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Law Summary

(Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

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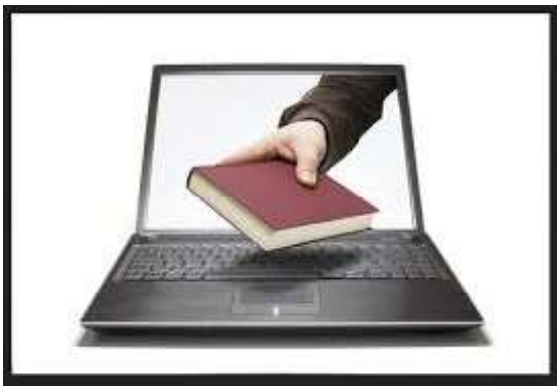

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PART -9 (15TH MAY 2022)

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A.P. CHARITABLE AND HINDU RELIGIOUS INSTITUTIONS AND ENDOWMENTS ACT - Petitioner is a founder family member of the 3rd respondent/Temple - Temple had been registered under the Endowments Act and owns a land which fetches an income of about Rs.1 lakh per annum - Case of the petitioner that on account of the said registration, there are various liabilities cast on the temple, by way of making payments to the Endowments Department, which are taking away income of the temple - Petitioner contended that temples which have an income of less than Rs.5 lakhs are exempt from all the regulations set out in the Endowments Act including the payment of various contributions to the Endowments Department.

HELD: There is every need for the State Government to reconsider it s decision of granting exemption to only those temples having an annual income of less than Rs. 2 lakhs and to increase the limit to Rs.5 lakhs - Writ Petition stands disposed of with a direction to the State Government to consider the grant of exemption to temples having an annual income of less than Rs.5 lakhs from the provisions of the Act including the requirement to pay the mandatory contributions, in the light of the directions of the Hon'ble Supreme court in Sri Divi Kodandarama Sarma and others vs. State of Andhra Pradesh and others (1997) 6 SCC 189 - This exercise shall be conducted within a period of four months from the date of receipt of this Order. **(A.P.) *45***

CIVIL PROCEDURE CODE, Sec.2(2) and Sec.96 - Petitioner/Plaintiff filed OS seeking to grant decree of permanent injunction restraining the defendants, from interfering with the peaceful possession and enjoyment over the suit schedule property - Respondents/ Defendants filed IA under Order VII Rule 11 of Code of Civil Procedure praying to reject the plaint - Trial Court, allowed the said IA with costs and rejected the plaint - Challenging the said Order and Decree, the Petitioner/Plaintiff filed present revision.

HELD: Once plaint is rejected decree ensues and it is a decree as defined

under section 2(2) of CPC - Against the Judgment and Decree, remedy is only in the form of an appeal under section 96 of CPC and revision is not maintainable - Revision stands dismissed - However, this Order does not come in the way of Petitioner working out his remedies as available to him. **(T.S.)** ***5***

CIVIL PROCEDURE CODE, Or.38, Rl.5 **-** ATTACHMENT BEFORE JUDGMENT - Respondent/Plaintiff filed a suit for recovery against Petitioner/Defendant - Along with the suit, he filed I.A. seeking attachment of the schedule property before Judgment - By an Order, Petitioner/Defendant was prohibited and restrained until further Orders from transferring or changing the petition schedule property on the ground that he failed to furnish security within 72 hours from the date of issuance of notice calling upon him to furnish security.

HELD: Order of the attachment was passed on the very same without giving sufficient opportunity to the petitioner to respond to the notice calling upon him to furnish sufficient security as required under Order XXXVIII, Rule 5(1)(b) of CPC - Order is not sustainable in terms of the Order XXXVIII, Rule 5 (4) of CPC, as there is no compliance with Sub-rule (1)(b) of the said Rule - Trial Court also failed to record its satisfaction before passing the order of attachment as required - Order under revision suffers from material irregularity and warrants - Civil Revision Petition stands allowed - Order passed in I.A. stands set aside. **(A.P.)** ***33***

CRIMINAL PROCEDURE CODE, Sec.125 - Petitioner is the legally wedded wife of the respondent No.1 - Petitioner, along with her son filed a petition to direct the respondent/husband to pay Rs.2000/- per month - Respondent No.1 pleaded talaq, vide Talaqnama upon the petitioner as per Muslim Law and that the Talaqnama was sent to the petitioner vide registered post which was received back with remarks “Refused” – Trial Court allowed the Maintenance petition, granting monthly maintenance @ Rs.800/- each to the petitioner (wife) as also to the son - Respondent No.1 filed Criminal Revision Petition whereby, Sessions Judge, partly allowed the Revision setting aside the part of the Trial Court judgment whereby, maintenance was granted to the petitioner, but maintaining the grant of maintenance to the son.

HELD: Even the divorced muslim woman is entitled for maintenance u/Sec.125 of Cr.P.C for her whole life so long as she does not remarry and her right to maintenance against the husband is not restricted to the period of Iddat only - Pronouncement of talaq as per the Mahomedan law, with due observance of required time gap amongst three pronouncements has not been proved by any evidence, oral or documentary - Pre-condition of arbitration for reconciliation by two arbiters, one each from family of the wife and the husband respectively, could not be established to have been followed - Registered letter sent to the wife was received back with endorsement of “refusal - Respondent not having adduced any other evidence, except the endorsement

on the registered envelop, failed to prove the service of the registered envelop as also the talaqnama on the Petitioner – Petitioner's application for maintenance under Sec.125 Cr.P.C was maintainable and was rightly allowed by the Magistrate - Judgment passed by the Revisional Court stands set aside and the Judgment of the Trial Court stands revived/restored. **(A.P.)** ***6***

CRIMINAL PROCEDURE CODE, Sec.482 - **PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005,** Sec.12 - Criminal Petition filed to quash the proceedings in D.V.C. before Trial Court by Respondent No.2.

HELD: Petitioners are aged parents of R.1, therefore, it is difficult for them to attend the Court on each date of hearing - Even the allegations made in the complaint against the petitioners are general in nature - Criminal Petition stands disposed of, dispensing with personal appearance of petitioners in D.V.C. proceedings before the Trial Court. **(T.S.) 1**

(INDIAN) EVIDENCE ACT, Sec.45 - Revision Petition assailing the Order passed in I.A, by which the Trial Court dismissed the petition filed by the plaintiff to send the Will, to an expert for opinion of the disputed signature.

HELD: Without assigning any reasons, and merely on the ground of gap of time, the relief sought cannot be declined at the threshold - It is for the expert concerned to conclude about desirability of the standard signature for comparison with the disputed signature - Trial Court is in error in declining the relief, just on the ground of long time gap without assigning any other reason(s) regarding the fitness or otherwise of the standard signature - Civil Revision Petition stands allowed setting aside the Order, passed in I.A. - Consequently, I.A. stands allowed subject to the condition that the Petitioner shall make a deposit of Rs.5,000/- before the Trial Court to meet the expenses towards obtaining the opinion of an expert within one week from the date of receipt of a copy of this Order. **(A.P.)** ***1***

INDIAN EVIDENCE ACT, Sec.65 - Trial Court by its Order I.A. allowed the application holding that the documents in question though photocopies, can be received and marked provided the contents of the photocopies are the true extract of the original copies and there is no requirement of compliance of section 65 of the Indian Evidence Act.

HELD: Defendant No.1 has not stated as to how he secured photocopies without disclosing the availability of the originals and from whom he secured the said photocopies - There is no averment of tracing the transactions by any other means - In the absence of the assertion by defendant No.1 on how he secured the copies and based on vague averment in the affidavit, the trial Court could not have allowed the application filed by

the petitioner - Documents relied upon by defendant No.1 are not in compliance with Sec.65 of the Indian Evidence Act, and therefore the trial Court erred in accepting the application and granting the relief - It is not sustainable - Civil revision petition stands allowed - Order passed by the trial Court in I.A. stands set aside. **(T.S.)** ***3***

NEGOTIABLE INSTRUMENTS ACT, Sec.138 - Issues raised in this appeal by the appellant, challenging his conviction under Section 138 read with Section 141 of the Act, are covered by the decisions of this Court on the aspects of (i) vicarious criminal liability of a partner; and (ii) whether a partner can be convicted and held to be vicariously liable when the partnership firm is not an accused tried for the primary/ substantive offence.

HELD: Appellant cannot be convicted merely because he was a partner of the firm which had taken the loan or that he stood as a guarantor for such a loan - Firm has not been made an accused or even summoned to be tried for the offence - Provisions of Section 141 impose vicarious liability by deeming fiction which presupposes and requires the commission of the offence by the company or firm - Unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-section (1) or (2) of Section 141 would not be liable and convicted as vicariously liable -Sec.141 of the N.I. Act extends vicarious criminal liability to officers associated with the company or firm when one of the twin requirements of Sec.141 has been satisfied, which person(s) then, by deeming fiction, is made vicariously liable and punished - However, such vicarious liability arises only when the company or firm commits the offence as the primary offender - Appeal stands set aside and the appellant's conviction under Sec.138 read with Sec.141 of the N.I. Act - Impugned Judgment of the High Court confirming the conviction and Order of sentence passed by the Sessions Court, and the Order of conviction passed by the Judicial Magistrate First Class stand set aside - Appellant stands acquitted. **(S.C.)** ***1***

NEGOTIABLE INSTRUMENTS ACT, Sec.148 - Challenging the impugned orders passed in Crl.M.P. in Criminal Appeal on before the Sessions Judge, whereby while suspending the execution of sentence of imprisonment imposed against the petitioner, lower appellate Court has ordered the revision petitioner to deposit 20% of the compensation amount in terms of N.I. Act.

HELD - Newly inserted provision u/Sec.148 of the N.I. Act mandates that notwithstanding anything contained in the Criminal Procedure Code, in an appeal preferred against conviction u/Sec.138 of the N.I. Act, the appellate Court may order the appellant to deposit a sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court - Since the appeals under these revisions are preferred in the year 2022 after the amendment came into force in the year 2018, in view of the dictum

laid down by the Apex Court, amended provision of Sec.148 of the N.I. Act squarely applies to the said appeals - As it is ordained that minimum sum of 20% is to be ordered to be deposited and as it is a statutory mandate, no discretion is left with Court to order to deposit less than 20% of the compensation amount - Appellate Court has rightly ordered to deposit 20% of the compensation amount - Impugned orders of the Appellate Court to deposit 20% of the compensation amount in terms of Sec.148 of the N.I. Act are perfectly sustainable under law and they warrant no interference in these Criminal Revision Cases - Criminal Revision Cases stand dismissed.

(A.P.) ***38***

REGISTRATION ACT, Sec.32(c) - Whether the invocation of the Writ jurisdiction of the High Court by the appellant was right, especially when civil suits at the instance of third parties are pending and when the appellant had already been directed by this Court, in proceedings arising under Sec.145 of the Code of Criminal Procedure, to move the civil Court - Appeals challenging the Judgment of the Division Bench of the High Court, reversing the judgment of a Single Judge, by which the Single Judge held that registration of a sale deed by the Registering Authority to be null and void.

HELD - If a party questions the very execution of a document or the right and title of a person to execute a document and present it for registration, his remedy will only be to go to the civil court - But where a party questions only the failure of the Registering Authority to perform his statutory duties in the course of the third step, it cannot be said that the jurisdiction of the High Court under Article 226 stands completely ousted - There is and there can be no dispute about the fact that while the Registering Officer under the Registration Act, may not be competent to examine whether the executant of a document has any right, title or interest over the property which is the subject matter of the document presented for registration, he is obliged to strictly comply with the mandate of law contained in the various provisions of the Act.

In cases where a document is presented for registration by the agent, (i) of the executant; or (ii) of the claimant; or (iii) of the representative or assign of the executant or claimant, the same cannot be accepted for registration unless the agent is duly authorized by a PoA executed and authenticated in the manner provided in the Act - Section 34(3)(c) imposes an obligation on the Registering Officer to satisfy himself about the right of a person appearing as a representative, assign or agent - Appeals stands allowed, and impugned order of the Division Bench is set aside and the Order of the learned single Judge stands restored. **(S.C.)** ***12***

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LAW SUMMARY

2022 (2)

Journal Section

IS IMPLEMENATION OF DIGITAL LEGAL LAWS FUNDMENTAL REALITY OR VIOLATION OF FUNDAMENTAL PRIVACY

By
PVS SAILAJA
Assistant Professor Mahatma Gandhi College Of Law ,Hyderabad

The subject under this analysis is the characteristics around the utilization of advanced digital innovations and its legal execution in the field of legal world and products arising from digital innovations. The decision of this point was foreordained by the dynamic improvement of digital administrations and advanced digital regulations, and the need to adopt present modern regulation to the requirements of the advanced execution and its accuracy. Notwithstanding the way that few strategies for the development of digital regulations are being worked out at the level of worldwide organizations, neither in principle nor in practice is there a solitary comprehension of the legal nature of advanced digital innovations and the foundations of their legal regulation. The rising utilization of digital technologies by legislatures brings up various issues with respect to the succor of these technologies, especially in regards to the rights and legal protections citizens are qualified to. The focus is for the most part on the application and likely modification of existing essential fundamental rights. Nonetheless, the discussion and legal research in this area lacks a mark on more extensive conversation on which new rights citizens ought to have in the computerized period. This article deals the inquiry which new, additional rights could be envisioned in the digital era time if we somehow happened to draft them right now, without any preparation, instead of being tied to a set of existing fundamental rights. To begin a more extensive lawful discussion on this, different new rights for citizens in the digital region are proposed.

Recently President Ram Nath Kovind has given his assent to the **Criminal Procedure (Identification) Bill,** [1] which empowers the police to get physical and biological samples of convicts and of those accused of crimes. The Code of Criminal Procedure currently has another any reason to be taken seriously **Bill 93 of 2022** plans to replace the existing "**Identification of Prisoners Act, 1920"**[2] The Bill as it remains upon the day of presentation to Parliament, gives the empowering provisions in Section 3(c) as produced below, which poses a specific conundrum:

"Any person, who has been, … or arrested in connection with an offence punishable under any law for the time being in force or detained under any preventive detention law, shall, if so required, allow his measurement to be taken by a police officer or a prison officer in such manner as may be prescribed by the Central Government or the State Government:"

The Criminal Procedure (Identification) Bill, 2022 accommodates assortment of 'measurements' from any convict or a person arrested for an offense. The term 'measurement' denotes in the Bill has a wide extension to the extent that it presently incorporates not just

the physical, social ascribes of a person but also the biological samples Moreover, the Bill additionally grows the extent of the person who will be empowered to take such measurements.

One of the most concerning aspects of the Bill is that it vitiates the entire idea of consent and privacy.

This represents a issue and discrediting of the laid out statute in criminal law that any person is sensibly assumed to be innocent until convicted. This has in addition to the fact that found been in the "**Universal Declaration of Human Right**s"[3] **(UDHR),** the Supreme Court of United States' law on the **"coffin case**[4]" and the contemporary Indian jurisprudence which repeated in various instances including **Rajesh Prasad v. Province of Bihar**[5]. The Identification of Prisoners Act, 1920 allows police officers to collect specific identifiable data fingerprints and fingerprints and footprints of persons including convicts and arrested persons Likewise, a Magistrate may order measurements or photographs of a person to be taken to help the investigation of an offense. In case of acquittal or discharge of the person, all material must be destroyed.

This Bill expands the reach of such information as well the people who can get it. It authorizes the National Crime Records Bureau to collect, store, and keep up with specified records. It more likely than not been created to consider the utilization of contemporary technology to take and record exact body measurements. Finger imprints, palm print and footprint impressions, photos, iris and retina scan, physical, biological samples and their analysis are all included in the Bill's definition of "measurements".

THE CRIMINAL PROCEDURE (IDENTIFICATION) BILL, 2022 AND ITS KEY FEATURES [6]

To allow for the application of contemporary technology to take and record accurate body measurements.

To allow a Magistrate to order anyone to take measures; additionally, a Magistrate can order law enforcement officials to collect in the case of a specific category of convicted and non-convicted individuals, "fingerprints, palm print impressions, footprint impressions, photographs, iris and retina scan, physical, biological samples and their analysis, behavioral attributes including signatures, handwriting, or any other examination".

Invest the **National Crime Records Bureau (NCRB)** with the authority to collect, store, and preserve records of measurements, as well as to share, disseminate, destroy, and dispose of records.

On the direction of a Magistrate, finger and footprint impressions, as well as a limited category of convicted and non-convicted persons' pictures, are permitted.

To any person who resists or refuses to offer measures should be able to be measured by police or jail authorities.

For the purposes of inquiry, the Bill also permits police to keep track of signatures, handwriting, and other behavioral characteristics referred to in Section 53 or Section 53-A of the Code of Criminal Procedure, 1973.

According to the Bill's criteria, anyone convicted, imprisoned, or held under any

preventive detention act will be obliged to give “measurements” to a police officer or a prison official.

The National Crime Records Bureau (NCRB) will be the central agency to maintain the records. It will share the data with law enforcement agencies. Further, states/UTs may notify agencies to collect, preserve, and share data in their respective jurisdictions.

PRESENT BILL AND ITS MODERN MEANS TO CAPTURE:

The Bill was acquainted with empower for the utilization of modern means to catch and record acceptable body dimensions, as the current regulation, the “identification of Prisoners Act, 1920,” just took into consideration the capturing of fingerprint and footprint impressions of a select group of convicted people. Moreover, the Bill intends to widen the “ambit of persons” who can be measured, which will aid insightful authorities in social affair satisfactory lawfully admissible evidence and establishing the accused person’s crime. In addition, the Bill stipulates legal expert for taking appropriate body measurements of the individuals who are constrained to submit such measurements, which would improve on the effectiveness and speed of criminal examinations while additionally improving the conviction rate.

THE WORD” MEASUREMENT AND ITS WIDE DESCRIPTION

One of the critical highlights of Bill is the extension of the term ‘measurement’. As indicated by **Clause 2(1)(b) of the Bill**, the term will incorporate “finger-impressions, palm-print impressions, foot-print impressions, photos, iris and retina scan, physical, biological examples and their analysis, conduct ascribes including marks, handwriting or some other examination alluded to in area **53 or segment 53A of the Code of Criminal Procedure, 1973**”[7].There have been advances in innovation that permit other measurements to be used for criminal investigations**. The DNA Technology (Use and Application) Regulation Bill, 2019**[8] (forthcoming in Lok Sabha) gives a structure to involving DNA innovation for this purpose. In 1980, the Law Commission of India, while analyzing the 1920 Act, had noticed the need to amend it to align it with modern trends in criminal investigation. In March 2003, the Expert Committee on Reforms of the Criminal Justice System **Dr. justice V. S. Malimath**[9] prescribed amending the 1920 Act to enable the Magistrate to authorize the collection of information, for example, blood tests for DNA, hair, saliva, and semen.

RIGHT TO PRIVACY AS WELL AS EQUALITY AND THE CRIMINAL PROCEDURE (IDENTIFICATION) BILL

The Bill permits the collection of certain identifiable information about individuals for the investigation of crime. The information specified under the Bill forms part of the personal data of individuals and is thus protected under the right to privacy of individuals. The right to privacy has been recognized as a fundamental right by the **Supreme Court (2017)[10].** The Court laid out principles that should govern any law that restricts this right. These include a public purpose, a rational nexus of the law with such purpose, and that this is the least intrusive way to achieve the purpose. That is, the infringement of privacy must be necessary for and proportionate to that purpose. The Bill may fail this test on several parameters. It may also fail Article 14 requirements of a law to be fair and reasonable and for equality under the law.

DATA AND ITS CONNECTED PERSONS:

The Bill expands the arrangement of persons whose information might be collected to incorporate people sentenced or arrested for any offense. For instance, this would incorporate someone arrested for rash and negligent driving, which conveys a penalty of a maximum imprisonment of six months . It also expands the power of the Magistrate to order collection from any person prior only those arrested) to aid investigation. This contrasts from the perception of the Law Commission in the year 1980 that the 1920 Act depends on the rule that the less serious the offense, the more restricted ought to be the power to go to coercive measures. **The DNA Technology (Use and Application) Regulation Bill, 2019** defers the assent prerequisite for collecting DNA from persons arrested for just those offenses which are punishable with death or imprisonment for a term exceeding seven years.

PERSONS AUTHORISED TO COLLECT DATA

Under the 1920 Act, a Magistrate may order information to be collected to aid the investigation of an offense. **The Law Commission in the year 1980**[11] commented that the 1920 Act didn't need the Magistrate to provide reasons for his order .It observed that the ambit of the law was exceptionally wide "any person" arrested regarding "any investigation", and refusal to obey the order could carry criminal punishments. It prescribed that the arrangement be amended to require the Magistrate to record reasons behind providing the order. The Bill has no such shield. All things considered, it brings down the level of the police officer who may take the measurement from sub-inspector to head constable also allows the head warder of a prison to take measurements.

AMBIT OF DATA AND COLLECTION OF INFORMATION:

The Bill extends the ambit of information to be collected to incorporate biometrics (fingerprints, palm prints, impressions, iris and retina scan), physical and biological samples (not characterized yet could include blood, semen, saliva, and so on.),and behavioral attributes (signature, handwriting, and could include voice samples). It does not perimeter the measurements to those necessary for a specific investigation. For example, the Bill permits taking the handwriting specimen of a person arrested for rash and negligent driving. It also does not specifically prohibit taking DNA samples (which may include information other than just for determining identity). Note that under Section 53 of the Code of Criminal Procedure, 1973, assortment of biological samples and their analysis might be done provided that "there are sensible ground for believing that such assessment will bear the afford of evidence to the commission of an offense".

ARRESTD PERSON AND BIOLOGICAL SAMPLES

The Bill makes an exception if there should arise an occurrence of biological samples. An person might decline to give such samples except if he is arrested for an offense: (I) against a woman or a child, or (ii) that carries a minimum punishment of seven years imprisonment. The first exception is broad. For example, it could include the case of theft against a woman. Such a provision would also violate equality of law between persons who stole an item from a man and from a woman.

DATA COLLECTION AND ITS RETAINING PROCESS

The Bill permits retaining the data for 75 years long period. The information would be erased distinctly on the acquittal or discharge of a person arrested for an offense. The maintenance

of data in a focal database and its potential use for the investigation of offenses in the future may likewise not meet the necessity and proportionality guidelines.

CONSTITUTIONAL VIGOR OF THE BILL WITH RESPECT TO PRIVACY

By adjusting the Act's scope and repealing it, the legislation has extended the literary interpretation of the Identification of Prisoners Act of 1920. The Bill has characterized the term measurements under Section 2(1)(b), which incorporates finger impressions, palm impressions, foot impressions, photos, iris and retina scan, physical, biological samples and their investigation, and analysis social ascribes like signatures, handwriting, or some other examination alluded to in Section 53 or Section 53-An of the Code of Criminal Procedure, 1973.

The legislature's intention to make the word measurement exclusive in nature by including general words like physical and biological samples could lead to Narco analysis and brain mapping through the use of force implicitly in collection, directly violating Article 20(3), right to self-

incrimination, and Article 21, right to life, of the Indian Constitution. According to Article 20(3)[12] of the Constitution of India , no person accused of a crime may be forced to testify against himself. It has become a source of concern regarding the privacy of individuals, which is in jeopardy.

It ought to be noticed that it is also infringing upon the United Nations Charter's Human Rights necessities. Privacy is a fundamental human right, and there are different aspects of privacy such as a privacy of space, privacy of body, security of information, and privacy of choice that have developed over the long haul through a catena of Supreme Court decisions starting with K. **Gopalan v. Province of Madras**[13], **Kharak Singh v. Province of U.P**[14]., **Charles Sobraj v. Supt. Focal Jail**[15], **Sheela Barse v. Province of Maharashtra**[16] and **Pramod Kumar Saxena v. Association of India**[17]**.**

Also, Clause 4(2) of the Bill considers the maintenance of measurement records for quite long time 75 years, which is a reasonable encroachment of the option to be forgotten, as perceived by the Supreme Court in **S. Puttaswamy v. Association of India**. Moreover, it goes against the core idea of criminal law that nobody is liable until demonstrated blameworthy in a court of law.

Further, In **Narayan Dutt Tiwari Rohit Shekhar**[18], the Court affirmed that nobody should be forced to be subjected to any techniques in question in any circumstances, even when it is in the context of an investigation in a criminal matter. Such actions would compose an unjustified infringement into an individual's personal liberty.

In another case **Kharak Singh State of U.P**[19]., In this case the Court resolute that the term "life" refers to more than animal existence. The resistance to its loss spreads to all of our limbs and faculties, allowing us to appreciate life. The right to life, it could be argued, does not only apply to animals. It refers to more than a person's physical well-being.

The Supreme Court added another aspect to Article 21 **in Maneka Gandhi Union of India**[20], declaring that the "right to life or live" incorporates substantially presence as well as the option to live with nobility. This Bill requires an person's life to be hold, and he will always be under government perception, which is a serious invasion of privacy.

The Supreme Court interpreted in **State of A.P. Challa Ramakrishna Reddy**[21] that one of the essential basic human rights ensured to everybody is the right to life. It is principal to such an extent that nobody, including the Government, has the authority to violate it. In any event, when detained, an individual holds their humanity. He retains his human status and is along these lines qualified for every single central right, including the right to life.

COMPARISON BETWEEN THE IDENTIFICATION OF PRISONERS ACT, 1920 AND CRIMINAL PROCEDURE (IDENTIFICATION) BILL 2020

According to 1920 Act, fingerprints, print impressions, photos might have been gathered. Be that as it may, according to the 2022 Bill the extent of the term measurements has been extended and presently incorporates biological samples and conduct ascribes also alongside those gave under Section 53 and 53A of CrPC.

Under the 1920 Act, An person who is convicted or is arrested for an offense punishable with imprisonment (rigorous) of one year or more might be approached to give their measurements or persons requested to give security for good way of behavior or keeping up with harmony might have been obtained and the magistrate was empowered to order collection from any arrested person to help investigation. Notwithstanding, according to the 2022 Bill, measurements of a person or arrested person for any offence might be taken, the exemptions have previously been talked about above, in addition the 2022 Bill adds the persons detained under any preventive detainment regulation whose estimations may now be taken. Further it additionally gives that Magistrate might arrange the estimations of any individual to be taken, not just a arrested person, to aid investigation or continuing under CrPC or any law. As per the previous Act, only an Investigating Officer, Officer in charge of Police Station or Officer not below the Rank of Sub Inspector were empowered to collect measurements. The 2022 Bill provides that the measurements might be collected by an official in charge of Police Station or any official not bellow the Rank of Head Constable and it additionally adds a classification of prison officers not below the Rank of head warden officer who may likewise collect measurements and samples.

CRIMINAL PROCEDURE (IDENTIFICATION) BILL 2020 AND ITS REPERCUSSION

The Bill has a number of issues and has been criticized on different counts. Few of the issues with the Bill are as under:

TEST OF ARTICLE 14 AND FAILS TO IMPLEMENTATION: The Bill in its current

structure fails the trial of Article 14. The object of the Bill is to utilize current innovation and make the criminal justice system framework more powerful and effective. Just those captured for offenses punishable by of 7 years or more, or those arrested for offenses against a woman or a child might be constrained to give their biological examples; while, all captured people might be constrained to give measurements other than biological examples. This arrangement bears no sane nexus to the point of making investigations more proficient. Also, there lies no choice of assent with the individual; consequently it is only obviously erratic.

VIOLATIVE OF ARTICLE 20(3): According to Article 20(3), one can’t be constrained to be witnessed against himself. An uncovered perusing of the Bill clarifies that the estimations of the person might be recorded and be utilized against him at his trail.

ARTICLE 21 AND ITS VIOLATION: The scope of the term measurement has been expanded in this Bill; it not only includes physical, behavioral attributes but also biological samples. In order for the Bill to stand the test of judicial review, it must satisfy the fourfold requirement of the doctrine of proportionality laid down in **Justice KS Puttaswamy v Union of India**. While the Bill has the authentic aim of further developing investigation, recognition and anticipation of crimes, it neglects to fulfill the other three prerequisites, specifically, appropriateness, need and adjusting and balancing.

AUTHORISED PERSONS AND CORRUPTION: It could be seen that the Bill accommodates for a police or prison official over the position of head constable or head warder to collect measurements, which is absurd and may prompt abuse of power and uncontrolled corruption.

COLLECTION OF DATA AND TIME PERIOD: The Bill means to save the records of measurements for period of 75 years from the date of assortment of such samples. Consequently, it needs reason and isn't anything, yet inconsistent and arbitrary. One more question before the law of the policing the territorial reach of the law to the extent that convicts who have been released after their sentence and maybe living in another country. The law is ambiguous on the degree to which the law enforcement can reach to take the "measurement" of the person. Adding to the interest is the arrangement of "measurement" which must be taken and safeguarded for a considerable for 75 in Section 4(2). The length of the preservation of records and intent is muddled. To contextualize, different High Courts in India safeguard their records for a 30 years. The time of limitation for a criminal case is infinite for heinous offenses however has been endorsed between a half year to 3 years for specific offenses. In this case, the evidence that could be illustrated for an offense, including standard of conduct of an arrestee has been given the high scope of 75 years. This is pretty much the normal life expectancy of any person in India.

CONCLUSION

As a result, the Bill was introduced all together with allow the utilization of modern means to capture and record acceptable body dimensions, determined to approve the taking of measurements of convicts and others for the reasons for distinguishing proof and investigation in criminal cases, as well as the safeguarding of records, in addition to other things. The Bill has encroached citizens' fundamental privileges and rights by conceding the State expansive powers to store detainee records and direct physical and biological tests with the inferred power of law, which is in contrary to law and order and inconsistent in character. People don't lose their humanity while they are detained. The Supreme Court of India, as well as numerous other Indian courts, have reaffirmed this situation in various cases to guarantee that detainees don't become victims. From that point forward, the legislature has been not able to qualify the immaterial differentia and rational connection tests. Subsequently, it is a barefaced encroachment of the citizens' central freedoms expressed in Sections 14, 19, 20(3), and 21 of the Constitution of India.

Several Activists and lawyers concerned about the legislation. The biggest concern is that by crating and storing a database of physical and biological samples as well as detailed profiles the bill infringes upon privacy, since the new law does not define physical and biological samples it can extend to that collection of DNA samples. The bill increases the power of the state by facilitating invasive biometric measurement for all arrested convicted detained person regardless of the gravity of the offence. Even more problematic is the 75 years retention period

which is wholly disproportionate the contrary to the principles of data minimization and storage limitation, laid down in the **Puttuswamy and Aadhar Judgment**. Another concern is that while powers of the judiciary are being unchanged, it is the power of the police and prison official that is being widened. The existing law permits data capture by police and prison officers either from persons convicted or persons arrested for commission of offences punishable with minimum of one year imprisonment. But new law removes existing limitation on person whose measurement could be taken and allows the police to collect samples not only from convicts but also those arrested or even detained under arrest in a case This is a truly breath taking spectrum including petty crime such as violating prohibitory order for not wearing a mask, or traffic violations extra. Most wrongly, even if a person has never been arrested in connection with an ongoing investigation magistrate can order their sample to be collected, taken to its logical connection this has potential to create a comprehensive profile of all crimes in the country. So finally I want to conclude that any government may implement reforms in various fields but it should not be inconsistent with the existing rights which are emerged in our Indian constitution and should not dilute its real essence.

"It's not a faith in technology. It's faith in people."

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2. https://legislative.gov.in/sites/default/files/A1920-33.pdf\
3. https://www.un.org/en/about-us/universal-declaration-of-human-rights
4. https://supreme.justia.com/cases/federal/us/156/432/
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15. https://indiankanoon.org/doc/1518037/
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19. https://indiankanoon.org/doc/619152/
20. https://indiankanoon.org/doc/1766147/
21. https://indiankanoon.org/doc/731194/.

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2022(2) L.S. 1 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

Present
The Hon'ble Ms. Justice
B.S. Bhanumathi

Karri Sri Rama Reddy ..Petitioner
Vs.
Karri Venkyamma ..Respondent

INDIAN EVIDENCE ACT, Sec.45 - Revision Petition assailing the Order passed in I.A, by which the Trial Court dismissed the petition filed by the plaintiff to send the Will, to an expert for opinion of the disputed signature.

HELD: Without assigning any reasons, and merely on the ground of gap of time, the relief sought cannot be declined at the threshold - It is for the expert concerned to conclude about desirability of the standard signature for comparison with the disputed signature - Trial Court is in error in declining the relief, just on the ground of long time gap without assigning any other reason(s) regarding the fitness or otherwise of the standard signature - Civil Revision Petition stands allowed setting aside the Order, passed in I.A. - Consequently, I.A. stands allowed subject to the condition that the Petitioner shall make a deposit of Rs.5,000/- before the Trial Court to meet the expenses towards obtaining the opinion of an expert within one week from the date of receipt of a copy of this Order.

C.R.P.No.912/2018 Date: 28-2-2022

Mr. Sai Gangadhar Chamarty, Advocate for the Petitioner.

O R D ER

This revision petition under Article 227 of the Constitution of India, is filed assailing the order dated 09.01.2018, passed in I.A.No.523 of 2017 in O.S.No.102 of 2011 on the file of Senior Civil Judge, Tanuku, by which the court dismissed the petition filed by the plaintiff under Section 45 of the Indian Evidence Act to send the Will dated 05.08.1995, to an expert for opinion of the disputed signature thereon of the executant, Karri Veerareddy, on comparison of the same with the admitted signature of the testator on a sale deed dated 22.06.1977.

2.Heard Mr. Sai Gangadhar Chamarty, learned counsel appearing for the revision petitioner/plaintiff and Mr. K.L.N.Swamy, learned counsel appearing for the respondent/defendant No.5. Respondents 1 to 4 and 6 to 9 are stated to be not necessary parties to this revision.

3.The petitioner/plaintiff denied the execution of the Will relied on by the defendants claiming that his father was completely bed ridden, unable to move from bed, unconscious and in a state of unsound mind before his death on 06.08.1995.

4.As per the counter of 5th respondent, adopted by 8th respondent, their case is that their father never acted as a guardian under the sale deed dated 22.06.1977 and the signature thereon is not that of their father. They further opposed the petition saying that without producing the signature of the deceased pertaining to period contemporary to the disputed document, the petition cannot be allowed. They further contended that their father was in sound disposing state of mind when the Will was executed.

5.The trial Court dismissed the petition, while accepting the proposition that petition for opinion of expert can be filed at any stage of the proceedings, and holding that (i) the petitioner failed to establish that the testator was literally on the deathbed at that time and suffering from several ailments; (ii) that the testator was aged about 70 years by the date of Will, whereas, he was 52 years old as on the date of the sale deed and the nature of the documents are different, because of which there is possibility of variations in the signatures which is an integral part of natural writing; that the opinion of an expert is not binding on Court as it is only advisory and can be interpreted like any other evidence; (iii) that in the absence of signatures of contemporary period at least within two or three years before or after the alleged Will dated 05.08.1995, it is not desirable to seek opinion of expert which may lead to further complications of the issue and it would be difficult for an expert to arrive at a just conclusion due to possibility of variations in signature due to lapse of time and it may result in prejudice to the respondents. Finally, Court below concluded that for want of proof of ill-health of the testator and availability of signature of the contemporaneous period; it cannot allow the petition.

6.The petitioner placed reliance before the trial Court, on the decision of a Full Bench of High Court of A.P. in Bande Siva Shankara Srin**ivasa Prasad Vs. Ravi Surya Prakash Babu and others**2016 (2) ALT 248 (F.B) to fortify the contention that Court is not barred from seeking opinion of an expert merely because the time gap between the admitted and disputed hand writing or signature is long and that the signature of the contemporary period is not always necessary and further that it is for the expert to reach a conclusion whether the signature to be sent for comparison is fit for comparison.

7.From the very same decision, the trial Court culled out the observations of the High Court that material written two or three years before or after the disputed writing serves as satisfactory standards; that if the questioned writing purports to be by an aged writer, it is especially desirable that the standards should not only be near the date of the writing in question, but it should also, if possible, be shown that they were written under similar health conditions as when serious illness occurs a signature often undergoes a remarkable change in a very short period and thereby, if a suspect Will is dated near the day of death, standard

signatures covering their period are essential, if reliable evidence of authenticity or otherwise of signature is to be established; that normally, in case of typical adult, basic writing habits change gradually and consequently effort should always be made to procure some standards (admittedly genuine writings/signatures) written near in date to the disputed matter.

8.The point for consideration is:

Whether the impugned order of the trial Court suffers from illegality or irregularity in dismissing the petition or is against the principles of natural justice or the Court below exceeded its jurisdiction or failed to exercise its jurisdiction?

9.POINT**:**

First of all, the Court below observed that the petitioner failed to observe that the testator was literally on the deathbed and was suffering from several ailments. It is not a stage to establish the contentions of the parties. At the most, the contentions may be considered to the extent of examining whether there are *bona fides* in seeking the reliefs, but not beyond that, while dealing with the petition of the type under consideration.

10. Because of a long gap between the signature alleged to be made on the disputed Will and the document, which is proposed for comparison, for about 18 years or so, the trial Court felt that it would be difficult for an expert to arrive at such conclusion for lack of admitted signature of the testator made during the period contemporaneous to the date of disputed Will. In this regard, the revision petitioner relied upon the decision of the Full Bench decision of the High Court of Andhra Pradesh at Hyderabad in the case of **Bande Siva Shankara Srinivasa Prasad** (supra), and contended that it is for the expert to decline comparison if the disputed signature and the standard signature cannot be compared due to lapse of time and it is not for the trial Court to decline on the ground of long lapse of time. In the said case, due to various views expressed by the same High Court in different matters, as to the effect of long time gap between the admitted signature and the disputed signature for comparison by the handwriting expert, a reference was made to the Full Bench of the High Court.

11.The question for consideration by the Full Bench is 'Whether contemporaneity of signatures was an essential pre-requisite for the Court to direct comparison thereof for expert opinion?' As such, the Full Bench formulated three more questions as follows:

"a)Are contemporaneous hand writings/signatures always or normally necessary for comparison and report;

b)What is the meaning of contemporaneous; and what is the measure of contemporaneity;

c)Why are Examiner of Questioned Documents frequently returning documents sent to them for opinion, to the referring Court for

contemporaneous signatures/ handwritings? Is current handwriting science/expert protocols in the area incapable of comparing handwritings/ signatures without contemporaneous models for comparison; whether in all circumstances or only in specific situations; and if in specific situations, what are the range of circumstances where contemporaneous handwritings/signatures required for rendering an opinion."

After thorough examination of views of different Benches on the point under reference, the Full Bench answered the reference as under:

"It is essentially within the judicious discretion of the Court, depending on the individual facts and circumstances of the case before it, to seek or not to seek expert opinion as to the comparison of the disputed handwriting/signature with the admitted handwriting/signature under Section 45 of the Indian Evidence Act, 1872. The Court is however not barred from sending the disputed handwriting/signature for comparison to an expert merely because the time gap between the admitted handwriting/ signature and the disputed handwriting/signature is long. The Court must however endeavour to impress upon the petitioning party that comparison of disputed handwritings/signatures with admitted handwritings/signatures, separated by a time lag of 2 to 3 years, would be desirable so as to facilitate expert comparison in accordance with satisfactory standards. That being said, there can

be no hard and fast rule about this aspect and it would ultimately be for the expert concerned to voice his conclusion as to whether the disputed handwriting/signature and the admitted handwriting/ signature are capable of comparison for a viable expert opinion. The view expressed by the Division Bench in *JANACHAITANYA HOUSING LIMITED* v. *DIVYA FINANCIERS [(2008)3 ALT 409 (DB)]*,

as to the stage of the proceedings when an application can be moved by a party under Section 45 of the Indian Evidence Act, 1872, continues to hold the field and there is no necessity for this Full Bench to address that issue."

12.In fact, this decision has been brought to the notice of the trial Court and the same has been mentioned in the impugned order for having cited in support of the contention that merely because of time gap between the admitted and disputed handwriting/signature is long, the Court is not debarred from sending the disputed hand writing or signature for comparison to expert and also that signatures of the contemporary period is not always necessary and further, it is for the expert to reach a conclusion whether the signature sent is fit for comparison or not. However, the trial Court followed the observations of the Full Bench in the same decision to the effect that material written two or three years before

or after the disputed writing serves as satisfactory standard as lapse of greater time or change in health condition would make the standards less representative and therefore an effort must always be made to procure admittedly genuine writing/ signature written near in date to the disputed matter.

13.The trial Court laid emphasis on the desirability to have the standard writing nearest in point of time, but, failed to take into consideration the next observation of the Full Bench that it would be ultimately be for the expert concerned to voice his conclusion as to whether the disputed handwriting/signatures and admitted

handwriting/signature are capable of comparison for a viable expert opinion.

14.In any case, the gap in period of time does not ipso facto disentitle comparison. Without assigning any reasons, and merely on the ground of gap of time, the relief sought cannot be declined at the threshold. At the cost of repetition, it can be said that irrespective of the time tap, signatures can be compared, but it is desirable to have a short gap of two or three years and thereby, whenever, in any given case, the request is to be declined, there must be a reason for doing so, other than the time gap. For instance, if there is an apparent variation in the signature, it may be recorded as a ground to decline the relief. Even then, an expert may be in a position to find some similarity or dissimilarity and it may be difficult for a Court to find such characters without technical support. In the present case, there is no such reason found.

15.Moreover, it is for the expert concerned to conclude about desirability of the standard signature for comparison with the disputed signature. As such, the trial Court is in error in declining the relief, just on the ground of long time gap without assigning any other reason(s) regarding the fitness or otherwise of the standard signature.

16.The trial Court further opined that the expert's opinion is not binding on the Court as it is only an advisory in nature and it can be interpreted like any other evidence.

17.Section 5 of the Indian Evidence Act, 1872, permits evidence of the existence or non-existence of every fact in issue and of such other facts as are declared to be 'relevant' in the said Act and of no others.

No doubt, the opinion of an expert is admissible in evidence as 'relevant' under Section 45 of the Indian Evidence Act and the same is liable for scrutiny as a matter of appreciation of evidence, like any other evidence, whereas, Section 73 of the Act enables the Court to examine the disputed signatures. In the absence of any other valid reason, the relief cannot be declined on the ground taken by the trial Court, since Sections 45 and 73 of the Evidence Act must be read using harmonious interpretation by which Section 73 does not make Section 45 redundant. Thus, for the foregoing reasons, the impugned order is liable to be set aside.

18.Accordingly, the Civil Revision Petition is allowed setting aside the order, dated 09.01.2018 of the learned Senior Civil

Judge, Tanuku, passed in I.A.No.523 of 2017 in O.S.No.102 of 2011. Consequently, I.A.No.523 of 2017 is allowed subject to the condition that the petitioner shall make a deposit of Rs.5,000/- before the trial Court to meet the expenses towards obtaining the opinion of an expert within one week from the date of receipt of a copy of this order. It is further made clear that the petitioner shall not cause any delay on his part in securing the opinion of expert.

There shall be no order as to costs.

Pending miscellaneous petitions, if any, shall stand closed.

–X–

2022(2) L.S. 6 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

Present
The Hon'ble Mr. Justice
Ravi Nath Tilhari

Pattam Gousha Bi ..Petitioner
Vs.
Pattan John Shaida & Anr. ..Respondent

CRIMINAL PROCEDURE CODE, Sec.125 - Petitioner is the legally wedded wife of the respondent No.1 - Petitioner, along with her son filed a petition to direct the respondent/ husband to pay Rs.2000/- per month - Respondent No.1 pleaded talaq, vide Talaqnama upon the petitioner as per Muslim Law and that the Talaqnama was sent to the petitioner vide registered post which was received back with remarks "Refused" – Trial Court allowed the Maintenance petition, granting monthly maintenance @ Rs.800/- each to the petitioner (wife) as also to the son - Respondent No.1 filed Criminal Revision Petition whereby, Sessions Judge, partly allowed the Revision setting aside the part of the Trial Court judgment whereby, maintenance was granted to the petitioner, but maintaining the grant of maintenance to the son.

HELD: Even the divorced muslim woman is entitled for maintenance u/Sec.125 of Cr.P.C for her whole life so long as she does not remarry and her right to maintenance against the husband is not restricted to the period of Iddat only - Pronouncement of talaq as per the Mahomedan law, with due observance of required time gap amongst three pronouncements has not been proved by any evidence, oral or documentary - Pre-condition of arbitration for reconciliation by two arbiters, one each from family of the wife and the husband respectively, could not be established to have been followed - Registered letter sent to the wife was received back with endorsement of "refusal - Respondent not having adduced any other evidence, except the endorsement on the registered envelop, failed to prove the service of the registered envelop as also the talaqnama on the Petitioner – Petitioner's application for

Crl.R.C.No.1743/2006 Date: 6-5-2022

maintenance under Sec.125 Cr.P.C was maintainable and was rightly allowed by the Magistrate - Judgment passed by the Revisional Court stands set aside and the Judgment of the Trial Court stands revived/restored.

J U D G M E N T

Heard Sri Raja Reddy Koneti, learned counsel for the petitioner and Sri Soora Venkata Sainath, learned Special Assistant Public Prosecutor for the 2nd respondent/ State.

2. There is no representation for the respondent No.1, inspite of service with respect to which the proof of service was filed vide U.S.R.No.66325/2021.

3. The petitioner, along with her son filed a Miscellaneous Petition No.4 of 2003 in the Court of Junior Civil Judge-cum-Judicial First Class Magistrate, Ponnur under Section 125 of the Code of Criminal Procedure 1973 (in short Cr.P.C.) praying to direct the respondent/husband to pay Rs.2000/- per month to both the applicants, towards maintenance. It was filed inter alia on the averments that the petitioner (petitioner No.1 in the maintenance petition) is the legally wedded wife of the respondent No.1. The marriage took place on 02.04.2000. The respondent neglected and refused to maintain without any cause for no fault or disability on the part of the petitioner, who is not able to maintain her.

4. The respondent No.1 filed counter admitting his marriage with the petitioner but without dowry. The respondent submitted that he took due care of the disabled son (petitioner No.2 in the maintenance petition), but it was due to the negligence of the petitioner that the disease of the son increased. He tried to bring them back but of no avail in spite of mediations of the elders and Jumma Masjid Mosque committee, Pusuluru. The petitioner and her mother gave criminal complaints against the respondent and when the respondent advised the petitioner not to visit her mother the petitioner did not accede to the request. The respondent No.1 pleaded talaq, vide Talaqnama upon the petitioner as per Muslim Law and that the Talaqnama was sent to the petitioner vide registered post along with demand draft of Rs.315/-, which was received back with remarks “Refused . The petitioner was thus not entitled for any maintenance.

5. The petitioner examined herself as PW.1 and examined PWs.2 and 3 and marked Ex.P1 to prove her case. The respondent No.1 examined himself as RW.1 and examined RWs.2 and 3, the said arbiters and marked Exs.R1 to R4 in support of his case.

6. The learned Judicial First Class Magistrate, Ponnur allowed the Maintenance Petition, granting monthly maintenance @ Rs.800/- each to the petitioner (wife) as also to the son from the date of the petition, with costs against the respondent vide judgment and order dated 29.12.2004.

7. The respondent No.1 filed Criminal Revision Petition No.36/2005 under Sections 397 and 399 Cr.P.C, challenging the judgment and order dated 29.12.2004. The First Additional Sessions Judge, Guntur

partly allowed the revision vide judgment dated 07.07.2006 setting aside the part of the judgment dated 29.12.2004 whereby maintenance was granted to the petitioner, but maintaining the grant of maintenance to the son.

8. In the background of the above facts the present criminal revision case was filed by the petitioner/wife.

9. Sri Raja Reddy Koneti, learned counsel for the petitioner submitted that there was no valid Talaq as per the Muslim Law. There was no communication of the Talaqnama. As per the own case of the respondent No.1, the registered envelope was returned unserved. The petitioner continued to be the wife of the respondent No.1 and was not the divorcee.

10. Sri Raja Reddy Koneti next submitted that a divorced Muslim wife is also entitled to maintenance under Section 125 Cr.P.C. for her whole life unless she remarries, and it cannot be restricted to iddat period only.

11. Sri Soora Venkata Sainath, learned counsel for the 2nd respondent/ State submitted that there was no illegality in the grant of maintenance to the petitioner by the learned Magistrate and its reversal by the Revisional Court cannot be sustained. He placed reliance on the judgment of Hon'ble the Apex Court in the case of Shamim Ara v. State of Uttar Pradesh and Another (2002) 7 SCC 518).

12. I have considered the submissions advanced by the learned counsels for the petitioner and respondent No.2 and perused the material on record.

13. Two points arise for consideration and determination by this Court which are as follows:-

i. Whether the petitioner is a "divorced wife or "wife of the respondent No.1 depending upon the validity or otherwise of the Talaq as claimed upon her, as per the Muslim Law?

ii. Whether the petitioner is entitled for maintenance from the respondent No.1, and if yes, upto what period?

14. The learned Magistrate held that there was no valid dissolution of the marriage as per Muslim Law. Except the copy of the Talaqnama, undelivered registered post with the demand draft, postal receipt and counter foil of the demand draft, no other evidence was produced by the respondent No.1 of the pronouncement of the Talaq and the communication of talaqnama to the petitioner. The petitioner as such was entitled for maintenance from the respondent No.1.

15. The learned Revisional Court held that the petitioner was not entitled for maintenance after divorce beyond iddat period. It held the petitioner to be the divorced wife as in its view the respondent No.1 had followed the due procedure as per Muslim law before pronouncement of Talaq. It held that from Ex.R1 (Talaknama), it was revealed that the respondent No.1 pronounced Triple Talaq on 30.07.2002 in the presence of the elders, for clear reasons, and from Ex.R2 (counter foil of DD receipt) it was revealed that the respondent No.1 had taken a

demand draft of Rs.525/- towards maintenance, whereas Ex.R3 (the postal receipt) revealed that the respondent send the Talaknama to the petitioner which the petitioner willfully and intentionally refused to take vide Ex.R4 (undelivered registered cover addressed to the petitioner). The refusal to take notice as per the revisional Court amounted to service of notice of Talaknama. Prior to pronouncement of talaq, the mediators on both sides tried to pacify the matter but of no use.

16. Only on the above ground that the petitioner was divorced, the revision was allowed and the order granting maintenance to the petitioner was set aside.

17. The Court proceeds to consider if there was valid talaq as per Muslim law.

18. In the "Commentaries on Mohammedan Law" by B.R. Verma, 12 Edition (2013), published by Law Publishers (India) Pvt. Ltd., Allahabad, Chapter V section 58 deals with modes of divorce which reads as under:

> "Section 58. Modes of talaq.— A talaq may be effected in the following ways:
>
> (1) By a single pronouncement followed by abstinence from sexual inter course during the period of talaq:
>
> Provided that in the case of a consummated marriage, with a menstruating wife, the pronouncement is made during a tuhr in which the husband had no sexual intercourse. This is called talaq-ahsan.
>
> (2)(a) In the case of unconsummated marriage, by a single pronouncement, even though during a period of menstruation.
>
> (b) In the case of a consummated marriage by three pronouncements made—
>
> (i) in the case of a menstruating wife- during each of three successive tuhrs; and
>
> (ii) in the case of a non-menstruating wife after intervals of 30 days between each pronouncement; with abstinence from sexual intercourse during these tuhrs on periods and in the case of a pregnant wife, till delivery. This is called talaqhasan.
>
> (3)(a) By a single pronouncement—
>
> (i) indicating a clear intention to dissolve the marriage irrevocably; or
>
> (ii) made during a tuhr in which there was sexual intercourse; or
>
> (iii) made during menstruation of a wife whose marriage was consummated.
>
> (b) By three pronouncements either in one sentence or separately. This is called talaq-ul-bidaat.
>
> Explanation.— Tuhr is the period of purity between menstruations."

19. Section 59, then provides manner of giving divorce and reads as under:

> "Section 59- Talaq how

pronounced.— (1) A talaq may be effected by words expressed either orally or in writing or by signs where the husband is unable to do so.

(2) An oral talaq becomes effective— (a) if the words used are express or clearly show an intention to divorce; or (b) where the words used are not express, if it is proved that there was an intention to effect a divorce.

(3) A talaq in writing becomes effective—

(a) if the writing is in the customary form, showing the name of the writer and the addressee; or

(b) if it is proved that there was an intention to effect a divorce.

(4) It is not necessary that a talaq should be pronounced in the presence of the wife or should be addressed to her.

(5) A talaq may be pronounced conditionally or so as to take effect immediately or at a future time or on the happening of any contingency."

20. As per Mahomedan Law, a divorce by the husband is talaq and it has its oral as well as written forms. There is no particular written form prescribed. Talaq reduced in a Talaqnama may be the record of the fact of an oral Talaq or it may be the deed by which the divorce is effected. A talaq in writing becomes effective if the writing is in customary form showing the name of the writer and the addressee or if it is proved that there was an intention to effect a divorce. There has to be pronouncement of talaq either orally or in writing or even by signs where the husband is unable to do so i.e., to pronounce orally or in writing. These are only the manner of giving divorce. Whatever be the manner of giving talaq, in all forms the husband has to follow the prescribed procedure of pronouncement of talaq, after the reconciliation process has been ineffected or in vain.

21. In Shamim Ara (supra)the Muslim wife had filed an application under Section 125 Cr.P.C. against husband claiming maintenance, which was refused on the ground that she was already divorced by her husband. The husband claimed protection behind the Muslim Women (Protection of Rights on Divorce) Act, 1986. The Hon'ble Apex Court held that law of talaq as ordained by Holy Quran, is: (i) that "talaq must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. The Hon'ble Apex Court further held that the Talaq to be effective has to be pronounced. The term "pronounced" means to proclaim, to utter formally, to utter rhetorically, to utter, to declare, to articulate. A mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot, by itself, be treated as effectuating Talaq on the date of delivery of the copy of the written statement to the wife. The husband ought to have adduced evidence and proved the pronouncement of

Talaq.

22. It is apt to refer paragraph Nos.13, 14 and 16 of Shamim Ara (supra) as under:-

> "13. There is yet another illuminating and weighty judicial opinion available in two decisions of Gauhati High Court recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in Sri Jiauddin Ahmed v. Anwara Begum {(1981) 1 GLR 358} and later speaking for the Division Bench in Rukia Khatun v. Abdul Khalique Laskar {(1981) 1 GLR 375}. In Jiauddin Ahmed's case {(1981) 1 Gau LR 375), a plea of previous divorce, i.e. the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid talaq of the wife by the husband under the Muslim law? The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage-tie, Islam recognize the necessity, in exceptional circumstances, of keeping the way open for its dissolution (Para 6). Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-recognized scholars of great eminence, the learned Judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected. (Para 13). In Rukia Khatun's case, the Division Bench stated that the correct law of talaq as ordained by Holy Quran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay view which, in their opinion, did not lay down the correct law.
>
> 14. We are in respectful agreement with the above said observations made by the learned Judges of High Courts.

….."

16. We are also of the opinion that the talaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, to utter rhetorically, to declare to, utter, to articulate (See Chambers 20th Century Dictionary, New Edition, p.1030). There is no proof of talaq having taken place on 11.7.1987. What the High Court has upheld as talaq is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5.12.1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. The respondent No. 2 ought to have adduced evidence and proved the pronounced of talaq on 11.7.1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do not agree with the view propounded in the decided cases referred to by Mulla and Dr. Tahir Mahmood in their respective commentaries, wherein a mere plea of previous talaq taken in the written statement, though unsubstantiated, has been accepted as proof of talaq bringing to an end the marital relationship with effect from the date of filing of the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on the wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife. So also the affidavit dated 31.8.1988, filed in some previous judicial proceedings not inter partes, containing a self-serving statement of respondent No. 2, could not have been read in evidence as relevant and of any value."

23. In Shayara Bano v. Union of India (2017) 9 SCC 1), the majority view endorsed and reiterated what was declared in Shamim Ara (supra).

24. It is apt to reproduce paragraph Nos.17, 18, 19 and 27 of the judgment by Hon'ble Kurian Joseph, J in Shayara Bano (supra) as under:-

"17. After a detailed discussion on the aforementioned cases, it has been specifically held by this Court in Shamim Ara {(2002) 7 SCC 518 : 2002 SCC (Cri) 1814}, at paragraph 15 that: (SCC p.527)

"15. … There are no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the talaq."

It has to be particularly noted that this conclusion by the Bench in Shamim Ara (supra) is made after "respectful agreement" with Jiauddin Ahmed (supra) that: (Shamim Ara (supra), SCC p.526, para 13)

"13. … talaq must be for a reasonable

cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, "talaq may be effected."

In the light of such specific findings as to how Triple Talaq is bad in law on account of not following the Quranic principles, it cannot be said that there is no ratio decidendi on Triple Talaq in Shamim Ara (supra).

18. Shamim Ara (supra) has since been understood by various High Courts across the country as the law deprecating Triple Talaq as it is opposed to the tenets of the Holy Quran. Consequently, Triple Talaq lacks the approval of Shariat.

19. The High Court of Andhra Pradesh, in Zamrud Begum v. K. Md. Haneef {2002 SCC Online AP 1063 : (2003) 3 ALD 220}, is one of the first High Courts to affirm the view adopted in Shamim Ara (Supra). The High Court, after referring to Shamim Ara (Supra) and all the other decisions mentioned therein, held in paragraphs 13 and 17 as follows: (Zamrud Begum (Supra), SCC Online AP)

"13. It is observed by the Supreme Court in the above said decision that talaq may be oral or in writing and it must be for a reasonable cause. It must be preceded by an attempt of reconciliation of husband and wife by two arbitrators one chosen from the family of the wife and other by husband. If their attempts fail then talaq may be effected by pronouncement. The said procedure has not been followed. The Supreme Court has culled out the same from Mulla and the principles of Mahammedan Law.

17. I am of the considered view that the alleged talaq is not a valid talaq as it is not in accordance with the principles laid down by the Supreme Court. If there is no valid talaq the relationship of the wife with her husband still continues and she cannot be treated as a divorced wife…."

(emphasis supplied)

27. Fortunately, this Court has done its part in Shamim Ara (supra). I expressly endorse and reiterate the law declared in Shamim Ara (Supra). What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well.

25. It is further apt to reproduce paras-102 to 104 of the judgment of the Hon'ble R.F.Nariman, J in Shayara Bano (supra) as under:

102. Applying the test of manifest arbitrariness to the case at hand, it is clear that Triple Talaq is a form of talaq which is itself considered to be something innovative, namely, that it is not in the Sunna, being an irregular or heretical form of talaq. We have noticed how in Fyzee's

book [Tahir Mahmood (Ed.), Asaf A.A. Fyzee, Outlines of Muhammadan Law, 5th Edn., 2008.], the Hanafi School of Shariat law, which itself recognises this form of talaq, specifically states that though lawful it is sinful in that it incurs the wrath of God.

103. Indeed, in Shamim Ara v. State of U.P. [Shamim Ara v. State of U.P., (2002) 7 SCC 518 : 2002 SCC (Cri) 1814] this Court after referring to a number of authorities including certain recent High Court judgments held as under : (SCC p. 526, paras 13-14)

"13. … The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters—one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected (para 13). In Rukia Khatun case [Rukia Khatun v. Abdul Khalique Laskar, (1981) 1 Gau LR 375] the Division Bench stated that the correct law of talaq, as ordained by the Holy Quran, is : (i) that "talaq" must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, "talaq" may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.

14. We are in respectful agreement with the abovesaid observations made by the learned Judges of the High Courts."

104. Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. Also, as understood by the Privy Council in Rashid Ahmad [Rashid Ahmad v. Anisa Khatun, 1931 SCC OnLine PC 78 : (1931-32) 59 IA 21 : AIR 1932 PC 25] , such Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds good after Shamim Ara [Shamim Ara v. State of U.P., (2002) 7 SCC 518 : 2002 SCC (Cri) 1814] . This being the case, it is clear that this form of talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognise and enforce Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) and must be

struck down as being void to the extent that it recognises and enforces Triple Talaq. Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him."

26. In the case of Shayara Bano (supra) the Hon'ble Apex Court by majority set aside the practice of triple talaq-e-Biddat. The Hon'ble Apex Court held that a disapproved form of divorce is talaq by triple declarations in which three pronouncements are made in a single tuhr, either in one sentence e.g. "I divorce thee triply or thrice" or in three sentences "I divorce thee, I divorce thee, I divorce thee" etc., practice. The correct law of Talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters—one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected. It was held that, given the fact that Triple Talaq is instant and irrevocable, any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. This form of talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. Finally by majority, it was held that the practice of Triple Talaq is set aside.

27. It is thus settled in law that the pronouncement of Talaq is to be proved by evidence. Talaq must be for a reasonable cause. It must be preceded by an attempt of reconciliation by husband and wife by two arbiters; and the two arbiters will be, one each, chosen from the family of the husband and the wife respectively.

28. In the present case, the plea of the husband in the written statement before the Court is that the divorce was given on 30.07.2002 and he filed copy of the talaqnama with such written statement.

29. The official true English version of the Talaqnama, dated 30.07.2022 (Ex.R1) which is placed on record reads as under:

"To
Patan Gowsiyabi,
Husband-Patan John Saida,
C/o.S/o.Shaik Abdul Haseem,
Pusuluru, Peddanandipadu Mandal.

This Talaknama is written by John Saida, S/o. Patan Allabaksh, R/o. Pedanandipadu village.

My Nikha with you was performed in Pusuluru Village about three years back as per Mohammedian Customs in the presence of elders. We both of you lived together in Pusuluru Village for a period of one year without any disputes. On the next year of Nikha, a male child was born to us by name Allahbaksh. You at the instance of evil preachings and bad behaviour of your

mother by name Chand Bibi, you after giving birth to male child, you started harassing me and my mother mentally and abused my mother in filthy language and you stated that you would kill me and my mother by giving the poison. As I stated to you not to allow your mother to our house as your mother is having illegal intimacy with other person and that is not good for us, so you and your mother stated that you would kill me and my mother and not only that, on 28.06.2002 you gave report to the Police of Pedanandipadu against me alleging that I beat you. The elders of our village came to Pedanandipadu Police Station and stated actual facts to the Police and then the Police suggested us to live amicably. In spite of the suggestion given by the Police, you did not join the matrimonial home and you went to your parents house along with your mother. Even if you come to the matrimonial house for leading conjugal life, as there is a threat to my life and to the life of my mother, I came to conclusion that we cannot live as husband and wife and so I am stating "Talaq, Talaq, Talaq" for three times to you and dissolving our marriage. At the time of Nikha as Rs.525/- Mehar was given, for 3 months period of iddat at the rate of one rupee per Hundred, I am sending Rs.300/- through Demand Draft, D.D.No.301001, dt.30.07.2002.

Sd/- Patan John Saida,
(Patan John Saida)
Father-Allahbaksh,
Pusuluru village,
Pedanandipadu Mandal

Witnesses:-
(1) Sk.Meerasa
(2) Patan Chinna Saidulu"

30. The talaqnama shows triple talaq in one go, i.e., at the same time in one sentence. The talaqnama, may only be the record of fact of an oral talaq or it may also be a deed by which the divorce is effected. The talaqnama is dated 30.07.2002. Even if it is taken as deed by which the divorce is effected, and addressed to the wife by the respondent No.1, and therefore, in a customary form, even then the respondent/husband had to prove that the talaq in written form was as per the Mahomedan Law, i.e., the writing must show that while divorcing, the true form of talaq was observed i.e., observing the time gap between three pronouncements in writing. Three pronouncements of talaq at the same time i.e., pronouncement of talaq at single go, divorcing thrice at the same time is not as per Muslim Law. The talaqnama, as in the present case, does not effect the talaq upon the petitioner. Divorce in writing, to be effected, must also comply with the pre-requisites of a valid talaq as per the Muslim Law. What cannot be done orally, i.e., by pronouncing talaq thrice in one sentence or at the same time without observing the required time gap can also not be done in writing. Talaq, oral or written must comply with pre-requisites of talaq as per Muslim law to be effective.

31. In Dagdu Chotu Pathan v. Rahimbi Dagdu Pathan (2002 SCC Online Bom 440) the Full Bench of the High Court of Bombay held that even if such statement in writing or made orally before the Court is supported by a talaqnama which may be a record of fact of a oral talaq or may be the deed

by which the divorce is effected, but that supportive document by itself does not lead to a conclusion that the talaq was valid, effective and legal. It was held that in most of the cases, the talaqnamas are customary and unless the factum of talaq is proved, these documents in isolation have no sanctity in support of a valid talaq. Mere existence of the document i.e., the talaqnama, does not make the talaq valid or legal and therefore, it is necessary that the factum of talaq and the stages it is preceded by are required to be proved before the Court, if disputed by the wife.

32. In Dagdu Chotu Pathan (supra) the Bombay High Court further considered specific cases with respect to different pleas of husband having divorced his wife. One of the specific pleas was, as is in the present case, i.e., "in the written statement filed before the Court the husband takes a plea of divorce given on some date in the past and files a copy of the talaqnama and/or divorce certificate with such a written statement". The Bombay High Court held that if the wife disputed about its factum, it cannot be valid and operative. Such divorce will be fictitious and inoperative, unless the husband proves his plea of any of these forms of talaq, before the Court by leading evidence.

33. It is apt to reproduce paras-61, 62, 66 to 68, 71 & 72 of Dagdu Chotu Pathan (supra) as under:

> "61. The above discussion does indicate that mere pronouncement of Talaq by the husband or merely declaring his intentions or his acts of having pronounced the Talaq is not sufficient and does not meet the requirements of law. In every such exercise of right to Talaq the husband is required to satisfy the preconditions of arbitration for reconciliation and reasons for Talaq. Conveying his intentions to divorce the wife are not adequate to meet the requirements of Talaq in the eyes of law. All the stages of conveying the reasons for divorce, appointment of arbiters, the arbiters resorting to conciliation proceedings so as to bring reconciliation between the parties and the failure of such proceedings or a situation where it was impossible for the marriage to continue, are required to be proved as conditions precedent for the husband's right to give Talaq to his wife. It is, thus, not merely the factum of Talaq but the conditions preceding to this stage of giving Talaq are also required to be proved when the wife disputes the factum of Talaq or the effectiveness of Talaq or the legality of Talaq before a Court of law. Mere statement made in writing before the Court, in any form, or in oral depositions regarding the Talaq having been pronounced sometimes in the past is not sufficient to hold that the husband has divorced his wife and such a divorce is in keeping with the dictates of Islam.
>
> 62. It is a fallacious argument that in case of a minor or a woman past menopause, the oral Talaq in the form of Ahsan or Hasan could be pronounced by the husband at any

time or at his sweet will as in such cases there is no Iddat. However, the period of Iddat has been specifically defined and even in such cases there is a waiting period of three lunar months even though there is no occurrence of menstruation. The view taken by this Court in the case of Chandbi Ex. w/o Bandeshah Mujawar (supra) cannot be accepted as a good law.

66. Let us consider now specific cases of husband taking the plea of having divorced his wife:

(a) In the written statement filed before the Court the husband takes a plea of divorce given on some date in the past and files a copy of the Talaqnama and/or divorce certificate with such a written statement....."

67. And, in support thereof, copy of the Talaqnama or deed of divorce or certificate of divorce is produced.

68. On the proceedings initiated by the wife before a competent Court the divorce allegedly given by the husband in the first three forms (a) to (c), if disputed about its factum, cannot be valid and operative. Such a divorce will be fictitious and inoperative unless the husband proves his plea of any of these forms of Talaq before the Court by leading evidence. Mere taking such plea, even in a statement on oath, does not by itself operate as a divorce from the date it is so made because there are conditions precedent to such a form of Talaq and it is required to be exercised during a particular period. The husband is required to discharge his burden of proving that he had no physical relationship with the wife during the waiting period and the reasons for exercising such a right are required to be putforth. The factum of conciliation or arbitration is also one of the conditions preceding the process of Talaq in any of these forms namely "Ahsan" and "Hasan".

71. However, in the last contingency the divorce becomes effective and irrevocable forthwith and the wife becomes "Haram" for the husband. If the husband claims to have exercised his right of divorce in the form of Biddat/Bidai or Rajai, in the written statement on an earlier occasion the divorce is complete and irrevocable provided the factum of due Talaq given in this form, on an earlier occasion, is duly proved before the Court. The words uttered for giving Talaq in these two forms or in any of them are required to be proved before the Court and mere statement of the husband or the proof in support thereof by way of Talaqnama or deed of divorce or certificate of divorce will not be sufficient to prove the factum of having exercised this power sometimes in the past. This view is in consonance with the law laid down by the Privy Council in Anisa Khatun's case (supra).

72. We accordingly hold, with

profound respect, that the view taken in Jaitunbi's case (supra) does not meet the requirements of the Mahomedan Personal Law for a valid and irrevocable divorce. The plea taken by the husband in his written statement that he had given Talaq at an earlier date shall not amount to the dissolution of marriage under the Muslim Personal Law from the date on which such a statement was made unless such a Talaq is duly proved and it is further proved that it was given by following the conditions precedent viz. that of arbitration/reconciliation and for valid reasons and more so when the mode of divorce alleged to have been given in the "Ahsan" or "Hasan" form. The factum of divorce is required to be proved, including the conditions precedent therefor, by evidence both oral and documentary, when the same is disputed by the wife before a competent Court of law. We agree with the view taken subsequently by a Division Bench of this Court in the case of "Saira Banu" (supra) and further lay down the clarifications, as set out hereinabove. We hold that the view taken by the Gauhati High Court in the case of Mast. Rukia Khatun (supra) and Zeenat Fatima Rashid (supra) is more in tune with the ethos of Islamic Personal Law. However, if the husband relies upon the Biddat or Rajai form of Talaq given at an earlier occasion either in his written statement or in his oral depositions, he is required to prove the factum of the same by leading evidence before the Court, if disputed by the wife....."

34. The Court now adverts to the evidence on record, not to re-appreciate the evidence in the exercise of Revisional Jurisdiction, but to determine if based thereon, the finding of the Magistrate or of the Revisional Court is according to law.

35. A perusal of the evidence of RW.2 and RW.3, who are the arbiters / witnesses to prove the factum of mediation, shows that some reconciliation efforts were made which did not succeed. These witnesses stated that they went to the Police Station and to the house of the mother of PW.1 (petitioner), sent by the respondent/ husband. It has been settled in law that the attempt of reconciliation must be by two arbiters, one each, chosen by the family of the wife and the husband respectively. RW.2 and RW.3 were sent only by the respondent/husband. There is nothing on record to show that the Talaq was preceded by an attempt of reconciliation by two (02) arbiters, one chosen by the husband and one chosen by the wife from their respective family.

36. The learned Magistrate recorded that the alleged reconciliation, as deposed by the two (02) witnesses, RW.2 and RW.3, in their statements was not filed before the Court. They failed to file their identification as well to prove that they were the executive body members of the Jumma Masjid, as also that they passed any resolution of reconciliation. The Revisional Court did not advert to this aspect of the matter, which was considered by the learned Magistrate, as in the absence of resolution of

reconciliation alleged to have been entered as per the statements of RW 2 and RW 3 the reconciliation prior to talaq could not have been proved.

37. Pronouncement of Talaq is to be proved by evidence as held in Shamim Ara (supra). The evidence of RW.2 and RW.3 does not prove pronouncement of Talaq by the respondent No.1 upon the petitioner. Any witnesses of talaqnama has also not been produced in evidence. There is no evidence to prove the pronouncement of Talaq by any witness, except the respondent himself, as RW.1, on the basis of Talaqnama.

38. Now the Court proceeds to consider if talaq was communicated to the petitioner/wife.

39. On the point of communication of Talaqnama to the petitioner/wife, the Magistrate recorded that it is admitted case that the Talaqnama sent through registered post was not served upon her. On perusal of the evidence, it is evident that PW.1 deposed in cross examination that "it is not true to suggest that the respondent sent a talaknama and also payment of Rs.300/-". The witness PW.2 also in his cross examination deposed "it is not true to suggest that the respondent sent Talak through registered post and I refused to receive the same". There was clear denial of service of the registered post of Talaqnama as also denial of refusal to receive the registered post. The respondent No.1 did not produce the concerned postman to prove the endorsement of "refusal made on the registered envelope.

40. Section 114 (e) and (f) of the Indian Evidence Act, 1872 reads as under:

> "114 Court may presume existence of certain facts. " The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.
>
> The Court may presume—
>
> (e) That judicial and official acts have been regularly performed;
>
> As to illustration (e)— A judicial act, the regularity of which is in question, was performed under exceptional circumstances;
>
> (f) That the common course of business has been followed in particular cases;
>
> As to illustration (f) — The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances;"

41. Section 4 of the Indian Evidence Act defines the expression "may presume which reads as under:

> "May presume - "Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it."

42. According to Section 4, whenever it is provided by the Evidence Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. The presumption under clauses (e) and (f) of Section 114, the Court may either regard such fact as proved unless and until it is disproved or the Court may call for proof of all those facts with respect to which the presumption is raised. Use of the expression "may presume in Section 114 makes the presumptions therein, "rebuttable presumptions , and when the party, against whom those presumptions are drawn, produce evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of presumption is over and then the evidence will determine the true nature of the fact to be established.

43. In Partap Singh v. Shiv Ram (2020) 11 SCC 242) the Hon'ble Apex Court held that a presumption is not in itself evidence but only makes a prima facie case for party in whose favour it exists. It is a rule concerning evidence. It indicates the person on whom the burden of proof lies. When presumption is conclusive, it obviates the production of other evidence to dislodge conclusion to be drawn on proof of certain facts. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. Then the evidence will determine the true nature of the fact to be established.

44. Paragraphs No.23 and 24 of Pratap Singh (supra) are reproduced as under:

> "23. In Sodhi Transport Co. v. State of U.P. [Sodhi Transport Co. v. State of U.P., (1986) 2 SCC 486 : 1986 SCC (Tax) 410] , this Court was considering Section 28-B of the Uttar Pradesh Sales Tax Act, 1948 which raises a presumption of sale of goods in a manner prescribed therein. This Court considered Section 4 of the Evidence Act and also the previous judgments and held as under: (SCC p. 496, para 14)
>
> "14. A presumption is not in itself evidence but only makes a prima facie case for party in whose favour it exists. It is a rule concerning evidence. It indicates the person on whom the burden of proof lies. When presumption is conclusive, it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. Then the evidence will determine the true nature of the fact to be established. The rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and

coincidence of facts, and circumstances."

24. In another judgment in Kumar Exports v. Sharma Carpets [Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513 : (2009) 1 SCC (Civ) 629 : (2009) 1 SCC (Cri) 823] , this Court examined the presumption of fact in proceedings under Section 138 of the Negotiable Instruments Act, 1881. It was held that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. It was held as under: (SCC p. 521, para 21)

"21. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue."

45. Section 27 of the General Clauses Act, 1897 reads as under:

"27. Meaning of service by post. — Where any [Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

46. In C.C.Alavi Haji v. Palapetty Muhammed (2007)6 SCC 555) the Hon'ble Apex Court held that Section 114 of the Evidence Act enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the Court can presume that the common course of business has been followed in particular cases. When applied to communications sent by the post, Section 114 enables the Court to presume that in common course of natural events, the communications would have been delivered at the address of the addressee. The Hon'ble Apex Court further held that the presumption that is raised

under Section 27 of the General Clauses Act is a far stronger presumption. While Section 114 of the Evidence Act refers to a general presumption, Section 27 of the General Clauses Act refers to a specific presumption.

47. In C.C.Alavi Haji (supra), the Hon'ble Apex Court further held that Section 27 of the General Clauses Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. When a notice is sent by registered post and is returned with a postal endorsement "refused or "not available in the house or "house locked or "shop closed or "addressee not in the station due service has to be presumed. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business.

48. It is apt to refer paragraphs-13 and 14 in C.C.Alavi Haji (supra) as under:

> "13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the court that the common course of business renders it probable that a thing would happen, the court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the GC Act is a far stronger presumption. Further, while Section 114 of the Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of the GC Act is extracted below:
>
> "27. Meaning of service by post.— Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve or either of the expression "give or "send or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the

document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. (Vide Jagdish Singh v. Natthu Singh [(1992) 1 SCC 647 : AIR 1992 SC 1604] ; State of M.P. v. Hiralal [(1996) 7 SCC 523] and V. Raja Kumari v. P. Subbarama Naidu [(2004) 8 SCC 774 : 2005 SCC (Cri) 393] .) It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved."

49. The presumption raised under Section 114 of the Indian Evidence Act is a general presumption whereas the presumption that is raised under Section 27 of the General Clauses Act is specific presumption and is a far stronger presumption. Consequently, where the presumption raised by the Court is referable to Section 114 of the Evidence Act and not to Section 27 of the General Clauses Act, such presumption could be rebutted by producing evidence which may not be as strong as to rebut the presumption raised under Section 27 of the General Clauses Act. Section 27 of the General Clauses Act applies where any Central Act or Regulation made after commencement of the General Clauses Act authorizes or requires any document to be served by post. Serving Talaqnama by post is not authorized or required by any Central Act or Regulation. Any State Act or regulation also does not authorize or require the Talaqnama to be served by post. Therefore, the presumption under Section 27 cannot be applied to the service of Talaqnama even if sent by registered post. The presumption may be raised under Section 114 (e) and (f) of the Evidence Act, which is not as strong as presumption under Section 27 of the General Clauses Act.

50. The petitioner herein produced the evidence of herself as PW 1 and the witness PW 2 deposing that the registered

envelop was not served and that there was no refusal to receive the same. The presumption against the petitioner drawn about service by refusal, was over. Now it was for the respondent No.1 by adducing evidence to prove the true nature of the fact, i.e., that there was refusal as noted on the registered post. The initial burden on the 1st respondent to prove service of talaqnama was discharged in view of the presumption in law in his favour, but in view of the evidence led by the petitioner, the burden was now on the 1st respondent to prove the real fact by adducing evidence as the purpose of presumption was over, it being a rebuttable presumption.

51. Recently, in Vishwabandu v. Krishna (2021 SCC Online SC 828) the summons issued by the registered post was received back with postal endorsement of "refusal and trial Court had proceeded after declaring that the summons had been duly served on the defendant. The Hon'ble Apex Court held that the order passed by the trial Court declaring that the summons had been duly served on the defendant was completely in conformity with legal requirements. Sub-rule (5) of Order V Rule 9 of the CPC was referred to, which provided that if the defendant or his agent had refused to take delivery of the postal article containing summons, the Court issuing the summons shall declare that the summons had been duly served on the defendant. With respect to the Section 27 of the General Clauses Act, the judgment in C.C.Alavi Haji (supra) was also referred. In the present case, Order V Rule 9(5) CPC is not applicable, which provision is with respect to the summons sent by the Court by post and specifically provided for, by the Central Act, i.e., the Code of Civil Procedure.

52. It is settled in law that an affirmative is to be proved and a negative is generally not to be proved, unless it is so provided by law by placing burden to prove negative on a particular person. In Krishna Janardhan Bhat v. Dattatraya G. Hegde (2008) 4 SCC 54) in a different context, the Hon'ble Apex Court held that the Courts must be on guard to see that merely on the application of presumption the same may not lead to injustice or mistaken conviction. It held that it is not that a negative can never be proved but there are cases where such difficulties are faced.

53. It is apt to refer paras-41 to 44 of Krishna Janardhan Bhat (supra) as under:

> "41. Mr Bhat relied upon a decision of this Court in Hiten P. Dalal v. Bratindranath Banerjee [(2001) 6 SCC 16 : 2001 SCC (Cri) 960] wherein this Court held: (SCC pp. 24-25, paras 22-23)
>
> "22. … Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when,

"after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists .

Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man ."

(See also K.N. Beena v. Muniyappan [(2001) 8 SCC 458 : 2002 SCC (Cri) 14].)

42. We assume that the law laid down therein is correct. The views we have taken are not inconsistent therewith.

43. But, we may at the same time notice the development of law in this area in some jurisdictions.

44. The presumption of innocence is a human right. (See Narendra Singh v. State of M.P. [(2004) 10 SCC 699 : 2004 SCC (Cri) 1893] , Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra [(2005) 5 SCC 294 : 2005 SCC (Cri) 1057] and Rajesh Ranjan Yadav v. CBI [(2007) 1 SCC 70 : (2007) 1 SCC (Cri) 254] .) Article 6(2) of the European Convention on Human Rights provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with the Convention, a balancing of the accused's rights and the interest of the society is required to be taken into consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity thereof may be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated under Section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficulty of proving a negative has been emphasised. It is not suggested

that a negative can never be proved but there are cases where such difficulties are faced by the accused e.g. honest and reasonable mistake of fact. In a recent article The Presumption of Innocence and Reverse Burdens: A Balancing Duty published in 2007 CLJ (March Part) 142 it has been stated:

"In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice—where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment."

54. The Andhra Pradesh High Court in Chidamana Venkata Ramana v. Puwada Venkateswara Rao {CRP.No.2190 of 1968, decided on 19.08.1969} relying in the case of Meghji K.Patel v. Kundanmal (1968 Mah.LJ 490) by Bombay High Court held that the notice was not served; In Bombay case, a writ of summons, sought to be served by registered post, had been returned with the endorsement "refused". The Bombay High Court held that the presumption of service had been repelled by the defendant's statements on oath that he has not refused the summons as it was never brought to him. The statement of the defendant on oath prevailed to rebut the presumption in the absence of the evidence of postman. The Hon'ble Apex Court, in Puwada Venkateswara Rao v. Chidamana Venkata Ramana (AIR 1976 SC 869), held that on facts found, the view expressed could not be held to be incorrect. The Hon'ble Apex Court held that in the Bombay case, the presumption had been held to have been rebutted by the evidence of the defendant on oath so that it meant that the plaintiff could not succeed without further evidence.

55. It is apt to reproduce Paragraph Nos.8, 9 and 10 of Puwada Venkateswara Rao (supra), as under:-

"8. A question raised before us by learned Counsel for the respondent is whether the notice sent by the respondent- landlord could be held not to have been served at all simply because the postman, who had made the endorsement of refusal, had not been produced. The Andhra Pradesh High Court had relied upon Meghji Kanji Patel v. Kundanmal Chamanlal, to hold that the notice was not served. There, a writ of summons, sought to be served by registered post, had been returned with the endorsement "refused". The Bombay High Court held G that the presumption of service had been repelled by the defendant's statement on oath that he had not refused it

as it was never brought to him. In this state of evidence, it was held that, unless the postman was produced, the statement of the defendant on oath must prevail. An ex-parte decree, passed on the basis of such an alleged service was, therefore, set aside. On facts found, the view expressed could not be held to be incorrect.

9. In Nirmalabala Debi v. Provat Kumar Basa, it was held by the Calcutta High Court, that a letter sent by registered post, with the endorsement "refused" on the cover, could be presumed to have been duly served upon the addressee without examining the postman who had tried to effect service. What was held there was that the mere fact that the latter had come back with the endorsement "refused" could not raise a presumption of failure to serve. On the other hand, the presumption under section 114 of the Evidence Act would be that, in the ordinary course of business, it was received by the addressee and actually refused by him. This is also a correct statement of the law.

10. The two decisions are reconcilable. The Calcutta High Court applied a rebuttable presumption which had not been repelled by any evidence. In the Bombay case, the presumption had been held to have been rebutted by the evidence of the defendant on oath so that it meant that the plaintiff could not succeed without further evidence. The Andhra Pradesh High Court had applied the ratio disdained of the Bombay case because the defendant-appellant before us had deposed that he had not received the notice. It may be that, on a closer examination of evidence on record, the Court could have reached the conclusion that the defendant had full knowledge of the notice and had actually refused it knowingly. It is not always necessary, in such cases, to produce the postman who tried to effect service. The denial of service by a party may be found to be incorrect from its own admissions or conduct. We do not think it necessary to go into this question any further as we agree with the High Court on the first point argued before us."

56. In view of the aforesaid, this Court finds that the presumption of service by filing the registered envelop with an endorsement "refusal was raised, but that presumption stood rebutted in view of the evidence of PW 1 and PW 2, who clearly deposed that any registered post was not served nor there was any refusal to receive the same. There could be no other evidence to prove the negative, that the petitioner did not refuse to receive the registered post. It would be highly unreasonable to expect that the postman concerned would appear to depose at the instance of the petitioner or in her favour contrary to the endorsement of refusal. However, the endorsement of refusal could be proved by the 1st respondent by producing the postman, which was not

done. Therefore, the presumption having been rebutted and the 1st respondent not having produced any other evidence to prove that the real fact was that there was service of Talaqnama by refusal, the service of talaqnama upon petitioner by refusal could not be proved. There is nothing on record to show that the denial of service by the petitioner as deposed was incorrect either from her own admission if any or conduct or that she had full knowledge of the Talaqnama and knowingly actually refused the same. The finding recorded by the Revisional Court that in view of the refusal, there was deemed service of Talaqnama on the petitioner, cannot be legally sustained.

57. On the point of maintenance, it is apt to refer the following judgment in which the controversy has been set as rest.

58. In Danial Latifi and Another v. Union of India (2001) 7 SCC 740), the constitution bench of the Hon'ble Apex Court considered the question of grant of maintenance to a Muslim divorcee wife and summarized the principles of law holding that the Muslim divorcee wife is entitled for maintenance even beyond iddat period which extends to her whole life unless she remarries.

59. It is apt to reproduce paragraph No.36 of Danial Latifi (supra) as under:

> "36. While upholding the validity of the Act, we may sum up our conclusions:
>
> 1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.
>
> 2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the iddat period.
>
> 3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.
>
> 4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India."

60. In Shabana Bano v. Imran Khan (2010) 1 SCC 666), Hon'ble the Apex Court reiterated that even if a Muslim women has been divorced she would be entitled to claim maintenance from her husband under Section 125 Cr.P.C. after the expiry of the period of iddat also, as long as she does not remarry. It was further held that the

petition under Section 125 Cr.P.C would be maintainable before the Family Court as long as she does not remarry.

61. It is apt to refer Paragraph Nos.20 to 24 of Shabana Bano (supra) as under:-

> "20. In the light of the findings already recorded in earlier paras, it is not necessary for us to go into the merits. The point stands well settled which we would like to reiterate.
>
> 21. The appellant's petition under Section 125 CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 CrPC cannot be restricted for the iddat period only.
>
> 22. The learned Single Judge appeared to be little confused with regard to different provisions of the Muslim Act, the Family Act and CrPC and thus was wholly unjustified in rejecting the appellant's revision.
>
> 23. Cumulative reading of the relevant portions of the judgments of this Court in Danial Latifi [(2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266] and Iqbal Bano [(2007) 6 SCC 785 : (2007) 3 SCC (Cri) 258] would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.
>
> 24. In the light of the aforesaid discussion, the impugned orders are hereby set aside and quashed. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 CrPC after the expiry of period of iddat also, as long as she does not remarry. As a necessary consequence thereof, the matter is remanded to the Family Court at Gwalior for its disposal on merits at an early date, in accordance with law. The respondent shall bear the costs of litigation of the appellant. Counsel's fees Rs 5000."

62. In Shamima Farooqui v. Shahid Khan (2015) 5 SCC 705), the Hon'ble Apex Court held that it can never be forgotten that the inherent and fundamental principle behind Section 125 Cr.P.C. is for amelioration of the financial state of affairs as well as mental agony and anguish that a woman suffers when she is compelled to leave her matrimonial home. The statute commands that there have to be some acceptable arrangements so that she can sustain herself. The principle of sustenance gets more heightened when the children are with her. It was further held that Sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither

arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. The grant of maintenance has to be adequate so that she can live with dignity. She cannot be compelled to become a destitute or a beggar.

63. In view of the aforesaid consideration, this Court is of the considered view that;

I. There was no valid talaq as per the Mahomedan Law by respondent No.1/husband upon petitioner/wife, in as much as;

(i) The triple talaq, in one sentence Talaq-e-biddat is not valid and is declared as unconstitutional in the case of Shayara Bano (supra);

(ii) When there can be no pronouncement of talaq, contrary to Mahomedan Law, orally, it can also not be in the form of writing. Talaq in written form, "talaq name be it a record of fact of an oral talaq or be the deed by which talaq is effected, must also be by observing the pre-conditions of talaq, i.e., after arbitration or reconciliation by their arbiters, one each from the families of husband and wife respectively and for reasons, as also with due observance of the mode of pronouncement of talaq i.e., not in one sentence saying "talaq, talaq, talaq but with duly following the requisite time gap amongst all the three pronouncements.

(iii) The talaq in writing, i.e., talaqnama, was triple talaq written at the same time i.e., in one go, without due observance of the time gap between three pronouncements of talaq, a mode of talaq unrecognized;

(iv) The pronouncement of talaq as per the Mahomedan law, with due observance of required time gap amongst three pronouncements has not been proved by any evidence, oral or documentary;

(v) The pre-condition of arbitration for reconciliation by two arbiters, one each from family of the wife and the husband respectively, could not be established to have been followed;

(vi) The pronouncement of talaq are required to be communicated to the wife;

(vii) The registered letter sent to the wife was received back with endorsement of "refusal ; The endorsement of refusal, on registered envelop, although raises primary presumption that the official acts have been regularly performed or/and the common course of business has been followed, but such presumption under Section 114 (e) and (f) of the Indian Evidence Act is only a rebuttable presumption; Such primary presumption was rebutted on the evidence of the petitioner as PW 1 and the witness PW 2, that neither there was service nor there was

refusal to receive the registered post. The respondent not having adduced any other evidence, except the endorsement on the registered envelop, failed to prove the service of the registered envelop as also the talaqnama on the petitioner. There was no communication of the talaqnama on the petitioner.

(viii) The presumption under Section 27 of the General Clauses Act applies where any Central Act or Regulation made after the commencement of the General Clauses Act authorises or requires any document to be served by post. Presumption under Section 27 of the General Clauses Act, therefore, could not be raised with respect to service of Talaqnama by post.

(ix) The Talaqnama did not effect talaq on the petitioner. She continued to be the wife of the 1st respondent, and was not the divorcee.

II. Maintenance:

i. The petitioner's application for maintenance under Section 125 Cr.P.C was maintainable and was rightly allowed by the Magistrate.

ii. The provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 are not attracted which apply to a divorcee muslim woman.

iii. Even the divorced muslim woman is entitled for maintenance under Section 125 of Cr.P.C for her whole life so long as she does not remarry and her right to maintenance against the husband is not restricted to the period of Iddat only.

64. The points No. I & II as framed in para-13 (supra) stands answered in terms of paragraph No. I (i) to (viii) & II i to iii of para-63 (supra).

65. For all the aforesaid reasons the Revision is allowed. The judgment passed by the revisional court dated 07.07.2006 is set aside and the judgment of the trial Court dated 29.12.2004 is revived/restored.

66. Since long time has expired, it shall be open for the petitioner, if so desired, to take recourse to the appropriate proceedings open in law to her for enhancement of the maintenance amount, if so advised.

67. No order as to costs. Pending miscellaneous petitions, if any, shall stand closed in consequence.

–X–

2021(2) L.S. 33 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

Present
The Hon'ble Mr. Justice Ninala Jayasurya

Pinisetti Srinivas ..Petitioner

Vs.

Bolla Guruvaiah ..Respondent

CIVIL PROCEDURE CODE, Or.38, Rl.5 - ATTACHMENT BEFORE JUDGMENT - Respondent/Plaintiff filed a suit for recovery against Petitioner/Defendant - Along with the suit, he filed I.A. seeking attachment of the schedule property before Judgment - By an Order, Petitioner/Defendant was prohibited and restrained until further Orders from transferring or changing the petition schedule property on the ground that he failed to furnish security within 72 hours from the date of issuance of notice calling upon him to furnish security.

HELD: Order of the attachment was passed on the very same without giving sufficient opportunity to the petitioner to respond to the notice calling upon him to furnish sufficient security as required under Order XXXVIII, Rule 5(1)(b) of CPC - Order is not sustainable in terms of the Order XXXVIII, Rule 5 (4) of CPC, as there is no compliance with Sub-rule (1)(b) of the said Rule - Trial Court also failed to record its satisfaction before passing the order of attachment as required - Order under revision suffers from material irregularity and warrants - Civil Revision Petition stands allowed - Order passed in I.A. stands set aside.

Mr.Kambhampati Ramesh Babu,Advocate for the Petitioner.
Ghantasala Udaya Bhaskar, Advocate for the Respondents.

O R D ER

1. Heard Mr.Kambhampati Ramesh Babu, learned counsel for the petitioner and Mr.Ghantasala Udaya Bhaskar, learned counsel for the respondent.

2. The present Civil Revision Petition is filed aggrieved by an Order dated 30.12.2021 passed in I.A.No.359 of 2021 in O.S.No.197 of 2021 on the file of the Court of the Junior Civil Judge, Movva, Krishna District.

3. The petitioner herein is the defendant in the above referred suit. The respondent/plaintiff filed the above referred suit for recovery of an amount of Rs.18,46,875/-. Along with the suit, he filed I.A.No.359 of 2021 under Order XXXVIII, Rule 5 and Section 151 of the Civil Procedure Code (hereinafter referred to as "CPC) seeking attachment of the petition schedule property before Judgment. By an Order dated 30.12.2021, the petitioner/defendant was prohibited and restrained until further Orders from transferring or changing the petition schedule property on the ground that he failed to furnish security within 72 hours

from the date of issuance of notice calling upon him to furnish security. Hence, the present Civil Revision Petition.

4. The learned counsel for the petitioner, while drawing the attention of this Court to the relevant provisions of Law and the Order under Revision submits that the Order of attachment was passed without issuing notice and without recording satisfaction by the Court, as required under Order XXXVIII, Rule 5 of CPC. He submits that as the Order of attachment is made without complying with the provisions of Sub-rule (1) of Rule 5, the said attachment is void in terms of Sub-rule (4) of Rule 5 of Order XXXVIII of CPC. The learned counsel submits that as seen from the material on record, the notice calling upon the petitioner to furnish security was served on 30.12.2021 and on the very same day, the petition schedule property was attached. Therefore, the impugned Order is liable to be set aside. In support of his contentions, the learned counsel while placing reliance on the decisions in G.Pochaiah vs. S.Balachandran & Ors. (2004 (3) APLJ 344) and Ankinapalli Obul Reddy vs. Dadibathina China Gurava Reddy & Others (2005) 5 ALT 125) submits that the Order under Revision is liable to be set aside.

5. Per contra, the learned counsel for the respondent while contending that the Civil Revision Petition is not maintainable, supported the Order under Revision. He submits that the learned Trail Court passed a detailed Order dated 23.12.2021 and as the petitioner failed to furnish third party security within the time stipulated in terms of the said Order, the Order of attachment came to be passed. He submits that there is no jurisdictional error or perversity in the Order under Revision and that there are no merits warranting interference with the same. Making the said submissions, the learned counsel seeks dismissal of the Revision Petition. With regard to maintainability of the Revision Petition, the learned counsel places reliance on the decision in New India Assurance Co. Ltd., vs. M/s. Bhagyanagar Ventures Ltd., (AIR 2010 Andhra Pradesh 96).

6. This Court has considered the submissions made and perused the material on record. As an issue with regard to maintainability of the Civil Revision Petition has been raised by the learned counsel for the respondent, this Court deems it appropriate to deal with the same before considering the merits of the matter.

7. In New India Assurance Co. Ltd., referred to supra on which reliance is placed by the learned counsel for the respondent, the Hon'ble Division Bench of this Court was dealing with the provisions of the Order XXXVIII, Rule 5 of CPC. The Division Bench in Para 5 of the said Judgment categorically held that:-

> "5. The power of the Court to order attachment before judgment is attracted only when plaintiff pleads and prima facie proves two conditions precedent. These are: that the defendant is about to dispose of whole or any part of his property and defendant is about to remove the

property from local limits of jurisdiction of the Court. Even when such prima facie case is proved, an order of attachment cannot be straight away issued without following procedure contemplated in Rule 5 of Order XXXVIII of CPC. The said Rule requires the Court to direct defendant to furnish security in such a sum as may be specified within the time stipulated by the Court."

8. The Division Bench after referring to the relevant Forms of Appendix-F of CPC, dealt with the stages with regard to furnishing security by the defendant/s in a suit and categorically held that "after issuing notice/ Order of attachment before Judgment in Form No.5 calling for security from defendant for fulfilment of the decree that may be passed against him, the Court has to necessarily wait till the time fixed thereon is completed". The Division Bench at Para 7 of the Judgment held that "if after receiving the said show cause notice within the time stipulated in Form No.5 proceedings, the defendant fails to appear before the Court or appears and fails to satisfy the Court, the Court can issue an Order in Form No.7 directing attachment of property. The Law contemplates appeal only at the second stage actually attaching the property and not at the stage of show cause notice . The Division Bench after referring to the decision of another Division Bench in Union of India vs. M/s. Andhra Technocrats Industries (1982 (2) ALT 19 (NRC), extracted the relevant portion of the said decision, which reads as follows:-

"An order dismissing an application under Order 38, Rule (5) is not appealable. An order under Rule 5 merely directing the defendant to furnish security or to appear and show cause why security should not be furnished is not appealable. Only an order allowing an application under Rule 5 and an order withdrawing the attachment made under sub-rule (3) of Rule 5 on cause being shown by the defendant, are appealable... In this case, there was no interim order of attachment passed under sub-rule (3) of Rule 5. Only an order was passed by the Court under sub-rule (1) of Rule 5 directing issue of notice to the defendant to show cause why he should not furnish security and on the defendant appearing and showing cause in answer to the notice to the Court, dismissed the application. There was no interim attachment passed under sub-rule (3) of Rule 5. Therefore, the order passed by the Court below does not fall within sub-rule (2) of Rule 6. Therefore, the Order passed by the lower Court is not appealable."

9. In the light of the said legal position, the Division Bench in the attending facts and circumstances held that appeal is not maintainable against the Order calling upon to furnish security. There is no dispute about the above stated legal position. However, the said decision is of no aid to the respondent, since there is no compliance with the requirements of Order XXXVIII, Rule 5 of CPC in the present case.

10. For ready reference, the said Rule may be extracted as hereunder:-

> Rule 5 Order XXXVIII of Code of Civil Procedure 1908 "Where defendant may be called upon to furnish security for production of property"
>
> (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,
>
> (a) is about to dispose of the whole or any part of his property, or
>
> (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy, the decree, or to appear and show cause why he should not furnish security.
>
> (2) The plaintiff shall, unless the Court otherwise directs specify the property required to be attached and the estimated value thereof.
>
> (3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.
>
> (4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule such attachment shall be void.

11. In the case on hand, an Order was passed on 23.12.2021 in I.A.No.389 of 2021, the relevant portion of which reads as follows:-

> "It is the contention of the petitioner/ plaintiff that the respondent/defendant is trying to alienate the schedule property in order to default the bona fide creditors. If the respondent succeed in his attempt it will be difficult for the Petitioner to realize the fruits of the decree that may be passed against him.
>
> Issue urgent notice and conditional attachment of the petition schedule property. Attach petition schedule property, if the respondent/defendant fails to furnish third party security to the tune of suit amount within 72 hours."

12. The material on record would go to show that the notice calling upon the petitioner to furnish security was served on 30.12.2021. The endorsement of the concerned Superintendent of the Court of the Junior Civil Judge, Movva, Krishna District in this regard reads thus:-

> "Note: The call for security notice personally served on 30.12.2021. Respondent security not furnished."

13. The above aspect would make it clear that the Order of the attachment was passed on the very same day i.e., 30.12.2021 without giving sufficient opportunity to the petitioner herein to respond to the notice calling upon him to furnish sufficient security as required under Order XXXVIII, Rule 5(1)(b) of CPC. Therefore, the Order is not sustainable in terms of the Order XXXVIII, Rule 5 (4) of CPC, as there is no compliance with Sub-rule (1)(b) of the said Rule.

14. Further, the learned Trial Court also failed to record its satisfaction before passing the Order of attachment as required under the above referred provision of Law. In G.Pochaiah's case referred to supra, it was held as follows:-

> "11. The law is well settled that before passing an order under Order 38 Rule 5 of Civil Procedure Code, it is mandatory for the Court to satisfy itself that the defendant is intending to obstruct or delay the execution of the decree that maybe passed against him. It is also well settled that simple mention of the apprehension in the affidavit or reproduction of the language used in Order 38 Rule 5 of CPC in the absence of disclosing the source of such apprehension or information is not sufficient compliance with the mandatory provisions of sub-rule (1) of Rule 5 of Order 38 of C.P.C.
>
> 12. On a perusal of the material on record, I find force in the contention of the learned Counsel for the petitioner that the order of attachment is not at all warranted on the basis of the vague averments in the affidavit filed in support of the application. It is relevant to note that the impugned order does not reflect the satisfaction of the Court or at least application of its mind to the requirements of Order 38 Rule 5 of Civil Procedure Code. Such an order where the Court failed to record its satisfaction that the defendant with an intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of the property being in violation of Order 38 Rule 5 (1) of C.P.C. is unsustainable and liable to be set aside."

15. In Ankinapalli Obul Reddy's case, a similar view was taken by another learned Judge while setting aside the Order of attachment, wherein it was held as follows:-

> "8. As can be seen from the above provision the Court has to satisfy itself that the defendant with an intention to obstruct or delay execution of any decree that may be passed against him is in the process of disposing of the whole or any part of the property, then only after recording such satisfaction, it shall call upon the petitioner to furnish security stipulating certain time and if he does not furnish sufficient security, it is open for the Court to order attachment before judgment. But as can be seen from the order

the lower Court only extracted contentions of the petitioner as well as the 1st respondent-plaintiff, but did not record the satisfaction as to whether the petitioner is likely to dispose of the whole or any part of his property, which is a mandatory requirement and if this requirement is not followed the entire attachment becomes void under sub-rule (4) of Rule 5 of Order XXXVIII."

16. In the light of the above stated factual and legal position, this Court is of the considered view that the Order under Revision suffers from material irregularity and warrants interference by this Court under Article 227 of the Constitution of India.

17. The Civil Revision Petition is accordingly, allowed. The Order dated 30.12.2021 passed in I.A.No.359 of 2021 in O.S.No.197 of 2021 on the file of the Court of the Junior Civil Judge, Movva, Krishna District is set aside. There shall be no Order as to costs.

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

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2021(2) L.S. 38 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

Present
The Hon'ble Mr. Justice
Cheekati Manavendranath Roy

Sanapala Taviti Naidu ..Petitioner
Vs.
Vaddi Narendra Kumar & Anr., ..Respondents

NEGOTIABLE INSTRUMENTS ACT, Sec.148 - Challenging the impugned orders passed in Crl.M.P. in Criminal Appeal on before the Sessions Judge, whereby while suspending the execution of sentence of imprisonment imposed against the petitioner, lower appellate Court has ordered the revision petitioner to deposit 20% of the compensation amount in terms of N.I. Act.

HELD - Newly inserted provision u/Sec.148 of the N.I. Act mandates that notwithstanding anything contained in the Criminal Procedure Code, in an appeal preferred against conviction u/Sec.138 of the N.I. Act, the appellate Court may order the appellant to deposit a sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court - Since the appeals under these revisions are preferred in the year 2022 after the amendment came into force in the year 2018, in view of the dictum laid down

by the Apex Court, amended provision of Sec.148 of the N.I. Act squarely applies to the said appeals - As it is ordained that minimum sum of 20% is to be ordered to be deposited and as it is a statutory mandate, no discretion is left with Court to order to deposit less than 20% of the compensation amount - Appellate Court has rightly ordered to deposit 20% of the compensation amount - Impugned orders of the Appellate Court to deposit 20% of the compensation amount in terms of Sec.148 of the N.I. Act are perfectly sustainable under law and they warrant no interference in these Criminal Revision Cases - Criminal Revision Cases stand dismissed.

Mr.Jakkamsetti Saraschandra Babu, Advocate for the Petitioner.
Addl.Public Prosecutor, Learned Counsel for the Respondent 2.

C O M M O N O R D E R

Challenging the impugned orders dated 14.03.2022 passed in Crl.M.P.Nos.21, 22 and 23 of 2022 in Criminal Appeal Nos.60, 61 and 62 of 2022 on the file of the III Additional Sessions Judge, Bhimavaram, respectively, whereby while suspending the execution of sentence of imprisonment imposed against the petitioner, the appellate Court has ordered the revision petitioner to deposit 20% of the compensation amount in terms of Section 148 of the Negotiable Instruments Act, 1881 (for short, the "N.I. Act"), these Criminal Revision Cases are preferred by the revision petitioner.

2. Heard learned counsel for the petitioner and learned Additional Public Prosecutor for the 2nd respondent State.

3. The revision petitioner is the accused in three separate Calendar Cases in C.C.Nos.894, 888 and 889 of 2017 on the file of the II Additional Judicial Magistrate of First Class, Bhimavaram. The said criminal cases are filed against him by the 1st respondent complainants in these three Criminal Revision Cases under Section 138 of the N.I. Act on the ground that the cheques that were issued by him for discharge of legally enforceable debt or liability were dishonoured. The revision petitioner was prosecuted for the said offence and eventually he was found guilty for commission of the said offence punishable under Section 138 of the N.I. Act in all the three cases and he was convicted for the said offence and was sentenced to undergo imprisonment and to pay compensation to the 1st respondent complainants in these Criminal Revision Cases.

4. Aggrieved thereby he has preferred three appeals in Crl.Appeal Nos.60, 61 and 62 of 2022 to the Court of the III Additional Sessions Judge, Bhimavaram. Alongside the appeals, he has filed three petitions under Section 389(1) Cr.P.C. for suspension of execution of sentence of imprisonment imposed against him including the payment of compensation as ordered by the trial Court. The learned III Additional Sessions Judge, Bhimavaram, by the impugned orders, dated 14.03.2022, ordered for suspension of execution of sentence of imprisonment imposed against the petitioner by the trial Court and further ordered the

revision petitioner to deposit 20% of the compensation amount with the trial Court within 60 days from the date of the order in terms of Section 148 of the N.I. Act.

5. The revision petitioner is aggrieved by the said orders pertaining to deposit of 20% of the compensation amount with the trial Court in terms of Section 148 of the N.I.Act. Therefore, the present Criminal Revision Cases are preferred questioning the legality and validity of the said orders whereby he was directed to deposit 20% of the compensation amount.

6. Learned counsel for the petitioner would submit that the order to deposit 20% of the compensation amount is not valid under law. According to him, the complaints were filed in the trial Court under Section 138 of the N.I. Act in the year 2017 and the amendment by way of incorporating Section 148 of the N.I. Act to deposit 20% of the compensation amount when appeal is preferred against the judgment of conviction, came in to effect in the year 2018 i.e. on 01.09.2018 and as such the said amendment has no application to the cases instituted prior to said amendment. Therefore, he would submit that the impugned orders to deposit 20% of the compensation amount are not valid under law. In other words he would contend that Section 148 of the N.I. Act has no retrospective effect and operates prospectively. So, it has no application to cases filed in trial Courts prior to the date on which the amendment came into force. He then contends that the order to deposit 20% of the compensation amount is too exorbitant and if at all this Court sustain the said orders, he would pray for reduction of the said compensation amount from 20% to either 15% or 10% of the compensation amount. He would submit that as the word “may” is used in Section 148 of the N.I. Act, Court got discretion to reduce the amount.

7. Learned Additional Public Prosecutor for the 2nd respondent State would submit that the said contention that the amended provision of Section 148 of the N.I. Act has no application to the cases instituted in the trial Court prior to the date of amendment has no merit and the same is unsustainable under law. He would submit that as per settled law the said amendment under Section 148 of the N.I. Act applies to all the appeals preferred against conviction after the date of the said amendment i.e. 01.09.2018. He contends that as these appeals are filed recently in the year 2022 after the said amendment came into force, the said amendment is clearly applicable to the present appeals. In support of his contention, he relied on the judgment of the Apex Court rendered in the case of Surinder Singh Deswal @ Colonel S.S.Deswal v. Virender Gandhi (2019) 11 SCC 341 = (2019) 3 SCC (Crl) 461). He would also contend that the request of the revision petitioner to reduce the compensation amount from 20% is also liable to be turned down. He would contend that it is clear from Section 148 of the N.I. Act that minimum of 20% of the fine or compensation awarded by the trial Court is to be deposited while preferring an appeal against the judgment of conviction and as the word “minimum” is used, no discretion is left with the appellate Court to order for deposit of less than 20% of the

compensation amount. So, he would finally submit that the impugned orders of the appellate Court are perfectly sustainable under law and it warrants no interference in these Criminal Revision Cases. Therefore, he would pray for dismissal of these Criminal Revision Cases in view of the aforesaid submissions.

8. As noticed supra, the contention of the revision petitioner is two fold. Firstly, he contends that as the cases are instituted in the trial Court under Section 138 of the N.I.Act in the year 2017, that Section 148 of the N.I. Act which was incorporated by way of amendment in the year 2018 cannot be made applicable to the cases instituted prior to the said date of amendment and that Section 148 of the N.I. Act has no retrospective effect. Then he contends that even otherwise Court got discretion to reduce the amount from 20%.

9. As regards the first contention is concerned, no doubt the amendment came into force on 01.09.2018. Section 148 of the N.I. Act was incorporated by way of amendment in the N.I. Act with effect from 01.09.2018. The newly inserted provision under Section 148 of the N.I.Act mandates that notwithstanding anything contained in the Criminal Procedure Code, in an appeal preferred against conviction under Section 138 of the N.I. Act, the appellate Court may order the appellant to deposit a sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court. In terms of the said Section 148 of the N.I. Act, the appellate Court while suspending the execution of sentence ordered the revision petitioner to deposit 20% of the compensation amount within 60 days from the date of that order with the trial Court. Eventhough the cases were instituted in the trial Court in the year 2017 prior to the date on which the amendment came into force with effect from 01.09.2018, as per settled law, the said amended provision applies to all the appeals that are filed against conviction for the offence punishable under Section 138 of the N.I.Act after the said amendment came into force. The legal position in this regard is no more res integra and the same has been well settled by the Apex Court in the judgment cited by the learned Additional Public Prosecutor for the 2nd respondent State rendered in the case of Surinder Singh Deswal @ Colonel S.S.Deswal1. The same contention that the amended provision of Section 148 of the N.I. Act which came into force in the year 2018 cannot be made applicable to the cases instituted prior to the date of amendment was raised before the Apex Court. The Apex Court rejected the said contention. The Apex Court held that Section 148 of the N.I. Act applies to all the appeals that are preferred after the amendment came into force with effect from 01.09.2018. Therefore, since the appeals under these revisions are preferred in the year 2022 after the amendment came into force in the year 2018, in view of the dictum laid down by the Apex Court in the above referred judgment, the amended provision of Section 148 of the N.I. Act squarely applies to the said appeals.

10. In arriving at the above conclusion that Section 148 of the N.I. Act applies even to cases instituted prior to its amendment and to all the appeals which are filed against

conviction after the said Section 148 of the N.I. Act came into force, the Apex Court has considered the Objects and Reasons in incorporating Section 148 of the N.I. Act by way of amendment in the year 2018. It is held as follows in the said judgment:

> "While considering the aforesaid issue/question, the Statement of Objects and Reasons of the amendment in Section 148 of the N.I. Act, as amended by way of Amendment Act No. 20/2018 and Section 148 of the N.I. Act as amended, are required to be referred to and considered, which read as under:
>
> "The Negotiable Instruments Act, 1881 (the Act) was enacted to define and amend the law relating to Promissory Notes, Bills of Exchange and Cheques. The said Act has been amended from time to time so as to provide, inter alia, speedy disposal of cases relating to the offence of dishonour of cheques. However, the Central Government has been receiving several representations from the public including trading community relating to pendency of cheque dishonour cases. This is because of delay tactics of unscrupulous drawers of dishonoured cheques due to easy filing of appeals and obtaining stay on proceedings. As a result of this, injustice is caused to the payee of a dishonoured cheque who has to spend considerable time and resources in court proceedings to realize the value of the cheque. Such delays compromise the sanctity of cheque transactions.
>
> 2. It is proposed to amend the said Act with a view to address the issue of undue delay in final resolution of cheque dishonour cases so as to provide relief to payees of dishonoured cheques and to discourage frivolous and unnecessary litigation which would save time and money. The proposed amendments will strengthen the credibility of cheques and help trade and commerce in general by allowing lending institutions, including banks, to continue to extend financing to the productive sectors of the economy.
>
> 3. It is, therefore, proposed to introduce the Negotiable Instruments (Amendment) Bill, 2017 to provide, inter alia, for the following, namely:
>
> (i) to insert a new Section 143A in the said Act to provide that the Court trying an offence under Section 138, may order the drawer of the cheque to pay interim compensation to the complainant, in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and in any other case, upon framing of charge. The interim compensation so payable shall be such sum not exceeding twenty per cent of the amount of the cheque; and
>
> (ii) to insert a new Section 148 in the said Act so as to provide that

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in an appeal by the drawer against conviction under Section 138, the Appellate Court may order the Appellant to deposit such sum which shall be a minimum of twenty per cent of the fine or compensation awarded by the trial court.

4. The Bill seeks to achieve the above objectives."

11. After considering the said Objects and Reasons in incorporating Section 148 of N.I. Act, the Apex Court then held as follows:

"Having observed and found that because of the delay tactics of unscrupulous drawers of dishonoured cheques due to easy filing of appeals and obtaining stay on proceedings, the object and purpose of the enactment of Section 138 of the N.I. Act was being frustrated, Parliament has thought it fit to amend Section 148 of the N.I. Act, by which the first appellate Court, in an appeal challenging the order of conviction under Section 138 of the N.I. Act, is conferred with the power to direct the convicted appellant-accused to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court. By the amendment in Section 148 of the N.I. Act, it cannot be said that any vested right of appeal of the appellant-accused has been taken away and/or affected. Therefore, submission on behalf of the appellants that amendment in Section 148 of the N.I. Act shall not be made applicable retrospectively and more particularly with respect to cases/ complaints filed prior to 1.9.2018 shall not be applicable has no substance and cannot be accepted, as by amendment in Section 148 of the N.I. Act, no substantive right of appeal has been taken away and/or affected. Therefore the decisions of this Court in Garikapatti Veeraya v. N.Subbaiah Choudhry (AIR 1957 SC 540) and Videocon International Limited v. SEBI ((2015) 4 SCC 33), relied upon by the learned Senior Counsel appearing on behalf of the appellants shall not be applicable to the facts of the case on hand. Therefore, considering the Statement of Objects and Reasons of the amendment in Section 148 of the N.I. Act stated hereinabove, on purposive interpretation of Section 148 of the N.I. Act as amended, we are of the opinion that Section 148 of the N.I. Act as amended, shall be applicable in respect of the appeals against the order of conviction and sentence for the offence under Section 138 of the N.I. Act, even in a case where the criminal complaints for the offence under Section 138 of the N.I. Act were filed prior to amendment Act No.20/2018 i.e., prior to 01.09.2018. If such a purposive interpretation is not adopted, in that case, the object and purpose of amendment in Section 148 of the N.I. Act would be frustrated. ……"

12. Therefore, in view of the law enunciated by the Apex Court in the above judgment, the said contention of the learned

counsel for the petitioner that Section 148 of the N.I. Act has no application to cases instituted prior to the amendment came into force is hereby rejected.

13. As regards the second contention that the Court got discretion to reduce the compensation amount from 20% is concerned, as can be seen from the express language employed in Section 148 of the N.I. Act, a minimum sum of not less than 20% of the compensation or fine awarded is to be deposited. Therefore, as it is ordained that minimum sum of 20% is to be ordered to be deposited and as it is a statutory mandate, no discretion is left with the Court to order to deposit less than 20% of the compensation amount. In fact, it was also contended before the Apex Court in the above cited case that as the word "shall" is not used and only the word "may" is used in the Section, that a discretion is given to the Court to reduce the amount from 20%. The said contention was also not accepted by the Apex Court. The Apex Court held that having regard to the Objects and Reasons of the amended Section 148 of the N.I. Act, though the word "may" is used that it is to be generally construed as a "rule" or "shall". Therefore, the appellate Court has rightly ordered to deposit 20% of the compensation amount.

14. Learned counsel for the revision petitioner relied on the judgment of the Apex Court rendered in the case of Shatrughna Baban Meshram v. State of Maharashtra (2021) 1 SCC 596) in support of his contentions. The facts of the said case are totally distinguishable from the facts of the present case. It was not a case under Section 148 of the N.I. Act. So, the ratio laid down in the said judgment is of no avail to the case of the revision petitioner.

15. Therefore, in view of the law enunciated by the Apex Court in the above cited Surinder Singh Deswal @ Colonel S.S.Deswal' case, both the contentions of the learned counsel for the revision petitioner hold no water and the same cannot be countenanced.

16. Therefore, the impugned orders of the appellate Court to deposit 20% of the compensation amount in terms of Section 148 of the N.I. Act are perfectly sustainable under law and they warrant no interference in these Criminal Revision Cases.

17. Resultantly, all these three Criminal Revision Cases are dismissed.

The miscellaneous petitions pending, if any, shall also stand closed.

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2021(2) L.S. 45 (A.P.)

IN THE HIGH COURT OF ANDHRA PRADESH

Present
The Hon'ble Mr. Justice
R. Raghunandan Rao

Allaparthi Venkata Chalapathi Rao ..Petitioner

Vs.

State of A.P., ..Respondent

A.P. CHARITABLE AND HINDU RELIGIOUS INSTITUTIONS AND ENDOWMENTS ACT - Petitioner is a founder family member of the 3rd respondent/Temple - Temple had been registered under the Endowments Act and owns a land which fetches an income of about Rs.1 lakh per annum - Case of the petitioner that on account of the said registration, there are various liabilities cast on the temple, by way of making payments to the Endowments Department, which are taking away income of the temple - Petitioner contended that temples which have an income of less than Rs.5 lakhs are exempt from all the regulations set out in the Endowments Act including the payment of various contributions to the Endowments Department.

HELD: There is every need for the State Government to reconsider it s decision of granting exemption to only those temples having an annual income of less than Rs. 2 lakhs and to increase the limit to Rs.5 lakhs - Writ Petition stands disposed of with a direction to the State Government to consider the grant of exemption to temples having an annual income of less than Rs.5 lakhs from the provisions of the Act including the requirement to pay the mandatory contributions, in the light of the directions of the Hon'ble Supreme court in *Sri Divi Kodandarama Sarma and others vs. State of Andhra Pradesh and others (1997) 6 SCC 189* - This exercise shall be conducted within a period of four months from the date of receipt of this Order.

Mr.V. Venu Gopala Rao, **Advocates** for the Petitioner.
G.P. for Endowments, Advocate for the Respondents: R1 & R2.
Mr.K. Madhava Reddy, Advocate for the Respondents: R3 & R4.

O R D E R

The petitioner is a founder family member of the 3rd respondent-temple. This temple owns Ac.6.00 cents of land which fetches an income of about Rs.1 lakh per annum. This temple had been registered under the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987 (for short, "the Act, 1987). It is the case of the petitioner that on account of the said registration, there are various liabilities cast on the temple, by way of making payments to the Endowments Department, which are effectively taking away the income of the temple. The petitioner relying upon the

observations of the Hon'ble Supreme Court in A.S.Narayana Deekshithulu vs. State of A.P and Others (1996) 9 SCC 548)., and Sri Divi Kodandarama Sarma and others vs. State of Andhra Pradesh and others (1997) 6 SCC 189), contends that temples which have an income of less than Rs.5 lakhs are exempt from all the regulations set out in the Endowments Act including the payment of various contributions to the Endowments Department and also salaries to the Executive Officer.

2. On the basis of these contentions, the petitioner seeks a Writ of Mandamus declaring the inaction of the 1st respondent in notifying and publishing in the Official Gazette, orders of exemption, under Section 154 of the Act, 1987 in relation to all temples whose annual income is less than Rs. 5 lakhs in the State of Andhra Pradesh and for these temples to be managed by the respective founder family members/persons in management.

3. Sri V.Venu Gopala Rao learned counsel, appearing for the petitioner has taken this Court through the aforesaid judgments as well as the report of the committee to contend that there are binding directions of the Hon'ble Supreme Court, to the State Government, to exempt all temples whose income is less than Rs.5 lakhs from the rigors of the provisions of the Endowments Act, 1987.

4. The learned Government Pleader would submit that the figure of Rs.5 lakhs is a typographical error, in the judgment, and it is only temples which have an income of less than Rs.50,000/- which have to be granted such an exemption. She further submits that the 2nd proviso to Section 29(1) of the Act provides for appointment of an executive officer, even if the income is less than Rs.2 lakhs per annum if the temple has substantial property. She would contend that this statutory provision clearly envisages departmental control over temples which have an income of less than two lakh rupees also and there cannot be any omnibus exemption to all temples whose income is less than rupees five lakhs, as contended by the petitioner, or rupees two lakhs as stipulated in Section 29 of the Act.

CONSIDERATION OF THE COURT:

5. Before going into the issues arising in this case, it is necessary to briefly review the circumstances in which this issue has come up. The regulation of Endowment Institutions in the erstwhile Madras province/ state commenced with Act 20 of 1863 and went through the enactment of various laws from time to time. It would suffice, for the purposes of this case, to recognize that the Madras Hindu Religious and Charitable Endowments Act, 1951 was in force when the state of Andhra came into existence. After the formation of the state of Andhra Pradesh, the 1951 Act was replaced by The Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act 1966. After the passage of a few decades, a commission, headed by a former chief justice of this court, was appointed to go

into the working of the 1966 Act. This commission submitted its report suggesting various changes in the existing law. The State of Andhra Pradesh, on the basis of the said recommendations, repealed the 1966 Act and replaced it with the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act 1987 (hereinafter referred to as the Act).

6. The Act brought in certain drastic departures and innovations in the administration of endowments and in the rights and liabilities of various stake holders. The relative merits and demerits of these innovations/departures are still being debated. The primary change sought to be brought into the whole system was the abolition of hereditary rights of Trustees, Archakas, Mirasidars and various other religious and non religious office holders of religious institutions. There were other drastic changes. As these are not the subject of this Writ Petition, they are not being mentioned.

7. The scheme of the Act was to abolish all hereditary positions, rights and liabilities of various holders of offices in the administration of religious institutions and replace these office holders with paid employees. Section 16 of the Act abolished the office of hereditary Trustees. Section 34 of the Act abolished the hereditary rights of Mirasidars, Archakas and other office holders and servants. Section 35 of the Act stipulates that all office bearers shall be appointed by the Trustee with prior permission of the competent authority or directly by the officers of the Endowment department, depending upon the income of the religious institution. It also abolished all forms of payment or income to the office holders, including the Archakas, except the salary paid to them as per scale. Section 144 abolished all shares in Hundis and other rusums, including shares in the income from the lands of the religious institutions which were earlier being given to the office holders including Archakas.

8. The said Act, and more specifically sections 16, 34 35, 37, 39 and 144 were challenged before the courts and the litigation culminated in the decision of the Hon'ble Supreme Court in the case of A.S. Narayana Deekshitulu v. State of A.P., (1996) 9 SCC 548 at page 611). The Hon'ble Supreme Court, while upholding the said Act, was also cognizant of the fact that such a drastic change was not taking into account, the practical problems that would be faced by Temples which would not have the financial ability to make the transition to the new regime introduced by the Act. The Hon'ble Supreme Court issued further directions in this regard with the following observations:

> 132. In Andhra Pradesh there are as many as 32,201 temples out of which 7761 temples are assessable institutions; the remaining 24,440 temples have income of less than Rs 1000 per annum, only 582 out of them have income of more than Rs 10,000 per annum. Only around 8 temples have income of more than

Rs 20,00,000 per annum. All the archakas or employees in these categories of 24,440 small temples would be deprived of their livelihood by abolition of their hereditary rights and introduction of graded scales of pay. This information has been furnished in the written arguments submitted by Shri Markandeya but we did not have the occasion to have them verified during the course of hearing. It would be seen that the principles in fixing the scales of pay and method of payment of salary introduced by the rules are required to be adjudged. In the absence of any material it is difficult for us to give any finding in that behalf. Suffice it to state that liberty is given to place those necessary and material evidence before the Government which would constitute a committee consisting of Deputy Secretary, Finance Department, Joint Secretary to the Government, Revenue (Endowments Department) and Joint Commissioner, Endowment Department. The Committee would go into the question to rationalise the pay scales of all the archakas in different temples and the modality for payment of salary to them. After approval of the rules by the State Government, the respondents should place the same before the Court for further approval.

133. Though we have upheld abolition of hereditary right to appointment as an archaka or other office-holders, the evidence from Vaikhanasa literature and other material indicate that archaka should bestow his total dedication to the Deity in the performance of daily rituals; at the same time, he and his family members must be kept in comfort. The property endowed for his services or the income derived from the offerings or the payment of salary, if any, is identified as a source for his living in comfort. The State exercising its secular power regulates appointment of archakas, as upheld hereinbefore; equally, he, along with his family, is required to be kept with daily comfort so that he would continue to dedicate himself to perform the ritual worship of the Deity. As indicated earlier, the State is required to determine his service conditions, scale of pay and other emoluments according to the grade of the temple in which he works and to regulate the period of duty and of service. That apart, welfare measures in addition should be initiated as a measure of social welfare to the archakas and other employees of the temple and pandits working in the temples and under the supervision of the Commissioner. Therefore, the State should come forward with a scheme to provide the archakas, other employees and their family members like suitable accommodation, education by way of refresher courses and courses in

Agamas in the respective region, medical facilities, educational facilities to their children, loans for construction of their own houses, and wherever accommodation in the temple is available letting the same to them on reasonable rent, group insurance scheme, unforeseen contingencies like accident, death, etc., rehabilitation of the widow or educated unemployed youth or such other measures as may be incidental and part of economic welfare. The extent of the similar facilities already existing and provided for may be excluded from the proposed scheme. For other items appropriate scheme should be formulated.

134. In that behalf the State Government is directed to constitute a committee consisting of the Additional Commissioner, Endowments Department, a Joint Secretary/Deputy Secretary (Endowment), Revenue Department; two representatives of the archakas to be nominated by their associations and one representative of other officers/servants of the temples. It would be open to the representatives of the archakas etc. to place their views and material before the Committee in the formulation of the scheme. The Committee will undertake an in-depth study into the schemes and formulate the same. After the scheme is formulated, the Government would take a decision thereon and would place the duly approved scheme before this Court within six months from today for further action thereon.

9. Pursuant to this direction, the State of Andhra Pradesh constituted a committee to go into these issues and submit a report. The committee, after conducting an exercise in this regard, submitted a report, dated 4.10.1996, making various recommendations. Some of these recommendations were accepted by the Government and some were modified. The recommendations of the Committee and the views of the government on these recommendations were placed before the Hon'ble Supreme Court, which passed orders in Sri Divi Kodandarama Sarma and others vs. State of Andhra Pradesh and others (1997) 6 SCC 189).

10. The sum and substance of the recommendations placed before the Hon'ble Supreme Court, which were permitted to be brought into force, are that, the State is not interested in taking up management and regulation of the affairs of temples with low income and would prefer these temples to look after themselves. The State would only take up management of those temples which have substantial income. The Hon'ble Supreme Court accepted this stand of the Government in the following manner:

3. Section 6 of the Act classifies the charitable or religious institutions and endowments and other mutts on the basis of the income and its

calculation under Section 65. Section 6(a) institutions are those whose income exceeds Rs 5 lakhs and above per annum; Section 6(b) institutions are those whose income exceeds Rs 50,000 but is less than Rs 5 lakhs; and Section 6(c) institutions are other than those covered under clauses (a) and (b). The Committee has gone into this aspect, in the light of the directions issued and has recommended that the temples whose annual income is less than Rs 5 lakhs may be allowed to be managed by the respective managements of the temples etc. but be supervised by the Department as is being now done so that the managements of such temples may be allowed to pay such remuneration to the Archakas. In lieu of salary, the properties given to them may be retained by the Archakas for enjoyment subject to rendering service depending upon the income of the respective temples as per the prevailing circumstances. We are informed that a sizeable part of the temples would come within that category and, therefore, the Government has accepted the classification with the rider: "Temple with such abnormally low income may be left to fend for themselves." The recommendation of the Committee has thus been accepted by the Government. Under Section 154 of the Act, the Government by a notification may exempt from the purview of any of the provisions of the Act or any of the rules made thereunder (a) any charitable institutions or endowments administration of which was or is for the time being vested in the Government either directly or through the Committee or a Treasurer (Endowment) appointed for the purpose or the Official Trustees or the Administrator General etc. Any institution or endowment may be exempted and may likewise vary or cancel such exemption. In view of the above provision, it would be open to the State Government to issue a notification published in the Official Gazette exempting such institutions subject to the above recommendation and such orders as may be mentioned therein or deemed appropriate.

11. Sri Venugopal Rao relies on this observation of the Hon'ble Supreme Court, to contend that a duty is cast on the government to exempt all temples having an income of less than rupees five lakhs. This is disputed by the Learned Government Pleader, who contends that the figure of rupees five lakhs mentioned in the above passage is a typographical error. She relies on the succeeding passages of the judgment to contend that the direction of the Hon'ble Supreme Court was to exempt all temples below Rs. 50,0000 per annum. While the contention of the learned Government pleader may merit consideration, this court cannot interpret

the judgment of the Hon'ble Supreme Court to hold that there was a typographical error. Any such finding would amount to a modification of the order of the Hon'ble Supreme Court and this court must decline to go into this question.

12. The matter does not rest there. The subsequent amendments to Section 144 of the Act need to be taken into account. This Section abolished the right of any office holder including Trustees, Dharmakarthas, Mutawallis, Archakas or Mirasidars to a share in the income of the temple obtained from the donations or offerings made to the religious institution or the income from the lands owned by the religious institutions or any other income as remuneration for services rendered by such office holders. This meant that the office holders would cease to be hereditary sharers in the fortunes of the religious institutions and become paid employees of the institution. As temples with low incomes would not be able to pay proper salaries to these office holders, the Hon'ble Supreme Court had directed that, for such temples, the earlier system could be followed. Effectively, the Hon'ble Supreme court, while upholding the abolition of such practices, permitted these practices to continue wherever it was not convenient for the State to take over management of low income temples.

13. This Supreme Court mandated system found legislative expression in Act 33 of 2007, with effect from 03.01.2008, which added two provisos to Section 144. The first proviso made it applicable only to institutions whose annual income exceeds Rs.5 lakhs. The second proviso also permitted the commissioner of Endowments to frame schemes of payment of emoluments to Archakas in any of the institutions, subject to the satisfaction of the Commissioner that such a scheme is necessary for that institution.

14. The above amendment is an indication of the fact that the state had taken cognizance of the fall in the value of the rupee and the need to enhance the cut off point, in terms of annual income, of those institutions which require to be placed outside the purview of section 144 of the Act. The same principle would apply to temples which need to be exempted from the provisions of the Act itself, in line with the policy of the state to leave temples below a certain income limit to their own devices. In view of the above monetary limits fixed in the above amendment, the government has implicitly accepted the fact that Temples with an annual income which is less than Rs. 5 lakhs would have to look after themselves and the earlier system should be allowed to go on in these temples and institutions as these temples do not have the financial capacity to give scales of pay to their employees.

15. Another aspect of the matter is the effect of payment of mandatory contributions to the endowment department over the income of the temples. The learned Government pleader has given the details of the contributions collected from the temples and other religious institutions,

which are as follows:

> The assessable income, as calculated under section 65 of the Act, is more or less the actual income of the temple or religious institution. Temples and religious institutions, with an income of more than Rs. 2 lakhs per annum are required to pay 18.5% of their income to the endowment department. Temples and religious institutions with an income of more than Rs.20 lakhs are required to pay 21.5 % of their income. No contributions are collected from temples with an income below Rs. 2 lakhs, on account of the exemption granted under G.O. Rt. No. 375, dated 01-10-2015.

16. The statistics provided by Sri V. Venugopal Rao show that there are 1440 temples in the State, registered with the endowments department, with an income between Rs.2 lakhs and Rs. 5 lakhs. These Temples are paying between Rs. 37,000/- and Rs. 92,500/- per annum, to the endowments department as mandatory contributions. Diversion of such amounts would clearly affect the financial strength and stability of these temples. By way of an example, if we were to take the case of a temple having an annual income of Rs. 2,00,001/-, the temple would have to pay Rs. 37,000/- to the endowments department. This would leave an amount of Rs. 1, 63,000/- in the hands of the Temple to defray it's entire annual expenditure. The minimum staff needed for a temple would be an Archaka, a watchman and a sweeper/ cleaning person. Apart from this the expenditure for Dhupa, Deepa Naivedyam would also have to be met. In today's world, such an amount is clearly inadequate. There is every need to reduce this burden on temples having an income of less than Rs. 5 lakhs.

17. On a review of all these facts, there is every need for the State government to reconsider it's decision of granting exemption to only those temples having an annual income of less than Rs. 2 lakhs and to increase the limit to Rs.5 lakhs.

18. Accordingly, this Writ Petition is disposed of with a direction to the State government to consider the grant of exemption to temples having an annual income of less than Rs.5 lakhs from the provisions of the Act including the requirement to pay the mandatory contributions mentioned above, in the light of the directions of the Hon'ble Supreme court in Sri Divi Kodandarama Sarma and others vs. State of Andhra Pradesh and others (1997) 6 SCC 189). This exercise shall be conducted within a period of four months from the date of receipt of this order.

Miscellaneous petitions, pending if any, shall stand closed.

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LAW SUMMARY

2022 (2)

Telangana High Court Reports

2022 (2) L.S. 1 (T.S)

IN THE HIGH COURT OF TELANGANA

Present:
The Hon'ble Mr. Justice
K. Lakshman

Vittal Shiva Kumar
& Anr., ..Petitioners

Vs.

The State of Telangana
& Anr., ..Respondents

CRIMINAL PROCEDURE CODE, Sec.482 - PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005, Sec.12 - Criminal Petition filed to quash the proceedings in D.V.C. before Trial Court by Respondent No.2.

HELD: Petitioners are aged parents of R.1, therefore, it is difficult for them to attend the Court on each date of hearing - Even the allegations made in the complaint against the petitioners are general in nature - Criminal Petition stands disposed of, dispensing with personal appearance of petitioners in D.V.C. proceedings before the Trial Court.

P Shiv Kumar, Advocate for the Petitioners.

Crl.P.No.402/2022. Date: 18.01.2022.

Public Prosecutor TG.Advocate for the Respondents.

J U D G M E N T

The present Criminal Petition is filed under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Code'') to quash the proceedings in D.V.C. No.24 of 2021 on the file of Additional Judicial Magistrate of First Class, Nirmal. The petitioners herein are respondents in the said DVC. The said DVC is filed by respondent No.2 herein under section 12 of the Protection of Women From Domestic Violence Act, 2005 (for short 'Act, 2005') against the petitioners seeking various reliefs.

2.Heard learned counsel for the petitioners and the learned Assistant Public Prosecutor appearing on behalf of respondent No.1 - State. Perused the record.

3.The learned counsel for the petitioners would submit that the petitioners herein never harassed the 2nd respondent as alleged by her in the complaint. The 2nd respondent falsely implicated the petitioners in the present case. He would further submit that petitioners herein are parents of R.1. There are no allegations, much less specific allegations against the petitioners. In view

of the same, he sought to quash the proceedings in the said DVC by dispensing with their presence before the trial Court.

4.On the other hand, the learned Assistant Public Prosecutor would submit that there are specific allegations made against the petitioners by the 2nd respondent in the complaint filed under Section 12 of the Act, 2005 and that the petitioners shall co-operate in concluding the trial before the Court below. In view of the same, he sought to dismiss the present petition.

5.As per the contents of the petition filed under Section 12 of the Act, 2005, the marriage of R.1 with the 2nd respondent was performed on 14.12.2016. After marriage, the petitioners herein started harassing the 2nd respondent.

6.In this regard, it is apt to refer to the decision rendered by a learned Single judge of High Court of Judicature for the States of Telangana and Andhra Pradesh in ***Giduthuri Kesari Kumar v. State of Telangana 2015 (2) ALD (Crl.) 470 (AP)***, which is as under:

> "14) To sum up the findings:
>
> i) Since the remedies under D.V. Act are civil remedies, the Magistrate in view of his powers under Section 28(2) of D.V Act shall issue notice to the parties for their first appearance and shall not insist for the attendance of the parties for every hearing and in case of non- appearance of the parties despite receiving notices, can conduct enquiry and pass exparte order with the material available. It is only in the exceptional cases where the Magistrate feels that the circumstance require that he can insist the presence of the parties even by adopting coercive measures.
>
> ii)In view of the remedies which are in civil nature and enquiry is not a trial of criminal case, the quash petitions under Section 482 Cr.P.C. on the plea that the petitioners are unnecessarily arrayed as parties are not maintainable. It is only in exceptional cases like without there existing any domestic relationship as laid under Section 2(f) of the D.V. Act between the parties, the petitioner filed D.V. case against them or a competent Court has already acquitted them of the allegations which are identical to the ones leveled in the Domestic Violence Case, the respondents can seek for quashment of the proceedings since continuation of the proceedings in such instances certainly amounts to abuse of process of Court."

7.In the present case, petitioners are aged parents of R.1, therefore, it is difficult for them to attend the Court on each date of hearing. Even the allegations made in the complaint against the petitioners herein are general in nature.

8.Considering the said facts and also

in view of the principle laid down in the above judgment, this Court is inclined to dispense with the presence of the petitioners in the DVC proceedings.

9.In view of the above discussion, the present Criminal Petition is disposed of, dispensing with personal appearance of petitioners herein in D.V.C. No. 24 of 2021 on the file of Additional Judicial Magistrate of First Class, Nirmal. However, it is made clear that the proceedings may go on against the respondent No.1 in DVC No.24 of 2021.

10.As a sequel, miscellaneous petitions, if any, pending in the Criminal Petition shall stand closed.

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2022 (2) L.S. 3 (T.S)

IN THE HIGH COURT OF TELANGANA

Present:
The Hon'ble Mr. Justice P.Naveen Rao

Nangunoori Vinod Rao ..Petitioner
Vs.
Vejella Rama Rao ..Respondent

INDIAN EVIDENCE ACT, Sec.65 - Trial Court by its Order I.A. allowed the application holding that the documents in question though photocopies, can be received and marked provided the contents of the photocopies are the true extract of the original copies and there is no requirement of compliance of section 65 of the Indian Evidence Act.

HELD: Defendant No.1 has not stated as to how he secured photocopies without disclosing the availability of the originals and from whom he secured the said photocopies - There is no averment of tracing the transactions by any other means - In the absence of the assertion by defendant No.1 on how he secured the copies and based on vague averment in the affidavit, the trial Court could not have allowed the application filed by the petitioner - Documents relied upon by defendant No.1 are not in compliance with Sec.65 of the Indian Evidence Act, and therefore the trial Court erred in accepting the application and granting the relief - It is not sustainable - Civil revision petition stands allowed - Order passed by the trial Court in I.A. stands set aside.

Mr.Sai Prasen Gundavaram, Advocate for the Petitioner.
Mr.Kondadi Ajay Kumar, Advocate for the Respondent.

J U D G M E N T

Heard learned counsel for the petitioner and Sri K. Ajay Kumar, learned counsel for the respondents.

2.The parties herein are referred to as arrayed before the trial Court. Petitioner is the plaintiff and respondents are the defendants in O.S.No.1123 of 2021. Plaintiff instituted O.S.No.138 of 2016 in the Court of VI Additional District Judge, Mahabubabad, praying to declare him as pattadar, owner and in possession of the suit schedule property. Defendant No.1 sought to present photocopies of the documents stated to have been issued by the office of the Tahsildar, Narsampet, in Rc.No.A2/753/1983 dated 18.08.1983 and the order of the Revenue Divisional Officer, Mahabubabad, vide his proceedings A.No.5/83 dated 26.05.1984. These documents are pressed into service by defendant No.1 to contend that on the application made by Sri N. Anjan Rao, junior paternal uncle of the plaintiff, for correction of entries in respect of land in Survey No.330 to an extent of Acs.15.00 situated at Narsampet Village, the Tahsildar, Narsampet Mandal, allowed the application, deleted the names of Narayana Rao and Mrs. Kay against the said survey number. The appeal preferred against the said corrections made by the Tahsildar was dismissed by the Revenue Divisional Officer, Mahabubabad. Defendant No.1 claimed that in spite of his best efforts, he could not secure the certified copies of the originals from the office of the Tahsildar and also from the office of the Revenue Divisional Officer and both the authorities have informed that the original files relating to the said proceedings are not available in their offices. It is therefore contended that in those circumstances, defendant No.1 was compelled to seek leave of the Court to mark the said documents.

3.Plaintiff opposed the claim of defendant No.1.

4.The trial Court by order dated 05.10.2020 made in I.A.No.220 of 2020 in O.S.No.138 of 2016 allowed the application holding that the documents in question though photocopies can be received and marked provided the contents of the photocopies are the true extract of the original copies and

there is no requirement of compliance of section 65 of the Indian Evidence Act, 1872.

5.From the averments made in the affidavit filed in support of I.A.No.220 of 2020, it is seen that defendant No.1 has not stated as to how he secured photocopies without disclosing the availability of the originals and from whom he secured the said photocopies. There is no averment of tracing the transactions by any other means.

6.According to the averments in the affidavit, reply given by the Tahsildar and the Revenue Divisional Officer is to the extent that files are not available. It is not the case of the Tahsildar or the Revenue Divisional Officer that files relating to the proceedings mentioned in the order relied upon by defendant No.1 are lost or misplaced. In the absence of the assertion by defendant No.1 on how he secured the copies and based on vague averment in the affidavit, the trial Court could not have allowed the

application filed by the petitioner.

7.The documents relied upon by defendant No.1 are not in compliance with section 65 of the Indian Evidence Act, 1872 and therefore the trial Court erred in accepting the application and granting the relief. It is not sustainable.

8.The civil revision petition is accordingly allowed. The order passed by the trial Court in I.A.No.220 of 2020 in O.S.No.138 of 2020, dated 05.10.2020, is set aside. However, this order does not come in the way of defendant No.1 in establishing his claim based on any other document available in his possession. Pending miscellaneous petitions if any shall stand closed

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2022 (2) L.S. 5 (T.S)

IN THE HIGH COURT OF TELANGANA

Present:
The Hon'ble Mr. Justice P.Naveen Rao

Rai Shetty Kanakaiah ..Petitioner

Vs.

V.Venkateshwar Rao & Ors., ..Respondents

CIVIL PROCEDURE CODE, Sec.2(2) and Sec.96 - Petitioner/Plaintiff filed OS seeking to grant decree of permanent injunction restraining the defendants, from interfering with the peaceful possession and enjoyment over the suit schedule property - Respondents/Defendants filed IA under Order VII Rule 11 of Code of Civil Procedure praying to reject the plaint - Trial Court, allowed the said IA with costs and rejected the plaint - Challenging the said Order and Decree, the Petitioner/Plaintiff filed present revision.

HELD: Once plaint is rejected decree ensues and it is a decree as defined under section 2(2) of CPC - Against the Judgment and Decree, remedy is only in the form of an appeal under section 96 of CPC and revision is not maintainable - Revision stands dismissed - However, this Order does not come in the way of Petitioner working out his remedies as available to him.

Mr.G. Simhadri, Advocate for the Petitioner.
Mr.J. Venkateshwara Reddy, Advocate for the Respondent.

O R D E R

Heard Sri G. Simhadri, learned Counsel for the petitioner, and Sri J. Venkateshwara Reddy, learned Counsel for respondent No.3.

2.Petitioner herein is the plaintiff and respondents are the defendants. Plaintiff

filed OS No.432 of 2014 on the file of the II Additional Junior Civil Judge at Warangal seeking to grant decree of permanent injunction restraining the defendants, their agents, workmen, employees and persons who represented on their behalf from interfering with the peaceful possession and enjoyment over the suit schedule property. The suit schedule property is 426 Sq.yards of land in Survey No.205/D/E of Waddepally Village, Hanamkonda, Warangal District. The respondents/defendants filed IA No.281 of 2021 under Order VII Rule 11 of Code of Civil Procedure (for short, the CPC) praying to reject the plaint.

3. Having regards to the order, which is proposed to be passed, the Court is not dwelling deep into the inter se dispute. Suffice to note that on considering the respective submissions, the Trial Court, by order dated 04.10.2021, allowed the said IA with costs and rejected the plaint. Challenging the said order and decree, the petitioner/plaintiff filed this revision.

4.When the revision was presented before the Registry, the Registry raised objection on maintainability of civil revision petition holding that against the order rejecting the plaint, appeal alone would lie under section 96 CPC and the revision is not maintainable.

5.Learned Counsel for the petitioner replied to the office objection as under:

"(1) Re-submission : The CRPSR No.36417 of 2021 is filed against order dated 04.10.2021 in IA No.281 of 2021 in OS No.432 of 2014 in which respondents/ defendants have filed an application under Order VII Rule 11 CPC and the same was allowed against the same CRP.

(2)Now the CRPSR No.36417 of 2021 is returned stating that how the CRP is maintainable stating that against the order passed under Order VII Rule 11 of CPC.

(3)Under Order XLIII CPC an appeal shall lie from the following order under provision of Section 104 remedy.

(a)An order under Rule 10 of Order VII returning a plaint to be presented to the proper aspect where the procedure specified in Rule 10-A of Order VII has been followed than only appeal lies.

However, the present CRPSR No.36417 of 2021 is filed against order passed under Order VII Rule 11 CPC against the order passed under Order VII Rule 11 CPC. Appeal is not maintainable. Therefore, CRP is only remedy. Accordingly, in accordance with Order XLIII CPC, if your authority not satisfied, post CRP for orders of the Court."

6.Not satisfied with the explanation offered by the petitioner, revision is listed before this Court for orders of the Court.

7.Learned Counsel for the petitioner

submits that the order under challenge is an order made in an application filed under Order VII Rule 11 CPC. In view of the provision in Order XLIII Rule 1 CPC, no appeal shall lie and therefore the revision is maintainable. In support of his contention, learned Counsel for the petitioner placed reliance on a decision of the Hon'ble Supreme Court ***dated 09.08.2021 in Srihari Hanumandas Totla v. Hemant Vithal Kamat and others, CA No.4665 of 2021, 2021 (5) AndhLD 98 (SC).***

8.Per contra, learned Counsel for the respondents submits that though the Trial Court considered the application filed under Order VII Rule 11 CPC, but having accepted preliminary objection raised by the respondents on maintainability of the suit, the Trial Court rejected the plaint. Once plaint is rejected decree ensues and it is a decree as defined under section 2(2) of CPC. Against the judgment and decree, remedy is only in the form of an appeal under section 96 of CPC and revision is not maintainable. In support of his contention, learned Counsel placed reliance on the reference answered by the Division Bench in ***Molugu Ram Reddy and others v. Molugu Vittal Reddy and others, 2011 (5) AndhLD 522 (FB) : 2011 SCC Online AP 228.***

9.I have carefully considered respective submissions and precedent decisions.

10.To resolve conflict of opinions expressed in various decisions, the matter was referred to Full

Bench in molugu Ram Reddy's case (supra). The reference reads as under:

> "... whether an appeal against order as civil miscellaneous appeal under Section 104 read with Order XLIII Rule 1 of Code of Civil Procedure, 1908 (CPC, for brevity) or a regular appeal under section 96 of the CPC, is maintainable against the judgment/ order passed under Rule 11 of Order VII of the CPC."

11.On elaborate consideration of the precedent decisions, provision under Order VII Rule 11, Order XLIII and section 96 of CPC, the Full Bench answered the reference as under:

> "24. In the result for the above reasons, the reference is answered as follows:
>
> On the true construction of Section 2(2), 2(9) and 2(14) and sections 96, 104 and 105 of the CPC, the conclusion is irresistible that a judgment rejecting a plaint is "decree" and is appealable under Section 96. A miscellaneous appeal against an order rejecting the plaint would not lie.
>
> 25. There is a much consensus of judicial opinion that supports this conclusion. A plaintiff, who is aggrieved by rejection of the plaint for any of the reasons as

> contemplated under Order VII Rule 11(a) to (f), is entitled to file a regular appeal under Section 96 and a miscellaneous appeal under Section 104 read with Order XLIII Rule 1 is barred."

12. Though not exactly on the same facts, in ***Sayyed Ayaz Ali v. Prakash G. Goyal and others, CA Nos.2401 and 2402 of 2021, 2021 (4) AndhLD 222 (SC), decided on 20.07.2021***, one of the issues raised was, against the decision of the Trial Court in an application filed under Order VII Rule 11 CPC whether a writ petition under Article 227 of the Constitution of India is maintainable.

13. By referring to the definition of 'decree' in the section 2(2) CPC, the Hon'ble Supreme Court held as under:

> "The definition of "decree" in Section 2(2) "shall be deemed to include the rejection of a plaint". Hence, the order of the Trial Court rejecting the plaint is subject to a first appeal under section 96 of the CPC. The writ petition filed by the appellant was liable to be rejected on that ground. We therefore affirm the judgment of the High Court rejecting the writ petition, though for the above reason leave it open to the appellant to pursue the remedy available in law." (Emphasis supplied)

14.Srihari Hanumandas's case (supra), was a case of dismissal of application filed under Order VII Rule 11 CPC to reject the plaint. An order dismissing the application filed under Order VII Rule 11 CPC is not a 'decree' as defined in section 2(2) of CPC and therefore it is not an appealable order. The Hon'ble Supreme Court was considering the reasons assigned in rejecting the application to reject the plaint and affirmed the decision of the Trial Court as well as the High Court. Therefore, the issue decided by the Hon'ble Supreme Court is Srihari Hanumandas's case (supra), is not the same as raised in this revision. The said decision does not come to the rescue of the petitioner.

15.Having regard to the plain reading of section 2(2) of CPC and precedent decisions on remedy against rejection of plaint, office objection is sustained and the revision is dismissed. However, this order does not come in the way of petitioner working out his remedies as available to him. Miscellaneous petitions, if any, pending in this revision shall stand closed.

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LAW SUMMARY

2022(2)

Supreme Court Reports

2022 (2) L.S. 1 (S.C)

IIN THE SUPREME COURT
OF INDIA

Present:
The Hon'ble Mr. Justice
Ajay Rastogi &
The Hon'ble Mr. Justice
Sanjay Khanna

Dilip Hariramani ..Petitioner
Vs.
Versus Bank of Baroda ..Respondent

NEGOTIABLE INSTRUMENTS ACT, Sec.138 - Issues raised in this appeal by the appellant, challenging his conviction under Section 138 read with Section 141 of the Act, are covered by the decisions of this Court on the aspects of (i) vicarious criminal liability of a partner; and (ii) whether a partner can be convicted and held to be vicariously liable when the partnership firm is not an accused tried for the primary/substantive offence.

HELD: Appellant cannot be convicted merely because he was a partner of the firm which had taken the loan or that he stood as a guarantor for such a loan - Firm has not been made an accused or even summoned to be tried for the offence - Provisions of Section 141 impose vicarious liability by deeming fiction which presupposes and requires the commission of the offence by the company or firm - Unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-section (1) or (2) of Section 141 would not be liable and convicted as vicariously liable - Sec.141 of the N.I. Act extends vicarious criminal liability to officers associated with the company or firm when one of the twin requirements of Sec.141 has been satisfied, which person(s) then, by deeming fiction, is made vicariously liable and punished - However, such vicarious liability arises only when the company or firm commits the offence as the primary offender - Appeal stands set aside and the appellant's conviction under Sec.138 read with Sec.141 of the N.I. Act - Impugned Judgment of the High Court confirming the conviction and Order of sentence passed by the Sessions Court, and the Order of conviction passed by the Judicial Magistrate First Class stand set aside - Appellant stands acquitted.

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

Leave granted.

2. The issues raised in this appeal

Crl.A.No. 767/2022 Date: 9-5-2022

by the appellant, Dilip Hariramani, challenging his conviction under Section 138 (138. Dishonour of cheque for insufficiency, etc., of funds in the account.— Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months* from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.) read with Section 141 of the Negotiable Instruments Act, 1881, (Hereinafter referred to as the 'NI Act') are covered by the decisions of this Court on the aspects of (i) vicarious criminal liability of a partner; and (ii) whether a partner can be convicted and held to be vicariously liable when the partnership firm is not an accused tried for the primary/substantive offence.

3. We are not required to refer to the facts extensively. Suffice it is to notice that the respondent before us – Bank of Baroda, had granted term loans and cash credit facility to a partnership firm – M/s. Global Packaging (Hereinafter referred to as 'the Firm') on 04th October 2012 for Rs. 6,73,80,000/-. It is alleged that in part repayment of the loan, the Firm, through its authorised signatory, Simaiya Hariramani, had issued three cheques of Rs. 25,00,000/- each on 17th October 2015, 27th October 2015 and 31st October 2015. However, the cheques were dishonoured on presentation due to insufficient funds. On 04th November 2015, the Bank, through its Branch Manager, issued a demand notice to Simaiya Hariramani under Section 138 of the NI Act. On 07th December 2015, the respondent Bank, through its Branch Manager, filed a complaint under Section 138 of the NI Act before the Court of Judicial Magistrate,

Balodabazar, Chhattisgarh, against Simaiya Hariramani and the appellant. The Firm was not made an accused. Simaiya Hariramani and the appellant, as per the cause title, were shown as partners of the Firm. Paragraph 8 of the complaint, which relates to the vicarious culpability, states:

"8. That, both accused No. 1 and accused No. 2 are partners of the indebted firm. Accused No. 1, as a partner of the debtor firm, issued a under the obligation of the debtor firm. Thus, under Section 20 of the Partnership Act 1932, accused No. 2 is equally responsible for the underlying authority and liability of the deemed partners."

Other than the paragraph mentioned above, no other assertion or statement is made to establish the vicarious liability of the appellant.

4. The respondent Bank had produced as witness - Prashant Kumar Gartia (PW-1), who was posted as the Branch Manager of the respondent and had deposed that the Firm was a partnership firm with Simaiya Hariramani as its partner. The Firm had availed term loans and cash credit and gave three cheques of Rs. 25,00,000/- each, which were dishonoured due to 'insufficient funds'. Even after the demand notice (Exhibit P-04), the accused had not deposited the amount. Thereby, a complaint under Section 138 of the NI Act was filed. In his cross-examination, PW-1 admitted that the demand notice had not been issued to the Firm and that no loan had been obtained by Dilip Hariramani and Simaiya Hariramani in their individual capacity.

5. By judgment dated 19th February 2019, the appellant and Simaiya Hariramani were convicted by the Judicial Magistrate First Class, Balodabazar, Chhattisgarh, under Section 138 of the NI Act and sentenced to imprisonment for six months. They were also asked to pay Rs. 97,50,000/- as compensation under Section 357(3) (357(3): When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced) of the Code of Criminal Procedure, 1973 and, in default, suffer additional imprisonment for one month. An appeal preferred by the appellant and Simaiya Hariramani challenging their conviction was dismissed by the Sessions Judge, Balodabazar, Chhattisgarh, vide judgment dated 21st November 2019, albeit the appellate court modified the sentence awarded to imprisonment till the rising of the court and at the same time, enhanced the compensation amount under Section 357(3) from Rs. 97,50,000/- to Rs. 1,20,00,000/- with the stipulation that the appellant and Simaiya Hariramani shall suffer additional imprisonment for three months in case of failure to pay.

6. The appellant and Simaiya Hariramani challenged the judgment before the High Court of Chhattisgarh, which has been dismissed by the impugned judgment dated 12th October 2020. The impugned

judgment primarily relies upon the decision of this Court in **Monaben Ketanbhai Shah and Another** v. **State of Gujarat and Others (**(2004) 7 SCC 15)and observes that the liability under the NI Act is only upon the partners who are responsible for the firm for conduct of its business. In the present case, both the appellant and Simaiya Hariramani had furnished guarantees of the amount borrowed by the Firm from the Bank. The exact reasoning given by the High Court reads as under:

"15. The only question raised in this revision petition is that the prosecution of the applicants in personal capacity, was not maintainable, appears to be out of place in view of the discussions, which has been made hereinabove. It is liability of a person as a partner of a firm, that has to be given emphasis. Lapse to make a proper mention in the cause title of the complaint would not by itself dis-entitle, the complainant, who has a claim to make and who has entitlement to file a complaint against the partners of the firm. The cause title of the complaint of course does not mention other description of the applicant, but the body of the plaint clearly mentions that the applicants are the partners of M/s. Global Packaging.

16. Section 141 of the Act of 1881 provides as to who shall be deemed as guilty and it mentions the person concerned not a company or the firm. Therefore, the complaint filed against the applicants was not against the provisions of law or against the provision under Section 141 of the Act of 1881."

7. Before we refer to the pertinent legal ratio in the case of **Aneeta Hada** v. **Godfather Travels and Tours Private Ltd.**, ((2012) 5 SCC 661) we would like to refer to an earlier apposite judgment of this Court in **State of Karnataka** v. **Pratap Chand and Others**, ((1981) 2 SCC 335) in which case prosecution had been initiated under the Drugs and Cosmetics Act, 1940 against a partnership firm and its partners. Reference was made to Section 34 (34. Offences by companies.—(1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

> Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to

be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section—

(a) "company" means a body corporate, and includes a firm or other association of individuals; and

(b) "director" in relation to a firm means a partner in the firm.) of the Drugs and Cosmetics Act, which is pari materia to Section 141 of the NI Act. Therefore, for the sake of convenience and for deciding the present appeal, we will reproduce Section 141 of the NI Act:

"141. Offences by companies.—(1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,— (a) "company" means any body corporate and includes a firm or other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm."

Sub-section (1) to Section 141 of the NI Act states that where a company commits an offence, every person who at the time the offence was committed was in charge of and was responsible to the company for the conduct of the business, as well as the company itself, shall be deemed to be guilty of the offence. The expression 'every person' is wide and comprehensive enough to include a director, partner or other officers or persons. At the same time, it follows that a person who does not bear out the requirements of 'in charge of and responsible

to the company for the conduct of its business' is not vicariously liable under Section 141 of the NI Act. The burden is on the prosecution to show that the person prosecuted was in charge of and responsible to the company for conduct of its business. The proviso, which is in the nature of an exception, states that a person liable under subsection (1) shall not be punished if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. The onus to satisfy the requirements and take benefit of the proviso is on the accused. Still, it does not displace or extricate the initial onus and burden on the prosecution to first establish the requirements of sub-section (1) to Section 141 of the NI Act. The proviso gives immunity to a person who is otherwise vicariously liable under sub-section (1) to Section 141 of the NI Act. (S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another, (2005) 8 SCC 89, para 4 and 9)

8. Sub-section (2) to Section 141 of the NI Act states that notwithstanding anything contained in sub-section (1), where a company has committed any offence under the Act, and it is proved that such an offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officers of the company, then such director, manager, secretary or other officers of the company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Sub-section (2) to Section 141 of the NI Act does not state that the persons enumerated, which can include an officer of the company, can be prosecuted and punished merely because of their status or position as a director, manager, secretary or any other officer, unless the offence in question was committed with their consent or connivance or is attributable to any neglect on their part. The onus under sub-section (2) to Section 141 of the NI Act is on the prosecution and not on the person being prosecuted.

9. In **Pratap Chand** (supra), specific reference was made to the Explanation to Section 34 of the Drugs and Cosmetics Act, which states that for Section 34, a 'company' means a body corporate and includes a firm or association of individuals, and a 'director' in relation to a firm means a partner in the firm. Thereafter, the conviction of the second respondent, one of the partners in the firm therein, was quashed on the ground that he cannot be convicted merely because he has the right to participate in the firm's business in terms of the partnership deed. Thus, notwithstanding the legal position that a firm is not a juristic person, a partner is not vicariously liable for an offence committed by the firm, unless one of the twin requirements are satisfied and established by the prosecution. This Court gave the following reasoning:

"7. It is seen that the partner of a firm is also liable to be convicted for an offence committed by the firm if he was in charge of, and was responsible to, the firm for the conduct of the business of the firm or if it is proved that the offence was committed with the consent or connivance

of, or was attributable to any neglect on the part of the partner concerned. In the present case the second respondent was sought to be made liable on the ground that he along with the first respondent was in charge of the conduct of the business of the firm. Section 23-C of the Foreign Exchange Regulation Act, 1947 which was identically the same as Section 34 of the Drugs and Cosmetics Act came up for interpretation in G.L. Gupta v. D.H. Mehta, (1971) 3 SCC 189 where it was observed as follows:

"What then does the expression 'a person incharge and responsible for the conduct of the affair of a company' means? It will be noticed that the word 'company' includes a firm or other association, and the same test must apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person 'in-charge' must mean that the person should be in overall control of the day to day business of the company or firm. This inference follows from the wording of Section 23-C(2). It mentions director, who may be a party to the policy being followed by a company and yet not be incharge of the business of the company. Further it mentions manager, who usually is in charge of the business but not in overall charge. Similarly the other officers may be in charge of only some part of business."

10. We would also refer to the summarisation of law on Section 141 by this Court in **National Small Industries Corporation Limited** v. **Harmeet Singh Paintal and Another, (**(2010) 3 SCC 330: The case dealt with challenge to a summoning order. Withal, interference by the courts at the stage of summoning order is restricted/limited)to the following effect:

"39. From the above discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/ petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

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(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

11. In the present case, we have reproduced the contents of the complaint and the deposition of PW-1. It is an admitted case of the respondent Bank that the appellant had not issued any of the three cheques, which had been dishonoured, in his personal capacity or otherwise as a partner. In the absence of any evidence led by the prosecution to show and establish that the appellant was in charge of and responsible for the conduct of the affairs of the firm, an expression interpreted by this Court in **Girdhari Lal Gupta** v. **D.H. Mehta and Another (**(1971) 3 SCC 189)to mean 'a person in overall control of the day-to-day business of the company or the firm', the conviction of the appellant has to be set aside. (State of Karnataka v. Pratap Chand and Others, (1981) 2 SCC 335) The appellant cannot be convicted merely because he was a partner of the firm which had taken the loan or that he stood as a guarantor for such a loan. The Partnership Act, 1932 creates civil liability. Further, the guarantor's liability under the Indian Contract Act, 1872 is a civil liability. The appellant may have civil liability and may also be liable under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. However, vicarious liability in the criminal law in terms of Section 141 of the NI Act cannot be fastened because of the civil liability. Vicarious liability under sub-section (1) to Section 141 of the NI Act can be pinned when the person is in overall control of the dayto- day business of the company or firm. Vicarious liability under sub-section (2) to Section 141 of the NI Act can arise because of the director, manager, secretary, or other officer's personal conduct, functional or transactional role, notwithstanding that the person was not in overall control of the day-to-day business of the company when the offence was committed. Vicarious liability under sub-section (2) is attracted when the offence is committed with the consent, connivance, or is attributable to the neglect on the part of a director, manager, secretary, or other officer of the company.

12. The demand notice issued on 04th November 2015 by the Bank, through its Branch Manager, was served solely to Simaiya Hariramani, the authorised signatory of the Firm. The complaint dated 07th December 2015 under Section 138 of the NI Act before the Court of Judicial Magistrate, Balodabazar, Chhattisgarh, was made against Simaiya Hariramani and the appellant. Thus, in the present case, the Firm has not been made an accused or even summoned to be tried for the offence.

13. The judgment in **Dayle De'souza** v. **Government of India through Deputy Chief Labour Commissioner (C) and Another**, (2021 SCC OnLine SC 1012) answered the question of whether a director or a partner can be prosecuted without the

company being prosecuted. Reference in this regard was made to the views expressed by this Court in **State of Madras** v. **C.V. Parekh and Another (**(1970) 3 SCC 491: "3. Learned Counsel for the appellant, however, sought conviction of the two respondents on the basis of Section 10 of the Essential Commodities Act under which, if the person contravening an order made under Section 3 (which covers an order under the Iron and Steel Control Order, 1956), is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. It was urged that the two respondents were in charge of, and were responsible to, the Company for the conduct of the business of the Company and, consequently, they must be held responsible for the sale and for thus contravening the provisions of clause (5) of the Iron and Steel Control Order. This argument cannot be accepted, because it ignores the first condition for the applicability of Section 10 to the effect that the person contravening the order must be a company itself. In the present case, there is no finding either by the Magistrate or by the High Court that the sale in contravention of clause (5) of the Iron and Steel Control Order was made by the Company. In fact, the Company was not charged with the offence at all. The liability of the persons in charge of the Company only arises when the contravention is by the Company itself. Since, in this case, there is no evidence and no finding that the Company contravened clause (5) of the Iron and Steel Control Order, the two respondents could not be held responsible. The actual contravention was by Kamdar and Vallabhdas Thacker and any contravention by them would not fasten responsibility on the respondents. The acquittal of the respondents is, therefore, fully justified. The appeal fails and is dismissed.")on the one hand and the divergent view expressed in **Sheoratan Agarwal and Another** v. **State of Madhya Pradesh (**(1984) 4 SCC 352: The court held that anyone among : the company itself; every person incharge of and responsible to the company for the conduct of the business; or any director, manager, secretary or other officer of the company with whose consent or connivance or because of whose neglect offence had been committed, could be prosecuted alone.)and **Anil Hada** v. **Indian Acrylic Ltd. (**(2000) 1 SCC 1:"13. If the offence was committed by a company it can be punished only if the company is prosecuted. But instead of prosecuting the company if a payee opts to prosecute only the persons falling within the second or third category the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the company. In such a prosecution the accused can show that the company has not committed the offence, though such company is not made an accused, and hence the prosecuted accused is not liable to be punished. The provisions do not contain a condition that prosecution of the company is sine qua non for prosecution of the other persons who fall within the second and the third categories mentioned above. No doubt a

finding that the offence was committed by the company is sine qua non for convicting those other persons. But if a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act.")This controversy was settled by a three Judge Bench of this Court in **Aneeta Hada** (supra), in which, interpreting and expounding the difference between the primary/substantial liability and vicarious liability under Section 141 of the NI Act, it has held:

"51. We have already opined that the decision in Sheoratan Agarwal runs counter to the ratio laid down in C.V. Parekh which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in Anil Hada has to be treated as not laying down the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the company. Needless to emphasise, the matter would stand on a different footing where there is some legal impediment and the doctrine of lex non cogit ad impossibilia gets attracted.

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59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada is overruled with the qualifier as stated in para 51. The decision in Modi Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove."

14. The provisions of Section 141 impose vicarious liability by deeming fiction which presupposes and requires the commission of the offence by the company or firm. Therefore, unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-section (1) or (2) would not be liable and convicted as vicariously liable. Section 141 of the NI Act extends vicarious criminal liability to officers associated with the company or firm when one of the twin requirements of Section 141 has been satisfied, which person(s) then, by deeming fiction, is made vicariously liable and punished. However, such vicarious liability arises only when the company or firm commits the offence as the primary offender. This view has been subsequently followed in **Sharad Kumar Sanghi** v. **Sangita Rane**, ((2015) 12 SCC 781:"11. In the case at hand as the complainant's initial statement would reflect, the allegations are against the Company, the Company has not been made a party and, therefore, the allegations are restricted to the Managing Director. As we have noted earlier,

allegations are vague and in fact, principally the allegations are against the Company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened under certain statutes. It has been so held by a three-Judge Bench in Aneeta Hada v. Godfather Travels and Tours (P) Ltd. in the context of the Negotiable Instruments Act, 1881.") **Himanshu** v. **B. Shivamurthy and Another**, ((2019) 3 SCC 797:"13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.") and **Hindustan Unilever Limited** v. **State of Madhya Pradesh**. ((2020) 10 SCC 751: "23. Clause (a) of sub-section (1) of Section 17 of the Act makes the person nominated to be in charge of and responsible to the company for the conduct of business and the company shall be guilty of the offences under clause (b) of sub-section (1) of Section 17 of the Act. Therefore, there is no material distinction between Section 141 of the NI Act and Section 17 of the Act which makes the company as well as the nominated person to be held guilty of the offences and/ or liable to be proceeded and punished accordingly. Clauses (a) and (b) are not in the alternative but conjoint. Therefore, in the absence of the company, the nominated person cannot be convicted or vice versa. Since the Company was not convicted by the trial court, we find that the finding of the High Court to revisit the judgment will be unfair to the appellant-nominated person who has been facing trial for more than last 30 years. Therefore, the order of remand to the trial court to fill up the lacuna is not a fair option exercised by the High Court as the failure of the trial court to convict the Company renders the entire conviction of the nominated person as unsustainable.") The exception carved out in **Aneeta Hada** (supra), (The exception would be when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar.) which applies when there is a legal bar for prosecuting a company or a firm, is not felicitous for the present case. No such plea or assertion is made by the respondent.

15. Given the discussion above, we allow the present appeal and set aside the appellant's conviction under Section 138 read with Section 141 of the NI Act. The impugned judgment of the High Court confirming the conviction and order of sentence passed by the Sessions Court, and the order of conviction passed by the Judicial Magistrate First Class are set aside. Bail bonds, if any, executed by the appellant shall be cancelled. The appellant is acquitted. (However, as Simaiya Hariramani has preferred no appeal, we express no opinion in his case.) However, there would be no order as to costs.

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2022 (2) L.S. 12 (S.C)

IIN THE SUPREME COURT
OF INDIA

Present:
The Hon'ble Mr. Justice
Hemanth Gupta &
The Hon'ble Mr. Justice
V. Ramasubramanian

Asset Reconstruction
Company (India) Ltd., ..Petitioner
Vs.
S.P. Velayutham & Ors ., ..Respondents

REGISTRATION ACT, Sec.32(c) - Whether the invocation of the Writ jurisdiction of the High Court by the appellant was right, especially when civil suits at the instance of third parties are pending and when the appellant had already been directed by this Court, in proceedings arising under Sec.145 of the Code of Criminal Procedure, to move the civil Court - Appeals challenging the Judgment of the Division Bench of the High Court, reversing the judgment of a Single Judge, by which the Single Judge held that registration of a sale deed by the Registering Authority to be null and void.

HELD - If a party questions the very execution of a document or the right and title of a person to execute a document and present it for registration, his remedy will only be to go to the civil court - But where a party questions only the failure of the Registering Authority to perform his statutory duties in the course of the third step, it cannot be said that the jurisdiction of the High Court under Article 226 stands completely ousted - There is and there can be no dispute about the fact that while the Registering Officer under the Registration Act, may not be competent to examine whether the executant of a document has any right, title or interest over the property which is the subject matter of the document presented for registration, he is obliged to strictly comply with the mandate of law contained in the various provisions of the Act.

In cases where a document is presented for registration by the agent, (i) of the executant; or (ii) of the claimant; or (iii) of the representative or assign of the executant or claimant, the same cannot be accepted for registration unless the agent is duly authorized by a PoA executed and authenticated in the manner provided in the Act - Section 34(3)(c) imposes an obligation on the Registering Officer to satisfy himself about the right of a person appearing as a representative, assign or agent - Appeals stands allowed, and impugned order of the Division Bench is set aside and the Order of the learned single Judge stands restored.

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

C.A.Nos. 2752-2753/2022 Date: Asset Reconstruction Company

(India) Limited, to whom the Indian Bank assigned the loans and the underlying security of a particular borrower, has come up with the above appeals challenging the judgment of the Division Bench of the High Court of Judicature at Madras, reversing the judgment of a learned Single Judge of the Court, by which the learned Single Judge held the registration of a sale-deed by the Registering Authority to be null and void.

2. We have heard Mr. Guru Krishna Kumar and Mr. Nakul Devan, learned senior counsel for the appellant, and Mr. Shyam Divan, Mr. Atul Nanda and Mr. Mukul Rohatgi, learned senior counsel appearing for the contesting respondents.

3. The brief facts necessary for the disposal of the appeals can be summarised as follows :-

(i) In the year 1992, the Indian Bank sanctioned financial facilities to M.V.R. Group of Industries. According to the Indian Bank, the borrower offered the immovable property covered by the document now in dispute, as collateral security and a mortgage by deposit of title deeds is said to have been created way back in the year 1995-96;

(ii) Alleging that the borrower defaulted in repayment of the loan, Indian Bank filed an application before the Debts Recovery Tribunal in the year 1996 under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993;

(iii) However, after the advent of the Securitisation Act, 2002, the Bank issued a demand notice dated 15.12.2004 under Section 13(2) of the Securitisation Act. It was followed by a possession notice dated 30.03.2005 under Section 13(4);

(iv) Thereafter, the respondent nos. 4 and 5 herein executed a deed of Power of Attorney ('PoA for short) on 23.08.2006 in favour of Mr. S.P. Velayutham, the 1st respondent in one of these appeals and the 6th respondent in the other appeal. This deed of Power of Attorney contained an express prohibition for the agent to encumber the properties. This deed of PoA was registered in the Office of the Sub-Registrar, Alandur;

(v) By another deed of PoA dated 07.06.2007, the power of sale is said to have been conferred upon the agent, but this deed of power was un-registered;

(vi) On the basis of the original registered deed of PoA dated 23.08.2006 which did not confer a power of sale, Mr. S.P. Velayutham sold the property to his son Amar (the 6th respondent in one of these appeals and the 1st respondent in the other appeal) under a deed of sale dated 05.07.2007;

(vii) In the meantime, Indian Bank which already initiated proceedings under the Securitisation Act, assigned the debt and the collateral security in favour of the appellant herein, which is an asset reconstruction company. On the basis of such assignment, the appellant issued a

sale notice dated 05.08.2008;

(viii) However, Mr. Amar, executed a deed of settlement dated 13.10.2008 in favour of his father Mr. S.P. Velayutham, from whom he had purchased the property;

(ix) While so, during the period 2009-2015, some encroachments took place which led to the initiation of proceedings under Section 145 Cr.P.C. The original borrowers also filed civil suits and the appellant got themselves impleaded in those suits;

(x) Eventually, the appellant filed a writ petition in W.P.No. 33462 of 2014 seeking a declaration that the act of the Sub-Registrar in registering the sale deed executed by S.P. Velayutham in favour of his son Amar, was null and void. The said writ petition was allowed by a learned Judge on the ground that there was utter failure on the part of the Registering Authority to follow the mandate of law as prescribed in Sections 32 to 35 of the Registration Act, 1908 and that the Registrar failed to verify the deed of PoA dated 23.08.2006, before allowing registration of the sale deed executed on the basis of the said power;

(xi) However, two intra-court appeals filed by the father-son duo, were allowed by the Division Bench primarily on the ground,

(1) that the appellant ought to have taken recourse to a civil suit; and

(2) that the appellant is guilty of violating the order passed by this Court in the proceedings arising out of the order of the Sub-Divisional Magistrate under Section 145 of the Cr.P.C., directing the parties to approach the civil court. Aggrieved by this order of the Division Bench, the appellant has come up with the above appeals.

4. Assailing the impugned order of the Division Bench of the High Court, it is contended by the learned senior counsel for the appellants, (i) that the High Court failed completely to appreciate that the Registration Act, 1908, enjoins upon the Registering Authority to verify "the person executing" the document sought to be registered; (ii) that in cases where the statutory authorities fail to perform the duties enjoined upon them, under specific provisions of the statute, the jurisdiction of the High Court under Article 226 of the Constitution does not stand ousted; (iii) that what was challenged before the High Court in a petition under Article 226 was not the acts of individuals, but the acts of omission and commission on the part of the Registering Authority and hence the writ petition cannot be said to be not maintainable; and (iv) that by an over-simplified process of reasoning, the Division Bench of the High Court threw the appellant out of the Court and also added insult to injury by commenting upon the conduct of the appellant and imposing costs.

5. Supporting the impugned order, it is contended by Mr. Shyam Divan, learned senior counsel appearing for Mr. S.P. Velayutham (respondent no. 6 in one of these appeals and respondent no. 1 in the other appeal), (i) that when admittedly title

suits are pending and the very appellant herein has got themselves impleaded therein, it was not open to the appellant to resort to a short-cut method of invoking the jurisdiction of the writ court; (ii) that when there are seriously disputed questions of fact, with the contesting respondents (father and son) tracing their title to an un-broken, un-impeachable chain of registered documents dating back to 1929, the appellant could not have invoked the writ jurisdiction of the High Court, after having got an assignment deed from the Indian Bank just a few years ago in 2007; (iii) that the very right of the Indian Bank to claim the creation of a mortgage in their favour, has come under cloud after the officials of the Indian Bank and the borrowers got convicted by the Special Court for the CBI cases in Calendar Case No. 36 of 1998 for various offences punishable under Section 120B read with Sections 420, 467, 471 etc., and Section 13(2) read with Section 13(1)(c) and 13(1)(d) of the Prevention of Corruption Act, 1988; (iv) that the attempt of the appellant to invoke the writ jurisdiction of the High Court was in the teeth of the judgment of this Court in SLP(Crl.)No. 838 of 2015 dated 27.02.2015, which arose out of proceedings under Section 145 of the Code of Criminal Procedure, 1973; (v) that despite this Court affirming the judgment of the High Court relegating the appellant to a civil court, the appellant took a chance by invoking the writ jurisdiction of the High Court suppressing material facts; and (vi) that the appellant, whose very locus to stake a claim on the properties is disputed, was rightly non suited by the High Court.

6. Mr. Atul Nanda, learned senior counsel appearing for one of the parties, while adopting the contentions of Mr. Shyam Divan, added that when the Special Court for CBI cases has found the very creation of the mortgage in favour of Indian Bank to be a product of fraud and forgery, an institution claiming to be the assignee of the mortgagee could not have invoked the writ jurisdiction of the High Court, especially after having got impleaded in the civil suits.

7. Mr. Mukul Rohatgi, learned senior counsel appearing for one of the contesting respondents invited our attention to the statutory provisions and the decision of this Court in Rajni Tandon vs. Dulal Ranjan Ghosh Dastidar & Anr, (2009) 14 SCC 782, and contended that the requirement of authentication of PoA by the Registrar under Section 33(1), was mandatory only in cases where the person executing the document is different from the person presenting it for registration and that wherever the agent himself has signed the deed which is presented for registration, he becomes the executant of the document, leaving no role for the Registrar to probe.

8. We have carefully considered the above submissions.

9. The limited question that arises for our consideration is as to whether the invocation of the writ jurisdiction of the High Court by the appellant was right, especially when civil suits at the instance of third parties are pending and when the appellant had already been directed by this Court, in proceedings arising under section 145 of the Code of Criminal Procedure, to move

the civil court?

10. To enable (or disable?) us to find an answer to the above question, the learned counsel on both sides took us through some provisions of the Registration Act, 1908 and a few decisions of this Court. We shall now take a look at them.

11. There is and there can be no dispute about the fact that while the Registering Officer under the Registration Act, 1908, may not be competent to examine whether the executant of a document has any right, title or interest over the property which is the subject matter of the document presented for registration, he is obliged to strictly comply with the mandate of law contained in the various provisions of the Act. Therefore let us take a look at the scheme of the Act.

12. The Registration Act, 1908 is divided into XV parts. Part III comprising of Sections 17 to 22 contains provisions relating to registerable documents; Part-IV of the Act contains prescriptions regarding the time of presentation of documents for registration; Part-V contains provisions prescribing and regulating the place of registration of documents; Part-VI contains provisions relating to presentation of documents for registration and the procedure on admission and denial of execution; Part-VII contains provisions for enforcing appearance of executants and witnesses; Part-XI contains provisions relating to the duties and powers of Registering Officers and Part-XII contains provisions relating to refusal to register and the remedies available against such refusal.

13. Before we look at the relevant provisions of the Registration Act, 1908, it is necessary to note that "Registration of deeds and documents" falls in Entry 6 of List III (Concurrent List) of the SEVENTH SCHEDULE of the Constitution. Therefore, the Registration Act, 1908, which is a Central Act, can be seen as something which provides only a template upon which the States are entitled to make amendments. This is why amendments by States galore in the Registration Act, 1908. Therefore, any interpretation of the provisions of the Act, should be in consonance with the scheme of the Act as applicable to the State involved in the litigation. For instance, registration of certain documents may be optional in some States but mandatory in some other States. Therefore, the interpretation made by this Court, of a provision as amended in its application to a particular State, cannot be applied blindly while interpreting the same provision as applicable to another State. Keeping this aspect in mind, let us now peep into the statutory provisions.

14. Section 32 of the Act mandates that every document to be registered under the Act, irrespective of whether such a registration is compulsory or optional, shall be presented by any of the persons mentioned therein. Section 32 reads as follows:-

32. Persons to present documents for registration.-Except in the cases mentioned in sections 31, 88 and 89, every document, to be registered under this Act, whether such registration be compulsory or optional, shall be presented

at the proper registration-office,-

(a) by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or

(b) by the representative or assign of such a person, or

(c) by the agent of such a person, representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned."

15. The words "such person" appearing in clauses (b) and (c) of Section 32, correlate to the words "person executing or claiming under the same", appearing in clause (a) of Section 32. In other words, clause (a) covers both the executant as well as the claimant of the document. Therefore, clauses (b) and (c) cover several persons who may represent the executant or the claimant. Since the controversy in several decisions of this Court has revolved around clause (c) of Section 32, it would be useful, for the purpose of easy appreciation, to break clause (c) into its several components as follows:-

(i) by the agent of the person executing the document;

ii) by the agent of the person claiming under the document;

iii) by the agent of the representative of the person executing the document;

(iv) by the agent of the representative of the person claiming under the document;

(v) by the agent of the assign of the person executing the document;

vi) by the agent of the assign claiming under the document.

It must be noted that the word "agent" appearing in clause (c) of section 32 goes not only with the words "such a person", but also with the words "representative" and "assign". This is for the reason that 'representative' and 'assign' are independently covered by clause (b) and hence if these words do not go with the word 'agent' then their appearance in clause (c) would be redundant.

16. By virtue of the 2nd part of clause (c) of Section 32, it is necessary that if a document for registration is presented by any of the aforementioned six categories of persons, he should have been "duly authorized by a PoA executed and authenticated in the manner mentioned in the other provisions of the Act". In other words, in cases where a document is presented for registration by the agent, (i) of the executant; or (ii) of the claimant; or (iii) of the representative or assign of the executant or claimant, the same cannot be accepted for registration unless the agent is duly authorized by a PoA executed and authenticated in the manner provided in the Act.

17. Section 33 contains prescriptions regarding the types of PoA, which alone shall be recognized, for the purposes of Section 32. Section 33 reads as follows:-

33. Power-of-attorney recognizable for purposes of section 32.-(I) For the purposes of section 32, the following powers-of-attorney shall alone be recognized, namely:-

a) if the principal at the time of executing the power-of-attorney resides in any part of Indiain which this Act is for the time being in force, a power-of-attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides;

(b) if the principal at the time aforesaid resides in any part of India in which this Act is not in force, a power-of-attorney executed before and authenticated by any Magistrate;

c) if the principal at the time aforesaid does not reside in India, a power-of-attorney executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government:

Provided that the following persons shall not be required to attend at any registration-office or Court for the purpose of executing any such power-of-attorney as is mentioned in clauses (a) and (b) of this section, namely:-

i) persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend;

ii) persons who are in jail under civil or criminal process; and

iii) persons exempt by law from personal appearance in Court.

2) In the case of every such person the Registrar or Sub-Registrar or Magistrate, as the case may be, if satisfied that the power-of-attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requiring his personal attendance at the office or Court aforesaid.

(3) To obtain evidence as to the voluntary nature of the execution, the Registrar or Sub-Registrar or Magistrate may either himself go to the house of the person purporting to be the principal, or to the jail in which he is confined, and examine him, or issue a commission for his examination.

(4) Any power-of-attorney mentioned in this section may be proved by the production of it without further proof when it purports on the face of it to have been executed before and authenticated by the person or Court hereinbefore mentioned in that behalf."

18. A careful look at Sections 32 and 33 will show that while speaking about PoA, these provisions do not use the word "registration". While Section 32(c) uses the words "executed and authenticated", Section 33(1) uses the words "recognised" and "authenticated". Therefore it is clear that the word "authenticated" is not to be understood to be the same as "registered". The reason why we say so is that Section 33(1) speaks only about authentication and not registration and clauses (a), (b) and (c)

Asset Reconstruction Company (India) Ltd., Vs. S.P. Velayutham & Ors ., 19 of Section 33(1) provides the list of persons competent to authenticate a PoA. Persons who are empowered by clauses (a), (b) and (c) of subsection (1) of Section 33 to authenticate a PoA are as follows:-

(i) The Registrar or the Sub-Registrar within whose district or sub-district the principal resides, if such principal resides, at the time of execution of the PoA, in any part of India to which this Act applies;

(ii) Any Magistrate, if the principal resides in any part of India where this Act is not in force;

(iii) A Notary Public, any Court, Judge, Magistrate, Indian Consul, Vice Consul or Representative of the Central Government, if the principal does not reside in India.

19. It may be seen from the list of persons indicated above, that not all of them are Registrars and Sub-Registrars appointed in terms of Section 6 of the Registration Act, 1908. Under the Act, the power of registration is conferred only upon the Registrars and Sub-Registrars appointed under the Act. But clauses (b) & (c) of Section 33(1) speaks about persons other than Registrars and Sub-Registrars. This is why, Section 32(c) as well as Section 33 use only the expression "authenticated" and not the word "registered". But unfortunately several Courts have mixed-up these two words, resulting in applying the test in terms of Sections 17 and 18 for determining the validity of a PoA.

20. In fact the distinction between "authentication" and "registration" is spelt out very clearly in the Tamilnadu Registration Rules. It may be noted here that section 69(1) of the Registration Act, 1908, empowers the Inspector General of Registration (i) to exercise general superintendence over all the registration offices in the territories under the State Government; and (ii) to make rules consistent with the Act, in respect of matters provided in clauses (a) to (j) therein. These rules, by virtue of sub-section (2) of section 69, are required to be submitted to the State Government for approval and to be published in the official gazette after such approval. The rules so made in terms of section 69, in the State of Tamil Nadu, provide clarity on the distinction between authentication and registration.

21. Rules 48 and 49 of the Tamilnadu Registration Rules read as follows:

48. A power of attorney may be brought to a registering officer (1) for authentication, or (2) for registration, or (3) for both authentication and registration. In the first case, he shall merely make the entry prescribed for authentication; in the second case, he shall register the power in the same manner as any other document; and in the third case, he shall first authenticate the power and then admit it to registration in the usual manner.

49. Although a power of attorney may be registered like any other instrument, it is not valid for registration purposes unless authenticated. When a power of attorney is brought to a registering officer by a person who does not understand the distinction between authentication and registration, the

registering officer should explain the difference to him and give him such information as may be necessary.

22. After pointing out the distinction between authentication and registration of a PoA, Rule 52 indicates the duty to be performed by the Registering Officer, at 2 points of time, namely (i) at the time of authentication; and (ii) when the power is revoked. Rule 52 reads as follows:

52. (i) An abstract in the form printed in Appendix III shall be retained of each power of attorney authenticated by a registering officer whether such power is general or special, registered or not registered. The abstract shall be signed by the registering officer; and shall be filed in a separate file with a serial number along with other powers retained under rule 46. The notes of interlineations, blanks, erasures and alterations made by the registering officer on the original power shall be copied verbatim in the abstract.

(i) (a) Each registration office shall maintain a register of all revocations of powers of attorney registered in, or communicated to it.

(b) When notice of a revocation is given to a registering officer, he shall send an intimation of the same to such other offices as may be specified by the person revoking the power.

23. In fact, there is a separate chapter in Chapter X of the Registration Rules of Tamilnadu, devoted to deeds of PoA. Rules 48, 49 and 52 which we have extracted above, are part of the said chapter. Rule 46 spells out the procedure to be followed by the Registering Officer when a document is presented for registration under a general PoA and the procedure to be followed when the document is presented under a Special PoA. It reads as follows:

46. (i) If a document is presented for registration under special power of attorney, the power shall be retained an filed in the office with the following endorsement .....No.....of 19..... Presented in connection with document No..... of 19.....of Book....., Vol..... Date: Signature of Registering Officer.

(ii) If a document is presented for registration under general power of attorney, the power shall be returned with the following endorsement:

Presented in connection with document No..... of 19.....of Book....., Vol..... Date: Signature of Registering Officer.

(iii) When a document is presented for registration by a person entitled to present it and execution is admitted by an agent under a power of attorney, the following endorsement shall be made on the power, which shall be retained and filed, or returned, according as it is a special or a general power

*No..... of 19..... Presented in connection with document No..... of 19..... of Book....., Vol.....

Date: Signature of Registering Officer.

24. Having seen (i) the distinction between authentication and registration of a PoA; (ii) the obligation imposed by the Act and the Rules, upon the Registering Officer while authenticating and/or registering a PoA; (iii) the necessity for the Registering Officer to maintain a track of revocation of deeds of PoA; and (iv) the different requirements of Rule 46, relating to a document presented under a general PoA and a document presented under a special PoA, let us now turn to the other provisions.

25. Section 34 of the Act contains provisions regarding the enquiry to be undertaken by the Registering Officer before registration. Section 34, in its application in the State of Tamilnadu, as amended by Tamilnadu Amendment Act 28 of 2000, reads as follows:-

34. Enquiry before registration by registering officer.-(I) Subject to the provisions contained in this Part and in sections 41, 43, 45, 69, 75, 77, 88 and 89, no document shall be registered under this Act, unless the persons executing such document (and in the case of document for sale of property, the persons claiming under that document) (Vide Tamil Nadu Act 28 of 2000, sec. 3), or their representatives, assigns or agents authorized as aforesaid, appear before the registering officer within the time allowed for presentation under sections 23, 24, 25 and 26:

Provided that, if owing to urgent necessity or unavoidable accident all such persons do not so appear, the Registrar, in cases where the delay in appearing does not exceed four months, may direct that on payment of a fine not exceeding ten times the amount of the proper registration fee, in addition to the fine, if any, payable under section 25, the document may be registered.

(2) Appearances under sub-section (1) may be simultaneous or at different times.

(3) The registering officer shall thereupon-

(a) enquire whether or not such document was executed by the persons by whom it purports to have been executed;

(b) satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document (or they are claiming under the document) (Vide Tamil Nadu Act 28 of 2000, sec. 3); and

(c) in the case of any person appearing as a representative, assign or agent, satisfy himself of the right of such person so to appear.

(4) Any application for a direction under the proviso to subsection (1) may be lodged with a Sub-Registrar, who shall forthwith forward it to the Registrar to whom he is subordinate.

(5) Nothing in this section applies to copies of decrees or orders.

26. Sub-section (3) of Section 34

imposes three obligations upon the Registering Officer. These obligations are:-

(i) To enquire whether or not such document was executed by the person by whom it is claimed to have been executed;

(ii) To satisfy himself as to the identity of the person appearing before him and claiming to have executed the document;

(iii) To satisfy himself about the right of any person appearing as a representative, assign or agent, to so appear;

27. We may note that Sections 32(c), 34(1) and 34(3)(c) use the expressions 'agent', 'representative' and 'assign'. Though in common parlance, we understand the power of attorney agent of a person to be the representative of the principal, the words "agent" and "representative" are used in Sections 32(c) and 34(3)(c) to mean different persons. The word "representative" is defined in Section 2(10) of the Registration Act "to include the guardian of a minor and the committee or other legal curator of a lunatic or idiot". The words "agent" and "assign" are not defined in the Act. Therefore, we may justifiably borrow the definition of the expression "agent" from Section 182 of the Indian Contract Act, 1872, which defines an "agent" "to mean a person employed to do any act for another or to represent another in dealings with third person".

28. Keeping the above definitions in mind, if we go back to Section 32(c) it could be seen that whenever the agent of, (i) the executant; (ii) the claimant; (iii) a representative; or (iv) an assign, presents a document for registration,

(1) he should have been authorised by PoA and

(2) such PoA should have been executed and authenticated in the manner provided in clauses (a), (b) or (c) of sub-section (1) of Section 33. The requirement of registration depends upon the State amendments.

29. What is covered by Section 32 (c) read with Section 33(1) is something different from what is covered by Section 34(3). While Section 32(c) read with Section 33(1) speaks about the entitlement of the person to present a document for registration, Section 34(3)speaks about the enquiry to be conducted and the satisfaction to be arrived at by the Registering Officer. Section 34(3) (c) imposes an obligation on the Registering Officer to satisfy himself about the right of a person appearing as a representative, assign or agent. This prescription has to be read with rule 46 of the Tamilnadu Rules.

30. Before we complete our discussion on the statutory scheme, it is necessary to take note of few more provisions, applicable in the State of Tamilnadu, which are of relevance. By Tamilnadu Act No. 29 of 2012, Section 17(1) of the Registration Act, 1908 was amended so as to insert clauses (f), (g), (h) and (i). Clause (h) so inserted, reads as follows:-

"Instruments of power of attorney relating to immovable property other than those executed outside India"

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