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PART - 9 (15TH MPAY 2018)

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Held: High Court had the jurisdiction to decide appeal only on substantial questions of law framed at the time of admitting the appeal - Procedure adopted by High Court while deciding appeal caused prejudice to the rights of the parties because the parties, had no knowledge about framing of the two additional questions inasmuch as they were deprived of the opportunity to address the Court on the two additional questions on which the impugned judgment was founded - Appeal is allowed and impugned judgment is set aside – Instant case is remanded to the High Court for deciding the appeal afresh on merits. **(S.C.)** ***1***

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Held – Where in a suit on a promissory note, case of the defendant as to circumstances under which promissory note was executed is not accepted, it is open to defendant to prove that the case set up by plaintiff on the basis of the recitals in promissory note, or case set up in suit notice or in plaint is not true - Once execution of promissory note is admitted, presumption u/Sec. 118(a) would arise that it is supported by consideration and such a presumption is rebuttable - Defendant can prove non-existence of consideration by raising a probable defence – Appeal suit is dismissed. **(Hyd.) 1**

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LAW SUMMARY
2018 (2)
JOURNAL SECTION

A REVIEW : IT IS NOT "AN APPEAL IN DISGUISE"

By
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'' Law has to bend before justice.''

Introduction:-

The dictionary meaning of the word 'review' is '*the act of looking*, *offer something again with a view to correction or improvement*'. It cannot be denied that the review is the creation of a statute.A judgment is open to review *inter alia*, there is a mistake apparent on the face of the record under Rule 47 Rule 1 Civil Procedure Code,1908.A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error had crept in earlier by judicial fallibility. A review is required to be confirmed to the grounds mentioned under Order 47 Rule 1 of CPC therein. A review petition has a limited purpose and cannot be allowed to be "an appeal in disguise". An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47, Rule 1 C.P.C. Review literally and even judicially means re-examination or reconsideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the Courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice.

Fundamental rule: an order made by the Court was final and could not be altered:-
In *Raja Prithvi Chand LalChoudhury v. Sukhraj Raj, AIR 1941 FC 1*, the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in *RajunderNarain Rae v. BijaiGovind Singh, 1836 (1) Moo PC 117*, that an order made by the Court was final and could not be altered : "...nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by common law, the same power which the Courts of record and statute have of rectifying the mistakes which

have crept in.... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments, or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies."

What are the circumstances to file review?:-

1) Three circumstances to file review:-

In*HaridasDas'case*, the Hon'ble Supreme Court considered that there were only three circumstances in which review of a judgment or order is permissible, viz.,

(i) discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the appellant;

(ii) such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; and

(iii) on account of some mistakes or error apparent on the face of the record or any other sufficient reason.

2) Five circumstances to file review:-

The Hon'ble Karnataka High Court had succinctly put it in *G. Venkatesh v. C. Gangaiah , (2008) 3 ICC 435* that review was permissible under five circumstances viz.,

(i) review can be made only when there is an error apparent on the face of the record, (ii) if a party has not highlighted all aspects of the case, it is not a ground on the basis of HaridasDas's case;

(iii) review of its order can be made only when there is an error apparent on the face of the record. Omission on the part of the learned counsel for the review petitioners to cite an authority of law does not amount to error apparent on the face of the record (on the basis of Doka Samuel's case;

(iv) review court shall not act as an appellate Court, as noticed in MeeraBhanja's case ; and

(v) counsel's failure to cite authorities does not amount to error apparent on the face of the record.

Recent observations by the Supreme Court on 'Review' application:-

(1) It has to be the duty of the Registry of every High Court to place the matter before the concerned Judge/Bench, so that the review application can be dealt with in quite promptitude.

(2) It is the duty and obligation of a litigant to file a review and not to keep it defective as if a defective petition can be allowed to remain on life support, as per his desire.

(3) It is the obligation of the Counsel filing an application for review to cure or remove the defects at the earliest.
(4) There may be absence of diligence on the part of the litigant, but the Registry of the High Courts is required to be vigilant.
(5) Procrastination of litigation Procrastination of litigation, in this manner, is nothing but a subterfuge taken recourse to in a manner that can epitomize cleverness in its conventional sense.
(6) High Courts requested not to keep the applications for review pending, as that is likely to delay the matter in every Court and also embolden the likes of the petitioner to take a stand intelligently depicting the same in the application for condonation of delay. See. Sasi (D) through Lrs. Vs. Aravindakshan Nair and others, 2017 (4) ALT (SC) (DB).

The power of review is not an inherent power:- It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules of procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in a miscarriage of justice nothing would preclude the Court from rectifying the error. See. **Lily** Thomas, Etc. Etc. vs Union Of India &Ors, 2000 (2) ALD (Cri) 686 = 2000 (1) ALT (Cri) 363. S. Nagaraj And Ors. vs State Of Karnataka And Anr., 1993 (3) SCALE 548.

Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice:-

Review literally and even judicially means re-examination or reconsideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the Courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest Court indicating the circumstances in which it could rectify its order the Courts culled out such power to avoid abuse of process or miscarriage of justice.

What is the basis for exercise of the power of review? :-

"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard." See. *RajunderNarain Rae v. BijaiGovind Singh, 1836 (1) Moo PC 117; RajaPrithvi Chand LalChoudhury v. Sukhraj Raj, AIR 1941 FC 1; H.A. Mohan Kumar And Ors. vs P. Muralidhar And Ors., 2005 (5) ALD 552.*

Power of review can be exercised for correction of the mistakes and not to substitute a view:-

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for distributing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution- makers who had the practical wisdom to visualize the efficacy of such provision expressly conferred the substantive power to review any judgment or order byArticle 187 of the Constitution and Clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order 40 had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order 47, Rule 1 of the Civil Procedure Code. The expression, or any other sufficient reason in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order 40, Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice. “The mere fact that two views on the same subject are possible is no ground to review the earlier judgment passed by a Bench of the same strength.” See. **H.A. Mohan Kumar And Ors. vs P. Muralidhar And Ors., 2005 (5) ALD 552.**

There be an end of law suits:-

In this context, it is important to remember an observation in 1941. His Lordship Chief Justice Gwyer, speaking for the Federal Court in Raja Prithwi Chand LallChoudhary v. Sukrai, 1941 FC 1 observed as follows:-

“This Court will not sit as a Court of appeal from its own decisions, nor will it entertain applications to review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision. It would in our opinion be intolerable and most prejudicial to the public interest if cases once decided by the Court could be re-opened and reheard: “There is a salutary maxim which ought to be observed by all Courts of last resort — *Interest reipublicaeut sit finis litium.* (It concerns the State that there be an end of law suits. It is in the interest of the State that there should be an end of law suits.) Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a Tribunal as this.”

Error apparent must strike the court at once and not on a prolonged sequential logical interpretation:-

Even if the Division Bench went beyond its powers in a writ appeal, it would be as erroneous decision and not an error apparent on the face of record and cannot be rectified through review jurisdiction under Order 47 Rule 1 of CPC. (See. Para 31), *PulugoruGopal Reddy and others Vs. Mandal Revenue Officer, Tirupathi (Urban) Mandal, Tirupathi and another, 2014 (2) ALT 576 (DB), 2014 (3) ALD 414 (DB).*

If the omission of the counsel to cite a case-law is not a ground for review:-

In *DokaSamuel v. Dr. Jacob, (1997) 4 SCC 478* it was held that the omission of the counsel to cite an authority of law does not amount to an error apparent on the face of the record so as to furnish a ground of review. The Hon'ble Karnataka High Court clarified in B. Sharma Rao v. H.Q. Assistant, 1997 AIHC 911 (Kant) that possibility of two interpretations of a provision of law is no ground of review.

If an amendment of an Act which was brought out with retrospective effect:-

In **Raja Shatrunjit v.Mohd.Azmat, (1971) 2 SCC 200**, it was noticed that a review would lie if a judgment was rendered erroneously on account of an amendment of an Act which was brought out with retrospective effect. In Gulam Abbas v. MullaAbdul , (1970) 3 SCC 643 when court did not consider a circular having the force of law, the Supreme Court considered it to be a ground to review its earlier judgment. In State of West Bengal v. Kamal, (2008) 8 SCC 612 it was noticed that an order or a decision or judgment could not be corrected merely because it was erroneous in law or on the ground that a different view could have been taken by the Court on a point of fact or law and that the review court could not sit in appeal over the decision under review. However, in Green View Tea and Industries v. Collector, (2004) 4 SCC 122, the Supreme Court held that review was permissible where the High Court did not consider the material evidence on record on the ground that it would constitute an error apparent on the face of the record.

The scope of a review:-

The scope of a review under section 114 CPC read with Order 47 Rule 1 CPC fell for consideration before the Hon'ble Supreme Court in Parsion Devi Vs. Sumitri Devi, (1997) 8 SCC 715. The Hon'ble Apex Court observed that a judgment may be open to review, *inter alia*, if there is an error apparent on the face of the record; such an error being self-evident and no requiring a process of reasoning to detect it. The Apex Court pointed out that review jurisdiction would not be applicable to an 'erroneous decision' which needed rehearing and correction and cautioned that a review petition could not be

allowed to be an appeal in disguise. See. AnapalliBhaskar and others Vs. GudiVenkateswarlu and others, 2013 (6) ALD 83.

Observations in interim order are not a binding precedent:-

Non-consideration of interim orders which are not a binding precedent, while deciding the main matter, is not a ground to review the main order of Court. See. BokkaSree Rama Krishna Vs. Osmania University, rep. by its Registrar and others, 2014 (2) ALT 652 (DB).

Conclusion:-

Review is permissible where the Court did not consider the material evidence on record on the ground that it would constitute an error apparent on the face of the record. A judgment may be open to review, if there is an error apparent on the face of the record. As I referred to above, review can be made only when there is an error apparent on the face of the record. If a party has not highlighted all aspects of the case, it is not a ground on the basis of *HaridasDas*'s case. *Omission* on the part of the learned counsel for the review petitioners to cite an authority of law does not amount to error apparent on the face of the record on the basis of *Doka Samuel*'s case. Review court shall not act as an appellate Court, as noticed in *MeeraBhanja*'s case. It concerns the State that *there be an end of law suits*. It is in the interest of the State that there should be an end of law suits. As was held in 2016, in *P. Narasimhulu Vs. Land Acquisition Officer, Madanapalle and others, 2016 (3) ALT 250 (DB)*, discovery of new matter or evidence to receive in support is not a ground for review. Section 5 of Limitation Act would apply to an appeal or any application other than an application under any of the provisions of Order 21, CPC Thus, it exempts only applications under Order 21, CPC and not any proceedings arising from the order passed on such applications such as revision and review petitions (See. VardhineediNarasimhaRao Vs. GadirajuBapiraju, 2015 (6) ALT 740). In BobbalaRamchandra Reddy Vs. Dasoju Rama Linga Chary and others, 2015 (3) ALT 78, it was observed that ''*Amendment of decree If a decree is drafted incorrectly, Court, under Section 152, CPC, can order for its correction to be in consonance with the judgment rendered by it*''. Observing this, it was held that lower appellate court erroneously dismissed the said application holding that the remedy for the petitioner is either second appeal or Review. As was held in AnapalliBhaskar and others Vs. GudiVenkateswarlu and others, 2014 (1) ALT 67, while exercising review jurisdiction, a clear distinction is essential between an error apparent on the face of record and an erroneous decision.

A Critical study of multiple importance Sec.4 of the Negotiable Instrument Act Vis-à-vis Section 12(3) of Stamp Act

By
P.Sambasivarao,
Advocate, Narsipatnam

Whether it is mandatory the promissory note should contain two signatures of the marker or borrower one as a marker of borrower and the other towards cancellation of adhesive stamps and omission if any of either of the two would lead to the instrument being void and inadmissible in evidence?

As a prefatory caveat in order to get hang over the centripode issue that eminates for consideration, it is desirable and profitable to extract the relevant provisions of the Negotiable Instrument Act and Stamp Act.

Sec.4 of Instrument Act defines a promissory Note as follows:

“A” Promissory note is an instrument in writing (not being a bank note or currency note) Containing an unconditional undertaking signed by the maker to pay certain sum of money only to or to the order of a certain person, or to bearer of the instrument’’.

It is the us evident the instrument interalia, must be signed by the maker of the instrument.

Section 12 Indian Stamp Act Cancellation of adhesive stamps :

1(a) Whoever affixes any adhesive stamp to any instrument chargeable with duty which has been executed by any person shall while affixing such stamp cancel the same so that it cannot be used again.

(b) Whoever executes any instrument on any paper bearing adhesive stamp shall, at the time of execution, unless such stamp has already been cancelled in manner aforesaid cancel the same so that it can not be used again.

(2) Any instrument bearing adhesive stamp, which has not been cancelled so that not be used again, shall, so far as such stamp is concerned be deemed be unstamped.

(3)The person required by sub section (1) to cancel an adhesive stamp may cancel it by writing on or across the stamp his name or initials or the name or initials of his firm with he true date of his so writing or in any other effectual manner.

It is thus evident the section explains the mode of cancellation of adhesive stamps, not merely by signature, and otherwise as suggested supra and its legal effect of non cancellation.

The writer made a deligent search for any authoritative pronouncement on this throny issue. It appears there is no authororitative pronouncement as to the legal affect of non compliance of two signatures as suggested supra.

However with respect to failure to cancel the adhesive stamps.

Mode of cancellation of the adhesive stamps.

1)The cancellation may be by drawing diagonal lines across the adhesive stamps is sufficient (151C202).

2) Drawing lines across anadhesive stamp is a god cancellation (AIR 1937 Rang 408 AIR 1961 Raj 43.

3) Drawing of two parallel lines on the three stamps affixed to a promissory note where the perusal of the note showed that the intention to cancel was clear (AIR 1963 AP 432)

In the back drop of these authorities it is not possible to lay down any general rule as to what mode of cancellation would be effective, Thus whatever might be the mode of cancellation there must be cancellation of the adhesive stamps affixed to rule out the possibility of inadmissibility as unstamped and the suit an a promissory note based on a unstamped promissory note maintainable.

The court has no power to direct cancellation of the uncancelled stamps (1963(2)A.N.W.R176

Conclusion

The promissory note contain two signatures of the maker one for execution as provided under section 4 of Negotiable instrument Act and the other for cancellation of adhesive stamps under section 12 of Stamp Act by any mode as suggested supra. to avoid in admissibility of the promissory note.

Note:- The writing of the name of maker or even by signature across the adhesive stamps which is meant for cancellation of the adhesive stamps as provided under section 12 of the Stamp Act does not amount to the Signature of the borrower by itself which leads to the execution of the Promissory note within the meaning of Section 4 of the Negotiable instrument Act There must be independent Signature of the borrower despite the signature of the borrower even otherwise on the adhesive stamps which is meant for cancellation of the adhesive stamps.

To the extent of the ability with which the writer is endowed an attempt is made seeking for an authoritative pronouncement on this centripode or thorny issue of day to day importance.

Any Sophisticated contra view is worth welcome in view of its importance of day to-day Occurrence.

–X–

LAW SUMMARY

2018 (2)

State of Telangana and the State of Andhra Pradesh High Court Reports

2018(2) L.S. 1

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

Present:
The Hon'ble Mr.Justice
A. Ramalingeswara Rao

Siram Srirama Murthy ..Appellant
Vs.
Meka Suryanarayanamma ..Respondent

NEGOTIABLE INSTRUMENTS ACT, Sec. 118 - Appeal - Suit was filed for recovery of certain money and interest due as on date of filing of suit with costs and future interest.

Held – Where in a suit on a promissory note, case of the defendant as to circumstances under which promissory note was executed is not accepted, it is open to defendant to prove that the case set up by plaintiff on the basis of the recitals in promissory note, or case set up in suit notice or in plaint is not true - Once execution of promissory note is admitted, presumption u/Sec. 118(a) would arise that it is supported by consideration and such a presumption is rebuttable - Defendant can prove non-existence of consideration by raising a probable defence – Appeal suit is dismissed.

A.S.No.1006/1999 Date:20-4-2018

M.V. Suresh, Advocate for the Appellant.
Mr.K.V. Subba Reddy, Advocate for the Respondent.

J U D G M E N T

This appeal is directed against the judgment and decree dated 22.01.1999 passed in O.S.No.27 of 1992 on the file of the learned Senior Civil Judge, Razole. The suit was filed for recovery of Rs.88,400/- being principal and interest due as on the date of filing of the suit with costs and future interest.

It was alleged in the plaint that the defendant borrowed an amount of Rs.65,000/- for the purpose of his necessities and executed a promissory note on 01.09.1989 in favour of the plaintiff undertaking to repay the same together with interest thereon at Rs.1.50 per mensem per hundred to her or her order on demand. The plaintiff issued a notice on 03.08.1992 and the defendant received the same. The defendant issued a reply notice on 08.08.1992 with false allegations. The suit was filed for Rs.88,400/- calculating interest at 12% p.a., on the original amount of Rs.65,000/-.

The defendant filed a written statement stating that the plaintiff is the sister of one Bolla Veera Venkata Rama Mohana Rao of Mondepulanka village, the plaintiff in O.S.No.37 of 1992 is the younger brother of the said B.V.V.R. Mohana Rao and the plaintiff in O.S.No.28 of 1992 is the mother of said B.V.V.R. Mohana Rao. All the pronotes were executed on the same date, but the date on the pronote in O.S.No.37 of 1992 was put as 26.10.1989. The plaint allegations are denied. The execution, passing of consideration under the promissory note and the validity of the same are specifically denied by the defendant. It was also stated that the suit promissory note was not true, valid and it is not supported by consideration. The defendant denied the knowledge of the plaintiff and also stated that there are no transactions between him and the plaintiff, but admitted that one B.V.V.R. Mohana Rao has got some transactions with the defendant. The said B.V.V.R. Mohana Rao was stated to be an unscrupulous money lender. It was also stated that the defendant and the said B.V.V.R. Mohana Rao stored the paddy by purchasing with a view to sell the same for higher price and in that transaction the defendant has to pay an amount of Rs.33,900/- as on 01.09.1988 and interest accrued thereon up to 01.09.1989 came to Rs.8,136/-. The defendant also borrowed an amount of Rs.20,000/- on 29.05.1988 and the interest accrued thereon came to Rs.10,500/- calculated up to 31.08.1989. The defendant further stated that he borrowed an amount of Rs.10,000/- on 06.01.1989 and the interest came to Rs.3,134/- calculated up to 31.08.1989. He also borrowed an amount of Rs.5,000/- on 07.01.1989 and the interest came to Rs.1,564/- as on 31.08.1989. The defendant and the said B.V.V.R. Mohana Rao did business in fire works during Diwali season of 1988. In that connection the defendant borrowed Rs.8,600/- and the interest came to Rs.3,612/- calculated up to 31.08.1989. When the said Mohana Rao gave pressure, threatened and coerced the defendant to execute fresh promissory notes on 01.09.1989, he executed the promissory notes in the name of his mother, Bolla Sathemma, W/o Subba Rao for Rs.43,900/- by putting the excess amount of Rs.10,000/- and the plaintiff made a material alteration in the said promissory note. The said promissory note is the subject matter of O.S.No.28 of 1992. The promissory note in favour of the present plaintiff was made up of borrowings on different dates and the total interest came to Rs.26,946/-, out of which the defendant paid an amount of Rs.4,260/- and the balance interest amount of Rs.22,686/- remained. He stated that on 01.09.1989, the promissory notes were obtained and the promissory notes in favour of the plaintiff herein and in favour of Bolla Sathemma, which is the subject matter of O.S.No.28 of 1992, are not supported by consideration. He also stated that he executed another promissory note in favour of younger brother of Mohana Rao which is the subject matter of O.S.No.37 of 1992. Thus, the promissory notes under three suits being O.S.Nos.27 of 1992, 28 of 1992 and 37 of 1992 were not supported by consideration, they were not executed, they were not valid and they were not enforceable under law. The alleged attesting witnesses were not present at the time of execution of the promissory notes and the attesting

signatures were subsequently obtained without the knowledge of the defendant. So, the said promissory notes were vitiated by material alterations. The defendant is entitled to the benefit of Act 45 of 1987 and also Act 1 of 1990 and other enactments. The suit debt even if it is true was abated.

On the basis of the above pleadings, the following issues were framed by the trial court:

1. Whether the suit promissory note is true, valid and supported by consideration?

2. Whether the suit promissory note came into existence under the circumstances mentioned in the written statement:

3. Whether the defendant is a small farmer and whether he is entitled to the benefits of Act 45 of 1987 and Act 1 of 1990.

4. To what relief? On behalf of the plaintiff, PWs.1 and 2 were examined and Exs.A1 to A4 were marked.

On behalf of the defendant, the defendant himself was examined as DW.1 besides examining three more witnesses as DWs.2 to 4 and Exs.B1 to B19 were marked.

The trial Court noticed that the defendant as DW.1 admitted the execution of Ex.A1 promissory note and held that in view of the said admission, Section 118 of the Negotiable Instruments Act comes into operation and presumption could be drawn in favour of the promisee that the promissory note was supported by consideration. In view of the same, the oral evidence of DWs.2 to 4 to the effect that the said Mohana Rao was in the habit of getting promissory notes executed in favour of his family members for excess amount than lent was not taken into consideration. It was also observed that DWs.2 to 4 are well acquainted with the defendant and their oral evidence cannot be relied upon. Since the plaintiff proved the execution of Ex.A1 by examining one of the attestors, the trial Court came to the conclusion that the suit promissory note was proved, valid and supported by consideration. With regard to plea of small farmer and his entitlement to the benefit of Act 45 of 1987 and 1 of 1990, in view of the admission of the defendant that he is having one medical shop and two kirana shops at Gannavaram and in the absence of any evidence of ownership of agricultural lands by the defendant, the plea of small farmer was rejected. Accordingly, the suit was decreed, by judgment and decree dated 22.01.1999, for a sum of Rs.88,400/- with future interest at 12% p.a. Challenging the said judgment and decree, the above appeal was filed.

In the present appeal, the point that falls for consideration is whether, in the facts and circumstances of the case, the judgment and decree of the trial court is correct or not?

Learned counsel for the appellant/defendant submitted that in the absence of the plaintiff coming to the witness box, the suit should not have been decreed and he placed reliance on a decision of the Hon'ble Supreme Court reported in **Vidhyadhar v. Manikrao (**AIR 1999 SC 1441).

Learned counsel for the respondent/plaintiff, on the other hand, by relying on the decision reported in **Bijoy Kumar Karnani v. Lahori Ram Prashe (**AIR 1973 Calcutta 465), submitted that adverse inference under Section 114 of the Evidence Act cannot be drawn for mere non-examination of the plaintiff when other material witness is produced. He further submitted that when once execution of promissory note is admitted, presumption under Section 118(a) of the Negotiable Instruments Act would arise that it is supported by consideration and in support of the said contention he relied on a decision reported in **Bharat Barrel and Drum Manufacture Company Limited v. Amin Chand Payrelal** (1999) AIR (SC) 1008)**.**

It is no doubt true that the plaintiff did not enter the witness box. The said B.V.V.R. Mohana Rao @ Bolla Rama Rao was examined as PW.1 and he stated that the plaintiff is the daughter of his elder sister and he has been looking after her affairs. He spoke about the defendant borrowing an amount of Rs.65,000/- from the plaintiff and scribing the promissory note in favour of the plaintiff on 01.09.1989. He denied doing any business with the defendant jointly. The other averments made in the written statement were also denied by him. He further stated that DW.2 is a tailor by profession and close friend of DW.1. In the cross-examination he stated that himself, his mother and his brother are residing in the same house at Mondepulanka village and the plaintiff was not having any properties at Mondepulanka village. He further stated that except the amount lent under the promissory note, he did not lend any amount. He denied the other transactions alleged by the defendant in his cross-examination.

On behalf of the plaintiff, PW.2 was also examined and he is one of the attestors of the pronote. He stated that he attested Ex.A1 pronote along with elder son of the defendant who attested Ex.A1.

The defendant as DW.1 spoke on the lines of his written statement. In the chief-examination he admitted that the said Rama Mohana Rao obtained a pronote for Rs.65,000/-, which includes Rs.43,600/- borrowed with interest at Rs.10,000/- and the balance amount of Rs.11,400/-. He admitted the execution of pronote in the name of the plaintiff.

DW.2 denied his presence at the time of negotiations between Bolla Rama Rao and the defendant. DW.3 who is the supplier of eggs stated that he used to borrow money from Bolla Rama Rao. He stated that himself, defendant and Bolla Rama Rao were only present at the time of execution of Exs.B15 and 16. Similarly, DW.4 stated that he borrowed the amount from B. Rama Rao and discharged the said amount. He is an agriculturist and doing fishing business.

Thus, the plaintiff did not enter the witness box and PW.1 who stated that he is acquainted with the facts of the case deposed on behalf of the plaintiff. One of the attestors was examined as PW.2. The defendant admitted the execution of the promissory note, but disputed the attestation and consideration.

In **Vidhyadhar's** case (supra) the plaintiff filed a suit against the defendants for redemption of the mortgage by conditional sale or in the alternative for a decree of specific performance of contract for repurchase. The property involved is 4.04 acres of land. The second defendant executed a document called 'kararkharedi" in favour of the first defendant for a sum of Rs.1500/- and delivered possession thereof to him. The document contained a stipulation that if the entire amount of Rs.1500/- was returned to the first defendant before 15th of March, 1973, the property would be given back to the second defendant. The land was subsequently transferred by the second defendant in favour of the plaintiff for a sum of Rs.5,000/- by a registered sale deed dated 19.06.1973. After purchase of the property, the plaintiff filed the above suit stating that the second defendant had offered the entire amount to the first defendant but he did not accept the amount and since the document executed by the second defendant in favour of the first defendant was a mortgage by conditional sale the property was liable to be redeemed. It was also stated that if it was held by the Court that the document did not create a mortgage but was an out and out sale, the plaintiff as transferee of the second defendant was entitled to a decree for re-conveyance of the property as the second defendant already offered the entire amount of sale consideration to the first defendant which he refused and the plaintiff was still prepared to offer the said amount to the first defendant.

The second defendant admitted the case of the plaintiff, whereas the first defendant contested the suit and stated that the document was not a mortgage by conditional sale but an out and out sale and since the amount of consideration was not tendered within the time stipulated, the plaintiff could not claim re-conveyance of the property in question. The trial Court decreed the suit and was confirmed in appeal, but was reversed by the High Court in the Second Appeal.

In the said case, the Hon'ble Supreme Court noticed that the first defendant did not enter the witness box, did not state the facts pleaded in the written statement on oath in the trial Court and avoided the witness box so that he may not be cross-examined and that would itself be enough to reject the claim that the transaction of sale between the plaintiff and the second defendant was a bogus transaction. In that connection the Hon'ble Supreme Court observed as follows:

> "16. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in **Sardar Gurbakhsh Singh v. Gurdial Singh** (AIR 1927 PC 230). This was followed by the Lahore High Court in **Kirpa Singh v. Ajaipal Singh** (AIR 1930 Lahore 1) and the Bombay High Court in **Martand Pandharinath Chaudhari v. Radhabai**

Krishnarao Deshmukh (AIR 1931 Bombay 97). The Madhya Pradesh High Court in **Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat** (AIR 1970 Madh Pra 225), also followed the Privy Council decision in **Sardar Gurbakhsh Singh's** case (supra). The Allahabad High Court in **Arjun Singh v. Virender Nath** (AIR 1971 Allahabad 29) held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab and Haryana High Court in **Bhagwan Dass v. Bhishan Chand** (AIR 1974 Punj and Har 7), drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box.

17. Defendant No. 1 himself was not a party to the transaction of sale between defendant No. 2 and the plaintiff. He himself had no personal knowledge of the terms settled between defendant No. 2 and the plaintiff. The transaction was not settled in his presence nor was any payment made in his presence. Nor, for that matter, was he a scribe or marginal witness of that sale deed. Could, in this situation, defendant No.1 have raised a plea as to the validity of the sale deed on the ground of inadequacy of consideration or part-payment thereof? Defendant No. 2 alone, who was the executant of the sale deed, could have raised an objection as to the validity of the sale deed on the ground that it was without consideration or that the consideration paid to him was highly inadequate. But he, as pointed out earlier, admitted the claim of the plaintiff whose claim in the suit was based on the sale deed, executed by defendant No. 2 in his favour. The property having been transferred to him, the plaintiff became entitled to all the reliefs which could have been claimed by defendant No. 2 against defendant No. 1 including redemption of the mortgaged property."

The instant case is a converse case, where, though the plaintiff did not enter the witness box, but the facts were spoken by PW.1 on behalf of the plaintiff and the case of the plaintiff to the extent of execution of the document was admitted by the defendant, though he denied the consideration and attestation. The suit promissory note is not a compulsorily attestable document and there is no dispute with regard to execution of Ex.A1 promissory note. In such circumstances, as rightly pointed out by the learned counsel for the respondent/plaintiff, Section 118(a) of the Negotiable Instruments Act comes into operation and the decision in **Vidhyadhar's** case (supra) is not applicable to the facts of the present case.

The facts in **Bijoy Kumar Karnani's** case (supra) are identical to the facts of the present case. The case of the plaintiff was that the defendant executed two promissory notes for a sum of Rs.5,000/- and Rs.12,000/- respectively. He also executed two receipts on the dates of the promissory notes. In spite of giving notice, the defendant failed to pay the amount and accordingly the suit was filed. In the suit, the defendant admitted the execution of the promissory notes and the receipts of the monies under the said

promissory notes. He also admitted the execution of two separate receipts/vouchers in favour of the plaintiff, but stated that the promissory notes and the receipts/vouchers were not executed at Calcutta within the jurisdiction of the Court but the same were executed out side the jurisdiction of the Court. He also pleaded that he repaid the sum covered by the promissory notes in due course and thus they were discharged. The plaintiff returned the promissory notes duly discharging it to the defendant. In the said suit, the plaintiff did not come to the witness box. The Accountant also was not called for evidence. He placed reliance on Section 114, illustration (g) of the Indian Evidence Act. In this connection, the Calcutta High Court observed as follows:

> “10. I do not understand how this decision of the Privy Council establishes the proposition made by Dr. Das that under the facts of the instant case before me for non-calling of Bejoy Kumar Karnani and the Accountant Kundu I shall draw the adverse inference which the Privy Council was pleased to draw by non-calling the second widow of Jawalla Singh. In the instant case, Sanak Chandra Biswas an employee of Bejoy Kumar Karnani gave evidence before me, stating that two documents were executed before him by the defendant at No.17, Chowringhee Road, Calcutta, and he made payment of the money which he carried to the defendant at that place. He took the promissory notes and two vouchers were signed in his presence at No.17, Chowringhee Road, Calcutta. When he took the money to the defendant No.17, Chowringhee Road, only the Darwan accompanied him. He did not remember the name of the Darwan. Apart from the Darwan, driver of the defendant drove the car. Therefore, at the time when the promissory notes were executed Bijoy Kumar Karnani was not present. There is no dispute with regard to making of the vouchers. The execution of the receipts in the vouchers is also admitted. Only the place of execution is disputed. In view of the evidence given on behalf of the plaintiff, I do not understand how the plaintiff was a material witness to prove the fact of the place of the execution of two promissory notes and why I should draw any adverse inference which the Privy Council was pleased to draw under entirely different facts and circumstances. It is true that the defendant made the case that the promissory notes were executed at 22/23, Gariahat Road, outside the said jurisdiction. But this was not the case of the plaintiff. In cross-examination it was suggested that paragraphs 1 and 2 of the plaint are verified by the plaintiff as true to his knowledge and it was suggested that the plaintiff should have come and deposed. But in view of the evidence given by the plaintiff’s witness I do not think that the plaintiff himself was a material witness to prove the place of execution. The accountant Kundu is also not a material witness in this suit. The argument made by Dr. Das,

> if accepted, would mean that the plaintiff should have been called to disprove the defendant's case. In my view, there is no question of invoking presumption of Section 114, illustration (g) of the Indian Evidence Act and the principles laid down in the said Privy Council decision, cannot apply in this case."

In **Bharat Barrel and Drum Manufacture Company Limited's** case (supra) also the defendant admitted the execution of the promissory note. The Hon'ble Supreme Court, interpreting the scope of Section 118 of the Negotiable Instruments Act and the presumptions arising under it held as follows:

> "11. Section 118 of the Act deals with the presumptions as to negotiable instruments. One of such presumptions is, that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration. This presumption is based upon a principle and is not a mere technical provision. The principle incorporated being, inferring of a presumption of consideration in the case of a negotiable instrument. A Full Bench of the Rajasthan High Court in **Heerachand v. Jeevraj** (AIR 1959 Raj. 1) held that, presumption, therefore, as to consideration is the very ingredient of negotiability and in the case of negotiable instrument, presumption as to consideration has to be made. A Full Bench of the Andhra Pradesh High Court in **G. Vasu v. Syed Yaseen Sifuddin Quadri** (AIR 1987 Andhra Pradesh 139) while dealing with the words "until the contrary is proved" held that it was permissible for the Court to look into the preponderance of the probabilities and the entire circumstances of the particular case. After referring to Sections 3, 4 and 101 to 104 of the Evidence Act, the Court held that while dealing with the absence of consideration, the Court shall have to consider not only whether it believed that consideration did not exist but also whether it considered the non-existence of the consideration so probable that a reasonable man would, under the circumstances of a particular case, could act upon the supposition that the consideration did not exist. Once the defendant showed either by direct evidence or circumstantial evidence or by use of the other presumptions of law or fact that the promissory note was not supported by consideration in the manner stated therein, the evidentiary burden would shift to the plaintiff and the legal burden reviving his legal burden to prove that the promissory note was supported by consideration and at that stage, the presumption of law covered by Section 118 of the Act would disappear. Merely because the plaintiff came forward with a case different from the one mentioned in the promissory note it would not be

correct to say that the presumption under Section 118 did not apply at all. Such a presumption applies once the execution of the promissory note is accepted by the defendant. The circumstances that the plaintiff's case was at a variance with the one contained in the promissory note could be relied by the defendant for the purpose of rebutting the presumption of shifting the evidential burden to the plaintiff. After referring to the catena of authorities on the point, the Full Bench held:—

"Having referred to the method and manner in which the presumption under Section 118 is to be rebutted and as to how, it thereafter 'disappears' we shall also make reference to three principles which are relevant in the context. The first one is connected with the practical difficulties that beset the defendant for proving a negative, namely that no other conceivable consideration exists. We had occasion to refer to this aspect earlier. Negative evidence is always in some sort circumstantial or indirect, and the difficulty or proving a negative lies in discovering a fact or series of facts inconsistent with the fact which we seek to disprove (**Gulson, Philosophy of Proof,** 2nd Edition, p. 153 quoted in **Cross on Evidence**, 3rd Edition, page 78 Fn).

In such situations, a lesser amount of proof than is usually required may avail. In fact, such evidence as renders the existence of the negative probable may shift the burden on to the other party (**Jones**, quoted in **A Sarkar on Evidence**, 12th Edition, p. 870). The second principle which is relevant in the context is the one stated in S.106 of the Evidence Act. That section states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. It is very generally stated that, where the party who does not have the evidential burden, such as the plaintiff in this case, possesses positive and complete knowledge concerning the existence of fact which the party having the evidential burden, such as the defendant in this case, is called upon the negative or has peculiar knowledge or control of evidence as such matters, the burden rests on him to produce the evidence, the negative averment being taken as true unless disapproved by the party having such knowledge or control. The difficulty or proving a negative only relieves the party having the evidential burden from the necessity of creating a positive conviction entirely by his own evidence so that, when he produces such evidence as it is in his power to produce, its probative effect is enhanced by the silence of the opponent (**Corpus Juris**, Vol. 31, Para 113). The third principle that has to be borne in mind is the one that when both parties have led evidence, the onus of proof loses all importance and becomes purely academic. Referring to this principles, the Supreme Court stated in **Narayan v. Gopal** (AIR 1960 SC 100) as follows:

> "The burden of proof is of importance only where by reason of not discharging the burden which was put upon it, a party must eventually fail, where, however, parties have joined issue and have led evidence

> and the conflicting evidence can be weighed to determine which way the issue can be decided, the abstract question of burden of proof becomes academic."

We have referred to these three principles as they are important and have to be borne in mind by the Court while deciding whether the initial 'evidential burden' under Section 118 of the Negotiable Instruments Act has been discharged by the defendant and the presumption 'disappeared' and whether the burden has shifted and later whether the plaintiff has discharged the 'legal burden' after the same was restored.

For the aforesaid reasons, we are of the view that where, in a suit on a promissory note, the case of the defendant as to the circumstances under which the promissory note was executed is not accepted, it is open to the defendant to prove that the case set up by the plaintiff on the basis of the recitals in the promissory note, or the case set up in suit notice or in the plaint is not true and rebut the presumption under Section 118 by showing a preponderance of probabilities in his favour and against the plaintiff. He need not lead evidence on all conceivable modes of consideration for establishing that the promissory note is not supported by any consideration whatsoever. The words 'until the contrary is proved' in Section 118 do not mean that the defendant must necessarily show that the document is not supported by any form of consideration but the defendant has the option to ask the court to consider the non-existence of consideration so probable that a prudent man ought, under the circumstances of the case, to fact upon the supposition that consideration did not exist. Though the evidential burden is initially placed on the defendant by virtue of Section 118 it can be rebutted by the defendant by showing a prepon-derance of probabilities that such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption 'disappears'. For the purpose of rebutting the initial evidence bur-den, the defendant can rely on direct evidence on circumstantial evidence or on presumptions of law or fact. Once such convincing rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of proba-bilities, the evidential burden shifts back to the plaintiff who has also the legal burden. Thereafter, the presumption under Section 118 does not again come to the plaintiff's rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance…………………….

> 12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of consideration by raising a probable defence. If the defendant

is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would dis-entitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such as event the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as existence of negative evidence is neither possible nor contemplated and even if led is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist. We find ourselves in the close proximity of the view expressed by the Full Benches of the Rajasthan High Court and Andhra Pradesh High Court in this regard."

Hence, in view of admission of execution of the Ex.A1 promissory note, the burden is on the defendant to prove his case. Besides himself, the defendant examined DWs.2 to 4 to show that the said Mohana Rao was in the habit of lending money, but did not speak of non-passing of consideration. On the other hand, it is the case of the defendant that he was borrowing amounts from Mohana Rao and the suit promissory note was executed for a much higher amount than the amount borrowed by him. That borrowing of higher amount was also not proved by the defendant in the instant case by producing any documentary evidence. In view of the same, the judgment and decree passed by the trial Court cannot be set aside and accordingly it is affirmed. Consequently, the Appeal Suit is dismissed with costs.

The miscellaneous petitions, if any, pending in this appeal shall stand closed.

–X–

2018(2) L.S. 12

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

Present:
The Hon'ble Mr.Justice
A. Ramalingeswara Rao

P.V. Chowdary (died)
& Ors., ..Appellants
Vs.
Lingala Narasanna
(died) & Ors., ..Respondents

SPECIFIC RELIEF ACT, Sec.16(c) - Unsuccessful defendants preferred present Appeal against Respondent/ Plaintiff in the suit, where by suit was filed for specific performance of agreement of sale executed by first defendant in favour of plaintiff - Whether plaintiff was ready and willing to perform his part of contract.

Held: An averment of readiness and willingness in plaint is not a mathematical formula which should only be in specific words - If averments in the plaint as a whole do clearly indicate readiness and willingness of plaintiff to fulfill his part of obligations under contract which is subject matter of suit, fact that they are differently worded will not militate against readiness and willingness of plaintiff in a suit for specific performance of contract for sale - Appeal Suit is dismissed.

A.S.No.1224/.1999 Date:20-4-2018

Mr.O. Manohar Reddy, Advocate for the Appellants.
Mr.D. Jagan Mohan Reddy, Advocate for the Respondents.

J U D G M E N T

The unsuccessful defendants in O.S.No.72 of 1997 on the file of the Court of the Senior Civil Judge, Penukonda preferred the present Appeal. The respondent herein, who is the plaintiff in the said suit, filed the suit for specific performance of agreement of sale dated 16.03.1985 executed by the first defendant in favour of the plaintiff and two others to the extent of share of the plaintiff and for delivery of possession or in the alternative for recovery of Rs.1,07,811/- with future interest @ 12% per annum and for costs of the suit.

The plaintiff's case is that the first defendant was the absolute owner of the property mentioned in the schedule to the plaint. He agreed to sell the property mentioned in 'A' schedule to the plaintiff on 16.03.1985 in favour of the plaintiff, Dasari Anjaneyulu and Chinna Nagaraju @ Rs.19,000/- per cent. The total extent of 'A' schedule property is Acs.0.25 cents situated in Survey No.524-1B of Dharmavaram Town, Ananthapur District. The purchasers agreed to purchase 1/3rd share of the said property and the first defendant agreed to sell the same. On the date of agreement of sale, the first defendant received a sum of Rs.1,00,000/- out of which, an amount of Rs.33,334/- was paid by the plaintiff towards advance money and for execution of agreement of sale in favour of the plaintiff and two others. The plaintiff paid a further

amount of Rs.50,000/- on 12.08.1985 to the first defendant for his share of balance consideration. The same was endorsed on the photostat copy of the agreement of sale given to the plaintiff. The plaintiff further stated that he was always ready and willing to perform his part of the contract but the first defendant was evading to perform his part of the contract on some or other ground stating that there were some family disputes. The plaintiff also learnt that one Govinda Chowdary filed a suit alleging that he was having share in the family properties of the defendants and the said suit was pending on the file of the Subordinate Judge, Ananthapur, wherein he obtained a temporary injunction in respect of the plaint schedule property. Though, in the agreement, it was stated that the balance consideration had to be paid on or before 30.06.1985, it was agreed that time was not the essence of the contract. The first defendant already executed a regular sale deed in respect of 2/3rd share of the plaint 'A' schedule property but the possession of the same was not delivered to the purchasers, in whose favour the agreement was executed along with the plaintiff. Though the plaintiff made a number of demands to accept the balance sale consideration and execute a regular sale deed, followed by a registered notice, the sale deed was not executed and the notices were also not received by the first defendant. The plaintiff sought for repayment of the amount of Rs.88,334/- received by the first defendant in case the Court was not inclined to order specific performance, by calculating interest @ 12% per annum from 16.03.1985 to 12.08.1985 on Rs.33,334/- and from 12.08.1985 to 14.03.1988 and arriving at an amount of Rs.1,07,811. Accordingly, he sought for specific performance of agreement of sale dated 16.03.1985 and for consequential delivery of possession or in the alternative, to pass a decree for a sum of Rs.1,07,811/- with future interest @ 12% per annum.

The first defendant filed a written statement admitting the execution of agreement of sale dated 16.03.1985, in favour of the plaintiff and two others @ Rs.19,000/- per cent. It was also admitted that an amount of Rs.1,00,000/- was received as advance amount, but it was stated that the said amount was paid only by Dasari Anjaneyulu and Chinna Nagaraju and the plaintiff never contributed any amount towards advance amount paid. After execution of the agreement, the other two vendees paid a sum of Rs.50,000/- each and the plaintiff also paid a sum of Rs.50,000/- and got an endorsement made on photostat copy of the agreement. Subsequently, the two other vendees got executed a registered sale deed in respect of their 2/3rd share of the property, but the plaintiff came and represented that he was not in a position to take the registered sale deed and he returned the original agreement stating that he would receive the amount of Rs.50,000/- a little later. The plaintiff was never ready and willing to perform his part of the contract and time was already treated as essence of the contract. The plaintiff did not pay the amount within the stipulated time on 30.06.1985 and he was given an opportunity of two more months and accordingly, he paid an amount of Rs.50,000/- on 12.08.1985, but he could not get the balance sale consideration and the agreement was returned. In view of the breaches committed

by the plaintiff, he was not entitled for the discretionary relief of specific performance. The allegation that the possession was not delivered to other two vendees after execution of the registered sale deed was not correct. The first defendant has not returned the original agreement and kept the same with him was denied. The defendant was always ready and willing to return the sum of Rs.50,000/- and he was not aware of sending any notice by the plaintiff and hence, the refusal does not arise.

The plaintiff filed rejoinder denying the allegation that since the plaintiff did not pay the amount, he was given an opportunity of two more months time and accordingly, he paid a sum of Rs.50,000/- before 30.08.1985. On the above pleadings, the following issues were framed for consideration by the trial Court:

> "1. Whether the plaintiff is entitled for the relief of specific performance?
>
> 2. Whether the plaintiff is entitled to recover Rs.1,7811/- (sic. Rs.1,07,811/-) and not only Rs.50,000/- with future interest at 12%?
>
> 3. To what relief?"
>
> The trial Court split the first issue into five points and they are as follows:-
>
> "1. Whether the plaintiff paid his part of advance consideration on the date of Ex.A.1, agreement?
>
> 2. Whether the time was the essence of the contract?
>
> 3. Whether the plaintiff was always ready and willing to perform his part of the contract?
>
> 4. Whether the suit by the sole plaintiff is maintainable?
>
> 5. Whether the Govinda Chowdary is a necessary party to the suit? What is the effect of his non-impleaded?"

In support of the case of the plaintiff, he was examined as P.W.1 and Exs.A.1 to A.13 were marked. The first defendant's son was examined as D.W.1 and two other vendees under the agreement were examined as D.Ws.2 and 3. Exs.B.1, dated 18.08.1989, certified copy of the decree in O.S.No.123 of 1986 on the file of the Subordinate Judge, Anantapur, was marked on behalf of the defendants.

On the basis of oral and documentary evidence, the lower Court came to the conclusion that D.Ws.2 and 3 are blindly supporting the first defendant for reasons known to them and their evidence cannot be made the basis to hold that the plaintiff has not paid his part of consideration amount at the time of Ex.A.1, agreement of sale, particularly when Ex.A.1, agreement of sale and subsequent conduct of the first defendant in Ex.A.4, endorsement, would clearly bring out that the plaintiff along with D.Ws.2 and 3 paid Rs.1,00,000/- on the date of Ex.A.1, agreement of sale, as advance sale consideration and subsequently paid Rs.50,000/- on

12.08.1985 towards balance sale consideration. Accordingly, the trial Court held that the plaintiff, D.Ws.2 and 3 altogether paid a sum of Rs.1,00,000/- as advance consideration and the plaintiff paid his 1/3rd share of Rs.33,334/- to the first defendant. The trial Court held that though time was made the essence of contract in Ex.A.1, agreement of sale, the first defendant, by his subsequent conduct has waived the said terms and hence the first defendant cannot rely on the said circumstance to non-suit the plaintiff. With regard to the readiness and willingness of the plaintiff, the trial Court noticed that the first defendant executed sale deeds in favour of D.Ws.2 and 3 under Exs.A.5 and A.6 on 10.12.1985 and they, in turn, sold the said extent of land in favour of the wife of Govinda Chowdary, by name Lakshmi Chowdary, by executing registered sale deed, dated 02.08.1993. The suit for partition was filed by Govinda Chowdary in O.S.No.123 of 1986 on 01.10.1986. The trial Court also observed that the notice sent to Noohtimadugu address under Ex.A.12 to the first defendant was returned with an endorsement that he was absent during delivery times on 14th, 15th and 16th October and he refused to receive the same on 19.10.1985. In view of the same, the trial Court observed that the first defendant refused to receive the notice issued by the plaintiff and the subsequent conduct of the first defendant was not proper. The lower Court brushed aside the argument that the delay in filing the suit, though within the time of limitation, should disentitle the plaintiff for the relief for specific performance of the agreement of sale. The lower Court gave a finding that the plaintiff was always ready and willing to perform his part of contract. The trial Court also held that though there was a compromise decree in O.S.No.123 of 1986, the share of the plaintiff was kept intact and hence, the suit in the present form by the plaintiff is maintainable for the land of an extent of Acs.8 1/3 cents of the property. With regard to maintainability of the suit without impleading Govind Chowdary, the trial Court observed that the plaintiff filed I.A.No.426 of 1993 seeking to add Govinda Chowdary as defendant No.12 in the suit, but the said application was dismissed on 31.12.1996. In those circumstances, the plaintiff cannot be found fault for not impleading Govinda Chowdary as defendant in the suit. Though Govinda Chowdary can be said to be a proper party, the effect of non-impleadment of him in the suit, is not due to any fault of the plaintiff and it could not affect the relief of specific performance of the agreement of sale. On the second issue of the entitlement of the plaintiff for refund of the amount, the plaintiff was held to be entitled for refund of the amount and accordingly the suit was decreed with costs directing the defendants 2 to 11 to execute a registered sale deed conveying title in respect of the plaint schedule property in favour of the plaintiff within a period of three months from the date of the decree by accepting the balance sale consideration by its judgment and decree, dated 18.01.1999. Challenging the said judgment and decree, the present Appeal is filed.

The point for consideration in the present appeal is whether the plaintiff was ready and willing to perform his part of the contract and whether decree passed by the trial

court is proper or not?

The learned counsel for the appellants raised the following contentions:-

> The plaintiff failed to aver in the plaint with regard to his readiness and willingness to perform his part of contract and prove the same and hence, he is not entitled for the discretionary relief of specific performance. Learned counsel further submitted that the suit is bad for non-joinder of other two purchasers, who are parties to the agreement along with the plaintiff. He lastly submitted that in view of the facts and circumstances of the case, the trial Court has not properly exercised its direction. He relied on **Pushparani S. Sundaram vs. Pauline Manomani James** (2002) 9 SCC 582), **Manjunath Anandappa vs. Tammanasa** (2003) 10 SCC 390), **I.S.Sikandar vs. K.Subramani** (2013) 15 SCC 27), **Padmakumari vs. Dasayyan** (2015) 8 SCC 695)and **Killamsetty Eswari vs. Pedada Tulasi Rao (died) per LRs (**2017 (3) ALD 573 (DB).

Learned counsel for the respondent submitted that since the plaintiff deposited the balance sale consideration before the trial Court, it is sufficient compliance for his readiness and willingness and no further proof is required. He relied on **Motilal Jain vs. Ramdasi Devi** (2000) 6 SCC 420), **Panchanan Dhara vs. Monmatha Nath Maity** (2006) 5 SCC 340)and **N.Srinivasa vs. Kuttukaran Machine Tools Limited** (2009) 5 SCC 182)**.**

The undisputed facts in the instant case are that the first defendant was absolute owner of the agricultural land of an extent of Acs.7.47 cents situated in Survey No.524-1B of Dharmavaram Town and Municipality and out of the same, he wanted to sell Acs.0.25 cents of land to the plaintiff and two others under an agreement of sale dated 16.03.1985, which is marked as Ex.A.1. He received an amount of Rs.1,00,000/- towards advance sale consideration stipulating in the agreement that the balance sale consideration was to be paid on or before 30.06.1985. Thereafter, the two other vendees under Ex.A.1, agreement, got registered sale deeds executed in their favour in respect of 2/3rd share of the property on 06.12.1985 and 09.12.1985 respectively under Exs.A.5 and A.6. The plaintiff paid an amount of Rs.50,000/- on 12.08.1985 to the first defendant beyond the period of two months period of the date specified in the agreement and the first defendant has accepted the same by making an endorsement on the copy of the agreement of sale. In the meanwhile, it appears that one Govinda Chowdary, who is the son of the sister of the first defendant, filed O.S.No.123 of 1986 on the file of the Subordinate Judge, Ananthapur, seeking partition of the properties held by the joint family claiming 3/8th share therein. The property covered by Ex.A.1, agreement of sale, is also part of the said property. In the said suit, the two other vendees under Ex.A.1, agreement of sale, were arrayed as defendants 14 and 16. The matter was compromised ultimately on 18.06.1989 and 'B' schedule in the compromise decree

states that an extent of 162/3 cents on the western side of Survey No.524-1B belongs to defendants 14 to 17, according to the sale deed executed by the first defendant. It is also agreed that the plaintiff and defendant No.7 should have the right in the balance 1/3rd on the Eastern side, which is the subject matter of the present suit and it was held that the first defendant had to take responsibility to settle the said dispute and give the said portion to the plaintiff and defendant No.7. The plaintiff issued a notice under Ex.A.7 on 14.09.1987 and the notices were refused and they were marked as Exs.A.10, 12 and 13. Insofar as the property purchased by the two other vendees under Ex.A.1, agreement of sale is concerned, they executed a registered sale deed in favour of the plaintiff in O.S.No.123 of 1986, Govinda Chowdary on 02.08.1993 and 28.12.1994 respectively under Exs.A.8 and A.9. The plaintiff filed the suit originally before the learned Subordinate Judge, Ananthapur in O.S.No.39 of 1988 and it was transferred to the Court of the Senior Civil Judge, Penukonda, by the orders of the District Judge, 10 Ananthapur, on 01.08.1997 and the same was re-numbered as O.S.No.72 of 1997 consequent to transfer. The first defendant expired *pendentelite* and his legal representatives were brought on record as defendants 2 to 11. The son of the first defendant was examined as D.W.1 and the two other vendees under Ex.A.1, agreement of sale, were examined as D.Ws.2 and 3.

A perusal of E.A.1, agreement of sale, dated 16.03.1985, shows that the land of an extent of Acs.0.25 cents in Survey No.524-1B was agreed to be sold by the first defendant at the rate of Rs.19,000/- per cent and he received the advance amount of Rs.1,00,000/- on the date of the agreement. The balance sale consideration was agreed to be paid on or before 30.06.1985. It was also stated that the advance amount would be forfeited in case of nonpayment of balance consideration within the date and in case of failure of the first defendant to execute the sale deed in spite of paying the balance sale consideration, the parties were given liberty to deposit the balance sale consideration and get the document registered.

In view of the submission made by the learned counsel for the appellants that the plaintiff failed to aver his readiness and willingness and the pleadings of the plaintiff were not in conformity with Order VI Rule 3 CPC and clause 3 of Form 47 in appendix A, it has to be seen whether such a pleading was there by the plaintiff and what is the effect of absence of such pleading as per the provisions of CPC. To examine this point, it is relevant to extract Order VI Rule 3 CPC and clause 3 of Form 47 in appendix A in this order and the same reads as under.

Order VI Rule 3 of CPC reads as under:

> **“3. Forms of pleading.-** The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings.”

Form 47 in Appendix A of CPC reads as under:

"No.47

(Specific Performance (No.1)

(Title) 11 A.B., the above named plaintiff, states as follows:-

1. By an agreement dated the ______ day of _____ and signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immovable property therein described and referred to, for the sum of ____ rupees

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

4. [*facts showing when the cause of action arose and that the Court has jurisdiction]*

5. The value of the subject matter of the suit for the purpose of jurisdiction is ____ rupees and for the purpose of court fees is ____ rupees.

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit."

It is also relevant to refer to 16(c) of the Specific Relief Act, which is as follows:-

"16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favour of a person-

(a) …

(b) …

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation.- For the purpose of clause (c),-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

In the light of the above provisions of CPC, it is relevant to refer to the paragraphs 4, 5 and 6 of the plaint and the same reads as under.

"(4) On 16-3-1985, the defendant agreed to sell the property mentioned in the A schedule in favour plaintiff, Dasari Anjaneyulu and Chinna Nagaraju at the rate of Rs.19,000.00 (Nineteen thousand only) per cent. Each of the above said persons agreed to purchase 1/3 share and the property

mentioned in the B schedule allotted to the share of plaintiff, and the defendant agreed to sell the same to the plaintiff. On the even date, the defendant received a sum of Rs.1,00,000.00 (one lakh), out of which a sum of Rs.33,334.00 is paid by the plaintiff towards advance money and excuted an agreement of sale in favour of the plaintiff, Anjaneyuulu and Chinna Nagaraju. The photostat copy of the agreement eecuted by the defendant is herewith filed and the plaintiff crave leave of this Honourable Court to read the same as part and parcel of this plaint.

(5) On 12-8-85, the plaintiff paid Rs.50,000.00 to the defendant towards his share of balance consideration. The defendant endorsed the same on the photostat copy of the agreement given to the plaintiff.

(6) The plaintiff is always ready and willing to perform his part of the contract. The defendant is always evading to perform his part of the contract on some or other ground stating that there are some family disputes."

In **Pushparani S. Sundaram**'s case, the Supreme Court held that mere averment is not sufficient but there should be proof of the same. In the said case, the plaintiff has not come to the witness box and also did not even send any communication or notice to the defendant therein about his willingness to perform his part of the contract. No evidence was let in in support of his plea and hence, it is distinguishable on facts.

In **Manjunath Anandappa**'s case, the plaintiff served a notice upon the second defendant only after expiry of the period of three years. He filed the suit after coming to know of the fact that the first defendant transferred the property in favour of third party and the first defendant did not receive any notice. In fact, the plaintiff filed the suit after six years from the date of entering into the agreement of sale. The Supreme Court observed as follows:-

> "The decisions of this Court, therefore, leave no manner of doubt that a plaintiff in a suit for specific performance of contract not only must raise a plea that he had all along been and even on the date of filing of suit was ready and willing to perform his part of contract, but also prove the same. Only in certain exceptional situation where although in letter and spirit, the exact words had not been used but readiness and willingness can be culled out from reading all the averments made by the plaintiff as a whole coupled with the materials brought on record at the trial of the suit, to the said effect, the statutory requirement of Section 16(c) of the Specific Relief Act may be held to have been complied with."

Thus, the above decision is also distinguishable on facts.

In **I.S.Sikandar**'s case, the suit was filed eleven months after expiry of the limitation period stipulated in the agreement, to get the sale deed executed in favour of the plaintiff. The sale consideration of Rs.48,000/

- was paid to defendants 1 to 4 after the termination of the earlier agreement on 10.04.1985 by notice dated 28.03.1985. The plaintiff did not get the agreement of sale executed by paying the remaining consideration to defendants 1 to 4. The plaintiff has not asked the defendants 1 to 4 to get the necessary permission from the Urban Land Ceiling and Income Tax Department after paying the Layout charges to the authorities concerned for getting the sale deed executed in his favour. Thus, the facts in the said case are also different.

In **Padmakumari**'s case, the plaintiff agreed for payment of balance sale consideration more than nine months from the date of execution of the agreement to sell, but the plaintiff argued that the payment of balance consideration would arise as per the terms and conditions of the contract agreed upon by the defendants 1 to 11, if they had measured the suit schedule property and since they failed to discharge their part, time was not the essence of the contract. The Supreme Court held that the said contention raised by the plaintiff is unaccpetable as the question of taking measurement could not arise before the plaintiff performs his part of the contract for payment of balance sale consideration within the period stipulated in the agreement. Further, after committing default by the plaintiff, the defendants 1 to 11 entered into another agreement with defendants 12 to 15 as the sale deed was registered in their favour by taking the consideration. Hence, the facts of the case are also different from the facts in the present case. The last decision relied upon by the learned counsel for the appellants is that of **Killamsetty Eswari** decided by the Division Bench of this Court. The plaintiff though stated his readiness and willingness to perform the essential terms of the contract did not produce any proof to show his readiness.

In the present case, the plaintiff contributed his share of the advance sale consideration at the time of Ex.A.1, agreement of sale, followed by payment of Rs.50,000/- on 12.08.1985, which was accepted by the first defendant. In the evidence of D.W.1, a suggestion was made stating that the plaintiff had Acs.20.00 of dry land and Acs.4.00 of wet land and was getting the yield of 200 bags of paddy and 200 bags of groundnut and earning Rs.1,00,000/- to Rs.1,50,000/- at the time of Ex.A.1. Another suggestion was also put to him stating that right from the beginning, the plaintiff was ready and willing to perform his part and get a valid sale deed executed, but the first defendant was evading the same. The refusal of the notice issued by the plaintiff on 24.09.1987 asking the defendants to receive the balance sale consideration and execute a registered sale deed clearly indicates the readiness and willingness of the plaintiff. This was further supported by deposit of balance sale consideration in the Court at the time of filing the suit. Hence, the decisions relied on by the learned counsel for the appellants are not applicable to the facts of the present case though there cannot be any dispute on the point of law.

Learned counsel for the respondents by relying on the decision in **Manjunath Anandappa**'s case, drew the attention of this Court to paragraph 24 of the said decision and submitted that in view of the deposit

of the amount in the Court, it is sufficient compliance under Section 16(c) of the Specific Relief Act. He also relied on paragraph 9 of the decision in **Motilal Jain**'s case, which are as follows:-

> "9. That decision was relied upon by a three-Judge Bench of this Court in **Syed Dastagir vs. T.R.Gopalakrishna Setty** ((1999) 6 SCC 337), wherein it was held that in construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. It is pointed out that in India most of the pleas are drafted by counsel and hence they inevitably differ from one to the other; thus, to gather the true spirit behind a plea it should be read as a whole and to test whether the plaintiff has performed his obligations, one has to see the pith and substance of the plea. It was observed: (SCC Headnote)

"Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) of the Specific Relief Act, 1963 does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of 'readiness and willingness' has to be in spirit and substance and not in letter and form." It is thus clear that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfill his part of the obligations under the contract which is the subject matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit for specific performance of contract for sale."

In **Panchanan Dhara**'s case, the point of limitation for filing suit for specific performance was considered and held that the suit filed within the period of three years from the date of agreement of sale would be in order.

Lastly, he submitted that in a contract for sale of immovable property, the time is not the essence of the contract. Even if there is an express stipulation to that effect, the said presumption can be rebutted. He placed reliance on **N.Srinivasa**'s case in this regard.

In the instant case, the first defendant accepted the payment beyond the period stipulated in the contract and he did not issue any notice terminating the contract by stipulating the period thereafter. Further, when a notice was issued by the plaintiff, he refused to receive the same. The suit cannot be held bad for non-joinder of other two purchasers along with the plaintiff since Anjaneyulu and Chinna Nagaraju already got sale deeds executed and in turn, they executed sale deed in favour of in favour of the plaintiff in O.S.No.123 of 1986.

The last submission made by the learned counsel for the appellants that the trial Court has not exercised its discretion properly while decreeing the suit for specific performance has also to be rejected in view of the observations in **Manjunath Anandappa**'s case, which are as under:

"37. In **U.P. Coop. Federation Ltd. v. Sunder Bros**. (AIR 1967 SC 249) the law is stated in the following terms:

(AIR p.253, para 8)

> "8. It is well-established that where the discretion vested in the court under Section 34 of the Indian Arbitration Act has been exercised by the lower court the appellate court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellate stage the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial Judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court s exercise of discretion. This principle is well-established; but, as has been observed by Viscount Simon, L.C., in **Charles Osenton & Co. v. Johnston** (1942 AC 130 : (1941) 2 All ER 245 (HL)) AC at p. 138:

"The law as to the reversal by a court of appeal of an order made by a Judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case'."

38. Yet again in **Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha** ((1980) 2 SCC 593 : 1980 SCC (L&S) 197 : AIR 1980 SC 1896) the law is stated in the following terms: (SCC pp.624-25, para 73)

> "73. While the remedy under Article 226 is extraordinary and is of Anglo-Saxon vintage, it is not a carbon copy of English processes. Article 226 is a sparing surgery but the lancet operates where injustice suppurates. While traditional restraints like availability of alternative remedy hold back the court, and judicial power should not ordinarily rush in where the other two branches fear to tread, judicial daring is not daunted where glaring injustice demands even affirmative action. The wide words of Article 226 are designed for service

of the lowly numbers in their grievances if the subject belongs to the court s province and the remedy is appropriate to the judicial process. There is a native hue about Article 226, without being anglophilic or anglophobic in attitude. Viewed from this jurisprudential perspective, we have to be cautious both in not overstepping as if Article 226 were as large as an appeal and not failing to intervene where a grave error has crept in. Moreover, we sit here in appeal over the High Court s judgment. And an appellate power interferes not when the order appealed is not right but only when it is clearly wrong. The difference is real, though fine." (emphasis in original)"

In the instant case, the trial Court exercised its discretion and when the said discretion is not clearly wrong on the face of it, it is not proper for this Court to interfere with the said discretion exercised by the trial Court. Accordingly, the Appeal Suit is dismissed without costs, by confirming the Judgment and Decree, dated 18.01.1999, passed in O.S.No.72 of 1997 by the Court of the Senior Civil Judge, Penukonda.

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

–X–

2018(2) L.S. 23

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

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

Mallampati Gandhi ..Appellant
Vs.
The State of Telangana, ..Respondent

PREVENTION OF CORRUPTION ACT, Sec.13(1)(e) r/w Section 13(2) – CRIMINAL PROCEDURE CODE, Secs.437 & 439 – Petitioner was presiding officer in Labour Court – Economic offence – Bail application.

Held : Strong prima facie case against petitioner which requires a thorough investigation - Judicial edifice is built not with bricks and cement but with belief and confidence reposed by the public on the institution - A minutest impious deed of even a single individual will bring disrepute to the majesty of justice – Bail application is dismissed.

Mr.C. Nageshwar Rao, Senior Counsel for Sreenivas Padala, Advocate for the Petitioner.
Special Public Prosecutor for ACB, Advocate for the Respondent.

Crl.P.No.3857/2018 Date: 16-4-2018

J U D G M E N T

1.In this petition filed under Sections 437 and 439 Cr.P.C, the petitioner/AO craves for bail.

2. FIR No.05/RCA-CR-1/2018 dt.16.03.2018 was registered against AO by the Inspector of Police, ACB, City Range-I, Hyderabad for the offence under Section 13(1)(e) r/w 13(2) of Prevention of Corruption Act, 1988 (for short "PC Act, 1988) on the allegation that the AO, who is working as Presiding Officer, Labour Court-I, Nampally, Hyderabad, has acquired assets worth Rs.1,96,44,000/- disproportionate to his known source of legal income.

3. The investigation is reported to be pending.

4. The AO was arrested on 17.03.2018 and his bail application in Crl.M.P.No.215/2018 was dismissed by the Principal Special Judge for SPE & ACB Cases-cum-IV Additional Chief Judge, City Civil Court, Hyderabad on 28.03.2018.

5. It is an economic offence. With man's pursuit for materialistic pleasures increased, the economic offences started waxing. The height of the concern for the society in recent period unfortunately is that the law protectors, the guardians of public rights are being frequently involved in economic and white collar offences. This is one of such classic examples.

6. In every bail application including the offences involving economic frauds and white collar crimes, the Courts encounter a crucial issue of individual liberty guaranteed by the Constitution under Article 21 on one hand and societal interest to bring the culprit to book and see that the fair trial and impartial justice are rendered. These two aspects being distinct poles, Courts are required to strike a judicious balance between the two conflicting interests. That is where, we are now.

7. Bail law on economic and white collar offences is well delineated and no more res integra. Echoing the concern for economic offences, which are more dangerous and having far reaching impact on society than bodily offences, Hon'ble Apex Court and several High Courts have held that in dealing with such bail applications, Courts are required to analyze and evaluate certain relevant factors cautiously.

i) In **State of Gujarat vs. Mohanlal Jitamalji Porwal and another** (1987) 2 SCC 364), the Apex Court observed thus:

> "**Para 5**: xx xx…. Ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions. The community or the State is not a persona-non-grata whose cause may be treated with disdain. The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder

may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest."

ii) In **Nimmagadda Prasad v. Central Bureau of Investigation** (2013) 7 SCC 466), the Supreme Court voiced:

"**Para 23**: Unfortunately, in the last few years, the country has been seeing an alarming rise in white-collar crimes, which has affected the fibre of the country's economic structure. Incontrovertibly, economic offences have serious repercussions on the development of the country as a whole.

Para 25: Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep-rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as a grave offence affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country."

iii) In **Shivani Rajiv Saxena v. Directorate of Enforcement and others (**2017 (4) RCR (Criminal) 646 = MANU/DE/2776/2017), the High Court of Delhi observed thus:

"**Para 13**: The offence alleged against the petitioner falls under the category of economic offences which stand on a graver footing. These crimes are professionally committed by white-collared people which inflict severe injuries on both health and wealth of the nation. Such offences need to be dealt with a heavy hand and releasing such accused on bail will affect the community at large and also jeopardize the economy of the country. The plea of parity is also not tenable in this case since the court did not consider, refer to and discuss the rigours of Section 45(1) of the PMLA. Petitioner has also failed to bring out any special circumstances for her release on bail being a woman or sick, keeping in mind the nature and gravity of offence, bail application is dismissed."

8. Thus the above rulings would emphasize the need to treat the economic offences as being class apart. In the matter of dealing with bail applications in such offences, certain parameters have been propagated by the precedential jurimetrics.

i) In **State of U.P through CBI v.**

Amarmani Tripathi (2005) 8 SCC 21), the Supreme Court pointed out the factors to be observed:

> **"Para 18**: It is well settled that the matters to be considered in an application for bail are (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 charge; (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 tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail".

ii) In **Nimmagadda Prasad** (supra), the Apex Court has, succinctly enlisted the factors to be weighed.

> **"Para 24**: While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

With the above jurisprudence on bails, the case on hand has to be perused.

9. Learned Senior Counsel for petitioner— Sri C.Nageshwar Rao, while strongly refuting the accusation against the AO would seek for bail on the following main plank of argument:

a) Firstly, out of the 19 items of the properties cited by the IO, Items 1 to 4 and 6 to 13 were alone related to petitioner and his family members and they were acquired with the prior permission of the High Court. Whereas Items 14 to 19 do not belong to him and they relate to his mother-in-law, sister-in-law and co-brother. If this aspect is properly considered, there can be no scope for holding him guilty of possessing disproportionate assets. Hence, there is no prima facie case against him.

b) Secondly, he would argue that the Vigilance Cell of High Court granted permission to register a case in a post-haste manner without calling for an

explanation from the Officer on his assets.

c) Thirdly, it is argued that the ACB officials already searched his house and bank locker and seized the concerned records and nothing more is left for further search and seizure. Added to it, the other 8 records relating to service particulars of the petitioner are available with the High Court, who is the employer of the petitioner and therefore, there is no question of petitioner either meddling with the investigation or tampering the records.

d) Fourthly, learned counsel would submit that the AO is suffering with multiple health problems. He is already on pacemaker in the heart and he was recently recommended surgery for transplantation of liver besides he is having high blood pressure. Therefore, his continued incarceration in uncongenial and unhygienic atmosphere would aggravate his health problems.

e) Above all, the marriage of the petitioner's son—Sameer is fixed to be performed on 06.05.2018. The AO being father, his presence is essential.

On all the above submissions, learned Senior Counsel sought for bail.

10. In oppugnation, learned Special Public Prosecutor for ACB(Telangana) ("Spl.P.P.") would argue that with the permission of Hon'ble High Court a discrete enquiry was conducted against the AO and report was submitted and thereupon the High Court accorded permission to ACB to register FIR against AO and to proceed further and hence, it is preposterous for the petitioner to contend that the High Court accorded permission to register the case in a post-haste manner. 9 a) Secondly, arguing on the existence of prima facie case, learned Spl.P.P. would argue that at the time of registration of FIR the disproportionate assets were roughly assessed to a tune of Rs.1,96,44,000/-. However, after conducting searches in six places excluding the bank locker and the house of J.Nagakumari, sister-in-law of AO, the disproportionate assets were revised to Rs.2,50,40,881/-. He would emphasize that after completion of entire investigation the value of disproportionate assets may increase further. Hence, there exists a strong prima facie case, he would avouch.

b) Thirdly, opposing the bail, learned Spl.P.P. would submit that the investigation is in the inceptional stage and a thorough investigation relating to financial transactions between the petitioner/AO and his sister-in-law—J.Nagakumari is very much essential. He would submit that petitioner's daughter, his sister-in-law and co-brother—Pulla Rao started M/s.Deepu Constructions wherein, from the resourceful information the IO came to know, the petitioner/AO has pumped his ill-gotten money. There was a huge investment of about 5 crores during the year 2014-15 by N.Pulla Rao. Therefore, a threadbare investigation is necessary to know the financial resources of Pulla Rao and Nagakumari and Sravani the daughter of AO and to confirm whether the AO laundered money in the said construction firm in their names. Learned Spl.P.P. would further submit that the investigation has to unearth the huge amounts paid by AO towards Margadarshi chits in the name of

his family members. The IO has to investigate about the withdrawal of Rs.41 10 lakhs from the bank account and expenditure details. Added to it, the AO applied for permission to purchase 11.67 acres of agricultural land worth Rs.32 lakhs in Yedamolu village, W.G.District. However, as per the information secured by IO he was purchasing 14 acres of land worth more than two crores and the said aspect also requires a thorough investigation. In this regard, the IO has already addressed 16 letters to different authorities to secure authenticated information and replies are being awaited from the concerned. Since the investigation is in the crucial stage, if granted bail, the AO being a Judicial Officer and law knowing person will certainly use his legal skills to sabotage the investigation and thereby, the IO cannot be able to conduct a fair investigation to disinter the truth.

c) Responding on the health problems of AO, the Spl.P.P. would submit that on the direction of Principal Special Judge for SPE and ACB Cases, Hyderabad, the AO was referred to NIMS wherein after conducting all tests on 25.03.2018 and holding that his condition was stable and normal, he was discharged from the said hospital. Any medical requirement occurs, the jail authorities can well attend to and therefore, on the medical ground he may not be enlarged. With regard to the proposed marriage of AO's son, learned Spl.P.P. would vehemently argue that in view of gravity of the offence and pending investigation, the request may not be considered as the petitioner may misuse his liberty to trample the crucial evidence. He thus prayed to dismiss the bail application.

11. The point for determination is:

"Whether there are merits in this petition to grant bail"

12. **POINT**: As already discussed supra, the bail application has to be tested on the touchstone of relevant factors propounded by the Apex Court. The first among them is about the existence of prima facie accusation against the AO. It is pertinent to note that as per FIR No.05/RCA/CR/1/2018 dated 16.03.2018, the petitioner/AO joined in Judicial Department on 05.05.1994 and thus, his check period is taken from said date till 16.03.2018.

His income from different sources during check period approx.:	Rs. 2,87,37,000-00
His expenditure during said period	Rs. 1,93,58,000-00
His likely savings	Rs. 93,79,000-00
Assets in possession of AO	Rs. 2,90,23,000-00
Assets disproportionate to income	Rs. 1,96,44,000-00

This was the figure on the date of registration of FIR.

a) Be that it may, as per remand CD dated 18.03.2018, which was prepared after conducting the searches in the house of

AO and five other places on 17.03.2018, the IO arrived at different figures as follows:

His income from different sources during check period approx.:	Rs. 2,87,37,000-00
His expenditure during said period	Rs. 1,98,83,000-00
His likely savings	Rs. 88,54,000-00
Assets in possession of AO	Rs. 3,38,94,881-00
Assets disproportionate to income	Rs. 2,50,40,881-00

Thus, after conducting preliminary searches the value of disproportionate assets increased to Rs.2,50,40,881/-. This figure does not include in itself the worth of valuable articles recovered from the locker of AO in SBI, Warasiguda Branch, Hyderabad. No doubt, in the grounds of bail application, it is the contention of AO that out of 19 items cited, items 1 to 4 and 6 to 13 alone belong to him and his family members and rest of the items belong to his sister-in-law and others. Even if the said contention is taken into consideration, the value of items 1 to 4 and 6 to 13 mentioned in remand report roughly comes to Rs.2,16,78,881/-. However, his savings for the said period were only worth Rs.88,54,000/-. Therefore, even if his contention is accepted, still the worth of disproportionate assets comes to Rs.1,28,24,881/- (Rs.2,16,78,881/- minus Rs.88,54,000/-).

Thus, a careful scrutiny of the aforesaid figures would manifest that even if the contention of petitioner is accepted and some errors in the appraisal of the income, expenditure and assets are taken into consideration, still, AO possessing assets disproportionate to his income cannot be ruled out at this juncture. Of course, I must hasten that this is only a theoretical analysis to know about the existence or non-existence of prima facie case to consider the bail application. Ultimate truth has to be exhumed after investigation. Hence, there exists a strong prima facie case against AO which requires a thorough investigation.

b) The contention of petitioner that the Registry of High Court has granted permission to register FIR in a post-haste manner does not hold water because, the letter dated 17.03.2018 of Director General, ACB to the Registrar General would show that upon securing permission, the ACB at first conducted discrete enquiry against AO and submitted a report and after satisfying with the prima facie material, the High Court accorded permission to register the FIR against AO. Hence it appears a methodical exercise was undertaken prior to registration of FIR.

13. The second factor to be considered is the nature and gravity of charge and severity of punishment in the event of conviction. The offence alleged is under Section 13 (1)(e) r/w 13(2) of PC Act, 1988 for possessing assets disproportionate to the

known sources of income of AO. The offence is punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and also liable to fine. Hence going by the Schedule II of Cr.P.C., the offence is a cognizable and non-bailable offence. Since the offence alleged falls in the category of economic and white collar offence, more than the term of punishment, its impact on the society in the event of conviction being recorded shall also be taken into consideration. It is not out of place here to mention that each time a Judicial Officer is accused of committing bribery or other related offence, the reputation of judicial institution itself stands for trial. The judicial edifice is built not with bricks and cement but with belief and confidence reposed by the public on the institution. That is why 14 absolute honesty and integrity are regarded as the minimum qualifications for a Judicial Officer to hold the mace of justice. A minutest impious deed of even a single individual will bring disrepute to the majesty of justice. In that context, the impact of the offence has to be viewed even at the stage of bail, particularly when prima facie case is found out.

14. The next factor to be considered is the possibility of AO meddling with investigation and tampering the evidence. In this regard, the submission of Spl.P.P. is that the investigation is at the infancy and the IO has to investigate the affairs of M/s.Deepu Constructions wherein the daughter and sister-in-law of AO are Directors and huge amount of Rs.5 crores was invested in it during 2014-2015 by N.Pulla Rao. The IO apprehends that the AO has pumped in his ill-gotten money into said firm. Further, investigation is also required to be made with regard to purchase of 14 acres of land by AO in Yedavolu village as he obtained permission to purchase only Ac.11.67 cts. The cost of the land is about Rs.2 crores. That apart, investigation shall be made regarding huge amount paid by AO towards Margadarsi Chits in the name of his family members and his withdrawal of Rs.41 lakhs from the bank account, his purchasing the car in the name of his mother-in-law and some other related transactions and if AO is at large, he will meddle with investigation. This Court finds force in the above submission. AO being Judicial Officer, there is a possibility of his finding out the ways to stifle the crucial evidence and scuttle the process of investigation with his legal acumen. Such a possibility cannot be obviated. The contention of AO that the entire investigation is completed with the searches conducted at various places and his service record is available with the High Court and hence, he cannot tamper with the evidence cannot be countenanced in view of the crucial part of investigation still left over.

15. The ill-health of the petitioner/AO is concerned, the bail order in Crl.M.P.No.215 of 2018 would show that on the direction of Principal Special Judge for SPE and ACB Cases, Hyderabad the AO was shifted to NIMS from Gandhi Hospital wherein after conducting all tests the authorities discharged him finding him fit. Therefore, the trial Court considering the discharge summary issued by NIMS, which revealed his fit condition, did not accede to grant bail on the health grounds. I find no reason

to come to a different conclusion.

16. Sofaras the proposed marriage of AO's son is concerned, the petitioner only produced a manuscript of 'lagna patrika' showing the marriage is fixed to be performed on 06.05.2018. No printed wedding card is produced for verification. Even assuming that his son's marriage is going to be held on 06.05.2018, in view of gravity of the offence and pending investigation at the crucial stage, a regular and full-fledged bail cannot be granted to AO at this stage.

17. Therefore, while dismissing the bail application, it is observed that in case the marriage of AO's son is scheduled to take place on 06.05.2018, the petitioner/AO is given liberty to produce the wedding card along with his affidavit affirming the said fact before the Principal Special Judge for SPE and ACB cases, Hyderabad, in which case the learned Judge shall direct the concerned jail authorities to enlarge him on bail for a temporary period between 04.05.2018 and 09.05.2018 (both days inclusive) on AO executing a personal bond for Rs.50,000/- (Rupees fifty thousand only) with two sureties each for likesum to the satisfaction of said Court. The AO shall surrender before the jail authorities before 5.00 PM on 09.05.2018.

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2018(2) L.S. 31 (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 Smt.Justice
T. Rajani

Ajjada Balakrishna ..Appellant
Vs.
The State of A.P., ..Respondent

INDIAN PENAL CODE, Secs.302 & 364 - Appeal against Judgment of Sessions Court - Accused is junior paternal uncle of the two children, who were murdered.

Held: When the circumstances, proving the guilt of accused are so cogent, pointing unerringly to the guilt of the accused, brushing aside all those circumstances, on the mere ground of inadequacy of motive, would not be in the interest of justice - Criminal appeal is dismissed upholding the conviction and sentence passed by Sessions Judge.

Cases referred:
(2014) 4 SCC 715
(2012) 10 SCC 464
(2017) 11 SCC 222
2018 (1) ALT (CRL.) 304 (DB) (AP)

Crl.A.No.824/11 Date: 4-4-2018

Mr.C.Vasundhara Reddy, Advocate for the Appellant.
Public Prosecutor for Respondent.

J U D G M E N T
(Per the Hon'ble Smt. Justice T.Rajani)

The judgment of the I Additional Sessions Judge, Srikakulam in SC.No.92 of 2010 dated 03.01.2011 is brought to question by way of this appeal. The I Additional Sessions Judge found the accused guilty for the offence under Section 302 of the Indian Penal code and convicted him for the same and sentenced him to undergo life imprisonment and also to pay fine of Rs.3,000/- in default of payment of fine, to undergo simple imprisonment for a period of three months and also found the accused guilty for the offence under Section 364 IPC and convicted him for the same and sentenced him to undergo simple imprisonment for a period of ten years and also to pay fine of Rs.3,000/- in default of payment of fine, to undergo simple imprisonment for a period of three months.

2. The triviality of the gain, that led the accused to commit the murder of two children, shocks our conscience. The accused is no other than the junior paternal uncle of the two children, who were murdered.

3. The facts of the case, briefly, as reflected in the charge sheet, are as follows: On the morning of 14.02.2010, the accused took the two deceased children on his TVS XL Moped and roamed in the village for some time. Later, he took them to Pedduru village, stopped his motor cycle, took the children to nearby stone, made D2, who is one of the children to sit on a boulder and took D1, who is the other child, to a nearby field and strangulated him to death with a rope, which he used to use to tie to his cloth bundles to his moped; later he pressed D2 to a boulder and strangulated the boy with the same rope. The parents of the children having not found the children for long, searched for them in and around the Dosari village and then gave a report to the police. The accused made an extra-judicial confession before the Village Revenue Officer of Aguru and later on, recoveries were made at his instance.

4. After concluding the investigation by recording the statements of the witnesses, among whom, those who saw the accused and the deceased together lastly were also present; the charge sheet was laid for the offence punishable under Sections 364 and 302 of the Indian Penal Code. The Judicial Magistrate of First Class, Palakonda, after taking cognizance of the case committed the case to the Sessions Division, Srikakulam. The Sessions Judge, in turn, made over the case to the I Additional Sessions Judge, Srikakulam for trial and disposal as per law. The learned Judge, after framing the charges for the offence under Sections 302 and 264 IPC, conducted trial of the case, during which P.Ws.1 to 17 were examined and Exs.P1 to P26 and M.Os.1 to 5 marked. None were examined on behalf of accused. The accused was

questioned on the incriminating circumstances appearing in the prosecution evidence, which he denied and stated that he did not commit any offence and that he was falsely implicated in the case and that one Ajjada Ramana is behind his false implication.

5. After hearing the arguments of both sides and considering the evidence, the I Additional Sessions Judge, Srikakulam passed the impugned judgment.

6. Aggrieved by the said judgment, this appeal is preferred on the following grounds:

> The Court below ought to have seen that there is no direct evidence to prove the guilt of the accused and the prosecution failed to prove the motive of the accused to commit the alleged offence. It ought to have seen that the motive is important when the case is based on circumstantial evidence. The Court below erred in coming to the conclusion that the appellants so-called extra-judicial confession recorded by P.W.15 is true and failed to notice that if any statement is made at the instance of the police, the said statements are not according to law. The Court below failed to notice that the case was foisted at the instance of Ajjada Ramana, who is a politician in the locality. The Court below failed to notice that no name was mentioned, suspecting the alleged offence, either in the complaint or in the report given by P.W.5. The Court below failed to notice that when the prosecution is based on circumstantial evidence, four tests have to be satisfied, which are (1) the circumstances from which conclusion of guilt is to be drawn have been fully established (2) All the facts so established are consistent only with the hypothesis of the guilt of the accused and did not exclude any hypothesis except the one sought to be proved (3) Circumstances on which reliance are placed are conclusive in nature. (4) The chain of events is such that there is no scope for any reasonable ground for a conclusion consistent with the innocence of the accused. The Court below ought to have considered that the seizure of M.Os.1 to 4 is not in accordance with the procedure. The Court below ignored the contradictions in the evidence.

7. Heard Ms. C. Vasundhara Reddy, counsel for the appellant and the learned Public Prosecutor appearing for the respondent.

8. The counsel for the appellant submits that the case is based on the evidence of the witnesses, who last saw the accused and the deceased together, which is a very weak piece of evidence, more so, when the witnesses are belated witnesses. She contends that the fact of the missing of the deceased children came to light on the very next day of their missing and if they had really seen the accused and the deceased together, they would have informed about the same to P.W.1, who is the father of the deceased children and suspicion would have been entertained against the accused immediately.

9. The Public Prosecutor, on the other hand, contends that the extra-judicial confession made by the accused before P.W.15 would brush aside all the contentions raised by the appellant's counsel, as absolutely there is no reason to disbelieve the said confession. He also submits that the fact that the rope was recovered at the instance of the accused would get strongly linked to the circumstance of last seen and would from a strong chain of circumstances, pointing to the guilt of the accused alone. The failure of the accused to explain as to what happened to the children, who were seen along with him, would also add strength to the above circumstances. He contends that there is absolutely no reason to interfere with the impugned judgment, as it has well considered the facts of the case in the background of law.

10. Based on the arguments of the counsel and the material on record, we frame the following points for determination:

1. Whether the evidence of the witnesses, who have seen the deceased and the accused together, prior to the missing of the deceased, is credible and reliable.

2. Whether the extra-judicial confession made by the accused before P.W.15 inspires confidence.

3. Whether the judgment of the Court below needs any interference.

4. To what result. POINT No.1:

11. The fact that the accused is closely related to P.W.1 has to be borne in mind while appreciating the evidence of the concerned witnesses and also the reason for their not reporting about the same to P.W.1. The accused is no other than the co-son-in-law of P.W.1, the children were seen with the accused, going on his Moped with all faith in him that he developed by virtue of being their uncle. Nothing strange would be perceived by the people to see them together and certainly, first doubt would not go against the accused. Seeing the accused and the deceased together might have been considered as a usual affair, by the witnesses concerned and that might be the reason for which they did not report the same to P.W.1 or anyone. It requires an amount of courage for the witnesses to inform about the same to P.W.1 or his family members, as the same would sound like they are suspecting the accused, who is also their family member. Since the relation between the accused and the family of P.W.1 being normal, the witnesses might not have ventured to put forth any opinion carrying their suspension. Hence, the lapse on the part of the witnesses in not informing the about their seeing the accused and the deceased together, to P.W.1 and his family members gets explained by the above reasoning.

12. There is certainly some delay in recording the statements of the witnesses. The accused was apprehended on 25.02.2010 when he was taken to the police by P.W.15, to whom he went for making confession. But the statements of the witnesses were recorded on 27.02.2010 as can be gathered from the evidence of P.W.16, who stated that he was examined by the police on 27.02.2010. It appears that until

the extra-judicial confession was made by the accused, no suspicion was entertained by any of the family members of the deceased.

13. The triviality of the gain can be gathered from the evidence of P.W.4, who is the father-in-law of P.W.1 and the accused. The motive was spoken to by P.W.4, by stating that the accused used to quarrel with him for the properties; he has given one acre of wet land and one acre of dry land and a house, to the accused, at the time of marriage and did not give any dowry. The accused is his nephew, being his sisters son. He could not give any reason for the accused killing the children, as he had already given the properties and did not suspect that the accused would kill the children.

In the cross-examination, he further clarifies that there are no big disputes between himself and the accused and the accused only now and then used to ask him for the properties. He has not given land to P.W.1 and only demarked the land to P.W.1. They went to work in his land on the date of the incident. P.W.1 also seems to have not considered the dispute with the accused, serious. He states that the accused had one son and on the date of killing the children of P.W.1, another son was born to him. He states that the accused killed the sons of P.W.1 under the impression that his father-in-law might give two acres of land to the sons of P.W.1 by adopting them. He also speaks about his father-in-law giving one acre each to his daughters.

14. The evidence of P.W.1 also shows that the accused also made searches for the children, along with them and he was also present at the time of the funeral of the deceased. Hence, in the above circumstances, there would not be any reason, for either P.W.1 or anyone else, to suspect the accused. As already observed, in the background of the accused moving with P.W.1 even after the death of the children and P.W.1 and his family members not expressing any suspicion against the accused, the witnesses, who saw the accused and the deceased together, might not have felt it proper to report to them the said fact, which would imply an expression of suspicion.

15. When we understand the reasons for the witnesses not revealing their seeing the accused and the deceased together, in the above manner, their evidence would become wholly reliable.

16. P.W.1 speaks about the missing of his children and their searching for them and about the presence of the accused and their identifying the same near Pedduru. Ligature mark was found on the neck of his elder son and the younger sons face was completely blood-stained and he was on a rock.

17. P.W.2 is a witness, who went to raise cattle through Dhonubai road of Pedduru village and came across the dead bodies of the two children and he, in turn, informed to L.W.4, Raju, who also came and saw the dead bodies and informed the same to L.W.5, who is a teacher and they took L.W.5 also to the spot, L.W.5, in turn, informed the same to the police.

18. P.W.3 is also a similar witness. P.W.4, as already discussed, is the father-in-law of the accused and P.W.1, also participated in the search made for the children. According to him, Rajam police informed him about the presence of the bodies near Pedduru village. P.W.5 is the father of P.W.1. His evidence is not material as he also speaks about the missing of the children and recovery of their dead bodies. P.W.6 is one of the witnesses, who saw the accused on 14.02.2010, at about 4 PM at Mudidam village, a motor cycle was kept by his side and he was standing. When he talked to the accused, he told them that he went to Mudadam village and came back and then he left the place. He further specified the place where the accused was standing is a tank bund.

19. P.W.7 is a child witness, aged 13 years. He is one of the witnesses, who saw the deceased and the accused together on TVS XL Moped, which was being driven by the accused at that time. He saw them at about 11 AM on 14.02.2010. He was sitting under a Tamarind tree along with L.W.15 Vandana Vasudevarao. The accused was going on the road leading to Aguru village. He clearly stated that Naveen was sitting in front of the accused, while Nitin was sitting behind the accused.

The cross-examination of P.W.7 would answer the improbability pointed out by the counsel for the appellant, with regard to his moving with L.W.15, who is aged 23 years. He stated that he stopped his education after the death of his father and was doing mechanic work. It is a usual view in the villages, that children of the age of P.W.7, who give up education and do some work, would move with people of all ages.

20. P.W.8 is another witness, who saw the accused and the deceased together at about the same time as stated by P.W.7. The accused was seen going on a motor cycle along with two children towards Aguru road. When he questioned the accused as to where he was going, he gave an evasive reply that YETULEDULE, later he came to know that the children were missing.

In the cross-examination, when he was questioned about the vehicle number, he stated that he did not remember the number, but he stated that it is a TVS XL Blue colour Moped. He further explained that cloth business people used to maintain TVS XL Mopeds and he also does the same business. He saw the accused searching for the children in the village. He stated that he did not tell the parents of the deceased that he saw the accused along with the deceased, but he did not, however, give any reason.

21. P.W.16 is another witness, who saw the accused and the deceased together. He also saw them at about 11 AM on 14.02.2010. He stated that the accused replied in the same manner, as he replied to P.W.8. He also stated that till he was examined by P.W.1, he did not state to P.W.1 or any other witness that he saw the accused along with the children.

22. The above witnesses have categorically stated that they saw the accused taking the children on his TVS XL Moped. There

was nothing that was elicited from the cross-examination of the witnesses, which would make their evidence incredible. The recovery of motor cycle was made from the accused. The registration certificate is marked as Ex.P26, which shows that the vehicle, which is TVS XL HD, stands in the name of the accused. Hence, the said exhibit would support the evidence of the above witnesses, that the accused took the children on TVS XL Moped. The colour of the motor cycles also stands to be blue, as stated by P.W.8. Hence, we opine that the evidence of P.Ws.4, 7, 8 and 16 is trustworthy and can very well be relied upon. The point is answered accordingly.

POINT Nos.2 & 3:

23. The extra-judicial confession that the accused made before P.W.15 does not suffer from any doubt. The contention of the counsel for the appellant that the accused had no reason to confide in P.W.15 to make the confession, as he is the VRO of Aguru village, which is not the village of the accused, gets marginalized by the evidence of P.W.15 himself wherein he states that Dosari village is also included in his jurisdiction and that Aguru panchayat and Dosari panchayat are one cluster, for which he is the VRO. He also stated that the accused is a resident of Dosari village, hence, P.W.15, being a Government servant, might have been chosen by the accused, as a proper person to confide in and to make the extra-judicial confession.

24. The confession made before P.W.15 also become reliable due to the fact that it was drafted by P.W.15, in the absence of police and the signature of the accused was also obtained on the same. The VRO asked him to surrender before the police and therefore, he came to the police station. The evidence of P.W.17, who is the Investigating Officer, corroborates with the evidence of P.W.15, to the extent of P.W.15 taking the accused to the police station. Thereafter, the confession of the accused was recorded by P.W.17 in the presence of two other witnesses and recoveries were made. The accused took them and showed M.Os.1 to 3, which are clothes and M.O.4, which is a rope, used for committing the offence. He later took them to his house from where TVS Moped was recovered.

25. The recoveries made, at the instance of the accused, do not suffer from any doubt. The failure of the accused to explain as to what happened to the deceased after they were taken by him, would also form one of the strong links in the chain of circumstances. Hence, the decision relied upon the counsel for the appellant in KANHAIYA LAL v. STATE OF RAJASTHAN (1) does not help the appellant, as we do not base our judgment simply on the last seen theory but also on the other circumstances, which lend support to the judgment. The Supreme Court also observed the same, by stating that there must be something more than evidence of last seen together for establishing the connection between the accused and the crime. Though the Supreme Court held that mere non-explanation of the accused being last seen together with the deceased person by itself

1. (2014) 4 SCC 715

cannot lead to proof of guilt against him, the Supreme Court did not exclude the said fact from the arena of consideration, which can be understood from the observation made by it, that it by itself cannot lead to proof of guilt. What follows is, that it can lead to proof of guilt, if it is supported by other circumstances and evidence.

26. The Public Prosecutor, on the other hand, relies on a decision of the Supreme Court in MUNISH MUBAR v. STATE OF HARYANA(2) wherein it was held that it is obligatory on the part of the accused, while being examined under Section 313 Cr.P.C to furnish some explanation with respect to the incriminating circumstances associated with him and the Court must take note of such explanation even in case of circumstantial evidence, so as to decide whether chain of circumstances is complete. Hence, it has to be understood that the facts and circumstances of the case are relevant to appreciate the silence of the accused.

27. The Public Prosecutor, on the aspect of delay in recording the statement of the witnesses, relies on a decision of the Supreme Court in ANJAN DASGUPTA v. STATE OF WEST BENGAL (3)wherein, it was held that statements of witnesses cannot be discarded merely on the ground of delay, more so, when no explanation was sought from the Investigating Officer regarding delay. In this case also, it can be seen that no explanation was sought for from the Investigating Officer with regard to the said delay.

28. On the aspect of motive, the counsel for the appellant relies on the decision of this Court in PANCHIKATLA SREENIVASULU v. STATE OF AP (4) wherein it was held that in a case of circumstantial evidence, motive plays predominant role.

Motive, in this case is well proved. Whether it is sufficient enough to drive the accused to commit such a heinous offence or not, is a question, the answer for which is lodged in the mind of the accused. When the circumstances, proving the guilt of the accused are so cogent, pointing unerringly to the guilt of the accused, brushing aside all those circumstances, on the mere ground of inadequacy of motive, would not be in the interest of justice. We are left without any demur, in finding the accused guilty of the charged offence and consequently, do not feel the necessity of any interference with the impugned judgment.

POINT No.4:

In the result, the criminal appeal is dismissed upholding the conviction and sentence passed by the I Additional Sessions Judge, Srikakulam in SC.No.92 of 2010 dated 03.01.2011. As a sequel, the miscellaneous applications, if any pending, shall stand closed.

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2.(2012) 10 SCC 464
3.(2017) 11 SCC 222
4.2018 (1) ALT (CRL.) 304 (DB) (AP)

2018(2) L.S. 39 (D.B.)

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

Present:
The Hon'ble Mr.Acting Chief Justice Ramesh Ranganathan &
The Hon'ble Smt.Justice Kongara Vijaya Lakshmi

State of A.P., ..Appellant

Vs.

Datla Krishna Varma & Ors., ..Respondents

REGISTRATION ACT, Sec.22-A - Letters Patent Appeal, aggrieved by the interim orders passed in Writ Petition.

Held: Final relief sought for in Writ Petition should not be granted, by way of interim relief - Learned Single Judge ought not have, at the stage of admission of the Writ Petition, granted the interim relief which has effect of allowing Writ Petition itself even without giving Appellants/Respondents a reasonable opportunity of filing their counter-affidavit.

Cases Referred:
(1981) 4 SCC 8
(2001) 2 SCC 588
2002 (5) ALD 1 (LB)
(1973) 2 SCC 705
(2013) 9 SCC 221 : (2013) 4 SCC (Civ) 285
1952 SCR 28 : AIR 1952 SC 12
AIR 1983 SC 1272
(Judgment in Writ Appeal No.797 of 2016 dated 17.09.2016)
(1984) 2 SCC 436
(1985) 1 SCC 260
(1985) 3 SCC 217
(1995) 3 SCC 257
1994 Supp (3) SCC 220
(2009) 14 SCC 48
(2009) 5 SCC 452
(2004)11 SCC 168
(1994) 5 SCC 380
(2006) 10 SCC 261
(2011) 14 SCC 227 : (2012) 4 SCC (Civ) 235 : (2012) 2 SCC (L&S) 890
2002 (1) ALD 280
ILR 35 Mad. 1
2016(1) ALT 550 (FB)
1983 (67) STC 424
2001(1) ALD 443(DB)
2012 (6) ALD 458 (DB)
(1972) 2 SCC 200
1942 AC 130
AIR 1960 SC 1156
1990 Supp. SCC 7273

W.A.No.36/18 Date:3-4-2018

Learned Government Pleader for Registration and Stamps, Advocate for Appellants.
Mr.Anand Kumar Kapoor, Advocate for Respondents.

J U D G M E N T

(The Hon'ble Mr.Acting Chief Justice Ramesh Ranganathan)

These two appeals are preferred, under Clause 15 of the Letters Patent, by respondents 1, 3 and 4 in W.P. No.38480

of 2017 aggrieved by the interim orders passed by the Learned Single Judge in WPMP. No.47767 of 2017 in W.P. No.38480 of 2017 dated 15.11.2017, and in WPMP No.47768 of 2017 in W.P. No.38480 of 2017 dated 15.11.2017.

Respondents 1 and 2 herein had filed the said Writ Petition seeking a mandamus to declare the proceedings of the District Collector, Visakhapatnam dated 23.08.2017, including Sy. No.187/4 for an extent of Ac.4.35 cts of Desapatrunipalem village in the list of prohibited properties under Section 22-A(i)(a) of the Registration Act, as wholly arbitrary and opposed to the provisions of the Registration Act and the rules made thereunder. A consequential direction was sought to the Sub-Registrar, Lankelapalem, Visakhapatnam to register the document presented by the petitioner for registration. By way of interim relief, respondents 1 and 2 herein sought an order (1) in W.P.M.P. No.47768 of 2017 to suspend the endorsement dated 23.08.2017 of the District Collector, Visakhapatnam; and (2) in W.P.M.P.No.47767 of 2017 to direct the Sub-Registrar, Lankelapalem to register the documents, presented by the petitioner for registration, in respect of the property purchased under the registered sale deed No.8629 of 2005.

In his order in WPMP No.47768 of 2017 in W.P. No.38480 of 2017, the Learned Single Judge observed that, prima facie, the order of the District Collector dated 23.08.2017, refusing to delete the subject lands from the notification issued under Section 22- A(i)(a) of the Registration Act, on the ground that they are assigned lands, could not be sustained because the said order did not mention when the alleged assignment was made, and whether there was a clause prohibiting alienation in the assignment patta granted to the assignees; the condition, prohibiting alienation, was introduced for the first time by G.O.Ms. No.1142 dated 18.06.1954; unless the assignment is shown to have taken place after the said date, on which point the order of the District Collector was deliberately silent, the District Collector could not treat the subject land as Government land, and include it in the notification issued under Section 22-A(i)(a) of the Act; and the second respondent did not also advert to the proceedings dated 13.07.2004 and 25.06.2004, issued by the Mandal Revenue Officer, Paravada stating that the said lands are private patta lands, and not assigned or government lands, though the said proceedings were relied upon by the petitioners in their application made to the District Collector. The Learned Single Judge granted interim suspension of the endorsement of the District Collector dated 23.08.2017 pending disposal of the Writ Petition.

By his order, in WPMP No.47767 of 2017 in W.P. No.38480 of 2017 dated 15.11.2017, the Learned Single Judge directed the Sub-Registrar, Lankelapalem, Visakhapatnam to receive the documents presented by the respondents-writ petitioners for registration, and consider the same strictly in accordance with the provisions of the Indian Stamp Act, 1899 and the Registration Act, 1908, without reference to the proceedings dated 23.08.2017 of the District Collector, Visakhapantam, in view of the order dated

12.05.2016, within two months from the date of presentation of the document by the petitioners. The Learned Single Judge observed that any such registration would be subject to final orders in the Writ Petition, and in the case pending before the Supreme Court. While these two appeals have been preferred against the interlocutory orders passed in WPMP No.47768 of 2017 and WPMP No.47767 of 2017 respectively, the main Writ Petition i.e., W.P. No.38480 of 2017 is still pending adjudication before the Learned Single Judge.

Learned Government Pleader for Revenue (Assignment) would submit that the order of the District Collector, Visakhapatnam dated 23.08.2017 refers to the subject lands having been included in the list of prohibited properties vide his proceedings dated 08.07.2016; the Learned Single Judge has in effect granted, by way of interim relief, a relief which could only have been granted as a consequence of the Writ Petition being finally allowed; in view of Section 22-A of the Registration Act all those properties, included in the list of prohibited properties, cannot be subjected to registration; it is only if the proceedings of the District Collector dated 08.07.2016 is set aside, could the Learned Single Judge have granted a consequential direction to the Registrar to consider grant of registration of the subject property; such an order could not have been passed at the stage of admission of the Writ Petition; while W.P.No.38480 of 2017 was filed on 13.11.2017, the interim orders under appeal came to be passed within two days thereafter on 15.11.2017; an ad-interim order at the stage of admission of the Writ Petition, which has the effect of allowing the Writ Petition itself, ought not to have been passed by the Learned Single Judge; and the orders under appeal necessitate being set aside.

On the other hand Sri Anand Kumar Kapoor, Learned Counsel for the respondent-writ petitioner, would submit that the Learned Single Judge has merely followed the interim order passed by the Supreme Court in granting the relief sought for in the Writ Petition; an appeal under Clause 15 of the Letters Patent is not maintainable against an ad-interim order; the rights, over the property in dispute, is not affected by the order under appeal; Section 52 of the Transfer of Property Act enables the Court to permit lis pendens sale; such lis pendens registration does not affect the right of parties; nowhere has the appellant stated, even subsequently, that the subject document is not genuine; the order under appeal is merely a facilitative order; the Learned Single Judge has imposed a condition that the registration is subject to the result of the Special Leave Petition and the Writ Petition; and an interim order, which is passed taking a cue from the interim order of the Supreme Court, is in furtherance of the order of the Supreme Court, and does not necessitate interference. Besides placing reliance on Section 52 of the Transfer of Property Act, Sri Anand Kumar Kapoor, Learned Counsel, would also rely on SHAH BABULAL KHIMJI V. JAYABEN D KANIA(1) ; CENTRAL MINE PLANNING AND DESIGN INSTITUTE LTD. V. UNION OF INDIA(2) ; B.F. PUSHPALEELA DEVI

1) (1981) 4 SCC 8
2) (2001) 2 SCC 588

V. STATE OF A.P.(3) ; RAJENDER SINGH V. SANTA SINGH (4) AND MOHD. MEHTAB KHAN V. KHUSHNUMA IBRAHIM KHAN(5) .

In the impugned order dated 23.08.2017 the District Collector, Visakhapatnam, after referring to an earlier representation submitted by one Sri B. Radhakrishna Varma who had purchased land adjacent to that of the appellant-writ petitioner, held that Sri B. Radhakrishna Varma had purchased assigned lands which were prohibited from alienation under Section 3(1) of the A.P. Assigned Lands (Prohibition of Transfer) Act, 1977; as per Section 3(1) and 3(3) of the A.P. Assigned Lands (Prohibition of Transfer) Act, 1977; the list of prohibited properties under Section 22-A(1)(a) to (d) along with Form-III (Assigned lands list under Section 5(1) of the A.P. Assigned Lands (Prohibition of Transfer) Act) had been communicated to the registration department vide his office proceedings dated 08.07.2016; Sri B. Radhakrishna Varma had no valid title over the subject lands; hence his request for de-notification of the lands covered by Sy. No.80/4 and 187/4 of Desapatrunipalem village, from the list of prohibited properties, deserved no consideration; and it was, therefore, rejected. The Tahsildar, Parawada was directed to initiate necessary action, under the provisions of the A.P. Assigned Lands (Prohibition of Transfer) Act, 1977, by issuing notices in Forms I and II to the assignee/ purchasers, since the applicant had purchased assigned land through registered documents, and had blatantly violated the provisions of the said Act. The Tahsildar was directed to report compliance within thirty days.

In the affidavit, filed in support of W.P. No.38480 of 2017, the respondent-writ petitioner has stated that, aggrieved by the said endorsement, Sri B. Radha Krishna Varma had filed an appeal and, on its dismissal, had filed W.P. No.4293 of 2014, which was disposed of along with W.P. No.4271 of 2014 dated 25.04.2014, directing the Mandal Revenue Officer, Paravada, Visakhapatnam to verify the genuineness of the certificates issued earlier; if the certificates were genuine, he should then communicate his decision to the Sub-Registrar, Lankelapalem, Visakhapanam, and also to the respondent-writ petitioner; if, according to the Mandal Revenue Officer, the status of the land, as per the revenue records, was not private patta land, the said information should then be furnished to the petitioner; such exercise should be completed within four weeks; the petitioners are simultaneous purchasers with Sri B. Radhakrishna Varma; on being made aware of the proceedings undertaken by him, and its likely impact on the petitioners, the first petitioner along with Sri B. Radhakrishna Varma had submitted a joint representation to the District Collector on 02.03.2017 and 20.07.2017 requesting him to delete the subject survey numbers from the list made under Section 22- A(1) of the Registration Act; and the District Collector had passed the order dated 23.08.2017 even without considering the orders passed by this Court earlier.

As noted hereinabove the District Collector,

3) 2002 (5) ALD 1 (LB)
4) (1973) 2 SCC 705
5)(2013) 9 SCC 221:(2013) 4 SCC (Civ) 285

by his proceedings dated 23.08.2017, informed that the subject lands were included in the list of prohibited properties vide proceedings dated 08.07.2016. While the relief sought for in W.P.No.38480 of 2017 is to declare the proceedings of the District Collector dated 23.08.2017 as arbitrary and illegal, curiously the proceedings of the District Collector dated 08.07.2016, including these lands in the list of prohibited properties, has not even subjected to challenge in the Writ Petition. Section 22-A of the Registration Act relates to prohibition of registration of certain documents and, under sub-section (1) thereof, the classes of documents mentioned in clauses (a) to (e) thereunder are prohibited from registration. On the subject lands being included by the District Collector in the list of prohibited properties, the concerned Sub-Registrar was disabled thereafter from registering the documents in view of Section 22-A(1)(a) & (b) of the Registration Act. It is only if, and after, the subject lands are excluded from the list of prohibited properties, and the order of the District Collector including the subject lands in the said list is set aside, would the Sub-Registrar, thereafter, be entitled in law to register alienation of the subject lands.

Clause (a), of Section 22-A(1) of the Registration Act, are the documents relating to transfer of immovable property, the alienation or transfer of which is prohibited under any statute of the State or Central Government. Section 5 of the A.P. Assigned Lands (Prohibition of Transfer) Act, 1977 prohibits registration of assigned lands. The District Collector, Visakhapatnam has included the subject lands in the list of prohibited properties on the ground that they are assigned lands. Whether the subject lands are, in fact, assigned lands justifying their inclusion in the list of prohibited properties; whether the proceedings dated 13.07.2004 and 25.06.2004, issued by the Mandal Revenue Officer, required the District Collector to abstain from including the subject lands in the list of prohibited properties; whether the subject lands are assigned lands, as is claimed by the District Collector as justification for inclusion of these lands in the list of prohibited properties, or are private patta lands rendering its inclusion in the list of prohibited properties illegal, are all matters of examination in the Writ Petition after the appellants herein (respondents in the Writ Petition) are given a reasonable opportunity of filing their counter-affidavit.

By the interim order in WPMP No.47767 of 2017 dated 15.11.2017, which is under challenge in W.A. No.36 of 2017, the Sub-Registrar was directed to consider registration of the documents, without reference to the District Collectors proceedings dated 23.08.2017. The said interim order is not only a direction to the Sub-Registrar to violate the law (Section 22-A of the Registration Act), but also amounts to granting a relief which could only have been granted consequent upon the main relief, sought for in the Writ Petition, being granted. Such an order would, ordinarily, not be passed at the stage of admission without the appellants herein (respondents in the Writ Petition) being given an opportunity of filing their counter-affidavit.

An interim relief can be granted only in aid of, and as ancillary to, the main relief which may be available to the party on a final determination of his rights. (STATE OF ORISSA V. MADAN GOPAL RUNGTA (6); COTTON CORPORATION OF INDIA V. UNITED INDUSTRIAL BANK LTD (7); THE STATE OF A.P. V. M/S.MAHESWARI MINERALS (8)). The main purpose of passing an interim order is to evolve a workable formula or a workable arrangement to the extent called for by the demands of the situation, only in order that no irreparable injury is occasioned. The Court has to strike a delicate balance after considering the pros and cons of the matter to ensure that larger public interest is not jeopardized thereby. (SILIGURI MUNICIPALITY V. AMALENDU DAS(9)). Interim orders, which practically give the principal relief sought for in the writ petition, only for the reason that a prima-facie case has been made out, without considering the balance of convenience, the public interest and other considerations, should not be passed. (ASSTT. CCE V. DUNLOP INDIA LTD.(10) ; STATE OF RAJASTHAN V. SWAIKA PROPERTIES (11); BANK OF MAHARASHTRA V. RACE SHIPPING & TRANSPORT CO. (P) LTD (12); M/s.Maheswari Minerals8).

Interim orders are, ordinarily, made to maintain the status quo so that the ultimate relief to be granted, to the party approaching the Court, may not become futile. (BIHAR PUBLIC SERVICE COMMISSION V. SHIV JATAN THAKUR (DR)(13)). Interim relief is granted during the pendency of proceeding so that, while granting final relief, the court is not faced with a situation of the relief having become infructuous or that, during the pendency of the proceeding, an unfair advantage has been taken by the party in default or against whom interim relief is sought. The object behind granting interim relief is to maintain the status quo so that the final relief can be appropriately moulded without the party's position being altered during the pendency of the proceedings. (Cotton Corporation of India7). It is settled legal position that, by way of interim relief, the final relief should not be granted till the matter is decided one way or the other, (MEHUL MAHENDRA THAKKAR V. MEENA MEHUL THAKKAR 14); ALL INDIA ANNA DRAVIDA MUNNETRA KAZHAGAM V. GOVT. OF T.N.,(15)), as interlocutory orders are made in aid of final orders and not vice versa. (SHIPPING CORPORATION OF INDIA LTD. V. MACHADO BROTHERS(16) ; KAVITA TREHAN V. BALSARA HYGIENE PRODUCTS LTD (17); AND PITTA NAVEEN KUMAR V. RAJA NARASAIAH ZANGITI (18)). An interim order should not be of such a nature as to result in the writ petition being finally allowed at an interim stage nor should relief be granted,

6) 1952 SCR 28 : AIR 1952 SC 12
7) AIR 1983 SC 1272
8) (Judgment in Writ Appeal No.797 of 2016 dated 17.09.2016)
9) (1984) 2 SCC 436
10) (1985) 1 SCC 260
11) (1985) 3 SCC 217
12) (1995) 3 SCC 257
13) 1994 Supp (3) SCC 220
14) (2009) 14 SCC 48
15) (2009) 5 SCC 452
16) (2004)11 SCC 168
17) (1994) 5 SCC 380
18) (2006) 10 SCC 261

at the interlocutory stage, by which the final relief, which is asked for and is available at the disposal of the matter, is granted. (UPSC V. S. KRISHNA CHAITANYA(19) ; M/s. Maheswari Minerals8).

While W.P. No.38480 of 2017 was filed on 13.11.2017, the ad-interim orders under appeal came to be passed on 15.11.2017 just two days after the Writ Petition was filed. It is evident, therefore, that the interim order, which has the effect of allowing the Writ Petition itself at the admission stage, was passed in W.P.M.P. No.47767 of 2017 without the appellants herein (respondents in the Writ Petition) being given a reasonable opportunity of being heard i.e., of filing their counter-affidavit.

Clause 15 of the Letters Patent provides for an appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction. An appeal does not lie to the Division bench of the same High Court against every order passed by a Single Judge of the High Court. It is only against a judgment would an intra- Court Appeal lie. The Letters Patent jurisdiction is not attracted and available if the judgment is passed by the High Court in the exercise of its appellate jurisdiction in respect of a decree or order made in the exercise of the appellate jurisdiction by a Court subject to the superintendence of the said High Court. It is also not attracted and available if the order is made under the revisional jurisdiction of the High Court, and it is also not attracted in respect of a sentence or order made or passed in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act or in the exercise of criminal jurisdiction. If the order complained of is not a judgment, the appellate jurisdiction of the High Court, under Clause 15 of the Letters Patent. is not attracted and available. (Shah Babulal Khimji1; H. KONDAL REDDY V. CENTRAL BANK OF INDIA(20), Hyderabad ; B.F. Pushpaleela Devi3).

The word judgment, in Clause 15 of the Letters Patent, should receive a much wider and more liberal interpretation than the word judgment used in the Code of Civil Procedure. At the same time, all orders passed by a trial Judge would not amount to a judgment, otherwise there would be no end to the number of orders which would be appealable under the Letters Patent. The word judgment has, undoubtedly, a concept of finality in a broader and not a narrower sense. (Shah Babulal Khimji1; Central Mine Planning and Design Institute Ltd.2).

A judgment can be of three kinds: (1) a final judgment.in this category falls a judgment by which the suit, or action, brought by the plaintiff is dismissed or decreed in part or full; (2) a preliminary judgment.this category is sub-divided into two classes: (a) where the trial Judge, by

19) (2011) 14 SCC 227 : (2012) 4 SCC (Civ) 935 : (2012) 2 SCC (L&S) 890

20) 2002 (1) ALD 280

an order, dismisses the suit, without going into the merits of the suit, and only on a preliminary objection raised by the defendant/respondent on the ground of maintainability; (b) where maintainability of the Suit is objected on the ground of bar of jurisdiction, e.g., res judicata, a manifest defect in the suit, absence of notice under Section 80 and the like; and (3) intermediary or interlocutory judgment.in this category fall orders referred to in clauses (a) to (w) of Order 43 Rule 1 and also such other orders which possess the characteristics and trappings of finality, and may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. (Shah Babulal Khimji1; Central Mine Planning and Design Institute Ltd. 2).

Under the third category, every interlocutory order cannot be regarded as a judgment. Only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties, and which work serious injustice to the party concerned. (Shah Babulal Khimji1; Central Mine Planning and Design Institute Ltd.2). Interlocutory orders, in order to be a judgment, must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings. (Shah Babulal Khimji1).

The following are the tests to assess the import and definition of the word 'judgment' as used in Clause I5 of the Letters Patent. (1) It is not the form of adjudication which is to be seen but its actual effect on the suit or proceeding; (2) If, irrespective of the form of the suit or proceeding, the order impugned puts an end to the suit or proceeding it doubtless amounts to a judgment; (3) Similarly, the effect of the order, if not complied with, is to terminate the proceedings, the said order would amount to a judgment; (4) Any order in an independent proceeding which is ancillary to the suit (not being a step towards judgment) but is designed to render the judgment effective can also be termed as judgment within the meaning of the Letters Patent. (5) An order may be a judgment even if it does not affect the merits of the suit or proceedings or does not determine any rights in question raised in the suit or proceedings. (6) An adjudication based on a refusal to exercise discretion the effect of which is to dispose of the suit, so far as that particular adjudication is concerned, would certainly amount to a judgment within the meaning of the Letters Patent. (T.V.TULJARAM ROW V. M.K.R.V. ALAGAPPA CHETTIAR(21) ; Shah Babulal Khimji1).

In order to determine the question, whether an interlocutory order passed by a Judge of a High Court falls within the meaning of judgment, for purposes of the Letters Patent, the test is whether the order is a final determination affecting vital and valuable rights and obligations of the parties

21) ILR 35 Mad. 1

concerned. This has to be ascertained on the facts of each case. (Shah Babulal Khimji1; Central Mine Planning and Design Institute Ltd.2).

In the present case, the effect of the interim order under appeal (i.e in W.P.M.P.No.47767 of 2017) is to grant the main relief sought for in the Writ Petition. The said order has the traits and trappings of finality and has decided the question in controversy in the Writ Petition. It also requires the Sub-Registrar to consider the respondent-writ petitioners application for registration in violation of Section 22-A of the Registration Act, and thereby works serious injustice to the appellants herein. We are satisfied, therefore, that the interim order under appeal, in W.P.M.P. No.47767 of 2017 dated 15.11.2017, constitutes a judgment within the meaning of Clause 15 of the Letters Patent, the appellants herein are entitled to invoke our jurisdiction against the said order, and the appeal in W.A.No.36 of 2018, against the ad-interim order passed in W.P.M.P. No. 47767 of 2017 in W.P.No.38480 of 2017 dated 15.11.2017, is maintainable under Clause 15 of the Letters Patent.

It is no doubt true that, against the order passed by a Full Bench of this Court in Vinjamuri Rajagopala Chary v. State of Andhra Pradesh , the matter was carried in appeal to the Supreme Court; and, by its order in SLP (Civil) C.C. No. 8917/16 dated 12.5.2016, the Supreme Court, while granting permission to file Special Leave to Appeal, condoning the delay and issuing notice, made it clear that registration could be done expressly subject to the final outcome of the Special Leave Petition.

Learned Government Pleader for Revenue would contend, not without justification, that pendency of the SLP before the Supreme Court against the order of the Full Bench in VINJAMURI RAJAGOPALA CHARY(22), and an interim order being passed therein, would not obliterate the law declared by the Full Bench; and, notwithstanding the fact that the order of the Full Bench is under challenge before the Supreme Court, the said order would bind both the Division Bench of this Court, and the Single Judge, till the judgment of the Full bench is set aside by the Supreme Court. In K. VENKATA REDDY V. LAND ACQUISITION OFFICER(23) , a Division Bench of this Court observed:

> .. When the matter came up before our learned brother Kodandaramayya, J., he felt a doubt whether, having regard to the fact that the judgment of the Full Bench is the subject-matter of an appeal before the Supreme Court and the operation of the said judgment is suspended, the dicta laid down by the Full Bench would be binding on this Court and has to be followed, and referred the matter to the Bench. We are of the

22) 2016(1) ALT 550 (FB)

23) 1983 (67) STC 424

view that when a judgment of the High Court is the subject-matter of an appeal and the said judgment is suspended the only effect of such suspension is that that judgment cannot be executed or implemented. But so long as the Full Bench judgment stands, the dicta laid down therein are binding on all Courts including the single Judges and Division Benches of this Court. The dicta laid down therein cannot be ignored unless the Court after hearing a particular case doubts the correctness of the dicta and thinks it appropriate that it should be reconsidered. We, however, do not feel any such doubt that in so far as the acquisition of the land of a person, whose holding is less than the ceiling area and is personally cultivating the same, is concerned, he is entitled to the payment of market value in lump sum. Payment of compensation in instalments is violative of the provisions of clause (2) of article 31-A(1) of the Constitution. (emphasis supplied)

In Government of Andhra Pradesh v. N. Rami Reddy(24) , a Division Bench of this Court observed that, when a Court of appeal stays the operation of the judgment, it stays the further implementation as between the parties, of the operative portion thereof, and thereby the ratio of the said decision cannot be said to be wiped off. The observations of the Division bench, in this regard, are as under:

.. It is now a well settled principle of law that the ratio of a judgment is the reason assigned in support thereof. While a Court of appeal stays the operation of the judgment, it stays the further implementation, as between the parties, of the operative portion thereof, and thereby the ratio of the decision cannot be said to be wiped off.

.This aspect of the matter is no longer res integra in view of the decision of a Three-Judge Bench of the Apex Court in M/s. Sree Chamundi Mopeds Ltd. v. Church of SIT Association (AIR 1992 SC 1439), wherein the Apex Court has laid down the law in the following terms:

"The said stay order of the High Court cannot have the effect of reviving the proceedings which had been disposed of by the Appellate Authority by its order dated January 7, 1991. While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has

24) 2001(1) ALD 443(DB)

been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because inspite of the said order, the order of the Appellate Authority continues to exist in law and so long as it exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of and is still pending.. (emphasis supplied)

Again in GOVERNMENT OF ANDHRA PRADESH VS. P. GAUTAM KUMAR(25) a Division Bench of this Court observed:

The other aspect of the contention, ie., that on account of stay of operation of the judgment, the Prakash Singhs case (supra), directive is itself not binding, is a contention that is wholly misconceived. Acceptance of this contention would lead to utter chaos and a de-construction of the principle of stare decisis, an essential integer of our system of law. To illustrate, if a judgment of the Supreme Court is referred to and relied upon for conclusions or grant of relief in a judgment by a High Court; and the High Court judgment is appealed against and a stay granted by the Supreme Court, according to the learned Advocate-General the binding authority of the earlier judgment of the Supreme Court is rendered inoperative and the earlier Supreme Court judgment ceases to have a precedential value, during currency of the order of stay. Such a proposition is productive of universal and unmitigated mischief and therefore does not merit acceptance. From the guidance derived from the precedents referred to, we are of the view that the stay of operation of the Yadavs case (supra), judgment only disables execution of the consequences of the judgment to the parties thereto. Grant of stay does not extinguish the norm(s) predicated in the judgment . (emphasis supplied).

25) 2012 (6) ALD 458 (DB)

The Learned Single Judge has erred in granting a similar interim order, in W.P.M.P.No.47767 of 2017 dated 15.11.2017, as was passed by the Supreme Court, as the law declared by the Full Bench in Vinjamuri Rajagopala Chary22 would continue to bind this Court.

Reliance placed by Sri Anand Kumar Kapoor, Learned Counsel for the respondent-writ petitioners, on Section 52 of the Transfer of Property Act, 1882, is also of no avail. Section 52 stipulates that, during the pendency in any Court in which any right to immovable property is directly and specifically in question, the property cannot be transferred, or otherwise dealt with, by any party to the suit or proceedings so as to affect the rights of any other party thereto. An exception thereto is where the transfer is made under the authority of the Court, and on such terms as it may impose.

Lis pendens literally means a pending suit, and the doctrine of lis pendens has been defined as the jurisdiction, power, or control which a court acquires over the property involved in a suit pending the continuance of the action, and until final judgment therein. (Corpus Juris Secundum (Vol. LIV, p. 570). Expositions of the doctrine indicate that the need for it arises from the very nature of the jurisdiction of Courts, and their control over the subject-matter of litigation, so that parties litigating before it may not remove any part of the subject-matter outside the power of the Court to deal with it and thus make the proceedings infructuous. (RAJENDER SINGH4; JAYARAM MUDALIAR V. AYYASWAMI(26)).

The question which necessitates examination in the present case is not whether this Court has the power, under Article 226 of the Constitution of India, to grant a relief of the nature sought for in the Writ Petition, but whether an interim order, which has the effect of granting the main relief sought for in the Writ Petition, could have been passed without the appellants (respondents in the Writ Petition) being given a reasonable opportunity of being heard by filing their counter-affidavit. While the High Court may have the power to permit transfer of property during the pendency of proceedings before it, and upon such terms as it may impose, the question is not regarding existence of such a power with the High Court but regarding its exercise, and whether an interim order, directing the Sub-Registrar to receive and register the document for alienation of immovable property, could have been passed without giving the official respondents in the Writ Petition a reasonable opportunity of filing their counter-affidavit, more so as the interim relief sought for, and granted, has the effect of allowing the Writ Petition itself, and in the main relief sought for in the Writ Petition being granted.

It is no doubt true that a Division bench would, ordinarily, not interfere with the exercise of discretion by the Learned Single

26) (1972) 2 SCC 200

Judge in granting interim relief. The law as to the reversal by a Court of Appeal of an order made by the Judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. (OSENTON (CHARLES) & CO. V. JOHNSTON(27) ; PRINTERS (MYSORE) (P) LTD. V. POTHAN JOSEPH (28); Mohd. Mehtab Khan5; WANDER LTD. V. ANTOX INDIA (P) LTD(29)).

Where the appeals before the Division Bench are preferred against the exercise of discretion by the Single Judge, the appellate court will not interfere with such exercise of discretion by the court of first instance, and substitute its own discretion, except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored settled principles of law regulating grant or refusal of interlocutory orders. An appeal against exercise of discretion is said to be an appeal on principle. The appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would, normally, not be justified in interfering with the exercise of discretion under appeal solely on the ground that, if it had considered the matter at the trial stage, it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably, and in a judicious manner, the fact that the appellate court would have taken a different view may not justify interference with the trial courts exercise of discretion. The appellate court would not interfere with the exercise of discretion by the learned trial Judge unless such exercise is found to be palpably incorrect or untenable or if the view taken by the Learned Single Judge is not a possible view. (Wander Ltd.29; Mohd. Mehtab Khan5).

In the present case, the interim order under appeal, directing the Sub-Registrar to consider registering the document without reference to the District Collectors proceedings dated 23.08.2017, has the effect of granting the main relief sought for in the Writ Petition, though it is settled law that, ordinarily, the final relief sought for in the Writ Petition should not be granted, by way of interim relief, and the matter should await a final decision one way or the other. This contention of Sri A.K. Kapoor, Learned Counsel for the respondent-writ petitioner, also necessitates rejection.

Viewed from any angle, we are satisfied that the Learned Single Judge ought not to have, at the stage of admission of the Writ Petition, granted the interim relief, sought for in W.P.M.P. No.47767 of 2017, which has the effect of allowing the Writ Petition itself even without giving the appellants herein (respondents in the Writ

27) 1942 AC 130
28) AIR 1960 SC 1156
29) 1990 Supp. SCC 727“3

Petition) a reasonable opportunity of filing their counter- affidavit.

By the interim order passed by the Learned Single Judge, in WPMP No.47768 of 2017 in W.P.No.38480 of 2017 dated 15.11.2017, the endorsement of the District Collector dated 23.08.2017 was suspended. The said interim order is merely a workable arrangement to ensure that no irreparable injury is otherwise occasioned. As a result of the said order, status-quo is sought to be maintained so that, in the meanwhile, no further action is taken pursuant to the endorsement dated 23.08.2017 whereby the Tahsildar was directed to initiate action under the provisions of the A.P. Assigned Lands (Prohibition of Transfer) Act, 1977 by issuing Form-I and Form-II notices to the assignees/ purchasers on the ground that assigned land had been purchased, through a registered document, in violation of the provisions of the said Act.

We may not be understood to have upheld the said interim order. All that we have held is that the said order, in WPMP No.47768 of 2017 in W.P.No.38480 of 2017 dated 15.11.2017, may not constitute a judgment justifying exercise of jurisdiction, under Clause 15 of the Letters Patent, at this stage. Suffice it to make it clear that the order now passed by us shall not disable the appellants, after they have filed their counter-affidavit in W.P.No.38480 of 2017, to seek vacation of the interim order passed in WPMP No.47768 of 2017 in W.P.No.38480 of 2017 dated 15.11.2017. Any such application, filed by the appellants later, shall be decided on its merits uninfluenced by any observations made in this order.

The order passed in WPMP No.47767 of 2017 in W.P.No.38480 of 2017 dated 15.11.2017 is set aside and WPMP No.47767 of 2017 is restored to file. The appellants herein shall file their counter-affidavit in W.P.No.38480 of 2017 within three weeks from today. It is open to Sri Anand Kumar Kapoor, Learned Counsel for the petitioners, to request the Learned Single Judge to take up WPMP No.47767 of 2017 for hearing any day after three weeks from today.

Writ Appeal No.215 of 2018 is dismissed, and Writ Appeal No.36 of 2018 is disposed of in terms of the directions given hereinabove. Miscellaneous Petitions, if any pending, shall also stand disposed of. However, in the circumstances, without costs.

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LAW SUMMARY

2018 (2)

Supreme Court Reports

2018 (2) L.S. 1 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Abhay Manohar Sapre &
The Hon'ble Mr.Justice
S. Abdul Nazeer

Vijay Arjun Bhagat
& Ors., ..Appellants

Vs.

Nana Laxman
Tapkire & Ors., ..Respondents

CIVIL PROCEDURE CODE, Sec.100 - Whether High Court was justified in allowing appeal - High Court instead of deciding appeal on substantial questions of law framed during admission allowed appeal on two additional substantial questions of law - High Court allowed appeal on the two questions, which were framed in the impugned judgment only.

Held: High Court had the jurisdiction to decide appeal only on substantial questions of law framed at the time of admitting the appeal - Procedure adopted by High Court while deciding appeal caused prejudice to the rights of the parties because the parties, had no knowledge about framing of the two additional questions inasmuch as they were deprived of the opportunity to address the Court on the two additional questions on which the impugned judgment was founded - Appeal is allowed and impugned judgment is set aside – Instant case is remanded to the High Court for deciding the appeal afresh on merits.

CA.No.6272/10 Date:11-5-2018

Mr.Chandan Ramamurthi, **Advocate** for the Appellants.
Mr.Asha Gopalan Nair, Sunil Kumar Verma, Ravindra Keshavrao Adsure, Advocate. for the Respondents.

J U D G M E N T

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

This appeal is directed against the final judgment and order dated 19.07.2007 passed by the High Court of Judicature at Bombay, Bench at Aurangabad in Second Appeal No.274 of 2002 whereby the Single Judge of the High Court allowed the appeal filed by respondent Nos.1 & 2 herein and set aside the judgment/order dated 16.01.2002 passed by the District Judge, Ahmednagar in R.C.A. No.21 of 2000 and confirmed the judgment dated 10.12.1999 passed by the Civil Judge, Junior Division, Ahmednagar in R.C.S. No.600 of 1982.

2. In order to appreciate the issues involved in the appeal, few relevant facts need to be mentioned hereinbelow.

3. The appellants are the plaintiffs whereas the respondents are the defendants in a civil suit out of which this appeal arises.

4. The appellants filed a civil suit (R.C.S. No. 600/1982) against the respondents in the Court of Civil Judge, Junior Division, Ahmednagar for declaration that, (1) the suit properties described in detail in the schedule are ancestral properties of the plaintiffs (2) the plaintiffs are the owners of the suit properties, and (3) the suit property described in schedule 1(A) is not a Trust property and be declared as the plaintiffs' private property.

5. Defendant No. 1 filed its written statement whereas defendant Nos. 3 and 4 filed their joint written statement. The defendants raised several objections about maintainability of the suit. They also denied plaintiffs' claim on merits.

6. The Trial Court framed issues. Parties adduced evidence in support of their case. By judgment and decree dated 10.12.1999, the Trial Judge though answered some issues in plaintiffs' favour but eventually dismissed the plaintiffs' suit on merits.

7. The plaintiffs felt aggrieved and filed First Appeal (R.C.A. No.21/2000) in the Court of District Judge, Ahmednagar. By order dated 16.01.2002, the first Appellate Court allowed the appeal, set aside the judgment and decree of the Trial Court and decreed the plaintiffs' suit.

8. Against the said judgment, Defendant Nos. 3 & 4 (respondent Nos. 1 & 2 herein) filed appeal being Second Appeal No. 274/2002 in the High Court of Bombay (Bench at Aurangabad). The High Court on 30.11.2002 admitted the second appeal on the following substantial questions of law:

"(A) Whether the first appellate court has misread the document of partition deed(Exh.81) and therefore the finding in this behalf suffers from perversity.

(B) Whether the first appellate Court has failed to consider the appropriate provisions of Order VII Rule 3 of C.P.C.

(C) Whether the first appellate Court has erroneously relied upon Xerox copies of the mortgage deed which is not registered.

(D) Whether the first appellate Court has erroneously that the suit properties are the private properties of original plaintiffs.

(E) Whether the Civil Court has jurisdiction to decide the nature of the property which issue required to be dealt with by the Charity Commissioner.

(F) Whether the suit is barred by limitation."

9. By impugned judgment, the Single Judge of the High Court allowed the appeal and, in consequence, set aside the order passed by the District Judge in R.C.A. No.21 of 2000 and confirmed the judgment passed by the Civil Judge in R.C.S. No.600 of 1982 which has given rise to filing of the present appeal by way of special leave by the plaintiffs before this Court.

10. The short question, which arises for consideration in this appeal, is whether the High Court was justified in allowing the appeal.

11. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal, set aside the impugned judgment and remand the case to the High Court for deciding the appeal afresh on merits in accordance with law.

12. In our considered view, the need to remand the case to the High Court has occasioned because the High Court while deciding and eventually allowing the second appeal did not follow the mandatory procedure prescribed under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code").

13. In other words, we find that the manner in which the High Court proceeded to decide the second appeal did not appear to be in conformity with the mandatory procedure prescribed under Section 100 of the Code. It is clear from our reasoning given infra.

14. Section 100 of the Code reads as under:

"100. Second appeal- (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this subsection shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

15. Sub-section (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is "satisfied" that the case involves a "substantial question of law". Subsection (3) makes it obligatory upon the appellant to precisely state in memo of appeal the "substantial question of law" involved in the appeal. Subsection (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question. In other words, once the High Court is satisfied after hearing the appellant or his counsel, as the case may be, that the

appeal involves a substantial question of law, it has to formulate that question and then direct issuance of notice to the respondent of the memo of appeal along with the question of law framed by the High Court. Sub-section (5) provides that the appeal shall be heard only on the question formulated by the High Court under sub-section (4). In other words, the jurisdiction of the High Court to decide the second appeal is confined only to the question framed by the High Court under sub-section (4). The respondent, however, at the time of hearing of the appeal is given a right under sub- section (5) to raise an objection that the question framed by the High Court under sub-section (4) does not involve in the appeal. The reason for giving this right to the respondent for raising such objection at the time of hearing is because the High Court frames the question at the admission stage which is prior to issuance of the notice of appeal to the respondent. In other words, the question is framed behind the back of the respondent and, therefore, sub-section (5) enables him to raise such objection at the time of hearing that the question framed does not arise in the appeal. The proviso to sub-section (5), however, also recognizes the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under sub-section (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of hearing of the appeal (See C.A. Nos.9118-9119 of 2010 titled Surat Singh (Dead) v. Siri Bhagwan & Ors. decided on 19.02.2018).

16. Adverting to the facts of the case at hand, we find that the High Court on 30.11.2002 admitted the second appeal and framed six substantial questions of law quoted supra as required under sub-sections (1) and (4) of Section 100 of the Code which, according to the High Court, arose in the second appeal.

17. The High Court was, therefore, required to decide the second appeal only on the six formulated substantial questions of law as provided under subsection (5) of Section 100 of the Code.

18. We, however, find that the High Court instead of deciding the second appeal on these six substantial questions of law framed at the time of admission allowed the appeal on two additional substantial questions of law (see Para 10 of the impugned judgment) which were neither framed by the High Court at the time of admission of the second appeal on 30.11.2002 and nor at the time of hearing the second appeal.

19. In other words, the High Court allowed the appeal on the two questions, which were framed in the impugned judgment only. These two questions read as under:

"In S.A. No.274/2002, following substantial questions of law arise:

(i) Whether the Civil Court has jurisdiction to decide the question whether a particular property is that of a Public Trust or that it is not a property of the Public Trust and belongs to individual claimant?

(ii) Whether the suit for declaration that the

properties were not of the Public Trust was barred by limitation and, therefore, the impugned judgment of the first appellate Court deserves interference?"

20. In our considered opinion, the High Court, therefore, committed two jurisdictional errors while deciding the second appeal.

21. First, though it rightly framed six substantial questions of law at the time of admission of the appeal on 30.11.2002 as arising in the case but erred in not answering these questions.

22. As mentioned above, the High Court had the jurisdiction to decide the second appeal only on the six substantial questions of law framed at the time of admitting the appeal. In other words, the jurisdiction of the High Court to decide the second appeal was confined only to six questions framed and not beyond it.

23. Second, the High Court though had the jurisdiction to frame additional question(s) by taking recourse to proviso to sub-section(5) of Section 100 of the Code but it was subject to fulfilling the three conditions, first "such questions should arise in the appeal", second, "assign the reasons for framing the additional questions" and third, "frame the questions at the time of hearing the appeal".

24. In this case, the High Court committed an error because it framed two additional questions in the judgment itself.

25. This procedure adopted by the High Court while deciding the second appeal caused prejudice to the rights of the parties because the parties, especially the appellants herein, who suffered the adverse order, had no knowledge about framing of the two additional questions inasmuch as they were deprived of the opportunity to address the Court on the two additional questions on which the impugned judgment was founded.

26. Learned counsel for the respondents, however, made sincere efforts to persuade the Court to uphold the impugned judgment on merits but in the light of what we have held above, it is not possible to accept the submissions of the learned counsel for the respondents much less the submissions urged on the merits of the controversy.

27. We, however, make it clear that having formed an opinion to remand the case, we have refrained from applying our mind to the merits of the case. It is now for the High Court to decide the appeal on merits.

28. In the light of the foregoing discussion, the appeal succeeds and is allowed. The impugned judgment is set aside. The case is remanded to the High Court for deciding the appeal afresh on merits in accordance with law without being influenced by any of our observations.

29. Since the appeal is quite old, the same shall be decided expeditiously.

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2018 (2) L.S. 6 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
N.V. Ramana &
The Hon'ble Mr.Justice
S. Abdul Nazzeer

Kumar ..Appellant
Vs.
State
Represented By
Inspector of Police ..Respondent

INDIAN PENAL CODE, Secs.302 & 324 – Appellant preferred instant appeal aggrieved by Judgment of High Court below.

Held : Motive of accused to commit the crime is ascribed to the previous quarrel occasioned between the accused and the deceased – If prosecution desires to place motive of accused as a circumstance, it should also be fully established - Evidence of direct witnesses is not satisfactory - Appeal is allowed - Appellant stands acquitted from all the charges levelled against him.

Mr.Ankur Prakash,Advocate for the Appellants.
Mr.M. Yogesh Kanna, Advocate for the Respondents.Advocate.

Crl.A.No.409/17 Date: 11-5-2018

J U D G M E N T

(per the Hon;ble Mr.Justice
N.V. Ramana)

This appeal is filed by the present appellant, aggrieved by the concurrent findings of the court below, which has upheld the culpability of the accused for culpable homicide amounting to murder under Section 302 of Indian Penal Code [hereinafter '**IPC**' for brevity] and voluntary causing hurt by dangerous weapons or means under Section 324 of IPC. This appeal presently impugns the High Court judgment dated 22.02.2016, in Criminal Appeal No. 326 of 2013.

2. The prosecution story in a nut shell begins with an earlier scuffle between the accused and deceased (Sakthivel), while watching a street play conducted during a village festival. It is alleged that the accused-appellant was rebuked by the deceased for sitting next to ladies. In this context, on 20.08.2009, at about 6:00 PM the accused came to the spot where Rajendran (PW-1), Arumugham (PW-2) and Subramani (PW-3) were savoring idliis from the stall of Sumathi (PW-4), when the accused-appellant arrived with an intention to draw out Sakthivel (deceased), by picking up a quarrel with Rajendran (PW-1), who was his brother-in-law. Accordingly, the accused-appellant arming himself with a wooden log lying nearby, assaulted Arumugham (PW-2), who came to the rescue. At that moment the Sakthivel (deceased) is supposed to have intervened. Seeing him, the accused barged on Sakthivel claiming to finish him

while kicking and pushing him into the water canal. When he tried to climb up from the canal, the accused hit him with a wooden log on his head. The villagers present at the spot, then prevented the accused while assaulting him on his head, thereby causing injuries to the accused. Thereafter, both the injured Sakthivel and accused were shifted to the Government Hospital, Pudukottai in an ambulance. Ultimately the Sakthivel succumbed to the injuries before reaching the Hospital.

3. Sub-Inspector Ramaswamy—PW-23 registered an FIR (**Ext. P1**) against the accused for the offences punishable under Sections 302 and 324 of IPC in Crime No. 47 of 2009. Circle Inspector Subhakumar—PW-24, undertook the investigation, visited the place of occurrence, prepared observation mahazar and drew the rough sketch (**Ext. P7**). The alleged weapon (wooden log—stick) (**Ext. P8**) used in the administration of crime was recovered from the spot. On the next day, he conducted inquest vide report (**Ext.P9**) and dead body of the deceased Sakthivel was sent for postmortem. Subsequently, the accused—appellant was reported to be arrested on 22nd August, 2009. The I.O. recorded the statements of Dr. Lavanya, the Doctor, who treated PW-2 (Arumugham), and Dr. Illayaraja, who conducted postmortem of the deceased. Thereafter the authorities seized the clothes of the deceased reported in the seizure report being M.O.4 to M.O.6. After completing the investigation, the I.O. submitted his report to the learned District Munsif-cum-Judicial Magistrate levelling charges against the accused for the offences punishable under Sections 324 and 302 of IPC. The learned Judicial Magistrate in turn committed the case to the Sessions Court. The accused pleaded not guilty and claimed to be tried.

4. The Sessions court by order, dated 07.10.2013, awarded conviction to the accused and directed him to suffer rigorous imprisonment for life for the offence under Section 302 of IPC and to pay a fine of Rs. 5,000/-, in default of payment of fine, to further suffer an imprisonment for a period of one year. The accused was also sentenced to suffer rigorous imprisonment for a period of one year for the offence under Section 324 of IPC. Both the sentences were however directed to run concurrently. The main reasons given by the trail court for maintaining the conviction against the appellant-accused are-

i. That the motive concerning the verbal spat between the accused and the deceased Sakthivel is proved by PW-1, PW-6, PW-8 and PW-7.

ii. That the delay was sufficiently explained, as the police were busy in conducting investigation in other case.

iii. That the recovered objects from the scene of crime has been proved before the court.

iv. That the injury on the accused has been attributed to a scuffle between the deceased and the crowd, which stands corroborated by the witness, statement of PW-2, PW-

3 and PW-5.

v. The trial recognizes that there were no step taken to identify the injury on the accused.

vi. That the mere wrong entry of timing in the inquest report, would not vitiate the post mortem report much less the prosecution case itself.

vii. That on the aspect of arrest, it is an acceptable inference, that the accused was forcefully discharged by the police personnel on 21.08.2009, and was confined by the police for one whole day, and the arrest was only shown on 22.08.2009. Further as there was no confession obtained due to such action by the police, the entire case cannot be vitiated.

viii. That publication of the story in a newspaper cannot be relied on, as the defense has not taken steps to mark the evidence or examine the editor.

ix. That the case was proved by the prosecution beyond reasonable doubt.

5. Aggrieved, the accused-appellant approached the High Court. By the impugned order, the High Court dismissed the appeal of the accused on the following grounds-

i. That the contention of the defense concerning the statement of the PW-2 about recording by the police, just after the incident is a flimsy contradiction, which does not have the force to dislodge the entire case.

ii. That PW-2's cross examination after re-calling the witness, cannot be taken into consideration.

iii. That failure to provide reasons for the injuries sustained by the accused, would not be sufficient to dislodge the prosecution's case.

iv. That the nature of weapon and the injury would not mandate reduction in the sentence from the charge of murder to grievous injury.

6. Aggrieved, by the concurrent finding of the fact, the accused has approached this court.

7. The main thrust of argument by the learned counsel for the appellant is that the entire prosecution case is a fabricated in such a way so as to implicate the appellant in the case as culprit. The real circumstances of the case have been concealed by the prosecution in order to help the complainant. Even the motive projected by the prosecution is false. There was no complaint lodged by the deceased or his wife against the accused, which itself proves that the motive ascribed to be the alleged verbal spat between the deceased and accused at the drama in the village on the eve of Kaliamman temple festival. Secondly, there was huge delay in registering the FIR and the delay was caused only to implicate the appellant. On the fateful day i.e. 20.8.2009 at about 6:23 P.M. police got the information about the occurrence, but no FIR was lodged. At

about 7:30 P.M. police visited the spot, conducted enquiry, suspected PWs 1 to 3 to be the real culprits and took them into their custody. Even PW2 informed police that he received injuries due to the attack made by the deceased. The appellant has also injured in the fight at the hands of deceased. But, police did not register the complaint on the basis of actual occurrence, and the courts below failed to appreciate the true aspects of the case particularly non-explanation by the prosecution as to the injuries sustained by the accused. Thereafter, the accused—appellant and deceased were sent to the hospital in same ambulance and till the discharge of the appellant from hospital, police did not suspect him as a culprit. It is only thereafter, police in connivance with complainant cooked up a case against the appellant, the complaint was suitably prepared and FIR (Ext. P1) registered. Even at the time of framing charges against the accused a charge under Section, 323, IPC was first charged but the trial Court convicted the appellant under Section 324, IPC. The trial Court as well as the High Court failed to notice the suppression of facts by the prosecution and came to a wrong conclusion without appreciating the evidence in accordance with settled principles of law, and thereby rendered a perverse judgment which is required to be set aside by the interference of this Court.

8. On the other hand, learned counsel for the State supported the view taken by the Courts below and submitted that having regard to the facts and circumstances, the trial Court assessed them in proper perspective and delivered a reasoned judgment. The conviction and sentence passed against the accused has also been affirmed by the High Court by categorical findings which does not require interference of this Court.

9. Having heard learned counsels for both parties, we acknowledge that this case is a direct evidence case and based on statement of eyewitnesses which mandates us to observe statements of certain eye witnesses for the disposal of this case at hand.

10. A bare perusal of the evidence deposed by the complainant—PW-1 (Rajendran) shows that while the complainant was in the company of Arumugham (PW2) and Subramanian (PW-3) having idliis sold by Sumathi (PW4), the accused appeared and picked up the assault on him. In the process of interference to prevent the assault, PW2 also got injured. Soon thereafter, with the appearance of his brother-in-law (Sakthivel—deceased) at the spot, the accused pushed him into canal and assaulted with a wooden log on the forehead of Sakthivel. Then Rajinikanth (PW15) and Balasundaram (PW19)—another co-brother of the complainant, called the ambulance and took the accused and Sakthivel to the hospital while the complainant followed them on two-wheeler and at the hospital he came to know about the death of the deceased, then he went to Udayalipatti police station and lodged complaint (Ext.P1).

11. The deposition of PW-2—Arumugham @ Iyyer, an eyewitness to the incident, is to the effect that when he was preventing the accused who was about to assault PW1, he sustained injuries. At that point of time, the deceased came with a wooden log in his hand and fought with the accused. He has also asserted that the ambulance came after police examined him and took his signature. He has further made it clear that many persons, including nearby shop owners, witnessed the incident, but it is a matter of record that except himself, two brothers-in-law of the deceased and Rasu, no one else was made witness. He further deposed that the deceased assaulted the accused with the wooden log on head due to which the accused got injury. When the deceased was trying to hit the accused for a second time, he intervened due to which he got injury on his wrist. On suspicion, police took him along with PWs 1 and 3 to the Keeranur Police Station where they detained him for the night and then sent to Government Hospital on the next day morning. Before his examination in chief, they warned him that if he does not depose as instructed, they will foist a case against him.

12. In his cross-examination PW-2 reveals as under-

Immediately after the occurrence, Udayalipatti police came to the place of occurrence and enquired about the incident and get my signature after recording my statement. They recorded my statement, before the arrival of 108 ambulance and before we took Sakthivel and Kumar. At the time, rajendra was also presented and the police recorded his statement and obtained his signature. The police examined me only prior to the arrival of 108 ambulance and never examined me after the arrival of 108 ambulance.

On recalling the PW-2, he states as under-

The deceased Sakthivel assaulted the accused in his head with the wooden log. I cam there and the accused sustained injuries in his head before I reached there. When I intervene the second blow by the Sakthivel, I sustained injuries in my writ. The accused Kumar also sustained injuries on his head. The Sakthivel fell down in the channel due to the forceful attack by him and the accused also fell down.

(**emphasis supplied**)

It may be noted that PW-2 is not declared as hostile by the prosecution.

13. In his cross-examination, PW3—Subramanian, another eyewitness and close relative of the deceased, also admitted that the occurrence took place at 6 p.m. and the scuffle between the accused and deceased was for five minutes. By the time the occurrence was completed, there was darkness. He further admits that he was examined by the Inspector of Police at the place of occurrence and PWs 1 & 2 were also present at that time. He was later taken to the Keeranur police station along

with PWs 1 and 2.

14. That PW-4 (Sumathi), who is alleged to be selling idliis, has not supported the case of the prosecution.

15. PW5—Rasu, corroborates the version of PW-2, wherein he states that both the accused and the deceased had held sticks. During the scuffle both of them fell into the channel and both were unconscious by the time they were pulled up.

16. Rajinikanth—PW-15 deposed that at 7:15 P.M., he went to Kurunthankudi bridge upon hearing about the occurrence and found the accused and deceased lying there and took them to Government Hospital in ambulance. Then he came back to the place of occurrence along with Village Administrative Officer (PW-14) where police prepared a rough sketch and took his signature. However, in his cross-examination he deposed that, by the time he reached the place of occurrence, police had already arrived there and thereafter ambulance came. He further stated that PW-1— Rajendran narrated to the police everything about the incident and police reduced it into writing and his signature was also obtained.

17. In his evidence, PW19—Balasundaram has also stated categorically that the ambulance came to the place of occurrence after the arrival of police and they seized the wooden log. According to him doctors declared the death of Sakthivel at about 8.45 p.m. and Rajendran—complainant—PW1 was not present at that time, but Inspector, Sub-Inspector and Head Constable were present who examined him and PW15, but did not obtain his signature.

18. Head Constable Mohan—PW20, in his chief examination adduced that at 6.23 p.m. on the day of incident, while he was going towards Ulaghanathapatti in connection with investigation in some other case, he received a call on his mobile phone about the occurrence. He immediately passed on the message to his seniors and called an ambulance. At 7:00 P.M., when he reached the place of occurrence, they found the deceased lying at Bridge Stone, Kurunkulam with injuries while the accused was lying at road side. He immediately sent them to Government Hospital at 7:05 P.M. However, in the cross examination, he stated that he had enquired PW-1—brother-in-law of the deceased and did not see the wounded accused and deceased when he reached the place of occurrence.

19. We have also gone through the statements of PWs 6, 7, 8, 9, 10, 11, 12, 13, 16, 22 etc. Most of them are hearsay witnesses and nothing important seem to come out from their depositions.

20. Contrary to what Rajendran—Complainant (PW-1) deposed, a combined reading of the evidences adduced by PWs 2, 3, 5, 15, 19 and 20 would make it abundantly clear that both the accused and the deceased have participated in the fight with wooden logs, accused has got head injury at the hands of deceased, PW2 (Arumugham) himself also received injury

at the hands of accused while he was trying to protect PW1 (Rajendran) from the assault of the accused, police reached the place of occurrence within ten minutes of the occurrence, that is well before the arrival of ambulance and Rajendran—PW1 (complainant), Arumugham @ Ayyar (PW2), Subramanian (PW3) and other witnesses described the incident to the police who then examined the persons present there, rough sketch was prepared and their signatures were also obtained.

21. Having observed the various depositions, we are of the considered opinion that there are four crucial aspects herein, which should be discussed and elaborated upon. The above evidence if examined from the perspective of time, the overall impression that can be drawn from the foregoing discussion is that the occurrence took place at around 6.15 p.m., and the Head Constable Mohan (PW-20) received information of occurrence at 6:23 P.M. and he passed on the message to Sub-Inspector and Circle Inspector at 6:26 P.M., soon thereafter ambulance arrived at the spot of occurrence at 6.30 p.m. At that point of time, Police have enquired PW-1, PW2 and other witnesses, drawn report, sketch map etc., and took their signatures and sent the injured persons to hospital. That sequence of incidents shows that already investigation was started by police. That means the information provided by PWs 1, 2 and other witnesses at about 6:30 P.M. at the place of occurrence should have ideally been the basis of the F.I.R. Whereas the F.I.R. (Ext.P1) shows that the information was received at police station at 9.30 p.m. on 20th August, 2009.

22. We may note that this case involves a fight between two persons-accused and the deceased. Majority of the eye witnesses including PW-1, PW-3, have categorically stated that accused-appellant was the aggressor. Interestingly, the PW-2 states that, even the Sakthivel assaulted the accused by a wooden log on the head, his statement should be given credence for eight major reasons-

i. That the Police has subdued the statement of PW-2 taken moments after the incident.

ii. That PW-4 corroborates the version of PW-2.

iii. That the injury on the accused has not be accounted for.

iv. That the accused was also noted to be injured by all the prosecution witness, without specific statements as to the nature and all the prosecution witnesses state that the injury on the accused were imputed by the by-standers without much clarity.

v. That the mode of arrest by the police to have unauthorizedly discharged the accused from the hospital and illegally confining him for a day in police custody.

vi. Active botch-up of investigation by the police authorities.

vii. Unexplained delay in registering the FIR

in the police station.

viii. He is alleged to be the person, who had been injured in the incident.

23. From the account of eye witness, we may observe that there are at least three different versions which substantially weakens the prosecution's case.

24. On the point of suppression of genesis of the crime, PW-20 (head constable) categorically states that he was present before the Ambulance had reached the place. Even though he was extensively cross-examined, he has not budged from his position that there was no recording of any statement before the Ambulance recorded. On the contrary PW-2 categorically remarks that a statement was recorded by PW-20 before the ambulance arrived. Although the High Court has discredited the evidence of PW-2 as the part which provides the aforesaid details was on recalling after few days, therefore, in light of possibility of being won over, the credibility of the statement made by PW-2 needs to be viewed with this background fact. However, we fail to understand internal logic of such assumption, when the prosecution has not declared the witness as hostile and more so, when his narrative is corroborated by other witnesses. Therefore, PW-2's evidence needs to be taken into fold.

25. It is matter of record that the alleged accused-appellant, was arrested in a hurried manner after the day of the incident from the hospital. It is also stated that the police authorities in an unusual manner got the appellant discharged from the hospital and kept him illegally confined for a day. Moreover, PW-2 has categorically stated the following on the action of the police-

The police enquired me about the incident and I narrated the same. The police and the Sub-inspector of Police on suspicion taken myself, PW-1 (Rajendran) and PW-3 (Subramanian) to Keeranur Police Station. I was detained in Keeranur police station during the night and on the next day morning, **I was sent to Keeranur Government Hospital for treatment. Before I was examined in chief, they warned me that if I have not deposed as instructed them, they will foist a case against me and only for that reason, I have stated like that**.

(**emphasis supplied**)

The action of investigating authority in pursuing the case in the manner which they have done must be rebuked. The High Court on this aspect, correctly notices that the police authorities have botched up the arrest for reasons best known to them. Although we are aware of the ratio laid down in **Parbhu v. Emperor**, AIR 1944 PC 73, wherein the court had ruled that irregularity and illegality of arrest would not affect the culpability of the offence if the same is proved by cogent evidence, yet in this case at hand, such irregularity should be shown deference as the investigating authorities are responsible for suppression of facts.

26. The criminal justice must be above reproach. It is irrelevant whether the falsity lie in the statement of witnesses or the guilt of the accused. The investigative authority has a responsibility to investigate in a fair manner and elicit truth. At the cost of repetition, I must remind the concerned authorities to take up the investigation in a neutral manner, without having regards to the ultimate result. In this case at hand, we cannot close our eyes to what has happened; regardless of guilt or the asserted persuasiveness of the evidence, the aspect wherein the police has actively connived to suppress the facts, cannot be ignored or overlooked.

27. Another point put forth by the learned counsel on behalf of the accused—appellant is that the prosecution has not explained the injuries suffered by the accused and hence prosecution case should not be believed. At the outset, it would be relevant to note the settled principles of law on this aspect. Generally failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true [See : **Mohar Rai and Bharath Rai** v. **The State of Bihar,** 1968 CriLJ 1479].

28. In **Lakshmi Singh and Ors.** v. **State of Bihar**, 1976 CriLJ 1736 this Court observed:

"Where the prosecution fails to explain the injuries on the accused, two results follow :

(1) that the evidence of the prosecution witnesses is untrue; and

(2) that the injuries probabilise the plea taken by the appellants.

It was further observed that:

In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences :

(1) **that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version**;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

29. In the case on hand, admittedly, the accused—appellant was also injured in the same occurrence and he too was admitted in the hospital. But, prosecution did not

produce his medical record, nor the Doctor was examined on the nature of injuries sustained by the accused. The trial Court, instead of seeking proper explanation from the prosecution for the injuries sustained by the accused, appears to have simply believed what prosecution witnesses deposed in one sentence that the accused had sustained simple injuries only.

30. From the evidence of I.O.—PW24 it is apparent that in the scuffle PW2 (Arumugham) received "simple" injuries and he had taken the statement of Dr. Lavanya (PW17) who treated PW2. He had also examined Dr. Illayaraj (PW18) who conducted postmortem on the body of the deceased. But, in the case of accused—appellant, PW24—I.O. admits that he was aware of the fact that the accused-appellant was admitted as in-patient and the accused-appellant had sustained injuries. He further states that neither did he arrest the accused nor he examined the Doctor in regard to the injuries of accused. In the circumstances in which the deceased, accused and also PW-2 (Arumugham) got injuries, it is obligatory on the part of I.O. to examine the Doctor and seek information about the injuries sustained by the accused and the same should have been made part of the record. A duty is cast on the prosecution to furnish proper explanation to the Court how the person who has been accused of assaulting the deceased, received injuries on his person in the same occurrence. We may note that the injuries alleged to have been caused are not properly explained. An alternative story is set up wherein the injuries are attributed to mob justice, such allegations without substantive evidence cannot be accepted.

31. Coming to the other aspect of the case, motive of the accused to commit the crime is ascribed to the previous quarrel occasioned between the accused and the deceased during a drama at a village festival. Generally, in case prosecution desires to place motive of the accused as a circumstance, like any other incriminating circumstance, it should also be fully established. We are alive to the fact that if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. But in the case on hand, as we have already discussed in the above paragraphs, the evidence of direct witnesses is not satisfactory and on the other hand, it is demonstrated that the deceased hit the accused on his head with the wooden log besides the testimony from the eye witnesses that there was scuffle. In such a factual situation, certainly motive may act as a double-edged sword.

32. In the light of the settled law thus by this Court and also from what is clear from the evidence, there is absence of extreme cruelty, even if it assumed that accused hit the deceased with the log. Had there been a strong motive to do away with the life of deceased, generally there would have been more fatal injuries caused on the deceased not by a log but by utilizing more

dangerous weapons. These circumstances would tell us that there is no reason to believe that motive was entertained by the accused in the back drop of quarrel that took place during drama at the village festival, prior to the date of occurrence. In as much as the prosecution laid the foundation for the commission of crime by the accused in the said quarrel as an element of motive, in the absence of positive proof of such motive, prosecution has to face the peril of failure in establishing that foundation.

33. Now coming to other charge under Section 324 of IPC, for causing injuries to Arumugham @ Ayyar [PW-2]. In light of the deficiencies noted above, it can be easily said that even the charge under Section 324 of IPC is not established. The aforesaid conclusion is clearly buttressed by the fact that the injured witness himself has attributed the injury on him to the deceased, instead of the accused. In such a situation conviction of the accused on the charge of Section 324 cannot be sustained under law.

34. Taking stock of the circumstances and depositions of prosecution witnesses in this case, it would be difficult to hold that prosecution has laid the case on real circumstances and proved its case beyond reasonable doubt. We are surprised at the way in which Courts below have perceived the facts and circumstances of this case. We are not in agreement with the views drawn by the trial Court as well as the High Court while dealing with the matter.

35. Normally this Court does not interfere with the concurrent findings recorded by the Courts below, but in this case we find certain exceptional circumstances as narrated above, considering these aspects we feel that this is a fit case for our interference. In our opinion, instead of dealing with the intrinsic merits of the evidence of witnesses, both the Courts below have acted perversely. Once we arrive at the conclusion that we cannot lend credence to the genuineness of the F.I.R. and the prosecution case, there is no need of further enquiry as the assertion made by the prosecution are not proved beyond reasonable doubt. In the peculiar facts and circumstances of the case, definitely the benefit of doubt goes to the accused—appellant. Viewed in that angle, the judgments of the Courts below awarding conviction and sentence to the accused—appellant requires to be set aside.

36. In the result, the appeal is allowed and the conviction and sentence awarded by the Courts below is set aside. The accused—appellant stands acquitted from all the charges levelled against him. The appellant is stated to be in jail. He may be set at liberty forthwith, if not required in any other case.

–X–

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