JUDICIAL ACADEMY JHARKHAND

SNIPPETS

OF

SUPREME COURT JUDGMENTS

(July 15-July 19, 2019)

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1. *RB Dealers Private Limited v. The Metro Railway, Kolkata, (2019 SCC OnLine SC 871)*

Decided on :- 17.07.2019

Bench :- 1. Hon'ble Mr. Justice Arun Mishra
2. Hon'ble Mr. Justice M.R. Shah

(The solatium amount to be determined and calculated under sub-section (1) of Section 30 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 Act shall be equivalent to 100% of the market value determined under Section 26 of the Act plus the value of all assets attached to the land i.e. the total amount of the compensation and shall not include an amount calculated at the rate of 12% per annum on such market value payable under sub-section (3) of Section 30 of the 2013 Act.)

Facts

The lands owned by the petitioner herein came to be acquired for the purpose of construction of the Metro railway under the provisions of the Metro Railways (Construction of Works) Act, 1978 (hereinafter referred to as the '1978 Act'). The Central Government published a notification under Section 10 of the 1978 Act, *inter alia*, declaring that the said land should be acquired in connection with the aforesaid project. In the year 2014, the petitioner filed an application under Section 13(1) of the 1978 Act, *inter alia*, praying for the compensation in respect of the said land. On 05.12.2016, the petitioner filed an application for amendment of the original claim, *inter alia*, praying for compensation to be determined under the provisions of the 2013 Act. The application for amendment came to be allowed.

The competent authority disposed of the aforesaid claim case awarding Rs. 1,48,29,312/- towards the market value and a sum of Rs. 6,75,526/- within two months from the date of the order on account of value of structure.

The petitioner preferred an appeal under Section 13(3) of the 1978 Act before the Appellate Authority. The Appellate Authority allowed the appeal and enhanced the amount of compensation and held that the petitioner is entitled to get a sum of Rs. 6,20,52,215/- on account of market value of the land and a further sum of Rs. 6,75,526/- on account of value of structure. The Appellate Authority also held that the petitioner shall be entitled to a further sum at the rate of 12% per annum on market value in terms of sub-section (3) of Section 30 of the 2013 Act and also held that the petitioner is entitled to get solatium @ 100% on the total compensation i.e. Rs. 6,20,52,215/- (market value) + Rs. 6,75,526/- (on account of value of structure) + Rs. 3,66,91,239/- (further sum at the rate of 12% per annum on market value in terms of sub-section (3) of Section 30 of the 2013 Act) = Rs. 9,94,18,980/-.

Being aggrieved and dissatisfied with the order passed by the Appellate Authority, the respondent preferred an application under Article 227 of the Constitution of India before the

High Court of Calcutta. By the impugned judgment and order, the High Court partly allowed the said application and held that the solatium payable under sub-section (1) of Section 30 of the 2013 Act has to be calculated only on the market value of the land acquired and the assets thereon and not on the total arrived at upon assessing the market value with additional 12% per annum thereon (further sum payable under sub-section (3) of Section 30 of the 2013 Act). Consequently, the High Court directed to reassess the total amount payable to the petitioner.

Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, the original owner-the petitioner herein preferred the present Special Leave Petitions.

Observations and Decision

The short question for consideration before the Hon'ble Court was – "***Whether the solatium payable under sub-section (1) of Section 30 of the 2013 Act has to be calculated only on the market value of the land acquired and the assets thereon or on the total arrived at upon adding the additional 12% per annum on the market value?"***

The Hon'ble Court referred to the following relevant provisions of the 2013 Act:

- **Section 26 –** provides for determination of market value of the land by the Collector
- **Section 27 –** Act provides for determination of the amount of compensation
- **Section 28** – provides the parameters to be considered by the Collector in determination of the award
- **Section 29** – provides for determination of the value of things attached to the land or building
- **Section 30** – provides that the Collector having determined the total compensation to be paid, shall, to arrive at the final award, impose a "Solatium" amount equivalent to one hundred per cent of the compensation amount. It also provides that in addition to the market value of the land provided under Section 26, the Collector shall, in every case, award the amount calculated at the rate of 12% per annum on such market value for the period commencing on and from the date of the publication of the notification under sub-section (2) of Section 4, in respect of such land, till the date of the award of the Collector or the date of taking possession of the land, whichever is earlier.

On analyzing the provisions mentioned hereinabove, the Hon'ble Court held as follows :-

> *".....Therefore, on conjoint reading of the aforesaid provisions and the scheme of the 2013 Act, the final award declared by the Collector shall be in three parts/components, namely the amount of compensation (which shall include the market value of the land to be acquired and the value of the assets attached to the land); the solatium determined and payable under sub-section (1) of Section 30 which shall be equivalent to one hundred per cent of the compensation amount (the market*

value + value of assets attached to the land) and the amount calculated at the rate of 12% per annum on such market value (as per subsection (3) of Section 30 of the 2013 Act). All the three components would be independent which shall ultimately form part of the final award. At this stage, it is required to be noted that unlike the market value (as defined under Section 3(u) of the Act), the "Compensation" is not defined. However, on reading Sections 26 and 27 of the Act, it is to be held that the total amount of compensation shall be the market value of the land to be acquired as determined under Section 26 of the Act and the value of assets attached to the land determined under Section 29 of the Act. It is required to be noted that in sub-section (1) of Section 30 of the 2013 Act, the word used is "Solatium" amount equivalent to one hundred per cent of the ***COMPENSATION AMOUNT****. At this stage, it is required to be noted that Section 28 of the Act provides for parameters to be considered by the Collector in determining the compensation to be awarded for the land acquired, which includes the market value as determined under Section 26 of the Act and other parameters, but does not include the amount calculated and payable under sub-section (3) of Section 30 of the 2013 Act. It is also required to be noted that unlike Section 23 of the old Land Acquisition Act, 1894, under the 2013 Act, the award of solatium and the additional amount calculated at the rate of 12% per annum on such market value is provided in the different section. Even the solatium payable under the old Land Acquisition Act was at the rate of 30 per cent on the market value and, in the new 2013 Act, the solatium amount is equivalent to one hundred per cent of the compensation amount. Therefore, there is a material change in determination of the market value, determination of the amount of compensation, determination of the amount of solatium and declaration of the final award.* ***Therefore, on a fair reading of the relevant provisions of the 2013 Act, namely Sections 26 to 30, we are of the opinion that the High Court has rightly observed and held that the solatium amount to be determined and calculated under sub-section (1) of Section 30 of the 2013 Act shall be equivalent to 100% of the market value determined under Section 26 of the Act plus the value of all assets attached to the land i.e. the total amount of the compensation and shall not include an amount calculated at the rate of 12% per annum on such market value payable under sub-section (3) of Section 30 of the 2013 Act.*** *On fair reading of the aforesaid provisions and the scheme of the 2013 Act, we are of the opinion that any other interpretation would be contrary to the scheme of the 2013 Act."* (Emphasis supplied)

2. *Vishal Ashok Thorat v. Rajesh Shrirambapu Fate, (2019 SCC OnLine SC 886)*

Decided on :- 19.07.2019

Bench :- 1. Hon'ble Mr. Justice Ashok Bhushan
2. Hon'ble Mr. Justice Navin Sinha

(A Public Interest Litigation (PIL) is not maintainable with regard to service jurisprudence)

Facts

In transport Department of the State of Maharashtra there were posts of Assistant Inspector of Motor Vehicles, Group-C. Under proviso to Article 309, Governor of Maharashtra by a notification dated 23.12.2016 framed the Rules namely "Assistant Inspector of Motor Vehicles, Group-C in Motor Vehicles Department (Recruitment) Rules 2016" (hereinafter referred to as "Rules, 2016").

On the requisition of the State Government, the Maharashtra Public Service Commission advertised the recruitment examination for the aforementioned post in which the stage of Mains Examination was completed. A writ petition was filed by respondent No. 1 challenging only the Rules, 2016 which petition was disposed of by the High Court on 13.11.2017 granting leave to writ petitioner to make appropriate representation to the State Government. The State Government was directed to take suitable decision in the next two months. The State Government vide order dated 01.02.2018 rejected the representation of respondent No. 1. The MPSC declared the final result of examination publishing a select list of 832 candidates. On 07.05.2018, MPSC recommended 832 candidates to the State Government for appointment. The State Government on 15.05.2018 directed Transport Commissioner to take further steps for 832 selected candidates. On 05.06.2018, Transport Commissioner asked selected candidates to come for verification of documents.

The respondent No. 1 filed a second Writ Petition challenging only Rules, 2016 in which writ petition, petitioner filed an amendment application praying for quashing of the advertisements dated 30.01.2017 and 01.07.2017 as well as list of selected candidates which amendment application was allowed by the High Court on 13.04.2018. The High Court on 12.06.2018 had passed an interim order for maintaining status quo.

Apart from the writ petition filed by respondent no. 1 challenging the Rules and subsequently the advertisement, there had been several challenges before the Maharashtra Administrative Tribunal as well as the High Court pertaining to 2016 Rules and the Advertisement no. 2 of 2017 and 48 of 2017.

Several O.A.s filed before Maharashtra State Administrative Tribunal were dismissed. In Writ Petition filed by the respondent No. 1, i.e., 1270 of 2018 both State Government as well as MPSC filed counter affidavits. Respondent Nos. 4 to 22 in Civil Appeal of Vishal Ashok

Thorat had filed application for impleadment in Writ Petition No. 1270 of 2018 along with the counter affidavit, which applications were allowed by the High Court. The High Court vide its judgment dated 28.09.2018 partly allowed the writ petition. The High Court although held that writ petitioner, i.e., respondent No. 1 cannot be permitted to challenge the advertisements dated 30.01.2017 and 01.07.2017 but the High Court set aside the Proviso at the end of Rule 3(iii) and Rule 3(iv) and also Rule 4 of Rules, 2016. The High Court ultimately directed the respondent to choose and select only those persons, who had participated in the selection process and who fulfilled the requirement of practical experiences and driving licences as per the qualifications prescribed by the Central Government, i.e., as per substantive part of Rule 3(iii) and Rule 3(iv) of Rules, 2016. This appeal was against the order of the High Court.

Observations and Decision

The contention on behalf of the appellants *inter alia* was that Respondent No. 1 did not have the locus to challenge the recruitment of Assistant Motor Vehicles Inspector mainly for the reasons, *firstly*, that he did not challenge the advertisements in his original writ petition and the same could not have been allowed to be challenged through an amendment in the petition and that too when the result was declared and one of his nephews was not selected, *secondly*, that he did not participate in the recruitment process and so he was not an aggrieved party and by entertaining his petition the High Court treated it as a Public Interest Litigation which cannot be done in service matters and, *thirdly,* none of the candidates selected through the recruitment process was made a party to the writ petition when the final order of the High Court has affected their interests.

Regarding impleading the selected candidates as necessary parties to the writ before the High Court, the Hon'ble Supreme Court referred to the Constitution Bench judgment of the Supreme Court in ***Udit Narain Singh, Malpatharia* v. *Additional Member Board of Revenue, Bihar***[1], wherein it had been held as follows :-

> *"**7.** To answer the question raised it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding. The law on the subject is well settled: it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.*
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> ***9.** The next question is whether the parties whose rights are directly affected are the necessary parties to a writ petition to quash the order of a tribunal. As we have seen, a tribunal or authority performs a judicial or quasi-judicial act after hearing parties. Its order affects the right or rights of one or the other of the parties before it. In a writ of certiorari, the defeated party seeks for the quashing of the order issued by the tribunal*

[1] AIR 1963 SC 786.

> *in favour of the successful party. How can the High Court vacate the said order without the successful party being before it?* ***Without the presence of the successful party the High Court cannot issue a substantial order affecting his right. Any order that may be issued behind the back of such a party can be ignored by the said party, with the result that the tribunal's order would be quashed but the right vested in that party by the wrong order of the tribunal would continue to be effective. Such a party, therefore, is a necessary party and a petition filed for the issue of a writ of certiorari without making him a party or without impleading him subsequently, if allowed by the court, would certainly be incompetent.*** *A party whose interests are directly affected is, therefore, a necessary party."* (Emphasis supplied)

The Hon'ble Court also referred to another judgment by the Supreme Court in ***Public Service Commission, Uttaranchal* v. *Mamta Bisht***[2], wherein it was held that the writ petition could not have been entertained against the selected candidate when he has not been a party in the writ petition.

While addressing the next issue of whether PIL in service matter is maintainable in service matters, the Hon'ble Court referred to the judgment of ***Ayaaubkhan Noorkhan Pathan v. State of Maharashtra***[3], wherein it was held that in service matters, PILs should not be entertained by Courts.[4] In the present case, the Hon'ble Court observed that the High Court had treated the writ petition as a PIL which was evident from the following paragraph from the order of the High Court:-

> *"29. We are here, satisfied that the loss being caused to public revenue cannot be ignored and challenge cannot be seen as a grievance pertaining to a service condition. Contention that it cannot, therefore, be seen as public interest litigation, is misconceived. Its larger impact on Society due to hole in taxpayer's money and omission to make requisite service available to the citizens, all necessitate cognizance by any writ petition."*

On the basis of the cases referred to and the observations made by the Hon'ble Court, the appeal was allowed and the order of the High Court was set aside.

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[2] (2010) 12 SCC 204. *See* also *Gulabchand Chhotalal Parikh* v. *State of Gujarat*, AIR 1965 SC 1153; *Babubhai Muljibhai Patel* v. *Nandlal, Khodidas Barat*, (1974) 2 SCC 706; *Sarguja Transport Service* v. *State Transport Appellate Tribunal, Gwalior*, (1987) 1 SCC 5

[3] (2013) 4 SCC 465.

[4] *See* also *Dr. Duryodhan Sahu* v. *Jitendra Kumar Mishra*, (1998) 7 SCC 273; *Dattaraj Natthuji Thaware* v. *State of Maharashtra*, (2005) 1 SCC 590; and *Neetu* v. *State of Punjab*, (2007) 10 SCC 614.

3. *Gurmit Singh Bhatia v. Kiran Kant Robinson and Others, (2019 SCC OnLine SC 912)*

Decided on :- 17.07.2019

Bench :- 1. Hon'ble Mr. Justice D.Y. Chandrachud
2. Hon'ble Mr. Justice M.R. Shah

(In a suit, the plaintiff is the *dominus litis* and he cannot be forced to add a party against whom he does not wish to seek relief. The question of jurisdiction of the court to invoke Order 1 Rule 10 CPC to add a party who is not made a party in the suit by the plaintiff shall not arise unless a party proposed to be added has direct and legal interest in the controversy involved in the suit.)

Facts

Respondent nos. 2 & 3 herein (the original plaintiffs) filed a suit against respondent no. 1 herein (original defendant no. 1) for specific performance of the agreement to sell/contract dated 3.5.2005 executed by respondent no. 1 in the Court of learned 4th Additional District Judge, Bilaspur. During the pendency of the aforesaid suit and despite the injunction against respondent no. 1, the original owner, not to alienate or transfer the suit property, respondent no. 1 herein - original defendant no. 1, executed a sale deed in favour of the appellant herein vide sale deed dated 10.07.2008. The appellant herein (purchaser) who purchased the suit property during the pendency of the suit filed an application in the pending suit under Order 1 Rule 10 of the CPC for impleadment as a defendant in the suit. It was the case on behalf of the appellant herein that he has purchased the suit property and is a necessary and proper party to the suit as he has a direct interest in the suit property. By an order dated 5.11.2012, the learned trial Court allowed the said application and directed the original plaintiffs to join the appellant as a defendant in the suit.

Feeling aggrieved and dissatisfied with the order passed by the learned trial Court dated 5.11.2012 allowing the application and permitting the appellant herein to be joined as a party defendant in the suit filed by the original plaintiffs - respondent nos. 2 & 3 herein, respondent nos. 2 & 3 herein filed writ petition before the High Court of Chhattisgarh. By the impugned judgment and order dated 3.7.2013, the High Court allowed the said writ petition and quashed and set aside the order passed by the learned trial Court allowing the impleadment application preferred by the appellant herein by holding that as regards the relief claimed against the original defendants and as no relief has been claimed against the appellant herein, the appellant cannot be said to be a necessary or formal party. Thereafter the appellant preferred a review application which came to be dismissed. Hence, the present appeals had been filed before the Supreme Court through SLPs.

Observations and Decision

The Hon'ble Court referred to the case of ***Kasturi* v. *Iyyamperumal***[5] wherein identical question was raised before the Supreme Court and applying the principle that the plaintiff is the *dominus litis*, in the similar facts and circumstances of the case, the Supreme Court observed and held that the question of jurisdiction of the court to invoke Order 1 Rule 10 CPC to add a party who is not made a party in the suit by the plaintiff shall not arise unless a party proposed to be added has direct and legal interest in the controversy involved in the suit. The Hon'ble Court also referred to the two tests that had been laid down by the Court which are to be satisfied for determining the question who is a necessary party. The tests are–

(1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings;

(2) no effective decree can be passed in the absence of such party.

The Hon'ble Court further observed that in a suit for specific performance the first test can be formulated is, to determine whether a party is a necessary party there must be a right to the same relief against the party claiming to be a necessary party, relating to the same subject matter involved in the proceedings for specific performance of contract to sell. In a suit for specific performance of the contract, a proper party is a party whose presence is necessary to adjudicate the controversy involved in the suit. The parties claiming an independent title and possession adverse to the title of the vendor and not on the basis of the contract, are not proper parties and if such party is impleaded in the suit, the scope of the suit for specific performance shall be enlarged to a suit for title and possession, which is impermissible. A third party or a stranger cannot be added in a suit for specific performance, merely in order to find out who is in possession of the contracted property or to avoid multiplicity of the suits. It was further held by the Court that a third party or a stranger to a contract cannot be added so as to convert a suit of one character into a suit of different character. The Hon'ble Court, therefore, held that in view of the principle that the plaintiff who has filed a suit for specific performance of the contract to sell is the *dominus litis*, he cannot be forced to add parties against whom, he does not want to fight unless it is a compulsion of the rule of law. The Hon'ble referring to the case of *Kasturi* (supra) held that merely in order to find out who is in possession of the contracted property, a third party or a stranger to the contract cannot be added in a suit for specific performance of the contract to sell because they are not necessary parties as there was no semblance of right to some relief against the party to the contract. It was further observed and held that in a suit for specific performance of the contract to sell the *lis* between the vendor and the persons in whose favour agreement to sell is executed shall only be gone into and it is also not open to the Court to decide whether any other parties have acquired any title and possession of the contracted property. Therefore, the Hon'ble Court held that ***if the plaintiff who has filed a suit for specific performance of***

[5] (2005) 6 SCC 733. *See* also, *Vijay Pratap* v. *Sambhu Saran Sinha* .(1996) 10 SCC 53.

the contract to sell, even after receiving the notice of claim of title and possession by other persons (not parties to the suit and even not parties to the agreement to sell for which a decree for specific performance is sought) does not want to join them in the pending suit, it is always done at the risk of the plaintiff because he cannot be forced to join the third parties as party-defendants in such suit.

4. *Union of India and Another v. Dimple Happy Dhakad, (2019 SCC OnLine SC 875)*

Decided on: - 18.07.2019

Bench :- 1. Hon'ble Ms. Justice R. Banumathi
2. Hon'ble Mr. Justice A.S. Bopanna

Order of detention is clearly a preventive measure and devised to afford protection to the society. When the preventive detention is aimed to protect the safety and security of the nation, balance has to be struck between liberty of an individual and the needs of the society.

Facts

The facts giving rise to these appeals are that pursuant to an investigation by the office of Directorate of Revenue Intelligence in the matter of smuggling of foreign origin gold by a syndicate of persons from UAE to India. On 28.03.2019 search and interception of two vehicles i.e. a Honda Activa Scooter and a Honda City car was held. It was noticed that there were two persons Abdul Ahad Zarodarwala and Shaikh Abdul Ahad, employee of Zarodarwala. Search of the vehicles resulted in recovery of 75 kgs of gold in the form of five circular discs valued at Rs. 24.5 crores. Follow-up searches were conducted in the offices and residential premises of the connected persons resulted in further recovery of 110 kgs of gold and currency amounting to Rs. 1.81 crores. Shoeb Zarodarwala, Abdul Ahad Zarodarwala and Shaikh Abdul Ahad were summoned and their statements were recorded and they are alleged to have made statement regarding receiving of smuggled gold from respondent detenu-Nisar Pallathukadavil Aliyar.

In SLP (Crl.) No. 5408 of 2018, the case of the appellants was that the respondent-detenu Nisar Pallathukadavil Aliyar is a full-time organised smuggler of large quantities of gold and is the mastermind of the smuggling syndicate and has been smuggling gold into India since 2016. Two companies, viz. M/s. Al Ramz Metal Scrap Trading and M/s. Blue Sea Metal FZE were floated and registered by the appellant in the name of one Kalpesh Nanda for exporting metal scrap to India which is alleged to cover cargo to smuggle gold. It was alleged that detenue Nisar Aliyar ensured that the sale proceeds of the smuggled gold were siphoned off to Dubai through hawala. It was alleged that Nisar Aliyar created a wide network of people to look after the operations at every stage and was smuggling gold into India since 2016 and is alleged to have smuggled more than 3300 kgs of gold having approximate value of Rs. 1000 crores and is alleged to be a mastermind of the smuggling syndicate. Detenu Nisar Aliyar was arrested on 31.03.2019 for commission of offences punishable under Section 135 of the Customs Act, 1962 and his statement was recorded.

The Detaining Authority-Joint Secretary (COFEPOSA), on being satisfied that the detenues have high propensity to indulge in the prejudicial activities, with a view to prevent them from smuggling and concealing smuggled gold in future, passed the orders of detention

dated 17.05.2019 under Section 3 of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (COFEPOSA). The detention orders and the grounds of detention were served on the detenues on 18.05.2019. The copies of the relied upon documents were served on the detenues on 21.05.2019 and 22.05.2019.

The detention orders dated 17.05.2019 was assailed by the detenues by filing writ petitions before the High Court. The High Court vide interim order dated 04.06.2019 directed the appellant to consider the writ petitions as a representation of the detenues. Accordingly, the representation was considered and the same was rejected by the Joint Secretary (COFEPOSA) who did not find any justification in modification of the detention orders.

By the impugned order dated 25.06.2019, the High Court quashed the detention orders by holding that there was no application of mind by the Detaining Authority in passing the detention orders. The High Court held that as per the principles laid down in ***Kamarunnisa v. Union of India (1991) 1 SCC 128***, there was no application of mind indicating the satisfaction of the detaining authority that there was imminent possibility of detenues being released on bail. The High Court also held that though the detention orders and grounds of detention were served on the detenues on 18.05.2019, the detenues were not served with the copies of relied upon documents and material particulars along with the orders of detention and grounds of detention and there was violation of Article 22(5) of the Constitution of India and violation of Guideline No. 21 of "**Hand Book on Compilation of Instructions on COFEPOSA matters**". The High Court did not accept the contention of the Department that the preparation of copies of documents and bulk of records did not enable the respondents to serve the relied upon documents simultaneously with the orders of detention upon the respondents. Holding that the preventive detention was in violation of Articles 21 and 22(5) of the Constitution of India and the Guidelines, the High Court quashed the detention orders dated 17.05.2019.

These appeals arise out of the judgment passed by the High Court of Judicature at Bombay in W.P. (Crl.) Nos. 2843 and 2844 of 2019 in and by which the High Court had quashed the detention orders dated 17.05.2019 passed against the detenues. The appellants-Union of India in appeals arising out of SLP(Crl.) Nos. 5459 and 5460 of 2019 challenged the impugned judgment quashing the detention orders.

Observations and Decision

The Hon'ble Court formulated the following points for consideration in the appeal:-

(i) Whether the orders of detention were vitiated on the ground that relied upon documents were not served along with the orders of detention and grounds of detention? Whether there was sufficient compliance of the provisions of Article 22(5) of the Constitution of India and Section 3(3) of the COFEPOSA Act?

(ii) Whether the High Court was right in quashing the detention orders merely on the ground that the detaining authority has not expressly satisfied itself about the imminent possibility of the detenues being released on bail?

The Hon'ble Court referred to Section 3(3) of COFEPOSA Act which states that "*the detenue should be communicated with the order of detention and the grounds as soon as may be after detaining him but ordinarily not later than five days……*". The Hon'ble Court also referred to the guidelines in the "*Do's and Don'ts in handling COFEPOSA matters*". According to the Hon'ble Court, there is no statutory obligation on the part of the detaining authority to serve the relied upon documents on the very same day of the service of the order of detention. In view of the time stipulated in Section 3(3) of COFEPOSA Act and the language used in Article 22(5) of the Constitution of India "*….earliest opportunity……*", non-serving of copies of documents together with detention order cannot be a ground to quash the detention order. It further held that there is no statutory obligation on the part of the detaining authority to serve the grounds of detention and relied upon documents on the very same day; more so, when there is nothing to show that the detaining authority was guilty of inaction or negligence. The principle laid down by the Supreme Court in ***Mehdi Mohamed Joudi* v. *State of Maharashtra*, (1981) 2 SCC 358** that non-supply of documents and material *pari passu* would vitiate the detention order must be understood in the context of Section 3(3) of the COFEPOSA Act. Serving of detention order, grounds of detention and supply of documents must be contemporaneous as mandated within the time limit of five days stipulated under Section 3(3) of the COFEPOSA Act and Article 22(5) of the Constitution of India. The Hon'ble Court further referred to the case of ***Jasbir Singh* v. *Lt. Governor, Delhi* (1999) 4 SCC 228**, wherein it was held that for computing the period of five days, the date on which the detention order was served has to be excluded. In the case in hand, therefore for computing the period of five days, the date 18.05.2019 has to be excluded. The grounds of detention and the relied upon documents have been served upon the detenues from 20.05.2019 to 22.05.2019 which is well within the statutory period of five days and there is no infraction of sub-section (3) of Section 3 of the COFEPOSA Act. The Hon'ble Court held that the term *pari passu* has to be read with the statutory provision of Section 3(3) of the COFEPOSA Act which would mean that the grounds of detention and relied upon documents are served within five days and for reasons to be recorded within fifteen days with explanation. Only when such rule is vitiated, it can be said that they were not furnished together. Therefore, according to the Hon'ble Court the High Court erred in quashing the detention orders on the ground that the documents and the material were not supplied *pari passu* the detention orders.

According to the Hon'ble Court, it is well settled that the order of detention can be validly passed against a person in custody and for that purpose, it is necessary that the grounds of detention must show that the detaining authority was aware of the fact that the detenu was already in custody. The detaining authority must be further satisfied that the detenu is likely

to be released from custody and the nature of activities of the detenu indicate that if he is released, he is likely to indulge in such prejudicial activities and therefore, it is necessary to detain him in order to prevent him from engaging in such activities. The Hon'ble Court referred to the case of ***Kamarunnisa* v. *Union of India***[6] for the tests laid down therein for the said purpose as follows :-

> *"**13.** From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition, to question it before a higher court. What this Court stated in the case of Ramesh Yadav (1985) 4 SCC 232 was that ordinarily a detention order should not be passed merely to pre-empt or circumvent enlargement on bail in cases which are essentially criminal in nature and can be dealt with under the ordinary law. It seems to us well settled that even in a case where a person is in custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive detention. ....."*

The Hon'ble Court then addressed the issue whether a person in jail can be detained under the detention law. The Hon' ble Court referred to a number of judgments[7] of the Supreme Court on this issue wherein it had been held that if the detaining authority is satisfied that taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities. Regarding the present case, the Hon'ble Court, after applying the principles laid down in the cases referred to, held that it cannot be said that the detaining authority has not applied its mind merely on the ground that in the detention orders, it is not expressly stated as to the "detenue's likelihood of being released on bail" and "if so released, he is likely to indulge in the same prejudicial activities". But the detaining authority has clearly recorded the antecedent of the detenues and its satisfaction that detenues Happy Dhakad and Nisar Aliyar have the high propensity to commit such offences in future. The Hon'ble Court relied on ***Senthamilselvi v. State of T.N.***[8] and held that the satisfaction of the authority coming to the conclusion that there is likelihood of the detenu being released on bail is the "subjective satisfaction" based on the materials and normally the subjective satisfaction is not to be interfered with and, therefore, he satisfaction of the detaining authority that the detenu may be released on bail cannot

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[6] (1991) 1 SCC 128. *See* also, *Union of India* v. *Paul Manickam* (2003) 8 SCC 342; *N. Meera Rani* v. *Govt. of T.N.* (1989) 4 SCC 418; *Dharmendra Suganchand Chelawat* v. *Union of India* (1990) 1 SCC 746

[7] *Huidrom Konungjao Singh* v. *State of Manipur* (2012) 7 SCC 181; *Dharmendra Suganchand Chelawat* v. *Union of India* (1990) 1 SCC 746; *Veeramani* v. *State of T.N.* (1994) 2 SCC 337

[8] (2006) 5 SCC 676.

be *ipse dixit* of the detaining authority. On the facts and circumstances of the present case, the subjective satisfaction of the detaining authority that the detenu is likely to be released on bail is based on the materials. The Hon'ble Court held that the High Court, in our view, erred in quashing the detention orders merely on the ground that the detaining authority has not expressly recorded the finding that there was real possibility of the detenues being released on bail which is in violation of the principles laid down in *Kamarunnisa* and other judgments and Guidelines No. 24.

Regarding personal liberty and compliance of procedural safeguards, the Hon'ble Court, after referring to the case of ***Naresh Kumar Goyal* v. *Union of India* (2005) 8 SCC 276** and ***State of Maharashtra* v. *Bhaurao Punjabrao Gawande* (2008) 3 SCC 613**[9], held as follows :-

> *"**42.** The learned senior counsel for detenues submitted that personal liberty and compliance of procedural safeguards are the prime consideration and since the procedural requirements are not complied with violating the personal liberty of the detenues, the High Court rightly quashed the detention orders and the same cannot be interfered with. As discussed earlier, in the case in hand, the procedural safeguards are complied with. Insofar as the contention that the courts should lean in favour of upholding the personal liberty, we are conscious that the Constitution and the Supreme Court are very zealous of upholding the personal liberty of an individual. But the liberty of an individual has to be subordinated within reasonable bounds to the good of the people. Order of detention is clearly a preventive measure and devised to afford protection to the society. When the preventive detention is aimed to protect the safety and security of the nation, balance has to be struck between liberty of an individual and the needs of the society.*
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> ***45.** The court must be conscious that the satisfaction of the detaining authority is "subjective" in nature and the court cannot substitute its opinion for the subjective satisfaction of the detaining authority and interfere with the order of detention. It does not mean that the subjective satisfaction of the detaining authority is immune from judicial reviewability. By various decisions, the Supreme Court has carved out areas within which the validity of subjective satisfaction can be tested. In the present case, huge volume of gold had been smuggled into the country unabatedly for the last three years and about 3396 kgs of the gold has been brought into India during the period from July 2018 to March, 2019 camouflaging it with brass metal scrap. The detaining authority recorded finding that this has serious impact on the economy of the nation. Detaining authority also satisfied that the detenues have propensity to indulge in the same act of smuggling and passed the order of preventive detention, which is a preventive measure. Based on the documents and the materials placed before the detaining authority and considering the individual role of the detenues, the detaining authority satisfied itself as to the detenues' continued propensity and their inclination to indulge in acts of smuggling in a planned manner to the detriment of the economic security of the country that there is a need to prevent the detenues from smuggling goods. The High Court erred in interfering with the satisfaction of the detaining authority and the impugned judgment cannot be sustained and is liable to be set aside."*

[9] *See* also, *A.K. Roy* v. *Union of India* (1982) 1 SCC 271, *Bhut Nath Mete* v. *State of W.B.* (1974) 1 SCC 645, *State of W.B.* v. *Ashok Dey* (1972) 1 SCC 199 and *ADM* v. *Shivakant Shukla* (1976) 2 SCC 521.

5. ***Sir Sobha Singh And Sons Pvt. Ltd. V. Shashi Mohan Kapur(Deceased)Through L.R. (Civil Appeal No.5534 Of 2019)***
Decided on – 15.07.2019

Bench – (1) Hon'ble Mr. Justice Abhay Manohar Sapre
(2) Hon'ble Mr. Justice Dinesh Maheshwari

(The principle underlined in Rule 6A(2) can be made applicable to filing of the execution application under Order 21 Rule 2 of the Code; Order 23 Rule 3 -after the compromise is recorded by the Court, it shall proceed to "pass a decree")

Facts

The appellant is the plaintiff/decree holder and the respondent is the defendant/judgment debtor.The dispute aose out of the execution proceedings emanating from Civil Suit No. 369/2009 (new No. 675/2009) decided on 01.06.2012.The appellant is the landlord of a Flat along with one Servant Quarter situated at Sujan Singh Park, New Delhi (hereinafter referred to as "suit house").The appellant let out the suit house to the father of the original respondent-Late Mr. R.L. Kapur as back as in 1959. The appellant, however, determined the tenancy by serving a quit notice to Mr. R.L. Kapur on 21.12.2004. Mr. R.L. Kapur died on 13.07.2007 leaving behind the respondent as his legal representative.The appellant served another quit notice dated 16.01.2009 to the respondent and called upon him to vacate the suit house. Since the respondent failed to vacate the suit house, the appellant was constrained to file Civil Suit in 2009 (Old No. 369/2009 new number 675/2009) against the respondent in the Court of ADJ for his eviction from the suit house and the mesne profits. The respondent, after entering his appearance in the suit, did not contest it and compromised the matter with the appellant. It was agreed that the respondent (tenant) would hand over the vacant possession of the suit house on or before 31.05.2016 to the appellant; Second, the respondent would pay a sum of Rs. 5,000/- per month towards user charges w.e.f. 01.06.2012 till the date of handing over of the suit house to the appellant; and third, the respondent would not sublet or create any third party rights in the suit house.The Trial Court recorded the statement of the parties and accordingly disposed of the civil suit in terms of the aforementioned compromise by its judgment dated 01.06.2012 On 27.05.2016, the respondent filed an application under Section 148 read with Section 151 of the Code of Civil Procedure, 1908 and prayed therein for extension of time to vacate the suit house. The extension to vacate the suit house was sought on medical grounds. By order dated 09.06.2016, the Trial Court allowed the said application and granted time to the respondent till 15.07.2016 to vacate the suit house. The respondent was also directed to clear the arrears of rent.

Instead of vacating the suit house on 15.07.2016, the respondent filed another application on 18.07.2016 and further sought time to vacate the suit house. The Trial Court, by order dated 08.08.2016, dismissed this application and declined to extend the time to vacate the suit

house. As a result of the dismissal of this application, the respondent was under a legal obligation to vacate the suit house immediately.Since the respondent failed to vacate the suit house, the appellant was constrained to file Execution Petition (5655/2016) in the Executing Court for execution of the consent decree dated 01.06.2012 against the respondent for obtaining vacant possession of the suit house. The Executing Court, by order dated 30.09.2016, issued a warrant of possession against the respondent/Judgment debtor in respect of suit house. Since the respondent obstructed the execution of decree, the appellant applied to the Executing Court for providing him the police assistance for obtaining possession of the suit house from the respondent. In the meantime, the Judgment debtor died leaving behind the present respondent as legal representative of the original tenant. On 18.10.2016 and 23.07.2018, the respondent herein filed four applications. One was under Order 47 read with Sections 114 and 151 of the Code for review of the order; Second was under Sections 47 & 151 read with Order 21 Rules 11(2) and 26 of the Code; Third was under Order 47 read with Sections 114 and 151 of the Code; and Fourth was under Section 151 of the Code. One application was filed by one Mr. Manmohan Kapur under Order 1 Rule 10 of the Code.

These applications were filed to challenge the executability of the consent order dated 01.06.2012 itself as being null and void. By order dated 22.10.2018, the Executing Court dismissed the applications filed by the respondent (Judgment debtor). The Executing Court held that the respondent was indulging in delaying tactics only to avoid the execution of the consent order dated 01.06.2012. The Executing Court dealt with each objection raised by the respondent and found no merit in any of them. The Executing Court held that the respondent having taken time twice to vacate the suit house did not honor the orders of the Court and, therefore, while dismissing his applications and the application of one Mr. Manomohan Kapur imposed a cost of Rs. 5 lakhs upon each of them with a direction to pay 50% to the appellant and remaining 50% to the Delhi Legal Services Authority.The respondent felt aggrieved and filed first appeal before the Delhi High Court. By impugned order, the High Court allowed the appeal and set aside the order dated 22.10.2018 passed by the Executing Court. The High Court held that since the Trial Court did not draw up the formal decree after passing the consent order on 01.06.2012, the Execution Petition filed by the appellant (decree holder) is not maintainable. The High Court, however, granted liberty to the appellant (decree holder) to apply to the Trial Court under Section 152 of the Code for drawing up a decree in terms of the consent order dated 01.06.2012. The appellant (decree holder) felt aggrieved by this order of the High Court and filed the appeal by way of special leave in the Apex court.

Decision and Observations

The issue that arose for consideration was whether the High Court was justified in allowing the respondent's (Judgment Debtor's) appeal and thereby was justified in holding that the Execution Petition filed by the appellant (5655/2016) was not maintainable for want of formal decree not being drawn up by the Court after passing of the order dated 01.06.2012.

The Apex Court found that the High Court was not right in holding that in the absence of a formal decree not being drawn or/and filed, the appellant (decree holder) had no right to file the Execution petition on the strength of the consent order dated 01.06.2012. The reason for the same is as herein below.

The Apex Court opined that though Rule 6A (2) of Order 20 of the Code deals with the filing of the appeal without enclosing the copy of the decree along with the judgment and further provides the consequence of not drawing up the decree yet, ***the principle underlined in Rule 6A(2) can be made applicable also to filing of the execution application under Order 21 Rule 2 of the Code.***

The Apex Court mentioned Order 20 Rule 7 which deals with the date of decree, Order 21 Rule 11(2) of the Code, which deals with the execution of the decree and provides that the decree holder is only required to give details of the judgment and the decree in the execution application along with other details, Order 21 Rule 11(3) of the Code makes it clear that the Court "may" require the decree holder to produce a certified copy of the decree. Therefore, the Apex Court noted that this clearly indicates that it is not necessary to file a copy of the decree along with execution application unless the Court directs the decree holder to file a certified copy of the decree.

So, the Apex Court held that when the decree holder files an application for execution of any decree, he is required to ensure compliance of three things. First, the written application filed under Order 21 Rules 10 and 11 (2) of the Code must be duly signed and verified by the applicant or any person, who is acquainted with the facts of the case, to the satisfaction of the Court; Second, the application must contain the details, which are specified in clauses (a) to (j) of Rule 11(2) of the Code, which include mentioning of the date of the judgment and the decree; and Third, filing of the certified copy of the decree, if the Court requires the decree holder to file it under Order 21 Rule 11(3) of the Code.

The Apex Court then dealt with the next point that the order dated 01.06.2012 itself is capable of being executable by virtue of Section 36 of the Code and, therefore, the High Court was not right in holding that the decree was required to be drawn. Although the Apex Court accepted that there are some orders, which are in the nature of decree and thus capable of being executed as such but the question, which arises for consideration in this case, is whether the order passed under Order 23 Rule 3 of the Code is such an order and held that it was not so because of the reason mentioned below.

First, the language of Order 23 Rule 3 of the Code does not admit passing of an order of the nature urged by the counsel for appellant;

Second, the expression "the court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith" occurring in Order 23 Rule 3 of the Code, in clear terms, suggests that it is necessary after recording the compromise in the order to further pass a decree in accordance therewith.

In other words, ***after the compromise is recorded by the Court, it shall proceed to "pass a decree". So, the rule contemplates, first an order recording of the compromise and then simultaneously passing a decree in accordance with the order.***

The Apex Court then deliberated on the effect of not filing the copy of the decree along with the execution application filed by the appellant. Even though the appellant did not file the certified copy of the decree along with the execution application for the reason that the same was not passed by the Court, yet the execution application filed by the appellant was maintainable. Indeed, so long as the formal decree was not passed, the order dated 01.06.2012 was to be treated as a decree during the interregnum period by virtue of Order 20 Rule 6A (2) of the Code. In other words, notwithstanding the fact that the decree had not been passed, yet by virtue of principle underlined in Order 20 Rule 6A(2) of the Code, the order dated 01.06.2012 had the effect of a decree till the date of actual passing of the decree by the Court for the purposes of execution or for any other purpose. This empowered the Executing Court to entertain the execution application and decide the objections raised by the respondent on merits.

Then the Apex Court dealt with the issue whether the High Court was justified in directing the appellant to apply under Section 152 of the Code for drawing a decree. The Apex Court noted that the High Court was not right in doing so.

Section 152 of the Code deals with the amendment of judgments, decrees or orders. It provides that any clerical or arithmetical mistakes in the judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties. Order 20 Rule 3 also provides that judgment can be altered or added either under Section 152 or in review.

The Apex Court held that in order to invoke the powers under Section 152 of the Code, two conditions must be present.

First, there has to be a judgment or decree or an order, as the case may be, and

Second, the judgment or decree or order, as the case may be, must contain any clerical or arithmetical error for its rectification. In other words, Section 152 of the Code contemplates that the Court has passed the judgment, decree or the order and the same contains clerical or arithmetical error. Any party to such judgment, decree or order, as the case may be, has a right to apply at any time under Section 152 of the Code to the concerned Court for rectification of any arithmetical or/and clerical error in the judgment, decree or the order, as the case may be.

The Apex Court noted that in the case at hand, ***the Court which disposed of the suit, did not draw the decree but only passed the order. In such a situation, the decree holder was required to file an application under Section 151 read with Order 20 Rule 6A of the Code to the Court for drawing a decree in accordance with the order dated 01.06.2012***. In the concluding para of the order dated 01.06.2018 the Court has already directed to ensure compliance of the

formalities. It would have been, therefore, proper in such circumstances for the Court to simultaneously draw a decree the same day itself or in any event within 15 days as provided in Order 20 Rule 6A. This being a procedural matter, even if it was not done, yet the ***same could be done by the Court at the instance of the appellant (decree holder) applying for drawing up a decree after filing of the execution application.***

Regarding the question as to whether the Executing Court was right in imposing a cost of Rs. 5 lakhs on the respondent for filing applications raising therein frivolous objections to avoid execution of the decree against them, the Apex Court found that though it is a fit case for imposition of cost but imposition of cost of Rs. 5 Lakhs was excessive and imposed a compensatory cost of Rs. 50,000/- on the respondent under Section 35-A of the Code which was to be paid by the respondent to the appellant within one month from the date of this order.

The Apex Court held that the execution petition filed by the appellant is maintainable and was, therefore, rightly allowed by the Executing Court by rejecting the objections raised by the respondent except with two modifications indicated above.

6. ***Badru (since deceased) Through L.R. Hari Ram v. NTPC Limited (Civil Appeal Nos. 5557-5559 of 2019)***

Decided on – 16.07.2019

Bench – (1) Hon'ble Mr. Justice Abhay Manohar Sapre

(2) Hon'ble Ms. Justice Indu Malhotra

(The cross objection had to be disposed of on its merits notwithstanding the dismissal of the appeals as provided by in Order 41 Rule 22(4) of the Code by assigning reasons.)

Facts

The appellants herein are the claimants (landowners) whereas the respondent No. 1 is the NTPC-a Government Company for whom the land in question was acquired for public purpose and respondent Nos. 2 and 3 are the State and the Land Acquisition Collector.The land in question (hereinafter called the "the suit land") belonged to the appellants. The suit land was acquired by the State (respondent No. 3) for the benefit of NTPC (respondent No. 1) for execution of public purpose under the provisions of the Land Acquisition Act, 1894 (hereinafter referred to as "the Act"). This led to initiation of proceedings for determination of compensation payable to the landowners (appellants herein) under Section 11 of the Act by the Land Acquisition Officer (LAO).By award dated 12.07.2006, the LAO offered Rs. 3,87,383/- per bigha to the appellants as compensation for the suit land. The appellants felt aggrieved and sought reference under Section 18 of the Act to the Civil Court for determination of the compensation offered by the LAO.

The Reference Court (Civil Court) by award dated 31.03.2009 partly allowed the reference in favour of the appellants and enhanced the compensation from Rs. 3,87,383/- to Rs. 5,00,000/- per bigha. In other words, the Reference Court, after appreciating the evidence, held that the appellants are entitled to claim compensation at the rate of Rs. 5,00,000/- per bigha. The State and NTPC felt aggrieved by the award of the Reference Court and filed appeals before the High Court of Himachal Pradesh under Section 54 of the Act. The appellants instead of filing regular appeal against the award of reference Court filed cross objection under Order 41 Rule 22 of the Code of Civil Procedure, 1908 in the respondents' appeals and sought enhancement in the compensation awarded by the Reference Court to them.By impugned order, the High Court dismissed the appeals filed by the NTPC/State and, in consequence, also dismissed the cross objection filed by the appellants. The effect of the dismissal of the appeals and cross objection was upholding of the award passed by the Reference Court (Civil Court). The landowners felt aggrieved by the rejection of their cross objection and they have filed the present appeals by way of special leave in this Court.

Decision and Observations

The Apex Court noted that the only question, which arose for consideration is whether the High Court was justified in dismissing the appellants' cross objection. Since the

respondents herein (State and NTPC) did not file any special leave to appeal in this Court against that part of the order of the High Court, which resulted in dismissal of their appeal, it has attained finality qua the respondents.

The Apex Court set aside the impugned order insofar as it related to the dismissal of the cross objection, remanded the case (cross objection) to the High Court for deciding the cross objection on its merits in accordance with law.

The Apex Court noted that two questions fell for consideration before the High Court: first, whether the Reference Court was right in awarding Rs. 5,00,000/- per bigha by way of compensation to the landowners and second, whether any case was made out for enhancement of the amount of compensation than what was awarded to them by the Reference Court by its award dated 31.03.2009.With regard to the first question it was required to be decided by the High Court at the instance of the State/NTPC in their appeals whereas so far as the second question is concerned, it was required to be decided at the instance of the landowners in their cross objection.

The Apex Court stated that the appellants (landowners) had two remedies to question the legality or/and correctness of the award passed by the Reference Court. One remedy was by way of appeal under Section 54 of the Act and the other remedy was to file cross objection under Order 41 Rule 22 of the Code in the appeal filed by the State/NTPC. In this case, the landowners took recourse to second remedy of filing the cross objection under Order 41 Rule 22 of the Code. The High Court having dismissed the appeals filed by the State/NTPC was, therefore, required to examine as to whether any case was made out by the landowners (appellants herein) in their cross objection for enhancement of compensation. The Apex Court noted that the High Court dismissed the cross objection without assigning any reason. Order 41 Rule 22(4) of the Code, provides that where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit. ***Merely because the High Court dismissed the appeals filed by the respondents herein though on merits, yet that by itself would not result in dismissal of the landowners' cross objection also. In our view, the cross objection had to be disposed of on its merits notwithstanding the dismissal of the appeals as provided by in Order 41 Rule 22(4) of the Code by assigning reasons.***

In other words, even though the High Court dismissed the appeals of the State/NTPC on merits yet it was obligatory on the part of the High Court to have independently examined the issues raised by the landowners (respondents in appeal) before the High Court in the cross objection with a view to find out as to whether any case was made out on facts by the landowners for further enhancement in the compensation and, if so, to what extent. The question as to whether any case for enhancement of compensation is made out or not was required to be decided on appreciation of the evidence adduced by the parties on the issue of market value of the acquired land keeping in view the parameters laid down in Section 23 of the Act.

The Apex Court noted that the High Court failed to examine the aforesaid question while dealing with the cross objection of the landowners and wrongly rejected it without assigning any reason. Rejection of cross objection without any discussion and reason cannot be countenanced. It is not, therefore, legally sustainable.The impugned order insofar as it related to dismissal of the appellants' (landowners) cross objection was set aside.The case was remanded to the High Court for deciding the cross objection filed by the appellants (landowners) in accordance with law with a view to find out as to whether any case on evidence is made out by the appellants (landowners) for claiming further enhancement of the amount of compensation determined by the Reference Court and, if so, to what extent and, if not, why.

The Apex Court further directed that the High Court would first verify as to whether the landowners have valued their claim made in the cross objection and, if so, whether they paid ad velorum court fees on the claim. If the landowners neither valued and nor paid the ad velorum court fees on the claim, they should be granted reasonable time to first value their claim and pay ad velorum court fees on such claim. Once the court fees, as required under the Court fees Act, is paid by the landowners, the cross objection is to be decided strictly in accordance with law without disturbing the main order passed in the appeals filed by the State/NTPC which had attained finality.

7. Sopan (Dead) Through His L.R v. Syed Nabi (Civil Appeal No. 3506 of 2010)

Decided on – 16.07.2019

Bench – (1) Hon'ble Ms. Justice R. Banumathi

(2) Hon'ble Mr. Justice A.S. Bopanna,

(Any recital relating to mortgage or the transaction being in the nature of a conditional sale should be an intrinsic part of the very sale deed which will be the subject matter.)

Facts

The brief facts are that the plaintiff and the defendant were known to each other and due to such acquaintance, the plaintiff had taken money from the defendant as and when such financial assistance was required. At a stage when the plaintiff received a sum of Rs. 5,000/-, the same was construed as the consideration for the land owned by the plaintiff and the defendant already being put in possession of the said property, a registered sale deed dated 10th December, 1968 was executed in favour of the defendant. A separate agreement dated 10th December, 1968 was also entered into between the parties whereby the plaintiff had agreed to repay the said amount and secure reconveyance of the property. Another agreement was entered into on 29th August, 1969 between the parties under which the respondent-plaintiff agreed that he has taken Rs. 5,000/- from the appellant-defendant and the possession of the land was given. In addition, respondent-plaintiff has received a sum of Rs. 2,224/- without any interest, in all Rs. 7,224/-. The respondent-plaintiff agreed if the amount is not repaid on "Velamavasya" the deed will be considered as sale deed. It is in that background the plaintiff claiming that he is prepared to repay the amount so as to secure back the property and, in that regard, construing the transaction as a mortgage, got issued a demand notice dated 10th September, 1980 through his Advocate. The defendant replied to the said notice on 23rd September, 1980 and disputed the claim put forth by the plaintiff. The plaintiff, therefore, filed the suit. The defendant entered appearance and filed the written statement disputing the claim. The trial court though had framed several issues, the entire consideration rested on the construction of the sale deed dated 10th December, 1968 and the contemporaneous documents, so as to consider whether the same amounts to a mortgage by conditional sale in the nature of contention put forth, or as to whether it is a sale transaction.

Decision and Observations

The Apex Court referred to the proviso to Section 58(c) which indicates that no transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect the sale. Therefore, the Apex Court noted that ***any recital relating to mortgage or the transaction being in the nature of a conditional sale should be an intrinsic part of the very sale deed which will be the subject matter.***

The Apex Court noted that in that background, a perusal of the document at Exhibit 23, namely, the sale deed dated 10th December, 1968 would make it clear that the document does not disclose that the transaction is one of mortgage or that of a conditional sale. However, the

issue as to whether it should be construed as mortgage has presently arisen since the agreement dated 10th December, 1968 at Exhibit 24 being a contemporaneous document is relied upon by the plaintiff to claim that the same indicates that the transaction is a mortgage and the relationship of debtor and the creditor is established by the said document. In addition, the document which is also to be noticed is at Exhibit 14/1 dated 29th August, 1969. It is no doubt true that in the document at Exhibit 24 it depicts that the sale deed is reconveyable when the plaintiff would repay Rs. 5,000/- to the defendant and the land would be retransferred. It also indicates that the interest of Rs. 720/- is agreed to be paid every year on the day of "Gudi Padwa".

In the instant case, the Apex Court stated that the claim of the plaintiff is based on the reliance placed on a contemporaneous document at Exh.24. Hence, it is evident that the case of the plaintiff cannot overcome the rigour of law to term it as a mortgage by conditional sale. That apart even if the nature of the transaction is taken note of and in that context if the sale dated 10th December, 1968 (Exh.23) is carefully perused, it not only does not indicate any clause to demonstrate it as a mortgage but, on the other hand, refers to the sale consideration, the manner in which it was received and the plaintiff as the vendor by executing the document has assured the defendant that he should enjoy possession of the said land ancestrally which, in other words, is an absolute conveyance***. In that background, even if the agreement dated 10th December, 1968 (Exh.24) is taken note, the same cannot alter recitals in the sale deed to treat the same as a mortgage by conditional sale. At best the said agreement (Exh.24) can only be treated as an agreement whereby the defendant had agreed to reconvey the property subject to the repayment being made as provided thereunder***. It is in that circumstance, the document dated 29th August, 1969 (Exh.14/1) is to be viewed. From a combined reading of Exhibits 24 and 14/1 it would disclose that not only the plaintiff has not repaid the sum of Rs. 5,000/- with interest but had received a further sum of Rs. 2,224/-, thus in all taking the financial assistance treated as sale consideration to Rs. 7,224/-. Hence, if the reconveyance as agreed under Exh.24 was to be effected the said amount was to be repaid on "Velamavasya" failing which the right of reconveyance would be forfeited and the sale deed would become absolute after which even the right of reconveyance will not be available. Admittedly amount of Rs. 2,224/- was not repaid by the plaintiff. In that background, in any event, the document cannot be considered as a mortgage by conditional sale.

In the above background, if the entire transaction is taken note, since the amount was not repaid the defendant had acquired absolute right to the property. Hence, he had also initiated mutation proceedings to secure the revenue entries relating to the land in his favour. Though the plaintiff had opposed the proceedings the very contention urged herein had been taken note therein and the Tehsildar by the order dated 23rd July, 1974 (Exh.21) has ordered the revenue entries to be changed to the name of the defendant. Change of mutation in the name of the defendant is a formidable circumstance to show that the Exh.23 is a sale deed conveying absolute right and title to the defendant.

The plaintiff has relied upon the decision in the case of *Bhimabai Mahadeo Kambekar* v. *Arthur Import and Export Co.*, (2019) 3 SCC 191 to contend that the mutation of land in the revenue records does not create or extinguish the title for such land, nor has it any presumptive value on the title, the said decision would not be of relevance in the present context, the Apex Court ruled, as the mutation proceeding becomes relevant in the instant proceedings though not for the purpose of title. In the present facts, while construing the nature of the transaction and while considering as to whether the plaintiff had a right of redemption as a mortgagor, the fact that the defendant had acted upon the sale deed dated 10th December, 1968 on the same becoming absolute in view of the reconveyance not being affected pursuant to the agreement dated 10th December, 1968 and in that circumstance, the right was exercised to secure the mutation order pertaining to the land is to be treated as a relevant circumstance. Further, though such mutation order was passed on 23rd July, 1974 in a proceeding in the presence of the plaintiff the said order was not assailed before an appropriate forum and it is only in the year 1980 the suit in question came to be filed.

In the above circumstance, the Apex Court held that the suit seeking redemption of mortgage was not sustainable. If at all the agreement of reconveyance (Exh.24) was to be pressed into service, the appropriate course ought to have been for the plaintiff to institute a suit seeking for the relief of specific performance. In such suit the consideration would be on the touchstone of the principles required to be satisfied as governed under the provisions of the Specific Relief Act. To that effect there should be appropriate pleading and evidence in support of the contentions which is not presently satisfied as the suit is instituted on a misconception.

The Apex Court set aside the judgment dated 26th September, 2007 passed by the High Court.

8. ***State Bank of India v. Mohammad Badruddin (Civil Appeal No. Civil Appeal No. 5604 of 2019)***

Decided on – 16.07.2019

Bench – (1) Hon'ble Mr. Justice L. Nageswara Rao

(2) Hon'ble Mr. Justice Hemant Gupta

(There is no necessity of communicating proposed punishment which was specifically contemplated by clause (2) of Article 311 prior to 42nd Amendment- the requirement of second show cause notice of proposed punishment has been dispensed with. The mandate now is only to apprise the delinquent of the Inquiry Officer's report.)

Facts

The High Court has dealt with two appeals arising out of two separate writ petitions imposing separate punishments. In Civil Appeal arising out of Special Leave Petition (Civil) No. 20770 of 2017 ,the said appeal is directed against an order passed by the High Court in Letters Patent Appeal No. 261 of 2007 wherein the Appellate Authority altered the punishment of compulsory retirement in terms of Rule 49(1) of the State Bank of India (Supervising Staff) Service Rules to one of reversion to the post of Junior Management Grade at the lowest stage vide order dated October 12, 1988. Such order became the subject matter of challenge in C.W.J.C. No. 444 of 1989. The writ petition was dismissed but the letters patent appeal was allowed. The Division Bench set aside the order of punishment on the ground that copy of the Inquiry Report was not supplied to the delinquent before the Disciplinary Authority passed an order of punishment, but was supplied along with the order of punishment. The Civil Appeal arising out of Special Leave Petition (Civil) No. 20488 of 2017, is directed against an order passed by the High Court in Letters Patent Appeal No. 258 of 2007 arising out of C.W.J.C. No. 2310 of 1995 filed by the respondent Mohammad Badruddin. The challenge in the writ petition is to an order dated November 4, 1993 by which the respondent was inflicted penalty of removal from service. The Division Bench set aside the order of removal on the ground of violation of principle of natural justice as the reasons of disagreement in respect of charge Nos. 1 and 5 were not communicated to the delinquent.

Decision and Observations

The Apex Court noted that in Civil Appeal arising out of Special Leave Petition (Civil) No. 20770 of 2017, the Division Bench set aside the order of punishment on the ground that copy of the Inquiry Report was not supplied to the delinquent before the Disciplinary Authority passed an order of punishment, but was supplied along with the order of punishment, therefore, there is complete violation of cardinal principle of natural justice. The Constitution Bench judgment reported in ***Managing Director, ECIL, Hyderabad* v. *B.***

Karunakar[10] though quoted by the High Court, had been applied wrongly. The Disciplinary Authority has passed an order of punishment on August 12, 1988 i.e. before this Court in *Union of India* v. *Mohd. Ramzan Khan*[11] laid down that wherever Inquiry Officer has furnished a report to the Disciplinary Authority at the conclusion of the inquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and will also be entitled to make a representation against it. A non-furnishing of the report would amount to violation of rules of natural justice and make the final order liable to challenge hereafter**.** However, the said judgment itself has given prospective effect i.e. that the inquiries concluded prior to the judgment dated November 20, 1990 will not be affected by the law laid down in the said judgment.

The Apex Court noted that since the order of punishment was passed by the Disciplinary Authority prior to November 20, 1990, therefore, the same could not be set aside only for the reason that the copy of the Inquiry Report was not supplied to the delinquent. Consequently, the order of the High Court in LPA No. 261 of 2007 was set aside and the order of punishment of reversion to the post of Junior Management Grade at the lowest stage, as modified by the Appellate Authority, was ordered to be restored. Civil Appeal arising out of Special Leave Petition (Civil) No. 20770 of 2017 was allowed.

Regarding the Civil Appeal arising out of Special Leave Petition (Civil) No. 20488 of 2017, the Apex Court noted that the Division Bench set aside the order of removal on the ground of violation of principle of natural justice as the reasons of disagreement in respect of charge Nos. 1 and 5 were not communicated to the delinquent. The memo of charge was served upon the respondent (delinquent) on June 13, 1989 in respect of the five charges.[12]

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[10] (1993) 4 SCC 727

[11](1991) 1 SCC 588

[12] "CHARGE-1.

On 15.12.1983, he opened a Savings Bank Account No. 11945 in a fake name viz. Shri Ajit Kumar Agrawal and also verified the forged signature appearing on the relative account opening form. He thus showed gross negligence in opening the said account through which a series of frauds involving Rs. 2,52,000/- were perpetrated, causing the Bank a pecuniary loss of the same amount. The list of fraudulent payment manipulated through the said account is given in Annexure 'A'.

CHARGE-2.

He passed the following payments (a to k) from different Savings Bank Accounts although the relative instruments had not been posted in the concerned accounts:—

Moreover, the balance of account no. 10586 at the time of making payments mentioned against b, c, d, e and f was Rs. 875.44 only. All the aforementioned payments turned out to be fraudulent once. Had he cared to refer to the concerned ledgers before passing the instruments, frauds amounting to Rs. 1,12,000/- could have been averted.

CHARGE-3

He passed the aforementioned payment without satisfying himself that the relative instruments were in order in every particular and thereby violated the instructions contained in para 3(c), Chapter 2 of the Bank's Book of Instructions, Volume-II.

CHARGE-4

The Inquiry Officer in his Report dated February 5, 1992 held that charge Nos. 1, 2, 3 and 5 were not proved against the delinquent though charge No. 4 stood proved. The Disciplinary Authority disagreed with the findings in respect of charge Nos. 1 and 5.

On the basis of the findings recorded and keeping in view punishment of reversion to Junior Manager Grade at the lowest stage earlier, the delinquent was inflicted penalty of removal from service in terms of Rule 67(g) of the Rules. The Division Bench relied upon *Punjab National Bank* **v.** *Kunj Behari Misra*[13] to hold that the order of punishment stands vitiated as the reasons for disagreement with the Inquiry Report have not been supplied to the delinquent.

The Apex Court referred to the 42nd Constitutional Amendment which deleted the following words appearing in clause (2) of Article 311 of the Constitution of India, which reads as under:

> "and where it is proposed, after such inquiry to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry."

The Apex Court noted that a perusal of such omitted provisions would show that an opportunity was required to be given to submit a representation on penalty proposed but such requirement had been omitted by 42nd Constitutional Amendment. This Court in *Mohd. Ramzan case* considered the effect of amendment and held as under:

> "9. Where, however, the Inquiry Officer furnishes a report with or without proposal of punishment the report of the Inquiry Officer does constitute an additional material which would be taken into account by the disciplinary authority in dealing with the matter. In cases where punishment is proposed there is an assessment of the material and a tentative conclusion is reached for consideration of the disciplinary authority and that action is one where the prejudicial material against the delinquent is all the more pronounced.
>
> xxxxxx
>
> 12. We have already noticed the position that the Forty-second Amendment has deleted the second stage of the inquiry which would commence with the service of a notice proposing one of the three punishments mentioned in Article 311(1) and the

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On the following dates (a to g of the charge sheet) while checking the Clean Cash Book, he failed to notice that the figures of Savings Bank Account appearing therein did not tally with those of Savings Bank Summary Day Book. His perfunctory checking of the Clean Cash Book resulted in suppression of frauds amounting to Rs. 70,000/-.

CHARGE-5

He has thus not only failed to discharge his duties with devotion and diligence, much against Rule 32(4) of State Bank of India (Supervising Staff) Service Rules but also caused a heavy pecuniary loss to the Bank."

[13] (1998) 7 SCC 84

delinquent officer would represent against the same and on the basis of such representation and/or oral hearing granted the disciplinary authority decides about the punishment. Deletion of this part from the concept of reasonable opportunity in Article 311(2), in our opinion, does not bring about any material change in regard to requiring the copy of the report to be provided to the delinquent.

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15. Deletion of the second opportunity from the scheme of Article 311(2) of the Constitution has nothing to do with providing of a copy of the report to the delinquent in the matter of making his representation. Even though the second stage of the inquiry in Article 311(2) has been abolished by amendment, the delinquent is still entitled to represent against the conclusion of the Inquiry Officer holding that the charges or some of the charges are established and holding the delinquent guilty of such charges. For doing away with the effect of the enquiry report or to meet the recommendations of the Inquiry Officer in the matter of imposition of punishment, furnishing a copy of the report becomes necessary and to have the proceeding completed by using some material behind the back of the delinquent is a position not countenanced by fair procedure. While by law application of natural justice could be totally ruled out or truncated, nothing has been done here which could be taken as keeping natural justice out of the proceedings and the series of pronouncements of this Court making rules of natural justice applicable to such an inquiry are not affected by the Forty-second Amendment. We, therefore, come to the conclusion that supply of a copy of the inquiry report along with recommendation, if any, in the matter of proposed punishment to be inflicted would be within the rules of natural justice and the delinquent would, therefore, be entitled to the supply of a copy thereof. The Forty-second Amendment has not brought about any change in this position."

Later, the Constitution Bench in *B. Karunakar* affirmed the said judgment to hold that it was no longer necessary to issue a notice to the delinquent employee to show cause against the punishment proposed.

The omission of the words from clause (2) of Article 311 of the Constitution reproduced above completely changes the requirement of serving notice in respect of the proposed punishment. The amended provisions of Article 311 of the Constitution of India have been considered in *Mohd. Ramzan's case* and later in *B. Karunakar's case*.

The Apex Court in ***Punjab National Bank* v. *K.K. Verma***[14] has taken the same view that right to represent against the proposed penalty has been taken away by the 42nd Amendment.

Thus, the requirement of second show cause notice of proposed punishment has been dispensed with. ***The mandate now is only to apprise the delinquent of the Inquiry Officer's***

[14] (2010) 13 SCC 494

report. There is no necessity of communicating proposed punishment which was specifically contemplated by clause (2) of Article 311 prior to 42nd Amendment.

The Apex Court held that the only requirement now is to send a copy of Inquiry Report to the delinquent to meet the principle of natural justice being the adverse material against the delinquent. There is no mandatory requirement of communicating the proposed punishment. Therefore, there cannot be any bar to take into consideration previous punishments in the constitutional scheme as interpreted by this Court. Thus, the non-communication of the previous punishments in the show cause notice will not vitiate the punishment imposed.

In *Kunj Behari Misra*, it is categorically held *that when the Inquiry Report is in favour of the delinquent officer but the Disciplinary Authority proposes to differ with such conclusions then that Authority must give the delinquent an opportunity of being heard, for otherwise he would be condemned unheard.*

In the present case, the High Court has set aside the order of punishment on the ground that it violates the principle of natural justice. This Court has not found reasons to set aside the order of punishment whereas in a case where order of punishment has been set aside, the principles of natural justice would warrant that the matter be remitted back to the Disciplinary Authority to consider whether the removal of the delinquent on the basis of charge No. 4 alone can be sustained or not.

In *B. Karunakar case*, the Constitution Bench examined the question as to what should be the order if the principle of natural justice has not been applied with and the order of punishment stands vitiated on that account. The Court held that if the order of punishment stands vitiated, the proper relief is to direct reinstatement with liberty to the management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question of back wages and other benefits should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending upon the final outcome.

Since the delinquent has attained the age of superannuation, there could not be any order of reinstatement or of suspension. In view thereof, the order of punishment dated November 4, 1993 as also the order of the Appellate Authority were set aside and the matter was remanded back to the Disciplinary Authority to consider as to whether it would like to record reasons of disagreement on charge Nos. 1 and 5 and/or impose punishment on the basis of charge No. 4 with which there is no disagreement, as it may consider appropriate.

Since, the delinquent had attained the age of superannuation, the Disciplinary Authority was directed by the Apex court to pass an appropriate order within three months of the receipt of copy of the judgment in respect of payment of back wages as well as terminal benefits, if any, payable to the delinquent.

9. *Wasim v. State NCT of Delhi (Criminal Appeal No. 1061 of 2019)*

Decided on – 18.07.2019

Bench – (1) Hon'ble Mr. Justice L. Nageswara Rao

(2) Hon'ble Mr. Justice Hemant Gupta

(Conviction for an offence under Section 498A IPC can be for wilful conduct which is likely to drive a woman to commit suicide OR for dowry demand.)

Facts

FIR was registered on the statement of Sunita (PW-11), the mother of the deceased on 04.11.2015. A charge sheet was filed on 05.02.2016. Charges were framed against the Appellant under Section 498A/304B of the Indian Penal Code, 1860. The Trial Court convicted the Appellant under Section 498A and 306 IPC. Sentence of three years' simple imprisonment for the offence under Section 498A IPC and four years simple imprisonment for the offence under Section 306 IPC was imposed on the Appellant. After examining the evidence on record, the Trial Court held that the demand of dowry was not proved. However, the Trial Court was convinced that the prosecution proved the extra marital relationship of the Appellant with Poonam. The oral evidence relating to the Appellant informing the deceased about such extra marital relations to the deceased was accepted by the Trial Court. Having found that the Appellant was guilty of mental cruelty, the Trial Court convicted the Appellant under Section 498A, IPC.

Though, there was no charge under Section 306 IPC, the Trial Court was of the opinion that the conviction under Section 306 IPC was permissible. The Trial Court found that the offence under Section 306 IPC was made out against the Appellant and convicted him. The appeal filed by the Appellant was partly allowed by the High Court. The Appellant was acquitted for the offence under Section 306 IPC. The main issue that was considered by the High Court in the appeal against the judgment of the Trial Court was the correctness of the conviction under Section 306 IPC without a charge being framed. The Appellant contended before the High Court that the charge that was framed against him was under Section 304B, IPC and that he could not have been convicted under Section 306 IPC. Placing reliance on the judgments of the Apex Court, it was held that a conviction under Section 306 IPC is permissible even without a charge being framed in a case where the accused is charged under Section 304 B IPC. The High Court held that such conviction would not amount to failure of justice. However, the High Court found no convincing evidence to hold that the Appellant abetted the commission of suicide by the deceased. The Appellant was acquitted for the offence under Section 306 IPC on the basis that there was no evidence to show that the deceased was subjected to mental or physical cruelty before her death. The High Court affirmed the conviction of the Appellant under Section 498A IPC by holding that there was sufficient evidence on record regarding the demand of dowry. The conviction and sentence under Section 498A IPC was upheld by the High Court. Hence, the appeal.

Decision and Observations

The Apex Court noted that the conviction of the Appellant by the Trial Court under Section 498A was not for demand of dowry. The conviction under Section 498A was on account of mental cruelty by the Appellant in having an extra marital relation and the threats held out by him to the deceased that he would leave her and marry one Poonam.

The Apex Court stated that the Conviction under Section 498A IPC is for subjecting a woman to cruelty. Cruelty is explained as any wilful conduct which is likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health. Harassment of a woman by unlawful demand of dowry also partakes the character of 'Cruelty'. ***It is clear from a plain reading of Section 498A that conviction for an offence under Section 498A IPC can be for wilful conduct which is likely to drive a woman to commit suicide OR for dowry demand.*** Having held that there is no evidence of dowry demand, the Trial Court convicted the Appellant under Section 498A IPC for his wilful conduct which drove the deceased to commit suicide. The Appellant was also convicted under Section 306 IPC as the Trial Court found him to have abetted the suicide by the deceased.

Further, Section 306 IPC provides for punishment with imprisonment that may extend to ten years. ***There should be clear mens rea to commit the offence for conviction under Section 306 IPC. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide*** - See ***M. Mohan* v. *State***[15]. To attract the ingredients of abetment, the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary - See ***Pallem Deniel Victoralions Victor Manter* v. *State of Andhra Pradesh***[16] Whereas, any wilful conduct which is likely to drive the woman to commit suicide is sufficient for conviction under Section 498A IPC. In this case, the High Court recorded a categorical finding that neither mental nor physical cruelty on the part of the Appellant was proved. Therefore, the conviction under Section 498A IPC is not for wilful conduct that drove the deceased to commit suicide. The High Court held that though there was no demand of dowry soon before the death, the prosecution proved dowry demand by the Appellant immediately after the marriage.

The Apex Court noted that the High Court ought not to have convicted the Appellant under Section 498A for demand of dowry without a detailed discussion of the evidence on record, especially when the Trial Court found that there is no material on record to show that there was any demand of dowry. The High Court did not refer to such findings of the Trial Court and record reasons for its disapproval. The judgment of the High Court was set aside.

[15] (2011) 3 SCC 626
[16] (1997) 1 Crimes 499 (AP)

10. Dr. S. Kumar v. S. Ramalingam (Civil Appeal Nos. 8628-8629 of 2009)

Decided on:- 16.07.2019

Bench :- 1. Hon'ble Mr. Justice L. Nageswara Rao
2. Hon'ble Mr. Justice Hemant Gupta

(The right granted to use passage in the sale deed is not easement of necessity being claimed by the appellants and such right will not be extinguished in terms of Section 41 of the Indian Easements Act, 1882.)

Facts

The facts leading to the present appeal are that one C.L. Rajasekaran was the owner of big chunk of land on Mowbrays Road in the city of Chennai. He executed three separate sale deeds on different dates. The first sale deed was executed in favour of defendant No. 1 -B. Shivaraman on December 5, 1973 in respect of property measuring 3483.66 sq. feet. Another adjoining land was purchased by Lakshmi Shivaraman, wife of defendant No. 1, vide separate sale deed dated April 1, 1976, in respect of land measuring 1062 sq. feet. The plaintiff entered into an agreement for purchase of land measuring 3525 sq. feet with C.L. Rajasekaran on May 13, 1978 but the sale deed was executed on May 31, 1988 after a decree in a suit for specific performance was granted. The sale of land to defendant No. 1 is abutting Mowbrays Road whereas the land purchased by defendant No. 2 is touching back of land purchased by defendant No. 1. The dispute is in respect of the passage over which plaintiff claims an exclusive right of use in terms of the sale deed dated May 31, 1988 whereas defendant No. 2 claims access to land purchased by her on the strength of recitals in the sale deed in her favour and also the fact that she has been using such passage from the day of purchase.

The plaintiff - respondent filed two suits, firstly, OS No. 2251 of 1985 claiming an injunction against the defendants from using a pathway shown as A B C D in the plaint and claiming exclusive right to use the said path. Another suit OS No. 9158 of 1986 was filed restraining the defendants from preventing the plaintiff from using the pathway to reach their land E F G H. The learned trial court dismissed the suits on April 22, 1991 holding the defendants have right of necessity of access to their property over the pathway A B C D in the first suit. However, the First Appellate Court allowed the appeal on September 16, 1993 and granted injunction as prayed holding that there is no necessity of easement as the said defendant has access from the property of her husband which is on Mowbrays Road. The High Court has maintained the judgment and decree of the First Appellate Court vide judgment dated March 6, 2007. The defendants came in appeal aggrieved against the judgment and decree passed by the High Court of Judicature at Madras on March 6, 2007, whereby judgment and decree passed by the First Appellate Court was not interfered with in the second appeal.

Observations and Decision

The Apex Court noted that there are three separate lay out plans on record. First, when the land was sold to defendant No. 1 - B. Shivaraman on December 5, 1973. In the said lay out plan, the adjacent land to the land sold is 12 feet wide strip throughout the length of the land. Second lay out plan is of the land sold to defendant No. 2. It showed that same 12 feet wide strip abutting the land was conveyed to defendant No. 2 on April 1, 1976. Third lay out plan is attached to the land sold to the plaintiff vide agreement dated May 13, 1978 in respect of an area which is adjacent to the land sold to defendant No. 2. However, schedule shows 16 feet wide strip 103 feet long which ends with the outer boundary of the plot sold to defendant No. 2.

The Apex Court stated that the relationship of defendant Nos. 1 and 2 will not negate the grant of easement right of passage granted to her in the sale deed only because the recital is generic in nature and usually put by the deed writers. Since there is specific mention of easement rights reserved for defendant No. 2 which recital is supported by a strip of land 16 feet wide which provides access to the plot of land purchased by defendants and also to the plaintiff. ***Once the land has been sold with the right of access through the land adjoining the property sold, such right could not be exclusively conferred to the plaintiff in the sale deed dated May 31, 1988.***

The Apex Court mentioned Section 48 of the Transfer of Property Act, 1882 which contemplates that where a person i.e. Rajasekaran has created different rights in or over the same property i.e. 16 feet wide strip of land and such rights cannot be exercised to their full extent together, then each later created right shall be subject to the rights previously created. The exception is if special contract or reservation binding the earlier transferee is executed. It will mean that the exclusive right conferred on the plaintiff in the sale deed dated May 31, 1988 will not be legal till such time the earlier transferee i.e. defendant No. 2 has a special contract or reservation which binds her. Since the right of access to defendant No. 2 was reserved in the sale deed dated April 1, 1976, therefore, the vendor could not confer exclusive right to the plaintiff vide sale deed dated May 31, 1988.

The Apex Court held that the plaintiff has to maintain the 16 feet wide passage in any case in terms of the recital in his sale deed dated May 31, 1988. Therefore, if the defendant No. 2 or her transferees use the passage, then such use of passage by defendant No. 2 or her transferees cannot be said to be causing any prejudice to the plaintiff.

The rights of the parties have to be adjudicated upon as they exist on the date of filing of the suit. The subsequent events of inheritance vesting the property in the same person will not take away the right of the defendants to use the passage adjacent to their land only because the defendant No. 2 has gifted part of land to defendant No. 1 or that after the death of both the defendants, the common legal proceedings inherited the property.

The Apex Court held ***that the appellants have been granted right to use passage in the sale deed. Thus, it is not easement of necessity being claimed by the appellants. It is right granted to defendant No. 2 in the sale deed therefore, such right will not extinguish in terms of Section 41 of the Indian Easements Act, 1882.***

Therefore, setting aside the judgment of the High Court, the 16 feet × 103 feet passage adjoining the property of the defendants leading to the property of the plaintiff was reserved for the common use of defendant No. 2 and of the plaintiff.

11. Sudin Dilip Talaulikar v. Polycap Wires Pvt. Ltd. (Civil Appeal No(s). 5528 of 2019)

Decided on: 15.07.2019

Bench:- 1. Hon'ble Mr. Justice Ashok Bhushan
2. Hon'ble Mr. Justice Navin Sinha

(Commercial relations between the parties could not per se be the justification for grant of conditional leave sans proper consideration of the defence from the materials on record.)

Facts

The respondent supplied electrical cables and wires to the appellant between 09.05.2010 to 03.06.2011. Acknowledging some payments they claimed outstanding dues of Rs. 34,24,633/-. Likewise, for supplies between 01.04.2010 to 10.03.2011 they claimed dues of Rs. 1,88,377/-. A notice was given to the appellant under Section 138(b) of the Negotiable Instruments Act after the cheques dated 01.03.2014 and 01.03.2014 were dishonored, as the account was blocked. The respondent then instituted a prosecution under Section 138 read with Section 142 of the Act lodged for Rs. 34,24,633/- on 30.04.2014 with regard to the former instrument and on 01.08.2014 with regard to the latter instrument. While the prosecution under the Act was pending, the respondent instituted the present summary suit on 24.11.2015 for a cumulative sum of Rs. 36,13,410/-, being the total amount of two dishonored instruments, with an additional claim for Rs. 28,05,199/- as interest at the rate of 18% per annum amounting to a total of Rs. 64,18,609/-. The Suit expressly referred to the pendency of the prosecution under the Act. In Summons for Judgment No. 105 of 2016 dated 16.03.2016, in the summary suit the respondent relied upon the extracts of accounts of the appellant to support its claim for unpaid dues. The prosecutions under the Act were withdrawn on 14.12.2015. The order withdrawing the prosecution under the Act is unconditional in nature and is a suo-moto action.

The appellant in its defence to the summons for judgment relied upon the institution of the prosecution under the Act prior to the suit and its unconditional withdrawal to contend that there were in fact no dues payable. The appellant further relied upon an order dated 29.10.2015 passed in the prosecution under the Act requiring the respondent to produce certain original documents materials to the complaint and only subsequent to which, without producing the said documents the prosecution under the Act was unconditionally withdrawn. Denying any dealings with the respondents after 2011, the appellant questioned that there was no occasion for it to issue a cheque in the year 2014 for any alleged dues of the year 2011. It was further contended that different inks had been used in the instruments for the signatures and its contents. Defective goods on the consignment had been returned and the balance of Rs. 5,00,000/- paid, facts which were not disputed by the respondent.

The Civil Judge by order dated 20.07.2017 recorded the satisfaction of a triable defence but granted conditional leave to defend with an unreasoned finding based on the existence of a commercial relationship between the parties. The High Court acknowledged that there was no admission by appellant about its liability to repay any amount, but because the appellant had not disputed a commercial relationship and purchase of goods from the respondent, and

in absence of any material to show sufficient payment, the order for conditional leave to defend required no interference.

Observations and Decision

Order XXXVII, Rule 3 of the Code dealing with the procedure for summary suit, in the relevant extract provides as follows:

"3. Procedure for the appearance of defendant

(4) if the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgement in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgement, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

The Apex Court noted that in a summary suit, if the defendant discloses such facts of a *prima facie* fair and reasonable defence, the court may grant unconditional leave to defend. This naturally concerns the subjective satisfaction of the court on basis of the materials that may be placed before it. However, in an appropriate case, if the court is satisfied of a plausible or probable defence and which defence is not considered a sham or moonshine, but yet leaving certain doubts in the mind of the court, it may grant conditional leave to defend. In contradistinction to the earlier subjective satisfaction of the court, in the latter case there is an element of discretion vested in the court. Such discretion is not absolute but has to be judiciously exercised tempered with what is just and proper in the facts of a particular case. ***The ultimate object of a summary suit is expeditious disposal of a commercial dispute. The discretion vested in the court therefore requires it to maintain the delicate balance between the respective rights and contentions by not passing an order which may ultimately end up impeding the speedy resolution of the dispute.***

The controversy in the facts of the present case was therefore not with regard to any dues admitted by the appellant or not, and the requirement to deposit the same. The issue for adjudication was whether on basis of the materials on record, whether there has been just

and proper exercise of the discretion to grant conditional leave to defend by deposit of Rs. 30,00,000/- after consideration of all material and relevant factors.

In ***IDBI Trusteeship Services Limited* v. *Hubtown Limited*** the Apex court has laid down the principles which should guide exercise of such discretion as follows :

> *"17.1. If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.*
>
> *17.2. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.*
>
> *17.3. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.*
>
> *17.4. If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.*
>
> *17.5. If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.*
>
> *17.6. If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."*

The Apex Court was of the opinion that both the Civil Judge and the High Court had posed unto themselves the wrong question and had therefore misdirected themselves in application of the above principles by granting conditional leave to defend without properly adverting and referring to the facts of the case and the materials on record. The fact that there was commercial dealing between the parties was not in issue at all. According to the plaint of the respondent, commercial dealings between the parties ended on 03.06.2011. It stands to reason why outstanding payment in respect of the same came to be made by cheque as late as 01.03.2014. It does not appeal to logic or reason much less to the usual practice in commercial dealings. In any event the respondent has not furnished any explanation with regard to the same. At this stage it becomes necessary to notice the contention of the appellant that the signatures and the contents of the cheques are in different writings. The respondent had the option to institute a summary suit at the very inception of the dispute.

But it consciously opted for a prosecution under the Act which undoubtedly was a more efficacious remedy for recovery of any specified amount of a dishonoured instrument raising a presumption against the drawer, as in a summary suit the possibility of leave to defend could not be completely ruled out, in which case the recovery gets delayed and protracted.

Significantly on 29.10.2015, in the prosecution instituted by the respondent under the Act, the court required the respondent to file certain additional documents because the appellant denied the existence of any legal liability for any sum due. It is only thereafter that the Summary Suit was instituted on 24.11.2015. The prosecution under the Act was subsequently unconditionally withdrawn on 14.12.2015. These facts are not in dispute and are clearly discernible from the records. This coupled with the specific contention of the appellant, not denied by the respondent, that it had returned defective goods and paid the balance dues of Rs. 5,00,000/-, we find the conclusion to grant leave to defend as perfectly justified.

But the defence raised by the appellant in the aforesaid background was certainly not a sham or a moonshine much less frivolous or vexatious and neither can it be called improbable. The appellant had raised a substantial defence and genuine triable issues. The fact that there may have been ***commercial relations between the parties was the ground for the institution of the summary suit but could not per se be the justification for grant of conditional leave sans proper consideration of the defence from the materials on record.***

The Apex Court set aside the impugned orders granting conditional leave to defend . The appellant was granted unconditional leave to defend.