIR 1987 Ker 246**.** 2. For an injunction suit, any number of times the cause of action may arise, whereas in a suit for declaration of title and recovery of possession, the date on which the defendant disputed the plaintiff's title and the date on which the plaintiff lost possession of the land is the basis of cause of action. 3. That interests of justice require that plaintiff should be permitted to prosecute the subsequently instituted suit and further permit her to seek the relief which is asked for in that suit. See. Ameena Bi deceased and others' case, 1998 (1) Current Civil Cases 57 (Mad.).

When there are two parts of the plaint. One for declaration and Other for recovery of possession - Limitation:- *Radha Gobinda Roy And Ors. vs Sri Sri Nilkantha Narayan Singh, AIR 1951 Pat 556; Gottumukkala Sundara Narasaraju and 2 others vs. Pinnamaraju Venkata Narasimharaju and 4 others, SA.Nos.1140 of 2003 and batch. Date of judgment: 07-12-2015* 1. When there are two parts of the plaint which are intimately connected

with each other and a declaration is asked for in one part of the plaint and it is the basis of the claim in the other part, which is for recovery of possession, then the period of limitation for recovery of possession being larger and being 12 years, the relief of declaration of title for which the period of limitation is less being 3 years is unaffected even though the suit which is comprehensive is instituted beyond three years. 2. When two prayers seeking two reliefs made in the plaint are intimately connected, the period of limitation which is larger and which is governing one of the two reliefs becomes the determinative factor and the prayer in regard to the relief for which the period of limitation is less remains unaffected.

The pleadings in the former suit were not marked. Effect?
The pleadings in the former suit were not marked, however, in the copy of the judgment that was exhibited, the trial Judge in extenso had referred to the pleadings of the parties in the earlier suit and, therefore, the Court found no necessity for marking of the copies of the pleadings in the former suit. *See. Gram Panchayat Vs. Ujagar Singh [AIR 2000 SC 3272*]

The weakness of the case set up by the defendants cannot be a ground to grant the relief:- *Union Of India (Uoi) Represented ... vs Vasavi Cooperative Housing, 2002 (5) ALD 532, 2002 (5) ALT 370.* It is trite law that, in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.

Future mesne profits:- *Gottumukkala Sundara Narasaraju and 2 others vs. Pinnamaraju Venkata Narasimharaju and 4 others, SA.Nos.1140 of 2003 and batch. Date of judgment: 07-12-2015.* In this case, the plaintiffs are directed to move an application under Order XX Rule 12 of the Code before the trial Court requesting to direct an enquiry as to the mesne profits from the date of the institution of the suit until the delivery of possession and pass a decree in respect of future mesne profits in accordance with the result of such enquiry.

Maintainability of the suit for recovery of possession of the entire property as against every person other than the true owner:- *Kanchi Kamamma And Ors. vs Yerramsetti Appanna, AIR 1973 AP 201.* The mere fact that the alienation is not valid to the extent of half share does not take away this right of the purchaser. He can very well maintain the suit for recovery of possession of the entire property as against every person other than the true owner. That apart the suit is also maintainable having regard to his prior possession over the entire property.
A party can only succeed according to what was alleged and proved:- *Allam Gangadhara Rao vs Gollapalli Gangarao,AIR 1968 AP 291.* 1.The main principle of practice is that a party can only succeed according to what was alleged and proved:

secundum allegate et probata. 2. He should not be allowed to succeed on a case which he has failed to set up. 3. He should not be permitted to change his case or set up a case which is inconsistent with what he had himself alleged in his pleading ex-cept by way of amendment of the plaint.

An elementary principle of law that persons who have got joint right should Join in an action to assert that right.:- *Kaliappa Nadar And Ors. vs Muthu Vijaya Thambayasami, AIR 1927 Mad 984*. It is an elementary principle of law that persons who have got joint right should Join in an action to assert that right and it is not open to one or two persons who have a joint right along with others to bring a suit for the assertion of that right on behalf for all without joining them as defendants.

One co-owner can sue to eject a trespasser :- *P. Thimmayya vs P. Siddappa, AIR 1925 Mad 63*. "One co-owner can sue to eject a trespasser and the suit is not bad for non-joinder provided the plaintiff does not deny the other co-owner's right."

What does Section 53-A contemplate?:- *Maung Ohn v. Maung Po Kwe. AIR 1938 Rang 356*, a Bench of the Rangoon High Court held: "Section 53-A clearly contemplates that the contract itself shall be in writing, and not that there shall be a writing referring to some part or parts of a contract which may previously have been oral. A distinction must be drawn between a writing which is a reduction into writing of a previous oral agreement, which would fall within the provisions of Section 53-A and a writing in which there is a mere reference to a previous oral agreement."

These principles are equally applicable to amendatory statutes. According to Crawford:- ***Ramvilas Bajaj vs Ashok Kumar And Anr. 2007 (4) ALD 137, 2007 (4) ALT 348.*** Amendatory statutes are subject to the general principles relative to retroactive operation. Like original statutes, they will not be given retroactive construction, unless the language clearly makes such construction necessary, in other words, the amendment will usually take effect only from the date of its enactment and will have no application to prior transactions, in the absence of an expressed intent or an intent clearly implied to the contrary. Indeed there is a presumption that an amendment shall operate prospectively. (*See Crawford's Statutory Construction, pp.622-623*)

The position of a Mutawalli:- *A.S. Abdul Khader Wakf For Deeni vs Saber Miah, 2003 (6) ALD 625, 2003 (6) ALT 469.* 1. The position of a Mutawalli is just akin to a Trustee. 2. Mutawalli cannot act adverse to the interests of the Wakf. 3. Mutawalli is expected to administer and manage the properties of the Wakf keeping in view the wishes of the founder and a Mutawalli is expected to protect the interest of the beneficiaries as well. 4. When there are more than one Mutawallis, one of the Mutawallis can definitely maintain a suit representing the other Mutawallis as well unless there is conflict of interest otherwise. 5. A co-owner can definitely maintain a suit for the relief of eviction and even in the case of Mutawallis, when there are more than one Mutawalli, one such joint Mutawalli can definitely maintain a suit. 6. The principle applicable in the case of a co-owner in this regard can be extended even in the case of Mutawallis.

Whether the plea of adverse possession and right under executory contract, can go together?:- *Arjuna Subramanya Reddy vs Arjuna China Thangavelu, AIR 2006 AP 362, 2006 (5) ALD 169, 2006 (5) ALT 231.* 1. The oral sale pleaded by the respondent, at the most, can be treated as an executory contract, enforceable in law, if other ingredients pleaded are proved. 2. The purchaser who got into possession under an executory contract of sale in a permissible character cannot be heard to contend that his possession was adverse. 3. In the conception of adverse possession there is an essential and basic difference between a case in which the other party is put in possession of property by an outright transfer, both parties stipulating for a total divestiture of all the rights of the transferor in the property, and in case in which there is mere executory agreement of transfer both parties contemplating a deed of transfer to be executed at a later point of time. 4. In the latter case the principle of estoppel applies estopping the transferee from contending that his possession, while the contract remained executory in stage, was in his own right and adversely against the transferor. 5. Adverse possession implies that it commenced in wrong, and is maintained against right. 6. When the commencement and continuance of possession is legal and proper, referable to contract, it cannot be adverse. (Also see. *Achal Reddy's case, AIR 1990 SC 553*).

Receiving a document or the collateral purpose:- ***Rayadurgam Pedda Reddeppa (Died) vs Rayadurgam Narasimha Reddy, 2006 (3) ALD 764.*** Even where a document is compulsorily registerable, proviso to Section 49 of the Registration Act, permits the same to be relied on, for collateral purposes, in the context of possession.

A person in possession of property, adverse to the interests of titleholder, can institute the suit for declaration of title:- ***Kotta Laxminarsaiah And 7 Ors. vs Tadasina Ramanarsamma, 2005 (5) ALD 522, 2005 (6) ALT 18.*** 1. Under Section-54 of Transfer of Property Act, a sale of an immovable property of value exceeding Rs. 100/- can be effected only through a registered document. 2. Even where the basis for initial possession of an immovable property is legally invalid, the possession derived thereunder becomes adverse to the original titleholder. See. State Of West Bengal vs The Dalhousie Institute Society, AIR 1970 SC 1778, (1970) 3 SCC 802; Also see. Mungamuru Lakshmidevamma vs Land Acquisition Officer, AIR 1985 AP 200. 3. A person in possession of property, adverse to the interests of titleholder, can institute the suit for declaration of title.

What is prohibited directly, cannot be permitted to be done indirectly:- ***Nandam Mohanamma And Ors. vs Markonda Narasimha Rao And Anr.,AIR 2006 AP 8, 2005 (5) ALD 296.*** 1. Section 91 of Indian Evidence Act mandates that where the terms of a contract, or of a grant, or of any other disposition of the property, have been reduced to the form of a document, no oral evidence shall be adduced in proof of the terms of such contract, grant or disposition. The document itself or its secondary evidence, if admissible, becomes the basis for proof. 2. Section 92 of Indian Evidence Act provides for exclusion of evidence of any oral agreement, when the terms of a contract have

been reduced into writing, or whether the contract is required by law to be in writing. Certain exceptions are provided to this general rule. For instance, where a party pleads fraud, intimidation, illegality, want of capacity, absence of contracting party, mistake of law, etc., in relation to the written contract, it shall be open to him to lead oral evidence to prove such factors.

Any allegation as to fraud, intimidation, illegality, want of execution etc., needs to be specifically pleaded:- ***Nandam Mohanamma And Ors. vs Markonda Narasimha Rao And Anr.,AIR 2006 AP 8, 2005 (5) ALD 296.*** It is settled principle of law that any allegation as to fraud, intimidation, illegality, want of execution etc., needs to be specifically pleaded. Unless there exists corresponding plea and an issue framed thereon, it is impermissible to lead evidence thereon. In fact, Rule 4 of Order 6 C.P.C. makes this aspect clear.

Court fee for suit for recovery of possession:- ***J.K. Associates vs B. Prameela Devi And Ors., 2005 (4) ALD 800, 2005 (4) ALT 504.*** 1. ***Section 29 the Act applies to suits for recovery of possession, not otherwise provided for.*** " Suits for possession not otherwise provided for:- In a suit for possession of immovable property not otherwise provided for, fee shall be computed on three-fourths of the market value of the property or on rupees three hundred, whichever is higher."

Court - fee under section 29 of the Act:- ***J.K. Associates vs B. Prameela Devi And Ors., 2005 (4) ALD 800, 2005 (4) ALT 504.*** 1. Suits contemplated under ***Section 29*** of the Act, are those where the plaintiff seeks to recover possession, with a view to retain it as owner. This contingency may arise, mostly as a consequence of declaration of title etc. 2. Suits for recovery of possession, within six months of dispossession under Section 6 of the Specific Relief Act, 1963 (see 9 of the 1877 Act) are dealt with under Section 28 of the Act. 3.Under ***Section 29*** of the Act, the court-fee has to be paid on the **three-fourths value** of the property. 4. Where the property is to be delivered to the plaintiff, for a limited purpose and not in recognition of his title as owner, ***Section 29*** does not get attracted. It would depend upon the purpose for which the delivery is sought.

Court - fee under section 39 of the Act:- *J.K. Associates vs B. Prameela Devi And Ors., 2005 (4) ALD 800, 2005 (4) ALT 504.* 1. Section 39 of the Act is broad in its perspective and covers all the suits, filed for specific performance of an agreement, which in turn, may result in variety of situations. 2. The amount of court-fee payable thereon depends upon the purport of agreements. It is not as if delivery of possession of immovable property, otherwise than in recognition of the ownership of plaintiff, is not contemplated in the suits for specific performance. 3. For example, under clauses (b) and (c) of **Section 39** of the Act, the decree is to entail in, the delivery of possession of the land, either for the purpose of mortgage or lease. If delivery of possession alone is the criterion to invoke **Section 29** the circumstances stipulated under clauses (b)

and (c) of Section 39 would have fallen under Section 29.

Court fee for Suit for possession:- In a suit for possession of immovable property under S.9 of the Specific Relief Act, 1877 (Central Act 1 of 1877), fee shall be computed on one-half of the market value of the property or on rupees two hundred, whichever is higher. See. *Section 28 of APCF & SV Act*. *Suits for possession not otherwise provided for***:-** In a suit for possession of immovable property not otherwise provided for, fee shall be computed on three-fourths of the market value of the property or on rupees three hundred, whichever is higher. See. **Section 28 of APCF & SV Act.**

The period of limitation for institution of a suit for declaration of title based on title: The period of limitation for institution of a suit for declaration of title seeking the further relief of recovery of possession based on title is governed by Article 65 and that, therefore, the period of limitation is twelve years from the time when the possession of the defendants becomes adverse to the plaintiffs. See. Gottumukkala Sundara Narasaraju's case, (2015). **"Limitation":-** *2016 (1) ALT 319, Kasa Mukanna and another Vs Sunka Rajyalakshmamma and others.* **Principle of Law**:- In the absence of people of adverse possession, the issue has to suit being barred by limitation does not arise for a decision in second appeal. *2016 (2) ALT 497, Gottumukkal Sundara NarasaRaju and Others Vs Pinnamaraju Venkata NarasimhaRaju and others.* In a suit for declaration of title and recovery of possession based on title the period of limitation to file the suit is 12 years and not 3 years. Article 65 and Article 58 of limitation act applies.

Period of Limitation:- *If no defence as to limitation was raised? Chidri Ashabee vs S. Sulochana And Ors.2007 (3) ALD 745, 2007 (4) ALT 209.* 1. Section 3 of the Limitation Act places a duty upon the Court, to examine the question as to whether the matter before it is barred by imitation, notwithstanding the fact that no defence as to limitation was raised. 2. If the plaintiff proposes to incorporate the relief of recovery of possession through amendment. This, naturally, is governed by Article 65 of the Limitation Act. 3. The starting point for computing limitation, in such cases is the date, on which the possession became adverse. 4. If the possession of the suit schedule property by a defendant is referable to any permission, express or implied, it cannot be treated as adverse. 5. Had there been, even a semblance of such a plea in the pleading, there would not be any scope for rejection of the relief, on the ground that it is barred.

Limitation:- *Gottumukkala Sundara Narasaraju and 2 others vs. Pinnamaraju Venkata Narasimharaju and 4 others, SA.Nos.1140 of 2003 and batch. Date of judgment: 07-12-2015.* 1. For a *suit for declaration of title* the limitation is **three years** under Article 58 and the time from which the period of limitation begins to run is the time when the right to sue first accrues. 2. For a *suit for recovery of possession of immovable property* or any interest thereon based on title, the limitation is **12 years** under **Article 65** and the time from which the period of limitation begins to run is the time when

the possession of the defendants becomes adverse to the plaintiffs. 3. Since declaration of title as well as recovery of possession based on title are sought, the periods of limitation, which govern the two reliefs are three years and twelve years respectively and, therefore, the limitation of twelve years is the period of limitation available to the plaintiffs under **Article 65** as the question of instituting a suit for declaration and recovery of possession would hardly arise until there was an actual disturbance of possession of the plaintiffs. 4. The 12 years period of limitation for the relief of recovery of possession is to be reckoned from the time the possession of the defendants becomes adverse to the plaintiffs.

Article 58:- Description of Suit Period of Limitation Time from which period begins to run To obtain any other declaration Three years When the right to sue first accrues. **Article 64**:- Description of Suit Period of Limitation Time from which period begins to run For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed Twelve years The date of dispossession. **Article 65**:-Description of Suit Period of Limitation Time from which period begins to run For possession of immovebale property or any interest therein based on title.

Limitation:- The limitation for a suit for recovery of possession of immovable property or any interest thereon based on title is 12 years from the time when the possession of the defendants becomes adverse to the plaintiffs. (See. Article 65 of Limitation Act). See. *Indira vs Arumugam And Anr, AIR 1999 SC 1549*. *Under Article 58 of the Limitation Act:-* Under Article 58 of the Limitation Act, the suit for declaration ought to have been filed within three years. (See. Article 58 of Limitation Act). See. *Tumu Srihari v. Thumu Padmamma and others*.

Law of limitation relating to the suit for possession:- The law of limitation relating to the suit for possession has undergone a drastic change. In terms of Articles 142 and 144 of the Limitation Act, 1908, it was obligatory on the part of the plaintiff to aver and plead that he not only has title over the property but also has been in possession of the same for a period of more than 12 years. However, if the plaintiff has filed the suit claiming title over the suit property in terms of Articles 64 and 65 of the Limitation Act, 1963, burden would be on the defendant to prove that he has acquired title by adverse possession.

(See. *Gottumukkala Sundara Narasaraju and 2 others vs. Pinnamaraju Venkata Narasimharaju and 4 others, SA.Nos.1140 of 2003 and batch. Date of judgment: 07-12-2015)*.

The scope and ambit of Articles 58 and 65 of the Limitation Act:- *Mechineni Chokka Rao And Ors. vs Sattu Sattamma, 2006 (1) ALD 116.* While part-Ill of first division deals with suits relating to declarations; Part-V thereof deals with suits relating to immovable property. In Part-III there are three Articles, namely, 56, 57 and 58. While Article 56 prescribes three years period of limitation to institute a suit for declaration

that the instrument issued or registered is a forged one;Article 57 prescribes an equal period for declaring the alleged adoption as invalid and Article 58, however, prescribes albeit an equal period in respect of any other declaration. It is obvious that Article 58 is in the nature of residuary provision among the declaratory suits. Indubitably the relief of declaration can be sought for in respect of an immovable property or movable property, or in respect of an instrument, or in respect of a decree, or in respect of an adoption. Thus, various types of declaratory reliefs can be sought for pertaining to those categories. Therefore, the relief of declaration alone appears to be not the criterion for prescribing the period of limitation but the subject-matter of the suit in respect of which the declaration is sought for, appears to be germane for consideration. (*See also. the Law Commission in the 89th Report for amendment of Article 58*).

Period of limitation as to declaratory suits:- 1. In respect of declaratory suits pertaining to immovable property, the period of limitation is governed by Articles 64 and 65 but not Article 58 of the Act. (See. Gottumukkala Sundara Narasaraju's case). 2. The period of limitation for the relief of declaration of title is three years from the date of accrual of the cause of action.

Computing the period of limitation for an appeal:- *Lal Bal Mukand (dead) by LRs v. Lajwanti and others.* 1. In computing the period of limitation for an appeal the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree or order appealed from shall be excluded. See. Section 12 (2) of the Limitation Act. 2. The Limitation Act deprives or restricts the right of an aggrieved person to have recourse to legal remedy, and where its language is ambiguous, that construction should be preferred which preserves such remedy to the one which bars or defeats it. 3. A Court ought to avoid an interpretation upon a statute of Limitation by implication or inference as may have a penalizing effect unless it is driven to do so by the irresistible force of the language employed by the legislature. 4. while interpreting the provisions of the Indian Limitation Act, when two constructions are possible, the construction which preserves the remedy should be preferred to the one which bars or defeats it.

Article III of the first division of the Schedule of the Limitation Act
(Articles 56, 57, and 58):- 1. It relates to suits for declaration. 2. There are three Articles viz., 56, 57 and 58. 3. Articles 56 & 57 relate respectively to (i) declaration that an instrument issued or registered is forged; and, (ii) a declaration that an alleged adoption is invalid; or never, in fact, took place. 4. Whereas Article 58 in that part, which deals with suits to obtain any other declaration, is a general provision. 5. Part V of the said division deals specifically with the suits relating to immovable properties. 6. The law is well settled that a special provision should be given effect to the extent of its scope leaving the general provision to control cases where the special provision does not apply. *See. Gottumukkala Sundara Narasaraju's case.*

Res Judicata -In declaratory suits:- *Sunderabai vs Devaji Shankar Deshpande, AIR 1954 SC 82*. 1. Where the right claimed in both suits is the same the subsequent suit would be barred as res judicata though the right in the subsequent suit is sought to be established on a ground different from that in the former suit. 2. It would be only in those cases where the rights claimed in the two suits were different that the subsequent suit would not be barred as res judicata even though the property was identical. 3. The decision in earlier case on the issue between the same parties or persons under whom they claim title or litigating under the same title, it operates as a res-judicata. See. Sulochana Amma Vs. Narayanan Nair, (1994) 2 SCC 14. 4. The principle of res judicata comes into play when by judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implications even then the principle of res judicata on that issue is directly applicable. See. Ramachandra Dagdu Sonavane(D)By ... vs Vithu Hira Mahar(Dead) By Lrs, CIVIL APPEAL NOs.7184-7185 OF 2001, Dated:09-10-2009. 5. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of the law, to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided. See. Workmen Of Cochin Port Trust vs Board Of Trustees Of The Cochin,(1978) 3 SCC 119. 6. The decision in earlier case on the issue between the same parties or persons under whom they claim title or litigating under the same title, it operates as a res-judicata. See. (1994) 2 SCC 14. 7. A plea decided even in a suit for injunction touching title between the same parties, would operate as res-judicata. See. (1994) 2 SCC 14. 8. It is a settled law that in a Suit for injunction when title is in issue, for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties when the same is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit, the decree in injunction suit equally operates as a res-judicata. See. Gram Panchayat Vs. Ujagar Singh [AIR 2000 SC 3272]. 9. Even in an earlier suit for injunction, if there is an incidental finding on title, the same will not be binding in the later suit or proceedings where title is directly in question, unless it is established that it was “necessary” in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was found or based on the findings of title. Even the mere framing of an issue may not be sufficient as pointed out in that case. See. AIR 2000 SC 3272. 10. A finding drawn and the plea decided in a suit for injunction touching the title between the same parties would operate as res judicata. See. Gram Panchayat Vs. Ujagar Singh [AIR 2000 SC 3272]. 11. Even though an issue is not formally framed but, such an issue is material and essential for the decision of the case in the earlier proceeding and when a finding was recorded though an issue was not framed, the said finding would operate as res judicata in a subsequent proceeding. *See. Commissioner Of Endowments & Ors vs Vittal Rao & Ors, Appeal (civil) 6246 of 1998,dt.25 November, 2004. 12. T*he words used in Section 11 CPC are “directly and substantially in issue”. If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata

in a subsequent proceeding. Judicial decisions have however held that if a matter was only 'collaterally or incidentally' in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue. *See. Sajjadanashin Sayed ... vs Musa Dadabhai Ummer & Others, Dt. 23 February, 2000, Appeal (civil) 5390 of 1985.* 13. A collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an auxiliary issue and the latter the principal issue. The expression 'collaterally or incidentally' in issue implies that there is another matter which is 'directly and substantially' in issue *(See. Mulla, CPC 15th Ed., p.104). See below for some rulings as to the principle of res judicata*

Res-judicata: *Sulochana Amma vs Narayanan Nair, 1994 AIR 152, 1994 SCC (2) 14:* Section 11 does not create any right or interest in the property, but merely operates as a bar to try the same issue once over. In other words, it aims to prevent multiplicity of the proceedings. *Gulam Abbas & Ors vs State Of U.P. & Ors, 1981 AIR 2198, 1982 SCR (1)1077:* The principle of res judicata though technical in nature, is founded on considerations of public policy. *Commissioner of endowments and Others VS Vital Rao and others.* When a finding was recorded though an issue was not framed, the said finding would operate as "res judicate in subsequent proceeding. (See also: 2016(2) ALT 497). **2016 (2) ALT 497,** Res judicate being a question of fact and law, the said question cannot be permitted to be raised in second appeal. **Constructive Res Judicata**: An issue which ought to have been raised earlier cannot be raised by the party in successive round of litigation. (See: *Ramchandra Dagdu Sonavane (dead) by Lrs.and others vs. Vithu Hira Mahar (dead) by Lrs. & Ors., AIR 2010 SC 818*. *2009 (10) SCC 273, Ramachandra Dagoluy Sonavanu(Dead) by LRs and others Vs Vithu Hira Mahar (Dead) By LRs and others:-* " The principle of res judcate comes into play when by judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have seen necessarily decided by implications even then the principles of resjudicate an that issue is directly applicable." *AIR 1963 SC 385, Vishal Yeswant Jathar Vs Sri Kandaarkhan Makhtumkhan Sardesai:-* It is well settled that if the final decision in any matter at issue between the parites is based by a court on its decisions or more than one point each of which by itself wuld be sufficient for the ultimate decision: the decision on eah of these points operates as Resjudicate" between the parties.(Sec Also:-2016(2) ALT 497

The Court, decreeing the suit, to examine the reliefs and then construct the operative part of the Judgment in such manner:- ***Faqruddin vs Didde Mahadevappa And Ors.,2004 (5) ALT 469.*** 1. It is for the Court, decreeing the suit, to examine the reliefs and then construct the operative part of the Judgment in such manner as to bring the reliefs granted in conformity with the findings arrived at on different issues and also the admitted facts. 2. The trial Court merely observing in the operative part of the Judgment that the suit is decreed or an appellate Court disposing of an appeal against dismissal of suit observing the appeal is allowed and then staying short at

that, without specifying the reliefs to which the successful party has been found entitled tantamounts to a failure on the part of the author of Judgment to discharge obligation cast on the Judge by the provisions of Code of Civil Procedure." (Held: in Lakshmi Ram Bhuyan vs Hari Prasad Bhuyan & Ors, Appeal (civil) 7450 of 2002).

Amendment to the plaint during pendency of the suit in suit for injunction:-
Ragu Thilak D. John vs S.Rayappan & Others, *Appeal (civil) 787 of 2001.* If the defendant, in a suit for perpetual injunction, had demolished any portion of the property, during pendency of the suit, necessary amendment to the plaint can be allowed, and the objection as to whether the amendment introduces any plea, which is barred by limitation, can be examined after the amendment is allowed.

When a bare suit for recovery of possession is maintainable without seeking declaration of title?
Meka Suramma And Ors. vs Surabathula Muralidhara Rao
2006 (5) ALD 683. 1. Had the land been not part of any estate or Jamindari, the sale deeds referred to above would certainly have the effect of conferring title upon the respondent and in a way, he would have been entitled to maintain the suit without the formal necessity of seeking the relief of declaration of title. 2. In that view of the matter, the suit must be taken to be the one for recovery of possession on the basis of possessory title.

Adverse possession itself, is a recognized defence
K. Ramabrahmam vs G. Narsingh Rao , 2006 (6) ALD 353:- 1. Adverse possession itself, is a recognized defence, on the strength of a continuous occupation and chalet possession, by the defendant, to thwart the efforts of a rightful owner, to recover the possession. 2. It is impermissible in law, for a plaintiff to recover the possession from the rightful owner, on the strength of his so-called adverse possession. 3. Whatever may be the efficacy of adverse possession, as a plea, to seek the declaration, as to title, it cannot be recognized as a basis for recovery of possession, by the one, who is not in possession of the property as on the date of filing the suit.

"Adverse possession":- 2016 (1) ALT 319, *Kasa Mukanna and another Vs Sunka Rajyalakshmamma and others.* **Principle of Law**:- Mere possession however long does not necessarily mean that it is an adverse to the true one. *Chatti Konati Rao & Ors Vs. Palle Venkata Subba Rao, Civil Appeal No. 6039 of 2003, dt. 07-12-2010***:-** Apex Court explained the underlying principles in cases pertaining to claims of Adverse Possession. To know underlying principles in cases pertaining to claims of Adverse Possession. *Anjanappa Vs. Somalingappa, (2006) 7 SCC 570.* Adverse possession really means the hostile possession which is expressly and impliedly in denial of title of the true owner. *Karnataka Board of Wakf vs. Government of India and Ors, (2004) 10 SCC 779.* A person pleading adverse possession has no equities in his favour and since

such a person is trying to defeat the rights of the true owner. *(1980) 1 MLJ 432 Karunai Ammal vs. Karuppa Gounder and Anr.* In the case of a co-owner mere possession, however long it might be, could not constitute adverse possession. *Civil Appeal Nos. 2811-2813 OF 2010, [Arising out of SLP [C] Nos.6745-47/2009], Suhrid Singh @ Sardool Singh Vs. Randhir Singh & Ors:-* **Appreciation of evidence in a suit for declaration** and cancellation of document.

"***Possession follows Title***":- Since the property is a vacant property, which is incapable of being physically possed all the time. Then the principle to be applied is "Possession follows titles". 2017 (2) ALT 468 Principle :- Time from which registered document operates". **Anjanappa Vs. Somalingappa, (2006) 7 SCC 570:-** Mere possession however long does not necessarily mean that it is adverse to the true owner. *Presumption against construing an enactment:- United Provinces v. Atiqa Begum 1940 FCR 110 : AIR 1941 FC 16.* There are two recognized principles:- (1) that vested rights should not be presumed to be affected and (2) that the rights of the parties to an action should ordinarily be determined in accordance with the law as it stood at the date of the commencement of the action. See also. *Ramvilas Bajaj vs Ashok Kumar And Anr. 2007 (4) ALD 137, 2007 (4) ALT 348.*

Burden of proof:- *AIR 1995 SC 167 (Para 19), Balasankar Vs Chartiy Comm, Gujarat***.** Burden of proof pales significance when both parties adduced evidence and it it the during the court to appreciate the entire evidence adduced by both sides in deciding the lis. ***No notice is necessary:-*** *2017 (2) ALT 781, Kavitha Balaji and Anu Vs State of Telagana.* No notice is necessary to respondent /Defendant if the suit is rejected before registration of such suit. **Prima facie title:-** *2017 (2) ALT 468, P.John Britto Vs Potluri Srinivas Chowdary and another.* Since the plaintiff is able to establish title prima facie, it must be constructed that the plaintiff is in lawful possession as apart the defendant.

Burden of proof in suit for recovery of possession:- *Chidri Ashabee vs S. Sulochana And Ors., 2007 (3) ALD 745, 2007 (4) ALT 209.* 1. The fundamental principles of evidence in relation to burden of proof are contained in Chapter VIII of Part III of the Evidence Act, 1872. (See. **2004 (4) ALD 889**) 2. Section 101 of the Act clearly mandate that it is he, who desires the Court to give a judgment, as to any legal right or liability dependant on the existence of facts which he asserts, that must prove that those facts exist. The burden of proof lies on such person. (See. **2004 (4) ALD 889**) 3. Section 102 of the Act further elaborates this principle by supplementing that the burden to prove a fact in a suit or proceeding lies on that person who would fail, if no evidence at all were given on the either side. (See. 2004 (4) ALD 889). 4. As per the amendment to Article 65 of the Limitation Act, whenever a suit for recovery of possession based on title is filed, the burden would be upon the defendant, to plead and prove that his

possession over the suit schedule property is adverse to the interest of the plaintiff. See. ***2007 (4) ALT 209.*** 2. If the adverse possession continued beyond 12 years, the suit would be liable to be dismissed, as barred by limitation. See. ***2007 (4) ALT 209*** 3. Before the amendment, it was for the plaintiff to prove that he lost possession of the property, 12 years before filing of the suit. See. ***2007 (4) ALT 209*** 4. In the matter of permitting amendments to pleadings, the Court is required to maintain a perfect balance, between allowing amendments and requiring the parties to contest the matter on merits, on the one hand, and to ensure that the pleas, which are otherwise barred by limitation, etc., are not permitted to be incorporated, through amendments. See. ***2007 (4) ALT 209.*** 5. Further, if any party claims the benefit under Section 14 of the Limitation Act, it must satisfy the Court that it was prosecuting the relief in another Civil Court with due diligence, on the same issue, in good faith, but on account of lack of jurisdiction, detected at a later point of time, the initial proceedings could not be continued. See. ***2007 (4) ALT 209.*** *6. W*here an individual asserts that any transaction is vitiated by factors like fraud, misrepresentation, coercion and undue influence etcetera, the burden squarely rests upon such person to plead and establish those factors. (See. **2004 (4) ALD 889**).

Conclusion:-

Before concluding this article, I intend to mention some important aspects which are to be remembered while dealing with title suits such as suit for recovery , declaration, injunction etc as was pointed out in ***Paka Venkaiah vs Taduri Buchi Reddy And Ors, 2004 (4) ALD 889***. 1. While framing of issues is in the realm of procedural law, adjudication of a right, which is the subject-matter of a suit, is governed by substantive law. 2. Each right claimed in a suit is governed by the corresponding substantive law. To establish a right, a bundle of facts, as required by such law, are to be pleaded and proved. 3. Questions of limitation, payment of Court fee, nature of cause of action, need to be verified with reference to such rights. 4. The occasion to undertake such an exercise would arise, when the correspondent right is claimed and relief is sought. 5. For instance, if the intention of the plaintiff is to get a pronouncement on his title to an immovable property, he has to plead necessary facts, pay proper Court fee and seek specific relief. In such an event, it would be verified with reference to section 34 of the Specific Relief Act, Law of Court Fee, Limitation, Succession etcetera. 6. This, in turn, would necessitate framing of issues. Where the relief itself is not claimed, it would be rather impermissible to undertake adjudication upon such matters. 7. A Court can pronounce upon an aspect even though an issue is not framed upon it, subject to certain conditions, such as, the parties adducing evidence on it, the affected parties not raising any objection. 8. However, such a facility cannot be extended, so far as to enable the Court to pronounce upon substantive rights, provided for under specific enactments and governed by different provisions relating to limitation, Court fee.

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2018(1) L.S. 293 (D.B.)

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

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

M/s.Venshiv Pharma Chem.
(P) Ltd. & Anr., ..Petitioners

Vs.

State Bank of India,
Stressed Assets Recovery
Branch, Koti, Hyd. & Ors., ..Respondents

SECURITIZATION & RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 - Sec.13(8) & 17(1) - Petitioners seek a direction to set aside auction sale of their properties by Respondents/ State Bank of India - Counsel for respondent contended that it is not open to petitioners to come before this Court by way of writ petition reiterating their challenge to the auction sale when the same issue is pending before Debt Recovery Tribunal.

Held - it is ultimately for High Court to decide as to whether individual case before it requires adherence to self-imposed restraint from entertaining it or warrants deviation therefrom - Sale held by bank fell foul of statutory mandate as petitioners were not afforded required 30 days clear notice to exercise their right of redemption, as requisite gap was not maintained between the date of receipt of Rule 8(6) notice and the publication of Rule 9(1) sale notice whereupon their right of redemption under amended Section 13(8) of SARFAESI Act stood prematurely extinguished - Writ petition is accordingly allowed holding that sale held by bank stands vitiated on grounds more than one - Sale certificate shall also stand cancelled.

Mr.C.B. Ram Mohan Reddy, Advocate for the Petitioners.
Mr.M. Narender Reddy, M. Srikanth Reddy,Advocate for the Respondents 1 & R2.
Mr.P. Nagendra Reddy, Advocate for Respondent no.3.

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

By way of their amended prayer in this writ petition, Venshiv Pharma Chem (P) Limited and its Managing Director, the petitioners, assail the auction sale of their properties by the State Bank of India (hereinafter, 'the bank') on 30.11.2016 (wrongly shown as 30.11.2017 in the prayer) pursuant to the e-auction sale notice dated 21.10.2016 (wrongly shown as 23.09.2017 in the prayer). They seek a consequential direction to set aside the said sale.

At the outset, it may be noted that the petitioners herein already filed S.A.No.513 of 2016 under Section 17(1) of the Securitisation and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the SARFAESI Act') before the Debts Recovery Tribunal (hereinafter, 'the Tribunal') at Hyderabad. Their prayers therein read as follows:

'i) Declare that the 'E-Auction Sale Notice' dated 21.10.2016 issued by the Respondent Bank and fixing the date of auction on 30.11.2016 against the schedule properties as arbitrary, illegal and not maintainable under the Act and Rules, 2002,

ii) Declare that the 'Notice issued under Rule 8 (6) of the Rules, 2002' dated 23.09.2016 and 03.11.2016 issued by the Respondent Bank against the alleged secured assets as arbitrary, illegal and not maintainable under the Act and Rules, 2002,

iii) Set aside all the measures initiated by the Respondent Bank under Section 13 (4) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act read with the Security Interest (Enforcement) Rules, 2002 including the Demand Notice issued by the Respondent Bank against the schedule property,

iv) Declare that taking physical possession of the unit along with plant and machinery belongs to the Applicant No.1 without following Rule 4 read with Rule 8 of the Rules, 2002 by the Respondent Bank as illegal and arbitrary,

v) Order to re-deliver the schedule property to the Applicants with a proper Inventory and Panchanama henceforth,

vi) Declare that the Demand Notice issued by the Respondent Bank has no loco-standi and consequently direct the Respondent Bank to issue a fresh Demand Notice in accordance with law,

vii) Set aside all the measures initiated by the Respondent Bank under Section 13 (2) and (4) of the SARFAESI Act and Rules, 2002 against the schedule properties,

viii) Direct the Respondent Bank to pay costs including the compensatory costs and damages to the extent of Rs.25 lakhs,

ix) and pass such other order(s) as the Hon'ble Tribunal deems fit and proper in the circumstances of the case.'

This S.A. is still pending consideration before the Tribunal.

Sri M.Narender Reddy, learned senior counsel representing Sri M.Srikanth Reddy, learned counsel for the bank, would contend that it is not open to the petitioners to come before this Court by way of the present writ petition reiterating their challenge to the auction sale when the same issue is pending consideration before the Tribunal. He would rely on case law in support of his contention that the writ petition should be dismissed on this short ground.

On the contrary, Sri C.B.Ram Mohan Reddy, learned counsel for the petitioners, would argue that the writ petition is maintainable as the statutory alternative remedy proved to be ineffective and that pendency of the same would not bar his clients from invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution. He would further submit that his clients would

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withdraw the pending securitization application, if necessary, and that this Court may adjudicate upon the merits of this case.

It is no doubt true that the Supreme Court has time and again cautioned High Courts not to entertain writ petitions arising under the SARFAESI Act, given the hierarchy of statutory remedies provided under the enactment itself. However, it must be remembered that refusal by High Courts to entertain writ petitions due to availability of alternative remedies is a self-imposed restraint and discretion in this regard has to be exercised judiciously on a case-to-case basis depending upon the individual facts obtaining therein.

Recently, the Supreme Court had occasion to consider this issue in **AUTHORIZED OFFICER, STATE BANK OF TRAVANCORE V/s. MATHEW K.C.** (2018) 3 SCC 85). The case arose out of the interim order passed by the Kerala High Court in a writ petition staying further proceedings at the stage of measures being taken under Section 13(4) of the SARFAESI Act. The Supreme Court observed that the SARFAESI Act is a complete code in itself and the High Court ought not to have entertained the writ petition in view of the alternative remedies available thereunder. On facts, the Supreme Court found that the writ petition was not instituted bonafide but only to stall further action for recovery. There was no pleading as to why the remedy under Section 17 of the SARFAESI Act was not efficacious and no compelling reasons were cited for bypassing the same. Referring to case law on the subject, the Supreme Court concluded that the writ petition ought not to have been entertained and that the interim order was granted for the mere asking without assigning special reasons and without even allowing a hearing to the bank.

Similar was the view taken by the Supreme Court a little earlier in November, 2017, in **AGARWAL TRACOM PVT. LTD. V/s. PUNJAB NATIONAL BANK** (2018) 1 SCC 626). This case also arose out of proceedings initiated under the SARFAESI Act which culminated in the sale of the secured asset. The appellant before the Supreme Court was the auction purchaser who failed to pay the bid amount in terms of the sale conditions. The Delhi High Court had refused to entertain the writ petition filed by the appellant assailing forfeiture of its deposit holding that the proper remedy was to file a securitization application under Section 17 of the SARFAESI Act before the jurisdictional Tribunal. In appeal, the Supreme Court observed that the expression 'any of the measures referred to in Section 13(4) taken by the secured creditor' in Section 17(1) of the SARFAESI Act would include forfeiture of the deposit made by the auction purchaser. The Supreme Court accordingly concurred with the view taken by the Delhi High Court that the auction purchaser ought to have availed the statutory remedy. While holding so, the Supreme Court recalled that in **UNITED BANK OF INDIA V/s. SATYAWATI TONDON** (2010) 8 SCC 110) it had occasion to examine in detail the provisions of the SARFAESI Act and invocation of the extraordinary power of the High Court under Article 226 of the Constitution to challenge the actions taken thereunder. The observations made therein were to the effect that the High Court would ordinarily not entertain a petition under Article 226 of the

Constitution if an effective remedy is available to the aggrieved person and that, in all such cases, the High Court must insist that a person aggrieved must exhaust the remedies available under the relevant statute before availing the remedy under Article 226 of the Constitution. It may however be noted that after saying so, the Supreme Court, in **SATYAWATI TONDON (supra)**, also observed as under:

> '44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.
>
> 45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.'

Much earlier, in **RASHID AHMAD V/s. MUNICIPAL BOARD OF KAIRANA (**AIR 1950 SC 163), the Supreme Court had observed that though existence of an alternative legal remedy was something to be taken into consideration while granting writs, when the authority concerned acted in violation of the relevant law, resulting in infringement of fundamental rights, the person aggrieved is entitled to have his grievance redressed without being relegated to a statutory remedy which may not, in such circumstances, be an alternative remedy.

Significantly, in **R.VIMALA V/s. STATE BANK OF INDIA (**2017 (1) ALD 193 (DB) = 2016 (6) ALT 426), a decision of a Division Bench of this Court in which one of us, SK,J, was a member, relying on observations made by the Supreme Court in **SRI SIDDESHWARA COOPERATIAVE BANK LTD. V/s. IKBAL** (2013) 10 SCC 83), it was affirmed that the rule of exhaustion of an alternative remedy was only a rule of discretion and not one of compulsion.

The aforestated case law makes it clear that it is ultimately for the High Court to decide as to whether the individual case before it requires adherence to the self-imposed restraint from entertaining it or warrants deviation therefrom.

In the case on hand, the petitioners have already invoked the statutory remedy under Section 17(1) of the SARFAESI Act. They

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filed the said application on 21.11.2016, aggrieved by the publication of the sale notice dated 21.10.2016 proposing to sell the secured assets on 30.11.2016. The auction sale notice mentioned the following secured assets: (a) the hypothecated plant and machinery of the first petitioner company and (b) the land admeasuring 20 acres, along with factory and buildings, in Survey Nos.1212 (part), 1213 (part), 1214 (part) and 1215 (part), Mega Industrial Park (APIIC-IALA), Kopparthy, Y.S.R. District, Andhra Pradesh.

The petitioners also filed I.A.No.3189 of 2016 in the S.A. seeking stay of all further proceedings, including the auction sale to be held on 30.11.2016. By Docket Order dated 30.11.2016 passed therein, the Tribunal noted their contention that the impugned sale notice was not in accordance with the statutory scheme but opined that the issue required to be examined in the main S.A. However, the Tribunal granted interim stay of the sale scheduled to be held on 30.11.2016 subject to the petitioners depositing 30% of the reserve price of Rs.8,03,00,000/-, fixed for the properties, in two equal instalments. The first instalment of 15% was to be paid by 4.00 PM on 30.11.2016 and the second instalment of 15% was to be paid within three weeks. The Tribunal also made it clear that failure to make the deposit of either of the instalments would enable the bank to proceed with the sale in accordance with law. In effect, the petitioners had to deposit a sum of Rs.1,20,45,000/- by 4.00 PM on the very same day so as to have the benefit of the stay order.

Be it noted that as on 30.11.2016, when the Tribunal passed this conditional order, the law laid down by this Court on 11.04.2016 in **M.AMARENDER REDDY V/s. CANARA BANK (**2016 (5) ALD 354 (DB) = 2016 (4) ALT 193 (DB)was holding the field. In the light of the ratio laid down therein, the bank necessarily had to maintain a clear 30 days gap after issuance of the notice under Rule 8(6) of the Rules of 2002 and another clear 30 days gap after publication of the sale notice under Rule 9(1) thereof. On facts, it was manifest that issuance of the sale notice on 23.09.2016 followed by publication of the sale notice under Rule 9(1) of the Rules of 2002 on 23.10.2016 did not satisfy the said requirement. Despite the same, the Tribunal found it fit to grant a conditional order and as the petitioners failed to comply with the same, the auction sale was held by the bank on 30.11.2016, notwithstanding clear transgression by the bank in abiding by the mandate of **M.AMARENDER REDDY (supra)**. It is no doubt true that the decision of this Court in **M.AMARENDER REDDY (supra)** was reversed by the Supreme Court in **CANARA BANK V/s. M.AMARENDER REDDY** (2017) 4 SCC 735)on 02.03.2017 and it was held therein that it is permissible to simultaneously issue the notice under Rule 8(6) of the Rules of 2002 and publish the sale notice under Rule 9(1) thereof, as long as 30 days clear gap is maintained between both the notices taken individually and the actual date of sale. Therefore, the ground urged by the petitioners in this regard may no longer hold good on that count, but significantly, it did have merit on the date of passing of the conditional order on 30.11.2016, but the Tribunal remained unmindful of the legal position as on that day.

This Court is also constrained to note the rather distressing practice that is being followed by Debts Recovery Tribunals in the States of Telangana and Andhra Pradesh. In all applications filed by aggrieved borrowers seeking stay of further proceedings, be it at the stage of taking possession or at the time of public auction of the secured assets, the Tribunals are adopting a uniform procedure of granting stay by directing the applicants/borrowers to deposit a percentage of the total outstanding dues or the reserve price and in most cases, 30% thereof. No endeavour is being made by the Tribunals at that stage to examine the merits of the case so as to ensure that the interest of justice is protected. It may well happen that in a wholly undeserving case, the Tribunal grants interim relief conditionally and on the other hand, in a deserving case also, where the actions of the secured creditor are demonstrably unsustainable in law, being in violation of the statutory procedure, the Tribunal still puts the applicants/borrowers on terms, though they may be justifiably entitled to unconditional protection.

It must be remembered that the secured creditor is armed with the power of recovering its dues under the SARFAESI Act without intervention of the normal judicial process and such great power would invariably bring with it the responsibility of scrupulously adhering to the procedure prescribed under the enactment. If, in a particular case, the secured creditor does not do so, the proper corrective measure is for the jurisdictional Tribunal to interfere at the stage of the first hearing of the securitization application for consideration of interim relief, so as to sensitize the secured creditor of the error in its ways. However, this is not happening as the Tribunals deal with all applications routinely. The failure on the part of the Tribunals to distinguish between a deserving and an undeserving case, in so far as interim relief is concerned, may cause irreparable injustice to one or the other party. Grant of an interim stay in an undeserving case at the stage of sale of the secured asset would put the secured creditor and the innocent auction purchaser to hardship as the secured creditor would not be in a position to realize the full sale consideration and conclude the sale transaction. The rights of such secured creditor and auction purchaser would be put on hold unfairly at the behest of the applicants/borrowers, even though they have no tangible merit in their case. On the other hand, the uniform approach adopted by the Tribunals of granting interim relief by invariably directing payment of a percentage of the dues/reserve price, irrespective of the merits of the case, not only causes irreparable injustice to the applicant/ borrower in a deserving case, but also defeats the very purpose of creation of this statutory remedy under the SARFAESI Act.

It is also to be noticed that Section 17(5) of the SARFAESI Act requires the Tribunal to deal with a securitization application made under Section 17(1) as expeditiously as possible and endeavour to dispose it of within 60 days from the date of filing. The proviso thereunder empowers the Tribunal to extend the said period, for reasons to be recorded in writing, subject to the total period of pendency of the

application not exceeding 4 months from the date of making of such an application. The unfortunate truth, however, is that Tribunals are not adhering to this temporal stipulation. In some cases, it is the applicant/borrower who is responsible for the delay by making one application after the other but in others, it is the secured creditor which is to blame for not filing its pleadings expeditiously.

In the case on hand, the petitioners raised crucial issues in their securitization application, relating to statutory procedure in the context of the impugned sale notice. Having adverted to these issues, the Tribunal did not even deem it appropriate to consider them so as to form a prima facie opinion as to whether their contentions had merit. Baldly stating that the said issues would be considered in the main S.A., the Tribunal allowed the bank to proceed with the sale if the petitioners failed to deposit 15% of the reserve price by 4.00 PM on the same day. The approach of the Tribunal was neither in the interest of the petitioners nor in the interest of the bank and the auction purchaser, who would come into the picture, as the very validity of the sale notice was in question.

This Court therefore finds no merit in the contention of Sri M.Narender Reddy, learned senior counsel, that the writ petition should not be entertained on the ground that the petitioners have already invoked the statutory remedy under Section 17 of the SARFAESI Act. We find from the very fact that the Tribunal failed to recognize the merit in their contentions and put them on terms while granting a conditional order, incapable of compliance due to time constraints, and also the fact that the said application is still pending though it was instituted in November, 2016, despite the mandate of Section 17(5) of the SARFAESI Act, that the S.A. has not proved to be an effective alternative remedy. Further, we find merit in the contentions urged as to fatal defects in the sale notice and the procedure followed by the bank, in the context thereof and thereafter. Lastly, legal issues of far reaching impact and consequence have been raised which need to be addressed by this Court for the guidance of Tribunals in future cases. We are therefore of the opinion that this is not a fit case to non-suit the petitioners on the ground that they have already invoked the statutory remedy under the SARFAESI Act.

Nutshelled, the facts of the case: The first petitioner company availed two term loans and working capital facilities, with a total limit of Rs.670.00 lakh, from the bank in May, 2011. Various properties were mortgaged/hypothecated as security therefor. Due to irregularities in the operation of the loan accounts, the bank classified them as non-performing assets on 28.06.2014. Recovery proceedings under the SARFAESI Act were initiated by issuing demand notice dated 15.09.2014 under Section 13(2) thereof. The outstanding dues mentioned therein were Rs.7,20,51,842/- as on 11.09.2014. This demand notice detailed the hypothecated movable property and mortgaged immovable properties. The hypothecated movable property included current assets, plant and machinery, vehicles, etc., as set out in Schedule-C appended thereto. The mortgaged

immovable properties were the 20 acres of land at the Mega Industrial Park, Kopparthy, YSR District, with buildings; house property at V.V.Nagar Colony, Kukatpally, Balanagar Mandal, Ranga Reddy District; Industrial Plot of Ac.0.20 cents in Modameedhipalli Village, Proddaturu Mandal, Kadapa District; and a house property in Balaji Nagar, Proddatur Town, Kadapa District.

Possession notice under Section 13(4) of the SARFAESI Act was issued by the bank on 10.12.2014 and it was published in newspapers on 13.12.2014. Physical possession of the secured assets at Kadapa was taken over by the bank on 09.12.2015, pursuant to the order dated 12.04.2015 passed by the District Magistrate, Kadapa, in exercise of power under Section 14 of the SARFAESI Act.

In the meanwhile, the petitioners challenged the possession notice dated 10.12.2014 by filing S.A.No.838 of 2014 before the Tribunal. This S.A. was dismissed on 17.08.2015 and aggrieved thereby, the petitioners filed Appeal No.49 of 2016 before the Debts Recovery Appellate Tribunal at Kolkata. The appeal was also dismissed on 30.08.2016. Thereafter, the first petitioner company filed W.P.No.16658 of 2016 before this Court, in the context of the action taken by the bank in relation to the house property at Kukatpally, Hyderabad. The writ petition was dismissed on 01.11.2017. In the course of the recovery proceedings, the bank issued sale notice dated 16.06.2016, fixing the date of sale of the same secured assets now brought to sale, as 29.08.2016. The reserve price was fixed at Rs.8.90 crore. However, the said auction failed for want of bidders. Thereafter, the bank issued notice dated 23.09.2016 under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 (for brevity, 'the Rules of 2002') informing the petitioners that the sale of the secured assets would be held on 30.11.2016. This notice was served on the petitioners on 01.10.2016. The subject sale notice dated 21.10.2016 under Rule 9(1) of the Rules of 2002 was published in newspapers on 23.10.2016. Aggrieved thereby, the petitioners filed S.A.No.513 of 2016 before the Tribunal. However, though an interim order of stay was granted therein on 30.11.2016, subject to conditions, the petitioners failed to deposit the amount by 4.00 PM on that day, as directed. Pursuant to the liberty granted by the Tribunal, if the petitioners failed to deposit the said amount, the bank held the sale on 30.11.2016 and the secured assets were sold to Hetero Labs Limited, the third respondent company, which was the highest bidder at Rs.9.80 crore. The sale consideration, in full, was however paid by the third respondent company only on 17.01.2017. This amount was credited to the term loan and C.C. accounts of the first petitioner company. After adjustment of the realized amounts, the outstanding dues that still remained, according to the bank, aggregated to Rs.34,18,037.65 ps. as on 31.03.2017.

It appears that the bank thereafter came out with a 'One Time Settlement' scheme for outstanding dues of over Rs.20,00,000/- as on 31.03.2017. This scheme was applicable to cases pending before Courts/Tribunals and also where the bank had initiated proceedings under the SARFAESI Act. As the remaining outstanding dues of

M/s.Venshiv Pharma Chem. (P) Ltd. & Anr., Vs. State Bank of India, Hyd. & Ors.,301 the petitioners were over Rs.20,00,000/- as on 31.03.2017, the bank issued letter dated 14.09.2017 informing the petitioners that they were eligible to avail the benefit of the scheme. The petitioners however misunderstood this offer to mean that they could pay the total outstanding dues by way of a 'One Time Settlement', so as to nullify the sale held on 30.11.2016. This was the grievance that was originally put forth by them in this writ petition. Be that as it may.

Primarily, two issues arise for consideration, apart from some incidental ones, which may be equally critical in their import.

Firstly, it may be noted that the statutory scheme of Rules 8 and 9 of the Rules of 2002, prior to their amendment with effect from 04.11.2016, mandated that the borrower should be allowed a clear 30 days notice period after the notice under Rule 8(6) thereof, so as to enable him to exercise his right of redemption under Section 13(8) of the SARFAESI Act. This mandate was recognized and affirmed by the Supreme Court in **MATHEW VARGHESE V/s. M.AMRITHA KUMAR** (2014) 5 SCC 610). Further, publication of the sale notice under Rule 9(1) of the Rules of 2002, must maintain a gap of 30 days before the date of the stipulated sale. In any event, the sale cannot take place before expiry of the 30 days notice period in terms of Rule 8(6). On facts, it is clear that even before expiry of a clear 30 days, be it from 23.09.2016, the date of the Rule 8(6) notice, or from 01.10.2016, the date of receipt of the said notice, the sale notice under Rule 9(1) of the Rules of 2002 was published on 23.10.2016. No doubt, the date of sale stipulated thereunder was 30.11.2016, beyond the required 30 days gap, and all would have been well in terms of the law laid down by the Supreme Court in **CANARA BANK8**, but for an intervening amendment to Section 13(8) of the SARFAESI Act, with effect from 01.09.2016, which assumes fatal significance in this context, as will be demonstrated hereinafter.

Secondly, it may be noted that the third respondent company, the highest bidder in the auction sale held on 30.11.2016, made an earnest money deposit of 10% of the reserve price on 24.11.2016 and was required to deposit, in all, 25% of the bid amount on the date of the sale itself, i.e., on 30.11.2016. However, it paid the balance due to make good 25% of the bid amount only on 01.12.2016. To compound matters further, the balance 75% of the bid amount, which should have been paid by the third respondent company within 15 days from the date of confirmation of the sale, was paid long thereafter on 17.01.2017.

Addressing the second issue first, it may be noted that in terms of Rule 9 of the Rules of 2002, as it stood prior to its amendment with effect from 04.11.2016, the sale of immovable property had to be effected after expiry of 30 days from the date on which the notice of sale was published in newspapers. Rule 9(2) of the Rules of 2002 provided that the sale should be confirmed in favour of the purchaser who offered the highest sale price in his bid or tender or quotation or offer to the authorized officer, subject to confirmation by the secured creditor. The first proviso thereunder

stipulated that no sale should be confirmed if the amount offered by way of the sale price was less than the reserve price. The second proviso, however, stipulated that if the authorized officer failed to obtain a price higher than the reserve price, he could, with the consent of the borrower and the secured creditor, effect the sale at such price. Rule 9(3) provided that on every sale of immovable property, the purchaser should immediately deposit 25% of the sale price with the authorized officer and in default of such deposit, the property should forthwith be sold again. Rule 9(4) stipulated that the balance of the purchase price should be paid by the purchaser to the authorized officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties. Rule 9(5) provided that in default of payment within the period mentioned in Rule 9(4), the deposit should be forfeited; the property should be resold; and the defaulting purchaser should forfeit all claims to the property or to any part of the sum for which it may be sold subsequently.

This being the statutory milieu obtaining prior to the amendment of the Rules of 2002 with effect from 04.11.2016, Sri M.Narender Reddy, learned senior counsel, would contend that as the auction sale in the present case was held by the bank on 30.11.2016, the amended provisions of the Rules of 2002 would apply and not the un-amended provisions thereof.

Before adverting to this argument, it would be necessary to note certain relevant facts. The third respondent company submitted its bid on 24.11.2016 along with 10% of the reserve price towards the EMD, viz., Rs.80,30,000/-. The auction sale was held on 30.11.2016 between 4.00 PM and 5.00 PM. Sri P.Nagendra Reddy, learned counsel for the third respondent company, would state that as the auction concluded after banking hours, the balance payable towards 25% of the bid of his client could not be paid to the bank on the same day. It was paid on the next day, i.e., 01.12.2016.

It appears that the bank issued sale confirmation advice to the third respondent company on 01.12.2016. This advice demonstrates that the third respondent company was informed thereunder that it was the successful bidder in the auction held on 30.11.2016 for the properties at Kadapa. The bank acknowledged receipt of Rs.2,45,00,000/-, in all, towards 25% of the bid amount and advised the third respondent company to remit the sum of Rs.7,35,00,000/-, the balance due, within 15 days from 30.11.2016. The bank also informed the third respondent company that sale of the property was subject to the final outcome of S.A.No.513 of 2016 filed by the borrowers. The bank cautioned the third respondent company that if it failed to remit the balance within the specified period, i.e., on or before 14.12.2016, the amount remitted by it would stand forfeited.

The third respondent company then addressed letter dated 05.12.2016 to the bank informing it that it was ready to remit the balance of Rs.7,35,00,000/-, subject to the readiness of the bank to register the property without any encumbrances of whatsoever nature. By letter dated

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14.12.2016, the bank informed the third respondent company, that as advised earlier, the borrowers had filed a securitization application which was coming up for hearing on 20.12.2016 and asked the third respondent company to pay the balance amount after 20.12.2016. The third respondent company addressed reply dated 14.12.2016, i.e., the same day, acknowledging the bank's letter and requesting 45 days time to remit the balance, due to internal adjustment of funds. By response dated 14.12.2016, i.e., the very same day, the bank informed the third respondent company that, having considered the request, it was permitting 45 days time to pay the balance sum of Rs.7,35,00,000/-.

In effect, the bank granted extension of time beyond the statutorily stipulated 15 days period. In this regard, Sri M.Narender Reddy, learned senior counsel, would point out that with effect from 04.11.2016, Rule 9(4) of the Rules of 2002 stood amended, whereby the bank could unilaterally extend the period for making payment of the balance sale consideration. Rule 9(4) of the Rules of 2002, as it stood after the amendment vide G.S.R.No.1046(E) dated 03.11.2016, which came into effect from 04.11.2016, reads as under:

'(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorized officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.'

However, the un-amended Rule 9(4) of the Rules of 2002 read differently and is extracted hereunder:

'(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorized officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.'

The connotation of the word 'parties' appearing in the un-amended Rule 9(4) of the Rules of 2002 fell for consideration before the Supreme Court in **IKBAL (supra)**. Therein, the Supreme Court categorically declared that the word 'parties' means the 'borrower', the 'secured creditor' and the 'auction purchaser'. Hence, as per the regime of the un-amended Rule 9(4) of the Rules of 2002, any extension of time to pay the balance sale consideration had to be by taking the borrower into confidence and by obtaining his consent.

In the present case, it is an admitted fact that the petitioners, being the borrowers, were not even consulted before extension of time by a further period of 45 days was granted by the bank to the third respondent company, on 14.12.2016. The contention of Sri M.Narender Reddy, learned senior counsel, is that the regime of the un-amended Rule 9(4) of the Rules of 2002 would not apply to the case on hand as the auction sale was held on 30.11.2016, well after the amended Rule 9(4) came into operation on 04.11.2016.

We, however, find this argument to be specious.

If the argument of Sri M.Narender Reddy, learned senior counsel, is to be accepted that the amended Rules of 2002 should be made applicable to the subject sale, the amended rules would have to be made applicable to the entire transaction, i.e., right from its initiation by issuance of the notice under Rule 8(6) of the Rules of 2002. Doing so, would entail the amendments made under G.S.R.No.1046(E) dated 03.11.2016, which came into effect from 04.11.2016, being given effect to cover a sale process which was already initiated by that date, i.e., with retrospective effect.

Sri M.Narender Reddy, learned senior counsel, placed reliance on the Full Bench judgment of the Orissa High Court in **SARTHAK BUILDERS PVT.LTD. V/s. ORISSA RURAL DEVELOPMENT CORPORATION LIMITED (**AIR 2014 (Orissa) 83 = 2014 LawSuit (Orissa) 42). The issue under consideration was as to whether the SARFAESI Act would apply to a loan transaction entered into prior to coming into force thereof. The Full Bench observed that the SARFAESI Act intends to provide a remedy in respect of pre-existing loans and the interpretation that it would apply only to future debts would defeat the very purpose of that law, which was to reduce non-performing assets. Reference was made by the Full Bench to Halsbury's Laws of England, wherein the position was crisply summarized thus:

'The presumption against retrospection does not apply to the legislation concerned merely with matters of procedure or of evidence; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament.' The Full Bench summed up the following conclusions:

(i) Presumption against retrospectivity is not applicable to enactments which merely affect procedure or change forum or are declaratory;

(ii) Retroactive/retrospective operation can be implicit in a provision construed in the context where it occurs;

(iii) Given the context, a provision can be held to apply to cause of action after such provision comes into force, even though the claim on which the action may be based may be of an anterior date; and 10 22

(iv) A remedial statute applies to pending proceedings and such application may not be taken to be retrospective if application is to be in future with reference to a pending cause of action;

(v) SARFAESI Act is a remedial statute intended to deal with problem of pre-existing loan transactions which need speedy recovery.

Observing that a notification in respect of a financial institution under Section 2(1)(m) of the SARFAESI Act would bring such an institution on par with statutory institutions covered by the said provision prior to such notification, the Full Bench concluded that from the date of such notification, remedies under the SARFAESI Act would be available to the institution even if the loan was advanced by it earlier. It was further observed

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A similar view was taken by the Supreme Court recently in **M.D.FROZEN FOODS EXPORTS PVT. LTD. V/s. HERO FINCORP LTD (**AIR 2017 SC 4481 = 2017 (3) Scale 266). One of the issues framed for consideration by the Supreme Court in this case was whether resort could be had to Section 13 of the SARFAESI Act in respect of debts which had arisen out of a loan agreement/mortgage created prior to application of the SARFAESI Act to the said institution. A linked question thereto was whether a lender could invoke the SARFAESI Act when the notification of it being a financial institution under Section 2(1)(m) thereof was issued after the account became a non-performing asset under Section 2(1)(o) thereof. Observing that the SARFAESI Act was brought into force to solve the problem of recovery of large debts locked in non-performing assets, the Supreme Court held that the very rationale for the said Act to be brought into force was to provide an expeditious procedure where there was a security interest. Pointing out that it did not apply retrospectively from the date when it came into force, the Supreme Court held that it would apply to all claims which were alive at the time when it was brought into force. Thus, qua an institution which was subsequently notified under Section 2(1)(m) of the SARFAESI Act, it would be applicable similarly from the date when it was so made applicable to it. Referring to the decision of the Orissa High Court in **SARTHAK BUILDERS PVT.LTD. (supra)**, the Supreme Court approved the view taken therein. Dealing with the argument that such a construction would give retrospective operation to the provisions of the SARFAESI Act, the Supreme Court observed that retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. It was further observed that the SARFAESI Act was to provide a measure against security interests and its scheme is really to provide a procedural remedy against the security interests already created. Opining that the definition clauses in the SARFAESI Act clearly convey the legislative intent that the SARFAESI Act applies to all existing agreements, irrespective of the fact whether the lender was a notified financial institution on the date of the execution of the agreement with the borrower or not, the Supreme Court pointed out that the scheme of the SARFAESI Act sets out an expeditious procedural methodology enabling the bank to take possession of the property for non-payment of dues, without intervention of the Court. Per the Supreme Court, the mere fact that a more expeditious remedy is provided under the SARFAESI Act does not mean that it has created an altogether new right and to accept the argument of the borrowers to the contrary would imply that they have an inherent right to delay enforcement against security interests.

In **COMMISSIONER OF INCOME TAX (CENTRAL)-I, NEW DELHI V/s. VATIKA TOWNSHIP PRIVATE LIMITED** (2015) 1 SCC 1 = 2014 SCC Online SC 712), the

question of law which was considered by a Constitution Bench was whether the proviso appended to Section 113 of the Income-tax Act, 1961, which was inserted by the Finance Act, 2002, was to operate prospectively or whether it was clarificatory and curative in nature, thereby having retrospective operation. This proviso was with regard to a surcharge being made applicable to the tax chargeable for the assessment year relevant to the previous year in which a search ensued under Section 132 or a requisition was made under Section 132A of the Income-tax Act, 1961. Two co-ordinate Benches of the Supreme Court had taken different views on the character of this proviso and the matter accordingly came up for consideration before the Constitution Bench. On the issue of retrospectivity of legislation, the Constitution Bench observed that a legislation, be it a statutory Act or a statutory Rule or a statutory Notification, may physically consist of words printed on papers but conceptually, it would be a great deal more than ordinary prose. Of the various rules guiding how a legislation has to be interpreted, the Supreme Court found that one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have retrospective operation and the idea behind the rule is that a current law should govern current activities. It was further observed that the obviousbasis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule. Thus, legislations which modify accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect. It was however noted that if legislation confers a benefit on some persons without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislator's object, then the presumption would be that such legislation, giving it a purposive construction, would warrant a retrospective effect. The Constitution Bench therefore observed that the rule against retrospective operation is a fundamental rule of law that no statute should be construed to have retrospective operation unless such construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. A distinction was however made by the Constitution Bench in so far as clarificatory or declaratory amendments were concerned. On facts, the Constitution Bench held that an assessment would create a vested right and an assessee cannot be subjected to re-assessment unless a provision to that effect is inserted by amendment, either expressly or by necessary implication, with retrospective effect. It was therefore held that the proviso to Section 113 of the Income-tax Act, 1961 could not be treated as a declaratory/curative amendment and, hence, it would not have retrospective effect.

The SARFAESI Act, as pointed out in **SARTHAK BUILDERS PVT.LTD. (supra)**, is a remedial statute and not just a procedural one. Substantive rights and duties were created under the provisions and prescriptions of the SARFAESI Act and the Rules of 2002, be it in the context of the secured creditor; the borrower, as defined thereunder; or, the auction purchaser, the

most important one being the right of the secured creditor to bypass the ordinary time-consuming legal process for realizing its dues. Further, the amendments to the Rules of 2002 took away existing rights and created new ones. Therefore, giving retrospective effect to such amendments, by holding them to be declaratory, clarificatory or curative, does not arise.

Pertinent to note, G.S.R.No.1046(E) dated 03.11.2016, which was published in the Gazette of India, Extraordinary, Part II-Section 3(i) on 04.11.2016, specifically stated that the Security Interest (Enforcement) (Amendment) Rules, 2002 notified thereunder shall come into force on the date of their publication in the Official Gazette. Therefore, these rules cannot be given retrospective effect going even by the explicit intendment, as set out in the Gazette Notification itself. There is no indication in G.S.R.No.1046 (E) dated 03.11.2016, even by implication, that the amendments brought about by it in the Rules of 2002 should be given effect retrospectively. This is obviously because, as stated supra, various changes were made thereby, which had the effect of denuding vested rights that stood crystallized under the un-amended rules, if given retrospective effect.

For instance, Rule 9(4) of the Rules of 2002 has undergone a sea change in as much as, earlier; extension of time to make the balance payment of the purchase price could be only upon the agreement in writing between the parties, viz., the borrower, the auction purchaser and the secured creditor. However, after the amendment, the Rule now reads to the effect that such agreement can be made in writing between the auction purchaser and the secured creditor, without the borrower being taken into confidence. The borrower therefore lost his earlier right. Similarly, Rule 9(5) of the un-amended Rules of 2002 provided that in default of payment within the period mentioned in Rule 9(4), the auction purchaser's deposit should be forfeited and the benefit of such forfeiture was being given to the borrower by crediting the said amount to the loan account. However, the amended provision now states that the deposit which would stand forfeited, upon the default of payment within the period mentioned in Rule 9(4), would be to the benefit of the secured creditor. The amendments brought about therefore cannot be said to be declaratory, clarificatory or procedural and were, in consequence, only prospective in operation.

It may be noted that the provisions of Section 13 of the SARFAESI Act were amended before the amendment of the Rules of 2002. The amendments to the SARFAESI Act were brought about by Act No.44 of 2016 with effect from 01.09.2016. Significantly, Section 13(8) of the SARFAESI Act also stood amended thereby. The un-amended Section 13(8) of the SARFAESI Act, as it stood prior to 01.09.2016, was as under:

'(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.'

The amended Section 13(8) of the SARFAESI Act, after 01.09.2016, reads as under:

'(8) Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date 28 of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,—

(i) the secured assets shall not be transferred by way of lease, assignment or sale by the secured creditor; and

(ii) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.'

Notably, in **VASU P.SHETTY V/s. M/ S.HOTEL VANDANA PALACE (**AIR 2014 SC 1947), the Supreme Court referred to its earlier judgment in **MATHEW VARGHESE (supra)** and reiterated that the provisions of the Section 13(8) of the SARFAESI Act, as it then stood, were specifically for the protection of the borrowers in as much as ownership of the secured asset was a Constitutional right vesting in such borrowers, protected under Article 300A of the Constitution, and therefore, the secured creditor as a trustee of the secured asset cannot deal with the same in any manner it likes and such an asset could be disposed of only in the manner prescribed in the SARFAESI Act. The Supreme Court further observed that the creditor should ensure that the borrower was clearly put on notice as to the date and time, by which either the sale or transfer would be effected, in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property. The Supreme Court noted that such a notice was also necessary to ensure that the secured asset would be sold to provide maximum benefit to the borrower. Earlier, in **MATHEW VARGHESE (supra)**, the Supreme Court observed as under:

'29.2. When we analyse in depth the stipulations contained in the said sub-section (8), we find that there is a valuable right recognised and asserted in favour of the borrower, who is the owner of the secured asset and who is extended an opportunity to take all efforts to stop the sale or transfer till the last minute before which the said sale or transfer is to be effected. Having regard to such a valuable right of a debtor having been embedded in the said subsection, it will have to be stated in uncontroverted terms that the said provision has been engrafted in the SARFAESI Act primarily with a view to protect the rights of a borrower, inasmuch as, such an ownership right is a constitutional right protected under Article 300-A of the Constitution, which mandates that no person shall be deprived of his property save by authority of law.

29.3. Therefore, dehors the extent of borrowing made and whatever costs,

M/s.Venshiv Pharma Chem. (P) Ltd. & Anr., Vs. State Bank of India, Hyd. & Ors.,309 196), the Madurai Bench of the Madras High Court held that it is only upon issuance of the sale certificate that the auction purchaser becomes the absolute owner of the property.

charges were incurred by the secured creditor in respect of such borrowings, when it comes to the question of realising the dues by bringing the property entrusted with the secured creditor for sale to realise money advanced without approaching any court or tribunal, the secured creditor as a TRUSTEE cannot deal with the said property in any manner it likes and can be disposed of only in the manner prescribed in the SARFAESI Act.'

As pointed out by the Supreme Court supra, though recovery of public dues should be made expeditiously, it should be in accordance with the procedure prescribed by law and should not frustrate the Constitutional right as well as the human right of a borrower to hold property and in the event of a fundamental procedural error occurring in the same, the sale should be set aside.

Construing the provisions of the un-amended Section 13(8) of the SARFAESI Act, Courts have held time and again that the right of redemption available to the borrower thereunder would extend upto the actual 'transfer' of the secured asset sold, as the provision itself states that upon the deposit being made by the borrower of all dues, the secured asset should not be 'transferred'. In effect, it was held that the right of redemption of the borrower extended upto the date of payment of the total sale consideration and issuance of the sale certificate, which would conclude the 'transfer' of the secured asset sold. In **K.CHIDAMBARA MANICKAM V/s. SHAKEENA (**AIR 2008 MADRAS 108 = (2007) 6 MLJ 488 = (2009) 152 Comp Cases

Sri M.Narender Reddy, learned senior counsel, would argue that the un-amended Section 13(8) of the SARFAESI Act was similar in its wording to the amended version thereof, as regards the right of redemption being linked to the date fixed for sale or transfer of the secured asset. However, it may be noted that the amended version contains a new insertion to the effect that the tendering of the dues by the borrower to the secured creditor has to be 'at any time before the date of publication of notice for public auction or inviting quotations, or tender from public or private treaty for transfer.' The language of the un-amended version did not contain such a bar and allowed the right of redemption to operate till the date fixed for 'sale or transfer' of the secured asset.

Though Sri M.Narender Reddy, learned senior counsel, would point out that Clause (i) in the amended Section 13(8) would indicate that if the dues are tendered by the borrower to the secured creditor, the secured assets should not be 'transferred' by way of lease, assignment or sale by the secured creditor and under Clause (ii), in case any step has already been taken by the secured creditor for 'transfer' by way of lease or assignment or sale of the assets, before tendering of such amount under this sub-section, no further step should be taken by the secured creditor and therefore, the right of redemption has to be construed

accordingly. However, it may be noticed that the amended Section 13(8) attaches vital importance to the date of 'publication of the notice'. In so far as the date of publication of the notice under Rule 9(1) is concerned, be it for a public auction or for inviting tenders from the public, the secured creditor is bound to wait for 30 days from the date on which such publication is carried out before proceeding to the actual sale. Prior to this date, no steps could possibly be taken by the secured creditor for 'transfer' of the secured asset. Therefore, it is only in the other two situations, that is, where the secured creditor resorts to sale of the secured asset by inviting quotations under Rule 8(5)(a) or by private treaty under Rule 8(5)(d) of the Rules of 2002, that the possibility of a step being taken by the secured creditor for 'transfer' would arise. The situation covered by clauses (i) & (ii) of amended Section 13(8) therefore would not arise where the sale is through public auction by publication of a sale notice under Rule 9(1).

Further, under the new Section 13(8), the right of redemption available to the borrower stands drastically curtailed. Now, such right is available to the borrower only up to the date of publication of the notice for public auction or inviting quotations or tender from public for transfer by way of lease, assignment or sale of the secured asset. Thus, when the secured creditor resorts to sale through public auction under Rule 8(5) of the Rules of 2002, the date of publication of such sale notice under Rule 9(1) of the Rules of 2002 would effectively clinch the right of the borrower to redeem the secured asset. However, Rule 8(6) of the Rules of 2002 remained unchanged, despite the amendments in November, 2016. This rule continues to provide that the authorized officer should serve upon the borrower a notice of 30 days before sale of the immovable secured asset. Obviously, this notice is intimation to the borrower of the intention of the secured creditor to recover its dues by sale of such asset, thereby enabling him to exercise his right of redemption under Section 13(8) of the SARFAESI Act. Therefore, a clear 30 days would have to be maintained between the date of service of such notice under Rule 8(6) of the Rules of 2002 and the expiry of the right of redemption under the amended Section 13(8) of the SARFAESI Act.

This brings us to the first issue of sufficient time not being given to the petitioners to exercise their right of redemption after the Rule 8(6) notice, in terms of the statutory mandate. In **MATHEW VARGHESE (supra)**, the Supreme Court made it clear that the cycle under the un-amended Rules of 2002 would start afresh with issuance of a notice under Rule 8(6) of the Rules of 2002, if a sale fails for reasons not attributable to the borrower. Therefore, once the bank initiated the sale process again after the earlier sale failed for want of bidders, by issuing a notice under Rule 8(6) of the Rules of 2002 on 23.09.2016, on which date the un-amended Rules of 2002 were still in force, the entire process pursuant thereto necessarily had to be governed by the un-amended Rules of 2002 only. However, as stated supra, by the date of issuance of the notice under Rule 8(6) on 23.09.2016, the amendment to Section 13(8) of the SARFAESI Act was already operative, as it came into effect on

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01.09.2016, and the amended Section 13(8) applied in full force to the right of redemption available to the petitioners pursuant to the Rule 8(6) notice dated 23.09.2016. In consequence, the right of redemption extended to them would have been alive only up to the date of publication of the notice of public auction under Rule 9(1) of the Rules of 2002.

In this context, the date of service of the Rule 8(6) notice dated 23.09.2019 assumes importance. According to the petitioners, they were served with the said notice only on 01.10.2016. This averment stands unrebutted. Even otherwise, given the fact that the notice was issued on 23.09.2016 and the notice of sale by public auction was published in newspapers on 23.10.2016, there was no clear thirty days gap available even between the said two dates. In this regard, it may be noted that in **R.VIMALA (supra)**, this Court held that in computing the 30 clear days notice to be afforded to a borrower in the scheme of the Rules of 2002, the day of publication of the notice in the newspapers and the day of the actual sale have to be excluded. Though this observation was made in the context of the 30 days gap to be maintained under Rule 9(1), the same analogy would apply to the 30 days notice that is to be given to a borrower under Rule 8(6) of the Rules of 2002. Thus, taking into account the date of service of the notice, i.e., 01.10.2016, or even otherwise, taking the date of the notice itself, viz., 23.09.2016, the bank failed to abide by the statutory mandate of maintaining a clear 30 days gap between such notice and the date of expiry of the petitioners right of redemption upon publication of the sale notice under Rule 9(1), in terms of the amended Section 13(8) of the SARFAESI Act.

Significantly, the judgment of the Supreme Court in **CANARA BANK (supra)**, rendered in the context of the un-amended provisions of the SARFAESI Act and the Rules of 2002, cannot be applied to the post-amendment scenario, in view of the truncated right of redemption available to a borrower under the amended Section 13(8) of the SARFAESI Act. The petitioners are therefore entitled to succeed even on the first issue as regards violation of the statutory mandate to give them 30 days time for redemption pursuant to the Rule 8(6) notice dated 23.09.2016, in terms of **MATHEW VARGHESE (supra)**.

Further, as it is an admitted fact that the bank did not take the petitioners into confidence while extending time under Rule 9(4) of the un-amended Rules of 2002 and did not obtain their consent in writing, the very extension granted by the bank to the third respondent company to make the balance payment stands vitiated.

POLISETTY HARANADH MURALIDHAR V/s. AUTHORIZED OFFICER, INDIAN OVERSEAS BANK, VISAKHAPATNAM (2016 (6) ALD 409 (DB)was a decision delivered by a Division Bench of this Court in which one of us, SK,J, was a member. That was also a case where the statutory mandate was not followed in so far as payment of the sale consideration was concerned. Leaving aside the fact that the initial 25% of the sale consideration was not paid on the date of the auction, there

was an extension of time granted by the bank to the auction purchaser behind the back of the borrower, as in the present case. It was accordingly held that, in the light of the law laid down in **IKBAL (supra)**, the bank could not have extended time for deposit of the balance sale consideration without taking the borrower into confidence and without obtaining his consent.

Therefore, the statutory mandate could not have been watered down by the bank unilaterally without the active participation of the petitioners. Further, it is not the bank's case that the petitioners waived their rights under the rule. In the absence of any clear waiver being pleaded and established, the bank was bound by the mandate.

Another irregularity that was committed by the bank in the course of the sale is that though the third respondent company participated in the auction sale held on 30.11.2016, the sale certificate pursuant thereto was ultimately issued in the name of Amarox Pharma Pvt. Ltd., as per the nomination of the third respondent company. It appears that sale certificate dated 13.01.2017 was initially prepared by the bank in the name of the third respondent company but later, a fresh sale certificate was made out in the name of Amarox Pharma Pvt. Ltd. The question is whether this change could have been permitted. A bidder in an auction sale held under the SARFAESI Act cannot undertake such participation in furtherance of real estate opportunism or by way of a business venture, so as to nominate a third party subsequently, after making a tidy profit for himself. If any such profit is made by an auction purchaser between the date of his bidding in the auction sale and issuance of the sale certificate, it would undermine the very purpose of the auction sale and reflect negatively upon the authorized officer, who conducts the auction sale. That apart, the sale notice dated 21.10.2016 contained a clear condition under Clause 13 of the 'Terms and Conditions of the e-auction', which reads as follows:

'The Sale Certificate will be issued in the name of the purchaser(s)/applicant(s) only and will not be issued in any other name(s).'

Sri P.Nagendra Reddy, learned counsel, would submit that the tender/quotation form submitted by the third respondent company indicated against Col.5, which requires the bidder to state whether he is participating for self or for others, that the bid was submitted by it for the Hetero Group of Companies. Learned counsel would state that Amarox Pharma Pvt. Ltd. is a sister concern of the third respondent company and therefore, issuance of the sale certificate in its name does not constitute an irregularity. However, this Court cannot lose sight of the fact that the bank specifically made it a condition of the sale that the sale certificate would be issued only in the name of the bidder and not in any other name. That being so, it could not have acceded to the request of the third respondent company to issue the sale certificate in the name of its sister concern. In this regard, it may be noticed that in **HEMALATHA RANGANATHAN V/s. THE AUTHORISED OFFICER, INDIAN BANK, CHENNAI (**2012 SCC OnLine Mad 3055 = (2012) 5 CTC 1 = (2012) 6 MLJ 717), the

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Madras High Court frowned upon the authorized officer of the bank for confirming the sale in the name of a third party after accepting 75% of the sale consideration after a period of 18 months and ultimately selling the property to yet another person. The Madras High Court found that in the sale notification under consideration, there was no provision permitting the authorized officer to issue the order of confirmation in favour of a person other than the successful bidder and observed that the 'purchaser' would mean only a person in whose name the auction was confirmed originally and not a person who offers subsequently, as a nominee of the successful bidder. It was categorically held that the authorized officer has no authority to accept the request of the highest bidder to issue the sale certificate in favour of a third party and that the sale should be confirmed in the name of the highest bidder and not in the name of his nominee, as privity of contract would be only between the successful bidder and the bank.

Further, even if Amarox Pharma Pvt. Ltd. is a sister concern of the third respondent company, they are both independent and separate legal entities, and in the event any transfer is to take place between them, it would entail payment of revenue to the State in the form of stamp duty, which now stands obviated by nomination of the sister concern by the third respondent company and acceptance thereof by the bank. Thus, this irregularity further taints the sale. One last issue that merits mention is that the bank resorted to fixation of the reserve price of Rs.8,03,00,000/- in the sale notice dated 21.10.2016, without proper valuation of the properties put to sale. The petitioners would point out that in the sale notice dated 16.06.2016, whereunder the bank had proposed to sell the same properties on 29.08.2016, the reserve price was Rs.8.90 crore but the said auction failed for want of bidders, and surprisingly, the bank then resorted to the sale under the impugned sale notice dated 21.10.2016, whereunder the reserve price was reduced to Rs.8.03 crore. Though this Court would normally not sit in appeal over valuation of secured assets, leading to fixation of the reserve price by the authorized officer in consultation with the secured creditor, the bank must prima facie satisfy the mandate of Rule 8(5) of the Rules of 2002, by getting the valuation of the property to be sold made by a Government Approved Valuer. The petitioners would point out that the valuation, which was the basis for the sale notice dated 21.10.2016, dated back to an inspection made on 09.12.2015, leading to valuation report dated 05.01.2016. As more than 11 months elapsed since that inspection, the petitioners contend that such a valuation report could not have been the basis, after such a long lapse of time. In response, Sri M.Narender Reddy, learned senior counsel, would assert that as per the policy of the bank, the valuation report dated 05.01.2016 could be taken into consideration for fixing the reserve price in the sale notice dated 21.10.2016. A copy of the letter dated 20.05.2015, addressed by the Deputy Managing Director and Chief Credit Officer of the bank to all the General Managers at various levels, demonstrates that the competent authority accorded approval for change of validity of valuation reports and conditions for obtaining second valuation report as under:

Particulars	Existing Instructions	Revised Instructions
Validity of Valuation Report for fixing Reserve Price and considering compromise settlement proposals.	The valuation report should be less than 6 months old based on which the Reserve Price is to be approved and compromise settlement proposals are to be considered.	The valuation report should be less than 1 year old for sale of properties under Private Treaty/SARFAESI Act 2002 and Settlement of dues through compromise
Obtention of SecondValuation	Two valuation reports should be obtained from Bank's approved valuers in case of loans above Rs.1.00 crore in case of compromise settlement & in case of securities of Rs.1.00 crore & above for fixation of Reserve Price	The second valuation report should be obtained only if the value of property is Rs.1.00 crore and above in case of compromise settlement & fixation of Reserve Price under SARFAESI Act 2002.

On the strength of the above decision of the Board, Sri M.Narender Reddy, learned senior counsel, would assert that as the valuation report in the present case was less than a year old, the bank could rely upon the same for fixing the reserve price.

In this regard, it may be noted that Rule 8(5) of the Rules of 2002 specifically provides that 'before effecting sale of the immovable property', the authorized officer should obtain valuation thereof from an Approved Valuer and thereafter fix its reserve price in consultation with the secured creditor, so as to sell it by any of the modes/ methods prescribed thereunder. The policy of the bank however seems to be that a valuation which is less than one year old can be taken into account for this exercise. Given the fluidity and volatility of the real estate market, this Court finds that the broad time frame of one year adopted by the bank is not in the

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interest of the borrower.

In this regard, reference may also be made to **RAJIV SUBRAMANIYAN V/s. M/S. PANDIYAS (**AIR 2014 SC 1710), wherein the Supreme Court, while referring to **MATHEW VARGHESE (supra)**, observed as under:

'13. This Court in Mathew Varghese case further observed that the provision contained in Section 13(8) of the SARFAESI Act, 2002 is specifically for the protection of the borrowers inasmuch as, ownership of the secured assets is a constitutional right vested in the borrowers and protected under Article 300-A of the Constitution of India. Therefore, the secured creditor as a trustee of the secured asset cannot deal with the same in any manner it likes and such an asset can be disposed of only in the manner prescribed in the SARFAESI Act, 2002. Therefore, the creditor should ensure that the borrower was clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property. Such a notice is also necessary to ensure that the process of sale will ensure that the secured assets will be sold to provide maximum benefit to the borrowers. The notice is also necessary to ensure that the secured creditor or anyone on its behalf is not allowed to exploit the situation by virtue of proceedings initiated under the SARFAESI Act, 2002.

17. It must be emphasized that generally proceedings under the SARFAESI Act, 2002 against the borrowers are initiated only when the borrower is in dire straits. The provisions of the SARFAESI Act, 2002 and the 2002 Rules have been enacted to ensure that the secured asset is not sold for a song. It is expected that all the banks and financial institutions which resort to the extreme measures under the SARFAESI Act, 2002 for sale of the secured assets to ensure that such sale of the asset provides maximum benefit to the borrower by the sale of such asset. Therefore, the secured creditors are expected to take bona fide measures to ensure that there is maximum yield from such secured assets for the borrowers. In the present case, Mr Dhruv Mehta has pointed out that sale consideration is only Rs.10,000 over the reserve price whereas the property was worth much more. It is not necessary for us to go into this question as, in our opinion, the sale is null and void being in violation of the provision of Section 13 of the SARFAESI Act, 2002 and Rules 8 and 9 of the 2002 Rules.'

(emphasis is ours)

It is therefore not open to the bank to fall back upon a valuation of over 11 months vintage to fix the reserve price for sale of the secured assets. All the more so, when such a reserve price indicates a radical fall, when compared with the reserve price in the earlier sale notice issued less than four months earlier. This Court therefore finds that this is one more irregularity which adversely impacts the subject sale.

On the above analysis, this Court finds that the sale held by the bank on 30.11.2016 pursuant to the notice dated 23.09.2016

under Rule 8(6) of the Rules of 2002 followed by the sale notice dated 21.10.2016, published in newspapers on 23.10.2016 under Rule 9(1) of the Rules of 2002, fell foul of the statutory mandate at its very inception, as the petitioners were not afforded the required 30 days clear notice to exercise their right of redemption, as the requisite gap was not maintained between the date of receipt of the Rule 8(6) notice dated 23.09.2016 and the publication of the Rule 9(1) sale notice on 23.10.2016, whereupon their right of redemption under the amended Section 13(8) of the SARFAESI Act stood prematurely extinguished.

To compound matters further, the bank thereafter committed the error of permitting extension of time to the third respondent company, the auction purchaser, to pay the balance 75% of the sale consideration without taking the petitioners into confidence and without obtaining their written consent. Other irregularities in the shape of the valuation not being obtained with proximity for fixing the reserve price before sale of the property, but in falling back on an inspection made 11 months previously, and the fact that the bank permitted the third respondent company, the auction purchaser, to nominate its sister concern, also taint the sale further. Given these incurable defects in the sale process, this Court necessarily has to set aside the sale held on 30.11.2016 and the consequential sale certificate dated 13.01.2017.

The writ petition is accordingly allowed holding that the sale held by the bank on 30.11.2016 stands vitiated on grounds more than one. Consequently, the sale certificate dated 13.01.2017 shall also stand cancelled. No further steps need be taken in this regard, as the said sale certificate has not been registered. This order shall however not preclude the bank from initiating measures afresh for recovery of its dues by taking further steps in accordance with the due procedure prescribed under the SARFAESI Act and the Rules of 2002.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

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2018(1) L.S. 316 (D.B.)

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

Present:
The Hon'ble Mr. Justice Suresh Kumar Kait &
The Hon'ble Mrs. Justice T.Rajani

Bandala Saya Goud ..Petitioner

Vs.

The State of A.P. ..Respondent

INDIAN PENAL CODE, Secs. 302 and 498A - Deceased was found hanging - Appeal is preferred against judgment passed by Trial Court whereby, appellant was found guilty for offences punishable u/Sec.498-A and 302 of IPC - Deceased was given in marriage to appellant and they led happy marital life for some time - Subsequently,

Crl.A. No.829/2011 Date: 4-4-2018

appellant harassed deceased demanding certain money – Counsel for appellant does not dispute convictionU/S 498-A of IPC but contends that appellant deserves to be acquitted from the charge of Section 302 IPC.

Held - In view of Sec.464 Cr.P.C., it is possible for the appellate or revisional court to convict an accused for an offence for which no charge was framed unless the court is of the opinion that a failure of justice would in fact occasion - Conviction of appellant/ accused for the offence u/Sec.302 of IPC is set aside - However, appellant is convicted for offence u/Sec. 306 of IPC – Appeal is allowed in part.

Mr. C. Vasundhara Reddy, Advocate for the Appellant.

Public Prosecutor, Advocate for the Respondent.

J U D G M E N T

(per the Hon'ble Mr.Justice Suresh Kumar Kait)

1. The present appeal is preferred against the order and judgment dated 29th November 2010, passed in Sessions Case No.335 of 2008 by the IX Additional Sessions Judge, Kamareddy, whereby, the appellant was found guilty for the offences punishable under Sections 498-A and 302 of IPC. Accordingly, he was sentenced to undergo simple imprisonment for a period of three years for the offence under Section 498-A IPC and to undergo life imprisonment for the offence under Section 302 of IPC and to pay a fine of Rs.10,000/-. In default of payment of fine, to undergo simple imprisonment for a period of three months. Both the sentences were to run concurrently.

2. Brief facts of the case are that about 18 years prior to the incident, the deceased was given in marriage to the appellant (hereinafter referred to as 'the accused'). At the time of marriage, 3 tulas of gold, Rs.70,000/- cash and other household articles were given. They led happy marital life for some time and were blessed with a female child i.e. PW-2. Subsequently, accused harassed the deceased demanding Rs.3,00,000/- and some times Rs.5,00,000/-. He also suspected her character and used to beat her frequently. As the accused continued his harassment, PW-2 stayed at Chittapur village with her grandmother i.e. PW-1 and pursued her studies. On 27.12.2007, at the instance of the deceased, PW-2 visited her and slept there with her paternal grand parents. In the middle of the night, on hearing the cries of her mother i.e. deceased, PW-2 went into the room and questioned her as to why she was weeping. On that, accused, who was found in aggressive mood, pushed PW-2. Being frightened, PW-2 left the room and hid herself. Thereafter, accused searched for her. PW-2 got into an auto which was stationed at the road and went to Ramayampet and from there, to Chittapur and informed PW-1/mother of the deceased. Next morning, they were informed by one Ramagoud about the death of the deceased. They immediately rushed to the scene and found the deceased hanging to the wooden beam on the roof with a saree, in the kitchen room. On that, PW-1 immediately lodged a report, which is marked as Ex.P-1.

3. On 28.12.2007, at about 12.30 p.m., on receiving Ex.P-1/report from PW-1, PW-8/ the then ASI of Police, Bhiknoor Police Station, registered a case in Crime No.242 of 2007 and issued FIR, which is marked as Ex.P-7. Investigation was taken over by PW-9/the C.I. of Police, Bhiknor. He visited the scene of offence and got the scene photographed through PW-6. Ex.P-4 are the photographs. He then got removed the body from the ceiling and then held scene of offence panchanama in the presence of PW-5, which is marked as Ex.P-2. He further held inquest over the dead body of the deceased, which is marked as Ex.P-3. During the course of investigation, he recorded the statements of PWs.2 to 4. Thereafter, he sent the deadbody for postmortem examination.

4. On receiving requisition dated 28th December 2007, PW-7/the then Civil Assistant Surgeon at Area Hospital, Kamareddy, held autopsy over the dead body of the deceased and opined that the cause of death was due to Asphyxia due to hanging. Ex.P-5 is the postmortem report.

5. On 06.01.2008, PW-9 apprehended the accused and sent him for judicial remand. After receiving all the relevant documents and on completion of investigation, he filed the charge sheet. After furnishing of copies to the accused, the learned trial Court framed charges under Sections 498-A and 302 of IPC. The accused pleaded not guilty and claimed to be tried.

6. Learned counsel appearing on behalf of appellant does not dispute the conviction under Section 498-A of IPC and sentencing the appellant for a period of 3 years since the appellant has already undergone more than Six years of imprisonment. However, she submitted that as per the deposition of PW-7/Doctor who conducted autopsy over the dead body, two views emerged – (i) it is a suicidal death and (ii) it is a homicidal. Learned counsel submits, if two views are there, the benefit of the same is to be given to the accused. Thus, the appellant deserves to be acquitted from the charge of Section 302 IPC.

7. We have heard learned counsel for parties and perused the record.

8. In view of arguments advanced by the counsel for the appellant, discussing the depositions of other witnesses is not necessary, however, it is important to discuss the deposition of PW-2/B.Rekha, who is the daughter of accused and the deceased. She deposed that in the year 2006-07, she studied 10th Class by staying in the house of her grand mother/PW-1 at Chittapur village, as her father i.e. the accused was harassing and beating her mother and also was suspecting her character all the time. The accused also used to follow her (PW-2) to the school and see if she was with any boy. The accused used to lock the house keeping her mother inside the house when he used to go out. He never allowed her mother even to peep from the window. He used to place stones on the edges of the curtains in order to see that her mother does not look through the window.

9. She further deposed that on 26.12.2007,

which was a Wednesday, her mother rang her up and asked to come home as she was preparing sweet chapathi (polelu). As such, she visited her mother on 27.12.2007 and since it was night, she had her dinner and slept with her paternal grand parents. In the middle of her sleep, she heard noise from her parents' room. She heard her mother crying. As such, she opened the door and went into the room of her parents and saw her mother weeping. When she was questioning her mother as to why she was crying, the accused came and questioned her whether she require the answer from her mother, and pushed her away in an aggressive mood. Seeing the aggressive mood of her father, which was on extreme side, she got frightened and left the room feeling that he may take some drastic step. The accused came out of his room, searched for her and again went back into the room. At that time, she noticed an Auto on the road. As such, she got into the Auto and went to Ramayampet, and from there, to Chittapur and informed her grand mother i.e. PW-1 that the accused was beating her mother severely. PW-1 told her that they will take some village elders and visit the house of her father on the next day morning. Early in the morning on the next day, her paternal aunt's husband, namely, Ramagoud came to PW-1's house and informed that her mother died. Later, they came to the house of his father along with other villagers in a Tractor. They saw the body of her mother with broken toes on the left foot, injured finger tips, broken nose and other injuries on the body. She further deposed that her father hanged her mother to the wooden beam on the roof with her saree in the kitchen room. Her father i.e. accused himself killed her mother. Accordingly, her maternal grand mother i.e. PW-1 lodged complaint to the Police.

10. The statement of PW-2 is corroborated by PW-1/mother of the deceased, PW-3/ cousin brother of the deceased and PW-4/brother of the deceased.

11. PW-7/Dr.Ajay Kumar, who conducted autopsy on the body of the deceased, deposed that on 28.12.2007 at 4.10 p.m., he received requisition from the Police, Bhiknoor for conducting postmortem examination on the dead body of Bandolla Savithri, aged 35 years. As such, he conducted the autopsy over her body on the same day from 4.15 p.m. to 5.30 p.m. During the said examination, he found the following ante-mortem injuries :

"1. An abrasion left great toe measuring ½ x ½ cms.

2. An abrasion over left nostril measuring ½ x ½ cms.

3. Clotted blood present over the upper teeth and the gums.

4. An abrasion over the back of left scapula measuring 2x2 cms.

5. Legature mark on the front of the neck, which is 'U' shape measuring 30x5 cms.

6. Knot mark was present behind the ear on the left side."

12. PW-7 further deposed that on dissection of the dead body, he found blood clots in

the throat muscles. He also found the tricia, branchy and both lungs were conjusted apart from a contusion over the small and large intestine. He then sent the viscera for chemical analysis. On receiving FSL report, he opined that the death of said Savithri was due to Asphyxia due to hanging. Accordingly, he issued certificate vide Ex.P-5. The FSL report is Ex.P-6. He stated that injury Nos.1 to 6 were not possible in case of a suicidal death. Whereas, in the cross-examination by the counsel for the accused, he admitted that injury Nos.5 and 6 mentioned in Ex.P-5 were possible by way of hanging a person.

13. The aforesaid statement was recorded on 17th June 2010. The witness was recalled thereafter vide order dated 19th August 2010 for further cross-examination, in which, he admitted that injury Nos.5 and 6 were possible in a case pertaining to suicide. He also added that the said injuries were also possible in case of hanging i.e. homicide.

14. From the deposition of PW-7/Doctor, it is evident that he was not sure as to whether injury Nos.5 and 6 were caused due to suicide or homicide. The fact remains that there were six injuries as mentioned above and all were ante-mortem, which is not disputed by the defence counsel. As stated by PW-2/daughter of the accused and the deceased, she saw the dead body of her mother with broken toes on the left foot, injured finger tips, broken nose apart from other injuries on her body. This fact has been corroborated by the post-mortem report/Ex.P-5. It is also a fact that the death of the deceased was due to Asphyxia. PW-7/Doctor who conducted autopsy was not clear as to whether injury Nos.5 and 6, which were the material injuries, were caused by suicide or by homicide. But, the fact remains that the accused used to beat and harass the deceased, and on 27.12.2007, he beat the deceased, which was witnessed by PW-2, who is none other than his daughter. The defence counsel cross-examined PW-2, but she was consistent with her deposition.

15. As per medical jurisprudence, it is difficult to kill a person and thereafter hang by a single person. This can be possible if the deceased is very weak or a child. In the present case, the age of the deceased is 35 years and height is 5 feet. Though weight is not on record, but we can say from the photographs/Ex.P-4 that it was difficult for the accused to commit homicide and thereafter hang the deceased. As per Section 106 of the Evidence Act, explanation has to come from the accused being husband of the deceased as to what had happened to his wife on the date of incident. Though he has taken the plea of alibi, however, there is no corroborating evidence to prove the same. Thus, it is established that the appellant/accused was very much in the house on the date of incident and that fact is corroborated by the evidence of PW-2/his daughter. It is also the fact that the deceased was beaten by the accused on the night of the incident in the room where they used to sleep, but the deceased was found in hanging position in the kitchen.

16. We have perused the record and photographs. It has come out from the said

photographs that the deceased hanged with saree and knot of the saree was on the left side of the face. There is a kitchen slab, from where, it appears, she hanged and thereafter jumped from the said slab. Therefore, keeping in view the deposition of PW-7/Doctor who conducted autopsy, we are of the opinion that the deceased had committed suicide due to the harassment and frequent beating in the hands of her husband i.e. the accused. It seems that after receiving the beatings of accused on that night, the deceased left the room and went into kitchen and hanged herself. Thus, she ended her life. The hanging of the deceased was because of the abetment due to beatings given by the accused/husband.

17. Though the learned trial Court has not framed the charge under Section 306 of IPC, however, the law has been settled in the case of **Dalbir Singh v. State of U.P.** (2004) 5 SCC 334), whereby, it is held as under : "There are a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one of them. Therefore, in view of Section 464 Cr.P.C., it is possible for the appellate or revisional court to convict an accused for an offence for which no charge was framed unless the court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. We are, therefore, of the opinion that Sangaraboina Sreenu [(1997) 5 SCC 348] was not correctly decided as it purports to lay down as a principle of law that where the accused is charged under Section 302 IPC, he cannot be convicted for the offence under Section 306 IPC."

18. The defence of appellant before trial Court was two fold –

(i) the alibi and
(ii) the deceased has committed suicide. The appellant has failed to prove the defence of alibi by not producing any defence to this effect. The second defence is that he has not killed the deceased but she herself hanged and committed suicide.

19. Now, question is, why the deceased has committed suicide? The deposition of PW-2 has proved that the appellant used to beat and harass the deceased. On the date of incident also, he beat the deceased. Accordingly, the deceased was fed-up with the harassment caused by the appellant and finished her life. We have no hesitation to say that the appellant was fully aware, while taking second defence, that he may be convicted for the offence under Section 306 of IPC, if not under Section 302 of IPC. Therefore, even if the trial Court has not framed charge under Section 306 of IPC, still, the appellant can be convicted for the aforementioned offence keeping in view the dictum of Hon'ble Supreme Court in the case of **Dalbir Singh** (supra 1).

20. In view of the above discussion and the legal position, we hereby set aside the

conviction of appellant/accused for the offence under Section 302 of IPC. However, we convict the appellant for the offence under Section 306 of IPC.

21. It is on record that apart from the remand period, the appellant remained in jail for Seven years and thereafter, he was released on bail vide order dated 12th June 2017. We hereby sentence him to the imprisonment already undergone.

22. Appeal is accordingly allowed in part. Pending miscellaneous applications, if any, shall stand closed.

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2018(1) L.S. 322

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

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

Janjanam Lalitha Devi ..Petitioner
Vs.
The State of A.P ..Respondent

CRIMINAL PROCEDURE CODE, Sec.473(2) - INDIAN PENAL CODE, Secs.498A and 376(2)(n)(f) – Petitions filed to cancel bail granted to accused.

Held - when investigation is completed and there is no allegation that appellant may flee the course of justice and there is no allegation that during this period he had tried to influence the witnesses, no cancellation of bail is warranted - There are no such allegations in present case - Hence, this Court opines that it is not a fit case for cancelling bail granted to respondents/accused - Criminal Petitions are dismissed.

Challa Ajay Kumar, Advocate for the Petitioner.
Public Prosecutor, S.S. Prasad, C. Sindhu Kumari, Advocates, Advocate for the Respondent.

C O M M O N O R D E R

1. The two petitions are filed, under Section 439(2) of the Criminal Procedure Code, seeking cancellation of regular bail granted to A2, by virtue of order in CRLMP.No.2054 of 2017 dated 08.12.2017 and cancellation of anticipatory bail granted to respondents/ A1 and A2, by virtue of order in CRLMP.No.1069 of 2017 dated 31.07.2017, by the Sessions Judge, Mahila Court, Vijayawada. Cr.No.237 of 2017 was registered, against A1 and A2, for the offences under Sections 498-A and 376(2)(n)(f) of the Indian Penal Code and Cr.No.353 of 2017 was subsequently registered against A2 for the offence under Section 307 of the Indian Penal Code.

2. Heard the counsel for the petitioner, Mr. S.S. Prasad, learned senior counsel for respondents/accused and the Public Prosecutor appearing for the State.

3. With respect to Cr.No.237 of 2017, which was registered on 15.07.2017 for the offence under Sections 498-A and 376(2)(n)(f) of IPC, the petitioner does not file copy of the original report given by her but she filed the letter of the Inspector of Police, Krishnalanka Police Station, Vijayawada City, addressed to the Assistant Commissioner of Police, South Zone, Vijayawada City, seeking to transfer the case to Suryaraopet Police Station, on the point of jurisdiction, which spells the facts, as under: On 05.07.2017 at 18.00 Hrs, the victim, who is the complainant, stated that her marriage was performed on 29.05.2005 with A2, by giving dowry of Rs.5 lakhs and 15 sovereigns of gold ornaments, apart household articles. A2 harassed her mentally and physically, even after two children were born. Her father-in-law made allegation that she had illegal contacts with so many persons and that she is giving entire money to them. After the death of her mother-in-law, her father-in-law made so many sexual assaults on her and finally in the month of November, between 7.00 hrs to 8.00 hrs, her father-in- law, forcibly, participated in sexual intercourse and also further several times. Even though she informed the matter to her husband, her husband did not consider her words. She came out in view of unbearable harassment and peculiar attitude of her husband and father-in-law. Later, her husband came to her house and threatened to kill her and her children.

4. The Court below, by elaborately considering the case law and also considering that a perusal of the statements of the father and the mother of the defacto complainant shows that the offence under Section 376 IPC is not attracted and that they also stated that the defacto complainant was residing in her parents house since December 2015, observed that no grave allegations are made out in the complaint given by the defacto complainant and granted bail to the petitioners therein.

5. The second order granting bail to the husband of the defacto complainant, who is the sole accused in Cr.No.353 of 2017, spells the facts, most of which are the same, as mentioned in Cr.No.237 of 2017. The additional allegations are that the accused therein, who is the husband of the defacto complainant, on 15.11.2017, at about 10.00 PM, came into her bedroom, on the eve of her daughters birthday, with a view to kill her and beat her in the presence of her children and also throttled her neck and tied a towel to her neck and he fisted on her right eye and attempted to kill her. Her children raised cries and she escaped and dialled 100 on which the police came to the spot and she informed the matter to them. Her husband necked her out of the house, stating that she cannot do anything to him. The police came there and called her husband. He came out but he did not even reply to the police. Again on 17.11.2017, at about 10.00 PM, her husband drove her children and herself and throttled her neck and tied a towel to her neck. Then her children raised cries and she escaped.

6. The Court below, though in detail, did not consider the gravity of the allegations and the truth of the allegations, observed that as the investigation was almost complete and as that the petitioner therein was in jail since 20.11.2017 and granted bail. The contention of the Public Prosecutor, that the offence is heinous in nature and the investigation is still pending, was noted. It also observed that a perusal of the CD file showed that the investigation is almost completed.

7. The petitions are now filed seeking cancellation of the aforesaid bail orders on the ground that the respondents/accused have misused the bail granted to them. After obtaining bail in Cr.No.237 of 2017, the husband of the complainant, committed an offence for which Cr.No.353 of 2017 was registered. The bail application does not make out any case for any relief and the respondents are not entitled for continuation of bail and that the petitioner apprehends danger to her life and her children in the hands of the accused. She also submits that the conditions imposed in the bail order are not complied with.

8. The order in CRLMP.No.1069 of 2017 in Cr.No.237 of 2017 is delivered in the petition filed for grant of anticipatory bail, while the order in CRLMP.No.2054 of 2017 in Cr.No.353 of 2017 is delivered in a petition seeking grant of regular bail. There are no conditions imposed while granting anticipatory bail to the respondents/ accused, except that they should furnish a personal bond for Rs.20,000/- with the sureties for a like submit. In the order granting regular bail, apart from the above condition, a condition that the respondent should attend the police station on every Monday and Friday between 8.00 AM and 12.00 Noon till the charge sheet is filed, was imposed. There is no adverse report from the Public Prosecutor, who is the person, who is expected to inform about the non-compliance of the conditions, with regard to the compliance of the said condition. Hence, the petitioner stands without any basis, for the contention that the conditions imposed in the bails orders were not complied with.

9. With regard to cancellation of bail, the counsel for the petitioner relies on the following decisions:

In PRASANTA KUMAR SARKAR v. ASHIS CHATTERJEE (2010) 14 SCC 496) the Supreme Court reiterated the factors to be considered while considering a bail application. It was stated that those factors should be borne in mind while considering the application for bail. They are as follows:

i. whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

ii. nature and gravity of the accusation;

iii. severity of the punishment in the

event of conviction;

iv. danger of the accused absconding or fleeing, if released on bail;

v. character, behaviour, means, position and standing of the accused;

vi. likelihood of the offence being repeated;

vii. reasonable apprehension of the witnesses being influenced; and

viii. danger, of course, of justice being thwarted by grant of bail.

It was observed that if the High Court does not advert to these relevant considerations and mechanically grants bail, the said order would suffer form the vice of non-application of mind, rendering it to be illegal and considering that the High Court therein completely lost sight of the basic principles enumerated in the decision, the appeal was allowed and the order was set aside.

The decision in SAVITRI AGARWAL v. STATE OF MAHARASHTRA (2009) 8 SCC 325) is, in fact, not useful for the petitioner as it was observed that very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail, already granted. It was observed that in the said case nothing was brought on record from which it can be inferred that the appellants had not cooperated in the investigation or had, in any manner, abused concession of bail granted to them. It was also observed that rejection of bail in a non-bailable case at the initial stage and cancellation of bail are two different aspects and overwhelming circumstances are necessary for cancelling the bail. The Supreme Court laid down the parameters for grant of anticipatory bail. It was observed that though the power conferred by Section 438 of the Code is of an extraordinary character, it does not justify the conclusion that the power must be exercised in exceptional cases only because it is of extraordinary character.

The decision in RANJIT SINGH v. STATE OF MADHYA PRADESH (2013) 16 SCC 797) lays down the parameters for granting bail. It was observed that no special emphasis is required to state that there is distinction between the parameters for grant of bail and cancellation of bail; there is also distinction between the concept of setting aside an unjustified, illegal or perverse order and cancellation of an order of bail, on the ground that the accused has misconducted himself or certain supervening circumstances warrant such cancellation. It held that if an order granting bail was a perverse one or passed on irrelevant materials, it can be annulled by superior Court.

10. The counsel for the respondents/accused also relies on certain decisions as under:

In BHAGIRATHSINH v. STATE OF GUJARAT the Supreme Court has laid down the considerations for cancellation of bail and observed that

very cogent and overwhelming circumstances are necessary for an order seeking cancellation of bail; even where a prima facie case is established, the approach of the Court in the matter of bail is not that the accused should be detained by way of punishment but whether the presence of the accused would be readily available for trial or that he is likely to abuse the discretion granted in his favour, by tampering with evidence. It was also observed that ordinarily the Supreme Court is not inclined to interfere with the orders either granting or refusing to grant bail to an accused person either facing a criminal trial or whose case after conviction is pending in appeal; but where the order granting the bail by the Sessions Judge was set aside by the High Court, adopting an erroneous approach, the Supreme Court can interfere with the High Courts order of cancellation of bail. It was also observed that the High Court therein was misdirected, while examining the question of directing cancellation of bail, by interfering with the discretionary order of the Sessions Court.

In BHADRESH BIPINBHAI SETH v. STATE OF GUJARAT (2016) 1 SCC 152) the Supreme Court laid down principles and guidelines regarding grant of anticipatory bail. The Supreme Court relied on GURUBAKSH SINGH SIBBIA v. STATE OF PUNJAB [(1980) 2 SCC 565] wherein the Constitution Bench emphasised that provision of anticipatory bail enshrined in Section 438 of the Code is conceptualized under Article 21 of the Constitution which relates to personal liberty; therefore, such a provision calls for a liberal interpretation of Section 438 of the Code, in the light of Article 21 of the Constitution; the Code explains that an anticipatory bail is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore, means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore, effective at the very moment of arrest. At para 22 of the judgment, the Supreme Court observed that grant or non-grant of bail depends upon a variety of circumstances and the cumulative effect thereof enters into judicial verdict. Hence, this part of the observation of the Supreme Court shows that the cumulative effect of consideration of the circumstances, enters into judicial verdict.

It is also interesting to note that at Para 25.4 the Supreme Court observed that there is no requirement that the accused must make out a special case for the exercise of power to grant anticipatory bail. It is also held that when the Court is inclined to grant anticipatory bail, it shall grant interim bail and then issue notice to the Public

Prosecutor, after hearing whom, the Court may either reject or confirm the initial order of granting bail. In the said decision, while holding that no purpose would be served in compelling the appellant to go behind bars; the Supreme Court also observed that the investigation is completed and there is no allegation that the appellant may flee the course of justice and there is no allegation that during this period he had tried to influence the witnesses. It also further observed that in the aforesaid circumstances, even when there is a serious charge levelled against the appellant, that by itself should not be the reason to deny anticipatory bail when the matter is examined, keeping in view other factors enumerated above.

A Full Bench judgment of the Supreme Court in STATE (DELHI ADMINISTRATION) v. SANJAY GANDHI (1978) 2 SCC 411) held that mere turning of witnesses hostile is not enough for cancellation of bail and involvement of the accused in bringing out such result must be shown.

11. As already observed, while granting anticipatory bail the Court below has considered the case law and in the order granting regular bail, the Court below observed that the investigation is completed and that the petitioner therein was in jail since long. Whether it is mandatory that all the considerations, that are held to be necessary for granting bail have to be spelled out by the order, has to be examined.

12. The nature and gravity of the accusation is, however, borne out by the record. The antecedents of the applicant have to be put forth by the prosecution i.e. with regard to the accused undergoing imprisonment on conviction by a court in respect of any cognizable offence. The possibility of the applicant to flee from justice and the possibility of the applicant likely to repeat similar or other offence are also the facts which have to be urged and proved by the prosecution. The impact of grant of anticipatory bail affecting very large number of people is, however, not there in this case. As the disputes are between two private parties, the question of the order granting bail, impacting large number of people, does not arise.

13. The parameters for granting bail are laid down and the parameters for cancellation of bail are also laid down by virtue of the above decisions. With regard to the parameters of granting bail, the Court below, while granting anticipatory bail, considered the above parameters. The order granting bail however, only reflects the stage of investigation and the period of detention of the accused. The nature and gravity of the accusation, however, is evident from the record. So also, the severity of the punishment in the event of conviction. With regard to the danger of absconding or fleeing after release on bail; the likelihood of the offence being repeated; the reasonable apprehension of the witnesses being influenced and the danger of justice being thwarted by grant of bail, it is for the Public Prosecution to put forth such submissions and also the material in support of such

submissions. The order does not show that any such submissions or material were put forth by the prosecution.

14. With regard to the contention of the counsel for the petitioner, that the respondents committed the offence under Section 307 IPC after anticipatory bail was granted in the earlier crime, this Court opines that the same shall not be the consideration for cancellation of bail, which was granted after the alleged offence was committed by the respondents. Apart from that, if the material on record shows that the allegations, prima facie, are not believable, the Court shall not cancel the bail. There is inherent inconsistency in the report given by the defacto complainant/ petitioner. The allegation is that on 15.11.2017 there was an attempt of murder on her and that she informed the police about the same but as to what happened after the police intervened and as to how she was again allowed into the house, so that the same offence was again committed on 17.11.2017 is not explained in the report. So also, the allegation that A1 had sexual intercourse with her on several occasions. It does not receive sufficient strength, for the reason that petitioner does not mention the dates of the offences and does not mention the reasons for her not reporting about the same immediately after the alleged offence took place, which is in one November. Though she does not specify the year, it has to be understood that it is, at any rate, in November 2016, as the report was given in the year 2017.

15. In RANJIT SINGHs case (3 supra) the Supreme Court says that if an order granting bail was a perverse one or passed on irrelevant materials, it can be annulled by superior Court. No perversity can be seen in the impugned orders.

16. From what is observed by the Supreme Court in BHADRESH BIPINBHAI SETHs case (5 supra) it can be understood that when the investigation is completed and there is no allegation that the appellant may flee the course of justice and there is no allegation that during this period he had tried to influence the witnesses, no cancellation of bail is warranted. There are no such allegations in this case. Hence, this Court opines that it is not a fit case for cancelling the bail granted to the respondents/accused.

The criminal petitions are dismissed. As a sequel, the miscellaneous applications, if any pending, shall stand closed.

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2018 (1) L.S. 149 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mrs.Justice
R.Bhanumathi &
The Hon'ble Mr.Justice
Uday Umesh Lalit

P. Meenakshisundaram ..Appellant
Vs.
P. Vijayakumar & Anr., ..Respondent

SPECIFIC PERFORMANCE – Trial Court dismissed counter claim preferred by Appellant/Defendant, whereby he prayed for delivery of possession of suit property - Appellant had mortgaged suit property with Bank – Later appellant entered into an agreement intending to sell suit property to respondent No.1/ Plaintiff – Appellant contended that plaintiff has taken illegal possession of suit property and has been in receipt of unlawful gains on account of being in illegal possession and receiving income from the suit property

Held – Court accepted counter claim made by appellant and hold that he was entitled to recovery of possession – On score that Appellant was wrongfully denied and deprived of earnings from suit property for last so many years, he would be entitled to reasonable return – But at same time he had retained and enjoyed said sum which he had received by way of advance from first Respondent/ Plaintiff – Neither would first Respondent be entitled to any interest on sum of which was given by way of advances under suit agreement to Appellant nor would Appellant be entitled to any sum by way of mesne profits of wrongful possession of suit property by first Respondent – Suit for specific performance filed by first Respondent was dismissed – Appeal allowed.

Mr.Vijay Kumar, Advocates for the Appellant.
Mr.S. Rajappa, Advocate for the Respondents.

J U D G M E N T
(Per the Hon'ble Mr.Justice
Uday Umesh Lalit)

Leave granted.

2. These appeals by special leave challenge the correctness of the judgment and order dated 07.01.2014 passed by the High Court of Madras in Appeal Suit (MD) Nos. 218-219 of 2010.

3. The facts leading to the filing of these appeals in brief are as under :-

A. The property in question is a plot admeasuring about 3708 sq.ft., with a marriage hall ("Suit Property", for short) situated in Village Parasuramanpatti, Madurai North Taluk, Tallakulakam sub- Division, Madurai North. The appellant had mortgaged the suit property with the Catholic Syrian Bank (later Federal Bank Ltd.) and the bank had initiated

recovery proceedings, namely, O.S. No.40 of 1996 before 3rd Additional Sub-Court, Madurai which was later transferred to DRT, Coimbatore and renumbered as Transfer Application No.1441 of 2002.

B. On 30.06.2000 the appellant entered into an agreement (Ex.A1) intending to sell the suit property to respondent No.1. The consideration agreed was Rs. 19 lakhs out of which Rs. 1 lakh was paid by way of advance. This agreement recited an assurance on the part of the appellant, "...that there is no encumbrance over the Schedule mentioned property" but went on to state:-

"The 2nd Party says that the original Parent Document in respect of the property is not available with the 2nd party and it is in the bank. In case, there is any loan availed by the 2nd party either on the schedule property or on other property, then the 2nd party has to pay the said loan amount by getting it from the 1st party and to get the Original Parent Document and other supportive records in respect of the schedule property and the 2nd party has to hand over the same to the 1st party."

C. The cheques issued thereafter by respondent No.1 were dishonored (as evident from Notice Ex.A-2 dated 18.09.2000) but the parties entered into a subsequent agreement on 20.09.2000 ("the suit agreement", for short) under which the consideration was fixed at Rs. 37.5 lakhs. As per this agreement, even the movables utilized for marriage hall were also included. Over and above Rs. 1 lakh which was already received as advance, additional sums of Rs. 2 lakhs by way of cheque and Rs. 3 lakhs by way of demand draft were paid on the same day. The suit agreement recited that the remaining amount had to be paid and the sale deed to be registered by 20.03.2001 in following terms:-

> ".....the 1st party has to pay the remaining amount of sale consideration of Rs. 26,50,000/- (Rupees twenty six lakhs and fifty thousand only) within 20.03.2001 either before the Sub Registrar or in person and the 2nd party has to receive the same and give proof to that effect and the said Sale Deed has to be registered by the 2nd party without any encumbrance and that there is no other person except the 2nd party to have title over the same."

D. Though the relevant terms in the suit agreement were identical to those in agreement (Ex.A1), the understanding between the parties as on the date when the suit agreement was entered into was captured in the subsequent communication of respondent No.1 dated 22.09.2001 (Ex.A6) as under :-

> "That on further persuasion and negotiations between the parties, it was agreed to have a fresh sale agreement with reference to the said Kalyana Mandapam and annexe. As your client wanted to clear the entire loan in the Catholic Syrian Bank only by himself, the sale price of the said property was agreed for Rs. 37,50,000/- only and a sum of Rs.

5,00,000/- (Rupees five lakhs only) through D.D. and Cheque was paid additionally to your client by making the total advance of Rs. 6,00,000/- including the cash advance of Rs. 1,00,000/- already paid on the earlier agreement dated 30.06.2000. Therefore in supersession of the earlier agreement dated 30.06.2000 a fresh sale agreement was made on 20.09.2000 with the parties concerned."

E. On 21.02.2001 a further sum of Rs. 2 lakhs was paid by way of cheque by respondent No.1. Though the transaction was to be completed by 22.03.2001 the record is silent about any communication between the parties around that time towards completion of transaction. However, amount of Rs. 10 lakhs was paid by cheque on 22.09.2001, which according to respondent No.1 was made over to the appellant so that the dues of the bank could be settled.

F. The record is again silent about any developments after 22.09.2001 till 29.07.2002 when a legal notice was issued by respondent No.1 through his advocate. According to respondent No.1 this was responded by the advocate for the appellant and in the ensuing discussion it was agreed that possession of the suit property be handed over to respondent No.1. According to respondent No.1, out of the balance amount of Rs. 19.5 lakhs, Rs. 13.5 lakhs was to be made over by respondent No.1 to the bank directly and the remaining sum of Rs. 6 lakhs was agreed to be paid to the appellant in cash on the day the document was to be registered. According to respondent No.1, possession of the suit property was handed over to him by the appellant on 03.08.2002.

The aforesaid case set up by respondent No.1 is disputed and denied by the appellant and according to him, with the intervention of local police and other hirelings, the possession was forcibly taken by respondent No.1 on 16.09.2002.

G. On 01.09.2002, a telegram was sent by the advocate for respondent No.1 to the appellant. Immediately thereafter i.e. on 02.09.2002 an IA No.126 of 2002 was preferred by respondent No.1 to implead himself in the Transfer Application No.1441 of 2002 before DRT, Coimbatore. In his reply telegram dated 03.09.2002 appellant denied all the assertions made by the advocate for respondent No.1 and cancelled the agreement dated 20.09.2000. The appellant also complained to DIG of the relevant range and sought police protection and preferred OP No.226 of 2002 in the High Court of Madras against respondent No.1, Inspector of Police, Oomachikulam and Deputy Superintendent of Police of the concerned Division. According to the appellant, he was threatened by the hirelings employed by respondent No.1 and possession of the suit property was taken over by respondent No.1 on 16.09.2002. This prompted the appellant to prefer an appropriate petition before the Superintendent of Police, Madurai, Rural.

H. In the aforesaid background, on 19.02.2002, respondent No.1 filed OS No.764 of 2002 seeking specific

performance of the agreement dated 20.09.2000. The plaint was later amended and the Federal Bank Ltd. through its Branch Manager was added as second defendant. As regards arrangement under which respondent No.1 was put in possession, it was averred:

> "..... Meanwhile, as necessary steps have to be taken for settlement of the loan availed on the suit property, the advocates of both the sides have held a meeting on 29.07.2002 to execute the Sale Agreement made on 20.09.2000 and it was agreed that this defendant has to execute the Sale Deed in respect of the suit property on the 18th day of Aadi month of this year (3.08.2002); that the remaining sale consideration of Rs. 13,00,000/- out of Rs. 19,50,000/- has to be paid by the plaintiff to settle the case which is being conducted at Debts Recovery Tribunal; that the remaining amount of Rs. 6,50,000/- (Rupees six lakhs and fifty thousand only) has to be given to the 1st defendant as cash ...."

In respect of readiness and willingness on the part of respondent No.1 to perform his obligations under the suit agreement, Para 7 of the amended plaint was as under:

> "(7) While this plaintiff was ready to fulfill the sale agreement on 3.8.2002 as per the above said arrangement, as agreed to execute the Sale Deed either on the 3rd day of Aavani Month (19.8.2002) or on 5th day of Aavani (21.8.2002) and that there is some difficulty according to religious custom in registering the sale deed in the month of Aadi and to give consent to this plaintiff to take the possession of the marriage hall, this plaintiff took the possession of the suit property on the 18th day of Aadi Month on 3.8.2002 and he has been enjoying the same. The marriage functions which were being booked by the 1st defendant are being conducted by this plaintiff under his supervision."

I. In his written statement, the appellant denied relevant assertions made by respondent No.1. As regards readiness and willingness on the part of respondent No.1, it was stated:-

> "It is submitted that in spite of defendant's repeated demands the plaintiff has not come forward either to pay balance sale price or to complete the sale immediately. Even though specific condition to complete the sale on or before 20.03.2001 is mentioned in the sale agreement and time is mentioned as essence of the contract, the plaintiff has not completed the sale within the stipulated time. The plaintiff was not ready and willing to perform his part of contract even though the defendant was ready to clear the encumbrance over the suit property."

The matter regarding handing over of possession was elaborated as under:

> "On 16.09.2002, the plaintiff came

with his men and threatened the defendant that why he had cancelled the sale agreement and if he did not execute sale deed in his favour he would not permit the defendant to enjoy the suit property. The defendant immediately went to the office of the Police Commissioner, Madurai City wherein he was asked to come tomorrow. On 17.09.2002 he presented a petition to the Police Commissioner, Madurai City and it was forwarded to SP, Madurai Rural. When the defendant was in the office of the SP, Madurai Rural, at the instigation of the plaintiff one Karthick Muniasamy of Pudur with his men namely Rajesh, Kannan, Muniasamy and other attacked the watchman of the suit property and illegally trespassed into the suit property and damaged the property and took illegal possession of the suit property. On coming to know about the illegal taking over possession of the suit property by the plaintiff's men, the defendant immediately told this matter to the SP, Madurai Rural who made endorsement on the petition directing the Inspector of Police, Oomachikulam to register F.I.R. against the plaintiff and his men. ....."

J. In his Additional Written Statement-cum-Counter Claim the appellant submitted:

> "The application in I.A. No.126/2002 filed by the plaintiff in T.A. No. 1441/2002 pending before the DRT, Coimbatore was dismissed on 03.01.2003. In the meantime the defendant has also paid Rs. 13 lakhs to the Federal Bank, Madurai after the filing of the suit till date."

He further submitted:

> "It is submitted that the plaintiff has taken illegal possession of the suit property as stated above and his possession is unlawful. He has been in receipt of unlawful gains on account of being in illegal possession and receiving income from the suit property. The suit property used to be booked for a minimum of 30 Muhoorthams per year. After deducting all expenses the year income from the suit property is Rs. 1,80,000/-. From 17.09.2002 to till filing of this counter-claim approximately the past mesne profits would be Rs. 5,40,000/-. The plaintiff is liable to pay Rs. 5,40,000/- as past mesne profits from 17.09.2002 to the date of filing of this Additional Written statement cum counter claim. In these circumstances a decree for mandatory injunction and for mesne profits is to be granted, where the 1st defendant would be put to irreparable loss and damage."

The appellant in the circumstances prayed for delivery of possession of the suit property, past mesne profits of Rs. 5,40,000/- and future mesne profits as well.

K. The Presenting Officer of the Federal Bank Ltd. filed a memo on 08.12.2009 in the proceedings before DRT Coimbatore that the appellant had remitted a sum of

L13,42,173/- on 16.11.2009 towards full and final settlement of the account. It was therefore prayed by the Presenting Officer that satisfaction of the claim be recorded.

L. The trial court by its judgment and decree dated 01.10.2010 decreed OS No.764 of 2002 and dismissed the counter claim preferred by the appellant. All the issues were answered in favour of respondent No.1. The appellant was directed to execute the sale deed in respect of the suit property and register the same in favour of respondent No.1 after receiving the balance sale consideration within three months and the appellant was further directed to pay to respondent a sum of Rs. 3,23,038/- towards the costs of the suit. It was observed that time was not the essence of the contract. As regards readiness and willingness on the part of respondent No.1, it was observed as under:

"While considering the readiness and willingness of the plaintiff as to purchase the suit properties it was submitted by the counsel for the plaintiff that as agreed the plaintiff did issue the legal notice to the 1st defendant to come forward to register suit properties after getting full consideration and also the plaintiff was waiting on 03.08.2002 in the suit Sub-Registrar office as to register the suit properties as agreed and also the plaintiff was ready to pay the full amount and willing to purchase the suit properties."

M. The matter was carried further by filing Appeals by the appellant in the Madras High Court, Madurai Bench. According to the High Court before the execution of suit agreement the appellant had not disclosed about the existence of encumbrance which fact came to the knowledge of respondent No.1 subsequently. Relying on the decision of this Court in S.P. Chengalvaraya Naidu (Dead) by LRs v. Jaganath (Dead) by LRs and Others, (1994) 1 SCC 1. it was observed as under:

> "Since the first defendant has suppressed the fact that he obtained loan by way of encumbering the suit property and also pendency of Original Suit No.40 of 1996 at the time of execution of Ex.A3, it is pellucid that the entire defence put forth on the side of the first defendant is based upon falsehood.

..... But for the reasons best known to him, schemingly, deliberately suppressed the existence of mortgage over the suit property and further stated in Ex.A3 to the effect that there is no encumbrance over the same. Therefore, the entire defence put forth on the side of the first defendant is purely based upon falsehood and as per the dictum given by the Hon'ble Apex Court the defence put forth by the first defendant in the present case can summarily be thrown out."

The High Court found that the readiness and willingness on the part of respondent No.1 stood established. The High Court, thus, by its judgment and order dated 07.01.2014 dismissed the appeals, namely, Appeal Suit Nos.218-219 of 2010 preferred by the appellant.

4. This Court issued notice on 25.08.2014 in petitions for special leave to appeal. The

parties exchanged the pleadings and also filed documents on record.

We heard Ms. V. Mohana, learned Senior Advocate in support of the appeals and Mr. V. Prabhakar, learned Advocate for respondent No.1. After conclusion of hearing, written submissions were filed by respondent No.1 submitting inter alia:-

"Apart from having averred regarding the readiness and willingness, respondent No.1 by his conduct had proved the same which are as below:-

i) Payment of an advance of Rs. 6,00,000/- on 20.09.2000.

ii) Further advance of Rs. 2,00,000/- paid on 21.01.2001.

iii) Further advance of Rs. 10,00,000/- paid on 22.09.2001.

iv) Notice dated 22.09.2001 issued by the respondent to the petitioner to execute the sale deed.

v) Holding a meeting of the petitioner, his counsel with the respondent and his counsel for determining the manner of performance of the Agreement. The said factum of the meeting and the outcome thereof as set out in the Plaint in Para 6 at Page 136 of Volume II stood admitted by the respondent in the Notice dated 29.07.2002 issued on his behalf which had been marked as Exhibit A15.

vi) Taking possession of the property on 03.08.2002.

vii) Seeking impleadment in the Debt Recovery proceedings with a view to settle the debt due from the Respondent.

viii) Filing of the Suit within 9 days after the telegram dated 03.09.2002 issued by the petitioner cancelling the agreement. Suit had been filed on 12.09.2002. .....

The non deposit of the balance consideration by respondent No.1 cannot be put against respondent No.1 inasmuch as the encumbrance came to light after the agreement to sell which ought to have been cleared by the petitioner by demanding the amount for the discharge in terms of the recital at page 37 of the SLP paper book (As quoted in Paragraph 3(B) above) which was never done by the petitioner. As per the recital in the Agreement to sell the petitioner had to handover the original parent title deed and other supportive documents which was again not done despite having received nearly half of the sale consideration. Since the parent title deed had not been given as required under the agreement, possession was given to respondent No.1."

5. In Gomathinayagam Pillai and Others v. Pallaniswami Nadar, (1967) 1 SCR 227 after referring to the observations of the Privy Council in Ardeshir Mama v. Flora Sassoon, L.R. 55 I.A. 360 this Court laid down that in a suit for specific performance of an agreement, the plaintiff must plead and prove that he was ready and willing to perform his part of the contract since the date of the contract, right upto the date of the hearing of the suit. The observations by this Court in that behalf were as under:-

"But the respondent has claimed a decree for specific performance and it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail. As observed by the Judicial Committee of the Privy Council in Ardeshir Mama v. Flora Sasson [L.R. 55 I.A. 360, 372]

"In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit."

The respondent must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit."

6. Similarly in J.P. Builders and Another v. A. Ramadas Rao and Another, 2011(1) R.C.R.(Civil) 604 : 2011(1) Recent Apex Judgments (R.A.J.) 88 : (2011) 1 SCC 429, it was observed by this Court in paragraphs 21 and 25 as under :-

"21. Among the three clauses, we are more concerned about clause (c). "Readiness and willingness" is enshrined in clause (c) which was not present in the old Act of 1877. However, it was later inserted with the recommendations of the 9th Law Commission's Report. This clause provides that the person seeking specific performance must prove that he has performed or has been ready and willing to perform the essential terms of the contract which are to be performed by him.

25. Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff."

7. The assurance given by the appellant at the time when the agreement dated 30.06.2000 (Ex.A1) was executed that there was no encumbrance over the suit property was not a correct statement of fact. The further recital that the "Original Parent Document" was in the Bank again was not a fair and complete disclosure. It is true that these averments were copied in the subsequent suit agreement dated 20.09.2000. However the communication dated 22.09.2001 (Ex.A6) emanating from respondent No.1 records that by the time the suit agreement was entered into the existence of the encumbrance was a well known fact. For the purposes of the present matter what is important is the common understanding with which the parties had entered into the transaction. If respondent No.1 was well aware about the existence

of encumbrance over the suit property at the time when suit agreement was entered into, he cannot thereafter submit to the contrary. In the face of such clear understanding under which the suit agreement was entered into, the High Court was completely in error in observing that the entire case put forth on the part of the appellant was required to be summarily thrown out. Further, reliance on the decision in S.P. Chengalveraya Naidu (supra) was also misplaced. That case did not arise from a suit for specific performance and more over the plaintiff in that case was found to have withheld relevant documents and as such the judgment rendered by the trial Court dismissing his claim was restored by this Court. The principle laid down therein cannot apply either on facts or in law to the present case.

8. As regards suit for specific performance, the law is very clear that the plaintiff must plead and prove his readiness and willingness to perform his part of the contract all through i.e., right from the date of the contract till the date of hearing of the suit. If respondent No.1 was well aware about the encumbrance and the parties had chosen that the balance consideration be paid to the appellant before 20.03.2001 so that the sale deed could be registered without any encumbrance, it was for respondent No.1 to have taken appropriate steps in that behalf for completion of transaction. The facts on record disclose that the first step taken by respondent No.1 after the suit agreement was well after four months, when further amount of Rs. 2 lakhs was paid on 21.01.2001. Thereafter nothing was done till 20.03.2001 by which the transaction had to be completed. The record is completely silent about any communication sent around 20.03.2001 towards completion of transaction. As a matter of fact the first step thereafter was six months after the deadline namely on 22.09.2001 when the communication (Ex.A6) was sent along with amount of Rs. 10 lakhs. The written submissions filed on behalf of respondent No.1 also do not indicate any steps till this time so as to say that he was all the while ready and willing to complete the transaction.

9. The assertion made by respondent No.1 in paragraph 7 of the plaint is a mere assertion without any relevant details as to what exactly he had done towards fulfillment of his obligations and completion of the transaction. The factual aspects as detailed above are quite clear that respondent No.1 had completely failed in his obligations and was not ready and willing to perform his part of the contract. Even going by the case set up by respondent No.1, that around 29.07.2002 an arrangement was arrived at, under which out of the balance amount Rs. 19.5 lakhs, Rs. 13.5 lakhs were to be made over by respondent No.1 to the Bank directly and rest of the sum of Rs. 6 lakhs was to be paid to the appellant in cash, the facts do not indicate any observance of these conditions. Beyond filing an application for impleadment which came to be dismissed, respondent No.1 did not take any step. The amount of Rs. 13.5 lakhs was independently deposited and discharge was obtained by the appellant.

10. If respondent No.1 was put in possession of the suit property pursuant to the

arrangement as suggested by him, his corresponding obligation under such arrangement was also twofold namely to pay off the dues to the Bank directly and pay rest of the sum to the appellant. There is nothing on record which could be consistent with discharge of such obligation on the part of respondent No.1.

11. The case put up by respondent No.1 that he was put in possession pursuant to an arrangement arrived at on or around 29.07.2002 is not free from doubt. In a matter where Rs. 19.5 lakhs were still outstanding, it is not possible to accept that the vendor may put the purchaser in possession when the original agreement did not contemplate handing over of the possession even before execution of the sale deed. The contemporaneous facts including the aspects that the appellant had initiated criminal proceedings and made complaints to various authorities about forcible possession having been taken by respondent No.1, also indicate falsity in the claim of respondent No.1. Be that as it may the basic issue is whether respondent No.1 was ready and willing to perform his part of the contract which in our considered view has to be answered against him. We are conscious that two Courts have arrived at a finding of fact but in our view such finding is completely opposed to and contrary to the facts on record and is completely unsustainable.

12. We, therefore, reject the claim of respondent No.1 and hold that the suit for specific performance preferred by respondent No.1 is required to be dismissed. At the same time we accept the counter claim made by the appellant and hold that he is entitled to recovery of possession. It appears that the assertions in the counter claim that the Kalyana Mandapam was fetching Rs. 1,80,000/- per annum were not disputed or denied by respondent No.1. On the score that the appellant was wrongfully denied and deprived of the earnings from Kalyana Mandapam for the last 16 years, he would be entitled to reasonable return. But at the same time he had retained and enjoyed sum of Rs. 18 lakhs which he had received by way of advance from respondent No.1. In the circumstances, though we would direct refund of the sum of Rs. 18 lakhs, we further deem it appropriate to direct that in the circumstances neither would respondent No.1 be entitled to any interest on the sum of Rs. 18 lakhs which was given by way of advances under the suit agreement to the appellant nor would appellant be entitled to any sum by way of mesne profits for last 18 years of wrongful possession of the suit property by respondent No.1.

13. Allowing the appeal, we therefore direct:-

(a) The suit for specific performance filed by respondent No. 1 is dismissed. Respondent No.1 shall be entitled to the refund of sum of Rs. 18 lakhs paid by way of advance under the suit agreement. Said sum shall be refunded by the appellant within three months from the date of this judgment. No interest shall be payable on said sum. However, if the said sum is not paid within three months from today as directed, it shall carry interest @ 7_ per cent from the date of expiry of said period of three months.

(b) Counter claim preferred by the appellant

is allowed. Respondent No.1 shall deliver vacant and peaceful possession of the suit property to the appellant within one month from the date of this judgment. The appellant shall however not be entitled to any mesne profits in respect of wrongful possession of the suit property by respondent No.1.

(c) The decree passed by the trial court and affirmed by the High Court stands modified accordingly. Each party shall bear his own costs throughout.

14. The appeals stand allowed in the aforesaid terms.

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2018 (1) L.S. 159 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:

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

Shakti Vahini ..Appellant

Vs.

Union of India & Ors., ..Respondents

CRIMINAL PROCEDURE CODE, Sec.144 and 151 – INDIAN PENAL CODE, Secs.300 and 302 - Writ Petition has been preferred seeking directions to State Governments and the Central Government to take preventive steps to combat honour crimes.

W.P.(Civil)No.231/2010 Date:27-3-2018

Held – Writ allowed - Measures havebeen directed

Preventive Steps :

(a) The State Governments should forthwith identify Districts, Sub-Divisions and/or Villages where instances of honour killing or assembly of Khap Panchayats have been reported in the recent past, e.g., in the last five years.

(b) The Secretary, Home Department of the concerned States shall issue directives/ advisories to the Superintendent of Police of the concerned Districts for ensuring that the Officer Incharge of the Police Stations of the identified areas are extra cautious if any instance of inter-caste or inter- religious marriage within their jurisdiction comes to their notice.

(c) If information about any proposed gathering of a KhapPanchayat comes to the knowledge of any police officer or any officer of the District Administration, he shall forthwith inform his immediate superior officer and also simultaneously intimate the jurisdictional Deputy Superintendent of Police and Superintendent of Police.

(d) On receiving such information, the Deputy Superintendent of Police (or such senior police

officer as identified by the State Governments with respect to the area/district) shall immediately interact with the members of the KhapPanchayat and impress upon them that convening of such meeting/gathering is not permissible in law and to eschew from going ahead with such a meeting. Additionally, he should issue appropriate directions to the Officer Incharge of the jurisdictional Police Station to be vigilant and, if necessary, to deploy adequate police force for prevention of assembly of the proposed gathering.

(e) Despite taking such measures, if the meeting is conducted, the Deputy Superintendent of Police shall personally remain present during the meeting and impress upon the assembly that no decision can be taken to cause any harm to the couple or the family members of the couple, failing which each one participating in the meeting besides the organisers would be personally liable for criminal prosecution. He shall also ensure that video recording of the discussion and participation of the members of the assembly is done on the basis of which the law enforcing machinery can resort to suitable action.

(f) If the Deputy Superintendent of Police, after interaction with the members of the KhapPanchayat, has reason to believe that the gathering cannot be prevented and/or is likely to cause harm to the couple or members of their family, he shall forthwith submit a proposal to the District Magistrate/Sub-Divisional Magistrate of the District/ Competent Authority of the concerned area for issuing orders to take preventive steps under the Cr.P.C., including by invoking prohibitory orders under Section 144 Cr.P.C. and also by causing arrest of the participants in the assembly under Section 151 Cr.P.C.

(g) The Home Department of the Government of India must take initiative and work in coordination with the State Governments for sensitising the law enforcement agencies and by involving all the stake holders to identify the measures for prevention of such violence and to implement the constitutional goal of social justice and the rule of law.

(h) There should be an institutional machinery with the necessary coordination of all the stakeholders. The different State Governments and the Centre ought to work on sensitization of the law enforcement agencies to mandate social initiatives and awareness to curb such violence.

J U D G M E N T

(per the Hon'ble Mr.Chief Justice of India Dipak Misra)

Assertion of choice is an insegregable facet of liberty and dignity. That is why the French philosopher and thinker, Simone Weil, has said:-

"Liberty, taking the word in its concrete sense consists in the ability to choose."

When the ability to choose is crushed in the name of class honour and the person's physical frame is treated with absolute indignity, a chilling effect dominates over the brains and bones of the society at large. The question that poignantly emanates for consideration is whether the elders of the family or clan can ever be allowed to proclaim a verdict guided by some notion of passion and eliminate the life of the young who have exercised their choice to get married against the wishes of their elders or contrary to the customary practice of the clan. The answer has to be an emphatic "No". It is because the sea of liberty and the ingrained sense of dignity do not countenance such treatment inasmuch as the pattern of behaviour is based on some extra-constitutional perception. Class honour, howsoever perceived, cannot smother the choice of an individual which he or she is entitled to enjoy under our compassionate Constitution. And this right of enjoyment of liberty deserves to be continually and zealously guarded so that it can thrive with strength and flourish with resplendence. It is also necessary to state here that the old order has to give way to the new. Feudal perception has to melt into oblivion paving the smooth path for liberty. That is how the statement of Joseph J. Ellis becomes relevant. He has propounded:-

"We don't live in a world in which there exists a single definition of honour anymore, and it's a fool that hangs on to the traditional standards and hopes that the world will come around him."

2. Presently, to the factual score. The instant Writ Petition has been preferred under Article 32 of the Constitution of India seeking directions to the respondents- State Governments and the Central Government to take preventive steps to combat honour crimes, to submit a National Plan of Action and State Plan of Action to curb crimes of the said nature and further to direct the State Governments to constitute special cells in each district which can be approached by the couples for their safety and well being. That apart, prayers have been made to issue a writ of mandamus to the State Governments to launch prosecutions in each case of honour killing and take appropriate measures so that such honour crimes and embedded evil in the mindset of certain members of the society are dealt with iron hands.

3. The petitioner-organization was authorized for conducting Research Study on "Honour Killings in Haryana and Western Uttar Pradesh" by order dated 22.12.2009 passed by the National Commission for Women. It is averred that there has been a spate of such honour killings in Haryana, Punjab and Western Uttar Pradesh and the said trend is on the increase and such

killings have sent a chilling sense of fear amongst young people who intend to get married but do not enter into wedlock out of fear. The social pressure and the consequent inhuman treatment by the core groups who arrogate to themselves the position of law makers and impose punishments which are extremely cruel instill immense fear that compels the victims to commit suicide or to suffer irreparably at the hands of these groups. The egoism in such groups getting support from similarly driven forces results in their becoming law unto themselves. The violation of human rights and destruction of fundamental rights take place in the name of class honour or group right or perverse individual perception of honour. Such individual or individuals consider their behaviour as justified leaning on the theory of socially sanctioned norms and the legitimacy of their functioning in the guise of ethicality of the community which results in vigilantism. The assembly or the collective defines honour from its own perception and describes the same in such astute cleverness so that its actions, as it asserts, have the normative justification.

4. It is contended that the existence of a woman in such an atmosphere is entirely dependent on the male view of the reputation of the family, the community and the milieu. Sometimes, it is centered on inherited local ethos which is rationally not discernible. The action of a woman or a man in choosing a life partner according to her or his own choice beyond the community norms is regarded as dishonour which, in the ultimate eventuate, innocently invites death at the cruel hands of the community prescription. The reputation of a woman is weighed according to the manner in which she conducts herself, and the family to which the girl or the woman belongs is put to pressure as a consequence of which the members of the family, on certain occasions, become silent spectators to the treatment meted out or sometimes become active participants forming a part of the group either due to determined behaviour or unwanted sense of redemption of family pride.

5. The concept of honour with which we are concerned has many facets. Sometimes, a young man can become the victim of honour killing or receive violent treatment at the hands of the family members of the girl when he has fallen in love or has entered into marriage. The collective behaves like a patriarchal monarch which treats the wives, sisters and daughters subordinate, even servile or self-sacrificing, persons moving in physical frame having no individual autonomy, desire and identity. The concept of status is accentuated by the male members of the community and a sense of masculine dominance becomes the sole governing factor of perceptive honour.

6. It is set forth in the petition that the actions which are found to be linked with honour based crimes are- (i) loss of virginity outside marriage; (ii) pre-marital pregnancy; (iii) infidelity; (iv) having unapproved relationships; (v) refusing an arranged marriage; (vi) asking for divorce; (vii) demanding custody of children after divorce; (viii) leaving the family or marital home without permission; (ix) causing scandal or gossip in the community, and (x) falling victim to rape. Expanding the aforesaid aspect, it is

stated that some of the facets relate to inappropriate relationship by a woman some of which lead to refusal of arranged marriages. Certain instances have been cited with regard to honour crimes and how the said crimes reflect the gruesome phenomena of such incidents. Murder in day light and brutal treatment in full public gaze of the members of the society reflect that the victims are treated as inanimate objects totally oblivious of the law of the land and absolutely unconcerned with the feelings of the victims who face such cruelty and eventually succumb to them. The expression of intention by the couples to get married even if they are adults is sans sense to the members who constitute the assembly, for according to them, it is the projected honour that rules supreme and the lives of others become subservient to their desires and decisions. Instances that have been depicted in the Writ Petition pertain to beating of people, shaving of heads and sometimes putting the victims on fire as if they are "flies to the wanton boys". Various news items have been referred to express anguish with regard to the abominable and horrifying incidents that the human eyes cannot see and sensitive minds can never countenance.

7. It is contended in the petition that the parallel law enforcement agency consists of leading men of a group having the same lineage or caste which quite often meets to deal with the problems that affect the group. They call themselves Panchayats which have the power to punish for the crimes and direct for social boycott or killing by a mob. Sometimes these Panchayats have the nomenclature of Khap Panchayats which have cultivated and nurtured the feeling amongst themselves that their duty is sanctified and their action of punishing the hapless victims is inviolable. The meetings of the collective and the discussions in the congregation reflect the level of passion at the highest. It is set forth that the extra-constitutional bodies which engage in feudalistic activities have no compunction to commit such crimes which are offences under the Indian Penal Code. It is because their violent acts have not been taken cognizance of by the police and their functioning is not seriously questioned by the administration. The constitutional provisions are shown scant regard and human dignity is treated at the lowest melting point by this collective. Article 21 which provides for protection of life and liberty and guards basic human rights and equality of status has been unceremoniously shown the exit by the actions of these Panchayats or the groups who, without the slightest pangs of conscience, subscribe to honour killing. In this backdrop, prayers have been made as has been stated hereinbefore.

8. A counter affidavit has been filed on the behalf of the Union of India, Ministry of Home Affairs and Ministry of Women and Child Development, respondent Nos. 1, 2 and 3 respectively. It has been contended that honour killings are treated as murder as defined under Section 300 of the IPC and punishable under Section 302 of the IPC. As the police and public order are State subjects under the Constitution, it is primarily the responsibility of the States to deal with honour killings. It is put forth that the Central Government is engaging various

States and Union Territories for considering a proposal to either amend the IPC or enact a separate legislation to address the menace of honour killing and related issues.

9. Pursuant to the order of this Court dated 9th September, 2013, the Union of India has filed another affidavit stating, inter alia, that in order to tackle the issue of 'honour killings', a Bill titled 'The Prohibition of Interference with the Freedom of Matrimonial Alliances Bill' has been recommended by the Law Commission of India vide the 242nd Law Commission Report. The Union of India has further contended that since the matter of the 242nd Law Commission Report falls under List III, i.e., Concurrent list of the Seventh Schedule to the Constitution of India, consultation with the Governments of the States and Union Territories is a sine qua non for taking a policy decision in this regard.

10. In a further affidavit dated 16th January, 2014, the Union of India has contended that as on the said date, 15 States/UTs have sent their positive responses, while responses from other remaining States/UTs were awaited. The Union of India filed an additional affidavit on 25th September, 2014 wherein vide paragraph 4 it is averred that six more States/UTs have sent positive responses in favour of 'The Prohibition of Interference with the Freedom of Matrimonial Alliances Bill' and that reminders have been sent to the remaining States/UTs whose responses are awaited. Further, it has been submitted that after receiving comments from the remaining States/UTs, necessary action shall be taken by the Union of India in the matter. It is the stand of the Union of India that a draft Bill in consultation with all stakeholders will be prepared for the avowed purpose as soon as the comments are received. It has also been set forth that several advisories have been issued to the State Governments from time to time regarding the steps needed to prevent crimes against women including special steps to be taken to curb the menace of honour killing.

11. An affidavit has been filed by the State of Punjab stating, inter alia, that it is not taking adversarial position and it does not intend to be a silent spectator to any form of honour killing and for the said reason, it has issued Memo No.5/151/10-5H4/2732-80 in the Department of Home Affairs and Justice laying down and bringing into force the revised guidelines/policies in order to remove any doubt and to clear any uncertainty and/or threat prevalent amongst the public at large. The policy, as put forth, envisages dealing with protection to newly wedded couples who apprehend danger to life and liberty for at least six weeks after marriage. It also asserted that the State is determined to take pre-emptive, protective and corrective measures and whenever any individual case comes to notice or is highlighted, appropriate action has been taken and shall also be taken by the Government. That apart, the reply affidavit reflects that all the culprits of the crime have been booked under the law and proceeded against.

12. The State of Haryana has filed an affidavit denying the allegations made against the State and further stating that adequate protection has been given to couples by virtue of the order of the High Court and District Courts and sometimes by the police

directly coming to know of the situation. It is contended that FIRs have been lodged against persons accused of the crime and the cases are progressing as per law. The stand of the State of Haryana is that an action plan has already been prepared and the Crime Against Women Cells are functioning at every district headquarter in the State and necessary publicity has already been given and the citizens are aware of those cells.

13. The State of Jharkhand has filed its response stating, inter alia, the measures taken against persons involved in such crimes. Apart from asseverating that honour killing is not common in the State of Jharkhand, it is stated that it shall take appropriate steps to combat such crimes.

14. A counter affidavit has been filed on behalf of NCT of Delhi. The affidavit states that Delhi Police does not maintain separate record for cases under the category of "Honour Killing". However, it has been mentioned that by the time the affidavit was filed, 11 cases were registered. It is urged that such cases are handled by the District Police and there is a special cell functioning within Delhi Police meant for serious crimes relating to internal security and such cases can be referred to the said cell and there is no necessity for constitution of a special cell in each police district. Emphasis has been laid that Delhi Police has sensitized the field officers in this regard so that the issues can be handled with necessary sensitivity and sensibility. The Department of Women and Child Development has also made arrangements for rehabilitation of female victims facing threat of honour killing and efforts have been made to sensitize the society against commission of such crimes. A circular dealing with the subject 'Action to be taken to prevent cases of "Honour Killing"' has been brought on record.

15. The State of Rajasthan, in its reply, had strongly deplored the exercise of unwarranted activities under the garb of khap panchayats. The State of Rajasthan contends that it has issued circulars to the police personnel to keep a check on the activities of the panchayats and further expressed its willingness to abide by any guidelines that may be issued by this Court to ameliorate and curb the evil of honour killing that subsists in our society.

16. The State of Uttar Pradesh has filed two counter affidavits wherein it is stated that it is the primary duty of the States to protect the Fundamental Rights enshrined and guaranteed under the Constitution of India. It is further contended that although there is no specific legislation to regulate and prevent "honour killing", yet effective measures under the present law are being taken by the State to control the same. The said measures are in the nature of directions and guidelines to the law enforcement agencies. Further, the State of Uttar Pradesh has brought on record that there have been no reported cases of "honour killing" or "social ostracizing" in the State for the period from 01.01.2010 till 31.12.2012. Yet, time and again, directions are being given to the police stations to keep a close watch on the activities and functioning of the Khaps. The State of Uttar Pradesh has acceded to comply with any directions which this Court may issue.

17. The State of Bihar has, in its affidavit,

acknowledged that honour killing is a heinous crime which violates the fundamental rights of the citizens. Although the State of Bihar has taken the stance that cases of honour killing in the State are almost nil, yet a list of five cases which may assume the character of honour killing have been mentioned in the affidavit. The State has further averred that several reformative steps have been taken for the upliftment and empowerment of women and constant efforts are being made to sensitize people. It has been asserted that the State of Bihar has initiated a scheme to provide National Saving Certificate amounting to Rs. 25,000/- as incentive to any woman performing inter-caste marriage in order to ensure their economic stability.

18. It has been contended by the State of Madhya Pradesh that the State Government and the police are alive to the problem of honour killings and they have created a "Crime Against Women Cell" at the State level headed by the Inspector General of Police to ensure safety of couples and active prosecution in each case of honour killing. The M.P. Government, vide order no. F/21-261/10 dated 27.01.2011, has issued specific instructions to the District Magistrates/Superintendent of Police for taking strict action in cases of honour killing.

19. It is the contention of the State of Himachal Pradesh that there are no Panchayats of the nature of Khap Panchayats operating in the State of Himachal Pradesh and that there have been no cases of honour killing reported in the past 10 years. The State avers that several measures are being taken to combat the social evils prevailing in the society.

20. An application for intervention, on behalf of several Khap Panchayats, filed by "Manushi Sanghatan" has been allowed. It has been averred by Manushi Sanghatan that, on being requested by the media to voice their concern on the activities of Khap panchayats, the Sanghatan has conducted a survey into the functioning of the Khap Panchayats, but they were unable to find any evidence to hold the Khap Panchayats responsible for honour killings occurring in the country. In this factual background, the Sanghatan contends that the proposed bill, "The Prohibition of Interference with the Freedom of Matrimonial Alliances Bill', is a futile exercise in view of the ample existing penal provisions and it is stated that the powers that the said bill aims to stipulate may have the result of giving power to vested interests to harass well meant gatherings of local communities. The intervenor has also challenged the findings of the report of the petitioner on various grounds.

21. The petitioner has filed a rejoinder affidavit wherein it has been highlighted that this Court has taken cognizance of the brutal killings that take place in the name of honour and it is urged that although some States have formed an Action Plan in pursuance of the directions issued by this Court, yet they have failed to effectively implement the same in letter and spirit. In view of this fact, effective guidelines to the police and law enforcement agencies to curb the menace of honour killing need to be formulated and implemented.

22. From the stand taken by the concerned States, it is perceivable that the authorities, while denying the incidences being visible,

do not dispute the sporadic happenstance of such occurrences and speak in a singular voice by decrying such acts. It is also clear that some such Panchayats take the positive stance demonstrating their collective effort as to how they cultivate in people the idea of inter-caste marriage and community acceptance. The duty of this Court, in view of the authorities in the field that deal with specific circumstances, is to view the scenario from the prism of pragmatic ground reality as has been projected and to act within the constitutional parameters to protect the liberty and life of citizens. Commitment to the constitutional values requires this Court to be sensitive and act in such a matter and we shall do so within the permissible boundaries and framework because as the guardian of the rights of the citizens, this Court cannot choose the path of silence.

23. Before we engage ourselves in the process what we have stated hereinabove and refer to the earlier decisions of this Court, we think it apt to refer to the 242nd Report submitted by the Law Commission of India, namely, "Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework". The relevant extracts of the Report read as follows:-

"1.2 At the outset, it may be stated that the words 'honour killings' and 'honour crimes' are being used loosely as convenient expressions to describe the incidents of violence and harassment caused to the young couple intending to marry or having married against the wishes of the community or family members. They are used more as catch phrases and not as apt and accurate expressions.

1.3 The so-called 'honour killings' or 'honour crimes' are not peculiar to our country. It is an evil which haunts many other societies also. The belief that the victim has brought dishonour upon the family or the community is the root cause of such violent crimes. Such violent crimes are directed especially against women. Men also become targets of attack by members of family of a woman with whom they are perceived to have an 'inappropriate relationship'. Changing cultural and economic status of women and the women going against their male dominated culture has been one of the causes of honour crimes. In some western cultures, honour killings often arise from women seeking greater independence and choosing their own way of life. In some cultures, honour killings are considered less serious than other murders because they arise from long standing cultural traditions and are thus deemed appropriate or justifiable. An adulterous behaviour of woman or pre-marital relationship or assertion of right to marry according to their choice, are widely known causes for honour killings in most of the countries. The report of the Special Rapporteur to U.N. (http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/42e7191fae543562c1256 ba7004e963c/$FILE/G0210428.pdf) of the year 2002 concerning cultural practices in the family that are violent towards women indicated that honour killings had been reported in Jordon, Lebanon, Morocco, Pakistan, United Arab Republic, Turkey, Yemen and other Persian Gulf countries and that they had also taken place in western countries such as France, Germany and U.K. mostly

within migrant communities. The report "Working towards the elimination of crimes against women committed in the name of honour" submitted to the United Nations High Commissioner for Human Rights is quite revealing. Apart from the other countries named above, according to the UN Commission on Human Rights, there are honour killings in the nations of Bangladesh, Brazil, Ecuador, India, Israel, Italy, Morocco, Sweden, Turkey and Uganda. According to Mr. Widney Brown, Advocacy Director for Human Rights Watch, the practice of honour killing "goes across cultures and across religions". There are reports that in some communities, many are prepared to condone the killing of someone who have dishonoured their family. The 2009 European Parliamentary Assembly noted the rising incidents of honour crimes with concern. In 2010, Britain saw a 47% rise of honour-related crimes. Data from police agencies in the UK report 2283 cases in 2010 and most of the attacks were conducted in cities that had high immigrant populations. The national legal Courts in some countries viz., Haiti, Jordon, Syria, Morocco and two Latin American countries do not penalize men killing female relatives found committing adultery or the husbands killing their wives in flagrante delicto. A survey by Elen R. Sheelay (Quoted in Anver Emon's Article on Honour Killings) revealed that 20% of Jordanites interviewed simply believe that Islam condones or even supports killing in the name of family honour which is a myth.

1.4 As far as India is concerned, "honour killings" are mostly reported from the States of Haryana, Punjab, Rajasthan and U.P. Bhagalpur in Bihar is also one of the known places for "honour killings". Even some incidents are reported from Delhi and Tamil Nadu. Marriages with members of other castes or the couple leaving the parental home to live together and marry provoke the harmful acts against the couple and immediate family members. 1.5 The Commission tried to ascertain the number of such incidents, the accused involved, the specific reasons, etc., so as to have an idea of the general crime scenario in such cases. The Government authorities of the States where incidents often occur have been addressed to furnish the information. The Director (SR) in the Ministry of Home Affairs, by her letter dated 26 May 2010, also requested the State Governments concerned to furnish the necessary information to the Commission. However, there has been no response despite reminder. But, from the newspaper reports, and reports from various other sources, it is clear that the honour crimes occur in those States as a result of people marrying without their family's acceptance and for marrying outside their caste or religion. Marriages between the couple belonging to same Gotra (family name) have also often led to violent reaction from the family members or the community members. The Caste councils or Panchayats popularly known as 'Khap Panchayats' try to adopt the chosen course of 'moral vigilantism' and enforce their diktats by assuming to themselves the role of social or community guardians."

[underlining is ours]

24. Adverting to the dimensions of the problem and the need for a separate law, the Report states:-

"2.3 The pernicious practice of Khap Panchayats and the like taking law into their own hands and pronouncing on the invalidity and impropriety of Sagotra and inter-caste marriages and handing over punishment to the couple and pressurizing the family members to execute their verdict by any means amounts to flagrant violation of rule of law and invasion of personal liberty of the persons affected.

2.4 Sagotra marriages are not prohibited by law, whatever may be the view in olden times. The Hindu Marriage Disabilities Removal Act, 1946 was enacted with a view to dispel any doubts in this regard. The Act expressly declared the validity of marriages between the Hindus belonging to the same 'gotra' or 'pravara' or different sub-divisions of same caste. The Hindu Marriage Act does not prohibit sagotra or intercaste marriages."

And further:-

"2.5 The views of village elders or family elders cannot be forced on the willing couple and no one has a right to use force or impose far-reaching sanctions in the name of vindicating community honour or family honour. There are reports that drastic action including wrongful confinement, persistent harassment, mental torture, infliction of or threats of severe bodily harm is resorted to either by close relations or some third parties against the so-called erring couple either on the exhortations of some or all the Panchayatdars or with their connivance. Several instances of murder of one or the other couple have been in the news. Social boycotts and other illegal sanctions affecting the young couple, the families and even a section of local inhabitants are quite often resorted to. All this is done in the name of tradition and honour. The cumulative effect of all such acts have public order dimensions also."

25. The Law Commission had prepared a draft Bill and while adverting to the underlying idea of the provisions of the draft Bill, it has stated:-

"2.8 The idea underlying the provisions in the draft Bill is that there must be a threshold bar against congregation or assembly for the purpose of objecting to and condemning the conduct of young persons of marriageable age marrying according to their choice, the ground of objection being that they belong to the same gotra or to different castes or communities. The Panchayatdars or caste elders have no right to interfere with the life and liberty of such young couples whose marriages are permitted by law and they cannot create a situation whereby such couples are placed in a hostile environment in the village/locality concerned and exposed to the risk of safety. Such highhanded acts have a tendency to create social tensions and disharmony too. No frame of mind or belief based on social hierarchy can claim immunity from social control and regulation, in so far as such beliefs manifest themselves as agents of enforcement of right and wrong. The very assembly for an unlawful purpose viz. disapproving the marriage which is otherwise within the bounds of law and taking consequential action should be treated as an offence as it has the potential to endanger the lives and liberties of individuals concerned. The object of such an assembly is grounded on disregard for the life and liberty of others

and such conduct shall be adequately tackled by penal law. This is without prejudice to the prosecution to be launched under the general penal law for the commission of offences including abetment and conspiracy.

2.9 Given the social milieu and powerful background of caste combines which bring to bear intense pressure on parents and relatives to go to any extent to punish the 'sinning' couples so as to restore the community honour, it has become necessary to deal with this fundamental problem. Any attempt to effectively tackle this socio-cultural phenomenon, rooted in superstition and authoritarianism, must therefore address itself to various factors and dimensions, viz, the nature and magnitude of the problem, the adequacy of existing law, and the wisdom in using penal and other measures of sanction to curb the power and conduct of caste combines. The law as it stands does not act either as a deterrence or as a sobering influence on the caste combinations and assemblies who regard themselves as being outside the pale of law. The socio-cultural outlook of the members of caste councils or Panchayats is such that they have minimal or scant regard for individual liberty and autonomy."

[Emphasis added]

26. Highlighting the aspect of autonomy of choices and liberty, the underlying object of the proposed Bill as has been stated by the Law Commission reads as under :-

"4.1 The autonomy of every person in matters concerning oneself – a free and willing creator of one's own choices and decisions, is now central to all thinking on community order and organization. Needless to emphasize that such autonomy with its manifold dimensions is a constitutionally protected value and is central to an open society and civilized order. Duly secured individual autonomy, exercised on informed understanding of the values integral to one's well being is deeply connected to a free social order. Coercion against individual autonomy will then become least necessary.

4.2 In moments and periods of social transition, the tensions between individual freedom and past social practices become focal points of the community's ability to contemplate and provide for least hurting or painful solutions. The wisdom or wrongness of certain community perspectives and practices, their intrinsic impact on liberty, autonomy and self-worth, as well as the parents' concern over impulsive and unreflective choices – all these factors come to the fore-front of consideration.

4.3 The problem, however, is the menacing phenomena of repressive social practices in the name of honor triggering violent reaction from the influential members of community who are blind to individual autonomy. …"

27. Thus, the Report shows the devastating effect of the crime and the destructive impact on the right of choice of an individual and the control of the collective over the said freedom. The Commission has emphasized on the intense pressure of the powerful community and how they punish the "sinning couples" according to their socio-cultural

perception and community honour and the action taken by them that results in extinction of the rights of individuals which are guaranteed under the Constitution. It has eloquently canvassed about the autonomy of every person in matters concerning oneself and the expression of the right which is integral to the said individual.

28. Be it noted, the draft Bill refers to "Khap Panchayat" to mean any person or group of persons who have gathered, assembled or congregated at any time with the view or intention of condemning any marriage, including a proposed marriage, not prohibited by law, on the basis that such marriage has dishonoured the caste or community tradition or brought disrepute to all or any of the persons forming part of the assembly or the family or the people of the locality concerned.

29. Presently, we shall advert to certain pronouncements of this Court where the Court, while adjudicating the lis of the said nature, has expressed its concern with regard to such social evil which is the manifestation of perverse thought, egotism at its worst and inhuman brutality.

30. In Lata Singh v. State of U.P. and another (2006) 5 SCC 475), a two- Judge Bench, while dealing with a writ petition under Article 32 of the Constitution which was filed for issuing a writ of certiorari and/or mandamus for quashing of a trial, allowed the writ petition preferred by the petitioner whose life along with her husband's life was in constant danger as her brothers were threatening them. The Court observed that there is no bar for inter-caste marriage under the Hindu Marriage Act or any other law and, hence, no offence was committed by the petitioner, her husband or husband's relatives. The Court also expressed dismay that instead of taking action against the petitioner's brothers for unlawful and high handed acts, the police proceeded against the petitioner's husband and her sisters-in-law. Being aware of the harassment faced and violence against women who marry outside their caste, the Court observed:-

"17. … This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. …"

31. After so stating, the two-Judge Bench directed the administration/police authorities throughout the country to ensure that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is neither harassed by anyone nor subjected to threats or acts of violence, and that anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law. Deliberating further, the Court painfully stated:-

"18. We sometimes hear of "honour" killings of such persons who undergo inter-caste or interreligious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal-minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism."

42. In this regard, we may fruitfully reproduce a passage from Kartar Singh v. State of Punjab (1994) 3 SCC 569) wherein C.G. Weeramantry in 'The Law in Crisis – Bridges of Understanding' emphasizing the importance of rule of law in achieving social interest has stated:-

"The protections the citizens enjoy under the Rule of Law are the quintessence of twenty centuries of human struggle. It is not commonly realised how easily these may be lost. There is no known method of retaining them but eternal vigilance. There is no known authority to which this duty can be delegated but the community itself. There is no known means of stimulating this vigilance but education of the community towards an enlightened interest in its legal system, its achievements and its problems."

Honour killing guillotines individual liberty, freedom of choice and one's own perception of choice. It has to be sublimely borne in mind that when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected and it cannot succumb to the conception of class honour or group thinking which is conceived of on some notion that remotely does not have any legitimacy.

43. The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the Constitutional Courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. Without sustenance of liberty, subject to constitutionally valid provisions of law, the life of a person is comparable to the living dead having to endure cruelty and torture without protest and tolerate imposition of thoughts and ideas without a voice to dissent or record a disagreement. The fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realization of choice within the parameters of law without any kind of subjugation. The purpose of laying stress on the concepts of individual dignity and choice within the framework of liberty is of paramount importance. We may clearly and emphatically state that life and liberty sans dignity and choice is a phenomenon that allows hollowness to enter into the constitutional recognition of identity of a person.

44. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but

in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation. The majority in the name of class or elevated honour of clan cannot call for their presence or force their appearance as if they are the monarchs of some indescribable era who have the power, authority and final say to impose any sentence and determine the execution of the same in the way they desire possibly harbouring the notion that they are a law unto themselves or they are the ancestors of Caesar or, for that matter, Louis the XIV. The Constitution and the laws of this country do not countenance such an act and, in fact, the whole activity is illegal and punishable as offence under the criminal law.

45. It has been argued on behalf of the "Khap Panchayats" that it is a misnomer to call them by such a name. The nomenclature is absolutely irrelevant. What is really significant is that the assembly of certain core groups meet, summon and forcefully ensure the presence of the couple and the family members and then adjudicate and impose punishment. Their further submission is that these panchayats are committed to the spreading of awareness of permissibility of inter-community and inter-caste marriages and they also tell the people at large how "Sapinda" and "Sagotra" marriages have no sanction of law. The propositions have been structured with immense craft and advanced with enormous zeal and enthusiasm but the fallacy behind the said proponements is easily decipherable. The argument is founded on the premise that there are certain statutory provisions and certain judgments of this Court which prescribe the prohibitory degrees for marriages and provide certain guidelines for maintaining the sex ratio and not giving any allowance for female foeticide that is a resultant effect of sex determination which is prohibited under the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex Selection) Act, 1994 (for short 'PCPNDT Act') (See : Voluntary Health Association of Punjab v. Union of India and others (2013) 4 SCC 1) and Voluntary Health Association of Punjab v. Union of India and others (2016) 10 SCC 265)).

46. The first argument deserves to be rejected without much discussion. Suffice it to say, the same relates to the recognition of matrimonial status. If it is prohibited in law, law shall take note of it when the courts are approached. Similarly, PCPNDT Act is a complete code. That apart, the concern of this Court in spreading awareness to sustain sex ratio is not to go for sex determination and resultantly female foeticide. It has nothing to do with the institution of marriage.

47. The 'Khap Panchayats' or such assembly should not take the law into their hands and further cannot assume the character of the law implementing agency, for that authority has not been conferred

upon them under any law. Law has to be allowed to sustain by the law enforcement agencies. For example, when a crime under IPC is committed, an assembly of people cannot impose the punishment. They have no authority. They are entitled to lodge an FIR or inform the police. They may also facilitate so that the accused is dealt with in accordance with law. But, by putting forth a stand that they are spreading awareness, they really can neither affect others' fundamental rights nor cover up their own illegal acts. It is simply not permissible. In fact, it has to be condemned as an act abhorrent to law and, therefore, it has to stop. Their activities are to be stopped in entirety. There is no other alternative. What is illegal cannot commend recognition or acceptance.

48. Having noted the viciousness of honour crimes and considering the catastrophic effect of such kind of crimes on the society, it is desirable to issue directives to be followed by the law enforcement agencies and also to the various administrative authorities. We are disposed to think so as it is the obligation of the State to have an atmosphere where the citizens are in a position to enjoy their fundamental rights. In this context, a passage from S. Rangarajan v. P. Jagjivan Ram and others (1989) 2 SCC 574) is worth reproducing:-

"51. We are amused yet troubled by the stand taken by the State Government with regard to the film which has received the National Award. We want to put the anguished question, what good is the protection of freedom of expression if the State does not take care to protect it? If the film, is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression.

We are absolutely conscious that the aforesaid passage has been stated in respect of a different fundamental right but the said principle applies with more vigour when the life and liberty of individuals is involved. We say so reminding the States of their constitutional obligation to comfort and nurture the sustenance of fundamental rights of the citizens and not to allow any hostile group to create any kind of trench in them.

49. We may also hold here that an assembly or Panchayat committed to engage in any constructive work that does not offend the fundamental rights of an individual will not stand on the same footing of Khap Phanchayat. Before we proceed to issue directions to meet the challenges of honour crime which includes honour killing, it is necessary to note that as many as 288 cases of honour killing were reported between 2014 and 2016. According to the data of National Crime Records Bureau (NCRB), 28 honour killing cases were reported in 2014, 192 in 2015 and 68 in the year 2016.

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