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22nd October, 2019

BURDEN OF PROOF AND THE APPLICABILITY OF PRINCIPLE OF PRESUMPTION ON DEFENDANT

I. BURDEN OF PROOF

1. Rangammal Vs. Kuppuswami & Anr., (2011) 12 SCC 220, Relevant Para 21

"Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party."

A Copy of the judgment attached hereto at **page no. 3 to 17.**

2. Commissioner of Income Tax Vs. Surendra Singh Pahwa & Ors., AIR 1995 All 259, Relevant Paras 3, 5, 6

"Mere fact that the defendant absented himself on the date of hearing and the suit proceeded ex parte, did not by itself entitle the plaintiff to get a decree in his favour. The court was under an obligation to apply its mind to whatever ex parte evidence or affidavit filed under Order 19 of the Code is on the record of the case, and application of mind must be writ large on the face of record. This is possible only if the court directs itself to whatever material is on record of the case, analyses the same and then comes to any conclusion on the basis of evidentiary value of the ex parte evidence or affidavit brought on record by the plaintiff. It may also be observed that the written statement already filed in this case would not be deemed to have been wiped off the record merely because the defendant did not appear on the date of issues and the suit was ordered to proceed ex parte."

A Copy of the judgment attached hereto at **page no. 18 to 20.**

II. ADVERSE INFERENCE & NO-CROSS EXAMINATION WHEN DEFENDANT PARTICIPATES IN PROCEEDINGS

3. Gulla Kharagjit Carpenter Vs. Narsingh Nandkishore Rawat, AIR 1970 MP 225, Relevant Paras 5, 6, 7 & 8

"When a material fact is within the knowledge of a party and he does not go into the witness box without any plausible reason, an adverse inference must be drawn against him. A presumption must be drawn against a party who having knowledge of the fact in dispute does not go into the witness box particularly when a prima facie case has been made out against him."

A Copy of the judgment attached hereto at **page no. 21 to 22.**

4. Iswar Bhai C. Patel alias Bachu Bhai Patel Vs. Harihar Bahera & Anr., (1999) 3 SCC 457, Relevant Para 29

"..it would be found that in the instant case also the appellant had abstained from the witness box and had not made any statement on oath in support of his pleading set out in the written statement. An adverse inference has, therefore, to be drawn against him."

A Copy of the judgment attached hereto at **page no. 23 to 30.**

5. Gurbakhsh Singh Vs. Gurdial Singh, AIR 1927 PC 230, Relevant Paras 30-32

"Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a manoeuvre under which counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's, own witness. This is thought to be clever, but it is a bad and degrading practice. Lord Atkinson dealt with the subject in Lal Kunwar v. Chiranji Lal 1, calling it "a vicious practice, unworthy of a high-toned or reputable system of advocacy." The present case, however, is a pointed instance of the evils which flow from such a practice."

A Copy of the judgment attached hereto at **page no. 31 to 36.**

6. Saha & Anr. Vs. Tulshi Bala Dassi & Anr., AIR 1958 Cal 713, Relevant Paras 13, 14

"Before leaving this question of fact it is necessary to emphasize the defendant's absence from the witness box and the effect of such absence on the issue of fact."

A Copy of the judgment attached hereto at **page no. 37 to 65.**

7. Vidyadhar Vs. Manikrao & Anr., (1999) 3 SCC 573, , Relevant Para 17

"Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct as has been held…"

A Copy of the judgment attached hereto at **page no. 66 to 87.**

III. ADVERSE INFERENCE & EX-PARTE AGAINST DEFENDANT

8. M/S Hindusthan Pencils Pvt. Ltd. Vs. Anand Kumar Bajaj & Ors., 2014 SCC OnLine 6505, Relevant Para 9

"As observed above, none appeared on behalf of the defendants despite service and they were proceeded ex-parte. Adverse inference is to be drawn against the defendants for not appearing and contesting the claim of the plaintiff."

"As observed above, none appeared on behalf of the defendants despite service and they were proceeded ex-parte. Adverse inference is to be drawn against the defendants for not appearing and contesting the claim of the plaintiff."

A Copy of the judgment attached hereto at **page no. 88 to 92.**

9. Sushma Berlia & Ors. Vs. Kamal Kumar & Ors., Relevant Paras 5, 9

"It appears that subsequently, none appeared on behalf of the defendants on adjourned hearings/dates. By an order dated

20.04.2011, defence of the defendants was struck off...Testimony of PW-1 (Bharat Bhushan) has remained unchallenged and unrebutted. Adverse inference is to be drawn against the defendants for not contesting the suit on adjourned date and remaining exparte. There are no sound reasons to disbelieve the positive uncontroverted testimony of PW-1."

"It appears that subsequently, none appeared on behalf of the defendants on adjourned hearings/dates. By an order dated 20.04.2011, defence of the defendants was struck off...Testimony of PW-1 (Bharat Bhushan) has remained unchallenged and unrebutted. Adverse inference is to be drawn against the defendants for not contesting the suit on adjourned date and remaining exparte. There are no sound reasons to disbelieve the positive uncontroverted testimony of PW-1."

A Copy of the judgment attached hereto at **page no. 93 to 96.**

(2011) 12 Supreme Court Cases 220

(BEFORE J.M. PANCHAL AND GYAN SUDHA MISRA, JJ.)

RANGAMMAL .. Appellant;

Versus

KUPPUSWAMI AND ANOTHER .. Respondents.

Civil Appeal No. 562 of 2003†, decided on May 13, 2011

A. **Family and Personal Laws — Hindu Law — Joint family property — Partition suit — Maintainability — Burden to prove properties that constitute joint family property, held, lies on person seeking partition — Property fraudulently sold to joint family by guardian of a minor — Burden of proving a fact lies on person who asserts that fact — In a suit for partition of joint family property, if a third person's property is included in schedule of partition suit on basis of sale of his property in favour of members of joint family by his guardian during his minority, but after attaining majority and on his being impleaded as defendant by court, he questions validity of the sale and inclusion of the property in the schedule, burden of proof will lie on plaintiff in partition suit to establish that title to suit property belongs to joint family and requires to be partitioned — Until that burden is discharged by plaintiff, the other party (impleaded defendant) cannot be required to prove his case that sale by the alleged guardian was not for legal necessity and sale deed was not genuine but bogus and sham as said defendant does not seek to rely on sham nature of transaction — Property Law — Transfer of property by guardian — Validity — Burden of proof — Evidence Act, 1872 — S. 101 — Transfer of Property Act, 1882, Ss. 7 and 8**

B. **Family and Personal Laws — Hindu Law — Alienation — Legal necessity — Sale of land by de facto guardian on behalf of minor — Validity of — Burden of proof — When a person, after attaining majority, questions sale of his property by his guardian during his minority, burden lies on person who upholds/asserts validity of sale to prove the same, as minor who has turned major does not seek to rely on sham nature of transaction — Guardians and Wards Act, 1890 — Ss. 27 and 37 — Property Law — Transfer of property by guardian — Validity — Transfer of Property Act, 1882, Ss. 7 and 8**

C. **Evidence Act, 1872 — S. 101 — Burden of proof — Genuineness of a document — Burden lies on the party who relies on validity of a document to prove its genuineness — Only then onus will shift on the opposite party to dislodge such proof and establish that the document is sham or bogus — Fraud/ Forgery/Mala Fides — Civil Procedure Code, 1908 — Or. 6 R. 4 — Transfer of Property Act, 1882, Ss. 7 and 8**

† From the Judgment and Order dated 11-7-2002 of the High Court of Judicature of Madras in SA No. 703 of 1992

D. **Evidence Act, 1872 — S. 101 — Burden lies on plaintiff to prove his case on basis of material available — He cannot rely on weakness or absence of defence of defendant to discharge the onus — If plaintiff claims title to property, he must prove his title — Property Law — Ownership and Title — Burden of proof — Specific Relief Act, 1963 — S. 34 — Transfer of Property Act, 1882, Ss. 7 and 8**

E. **Evidence Act, 1872 — S. 101 — Misplacing burden of proof on a particular party and recording findings on that basis by court vitiates its judgment — Practice and Procedure — Burden of proof — Civil Procedure Code, 1908, Or. 20 Rr. 4 & 5 and Or. 41 Rr. 30 & 31**

Held :

Section 101 of the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts the fact. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party. (Para 21)

When a person after attaining majority, questions any sale of his property by his guardian during his minority, the burden lies on the person who upholds/asserts the purchase not only to show that the guardian had the power to sell but further that the whole transaction was bona fide. (Para 23)

Roop Narain Singh v. *Gugadhur Pershad*, (1868) 9 Suth WR 297; *Anna Malay* v. *Na U Ma*, 17 C 990, *approved*

The party who alleged the sale deed to be not genuine, sham or bogus has to prove nothing until the party relying upon the document established its genuineness. (Para 29)

Subhra Mukherjee v. *Bharat Coking Coal Ltd.*, (2000) 3 SCC 312, *relied on*

[**Ed.**: It would still seem that the burden of proof would stand reversed i.e. fall on the person claiming that a transaction was a sham in case it is that person who is the plaintiff in some situation. The ruling in this case would seem to be limited to situations where the plaintiff seeks to rely on a transaction which is alleged by a defendant to be a sham. After all that is exactly the principle that Section 101 of Evidence Act, 1872 enshrines i.e. the burden of proving a fact always lies upon the person who asserts the fact. So it would seem that it is the person who invokes the court's jurisdiction, who must first prove all the facts it asserts to ground the relief it claims.]

In this case when the respondent-plaintiff came up with a case of execution of sale deed on 24-2-1951 for half of the schedule property/disputed property which had fallen into the share of the appellant alleged to have been sold for legal necessity by the appellant's guardian when she was a minor, in view of Section 101 of the Evidence Act burden lay on the plaintiff to prove that the minor appellant's share had been sold by the de facto guardian *K* without permission of the court in order to discharge the burden of debt for legal necessity and for the benefit of the appellant. When Respondent 1-plaintiff failed to discharge this burden, the question of discharge of burden to disprove the sale deed by the appellant-second defendant does not arise at all as per the provisions of the Evidence Act. (Paras 20, 27 and 28)

The plaintiff relying on the sale transaction had to first of all prove its genuineness and only thereafter would the defendant be required to discharge the

burden in order to dislodge such proof and establish that the transaction was sham and fictitious. In this case, it was the plaintiff who relied upon the alleged sale deed dated 24-2-1951 and included the subject-matter of the property which formed part of the sale deed and claimed partition. This sale deed was denied by the appellant-defendant on the ground that it was bogus and a sham transaction which was executed when she was a minor. It was not the appellant-defendant who first of all claimed benefit of the sale deed or asserted its genuineness, hence the burden of challenging the sale deed specifically when she had not even been dispossessed from the disputed share, did not arise at all. It was Respondent 1-plaintiff who should have first of all discharged the burden that the sale deed executed during the minority of the appellant was genuine and was fit to be relied upon. If the courts below including the High Court had felt satisfied on this aspect, only then the burden could be shifted on the appellant-defendant to dislodge the case of the plaintiff that the sale deed was not genuine. But when the plaintiff merely pleaded in the plaint but failed to lead any evidence—much less prove, that the sale deed was genuine and was executed in order to discharge the burden of legal necessity in the interest of minor, then the High Court clearly misdirected itself by recording in the impugned order that it is the appellant-defendant who should have challenged the genuineness of the sale deed after attaining majority within the period of limitation.

(Paras 22, 29 to 32 and 39)

Since the High Court has misplaced the burden of proof, it clearly vitiated its own judgment as also of the courts below. It is well-established dictum of the Evidence Act that misplacing burden of proof would vitiate the judgment. The burden of proof may not be of much consequence after both the parties lay evidence, but while appreciating the question of burden of proof, misplacing of burden of proof on a particular party and recording findings in a particular way definitely vitiates the judgment as it has happened in the instant matter.

(Para 33)

Koppula Koteshwara Rao v. *Koppula Hemantha Rao*, 2002 AIHC 4950 (AP), *approved*

In a suit for partition, it is expected of the plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the joint family which is sought to be partitioned and if someone else's property, meaning thereby disputed property is included in the schedule of the suit for partition, and the same is contested by a third party who is allowed to be impleaded by order of the trial court, obviously it is the plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property belongs to the joint family which should be partitioned excluding someone who claims that some portion of the joint family property did not belong to the plaintiff's joint family in regard to which decree for partition is sought. (Para 45)

The onus is on the plaintiff to positively establish its case on the basis of the material available and it cannot rely on the weakness or absence of defence to discharge the onus. In this case, it was the plaintiff who claimed title to the property which was the subject-matter of the alleged sale deed of 24-2-1951 for which he had sought partition against his brother and, therefore, it was clearly the plaintiff who should have first of all established his case establishing title of the property to the joint family out of which he was claiming his share. When the

plaintiff himself failed to discharge the burden, it was clearly fit to be set aside by the High Court which the High Court as also the courts below have miserably failed to discharge. (Paras 34 to 36 and 44 to 49)

State of J&K v. *Hindustan Forest Co.*, (2006) 12 SCC 198; *Corpn. of City of Bangalore* v. *Zulekha Bi*, (2008) 11 SCC 306, *relied on*

F. **Limitation Act, 1963 — Art. 60 — Bar of three years under — When not applicable — No cause of action arising for minor-turned-major to challenge transaction concerned — Failure to file suit within three years from date of attaining majority by a person questioning sale of her property by alleged de facto guardian during her minority, when cannot bar her from taking plea of sale being sham in a partition suit filed by successors of persons in whose favour sale deed was executed — In a suit for partition of joint family property, a third person having come to know from copy of plaint that property in her possession had also been included in schedule to partition suit on basis of sale deed executed several years ago during her minority by alleged de facto guardian and on being allowed by court to be impleaded as a defendant, she contested the suit taking the plea that sale deed was not genuine — Held, High Court erred in rejecting defendant's plea on ground of her failure to challenge the sale deed within three years from date of attaining her majority — No cause of action arose for her to file a suit challenging alleged sale deed prior to said partition suit — Property Law — Transfer of property by guardian — Validity — Guardians and Wards Act, 1890 — Ss. 27 and 37 — Transfer of Property Act, 1882, Ss. 7 and 8 (Paras 41 and 42)**

G. **Practice and Procedure — Costs — Conduct of respondent — Respondent-plaintiff unnecessarily dragged appellant into litigation which was initiated with an oblique motive and design and compelled appellant to contest the collusive suit for decades wasting time, energy and expense — Supreme Court while allowing appeal, costs of Rs 25,000 directed to be paid by respondent to appellant — Civil Procedure Code, 1908 — S. 35-A — Constitution of India, Art. 136 (Paras 48 and 49)**

Appeal allowed with costs R-D/48145/SV

Advocates who appeared in this case :
Jayanth Muth Raj and T.N. Rao, Advocates, for the Appellant;
Krishnamurthi Swami, Ms Prabha Swami, S.J. Aristotle, S. Prabu Rama Subramanian, L.A.J. Selvan, Ms Priya Aristotle and V.G. Pragasam, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2008) 11 SCC 306, *Corpn. of City of Bangalore* v. *Zulekha Bi* 231*f-g*
2. (2006) 12 SCC 198, *State of J&K* v. *Hindustan Forest Co.* 231*e-f*
3. 2002 AIHC 4950 (AP), *Koppula Koteshwara Rao* v. *Koppula Hemantha Rao* 231*e-f*
4. (2000) 3 SCC 312, *Subhra Mukherjee* v. *Bharat Coking Coal Ltd.* 230*c-d*, 230*d-e*, 230*f-g*
5. (1868) 9 Suth WR 297, *Roop Narain Singh* v. *Gugadhur Pershad* 229*b-c*
6. 17 C 990, *Anna Malay* v. *Na U Ma* 229*b-c*

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J.— This appeal by special leave has been filed by the appellant Tmt Rangammal against the order dated 11-7-2002 passed by the learned Single Judge of the High Court of Judicature of Madras in Second Appeal No. 703 of 1992 by which the appeal was dismissed by practically a summary order although the substantial question of law which was formulated at the time of admission of the appeal was as follows:

> "Whether the sale deed executed by the de facto guardian on behalf of the minor without the permission of the court could be held to be valid?"

2. However, on hearing the appeal in the light of the prevailing facts and circumstances of the instant matter, we are of the view that the question also arises whether in a partition suit filed by the plaintiff-Respondent 1 herein, the courts below could shift the burden of proof on the appellant-defendant regarding the validity of a sale deed, which was executed when the appellant was admittedly a minor, contrary to the pleading in the plaint filed in a suit for partition, who claimed title to the suit land on the basis of the alleged sale deed. Still further the question arises whether the question of limitation could arise against the appellant-defendant shifting the burden on her to challenge the sale deed, when the story of execution of the alleged sale deed was set up by Respondent 1-plaintiff in the plaint for the first time when he filed a partition suit against his brother, without impleading the appellant, but claimed benefit of title to the suit land on the basis of the alleged sale deed.

3. In order to decide the aforesaid controversy, it is necessary to relate the facts giving rise to this appeal insofar as it is relevant which disclose that the appellant Tmt Rangammal was impleaded as the second defendant in a suit for partition bearing OS No. 255 of 1982 which had been filed by one Kuppuswami, plaintiff-Respondent 1 herein in the Court of District Munsif, Palani, against his brother Andivelu who was the principal defendant/first defendant-Respondent 2 herein for partition and separate possession, but the plaintiff also included the property of the appellant Rangammal in the schedule to the plaint without including her as a party to the suit as it was pleaded by Respondent 1-plaintiff Kuppuswami that the share which originally belonged to the appellant Rangammal, was transferred to their predecessors, who were the father and uncle of the plaintiff and Respondent 2-Defendant 1, Andivelu, by way of a sale deed dated 24-2-1951 executed in their favour by Kumara Naicker who claimed to be the legal guardian of Rangammal when the appellant Rangammal was admittedly a minor and was barely few years old, less than even three years. The sale deed was claimed to have been executed for legal necessity in order to discharge the debt of the deceased mother of the appellant in the year 1951 which according to the case of Respondent 1-plaintiff had been transferred to their branch by virtue of the aforesaid sale deed executed on 24-2-1951 by the alleged guardian of the appellant, Kumara Naicker.

4. Since the appellant had not been impleaded in the suit for partition although her property was included in the partition suit between the two brothers i.e. plaintiff Kuppuswami, Respondent 1 herein and Andivelu, first defendant-Respondent 2 herein, the appellant filed an application for impleadment in the partition suit before the trial court which was allowed.

5. The appellant herein who was impleaded as a second defendant in the suit clearly pleaded that the partition suit filed by Kuppuswami, plaintiff against his brother Andivelu first defendant-Respondent 2 herein, was collusive in nature as this was clearly to deprive the appellant from her share by relying on an alleged sale deed dated 24-2-1951 by fraudulently stating that the deceased mother of the appellant was owing certain debt during her lifetime and in order to discharge the same, the so-called legal guardian of the appellant, Kumara Naicker executed a sale deed in favour of the father and uncle of the plaintiff and Defendant 1 who are the respondents herein.

6. It was, therefore, submitted by the appellant-second defendant in the suit that the sale deed dated 24-2-1951 alleged to have been executed in order to discharge the debt of her deceased mother, when the appellant was a minor, ought not to be held legally binding on her and so as to include her property for partition in the partition suit which had been instituted by an altogether different branch of the family who had separated more than three generations ago. Hence she specifically pleaded that the partition suit including her property was clearly collusive in nature and therefore the suit was fit to be dismissed.

7. In order to appreciate whether the courts below were justified in depriving the appellant Tmt Rangammal from her share, it appears necessary to relate some other salient facts of the case leading up to the filing of this appeal.

8. The schedule property comprising an area of 4 acres and 10 cents described in various survey numbers originally belonged to one Laksmi Naicker, the common ancestor of the contesting parties who had two sons and an oral partition had taken place between them in regard to the properties of the joint family including the schedule property. Thereafter, a sale deed dated 24-2-1951 in respect of the schedule property was executed by Kumara Naicker, alleged legal guardian of appellant Rangammal who was one of the sons of late Kumara Naicker and wife of the elder son of Laksmi Naicker, Thottammal a cousin of her son, who was descendent of Kumara Naicker.

9. Kumara Naicker i.e. the son of the elder son of Laksmi Naicker executed the sale deed on behalf of the appellant herein, who was the daughter of the younger son of Laksmi Naicker and Andi Naicker was admittedly a minor, representing himself as her guardian since she had lost both her father and her mother at the time of the execution of the sale deed. However, the appellant according to her case continued in possession of half of the schedule property according to the oral partition which had fallen into the share of her father since the only brother of the appellant Rangammal had

died unmarried. Thus, the appellant continued to be in possession of half of the property without any knowledge about the alleged sale deed.

10. The appellant's case is that as she was a minor and had lost both her parents, she was living with her maternal uncle even at the time of the alleged sale. The appellant's case is that the suit was instituted between the plaintiff-Respondent 1 herein and the first defendant-Respondent 2 herein under the pretext of partition but in fact the idea behind the institution of the suit was to oust the appellant who continued to be in possession of half of the share of the property being the sole legal representative of the younger son of Laksmi Naicker who was Andi Naicker. As already stated, the appellant in fact was not even made a party in the partition suit initially but was later impleaded as the second defendant after she filed an application for her impleadment.

11. However, the High Court while dealing with the second appeal arising out of the partition suit, cast the burden completely on the appellant-second defendant to prove that the property shown in the sale deed which fell into the share of the appellant, was not for the purpose of discharge of the liability of her deceased mother who according to her case was not owing any debt to anyone including Kumara Naicker. But the suit was finally decreed in favour of Respondent 1-plaintiff holding therein that the appellant's deceased mother was owing certain debts and for discharge of the same, the so-called legal guardian of the appellant, who was Kumara Naicker, executed a sale deed in favour of the plaintiff's father and Defendant 1's father in respect of the entire property of Rangammal and this was done ostensibly as the appellant's mother had to discharge certain debts which she was owing to the plaintiff's father during her lifetime.

12. Thus, the District Munsif, Palani, decreed the suit in favour of the plaintiff-first Respondent 1 herein, Kuppuswami. While doing so, the trial court recorded a finding that the sale deed dated 24-2-1951 by which half-share of the appellant in the suit property was transferred when the appellant was a minor had been executed by the legal guardian Kumara Naicker for legal necessity according to the case of the appellant herein, Kumara Naicker the so-called legal guardian was neither her natural guardian nor guardian appointed by the court and hence the sale deed executed by him to the extent of half-share of the schedule property of appellant Rangammal was clearly void, illegal, inoperative and hence not binding on her. The trial court decreed the suit against which the appeal before the first appellate court was dismissed. The matter then came up to the High Court by way of a second appeal.

13. The learned counsel for the appellant while challenging the judgment and orders of the courts below submitted that the sale deed executed by the so-called de facto guardian Kumara Naicker and Thottammal cannot be held to be binding on her as she was a minor in the custody of her maternal uncle and not Kumara Naicker, father of Respondent 2 and hence the sale deed executed by him on her behalf was not binding on her as the same was

executed in order to deprive her of her half-share in the disputed property which is situated on the eastern portion of the schedule property.

14. The learned Single Judge of the High Court however was pleased to dismiss the second appeal holding therein that the present suit out of which the second appeal arose was filed in the year 1982 which was after 31 years of the execution of the sale deed dated 24-2-1951. The Single Judge further observed that if the appellant Tmt Rangammal was aggrieved of the sale deed executed by the de facto guardian, she ought to have challenged it within three years from the date of attaining majority.

15. The High Court went on to hold that until the date of filing of the present suit by the first respondent and even thereafter, the appellant had not chosen to challenge the sale deed executed by the de facto guardian and she never asserted any title in respect of the suit property irrespective of the sale deed in order to establish that she was aggrieved of the sale deed and hence it was too late for the appellant to raise such a plea in the High Court by way of a second appeal.

16. We have heard the learned counsel for the parties at length and on a consideration of their submissions in the light of the judgments and orders of the courts below, specially the High Court, we are clearly of the view that the High Court as also the courts below have clearly misconstrued the entire case of the plaintiff as well as the respondents and tried it contrary to the pleadings.

17. The High Court has recorded that "the present suit which was filed in the year 1982, is after 31 years" i.e. after 31 years of the execution of the sale deed dated 24-2-1951. But it can be instantly noticed that the High Court has fallen into a crystal clear error as it has patently and unambiguously missed that the suit had not been filed by the appellant Tmt Rangammal as she was the second defendant who was later impleaded in the suit but the partition suit had been filed by the plaintiff Kuppuswami, Respondent 1 herein against his brother the second respondent Andivelu, first defendant which was a suit for partition of the property but while doing so he included and asserted title to the property in the schedule of the plaint which admittedly had fallen into the share of the appellant's deceased father which devolved upon her after the death of her father, mother and brother who died unmarried. But it is Respondent 1-plaintiff who came up with a case in the plaint that this property was transferred for legal necessity by the so-called legal guardian of the appellant by executing a sale deed on 24-2-1951 in favour of the respondents' predecessors who were father and uncle of the plaintiff and first defendant-respondents herein.

18. The learned Single Judge of the High Court as also the trial court and the lower appellate court thus have lost sight of the fact that it is the plaintiff-Respondent 1 herein who had come up with a case that the half-share of the disputed property which on partition had fallen into the share of the appellant's father was sold out by Kumara Naicker as guardian of the appellant, who was a minor in order to discharge some debt which the

appellant's deceased mother was alleged to be owing. However, the disputed property which was sold in order to discharge the alleged burden of debt vide sale deed dated 24-2-1951 was purchased by the plaintiff-first respondent's father Arumuga Gounder and their uncle Kumara Naicker which means that the legal guardian Kumara Naicker claims the property of the appellant who was a minor and then sold it to himself and nephew Arumuga Gounder.

19. Furthermore, it is also the plaintiff's case that the property which had fallen into the share of Tmt Rangammal had been sold out by Kumara Naicker to the father of Kuppuswami, Arumuga Gounder and Andivelu who was his own son.

20. Therefore, it is more than apparent that when the respondent-plaintiff came up with a case of execution of sale deed on 24-2-1951 for half of the schedule property/disputed property alleged to have been sold out for legal necessity which had fallen into the share of appellant Rangammal, the burden clearly lay on Respondent 1-plaintiff to discharge that the sale deed executed by Kumara Naicker to his own son and nephew Arumuga Gounder in regard to the share which had admittedly fallen into the appellant's share Rangammal who was a minor, was sold for the legal necessity. But this burden by the trial court was wrongly cast upon the appellant Rangammal to discharge, although, it is well settled that the party who pleads has also to prove his case.

21. Section 101 of the Evidence Act, 1872 defines "burden of proof" which clearly lays down that:

> "**101.** ***Burden of proof***.—Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Thus, the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.

22. In view of this legal position of the Evidence Act, it is clear that in the instant matter, when Respondent 1-plaintiff pleaded that the disputed property fell into the share of the plaintiff by virtue of the sale deed dated 24-2-1951, then it was clearly for Respondent 1-plaintiff to prove that it was executed for legal necessity of the appellant while she was a minor. But, the High Court clearly took an erroneous view while holding that it is the appellant-defendant who should have challenged the sale deed after attaining majority as she had no reason to do so since Respondent 1-plaintiff failed to first of all discharge the burden that the sale deed in fact had been executed for legal necessity of the minor's predecessor mother was without the permission of the court. It was not the appellant-defendant who first of all

claimed benefit of the sale deed or asserted its genuineness, hence the burden of challenging the sale deed specifically when she had not even been dispossessed from the disputed share, did not arise at all.

23. A plethora of commentaries emerging from series of case laws on burden of proof, which are too numerous to cite, lay down that *when a person after attaining majority, questions any sale of his property by his guardian during his minority, the burden lies on the person who upholds/asserts the purchase not only to show that the guardian had the power to sell but further that the whole transaction was bona fide*. This was held in *Roop Narain Singh* v. *Gugadhur Pershad*[1], as also in *Anna Malay* v. *Na U Ma*[2].

24. Thus when Respondent 1-plaintiff came up with a case that the minor's share/appellant herein was sold for legal necessity by her uncle Kumara Naicker, then it was Respondent 1-plaintiff who should have discharged the burden to prove that the minor/appellant's share had been sold of by the de facto guardian Kumara Naicker without the permission of the court, could be held to be legal and valid so as to include the same in the partition suit between two brothers, which has not been discharged at all by Respondent 1-plaintiff.

25. In fact, the real brother of plaintiff Kuppuswami who is Defendant 1-Respondent 2 herein, Andivelu has also not supported the case of the plaintiff that the half-share of appellant Rangammal in the disputed property was sold out vide sale deed dated 24-2-1951 for legal necessity without the permission of the court and hence Respondent 2-Defendant 1 also has not supported the case of Respondent 1-plaintiff on this count.

26. Respondent 1-plaintiff therefore has miserably failed to prove his case as per his pleading in the plaint and the burden to prove that the sale deed in fact was valid has not even been cast on Respondent 1-plaintiff that the share of appellant Rangammal had been sold out by Kumara Naicker vide sale deed dated 24-2-1951 for consideration without the permission of the court when the appellant was a minor.

27. The High Court, therefore, has fallen into an error while observing that the appellant-Defendant 2 in the suit should have assailed the sale deed and cannot do so after 31 years of its execution when it is unambiguously an admitted factual position that it is Respondent 1-plaintiff who had filed a suit for partition against his brother Respondent 2-Defendant 1 and in that partition suit it was Respondent 1-plaintiff who banked upon the story that a sale deed had been executed by his uncle Kumara Naicker, who claimed to be the legal guardian of the appellant Rangammal, who admittedly was a minor, for legal necessity which was to discharge the debt of the appellant's deceased mother. Hence, in view of Section 101 of the Evidence Act, 1872 it

1 (1868) 9 Suth WR 297
2 17 C 990

is Respondent 1-plaintiff who should have first of all discharged the burden that in fact a sale deed had been executed for the share which admittedly belonged to appellant Rangammal in order to discharge the burden of debt for legal necessity and for the benefit of the appellant who admittedly was a minor.

28. When Respondent 1-plaintiff, Kuppuswami came with a specific pleading for the first time in a partition suit that the appellant's share had been sold out by her de facto guardian Kumara Naicker without even the permission of the court, it was clearly Respondent 1-plaintiff who should have discharged the burden that the same was done for legal necessity of the minor in order to discharge the debt which the deceased mother of the appellant was alleged to have been owing to someone. When Respondent 1-plaintiff failed to discharge this burden, the question of discharge of burden to disprove the sale deed by the appellant-second defendant Rangammal do not arise at all as per the provisions of the Evidence Act.

29. It may be relevant at this stage to cite the ratio of the decision of this Court delivered in *Subhra Mukherjee* v. *Bharat Coking Coal Ltd.*[3], whether the document in question was genuine or sham or bogus, the party who alleged it to be bogus had to prove nothing until the party relying upon the document established its genuineness. This was the view expressed by this Court in *Subhra Mukherjee* v. *Bharat Coking Coal Ltd.*[3]

30. *Subhra Mukherjee case*[3] although did not relate to a suit for partition or question relating to minority, it was a case wherein the appellant refused to hand over possession of property to the respondent government company when ordered to do so. Instead she filed a suit for declaration of title in respect of property. The evidence of appellant-plaintiff indicated several discrepancies and inconsistencies due to which the trial court dismissed the suit but the first appellate court and the High Court, had allowed the appeal which was upheld by the Supreme Court as it was held that the High Court rightly allowed the respondent government company's second appeal and rightly found that the sale in favour of the appellant was not bona fide and thus confer no rights on them.

31. Application of Section 101 of the Evidence Act, 1872 thus came up for discussion in *Subhra Mukherjee case*[3] and while discussing the law on the burden of proof in the context of dealing with the allegation of sham and bogus transaction, it was held that the party which makes the allegation must prove it. But the Court was further pleased to hold, wherein the question before the Court was "whether the transaction in question was a bona fide and genuine one" so that the party/plaintiff relying on the transaction had to first of all prove its genuineness and only thereafter would the defendant be required to discharge the burden in order to dislodge such proof and establish that the transaction was sham and fictitious. This ratio can aptly be relied

3 (2000) 3 SCC 312 : AIR 2000 SC 1203

upon in this matter as in this particular case, it is Respondent 1-plaintiff Kuppuswami who relied upon the alleged sale deed dated 24-2-1951 and included the subject-matter of the property which formed part of the sale deed and claimed partition. This sale deed was denied by the appellant-defendant on the ground that it was bogus and a sham transaction which was executed admittedly in 1951 when she was a minor.

32. Thus, it was Respondent 1-plaintiff who should have first of all discharged the burden that the sale deed executed during the minority of the appellant was genuine and was fit to be relied upon. If the courts below including the High Court had felt satisfied on this aspect, only then the burden could be shifted on the appellant-defendant to dislodge the case of the plaintiff that the sale deed was not genuine. But when the plaintiff merely pleaded in the plaint but failed to lead any evidence—much less proof, that the sale deed was genuine and was executed in order to discharge the burden of legal necessity in the interest of minor, then the High Court clearly misdirected itself by recording in the impugned order that it is the defendant-appellant herein who should have challenged the genuineness of the sale deed after attaining majority within the period of limitation.

33. Since the High Court has misplaced the burden of proof, it clearly vitiated its own judgments as also of the courts below *since it is well-established dictum of the Evidence Act that misplacing burden of proof would vitiate the judgment.* It is also equally and undoubtedly true that the burden of proof may not be of much consequence after both the parties lay evidence, but while appreciating the question of burden of proof, misplacing of burden of proof on a particular party and recording findings in a particular way definitely vitiates the judgment as it has happened in the instant matter. This position stands reinforced by several authorities including the one delivered in *Koppula Koteshwara Rao* v. *Koppula Hemantha Rao*[4].

34. It has been further held by the Supreme Court in *State of J&K* v. *Hindustan Forest Co.*[5] wherein it was held that the onus is on the plaintiff to positively establish its case on the basis of the material available and it cannot rely on the weakness or absence of defence to discharge the onus.

35. It was still further held by this Court in *Corpn. of City of Bangalore* v. *Zulekha Bi*[6], SCC p. 308 that it is for the plaintiff to prove his title to the property. This ratio can clearly be made applicable to the facts of this case for it is the plaintiff who claimed title to the property which was the subject-matter of the alleged sale deed of 24-2-1951 for which he had sought partition against his brother and, therefore, it was clearly the plaintiff who should have first of all established his case establishing title of the property to the joint family out of which he was claiming his share. When the plaintiff himself failed to discharge the burden to prove that the sale deed which he

4 2002 AIHC 4950 (AP)
5 (2006) 12 SCC 198
6 (2008) 11 SCC 306

executed in favour of his own son and nephew by selling the property of a minor of whom he claimed to be legal guardian without permission of the court, it was clearly fit to be set aside by the High Court which the High Court as also the courts below have miserably failed to discharge.

36. The onus was clearly on the plaintiff to positively establish his case on the basis of material available and could not have been allowed by the High Court to rely on the weakness or absence of defence of the defendant-appellant herein to discharge such onus. The courts below thus have illegally and erroneously failed not to cast this burden on Respondent 1-plaintiff by clearly misconstruing the whole case and thus resulted into recording of findings which are wholly perverse and even against the admitted case of the parties.

37. *It is further well settled that a suit has to be tried on the basis of the pleadings of the contesting parties which is filed in the suit before the trial court in the form of plaint and written statement and the nucleus of the case of the plaintiff and the contesting case of the defendant in the form of issues emerges out of that.* This basic principle, seems to have been missed not only by the trial court in this case but consistently by the first appellate court which has been compounded by the High Court.

38. Thus, we are of the view, that the whole case out of which this appeal arises had been practically made a mess by missing the basic principle that the suit should be decided on the basis of the pleading of the contesting parties after which Section 101 of the Evidence Act would come into play in order to determine on whom the burden falls for proving the issues which have been determined.

39. We further fail to comprehend as to how the basic case pleaded by the plaintiff had been misconstrued and the burden of discharge of genuineness, veracity and legal efficacy of the sale deed dated 24-2-1951 was shifted on the appellant Rangammal clearly missing that it is Respondent 1-plaintiff's case who was bent upon to include Rangammal's property also for partition by relying upon the story of execution of sale deed when the partition suit was between the two brothers who were plaintiff Kuppuswami and Defendant 1 Andivelu.

40. Coming now to the next question, we are unable to appreciate as to how the High Court has held that the delay in challenging the sale deed of 1951 should have been done at the instance of the second defendant-appellant herein when it is the plaintiff who brought the theory/story of execution of the sale deed of appellant Rangammal's property into respondent-plaintiff's branch by pleading and asserting that this had fallen into the share of their predecessor as one of the predecessors was the de facto guardian of the appellant Rangammal.

41. In fact, if there was a dispute about the genuineness and veracity of the sale deed and the appellant was in occupation of her share, then it is the

plaintiff who should have filed a suit claiming title on the basis of the sale deed which was claimed to have been executed in their favour by the de facto guardian of Rangammal when she was a minor before this property could be included in the suit for partition between the brothers excluding the appellant-second defendant Rangammal and the consequence of not doing so or delay in this regard, obviously will have to be attributed to the respondent-plaintiff.

42. Thus, the High Court fell into a clear error when it observed that the suit was barred by limitation as it had been filed after 31 years of the execution of the sale deed which on the face of it is factually incorrect. The High Court has clearly erred while recording so, as it seems to have missed that the suit had not been filed by the appellant herein but she was merely contesting the suit as the second defendant by getting herself impleaded in the partition suit when it came to her knowledge that the property which is in her occupation and possession has also been included in the schedule in the suit for partition between plaintiff-Respondent 1 herein, Kuppuswamy and the first defendant-Respondent 2 herein, Andivelu and when she received the copy of the plaint, execution of the alleged sale deed way back in 1951 was disclosed to her for the first time. Hence, there was no cause of action for her to file a suit challenging the alleged sale deed as knowledge of the same cannot be attributed to her in this regard as she asserted actual physical possession on her share.

43. The appellant who claimed to be in occupation and peaceful possession of her share to the extent of half which is situated on the eastern side of the schedule property, had no reason to file a suit assailing the sale deed when she was in actual physical possession of her share and suddenly out of the blue, a partition suit was filed by Respondent 1-plaintiff wherein the property of the appellant also was included in the schedule of the partition suit which was to be partitioned between the two brothers by metes and bounds by setting a cooked up story that the appellant's share, who belonged to an altogether different branch of the family, had been given away by her de facto guardian Kumara Naicker by executing a sale deed in favour of the respondents' predecessor way back on 24-2-1951 when the appellant admittedly was a minor.

44. We are, therefore, constrained to partly set aside the judgment and order of the High Court insofar as the share of the appellant Rangammal is concerned and consequently the decree passed by the trial court, upheld by the first appellate court and the High Court which had been illegally decreed including the share of the appellant Rangammal which had not devolved on the family of Respondent 1-plaintiff and Respondent 2-Defendant 1, but was claimed on the basis of a sale deed which could not be proved either by evidence or law, is fit to be set aside.

45. It hardly needs to be highlighted that *in a suit for partition, it is expected of the plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the*

joint family which is sought to be partitioned and if someone else's property, meaning thereby disputed property is included in the schedule of the suit for partition, and the same is contested by a third party who is allowed to be impleaded by order of the trial court, obviously it is the plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property belongs to the joint family which should be partitioned excluding someone who claims that some portion of the joint family property did not belong to the plaintiff's joint family in regard to which decree for partition is sought.

46. However, we make it clear that the decree which has been passed by the trial court insofar as partition between Respondent 1-plaintiff and Respondent 2-Defendant 1 is concerned, shall remain intact but the said decree shall exclude the property which had fallen into the share of appellant Rangammal but was claimed to have been transferred to the branch of the plaintiff and the first defendant-respondents herein vide sale deed dated 24-2-1951. The trial court being the Court of District Munsif, Palani, accordingly shall modify the decree passed in OS No. 255 of 1982 by excluding the share of the appellant Rangammal claimed on the basis of the sale deed dated 24-2-1951.

47. Thereafter, if the decree is put to execution, the executing court shall ensure that such portion of the property which is in occupation of Rangammal which was alleged to have been sold vide sale deed dated 24-2-1951, shall not be put into execution while partitioning the remaining property between the plaintiff Kuppuswami and first defendant Andivelu, Respondent 2.

48. Thus, this appeal insofar as the claim of the appellant Rangammal to the extent of half of the share in the schedule to the suit property, situated on the eastern portion is concerned, stands allowed with a token cost which is quantified at rupees twenty-five thousand as we are of the view that the appellant who was in actual physical and peaceful possession of her property which she had inherited from her deceased parents, was unnecessarily dragged into this litigation at the instance of the plaintiff Kuppuswami who filed a partition suit which was apparently collusive in nature as it included the share of a third party to which the plaintiff and first defendant's family had no clear title.

49. Under the facts and circumstances of the instant case, it was clearly a compulsion on the part of the appellant Tmt Rangammal to contest the collusive suit for decades wasting time, energy and expense over a litigation which was started by the plaintiff clearly with an oblique motive and evil design. Hence the cost shall be paid by Respondent 1 Kuppuswami to the appellant Rangammal as indicated above.

50. Accordingly, this appeal stands allowed with costs.

1994 SCC OnLine All 806 : AIR 1995 All 259 : (1995) 2 AP LJ (DNC) 34 : 1995 All LJ 1355

In the High Court of Allahabad

(BEFORE S.R. SINGH, J.)

Commissioner of Income-Tax ... Appellant;

Versus

Surendra Singh Pahwa and others ... Respondents.

First Appeal No. 161 of 1994*

Decided on December 13, 1994

JUDGMENT

1. Both these appeals being, in a sense, interconnected, it would be convenient to dispose them of by a common order. While First Appeal No. 161 of 1994 is directed the ex parte judgment and decree dated 5-1-1994 passed in suit No. 71 of 1992 *Surendra Singh Pahwa* v. *Chandra Kumar*, First Appeal From Order No. 1014 of 1994 is directed against the order rejecting application under Order 9, Rule 13, C.P.C. for setting aside the ex parte decree which is the subject matter of challenge in the First Appeal.

2. The suit giving rise to these appeals was filed by the plaintiff respondent No. 1, Surendra Singh Pahwa against the respondents Nos. 2 to 4 impleading the appellant as defendant No. 4 for specific performance of a contract for sale dated 23-3-1976 between Ram Kumar, the father of the defendant Nos. 1 to 3 and Deshraj Singh Pahwa, the father of the plaintiff for sale consideration of Rupees 1,70,000/- as well as for perpetual injuction restraining the defendant appellant from auctioning the suit property in connection with the recovery of certain income-tax dues outstanding against Ram Kumar. It was alleged in the plaint that a sum of Rs. 20,000/- was paid in advance as earnest money and further that the plaintiff was always ready and willing to perform his part of contract, but despite notices the defendants Nos. 1 to 3 did not turn up to execute the sale deed in pursuance of the contract of sale and hence the necessity of suit.

3. Despite service of summons on them, the defendant respondent Nos. 1 to 3 did not file any written statement and the suit proceeded ex parte against them. The defendant-appellant did file written statement but, it appeals, on the date fixed for issues, viz. 1-12-1993 none appeared on behalf of the defendant appellant and, therefore, 7-12-1993 was fixed for ex parte evidence. The plaintiff respondent, however, filed affidavit in support of his case on 2-12-1993 i.e. before the date fixed for ex parte evidence and upon hearing the counsel for the plaintiff on 7-12-1993, the trial court fixed 13-12-1993 for judgment, but the judgment was not delivered on the date fixed and while the matter was pending judgment the defendant appellant moved an application on 17-12-1993 for setting aside the order dated 1-12-1993 to proceed ex parte against it. The said application was rejected by the trial court vide order dated 18-12-1993 on the ground, that the arguments in the case already been heard and the judgment reserved and, therefore, the application was not maintainable. Ultimately the judgment was delievered and suit decreed ex parte on 5-1-1994 which is the subject matter of challenge in First Appeal No. 161 of 1994.

4. The appellant then filed an application under Order 9, Rule 13, C.P.C. on 6-1-1994 with the allegation that none could appear on behalf of the appellant on the dated fixed for hearing due to the reason that on 30-10-1993 the Court while allowing an application for amendment in the pleading had fixed 15-11-1993 for carrying out

the amendment but the clerk of the appellant's counsel wrongly noted 15-12-1993 in place of 15-11-1993 and that he came to know of the order dated 1-12-1993 to proceed ex parte on a subsequent date. The learned Civil Judge disbelieved the appellant's version and rejected the application under Order 9, Rule 13, C.P.C. vide order dated 13-5-1994 which is the subject matter of challenge in First Appeal From Order No. 1014 of 1994.

5. Having heard the learned counsel for the parties and having perused the judgment dated 5-1-1994, I am of the view that it cannot be sustained. Even an ex parte judgment should satisfy the description of 'judgment' as laid down in Order 20, Rule 4(2), C.P.C., which visualises that the judgment of a Court other than the court of Small Causes "shall contain a concise statement of the case, points for determination, decision and the reasons for such decision." A 'judgment' for its sustenance must contain not only findings on the points, but must also contain what evidence consists of, and how does not prove plaintiff's case. A judgment unsupported by reasons is no judgment in the eye of law. It is well settled that reasons are the links between the material on record and the conclusion arrived at by the Court. Mere fact that the defendant absented himself on the date of hearing and the suit proceeded ex parte, did not by itself entitle the plaintiff to get a decree in his favour. The court was under an obligation to apply its mind to whatever ex parte evidence or affidavit filed under Order 19 of the Code is on the record of the case, and application of mind must be writ large on the face of record. This is possible only if the court directs itself to whatever material is on record of the case, analyses the same and then comes to any conclusion on the basis of evidentiary value of the ex parte evidence or affidavit brought on record by the plaintiff. It may also be observed that the written statement already filed in this case would not be deemed to have been wiped off the record merely because the defendant did not appear on the date of issues and the suit was ordered to proceed ex parte. The trial court ought to have, on consideration of pleadings, formulated points for determination. The judgment dated 5-1-1994 does not satisfy these tests in as much as apart from stating parties' case, the learned Additional Civil Judge has not stated as to what was the evidence on record and how did it prove the plaintiff's case. All that the learned trial court has stated is that affidavit was filed on behalf of the plaintiff which completely proved his case. The finding and the reasons as given by the learned trial court run as thus:—

> "VADI NE APNE SHAPATH PATRIYA SAKSHYA DWARA VAD PATRA ME KAHE GAYE ABHIKATHNON KA PURNRUREN SAMRTHAN KIYA HAI TATHA VADI KA VAD VIRUDDHA PROTIVADIGAN EK PARKSHIYA DECREE HONE YOGYA HAI".

6. What follows the aforequoted observation is the operative portion of the judgment. It is thus evident that the judgment given by the learned trial court is no judgment in the eye of law. In *Rameshwar Dayal* v. *Banda (dead) through his LR's* 1993 All CJ 597, a judgment of Judge Small Causes Court without setting out the points for determination and without giving findings thereon was held by the Supreme Court as a judgment not amounting to a decree within the meaning of Section 2(2) read with Section 2(9) and Rules 4 and 5 of Order 20, C.P.C. In the facts and circumstances of the case, therefore, this court is inclined to set aside the judgment and decree but not without the appellant being saddled with cost which I assess to be Rs. 2,000/- (Two thousand only) in as much the appellant has not been diligent in

prosecuting its case before the trial court and this has led to an avoidable harassment to the plaintiff respondent who must be compensated by cost.

7. In view of the above conclusion F.A.F.O. No. 1014 of 1994 directed against the order dated 23-5-1994 rejecting the appellant's application under Order 3, Rule 13, C.P.C. becomes infructuous.

8. Accordingly First Appeal No. 101 of 1994 succeeds and is allowed and the judgment and decree dated 5-1-1994 are set aside subject, of course, to the appellant's paying Rs. 2,000/- as cost to the plaintiff respondent within a period of six weeks from today and the suit is remanded to the trial court for decision afresh in accordance with law. First Appeal From Order No. 1014 of 1994 is disposed as having become infructuous. Let a copy of this judgment be placed on the file of First Appeal From Order No. 1014 of 1994.

9. Order accordingly.

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* Against judgment and decree of Sri Satya Pal, VII Addl. Civil J., Meerut in Suit No. 71 of 1992, D/- 5-1-1994.

1969 SCC OnLine MP 31 : AIR 1970 MP 225

Madhya Pradesh High Court
(Gwalior Bench)
(BEFORE S.M.N. RAINA, J.)

Gulla Kharagjit Carpenter ... Applicant;
Versus
Narsingh Nandkishore Rawat ... Opposite Party.

Civil Revn. No. 289 of 1967
Decided on October 27, 1969

ORDER

1. This is a revision petition under Section 25 of the Small Cause Courts Act.

2. The petitioner Gulla (hereinafter referred to as 'the applicant') filed a suit against the non-applicant Harisingh for recovery of a sum of Rs. 170 on account of the price of a bullock-cart supplied to him on 3-3-65. The non-applicant (defendant) denied the transaction and the trial Court after considering the evidence on record dismissed the suit on the ground that the case of the plaintiff-applicant was not proved. Being aggrieved by this decision of the trial Court the plaintiff-applicant has filed this revision petition.

3. In this case plaintiff Gulla (P.W. 1) testified that the non-applicant had purchased a bullock-cart from him on credit for Rs. 170 agreeing to pay the price a couple of months later, but he failed to do so in spite of demands. He is corroborated on this point by two witnesses namely, Chhidi (PW2) and Ratanlal (PW3).

4. The trial Court found fault with this evidence on the ground of certain minor discrepancies and also because there was no documentary evidence in support of the transaction. The Court, however, failed to take notice of the very material fact that the non-applicant did not go into the witness box to deny the transaction in question on oath. In fact he adduced no evidence in support of his case.

5. When a material fact is within the knowledge of a party and he does not go into the witness box without any plausible reason, an adverse inference must be drawn against him. A presumption must be drawn against a party who having knowledge of the fact in dispute does not go into the witness box particularly when a prima facie case has been made out against him.

6. In *Sardar Gur Bux Singh* v. *Gurudayalsingh*, AIR 1927 PC 230 their Lordships of the Privy Council observed at pages 233 and 234 that it is the bounden duty of a party acquainted with the facts of the case to give evidence in support of his case; failure to do so would be the strongest possible circumstance going to discredit the truth of his case. In *Pranballav Saha* v. *Sm. Tulsibala Dassi*, AIR 1958 Cal 713 the following observations were made while considering the effect of non-examination of a party:

> "The very fact that the defendant neither came to the box herself nor called any witness to contradict evidence given on oath against her shows that these facts cannot be denied. What was prima facie against her became conclusive proof by her failure to deny."

7. I entirely agree with the aforesaid observations.

8. The learned trial Judge, therefore committed a grave error in not taking into account the presumption arising out of non-examination of the defendant in this case while appreciating the evidence on record.

This has led to a grave miscarriage of justice.

9. In villages such transactions are often oral and are not supported by any documentary evidence. In any case the evidence adduced by the plaintiff ought to have been accepted in the absence of any evidence to the contrary. This Court ordinarily does not interfere with a finding of fact in revision, but as the finding of the trial Court is vitiated by ignoring the aforesaid presumption to favour of the plaintiff it must be set aside as not only unreasonable but perverse. I, therefore, hold that it has been duly established by the evidence on record that the defendant non-applicant had purchased a bullock-cart for Rs. 170 on credit and he failed to pay the price thereof. The plaintiff applicant is, therefore, entitled to a decree for a sum of Rs. 170.

10. The revision petition is, therefore, allowed and the decree of the trial Court is hereby set aside. The plaintiff's claim for Rs. 170 is decreed with costs against the defendant non-applicant. The non-applicant shall bear his own costs and pay that of the plaintiff in both the Courts. Counsel's fee according to scale, if certified.

11. *Petition allowed*.

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(1999) 3 Supreme Court Cases 457

(BEFORE S. SAGHIR AHMAD AND M.B. SHAH, JJ.)

ISWAR BHAI C. PATEL ALIAS BACHU BHAI PATEL .. Appellant;

Versus

HARIHAR BEHERA AND ANOTHER .. Respondents.

Civil Appeal No. 1417 of 1982†, decided on March 16, 1999

A. **Civil Procedure Code, 1908 — S. 96 r/w Or. 1 R. 3 and Or. 2 R. 3 — Appeal does lie against one of the two defendants against whom suit not decreed — Relief clause of plaint showing that decree was claimed against both defendants to be realised from both or either of them — Such a relief clause is legitimate and reasonable and thus where the suit is decreed against one defendant only an appeal lies against the other — Held, High Court was fully justified in decreeing the suit in its entirety and passing a decree against the other defendant (appellant herein) also — Orissa Money Lenders Act, 1939 (3 of 1939), S. 8**

B. **Civil Procedure Code, 1908 — Or. 1 R. 3 and Or. 2 R. 3 — Object of — Joinder of parties and of causes of action — Or. 1 R. 3 and Or. 2 R. 3 read together indicate that the question of joinder of parties involves joinder of causes of action — The basic principle is that as a person is made a party in a suit because there is a cause of action against him, so, when causes of action are joined the parties are also to be joined**

The appellant before the Supreme Court was Defendant 1 in a suit for recovery of Rs 7000 along with damages, filed by Respondent 1. Plaintiff-Respondent 1 was a registered moneylender who used to advance loans via his current account at Central Bank of India. Respondent 2, natural father of Plaintiff-Respondent 1, was authorized to operate this account and used to advance money on behalf of his son. When the Plaintiff's moneylending licence expired he did not get it renewed. Meanwhile the authority of Respondent 2 to operate the bank account continued. On 29-4-1964, Respondent 2, on the request of the Appellant used a cheque for Rs 7000 on the current account of the Plaintiff. The Appellant encashed the cheque and then despite repeated demands did not pay back the sum. Plaintiff then filed the suit against both the borrower-Defendant 1 and the authority-holder-Respondent 2 (Defendant 2), who had issued the cheque. The trial court dismissed the suit against the borrower-Defendant 1, but decreed it against Respondent 2, primarily on the grounds that: (1) Defendant 1 had not directly approached the plaintiff for the money and (2) that Respondent 2 could not be treated as the agent of the plaintiff.

In appeal the High Court modified the decree and decreed the suit against both the defendants. Before the Supreme Court the appellant contended that the Plaintiff-Respondent 1 had no right to appeal once the trial court had decreed the suit against one of the defendants.

Dismissing the appeal with costs the Supreme Court

Held :

The purpose of Order 1 Rule 3 is to avoid a multiplicity of suits. This rule, to some extent, also deals with the joinder of causes of action inasmuch as when the plaintiff frames his suit, he impleads persons as defendants against whom he claims to have a cause of action. Joinder of causes of action has been provided for in Order

† From the Judgment and Order dated 8-11-1978 of the Orissa High Court in F.A. No. 147 of 1978

2 Rule 3. Order 1 Rule 3 and Order 2 Rule 3 if read together indicate that the question of joinder of parties also involves the joinder of causes of action. The simple principle is that a person is made a party in a suit because there is a cause of action against him and when causes of action are joined, the parties are also joined. (Para 13)

Plaintiff-Respondent 1 had pleaded that from his current account in a bank which was authorised to be operated by his father, namely, Respondent 2 also, an amount of Rs 7000 was lent by a cheque to the appellant. Since the money had reached the hands of the appellant, though not directly through Respondent 1 but via his father, he had a cause of action against both the defendants, namely, the appellant and Respondent 2 both of whom were, therefore, impleaded as defendants in the suit particularly as it was one transaction in which both were involved. In this situation, therefore, if the suit was dismissed against one of them by the trial court, Respondent 1 had the right to file an appeal against the person against whom the suit was dismissed, notwithstanding that it was decreed against the other. (Para 15)

Suggested Case Finder Search Text (*inter alia*) :

cpc ("or 1 r 3" or 2 r 3")

C. **Evidence Act, 1872 — Ss. 114, Ill. (g) and 106 — Adverse presumption — Must be drawn against defendant who does not present himself for cross-examination and refuses to enter the witness-box in order to refute allegations made against him or to support his pleading in his written statement (Para 17)**

Sardar Gurbakhsh Singh v. *Gurdial Singh*, AIR 1927 PC 230 : 32 CWN 119; *Lal Kunwar* v. *Chiranji Lal*, ILR (1910) 32 All 104 : 37 IA 1 (PC), *relied on*

Kirpa Singh v. *Ajaipal Singh*, AIR 1930 Lah 1 : ILR 11 Lah 142; *Martand Pandharinath Chaudhari* v. *Radhabai Krishnarao Deshmukh*, AIR 1931 Bom 97 : 32 Bom LR 924; *Bishan Das* v. *Gurbakhsh Singh*, AIR 1934 Lah 63 (2) : 148 IC 45; *Puran Das Chela* v. *Kartar Singh*, AIR 1934 Lah 398 : 151 IC 32; *Devji Shivji* v. *Karsandas Ramji*, AIR 1954 Pat 280; *Gulla Kharagjit Carpenter* v. *Narsingh Nandkishore Rawat*, AIR 1970 MP 225 : 1970 MPLJ 586; *Pranballav Saha* v. *Tulsibala Dassi*, AIR 1958 Cal 713 : 63 CWN 258; *Arjun Singh* v. *Virendra Nath*, AIR 1971 All 29; *Bhagwan Dass* v. *Bhishan Chand*, AIR 1974 P&H 7, *approved*

A-M/TZ/20918/C

Advocates who appeared in this case :
S. Misra and R.S. Jena, Advocates, for the Appellant;
Krishnan Venugopal, D. Ranganathan, Uday Tiwari and P.H. Parekh, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. AIR 1974 P&H 7, *Bhagwan Dass* v. *Bhishan Chand* 464*d*
2. AIR 1971 All 29, *Arjun Singh* v. *Virendra Nath* 464*b*
3. AIR 1970 MP 225 : 1970 MPLJ 586, *Gulla Kharagjit Carpenter* v. *Narsingh Nandkishore Rawat* 464*a*
4. AIR 1958 Cal 713 : 63 CWN 258, *Pranballav Saha* v. *Tulsibala Dassi* 464*a*
5. AIR 1954 Pat 280, *Devji Shivji* v. *Karsandas Ramji* 463*g*
6. AIR 1934 Lah 398 : 151 IC 32, *Puran Das Chela* v. *Kartar Singh* 463*g*
7. AIR 1934 Lah 63 (2) : 148 IC 45, *Bishan Das* v. *Gurbakhsh Singh* 463*f-g*
8. AIR 1931 Bom 97 : 32 Bom LR 924, *Martand Pandharinath Chaudhari* v. *Radhabai Krishnarao Deshmukh* 463*e-f*
9. AIR 1930 Lah 1 : ILR 11 Lah 142, *Kirpa Singh* v. *Ajaipal Singh* 463*d*

10. AIR 1927 PC 230 : 32 CWN 119, *Sardar Gurbakhsh Singh* v. *Gurdial Singh* 462*f*, 463*g-h*
11. ILR (1910) 32 All 104 : 37 IA 1 (PC), *Lal Kunwar* v. *Chiranji Lal* 462*g-h*

The Judgment of the Court was delivered by

S. SAGHIR AHMAD, J.— The appellant was Defendant 1 in a suit filed by Respondent 1 for recovery of a sum of Rs 7000 together with damages (Rs 1400) in the trial court which was dismissed as against him but was decreed against the second defendant, namely, Respondent 2 who, incidentally, also is the natural father of Respondent 1 who was subsequently adopted by his maternal grandfather.

2. Respondent 1 had a current account in Central Bank of India Limited, Sambalpur Branch which was also operated by his natural father, namely, Respondent 2.

3. According to the facts set out in the plaint, Respondent 1 was registered as a moneylender in October 1958 and in that capacity, he used to advance loan through his natural father to different persons out of his account in the Bank which, as pointed out above, was also operated by his natural father. On the expiry of the licence, he did not get it renewed but the authority of his natural father (Defendant 2) to operate the account continued and taking advantage of this authority, Defendant (Respondent) 2, on the persuasion of the appellant, issued a cheque for Rs 7000 on the current account of Respondent 1 on 29-4-1964 which was encashed by the appellant. This amount was not paid back by the appellant in spite of repeated demands and, therefore, the suit was filed both against the appellant as also Respondent 2 who had issued the cheque to the appellant.

4. The appellant, in his written statement, pleaded that there was no relationship of debtor and creditor with Respondent 1 as the amount was advanced personally by Defendant (Respondent) 2 and, therefore, Respondent 1 had no right to institute a suit against him specially when Respondent 2 while advancing the money to him had not acted as an agent of Respondent 1. The appellant also raised the plea of Section 8 of the Orissa Money Lenders Act, 1939 and contended that since Respondent 1 was not a registered moneylender on the date on which the amount of Rs 7000 was advanced to him as loan, the suit was not maintainable as the amount was advanced in the course of regular moneylending business. It was also pleaded that since some dispute had arisen between the appellant and Defendant (Respondent) 2 with regard to the adjustment of the appellant's dues against Respondent 2, the latter, namely, Respondent 2 got the suit filed through his son on false pleas.

5. Respondent 2, in his separate written statement, pleaded that he was very close to the appellant who dealt in tobacco business and whenever he was in need of money, he would approach Respondent 2 for financial help and Respondent 2 would lend him the money required by the appellant. It was pleaded that on 29-4-1964, the appellant had approached Respondent 2 for payment of a sum of Rs 7000 for a short period and, therefore,

Respondent 2 issued a cheque for that amount in favour of the appellant on that day on the current account of Respondent 1 in Central Bank of India Ltd., Sambalpur Branch. When Respondent 1 came to know of this transaction, he demanded repayment of the amount but the appellant, instead of paying the amount to Respondent 1, proposed to set off his own dues against Respondent 2. It was pleaded that since the appellant had withdrawn the amount from Respondent 1's account through a cheque duly issued to him by Respondent 2, he was liable to pay the amount to Respondent 1.

6. The suit was decreed by the trial court only against Respondent 2 for a sum of Rs 8400 but was dismissed as against the appellant on the ground that the appellant had not approached Respondent 1 nor had Respondent 1 advanced the amount of Rs 7000 to the appellant. The trial court was of the opinion that the case of agency was not made out and Respondent 2 could not be treated to be the agent of the appellant. It was found that the transaction in question was directly entered into by the appellant with Respondent 2 and Respondent 1 was in no way involved at any stage in that transaction. The High Court, in appeal, modified the decree passed by the trial court and decreed the suit against both the defendants, namely, the present appellant as also Respondent 2. It is against this judgment that the present appeal has been filed.

7. The contention raised by the learned counsel for the appellant is that Respondent 1 had no right to institute an appeal in the High Court as the trial court had already decreed the suit. It is contended that though the decree was passed only against Respondent 2 and not against the appellant, it was wholly in consonance with the prayer made by Respondent 1 himself in his plaint in which he had claimed a decree either against the present appellant or against Respondent 2. Since the suit was decreed against Respondent 2, there was no occasion to file an appeal against that decree in the High Court.

8. Para 9 of the plaint, a copy of which was placed before us, reads as under:

> "9. Plaintiff prays for a decree of Rs 8400 with costs of suit against both the defendants, to be realised — severally from either of the defendants, with interest pendente lite and future at the rate of 7 per cent per annum."

The relief clause of the plaint extracted above would show that Respondent 1 had claimed a decree for a sum of Rs 8400 against both the defendants so that it could be realised from both the defendants or from either of them. This was a legitimate and reasonable prayer. Since Defendant (Respondent) 2 had advanced the amount in question to the appellant on the account of Respondent 1, both of them, namely, the appellant and Respondent 2 were jointly and severally liable to pay that amount to Respondent 1. Having claimed a decree against both the defendants, the plaintiff (Respondent 1) put it in the plaint that a decree be passed against both the defendants so that the decretal amount may be realised from either of the defendants.

9. Since the trial court had decreed the suit only against Respondent 2 and not against the appellant, it was open to Respondent 1, in this situation, to invoke the jurisdiction of the appellate court for decreeing the suit even against the appellant.

10. This can be viewed from another angle.

11. Order 1 Rule 3 provides as under:

"3. *Who may be joined as defendants.*—All persons may be joined in one suit as defendants where—

(*a*) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(*b*) if separate suits were brought against such persons, any common question of law or fact would arise."

12. This Rule requires all persons to be joined as defendants in a suit against whom any right to relief exists provided that such right is based on the same act or transaction or series of acts or transactions against those persons whether jointly, severally or in the alternative. The additional factor is that if separate suits were brought against such persons, common questions of law or fact would arise. The purpose of the Rule is to avoid a multiplicity of suits.

13. This Rule, to some extent, also deals with the joinder of causes of action inasmuch as when the plaintiff frames his suit, he impleads persons as defendants against whom he claims to have a cause of action. Joinder of causes of action has been provided for in Order 2 Rule 3 which provides as under:

"3. *Joinder of causes of action.*—(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit."

14. These two provisions, namely, Order 1 Rule 3 and Order 2 Rule 3 if read together indicate that the question of joinder of parties also involves the joinder of causes of action. The simple principle is that a person is made a party in a suit because there is a cause of action against him and when causes of action are joined, the parties are also joined.

15. Now, Respondent 1 in his plaint had pleaded that from his current account in a bank which was authorised to be operated by his father, namely, Respondent 2 also, an amount of Rs 7000 was lent by a cheque to the appellant. Since the money had reached the hands of the appellant, though not directly through Respondent 1 but via his father, he had a cause of action against both the defendants, namely, the appellant and Respondent 2 both of whom were, therefore, impleaded as defendants in the suit particularly as it

was one transaction in which both were involved. In this situation, therefore, if the suit was dismissed against one of them by the trial court, Respondent 1 had the right to file an appeal against the person against whom the suit was dismissed, notwithstanding that it was decreed against the other.

16. Learned counsel for the appellant next contended that the trial court was justified in recording a finding that it was a transaction which had taken place directly and personally between Respondent 2 and the appellant in which Respondent 1 had, at no stage, figured and, therefore, the suit was decreed only against Defendant (Respondent) 2 and not against the appellant. It is also contended that the trial court was justified in recording a finding that the case of "agency" was not established and the High Court was not justified in upsetting that finding. This contention too has no merit.

17. Admittedly Respondent 1 had an account in Central Bank of India Limited, Sambalpur Branch which his father, namely, Respondent 2 was authorised to operate. It is also an admitted fact that it was from this account that the amount was advanced to the appellant by Respondent 2. It has been given out in the statement of Respondent 2 that when the appellant had approached him for a loan of Rs 7000, he had explicitly told him that he had no money to lend whereupon the appellant had himself suggested to advance the loan from the account of Respondent 1 and it was on his suggestion that Respondent 2 issued the cheque to the appellant which the appellant, admittedly, encashed. This fact has not been controverted by the appellant who did not enter the witness-box to make a statement on oath denying the statement of Defendant (Respondent) 2 that it was at his instance that Respondent 2 had advanced the amount of Rs 7000 to the appellant by issuing a cheque on the account of Defendant (Respondent) 1. Having not entered into the witness-box and having not presented himself for cross-examination, an adverse presumption has to be drawn against him on the basis of the principles contained in Illustration (*g*) of Section 114 of the Evidence Act, 1872.

18. As early as in 1927, the Privy Council in *Sardar Gurbakhsh Singh* v. *Gurdial Singh*[1] took note of a practice prevalent in those days of not examining the parties as a witness in the case and leaving it to the other party to call that party so that the other party may be treated as the witness of the first party. Their Lordships of the Privy Council observed as under:

> "Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a manoeuvre under which counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's, own witness.
>
> This is thought to be clever, but it is a bad and degrading practice. Lord Atkinson dealt with the subject in *Lal Kunwar* v. *Chiranji Lal*[2]

1 AIR 1927 PC 230 : 32 CWN 119
2 ILR (1910) 32 All 104 : 37 IA 1 (PC)

calling it 'a vicious practice, unworthy of a high-toned or reputable system of advocacy'."

19. They further observed as under:

"But in any view her non-appearance as a witness, she being present in court, would be the strongest possible circumstance going to discredit the truth of her case."

20. Their Lordships also took note of the High Court finding which was to the following effect:

"It is true that she has not gone into the witness-box, but she made a full statement before Chaudhri Kesar Ram, and it does not seem likely that her evidence before the Subordinate Judge would have added materially to what she had said in the statement."

21. They observed:

"Their Lordships disapprove of such reasoning. The true object to be achieved by a court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination."

22. This decision has since been relied upon practically by all the High Courts. The Lahore High Court in *Kirpa Singh* v. *Ajaipal Singh*[3] observed as under:

"It is significant that while the plaintiffs put the defendant in the witness-box they themselves had not the courage to go into the witness-box. Plaintiffs were the best persons to give evidence as to the 'interest' possessed by them in the institution and their failure to go into the witness-box must in the circumstances go strongly against them."

23. This decision was also relied upon by the Bombay High Court in *Martand Pandharinath Chaudhari* v. *Radhabai Krishnarao Deshmukh*[4] which observed as under:

"It is the bounden duty of a party personally knowing the facts and circumstances, to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of his case."

24. The Lahore High Court in two other cases in 1934, namely, *Bishan Das* v. *Gurbakhsh Singh*[5] and *Puran Das Chela* v. *Kartar Singh*[6] took the same view.

25. A Division Bench of the Patna High Court in *Devji Shivji* v. *Karsandas Ramji*[7] relying upon the decision of the Privy Council in *Sardar*

3 AIR 1930 Lah 1 : ILR 11 Lah 142
4 AIR 1931 Bom 97 : 32 Bom LR 924
5 AIR 1934 Lah 63 (2) : 148 IC 45
6 AIR 1934 Lah 398 : 151 IC 32
7 AIR 1954 Pat 280

Gurbakhsh Singh v. *Gurdial Singh*[1] and the Madhya Pradesh High Court in *Gulla Kharagjit Carpenter* v. *Narsingh Nandkishore Rawat*[8] have also taken the same view. The Madhya Pradesh High Court also relied upon the following observation of the Calcutta High Court in *Pranballav Saha* v. *Tulsibala Dassi*[9]:

> "The very fact that the defendant neither came to the box herself nor called any witness to contradict evidence given on oath against her shows that these facts cannot be denied. What was prima facie against her became conclusive proof by her failure to deny."

26. The Allahabad High Court in *Arjun Singh* v. *Virendra Nath*[10] held:

> "The explanation of any admission or conduct on the part of a party must, if the party is alive and capable of giving evidence, come from him and the court would not imagine an explanation which a party himself has not chosen to give."

27. It was further observed:

> "If such a party abstains from entering the witness-box it must give rise to an inference adverse against him."

28. A Division Bench of the Punjab and Haryana High Court also in *Bhagwan Dass* v. *Bhishan Chand*[11] drew a presumption under Section 114 of the Evidence Act that if a party does not enter the witness-box, an adverse presumption has to be drawn against that party.

29. Applying the principles stated above to the instant case, it would be found that in the instant case also the appellant had abstained from the witness-box and had not made any statement on oath in support of his pleading set out in the written statement. An adverse inference has, therefore, to be drawn against him. Since it was specifically stated by Respondent 2 in his statement on oath that it was at the instance of the appellant that he had issued the cheque on the account of Respondent 1 in Central Bank of India Ltd., Sambalpur Branch and the appellant, admittedly, had encashed that cheque, an inference has to be drawn against the appellant that what he stated in the written statement was not correct. In these circumstances, the High Court was fully justified in decreeing the suit of Respondent 1 in its entirety and passing a decree against the appellant also.

30. For the reasons stated above, we find no merit in this appeal which is dismissed with costs.

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8 AIR 1970 MP 225 : 1970 MPLJ 586
9 AIR 1958 Cal 713 : 63 CWN 258
10 AIR 1971 All 29
11 AIR 1974 P&H 7

1927 SCC OnLine PC 70 : AIR 1927 PC 230 : (1927-28) 32 CWN 119 : (1927) 29 Bom LR 1392 : (1927) 53 Mad LJ 392

Reported in AIR Privy Council
(From Lahore)

BEFORE VISCOUNT DUNEDIN, LORDS SHAW, SINHA AND SIR JOHN WALLIS, JJ.

Sardar Gurbakhsh Singh ... Appellant;

Versus

Gurdial Singh and another ... Respondents.

Privy Council Appeal No. 112 of 1925

Decided on July 19, 1927

LORD SHAW, J.:— This is an appeal against a judgment and decree dated the 9th April 1924, of the High Court of Judicature at Lahore, which reversed the judgment and decree of the 1st December 1919, of the Subordinate Judge at Ludhiana.

2. Sardar Jawala Singh was a jaghirdar possessed of certain properties in the Ludhiana and Ferozepore Districts of the Punjab. He lived in the village of Bhikki Khatra, in the Ludhiana District.

3. Jawala died on the 19th August 1915, leaving two widows. The elder, Harnam Kuar, was childess. The younger, Bhagwan Kuar, had borne to him a daughter, who at the date of his death was ten years old. These constituted the household.

4. It is admitted that according to the law in operation in that part of the Punjab, if there had been a son in the household, he would have succeeded to the properties; but that, failing a son, and there being only a daughter, the estate would fall to a collateral male relative. That relative was a stepbrother named Gurbakhsh Singh, who is the present appellant. If, however, a posthumous son was born, then that

posthumous son would, of course, succeed, the household would be kept together, and Gurbakhsh, the step-brother, would have no rights.

5. The story of this litigation, and of various other proceedings, partly legal and partly administrative, which preceded it, hangs upon the question whether such a posthumous son ever was born. It appears clear that a possible attempt to procure a spurious son was in the minds of all parties from the moment of Jawala's death, or even before that. He died on the 19th August 1915.

6. The appellant maintains that no such posthumous son was born. Almost immediately after the death he proceeded to raise the question. Simultaneously, or almost simultaneously, Bhagwan, the younger widow, disappeared.

7. Every day was of importance for the defeat of a plot, if plot there was, and for the immediate discovery of the truth. There seems to be little doubt that dissatisfaction arose as to the delay of the patwari of the village in taking action. It is a fact that the death having occurred on the 19th August, the patwari only entered the fact in his diary so late as the 29th August.

8. In the mutation register, which purports to be dated the 23rd August 1915, but which was only in reality completed on the 29th, there is in the last column the following entry:

To-day, Bachittar Singh, a co-sharer of mauza Attari, stated:

Jowala Singh, a co-sharer and jaghirdar of mauza Attari, died sonless on the 19th August 1915. Msts. Harnam Kaur and Bhagwan Kaur his widows, are entitled to succeed to the property left by him in equal shares. A report regarding the death with regard to the jaghir has been separately submitted to the tahsil. Hence the mutation entry relating to the khata is submitted.

He also states that Mt. Bhagwan Kaur is pregnant.

Dated the 23rd August 1915.

(Signed) BACHITTAR SINGH,
Declarant.

9. There remains in the case very considerable doubt as to when the words, "He (Bachittar Singh) also states that Mt. Bhagwan Kaur is pregnant," were entered. As will be shown, Bachittar Singh, the alleged informant, was not examined as a witness.

10. On the 31st August, Gurbakhsh, by a petition to the mutation officer, claimed that the property was his. By this time the parties were undoubtedly at arm's length. Gurbakhsh, the step-brother, appellant had applied to the Collector; the application has not been found, but at least by the 14th September an application was lodged which frankly made the charge of the attempt to procure a spurious son.

In our family there is a custom that when a number died sonless his collaterals get his jaghir, and his widows are entitled to gat maintenance only. They support themselves with the income of the ancestral land. The village Patwari has colluded with his (deceased's) widow. He made a false and fictitious report in the mutation register to the effect that Mt. Bhagwan Kaur is pregnant, whereas she is not at all pregnant. Our rights are prejudiced owing to collusion with the patwari. Mt. Bhagwan Kuar (she was the second and much the younger of the two widows) may be got medically examined by a doctor so that she may not procure a spurious son. If she procured a son somewhere or is trying to procure a son, we do not accept him. It is, therefore, prayed that local enquiry may be got made by a tahsildar and relief granted.

11. This challenge should, as was meant, have brought matters to a head. The request made was reasonable. The condition of Bhagwan was the critical and conclusive fact in the case. Without any doubt whatsoever she should have appeared, if her case was true; her condition of advanced pregnancy would have been plainly enough established in the course of that enquiry. She did not so appear. The proceedings were delayed. The Deputy Commissioner, on the 13th October, demanded to know what had become of the matter.

12. Meantime events ripened, or were alleged by the elder widow to have ripened, by the alleged birth of a son to Bhagwan in a remote village of an adjoining native state.

13. Gurbakhsh at once took action, and on the 21st October, another application was made to the Collector, which narrated as follows:

After his death Mt. Bhagwan Kaur, in order to prejudice my rights, gave out, in consultation with the village patwari, that she was pregnant, whereas she was not at all pregnant. I filed applications in your Court praying that enquiry may be got made at the spot or the woman may be got medically examined, but up-till now no attention has been paid to those applications.

14. Then follows the second stage of the case:

But a short time ago Mt. Harnam Kaur (that is, the elder widow) gave out that a son was born, nor is it known where was Mt. Bhagwan Kaur, nor yet did she tell on what date and in which village the son was born. This is all fraud.

15. This is the one side, namely, the stepbrother's allegations. It is, however, interesting to know what was the admitted attitude of the widows themselves upon the important subject of the possibility of a spurious son.

16. In the application before the Collector, Mt. Harnam Kaur, the elder widow, made the following statement on the 25th October, 1915:

The name of my co-wife is Mt. Bhagwaa Kuar. Our husband died about two months ago.

17. and then there follow these words:

About a month after his death, I sent her to my parents' house for the reason that she might, perhaps, give birth to a daughter and might go to her parents' house and secure a spurions son in order to prejudice my rights.

18. This is a curious statement, but in some respects it has obvious importance. It shows that the departure from the family home was deliberate. Next, the disappearance was in the mind of this co-widow connected with the birth or the production of a son. Further, the elder widow was to manage the affair of the residence of the younger.

19. This deliberate design was followed by the departure of the second widow, who went off in the first place to her own parents' house. This was natural and usual: but she was only there a day or two when she was taken therefrom by a nephew of the first widow, and immediately thereafter to Patiala, outside British territory and in a native state. Not content with this, she was again removed by him from Patiala to his own residence at a place called Lakha Singhwala, in Nabha, also a native state. This nephew states that his aunt Harnam wished him to take Bhagwan from Patiala to Lakha Singhwala in order to avoid the apprehended change from a girl to a boy.

20. The facts of these changes of residence are undoubted; but their Lordships do not believe a word of the story as to the object of the journey, or as to the absentee widow having borne a son.

21. The Board does not go into the details further than to say that it is satisfied with the interpretation put upon them by the Subordinate Judge. They think it true to say firstly, that the suggestion of an apprehended change from a girl to a boy is without any foundation whatsoever. Secondly, the deliberate removal from her home and even from the home of her own parents to these two different places in a foreign state was effected with the object of destroying traces of her whereabouts, of making it practically impassible compulsorily to secure her medical examination, of making it possible to lay a foundation for the fraud of obtaining a spurious son and of maintaining thereafter that in this remote place she herself had given birth to it. Their Lordships, in short, agree, on the whole of that part of the case, with the views of the Subordinate Judge.

22. One or two points, however, may be stated in addition. It was argued that the statement as to pregnancy attributed to Bachittar Singh was interpolated by the patwari in the original record of the death of Jawala Singh. The challenge was made before the proceedings, either before the Collector or in this suit, were instituted, and it is striking and suspicious that Bachittar Singh, to whom this statement was attributed, was not called as a witness to clear up the point, or to state upon what information his alleged statement was made.

23. There may be vary considerable doubt as to whether the statements made before the Collector, which truly did not form a part of the present *lis*, should have

been admitted in these civil proceedings. The thing, however, was done. As already mentioned, the appellant took action almost at once to have the truth as to Bhagwan's condition investigated. She, however, disappeared, and it was practically impossible for a private litigant to fetch her back, or possibly even to ascertain her whereabouts. The investigation proceeded in the Collector's tribunal, and on the 12th November the revenue assistants reported to the Deputy Commissioner that the boy was fictitious.

24. It may be remembered, however, that there being a report circulated that Harnam was certain that a son was born, Gurbakhsh instantly took action. By another application of the 21st October he requested that some high officer might be specially sent to the spot and a thorough inquiry made so that the true facts might come to light. The authorities could not use force beyond the British frontier, and in the course of the further proceedings on the 2nd February 1916 the following order was pronounced by the presiding officer of the revenue Court:

Mt. Bhagwan Kaur is keeping out of the way and cannot be found. Sardarni Harnam Kaur be summoned to Ludhiana for the 21st February 1916. Her whereabouts be inquired from Sardar Bahadur Sardar Gajjan Singh and Mr. Sarab Kishen. They state that they do not know where the Sardarni Sahiba is, nor did any mukhtar of her come to them again.

25. A last opportunity was given, but Bhagwan did not appear until the 3rd March, accompanied by a boy to which she maintained she had given birth in the previous October.

26. It appears clear to their lordships that she was purposely keeping out of the way, not only from August 1915, when she disappeared, but from October, when her alleged son was born. This further delay from October to March, about five months, was also deliberate. It was for the purpose of preventing the possibility of any medical examination of her after such a long period throwing light upon the question of the birth of a child by her in October. The Assistant Collector, however, heard her, and he was in no way moved by her evidence. "The statement," says he, "of Mt. Bhagwan Kaur has been taken down. Even after hearing her I see no reason to alter my first view."

27. Further proceedings took place in the revenue Courts, and then this civil suit followed. As already indicated, their Lordships see no reason to doubt either the great carefulness of the investigation made by the Subordinate Judge, or the soundness of the conclusions at which he arrived. The disappearance of Bhagwan, and the manifest approval of the co-widow, the refusal by her to come to the Court to submit to a medical examination, or even to remain for a reasonable period in her own old home, but in preference to go outside the jurisdiction of the Court and into a native state, would in any view have thrown the greatest doubt upon the story of her having given birth to a son as alleged; and then the second feature of the case—her continued absence for a long period after the alleged birth—the whole of this appears to their Lordships to be but part of a transaction which was simply a nefarious plot.

28. It must be stated that in taking a different view the High Court went very far, as, for instance, when they say: "We do not find any proof that Bhagwan Kaur did, in fact, shirk examination."

29. Their lordships think it unnecessary to repeat the numerous details of the story, but, as it involves a general and important question of procedure and practice, they think it expedient to make the following reference to what occurred at the trial of this civil suit. At the Bar of the Board it was admitted by the respondents that she, Bhagwan, had been present in Court when the evidence was being taken, and that she did not go into the witness box, and was not examined as a witness on her own or her alleged, son's behalf.

30. Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a manoeuvre under which counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's, own witness.

31. This is thought to be clever, but it is a bad and degrading practice. Lord Atkinson dealt with the subject in *Lal Kunwar* v. *Chiranji Lal* [1], calling it "a vicious practice, unworthy of a high-toned or reputable system of advocacy."

32. The present case, however, is a pointed instance of the evils which flow from such a practice. *Bhagwan's case* had been the subject of prolonged investigation in the revenue Courts, and had been pronounced by them a bogus case. She had appeared and told a story there, and it had not been believed. She was, however, also present in this civil suit, the issue in which was the legitimacy of the boy that she was putting forward as the jaghir of the estate. Her non-appearance in answer to the challenge, that is to say, to disclose the actual fact as to her condition shortly after her husband Jawala's death, her disappearance into a foreign state, and all the other circumstances mentioned, had been established. If her story were, notwithstanding all this, a true story, it was her bounden duty to give evidence in the suit, telling the whole facts in support of her and her alleged son's case; but she did not. If under advice she did not do so, that advice was of the worst description, and worthy of the animadversion above made. But in any view her non-appearance as a witness, she being present in

Court, would be the strongest possible circumstance going to discredit the truth of her case.

33. How did the High Court deal with this? They say:

> It is true that she has not gone into the witness box, but she made a full statement before Chaudhri Kesar Ram, and it does not seem likely that her evidence before the Subordinate Judge would have added materially to what she had said in the statement.

34. Their lordships disapprove of such reasoning. The true object to be achieved by a Court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination.

35. To say that she would likely have repeated what she had already said omits the entire force of the consideration as to cross-examination, and their lordships cannot doubt that if this part of the case had been treated from the point of view consistent

with sound practice, as just stated, the High Court could never have reached the conclusion come to.

36. Their lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of the Subordinate Judge restored with costs here and below.

Solicitors for Appellant — *H.S.L. Polak*.

Solicitors for Respondents — *T.L. Wilson & Co.*

D.D.

Appeal allowed.

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[1] [1910] 32 All. 104 : 5 I.C. 549 : 37 I.A. 1 (P.C).

1958 SCC OnLine Cal 103 : (1958-59) 63 CWN 258 : AIR 1958 Cal 713

Calcutta High Court
[Appeal From Original Civil]
(BEFORE P.B. MUKHARJI AND BACHAWAT, JJ.)

Pranballav Saha and anr. ... Appellants;
Versus
Tulshi Bala Dassi and anr. ... Respondents.
AFOD No. 96 of 1955
Decided on May 16, 1958

The Judgment of the Court was as follows:

P.B. MUKHARJI, J.:— This is an appeal from the judgment and decree dismissing the plaintiffs' suit for possession with costs. The point in the appeal raises the incidents and consequence of letting for immoral purpose. The moral and social perplexities of prostitution are not the concern of this court. Its legal perplexities demand this court's careful and anxious consideration.

2. The plaintiffs are the executors and trustees of the Will dated the 22nd June, 1946 of one Ranubala Dassi who died on the 23rd June, 1946 leaving the premises in suit No. 9/2 Sonagachi Lane, Calcutta as part of her assets. The plaintiffs executors obtained probate of the Will from this Court on the 15th August, 1946. The plaint alleges

that the premises were lei out by Ranubala Dassi to the defendant for running a brothel, and that the defendant is a woman of the town who has been using the said premises as a brothel and for carrying on prostitution along with other inmates of the said house. A case of disorderliness, annoyance and nuisance is also made in the plaint. Within a month of the grant of the probate the plaintiffs served a notice on the defendant to vacate the premises on the ground that she was a prostitute and carrying on the business of prostitution. The notice called for delivery of possession forthwith. The case of the plaintiff executors and trustees in evidence is that they want the said premises to administer the trust imposed by the Will of setting up there a charitable dispensary under the Will. They are faced with the proverbial defence that a property let for immoral purpose is irrecoverable in a court of law. The defendant filed a written statement denying the charge of prostitution and of running a brothel and pleading that she resides with her family and children. The defendant's further case is that after Ranubala's death the plaintiffs accepted the defendant as their tenant on the ground that two notices were served on her informing her about the grant of probate and that she had been depositing rent with the Rent Controller since July, 1946.

3. Neither the defendant nor any of her alleged family or children nor indeed any witness on her behalf appeared to give any evidence at the trial. On this disputed question of fact the defendant took the dangerous course of allowing the entire evidence against her to go unchallenged and uncontradicted and was content merely to rely on the alleged weakness of the evidence of the plaintiffs' witnesses to say that the plaintiffs' case had not been proved.

4. On plaintiffs' behalf (1) the plain tiff Saha, an executor and trustee under the Will, (2) one Khudiram, a tenant shop-keeper on a part of the very same premises, (3) one Amiya Nath Banerjee, an employee of the Eastern Rail way and a resident of the locality ever since his boyhood and an independent witness and (4) lastly, testatrix Ranu bala's daughter, Ratan Bala Dassi gave evidence.

5. The learned trial Judge found that the plaintiffs' case for letting for immoral purpose was not proved and secondly, that even if the immoral letting was taken as proved, the plaintiffs could not recover possession in the action following mainly the well-known decisions in *Ayerst* v. *Jenkins* (1) Law Reports 16 Equity, 275 and *Deivanayaga Padayachi* v. *Muthu Reddi* (2) I.L.R. 44 Madras, 329, *Kali Kumari Baisnabi* v. *Mono Mohini Baishnabi* (3) 40 C.W.N. 402 and *Scott* v. *Brown* (4) (1892) 2 Q.B. 724.

6. The learned trial Judge extended the doctrine of those cases not only to the original parties guilty of immorality but also to the present trustees and executors under the Will on the strength of two English decisions, one in *re Mapleback, Exparte Caldecott* (5) Law Reports 4 Ch. Div. 150, and the other in *Farmers' Mart Ltd.* v. *Milne* (6) 1915 A.C. 106, even though the learned trial Judge found against the defendant by rightly holding that the plaintiffs did not accept her as a tenant on the basis of the solitary instance of a dishonoured cheque.

7. The appellants challenge the finding of fact of the learned trial Judge that letting for immoral purpose has not been proved. They contend that the evidence is overwhelming and in fact all one way showing conclusively that the premises were let for the immoral purpose of carrying on prostitution and running a brothel. The trial Judge in dealing with the evidence on this point disregarded the most compelling facts and the context of surrounding circumstances. He failed to give proper weight to such outstanding considerations as (1) that Ranubala herself was a woman of the town, (2) that the defendant was also a woman of the town and a prostitute, (8) that the general reputation of the particular house as one of ill fame and a brothel and finally (4) that Sonagachi where the premises are situate is the notorious quarters of the City where it is said in evidence that all the houses in the street are brothels. They are all in my opinion relevant and compelling facts and cogent circumstances leading to the only possible conclusion that the letting was for immoral purposes of prostitution and for keeping a brothel.

8. Apart from the disregard of such weighty considerations which vitiates the learned trial Judge's finding of fact on the point, his reasons for rejecting evidence of material witnesses do not also commend themselves to us. It was an error for the learned trial Judge to say: "The evidence of Pranballav Saha on this point really does not touch the point at all." Now Pranballav Saha is a medical practitioner and was Ranubala's family physician. The evidence of a family physician on a point such as this which turns on the reputation of the locality and of the persons concerned is of great

weight and cannot be lightly dismissed. No doubt it is true that he visited this house after he became a trustee in August, 1946 and therefore he was not a witness proving that the letting in 1942 was for immoral purpose. But the learned trial Judge failed to see the importance of his evidence in proving (1) the reputation of the locality, (2) Ranubala to be a woman of the town, (3) defendant Tulsibala to be a woman of the town, (4) the present user for immoral purpose and (5) trustees' reluctance to permit such user of a part of the trust estate which this court has asked them to administer. His evidence therefore cannot be brushed aside as "not touching the point at all."

9. The evidence of Khudiram and Amiya Nath Banerjee is described by the learned trial Judge as 'anything but satisfactory'. Here again the learned Judge's rejection of their evidence is, in our judgment, wholly unjustified.

10. Khudiram is the tenant of a shop room in the very same premises. 9/2 Sonagachi Lane and has been in occupation there for about 20 or 25 years which period takes it beyond even the time when Ranubala let out the premises to the defendant on the 28th May, 1942. He distinctly states that the house is a brothel and a 'Beshyalaya', and that the defendant runs a brothel and that he has seen many women of the town living there (q. 13). Knowing the inmates of a brothel by name is not necessarily the only qualification to speak on the fact whether a particular house is a brothel or not. The evidence of reputation of a house by a person who resides in a part of the very same house as a shop-keeper saying what type of people visits such house is, in my opinion, not only admissible

but cogent and relevant. His incapacity to name the prostitutes or their paramours does not discredit the testimony of such a witness. The evidence of reputation is enough in a case such as this. It is not necessary in my view that this shop-keeper had to be inside the brothel himself in order to say that it was a brothel. Evidence should be assessed fairly and as a whole and it is always risky to tear a particular question out of its context and to appraise the whole evidence by such solitary and singular tests.

11. No reason whatever is given by the learned trial Judge why he considered the evidence of Amiya Nath Banerjee unsatisfactory and in what way. He was an independent witness, unconnected with the parties or with the premises in question. He lived in the vicinity of 9/2, Sonagachi Lane which was about 5 to 7 minutes walk from his house and he had grown up in that vicinity ever since his boyhood. He was a responsible person in the employment of the Government under the Eastern Railway. A person such as this is entitled to speak of the reputation of the premises, 9/2, Sonagachi Lane and that it is reputed in the locality as quarters for prostitution and brothel-keeping. The importance of the evidence of an impartial and nonpartisan witness like Amiya Nath Banerjee was missed in the judgment by apparently treating it as evidence only on the point of one single visit when he actually went inside the house. The importance of this evidence lies in the fact that it was the evidence of reputation under s. 34(4) of the Evidence Act coming from a man of the locality and its vicinity who spoke of this house and locality covering a time which went back to the period not only when it was let but even prior thereto.

12. Lastly, Ratanbala, the daughter of Ranubala gave evidence on the point. Her evidence is that the letting took place in her presence and the defendant told her mother that she was taking the house for the purpose of running a brothel. The learned Judge has not accepted her evidence. She being an interested witness I shall assume that the learned Judge's rejection of her testimony was right, although it

seems to be based only on the discrepancy on her evidence to reconcile the sum of Rs. 65/- as the settled rent at the time of letting with a rent receipt of Rs. 50/- which was paid to her mother as an advance rent for one month. But even rejecting completely Ratanbala's whole evidence and quite apart from and independently of it, the other evidence of other witnesses is overwhelmingly in favour of holding that the letting was for immoral purpose.

13. Before leaving this question of fact it is necessary to emphasize the defendant's absence from the witness box and the effect of such absence on the issue of fact. In fact not only the defendant but no witness on her behalf gave any evidence at the trial. The learned trial Judge says on this point:—

> "The counsel for the plaintiff made strong comment on the absence of the defendant from the witness box and contended that because of such absence I ought to presume that she kept herself away from the witness box in order to prevent the truth coming out of her own lips. Before the court can be called upon to make

any presumption of the kind it is for the plaintiffs to satisfy the court prima facie that they have made out a case."

14. The question then is what is a prima facie case. All the evidence of reputation from family physician, executors, trustees, local residents is there. It is surely prima facie evidence. The distinct charge in the evidence from the witness box is (1) that the defendant is a prostitute and carries on prostitution and (2) that she took the house on rent to run a brothel there. That is the prima facie case. She does not come herself nor calls any witness to deny these serious allegations of fact. Whether the Judge should believe one witness or another or one case or another in such a context of facts is not then a question of prima facie case. It is then a question of the weight of evidence and its credibility. Prima facie case is not the conclusive case and the learned Judge mistook the one for the other in his judgment. The very fact that the defendant neither came to the box herself nor called any witness to contradict evidence given on oath against her shows that these facts cannot be denied. What was prima facie against her became conclusive proof by her failure to deny.

15. For these reasons, on the evidence as a whole and on the evidence of individual witnesses, I set aside the learned Judge's finding of fact on the issue whether the premises was let out to the defendant for the purpose of running a brothel as alleged in paragraph 6 of the plaint. I hold that the premises in suit were let out to defendant for the purpose of running a brothel as alleged in paragraph 6 of the plaint and I answer the issue in the affirmative.

16. The question then is one of law. In order to understand the implications of the question of law it is necessary to state clearly the question itself in the facts of this case. The question is whether this court should grant the relief sought by the plaintiffs executors and trustees of the Will of the owner of the house who originally let out the property for the immoral purpose of running a brothel.

17. The danger to avoid in discussing and deciding this point of law canvassed in the appeal is the uncritical application of legal and equitable maxims without examining their rationale or their roots. My study of ancient and modern decisions shows the stranglehold of these maxims and ancient procedure disregarding the actual statutory provisions ruling and operating on this point in India. It will be evident when I come to discuss the different cases and authorities cited on this point. Before I do so

I think it is Letter to state my decision in law as I understand it on this point.

18. The crucial point is that section 6(h)(2) of the Transfer of Property Act lays down that—

> "no transfer can be made for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act."

19. Reference to section 23 of the Indian Contract Act shows that—

> "the consideration or object of an agreement is lawful unless it is forbidden by law; or is of such

a nature, that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy."

> "In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

20. The reference in section 6(h)(2) of the Transfer of Property Act to the Indian Contract Act has led to a most unfortunate confusion between property and contract. We have uncritically adopted in India decisions on contract and have applied them to property without marking the difference between the two in the respective Indian Statutes. The reference to the Contract Act in the Transfer of Property Act is for the purpose of determining the unlawful object or consideration. Whether the abject or consideration is unlawful, the test is to be found in section 23 of the Contract Act. The effect in the Contract Act by itself under section 23 is that the agreement is void. In section 6(h) (2) the interdict is "no transfer can be made." In other words, an apparent and attempted transfer for an object or consideration which is unlawful is no transfer in law. It does not succeed in transferring any property. Section (6) of the Transfer of Property Act deals with property which can not be transferred.

21. The effect, therefore, of section 6(h) (2) of the Transfer of Property Act is, when applied to the facts of this case relating to immorality, that no transfer of this property has taken place in law because the object or consideration is immoral. Therefore, it follows from the plain construction of the statute that a transfer of property for immoral consideration or purpose is no transfer in law and it does not succeed in transferring the property to such a transferee. No estate passes under such an attempt at transfer. The point then is that if a transferor transfers the property for the immoral object of prostitution the law regards it as no transfer. In other words, if a person lets out a house for the purpose of prostitution, the apparent lessee is not a lessee at all in law and the lessor has not parted with the leasehold interest in the estate. Where then does the property remain? It ought in plain commonsense and on obvious principles of conveyancing, to remain where it was, namely, with the owner. When the law says in s. 6 (h) (2) of the Transfer of Property Act that no transfer can be made for an immoral object or immoral consideration, the owner cannot divest himself of ownership by disregarding the law.

22. The reason why ordinarily a person who has himself been a party to the immoral purpose or consideration is not allowed relief in Court is not because the transfer for immoral purpose is good, but because a person participating in immorality is not assisted by the court to take the help of law to enforce his rights. It is a bar on his right of recovery with the aid of court and not a legal sanction to transfer in breach of statute. It has been put, explained, expounded and formulated in diverse ways. Behind the numerous justifications for this rule the one underlying recurring reason is

not that what the law says to be void is not

void, but that the court does not allow its own procedure to be used by one who has himself been a party to the immoral purpose or consideration.

23. An analysis of numerous cases on the point shows that the court has justified its attitude either (1) on the ground of public policy, or (2) that the courts do not aid a party to an illegal undertaking, or (3) that the law does not permit a party deliberately to put his property out of his control for an immoral purpose and then seek intervention of the court to regain the same after the immoral purpose is executed or accomplished, or (4) where both parties are equally guilty law leaves the parties where it finds them and keeps itself comfortably aloof from the obligation to determine the rights as between the guilty parties, or (5) that a party who claims an equitable relief must come into court with clean hands, or (6) that the party could not be allowed to blow hot and cold or (7) to let the mischief lie where it exists. All these justifications appeal to be inspired by a variety of such miscellaneous maxims such as:— (1) Ex dolo malo non or itur actio, (2) Ex turpis causa potior est conditio defendentis (3) Nullus commodium capero potest de injuria sua propria and (4) Allegans contraria non est andiendus. Behind all these various justifications the courts appear to have conceived discovered and followed a ground of public policy of their own. A not unreasonable judicial sanctimoniousness helped them to reach the conclusion that it is against public policy that a party to the immoral consideration or object should not be aided by the court. But it is a one-eyed policy which does see that this attitude can do more harm in perpetuating and conniving at illegality and its continuance than the doubtful good that the court thinks it does by withholding its assistance.

24. The dominating influence which produces this judicial attitude is of public policy by whatever name it is called. A public policy which defeats the statutory provision or does not correct the breach of a statutory mandate is always dangerous to use and apply. But if on the very same ground of public policy it is necessary to relieve a party, then the insistence on the procedural rule of denying a person in pari delicto or in particeps criminis the right of relief will be not furtherance of public policy, but its defeat. To deny a person, who in this case is not even a party to the immoral contract, the right of relief in the instant appeal, is to perpetuate for ever the prostitution and a brothel in the same premises. The court in such an event as this is faced with a choice of evils and should in my view be guided to choose the lesser evil I shall assume that both are good grounds of public policy. I shall assume that ordinarily public policy demands that this court should not allow itself and its procedure to be used to aid the grant of relief to a claimant whom it finds to be a person in pari delicto or particips criminis. I shall also assume within the meaning of section 23 of the Contract Act that every court of law in this country will regard prostitution and brothel-keeping as immoral and shall not wait to discuss whether prostitution or brothels can be justified by the new fangled ethics of the modern society or by any Shavian enthusiast for 'Mrs. Warren's Profession'. Haying made these two assumptions the question is, which consideration should be allowed to prevail. To follow the

former public policy ground is to perpetuate prostitution and brothel keeping. A decision to deny relief will be to hold that this property is for ever irrecoverable, and

that the moral evil of prostitution or keeping a brothel is for ever irremediable. I consider it to be the duty of the court in case of conflict of different grounds of public policy such as this to choose the lesser evil and discourage the greater evil. The lesser evil is the disregard of the purely procedural convention which is not sanctioned by Statute or any substantive law that I know but is evolved by judicial conscience of not helping an impure party. The greater evil in this case will be perpetuation of the brothel and the prostitution. I shall therefore accord relief to the claimant in such a case and depart from the procedural convention of courts tragically misconceived very often as an inflexible rule of law and obey the still higher rule of public policy of not permitting not only a void and illegal act forbidden and prohibited by Statute but also an immoral act under section 6(h)(2) of the Transfer of Property Act read with section 23 of the Indian Contract Act-Consequently, the very dictates of public policy which led the courts to invent their self-imposed bar against an immoral party demand that the bar should be lifted so that greater interest of a larger public policy is served.

25. The doctrine that the court does not grant relief to a person who is in pari delicto or in particips criminis has, in my view, been extended beyond its rational and legitimate limits. Delict or crime is ordinarily personal and not titular. But this procedural handicap which the courts have evolved has been applied indiscriminately to innocent persons other than those in pari delicto or in particips criminis. To extend that doctrine to such persons as innocent trustees and executors under a Will to whom this court has granted probate is in my view an unintelligible and unjustified extension of that principle whatever its merits may be as between actual guilty parties. The courts refused relief originally as personal disqualification for the guilty claimant. I see no principle or reason which justifies the courts to visit this personal disqualification on an innocent party who did not participate in the immorality. Application of the doctrine of in pari delicto or in particips criminis to the case of innocent executors and trustees under a Will of which this court has granted probate and whom the court by its solemn orders asked to administer the estate under the Will and to hold that they should not be permitted to bring to the notice of this very same court a transfer probihited by the Statute of this country and that relating to a party of the estate which this court has made them responsible for administering according to law is wholly indefensible and unjust. I have no hesitation in holding that the plaintiff executors and trustees here are not in pari delicto or in particips criminis, either literally or metaphorically or legally and they are not so either by any proprietary devolution because s. 6(h)(2) of the Transfer of Property Act says no transfer of property at all can take place for immoral purpose. It has been found by the learned trial Judge that the plaintiffs did not accept the defendant as a tenant after the death of Ranubala which was the second issue before the trial court and on which issue, I uphold the learned Judge's finding of fact. In such a case, therefore, it is all the more

impossible in fact or law to treat the trustees and executors as in pari delicto or in particips criminis.

26. Having stated my view of the law on the point I shall now proceed to a discussion of the cases and authorities cited at the Bar.

27. Most of these decisions trace their descent from *Ayerst* v. *Jenkins* (1), L.R. 16 Equity, 275. Lord Selborne came to the conclusion in that case that a Court of Equity would not, at the instance of a settlor or his legal personal representative, adversely set aside a settlement by which the settlor conferred on a stranger the absolute

beneficial interest in property legally vested in trustees, although such settlement might have been made for an illegal consideration not appearing on the face of the instrument. In that case the settlement was made in contemplation of a co-habitation under colour of a ceremony of marriage known to both parties to be invalid because the marriage between a widower and his deceased wife's sister was prohibited by an Act of Parliament and was held to be contrary to public policy. It was held by Lord Selborne that the suit could not be maintained. Many points distinguish this case from the present case before us. First, there is no difference between the Court of Equity and a Court of Law in India, nor does the Indian law make any difference between equitable interest and the legal interest; secondly, the suit in enquity in *Ayerst* v. *Jenkins* (1) was brought at the desire of persons beneficially interested in an estate against the surviving trustees of the settlor, and was therefore a case of devolution of proprietary interest; thirdly, the relief in *Ayerst* v. *Jenkins* (1) (supra) was sought by the representative, not merely of a particips criminis, but of a voluntary and sole donor, and also against a completed transfer of specific chattels, by which the legal estate in those chattels was absolutely vested in trustees; fourthly, in commenting on the case of *Wootton* v. *Wootton* dealing with mutual settlement made on the occasion of a fictitious marriage from which both parties desired, or were at least willing to be relieved, and where it was said that the door of this court should not be closed against persons repenting of such an unlawful connection, on the ground that being desirous of extricating themselves from fetters which, if relief were refused, might practically bind them to it, Lord Selborne expressly observed that it was consistent with all sound principle, and with all authority, to recognise the importance of the distinction between a completed voluntary gift, valid and irrevocable in law, as was the case in *Ayerst* v. *Jenkins* (1) of transfer of shares to the trustees and a bond or covenant for an illegal consideration, which has no effect whatever in law. This major distinction appears insufficiently emphasised and appreciated in many of the Indian decisions in the past. Lord Selborne in *Ayerst* v. *Jenkins* (1) mentions another distinction between executed and executory contracts, referring to the well-known decision of the Master of Rolls in *Whaley* v. *Norton* (7) which His Lordship quotes as an authority for the proposition that "this court would extend relief as to things executory, which, if done, it may be, might stand."

28. The mythology that was slowly and in perceptibly growing in Indian

case-law as an unqualified charter for denying relief in a court to an immoral party was first exploded by Sir S. Subrahmania Ayyar, Acting Chief Justice and Benson, J. in *Thasi Muthukannu* v. *Shunmugavalu Pillai* (8) reported in I.L.R. 28 Mad. 413 at page 418 where it was said that "Where the transaction, though completed, was intended to be for consideration, it can be impeached if the consideration is immoral, and it makes no difference whether the transaction is executed or executory." That great and erudite Judge, Sir Subrahmania Ayyar also drew a significant distinction for not applying the much misused doctrine of 'pari delicto' on the ground of the plaintiff's extreme youth and by holding that the youngman of 20 in that case was led into evil ways at the instance of those persons mentioned in the judgment. If that could exclude a man from the rigours of the doctrine of 'pari delicto' as in fact he was and he could be exonerated, how very much more it would be in the case which had nothing to do with the delict such as the present executors and trustees in this appeal. Sir Subrahmania Ayyar was very clear in indicating at page 418 of the report of his judgment.

"And *Wootton* v. *Wootton* referred to and distinguished by Lord Selborne in

Ayerst v. *Jenkins* (1) is a decisive instance against the Court laying down broadly that relief will never be given to a plaintiff in pari delicto in cases of completed transactions having for their consideration future illicit cohabitation."

29. On behalf of the respondents one of the main authorities relied upon is *Deivanayaga Padayachi* v. *Muthu Reddi*, (2) I.L.R. 44 Mad. 328. The head note of the case begins by stating that the well established rule of equity is that a person who has transferred a property to another for an illegal or immoral purpose cannot get it annulled if the intended purpose has been carried out and then saying that section 6 clause (h) of the Transfer of Property Act has not the effect of modifying it. That case concerns a settlement made with the object and consideration of the donee to cohabit with the settlor. Sir Abdur Rahim, J. delivering the judgment in that case followed the decision of *Ayerst* v. *Jenkins* (1). In discussing the argument how far section 6(h)(2) of the Amended Transfer of Property Act made a difference in the law in this country from the English law on the point, the learned Judge said at page 332:—

"That section says that 'no transfer can be made for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act.' The argument based on this clause is that the transfer for such an object or consideration is ipso facto void and therefore the transferor can come to court and ask its assistance in getting back the property. I do not think that such a far-reaching effect as the annulling of an established rule of law as laid down in *Ayerst* v. *Jenkins* (1) and followed consistently in the Indian courts could have been intended by this clause. It may be pointed out here that so far as the amendment goes that is the changing of the words 'illegal purpose' into 'unlawful object' its sole object was to amend the law on a minor point with respect to

an actionable claim. It would have been far from the object of the legislature to think of modifying the well-established rules of equity as propounded in *Ayerst* v. *Jenkins* (1) by an indirect amendment of this nature. However that may be, the words of this clause do not necessarily bear out the extreme contention of the appellant. The clause does not lay down in what classes of cases the court will or will not assist a person particips criminis. All that it says is that a transfer for an unlawful consideration canned be made. The language is certainly not very happy. But all that was intended was that the court will not enforce a transfer which would have the effect of carrying out its unlawful object. That is quite consistent with the well-established doctrine of law already referred to."

30. With great humility and respect to the learned Judge I find it a little difficult to appreciate the process of reasoning leading to the conclusion arrived at in the judgment. I shall not pause here to discuss whether the procedural handicap for a person in particips criminis barrng relief in court is a rule of law or a rule of procedure. If the law says that a transfer cannot be made, then every court of law. I think, should give effect to it and not to do so would be to violate the statute and its declared policy. If it is going to exclude persons on the ground of being particips criminis or pari delicto then the delict or the crime indicating the nature of public policy in the particular facts of the case must be carefully investigated and borne in mind. For if a rule in equity of English courts which we are supposed to inherit hare is to be applied, then in law equitable principles or the principles of 'equity and good conscience' also should be applied. If it is a rule of equity that an immoral person as a plaintiff cannot succeed in court, then it is equally a rule of equity and good conscience to see that all courts in denying relief do not encourage prostitution and brothel-keeping which would

be more against public policy.

31. In fact discussing this aspect of the case under estoppel *Taylor on Evidence*, 12th Edition, Vol. I, Art. 93 at page 89 says:

> "Indeed, the better opinion seems to be, that where both parties to an indenture either know, or have the means of knowing, that it was executed for an immoral purpose, or in contravention of a statute, or of public policy, neither of them will be estopped from proving those facts which render the instrument void ab initio for although a party will thus, in certain cases, be enabled to take advantage of his own wrong, yet this evil is of a trifling nature in comparison with the flagrant evasion of the law that would result from; the adoption of an opposite rule."

32. This is supported by the decision in *Banyon* v. *Nettlefold* (9) 20 L.J. Chan. 186, 187. I find that Taylor's passage occurs unacknowledged in the decision of Sir Ashutosh Mukherjee, J. In *Raghupati Chatterjee* v. *Nrishingha Hori Das* (10) reported in A.I.R. (1923) Cal 90 at page 94, —a decision which has also been relied on by the respondents.

33. Then again, I find it difficult to follow the reasoning in *Muthu Reddi's case*where it is said that the object of changing the words 'illegal purpose' into 'unlawful object' was to amend the law only on a minor point with respect to an actionable claim. Looking at the amendment in the statute I do not find any foundation for the saying that the law was amended only with respect to an actionable claim. Therefore, it seems to me that it is clearly wrong to say that the legislature could not modify the well established rule of equity in *Ayerst* v. *Jenkins* (1) by any indirect amendment. I am unable to accept either the conclusion or the reasons in the *Muthu Reddi's case* because first, we have no rules of equity as such, and secondly, the amendment was not an indirect one as wrongly said in that case, and thirdly, because it is a greater rule of law for this court to obey the clear statutory mandate. Having wrongly thought the amendment was only indirect in respect of an actionable claim the reason that it could not provide a valid reason why section 6 (h) (2) of the Transfer of Property Act could not be said to - make a difference cannot be sustained. It appears to be plain also from the judgment of Abdur Rahim, J. that the learned Judge found that "the language is certainly not very happy". To my mind the language is plain and simple that no transfer can be made. When the mandate of the Statute is clear and unambiguous it is the duty of this court to give effect to it.

34. The Full Bench decision of the Bombay High Court in *Guddappa Chikkappa Kurbar* v. *Balaji Ramji Dange* (11) reported in A.I.R. (1941) Bom. 274 overrules the decision of Sir Lawrence Junkins in *Sidlingappa* v. *Hirasa* (12) 31 Bom. 405. Sir Lawrence Jenkins observed that "the defendant could not be allowed to defeat the plaintiff's case by alleging his own fraud. It was there pointed out that the deed on which the plaintiff sued was ostensibly a valid conveyance, and it was held that the defendant could not be allowed to show that it was not what it purported to be, a conveyance for sale, by setting up his own fraud". The Bombay Full Bench in *Guddappa's case* (11) in A.I.R. (1941) Bom. 274 says at page 275:

> "The principles which must govern cases of this sort are in my opinion clear. No court will allow itself to be used as an instrument of fraud, and no court, by the application of rules of evidence or procedure, can allow its eyes to be closed to the fact that it is being used as an instrument of fraud. The legal maxim is ex turpi

causa non oritur actio. Once the court finds that the plaintiff is seeking its assistance to enable him to get the benefit or what is a fraud, the court refuses to assist him. If, as a result of such refusal, the defendant is left in possession of some advantage derived from his own fraud, that is not due to any action on the part of the court. It is a fraud for a plaintiff to claim beneficial title under a deed in respect of which he was a mere benamidar, and the court cannot refuse to allow the defendant to prove the benami nature of the transaction, even though in doing so the defendant may have to rely on his own wrong doing."

35. The actual case before the Bombay Full Bench was the case of a sale deed.

where as a fact it was found that there was no consideration for the tale deed and that it was a part of a fraudulent attempt on the part of the defendants to defeat their creditors and that the deed on which the plaintiff stood was in respect of a benami transaction. The questions of benami transaction, the questions of presence or absence of consideration are not questions which arise strictly within the interpretation of section 6(h)(2) of the Transfer of Property Act read with section 23 of the Indian Contract Act. The case therefore is distinguishable on the basic fact and the law concerning the Bombay decision. I have no quarrel with the doctrine that the court should not be used as an instrument of fraud and gladly accept it as a wholesome principle. But my only regret is that I find it is frequently invoked as a false siren and to send out false alarms. Is it a fraud to defeat the statute? To my mind it is. When the court finds that it has happened, it is bare duty of the Court to correct it. In doing so it is not used as an instrument of fraud but as an instrument of justice to correct fraud, specially when it is brought to the notice of the court not by the fraudulent party but a victim of the fraud of which the defendant wants to take the full benefit. Here in the facts of this case the plaintiffs cannot by any stretch of fact or notion be said to be using the court as an instrument of any fraud whatever. In this case the question of public policy demonstrates that the court will be used as an instrument of fraud rather by denying the plaintiffs the right to relief than by permitting them such right.

36. On behalf of the respondents the decision of the Lahore Full Bench in *Qadir Bakhsh* v. *Hakam*, (13) I.L.R. 13 Lahore 713 has been cited. That again is a case of benami mortgage and is not concerned with section 6(h)(2) of the Transfer of Property Act at all. The decision in *T.P. Petherpermal Chetty* v. *R. Muniandi Serval* (14) 35 I.A. 98 is also cited on behalf of the respondents. That again is a fraudulent conveyance turning on the question of banami transaction and did not relate to the effect of void transfer under section 6(h) (2) of the Transfer of Property Act read with section 23 of the Indian Contract Act. Mr. Ghose on behalf of the respondents also cited the case of *Bigos* v. *Bousted* reported in (1951) 1, All E.R. 92. This was a case of an agreement in contravention of the Exchange Control Act, 1947 of England whereby the plaintiff agreed to make available £150 worth of Italian money for the wife and daughter in Italy within a week and the defendant promised to repay her with English money in England. This case is also distinguishable on the same grounds which I have mentioned above. It does not deal with the effect of void and voidable transactions; secondly, there the parties were admittedly primarily in pari delicto and no question of trustees or executors arose in that case; thirdly, this was a case again of contract and not of transfer of immovable property such as is prohibited under s. 6 (h) (2) of the Transfer of Property Act.

37. The only Calcutta case which the learned trial Judge mentions in his judgment

is the decision of a single Judge, R.C. Mitter, J. in *Kali Kumar Baisnabi* v. *Mono Mohini Baisnabi* (3) 40 C.W.N. 402. There the actual case arose out of a promissory note whose origin was tainted with immorality. That again is a case of contract and

was a case where persons originally in pari delicto were parties to the suit. No question of transfer of property under section 6(h) of the Transfer of Property Act arose in that case. On the same ground the case of *Scott* v. *Brown* (4) (1892) 2 Q.B.D. 724 can be distinguished which was also a case of a contract for rigging the market by purchase of shares in a company.

38. The case of *Upfill* v. *Wright* (16) reported in (1911) 1 K.B. 506 is a decision of Darling, J. on the point, that the plaintiff was not entitled to recover rent because the flat for which rent was sought, was let for an immoral purpose. The learned Judge there expressly says that it is unnecessary for him to go through the authorities because he took the law as well settled by Pollock C.B. in *Pearce* v. *Brooks* (17) L.R. 1 Ex. at page 217, 218, which proceeded on the maxim I have elsewhere already quoted, viz., Ex Turpi Causa non oritur actio. The English law on which that case was decided was different from the law in our country. There the case is not a case of void transaction by statute but a voidable one under the common law. Two significant and outstanding differences have been ignored in our desire to follow the English precedents, one is the uncritical application of the equitable doctrine or equitable rules of procedure where the statute is clear and the other is the difference between void and voidable transactions. The result has been a confusion and a disregard of the statute in this country on this point. Finally, the decision of the English Court of Appeal in *Bowmakers Ltd.* v. *Barnet Instruments Ltd.* (18) reported in (1945) 1 K.B. 65 has been cited at the Bar on behalf of the respondents. That case decides that no claim founded on an illegal contract will be enforced by the Court but as a general rule a man's right to possession of his own chattels would be enforced against one who without any claim of right is detaining them or has converted them to his own use even though it might appear from the pleadings or in the course of the trial that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not either seek to enforce or found his claim on the illegal contract, or to plead his illegality in order to support his claim. An exception to this general rule arises in cases in which the goods claimed are of such a kind that it is unlawful to deal in them at all. This case is more important for what it does not say than for what it does say. It is plain from this decision that the rule laid down in Lord Selborne's judgment in *Ayerst* v. *Jenkins* (1) is not an inflexible rule at all and the court has always tried to make such inroads upon the rule whenever and whenever proper considerations demand that course.

39. Apart from the judgment of Sir Subramania Ayyar already quoted by me, support of the view that we are taking is to be found in the case of *Istak Kamu Musalman* v. *Ranchod Zipru Bhate* (19) reported in A.I.R. 1947 Bom. 198. There it was a case of a transfer in consideration of future illicit cohabitation. It was held to be an immoral consideration and therefore void. A gift does not require consideration and past cohabitation may be its motive but it was pointed out there

that it would be its object and consideration. It was held, therefore, that a gift made

out of gratitude for, or with the idea of compensating past cohabitation is not *per se* void under sec. 6 (h) (2) of the Transfer of Property Act read with sec. 23 of the Indian Contract Act. But the more important consideration discussed in that judgment by Lokur, J. is where His Lordship lays down at page 203 that the equitable doctrine in *Ayerst* v. *Jenkins* (1) 16 Equity, 275 does not apply to transactions which are forbidden by law and are void. Thus, the doctrine according to the learned Judge could not be extended to transfer for an unlawful object or consideration. Lokur, J. says at page 203 of the Report:

> "But in India a transfer for an unlawful object or consideration within the meaning of sec. 23, Contract Act, is expressly prohibited by sec. 6(h), T.P. Act. If the doctrine is extended to such transfers, the prohibition would be meaningless. This distinction has been emphasized by Lord Selborne on page 284 where he says:
>
> > ".....I think it consistent with all sound principle, and with all authority, to recognise the importance of the distinction between a completed voluntary gift, valid and irrevocable in law (as I hold the transfer of these shares to the defendant's trustees to be), and a bond or covenant for an illegal consideration, which has no effect whatever in law."

40. In extending the doctrine of 'pari delicto' or 'particips criminis' to the trustees the respondents relied on the case of in *Mapleback, Ex parte, Caldecott* (5) reported in Law Reports. 4 Ch. Div. 150. The point there arose in connection with payment for a forged bill of exchange. The arrangement was that if the payee paid the forged bill then the forger would later on repay the amount of [the bill. The payee agreed with the forger to that course and allowed the bank to discount the forged bill. The agreement between the forger and the payee was that the forger should execute a bill of sale of all his properties to secure the amount of the forged bill. After the execution of the bill of sale the forger was adjudicated a bankrupt. The trustee in bankruptcy made an application to the County Court for an order to avoid the bill of sale and for an order declaring that its execution was an act of bankruptcy and also pleading that the payee in accepting it compounded felony with the bankrupt. The case went through a chequered history and finally in the court of appeal it was held that the bankrupt could not recover back the proceeds of the sale and therefore his trustee could not have been in a better position than the bankrupt. It is important, however, to notice that the Court of Appeal expressly stated that if there was any offence against the bankruptcy law or against some law in favour of the creditors, then in that case the trustee was not merely the legal representative of the debtor but a little more. But in other respects he had no greater right than what the bankrupt had. Now that is the position in this case. The position in this case is that the plaintiffs are trustees and executors under the will of Ranubala. This Court had granted probate of the Will of Ranubala knowing that she was a woman of the town leaving such an estate. The

executor and trustee Pranballav Saha's evidence is that one of the reasons why this property is required is for the purpose of administration and for establishing a charitable dispensary in the said premises. The setting up of a charitable dispensary is a part of the obligation under the trust under the Will. This court having granted the executors and trustees a probate and ordered them to administer the estate, we are now being told that even the status in rem with which this court has invested the executors and trustees should not permit them to administer the estate and recover the property but should permit the continuance of the immorality and the illegality. A

trustee in bankruptcy in respect of the forged bill out of which Mapleback's case arose was dealing with the question of voidable transaction and not a void transaction prohibited by statute such as under sec. 6 (h) (2) of the Transfer of Property Act. A trustee in bankruptcy stands also fundamentally in a very different position so far as he represents the estate of the bankrupt which is taken charge of for the benefit of his creditor. A bankrupt's creditor can only get hold of such of the monies which the banrupt had or could have and no more except of course that which the statute avoids. In that case the bankrupt could not recover, a trustee in bankruptcy could not either. A trustee in bankruptcy is in many ways a very different from an ordinary trustee or executor under a Will with many more independent rights, discretion and obligation than a trustee in bankruptcy.

41. These are some of the cases cited at the Bar. It will be unnecessary to refer to other cases. The cases cited and the other decisions on this point are all distinguishable from the point under decision in this appeal either on the ground, (1) the difference between void and voidable transaction, (2) statutory prohibition of transfer under section 6(h)(2) of the Transfer of Property Act, (3) reasons of public policy which impose a ban on the plaintiff are themselves the grounds in this case to remove the ban because the court should chose the lesser evil, and (4) that the executors and trustees to whom this court has granted the probate and directed them to administer the estate cannot be told that they cannot recover the properties for the purpose of administration. It has not been suggested before us that a prostitute leaving a Will cannot seek aid of the court to have the Will probated through her executors and trustees. If it were a universal rule of law and not a mere matter of expendiency, procedure and public policy, then all aid should have been refused by the court to a prostitute on the ground of immorality. I do not read the case law on the point to think that a prostitute is quite so untouchable in law and procedure even in a puritan court of law.

42. It appears to me that Chittey's treatise on *Law of Contracts*, 20th Edition edited by Dr. Harold notices this distinction between void and voidable transaction and special transactions prohibited or made illegal by a statute or their differences with those under the common law. At page 469 Chitty puts this principle on the following grounds:—

> "As the benefit of the public, and not the advantage of the defendant, is the principle upon which a contract may be impeached

on account of illegality, this objection may be taken by either of the parties to such contract"

43. If the benefit of the public is the principle, then I have no hesitation left in my mind to hold that more advantage to the public will arise by giving relief to the plaintiffs in this case overriding the general rule of disqualification than by denying them. To deny them will be not to benefit the public, but will definitely hurt the public by the continuance of this degradation of a brothel and prostitution.

44. The legislative and judicial attitudes towards prostitution and brothels have bean very ambivalent throughout the course of legal history. The only legislative enactments that our statute book can produce are the Bengal Suppression of Immoral Traffic Act, 1933 (Bengal Act VI of 1933) and the recent Parliamentary Act of 1956. They appear to me to be at best mere Police Acts with little or no effective provision for suppression of immoral traffic which their preambles and titles proclaim.

45. The Bengal Suppression of Immoral Traffic Act, 1933 even with the amendment of the expression 'Brothels' which came in 1945 provides for termination of a tenancy of the premises of this nature only after a conviction under the Act. The prosecution under the Act cannot be initiated by any party to the tenancy in agreement and not even by the State. A complaint can only be made either by (1) the Corporation of Calcutta, (2) Chairman of the Municipality, District Board or Local Board, (3) three or more persons occupying separate rooms or holdings and residents in the vicinity of the premises, and (4) a representative of any society recognised by the Local Government in this behalf who has been authorised by the society to institute prosecutions under this section. Under section 4(1)(c) of the Bengal Suppression of Immoral Traffic Act, 1933 any person who being the lessor or landlord of any premises or the agent of such lessor or landlord, lets the same, or any part thereof, with the knowledge that the same, or any part thereof, is intended to be used as a brothel, shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both and under section 4(1)(b) of the same Act any person who being the tenant, lessee, occupier, or person in charge of any premises, knowingly permits such premises or any part thereof to be used as a brothel, shall be punished in the same way. By following what is called an equitable rule by denying the plaintiffs relief in this case I would be forcing both the plaintiffs and the defendants to commit an offence punishable with imprisonment. I am satisfied that no court by its act should do that. This is yet another compelling reason why this court should allow relief to the plaintiff in this case. I construe the words 'lets the same' in section 4(1) (c) of the Bengal Suppression of Immoral Traffic Act for this purpose to mean not only originally let, but continues to let. After all this is a monthly tenancy. This is a tenancy from month to month. Although that means that it has no definite period of time and that it does not come to an end by efflux of time, yet it gives option to terminate by 15 days' notice in Calcutta and that being so, every time that option is not exercised I would say that the landlords or the trustees or

the executors in this case being in charge of the administration of these premises within the meaning of s. 4(1)(c) of the Act are assenting to letting the same within the meaning of the Bengal Suppression of Immoral Traffic Act and thus making themselves liable to punishment thereunder.

46. Section 6 of the Act speaks of the Commissioner of Police and the Superintendant of Police upon a certain information to order discontinuance of a house, room or place as a brothel or for the purpose of carrying on prostitution. In this case a notice was issued under section 6(1) (a), (b), (c) and (d) of the Bengal Suppression of Immoral Traffic Act, 1933 asking the defendant to show cause why on the grounds stated on those sub-sections she should not be directed to discontinue the use of that house as a brothel, or a disorderly home, Those were the exact words of the notice to show cause. It appears that on the 11th February, 1946 the Deputy Commissioner of Police although describing the said premises as a brothel issued an order saying "she is informed that BO long as she does not disobey she may continue to stay where she is, provided the owner of the house allows it". I do not claim to know enough of the mysteries of the Bengal Suppression of Immoral Traffic Act, but I do not think that if a brothel is a brothel, then it can be allowed to continue under the orders of the Deputy Commissioner of Police. At least I do not find any provision to that effect in the statute. It so happens however that the brothels are permitted to continue under the orders of, (1) the Commissioner of Police and (2) with the

permission of the owner of the house. If the owner does not permit, then it should hot remain as a brothel. This is a strange commentary on the administration of even an otherwise wholly inadequate Statute.

47. We have proclaimed in Article 23 of our Constitution "Traffic in human beings.....are prohibited and any contravention of these provisions shall be an offence punishable in accordance with law." The neglected constitutional provision is of significant import. It straightaway phohibits traffic in human beings. No further law is necessary to prohibit. Law is only necessary under Article 35 of the Constitution for the purpose of punishing the contravention of the prohibition as an offence. Therefore to deny relief to the plaintiffs after the constitution is to permit what the constitution expressly prohibits. This again is yet one more powerful reason why plaintiffs must be allowed to succeed. I shall not permit any fancied equity or conventional procedure to override the express prohibition of the Constitution. But all that we have produced so far under Article 35 of the Constitution is a new Parliamentary Act of 1956 which is only at best a badly revised edition of the Bengal Suppression of Immoral Traffic Act of 1933. If abolition is the avowed object and if traffic in human beings is prohibited by the Constitution, then it is difficult to explain why at least no legislative attempt has not so far been made on the lines of the law of prohibition dealing with another great social evil of drink. After the Constitution time has certainly come to remove the ancient accusation that the statutes in this country have winked at brothels and prostitution.

48. My conclusions therefore are, (1) that *Ayerst* v. *Jenkins* (1) L.R. 16 Equity 275

has been misapplied and misunderstood in many cases in India, (2) that the principle in that case should not be understood as laying down an invariable and inflexible rule of disqualification for a plaintiff seeking the aid of court, (3) that the principle of that case should be understood with the limitations referred to by Lord Selborne himself in that judgment, (4) that the true boundaries of *Ayerst* v. *Jenkins* (1) when applied in India were rightly indicated by Sir Subramanian Ayyar in *Deivanayaga Padayachi* v. *Muthu Reddi* (2) I.L.R. 44 Madras 329 and Lokur, J. in *Istak Kummu Mussalman* v. *Ranchod Zipru Bhate* (19) A.I.R. 1947 Bom. 198, (5) that refusal by the courts to grant relief on the basis of such maxims as ex turis caura non oritur actio or pari delicto or particips criminis is based on grounds of public policy and therefore if the same or higher public policy demands in a particular context that relief should be given then such maxims should not be used any more as a bar and the courts should not deny relief, (6) that the rule in *Ayerst* v. *Jenkins* (1) should never be used to (a) defeat statutes like s. 6(h)(2) of the Transfer of Property Act, (b) make the plaintiff liable to prosecution, conviction and punishment under such statute as the Bengal Suppression of Immoral Traffic Act and, (c) violate the express prohibition of the Indian Constitution such as the Article 23 saying that traffic in human being is prohibited, and (7) that this rule in *Ayerst* v. *Jenkins* (1) in any event should not be extended to the class of innocent trustees and executors who are administering the estates under orders of court.

49. For these reasons, I allow the appeal and decree the plaintiffs' suit for possession. I hold that the defendant's possession is wrongful and the defendant is a trespasser. Damages for ordinary trespass will therefore have to be nominal and are assessed at 50 N.P. (Naye Paise) per diem from the 1st October, 1946 being a reasonable time after the notice of the 10th September, 1946, until delivery of vacant possession.

50. The appeal is allowed with costs to the appellants. The trustee plaintiffs will be entitled to retain their costs as between attorney and client out of the estate in their hands.

51. Each party will pay and bear its own costs in the trial court below.

BACHAWAT, J.:— This appeal arises out of a suit for ejectment. One Ranu Bala was the owner of premises No. 9/2, Sonagachi Lane, Calcutta. She was a woman of the town. In 1942 she let the defendant, Sm. Tulsibala Dasi, another woman of the town, into possession of the premises as a monthly tenant. The premises are situated in a locality where there are numerous other brothels. Since the inception of the tenancy the premises have always been used as a brothel. More than one woman carry on prostitution there. Even before the defendant became a tenant she was a woman of the town and carried on prostitution.

52. The plaintiff alleges that the premises were let to the defendant by Ranu Bala for the purpose of running a brothel. This is denied by the defendant. The learned trial Judge has found that the plaintiffs have not proved their case on this point. We are constrained

to differ from this finding of the learned Judge. The surrounding circumstances, the occupation of the defendant, the locality in which the premises were situated and the subsequent continuous user of the premises as a brothel all unmistakably point to the conclusion that the premises were let to the defendant for the purposes of running a brothel.

53. We can draw this inference as a matter of fact even without taking into account the evidence of Ratanbala. I am satisfied that the evidence of Ratanbala on this point also ought to be accepted. She has sworn that the premises were let for the purpose of running a brothel. She is no doubt an; unreliable witness. She has demonstrably told several untruths. That means that the court should approach her evidence warily and should not accept her evidence unless it is corroborated by other unimpeachable evidence. The surrounding circumstances corroborate her evidence. The defendant Tulsibala has not stepped into the witness box to deny the testimony given by Ratanbala and the other wit nesses. The absence of the defendant from the witness box is strong corroboration of the plaintiff's case.

54. I am satisfied that the premises were let for the purpose of running a brothel. Both Ranubala and the defendant were women of the town and they clearly knew of the immorality of the purpose for which the premises were let.

55. Ranubala has since died. Two of the plaintiffs are executors to the Will of Ranubala. All the three plaintiffs are trustees of the trust created by her Will. In agreement with the learned trial Judge I find that the plaintiffs did not accept the defendant as a tenant after the death of Ranubala.

56. The plaintiffs did not serve upon the defendant a notice to quit the premises as required by section 106 of the Transfer of Property Act. They made upon the defendant a demand for giving up possession. Possession not being given they have brought this suit. The plaintiffs plead and prove that they are the owners of the premises. They boldly plead and prove that the lease was for the purposes of running a brothel. They have to disclose the illegality of the lease as a necessary part of their case. If the lease is lawful and valid, the plaintiff can not succeed, for the requisite notice to quit has not teen given.

57. It is proved that the object of the lease is immoral and unlawful within the

meaning of section 23 of the Indian Contract Act. The lease is therefore in contravention of section 6(h) clause 2 of the Transfer of Property Act. The defendant resists the claim for ejectment. Her counsel contends that (a) the plaintiffs are privies to Ranubala who was a particips criminis in an immoral and illegal transaction, (b) the court will not lend its aid to a particips criminis and her privy who cannot succeed without showing the illegality of the transaction in which she participated, (c) the lease is voidable and not void and (d) relief should be refused following the principles of *Ayerst* v. *Jenkins* (1) (1873) 16 Eq. 275. Learned counsel for the plaintiffs contend that, (a) the lease is void and not validable, (b) the plaintiffs may ignore the lease and sue for possession and are entitled to relief as a matter of right, (c) the case of *Ayerst* v. *Jenkins* (1) 16 Eq. 275

has no application to a case where the transfer for illegal purposes is void (d) In any event the plea of particips criminis is not material because public interest requires that relief should he given to the plaintiff. (e) The plaintiffs are not particips criminis though they claim title through Ranubala.

58. To appreciate the respective contentions of the parties it is necessary to discuss the precise scope of the rule of public policy which denies relief to particips criminis and to understand how in parctice the rule is applied to transfers and contracts made for some unlawful (including immoral) object or consideration. The rule originated in England. It is necessary and desirable to state the English law before I discuss the Indian law.

59. I believe that the English law on the point is as follows:

> The rule which denies relief to particips cirminis is grounded upon public policy. The rule itself and the reasons upon which the rule is founded are stated thus by Mansfield in his classical judgment in *Holman* v. *Johnson* (20) (1775) 1 Cowp. 341 at 343. "The principle of public policy is this: ex dolo malo non oritur actio—No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise ex turpi causa or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, potior est conditio defendentis".

60. In the earlier case of *Montefiori* v. *Montefiori* (21) (1762) 1 W Black 363 Mansfield, C.J. rules that "no man shall set up his own iniquity as a defence any more than as a cause of action". The ruling was approved in *Doe* v. *Roberts* (22) (1819) 2 B & Ald. 367. The strictness of that ruling is much relaxed by the rule in *Holman* v. *Johnson* (20) (1775) 1 Cowp. 341. The defendant is allowed to plead his own iniquity as a defence where his iniquity is also the iniquity of the plaintiff. Where both parties to an illegal transaction knew or had the means of knowing that the transaction is illegal, neither of the particips criminis is debarred from pleading and showing the illegality. The particips criminis who comes to court as plaintig with turpi causa cannot maintain his action not because he is estopped from alleging his own iniquity but because no court will lend its aid to such a plaintiff.

61. Now observe how in practice the rule in *Holman* v. *Johnson* (20) is applied to

contracts and rights of property.

62. In general, courts refuse to give relief to a party to an illegal contract who either founds his cause of action upon it or who has necessarily to disclose or plead its illegality to sustain his cause of action.

63. An illegal contract cannot be enforced either at law or in equity by a particips criminis.

64. In general, courts will not allow a particips criminis to recover moneys paid on an illegal contract. *Collins* v. *Blantern* (23) (1765) 2 Wilson 341, 350. The courts do not enforce the contract directly nor in general allow an action for moneys had and received to be maintained for its recovery.

65. There is a distinction between enforcing an illegal contract and enforcing rights of property acquired under it or under some transaction tainted with illegality. Rights of property so acquired are protected and enforced.

66. Right of general property as owner, *Bowmakers Ltd.* v. *Barnet Instruments Ltd.* (18) (1945) 1 K.B. 65, 70 and of special property as pledgee, *Taylor* v. *Chester* (24) (1869) L.R. 4 Q.B. 309, 311, 315 and a right of lien, *Scarfe* v. *Morgan* (25) (1838) 4 M. & W. 270, 274, 281 pass though such rights are acquired under an illegal contract. "If an illegal contract is executed and a property either special or general has passed thereby the property must remain" per *Karkes B. Scarfe* v. *Morgan* (25) (1338) 4 M. & W. 270, 281.

67. Ownerships of money is acquired though it is earned in an illegal business. *Gordon* v. *Chief Commissioner of Metropolitan Police* (26) (1910) 2 K.B. 1080.

68. A lease of real property is valid though the purpose of the lessor, *Feret* v. *Hill* (27) (1854) 15 C.B. 207; or of the lessee *Alexander* v. *Rayson* (28) (1936) 1 K.B. 169, 184-7—in obtaining or granting the lease is illegal.

69. A fortiori a completed gift of shares passes the legal title though the donor may have made the gift for some illegal purpose of his own, *Ayerst* v. *Jenkins* (1) (1873) 16 Eq. 275, 283 284.

70. The title general or special passes at law and the transferee may defend his possession of the property on the strength of such title. *Taylor* v. *Chester* (24) (1869) L.R. 4 Q.B. 309; *Alexander* v. *Rayson* (28) (1936) 1 K.B. 169, 186.

71. The transferee may even as plaintiff by action recover possession of the property to which he is entitled from; a third party, *Gordon* v. *Chief Commissioner of Metropolitan Police* (26) (1910) 2 K.B. 1080, and from the transferor. *Feret* v. *Hill* (27) (1854) 15 C.B. 207, 219, 223, 225, 227. In such a suit the plaintiff seeks to enforce not the illegal contract but a right of property acquired under it and in general the courts will not refuse their aid to such a plaintiff.

72. If the transfer is of a right of special property only, the right of general property retained by the transferor will be recognised and enforced and the transferor may by action recover the property on the strength of his own title when the transferee's right of special property is extinguished. *Bowmakers Ltd.* v. *Barnet Instruments Ltd.* (18) (1945) 1 K.B. 65. In such a suit the plaintiff need not found his cause of action upon the illegal contract nor plead its illegality in support of his claim.

73. If the transfer itself is prohibited by statute the transfer is void and title to the property does not pass.

74. In *Lapiere* v. *M'Intosh* (29) (1839) 9 Ad. & Ell 857 the defendant owner unlawfully agreed to grant a lease of a

property for 21 years to the plaintiff who took possession of it with a view to carry out the agreement. The plaintiff was a stranger artificier and handicraftsman and a lease to such a stranger was void by statute—Henry 8 C. 16 Sec. 13. The defendant subsequently entered and took possession of the property, the door being open and no person being therein of whom possession could be demanded. The plaintiff sued for trespass and for breaking and entering the property and expelling him. The court held that he could not maintain the action. The agreement was illegal whether it amounted to a lease or was an agreement for one. The plaintiff had no interest which the law could recognise. It was competent for the defendant to enter and expel the plaintiff.

75. The case is instructive as showing that no title passes if the transfer itself is illegal. Could not the owner in that case sue for possession ignoring the void lease instead of entering and taking possession himself? The owner is entitled to his own proprety and is not necessarily debarred from recovering it by action, because it has come to be in possession of the defendant in consequence of some unlawful transaction to which the owner was a party and by which the defendant has not acquired any title or interest in the property.

76. In general, courts of equity do not interpose to grant relief in respect of an illegal transaction to a plaintiff implicated in the illegality following the rule of law as to particips criminis, and acting upon the maxim, that in pari delicto potior est conditio defendentis, *Ayerst* v. *Jenkins* (1) (1873) 16 Eq. 275, 283. But this is not universally true. The recrimination of particips criminis is not material where the agreement or transaction is against public policy, for then relief is given to the public through the plaintiff. *Story on Equity Jurisprudence*, Third English Edition by A.E. Rendall, article 298, *Lord St. John* v. *Lady St. John* (30) (1805) 11 Ves 526, 536.

77. The bar to relief in equity is sometimes described as an estoppel. There is no estoppel against public policy. In *Ayerst* v. *Jenkins* (1) (1873) 16 Eq. 275, 283 Lord Selborne observed, "when the immediate and direct effect of an estoppel in equity against relief to a particular plaintiff might be to effectuate an unlawful object or to defeat a legal prohibition or to protect a fraud, such an estoppel may well be regarded as against public policy."

78. Unless some special ground of equitable interference is made out a court of equity will not aid the plaintiff to recover property which he has allowed to be legally vested in the defendant for some unlawful purpose. The court will "let the estate lie where it falls."

79. Thus ordinarily the court will not aid the settlor seeking to recover property which he has allowed to be vested in the defendant for an illegal purpose. *Muckilston* v. *Brown* (31) (1801) 6 Ves. 52, 67 explaining *Cottington* v. *Fletcher* (32) 2 Atk 155. *Gascoigne* v. *Gascoigne* (33) (1918) 1 K.B. 223.

80. And in general the court will not at the instance of particips criminis set aside a transfer valid at law and made for an unlawful purpose. See *Ayerst* v. *Jenkins* (1) (1873) 16 Eq. 275.

81. In *Ayerst* v. *Jenkins* (1) (1874) 16 Eq. 275, the court refused to set aside a transfer of shares legally vested in trustees at the suit of the legal representative of the settlor, one William Hardinge. The shares were transferred by the settlor to trustees upon trusts for the benefit of his deceased wife's sister one, Isabella Buckton declared by a contemporaneous deed to which the settlor, the lady and the trustees were parties. The deed on the face of it was voluntary. It was executed some time after the lady and the settlor had agreed to cohabit under colour of a fictitious marriage. Two days after the deed the settlor and the lady went through a form of marriage though marriage with a deceased wife's sister was prohibited by an Act of Parliament. The two lived together till the death of the settlor which happened four months afterwards. More than eight years afterwards, the lady remarried without a settlement relying on the provision made for her by the impugned deceased. The lady enjoyed the full benefits given to her by the deceased. The bill was filed by the legal representative of the settlor ten years after the death of the deceased seeking a declaration that the deed was void on the ground that it was made in consideration of the then intended unlawful cohabitations of the settlor and the lady. The lady swore that there was no bargain or contract for any settlement, that she regarded the deed as a free and voluntary gift and that it was not offered by him nor accepted or understood by her as binding her to the fulfilment of the promise of co-habitation previously made. There was no evidence of the facts beyond her statement. A memorandum of instructions given by the settlor to his solicitor was put in evidence. It described the lady as "Isabella Buckton commonly called Mrs. Hardinge". These instructions had not been acted upon. The settlement was valid at law and the justice of the case did not require interference by a court of equity. The result of granting the relief would have been to commit a crude injustice to the lady. In these circumstances, relief was refused because it was sought, (1) by the representative of not merely a particips criminis but of a voluntary and sole donor on the naked ground of the illegality of his own intention and purpose, (2) after the illegal purpose had been accomplished and, (3) after long delay, (4) against a completed transfer of chattels legally vested in trustees and irrevocable in law and (5) the balance of equitable consideration was in favour of the defendant. While dismissing the bill, Lord Selborne observed at page 285 of the Law Report, "There is no legal ground on which the efficacy of the transfer of the shares in question can be disputed; and so far as equitable consideration enter into the case they appear to me to be in favour of the defendant."

82. This case did not lay down a rigid rule that a court of equity will never set aside a transfer tainted with illegality and valid at law. The case of *Wooton* v. *Wooton* noticed and distinguished in *Ayerst* v. *Jenkins* (1) (1874) 16 Eq. 275, 276, 283-4 shows that the court may set aside a mutual settlement made on the occasion of a fictitious marriage so as to prevent continuance of the illicit connection.

83. In *W.* v. *B.* (34) (1863) 32 Bevan's Reports 574, B and his five children viz: his daughter C and four others by an indenture covenanted to surrender a

copyhold estate by way of mortgage, to W for securing a sum of money lent by him to B. Part of the consideration was the permission of B to allow W to continue his visits to C whom he was seducing, or had seduced. Sir John, Romilly M.R. dismissed a bill by W to enforce the deed and to foreclose the mortgage and decreed a cross bill by B and his two daughters to cancel the deed on the ground, inter alia, that others besides the

parties to the corrupt bargain are affected by this deed.

84. Where the instrument is void at law on account of illegality not appearing on the face of it and the transaction is such that on grounds of public policy it cannot stand, a court of equity will decree its cancellation on equitable terms and the plaintiff will not be debarred from relief on the ground that he is particeps criminis—*Halsbury* Second Edition, Vol. 14, Article 973 page 513. If the illegality appears on the face of the instrument the court does not interpose, for then there is no danger of loss of available evidence by lapse of time and relief in equity is unnecessary. Illegal covenants and bonds are void at law and their cancellation may thus be decreed on equitable terms.

85. In *Lord St. John* v. *Lady St. John* (30) (1805) 11 Ves. 526, 535-6 Erskins L.C. dealing with a bill for cancellation of articles between husband and wife for future separation said to be void at law ruled that where the instrument was void upon grounds of policy, the court would order it to be delivered up, that the conduct of the party applying was out of consideration of the court and that where the transaction was against policy, it was no objection that the plaintiff himself was a party to the transaction which is illegal.

86. The Courts give relief liberally to a particeps criminis and even decree refund of money paid and cancellation of bills given in respect of marriage brocage contracts *Shirley* v. *Ferrers* (35) 3 P.W. 75, 77 cited in *Lord St. John* v. *Lady St. John* (30) (1805) 11 Ves. 526, 536 and in respect of sales of public offices *Morris* v. *McCulloch* (36) (1763) 2 Eden 190, 192, 193, *Whittingham* v. *Burgoyne* (37) (1779) 3 Anst. 900, 903. Public interest requires that relief be given to the public through the party and the recrimination of particeps criminis is not material. In the case last cited McDonald C.B. observed that public policy requires interference by the court to check vicious practices.

87. In general, the courts also give relief to a particips criminis suing to recover money paid or property parted with under an illegal transaction, (a) where the plaintiff is not in pari delicto and also, (b) where the illegal purpose has not been carried into execution. *Taylor* v. *Bowers* (38) (1876) 1 Q.B.D. 291, 296; *Symes* v. *Hughes* (39) (1870) 9 Eq. 475.

88. Indeed the modern doctrine in England appears to be that the maxim in pari delicto potior est conditio defendentis is no guide in determining in what cases relief ought to be given to or withheld from the plaintiff. That question must be determined independently before the maxim is applied. In *Bowmakers Limited* v. *Barnet Instruments Limited* (18) (1945) 1 K.B. 65, 72, Du Parcq, L.J. referring to that maxim observed, "Its true meaning is that, where the circumstances are such

that the court will refuse to assist either party, the consequence must, in fact, follow that the party in possession will not be disturbed."

89. In general the courts decline to grant relief to a plaintiff who claims title through a particeps criminis if his case is such that relief would have been denied to the particeps criminis had he come to the court as plaintiff with the same case. Thus relief was denied to the legal representative of the settlor seeking to set aside a settlement on the ground of the illegal purpose of the settlor, *Ayerst* v. *Jenkins* (1) (1874) 16 Eq. 275, and to the trustee in bankruptcy seeking to recover moneys paid by the bankrupt under an illegal arrangement. *Re Mapleback Ex parte Caldecott* (5) 4 Ch. D. 150, but not to the trustee in bankruptcy seeking to recover such money if at

the date of the payment it was vested in him by relation back of his title: *Ex parte Wolverhampton Banking Company In re Campbell* (40) (1884) 14 Q.B.D. 32. In *Muckleston* v. *Brown* (31) (1801) 6 Ves. 52, 59, 67-8, heirs at law were allowed to maintain against the residuary devisees, legatees and executors a bill claiming discovery accounts and declaration that the plaintiffs were entitled to the residue of the testator's real estates on the ground that the testator had made a secret trust for charitable purposes, that the trusts were not legally declared and even if so declared were illegal and void being forbidden by the Mortmain Act and that there was a resulting trust in favour of the plaintiffs. The heirs at law there came to be relieved against an act of the ancestor which defeated the whole policy of the law and which was really a fraud upon the heirs and their right to take the estate in the absence of a legal disposition. In such exceptional circumstances the delictum of the ancestor could not be imputed to the heirs-at-law and relief could not be denied to them on the ground that the ancestor would have been denied relief.

90. Let us now turn to the Indian Law. The sources of our law with regard to the effect of illegality on contract and rights of property and a claim for relief by particeps criminis are three-fold viz:

(1) our statute law particuarly the Indian Contract Act, the Transfer of Property Act and the Specific Relief Act, (2) Rules of English law, (3) our judicial decisions.

91. Our statuory law is paramount. All rules of English Common Law and Equity must yield wherever they differ from the positive law of the statutes.

92. The rule in *Holman* v. *Johnson* (20) (1775) 1 Cowp 341 is now firmly entrenched in our system of law and forms an integral part of it.

93. The rule must be applied with due regard to our statutes. In applying the rule we have sometimes omitted to notice our statutes and the differences between our law and the English law particularly with regard to the effect of illegality on transfers of property.

94. I will clear one point at the outset. I think that in general a privy to particeps criminis stands in the same position as the particeps criminis and our law is on a par with English law on the point. In general a plaintiff claiming title through a particeps criminis as his heir will be denied relief if on the same case the particeps criminis would not have got relief.

95. In *Sidlangappa* v. *Hirasa* (12) I.L.R. (1907) 31 Bom. 405, 412, Jenkins, C.J. expressed a doubt if the son and heir of a particeps criminis could be said to be in pari delicto and that doubt was shared by Patkar, J. in *Sabava* v. *Yemanappa* (41) A.I.R. 1933 Bom. 209, 214. Still I think that in general the heir is in pari delicto if the ancestor was because the delictum of the ancestor is imputed to the heir claiming through him. Jenkins, C.J. relied upon *Mathew* v. *Hanbury* (42) (1690) 2 Vern 187 a case which had been expressly overruled by *Ayerst* v. *Jenkins* (1) (1873) 16 Eq, 275, 281. He also relied upon *Mucklston* v. *Brown* (31) (1801) Ves. 52, 67-8 an exceptional case where heirs at law were relieved against an illegal act of the ancestor which was really a fraud upon them. Long ago *Kalinath Kur* v. *Doyal Kristo Deb* (43) (1870) 13 W.R. 87 decided clearly that the plaintiff could not be permitted to plead the fraud of his own father through whom he derived his title. In this connection it is however necessary to remember that *Raghupati* v. *Narasingha* (10) (1923) 36 C.L.J. 471, dissented from both *Sidlingappa* v. *Hirasa* (12) I.L.R. (1907) 31 Bom. 405 and

Kalinath Kur v. *Doyal Kristo Deb* (43) (1870) 13 W.R. 87 in so far as they acted upon *Doe* v. *Roberts* (22) (1819) 2 B & Aid. 367 and decided that particeps criminis could not plead his own fraud and illegality.

96. An agreement the object or consideration of which is unlawful within the meaning of section 23 of the Indian Contract Act is by that section made unlawful and void.

97. Paragraph 2 of section 56 of the Indian Contract Act allows relief to the promisee who did not know the promise to be unlawful against the promissor who knew or with reasonable diligence might have known it to be unlawful.

98. In general a particeps criminis cannot abtain restoration of any advantage received by the other party under an illegal agreement by recourse to section 65 of the Indian Contract Act. The courts have ruled that where both parties are aware of the illegality it cannot be said that the agreement is discovered to be void within the meaning of that section (*Nathu Khan* v. *Sewak Koeri* (44) 15 C.W.N. 408 and *Amjadennessa Bibee* v. *Rahim Baksh Shikdar* (45) (1914) 19 C.W.N. 383).

99. Section 65 of the Indian Contract Act being out of the way in general a party to an illegal contract cannot obtain refund of money paid under it (See *Ledu Coachman* v. *Hiralal* (46) I.L.R. (1916) 43 Cal. 115 : 19 C.W.N. 919.)

100. A transfer for an unlawful object or consideration within the meaning of the Indian Contract Act is prohibited by section 6(h) clause 2 of the Transfer of Property Act. Such a transfer does not pass any title. It is void and need not be set aside. *Jhuman* v. *Ramchandra Rao* (47) A.I.R. 1925 All. 437 and *Istak Khan* v. *Ranched Zipra* (19) A.I.R. 1947 Bom. 199, are clear rulings on this point. Even a third party has been allowed to show that the transfer is void and inoperative. In *Saleh Abraham* v. *Manekji* (43) I.L.R. (1923) 50 Cal. 491, the defendant in possession of the property was allowed to defeat a suit for his ejectment brought by a person claiming to be the lessee of the property by showing that

the object of the lease was of such a nature that if permitted it would defeat the provision of the Calcutta Kent Act and as such was unlawful within the meaning of section 23 of the Indian Contract Act and that consequently the lease was void and conferred no title on the plaintiff.

101. Section 6(h) clause 2 of the Transfer of Property Act has no counterpart in English law. Under that law a transfer pursuant to an illegal agreement or for an illegal purpose is valid at law. *Ayerst* v. *Jenkins* (1) 16 Eq. 275, lays down the principles upon which a court of equity may or may not set aside a transfer so valid at law and made by a transferor for an illegal purpose of his own. In our system of law a transfer for an unlawful object or purpose in contravention of section 6(h) clause 2 of the Transfer of Property Act is a nullity and need not be set aside. The case of *Ayerst* v. *Jenkins* (1) (1874) 16 Eq. 275, has no application to a case where the transfer is void and a suit for recovery of possession of the property is brought either by the transferor on the strength of his original title or by the transferee claiming title on the basis of the transfer. The assumptions and rulings to the contrary in *Daivanayaga* v. *Muthu Reddi* (2) 44 Mad. 329 and *Sabava* v. *Yamanapva* (41) A.I.R. 1933 Bom. 209 are erroneous and those rulings ought not to be followed on this point.

102. The transferee does not acquire any title under a transfer in contravention of section 6(h) clause 2 of the Transfer of Property Act and cannot recover possession of the property on the strength of such transfer.

103. What if the transferor sues the transferee for recovery of possession of the identical property transferred on the strength of his original title and claiming the transfer to be void?

104. It is argued that denial of relief to the plaintiff transferor and the consequent retention of the property by the transferee defeat the mandatory provision of section 6 (h) clause 2 of the Transfer of Property Act and that public policy is advanced more by granting relief than by refusing it. This argument raises a very broad question to which a decisive answer need not be given in this case.

105. Without deciding that broad question it is clear that inspite of the recrimination of particeps criminis the plaintiff transferor may recover possession of the property transferred at least in the following cases.

106. Section 84 of the Indian Trusts Act recognises three exceptions to the rule denying relief to a particeps criminis. Where the owner of property transfers it to another for an illegal purpose the transferee must hold the property for the benefit of the transferor if, (a) the illegal purpose is not carried into execution or, (b) the transferor is not as guilty as the transferee or, (c) the effect of permitting the transferee to retain the property might be to defeat the provisions of any law. The transferor is prima facie entitled to recover the property from the transferee if his case fall within one of these three exceptions.

107. Section 84 of the Indian Trusts Act is not exhaustive of the cases where relief may be given to the transferor making the illegal transfer. Relief

may be given to the transferor suing to recover possession of the property from the transferee where, (a) public interest or the interest of third parties require that the relief should be given or, (b) where denial of the relief may defeat a legal prohibition, (c) where the transfer ought not to be allowed to stand on grounds of policy. Reasons of public policy allow the defendant to take the plea of particips criminis. In the circumstances mentioned greater reasons of public policy allow the plaintiff to repel the plea.

108. It is not necessary to decide in this case if the transferor should be allowed to recover possession of the property from the transferee under other circumstances also.

109. In *Jhuman* v. *Ramchandra Rao* (47) A.I.R. 1925 All. 437 an heir of the transferor was allowed to plead that the transfer being in consideration of future illicit connection was void and to recover the property from the transferee. But the plea of particeps criminis was not raised and was not considered by the court.

110. In *Istak Khan* v. *Ranchod Zipru* (19) A.I.R. 1947 Bom. 199, transfers in consideration of past illicit cohabitation were held to be void and the transferee not haying allowed cohabitation by reason of the transfers the heirs of the transferor were permitted to recover possession of the properties from the transferee.

111. The transferor need not sue for cancellation of the void instrument or transfer but if he does so the court has discretionary power to grant him relief under sections 39 to 41 of the Specific Relief Act. In *Thasi Muthukannee* v. *Shummugavelu Pillai* (8) I.L.R. 28 Mad. 418, the court at the suit of the transferor set aside a deed of assignment made in consideration of future illicit cohabitation distinguishing, *Ayerst* v. *Jenkins* (1) 16 Eq. 275. The judgment does not refer to either section 6(h) clause 2 of the Transfer of Property Act or section 39 of the Specific Relief Act.

112. The power of the court to decree cancellation and rescission of an unlawful contract in writing is regulated by sections 35(b), 38, 39 to 41 of the Specific Relief

Act.

113. I will now briefly notice several of the cases dealing with benami transfers made with a view to shield the property from the creditors of the transferor. Where the fraudulent purpose has been achieved the courts have refused to give relief to the real owner who sued the banamdar for setting aside the documents of transfer and for confirmation of title and possession, *Banka Behary* v. *Raj Kumar* (49) I.L.R. (1900) 27 Cal. 231 as also to the benamdar who sued the real owner for recovery of possession on establishment of title, *Raghupati* v. *Narsingha* (10) (1923) 36 C.L.J. 491. But where the fraudulent purpose has not been carried into execution the courts have given relief to the real owner who sued the benamdar for recovery of possession and for cancellation of documents, *Petherpermal* v. *Muniandi* (14) (1908) 35 I.A. 98 and to the real owner who sued for declaration of title and for recovery of possession from the defendant in whose favour he had executed a deed of relinquishment, *Jadunath* v. *Ruplal* (50) I.L.R. (1906) 33 Cal. 967. In this special class of cases we have encouraged scrambles for possession and manoeuvres for the position of

being a defendant and the law of the jungle prevails. Though in *Banka Behary* v. *Raj Kumar* (49) I.L.R. (1900) 27 Cal. 231 a benami conveyance was said to give a good legal title to the benamar, in *Petherpermal* v. *Muniandi* (14) (1908) 35 I.A. 98, the Privy Council acted upon the view that a benami transfer was not intended to be an operative instrument and as such need not be set aside and did not bar a suit for recovery of possession by the real owner and that as soon as the benami was made out the benamdar disappeared from the title. The benami is a mask but the courts will not allow the mask to be torn off when the illegal purpose is accomplished. The mask then become a reality. In this view of the matter a benami transfer is not a real transfer and is not a transfer in contravention of section 6(h) clause 2 of the Transfer of Property Act. In fact the cases cited do not even refer to that provision of law. These cases do not decide when the court should grant or withhold its aid to the parties to a transfer made in contravention of section 6 (h) clause 2 of the Transfer of Property Act nor do they decide that relief should be denied to the transferor in all cases where the illegal purpose has been carried into execution.

114. I will also notice some cases of invalid registration of documents due to fraud upon the Registration Laws by inclusion of properties either fictitious or not intended to be transferred. Clearly the defendant can raise the plea of invalid registration though he is the transferor and a party to the fraud. *Ramnandan Prasad* v. *Chandradip Narain* (51) A.I.R. 1940 Pat. 504 : I.L.R. 19 Pat. 578. But in *Venkataswami* v. *Venkatasubbaya* (52) 55 Mad. 507 : A.I.R. 1932 Mad. 311, it was held that the court will not aid the transferor particeps criminis who comes as plaintiff who seeks to recover the property on the plea that the registration is invalid and consequently title to the property has not passed. Reilly, J. cited, *Gascoigne* v. *Gascoigne* (33) (1918) 1 K.B. 223 and the older cases where the courts did not allow the settlor to recover property legally vested in trustees on finding that the trust is for an unlawful purpose. Anantakrishna Aiyar, J. notices some cases on benami transfers and cases on recovery of moneys paid under illegal contracts. They do not seem to consider how far and within what limits the rule as to particeps criminis is applied in English law to transactions void at law on account of illegality. If the registration is invalid the legal title does not pass, There is no estoppel against statute. The decision in 55 Mad. 507, may be supported on the ground stated by Reilly, J. that the transferee in possession of the property is entitled to remain in possession by using the unregistered document

as a shield under section 53A of the Transfer of Property Act. In *Venkata Rama Rao* v. *Sobbhanadri Appa Rao* (53) 63 I.A. 169, the plaintiff was allowed to take the plea of invalidity of registeration and to show the fraud of his father who as guardian of the plaintiff had sold the property. The exact point decided by (52) I.L.R. 55 Mad. 507 does not arise here and it is not necessary to consider that case in greater detail.

115. I will summarise my conclusion as follows:—

(1) The rule in *Holman* v. *Johnson* (20) (1775) 1 Cowp. 341, 343, forms an integral part of our law.

(2) In general courts refuse to give relief to a party to an illegal contract who either founds his cause of action upon it or who has necessarily to disclose or plead its illegality to sustain his cause of action.

(3) An agreement the object or consideration of which is unlawful as defined by section 23 of the Indian Contract Act is unlawful and void.

(4) In general a particeps criminis cannot obtain refund of money paid under an unlawful agreement.

(5) In English law (a) a completed transfer of property made under an unlawful agreement or for an unlawful purpose is valid at law, (b) The title so acquired is protected and enforced and may be used by the transferee both as a shield and as a weapon of offence. (c) In the absence of some special ground of interference a court of equity will not on the ground of illegality set aside a transfer valid at law and will let the estate lie where it falls. (d) *Ayerst* v. *Jenkins* (1) (1874) 16 Eq. 275 lays down the principles upon which a court of equity may or may not set aside such a transfer.

(6) The case of *Ayerst* v. *Jenkins* (1874) 16 Eq. 275 has no application where the transfer is void.

(7) In Indian law a transfer for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act is prohibited by section 6(h) clause 2 of the Transfer of Property Act. Such a transfer is void and need not be set aside.

(8) In Indian law the transferee cannot recover the property on the strength of such a transfer.

(9) In Indian law the transferor claiming that the transfer is void may sue to recover the property on the strength of his original title and in general he may be given relief though he is particeps criminis in the following cases:

(a) Where his case falls within one of the three exceptions recognised by section 84 of the Indian Trusts Act or

(b) (i) Where public interest or the interest of third parties require that the relief should be given, or (ii) where denial of the relief may defeat a legal prohibition, or (iii) where the transaction is such that it ought to be allowed to stand on grounds of public policy.

Relief may be given upon such terms as the justice of the case may require.

It is an open question whether the transferor should be given relief under other circumstances also.

(10) When an instrument is void on account of illegality not appearing on the face of it and the transaction is such that it cannot stand on grounds of public policy,

the Court will decree its cancellation at the suit of the patriceps criminis on equitable terms. The power of the Court to decree cancellation of void instrument of transfer must be exercised in accordance with sections 39 to 41 of the Specific Relief Act. The power of the Court to decree cancellation and rescission of unlawful contracts in writing is regulated by sections 35(b), 38 and 39 to 41 of the Specific Relief Act.

(11) Reasons of public policy allow the defendant to take the plea of particeps criminis. Greater reasons of public policy may allow the plain tiff to repel the plea.

(12) In general a plaintiff claiming title through a particeps criminis is denied relief if his case is such that the particeps criminis would not have got relief had he come to the Court as plaintiff with the same case.

116. On the authorities I do not consider that we are free to hold that transfers in contravention of section 6(h) clause 2 of the Transfer of Property Act are valid until they are set aside. That point may be open to examination by a larger Bench or a higher court. The principles of *Ayerst* v. *Jenkins* (1) (1874) 16 Eq. 275 may be applied only if it can be held that such transfers are voidable only and not void.

117. A monthly tenancy is a lease and a transfer of property within the meaning of section 6(h) clause 2 of the Transfer of Property Act. In the instant case, the monthly tenancy being in contravention of section 6(h) clause 2 of the Transfer of Property Act is void. There is no lawful tenancy and no lawful lease and the defendant has not acquired any interest in the property. The plaintiff is not bound to give any notice to quit as contemplated by section 106 of the Transfer of Property Act. The giving of such a notice would be a farce considering that the lease is void. Sufficient demand for possession has been made and the defendant is bound to vacate the property. The plaintiffs claim title to the property through the particeps criminis who is now dead. The plaintiffs are the owners of the property and are entitled to immediate possession thereof. The plaintiffs bonafide intend to use the premises for lawful purpose. The defendant has used and still uses the premises as a brothel.

118. We consider that no rule of law or equity or public policy preclude the plaintiffs from obtaining relief. Public interest and public welfare demand discontinuance of the brothel and of the user of the premises as a place of promiscuous sexual intercourse. Public interest is not served by the continuance of brothel which breed disease, sap the manhood and vitality of the State and degenerate posterity.

119. The lease for immoral purposes ought not to be allowed to stand for reasons of policy. Relief will be given to the public through the plaintiff if the suit is decreed and the vicious practices are checked. Regard for public welfare is the supreme law. (Salus populi est suprema lex). To this maxim all other maxims of public policy must yield, for the object of all law is to promote the general well-being of society. In my judgment, the plaintiffs are entitled to a decree for ejectment.

120. The so-called rent was fixed and promised on the expectation of the inflated earnings of prostitution. We do not consider such rent to be the true measure of the profits which the defendant could have lawfully earned from the premises. We have made a rough and ready assessment of the mesne profits having regard to all the circumstances. I agree to the order proposed.

S.K.B.

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or acted in a cruel manner. The injuries found by the doctor PW 12, who carried out the post-mortem examination on the body of the deceased Zohra Bi, aged 40 years, were in all sixteen incised wounds, similarly, he had noted eleven incised wounds on the dead body of Gulzar, aged about 17 years. On the face of it, it is apparent that the accused acted in a most cruel manner by inflicting a number of dagger blows on a helpless stepmother and younger sister. Hence, even assuming that there was no premeditation and the act was done in the heat of passion because of a sudden quarrel between PW 1 on one side and Maqbool and the appellant on the other and that the appellant used the dagger which was brought out by his brother Maqbool for inflicting injuries, yet the main requirements, viz., (*i*) it was a sudden fight and (*ii*) the accused have not taken undue advantage or acted in a cruel or unusual manner of Exception 4 of Section 300 IPC are not satisfied. Further, the contention of the learned counsel for the appellant that PW 1 and the accused have reconciled and are staying together or that the accused is the sole earning member of the family would be totally irrelevant on the question of conviction and sentence of the accused for the offence of murder of his stepmother and sister.

6. In the result, the appeal fails and is dismissed accordingly. Bail bond stands cancelled. The appellant must surrender forthwith to serve the sentence.

(1999) 3 Supreme Court Cases 573

(BEFORE S. SAGHIR AHMAD AND D.P. WADHWA, JJ.)

VIDHYADHAR .. Appellant;

Versus

MANIKRAO AND ANOTHER .. Respondents.

Civil Appeal No. 1534 of 1999†, decided on March 17, 1999

A. **Transfer of Property Act, 1882 — S. 54 — Sale — Non-payment or inadequacy of sale consideration — Plea regarding — Plea that sale deed was void, fictitious, collusive or not intended to be acted upon — Held, can be raised also by a defendant who is a stranger to the sale deed — It would depend upon the pleadings of the parties, nature of the suit, nature of the deed, evidence led by the parties and other circumstances**

B. **Civil Procedure Code, 1908 — Or. 8 — Defendant can raise any legitimate plea available to him under law to defeat the suit of the plaintiff**

C. **Transfer of Property Act, 1882 — Ss. 54 and 60 — Sale of mortgaged property — Purchaser becomes entitled to right of redemption possessed by the seller**

D. **Civil Procedure Code, 1908 — S. 100 — Scope of High Court's power in second appeal to interfere with concurrent findings of fact (regarding execution of sale deed in this case)**

† From the Judgment and Order dated 3-5-1991 of the Bombay High Court in S.A. No. 352 of 1976

E. **Civil Procedure Code, 1908 — Or. 16 Rr. 1(3) & 1-A — R. 1-A not in derogation of R. 1(3) — Witnesses — A party may bring witnesses even without applying for court summons — But leave of the court has to be obtained before proceeding to examine such witnesses**

F. **Transfer of Property Act, 1882 — S. 54 — Sale — Consideration — "Price paid or promised or part paid and part promised" — Actual payment of full price at the time of execution of sale deed is not a sine qua non for completion of sale — Real test of sale is intention of the parties**

G. **Transfer of Property Act, 1882 — S. 55(4)(b) — Provision based on English doctrine of equitable lien — Where ownership of the property is transferred to the buyer before payment of the wholesale price, vendor is entitled to a charge on that property for the amount of sale price as also interest thereon — Such charge provides him right to enforce the charge by a suit but does not entitle the seller to retain the property as against the buyer**

H. **Transfer of Property Act, 1882 — S. 58(c) proviso — Mortgage by conditional sale — Whether transaction was an out and out sale or a mortgage — Intention of the parties to the deed is the real test — Document styled as 'kararkharedi' executed by Defendant 2 in favour of Defendant 1 for a sum of Rs 1500 with the stipulation therein that if the entire amount of Rs 1500 returned to Defendant 1 before a specified date the property would be reconveyed to Defendant 2 — Held, deed must be treated as a mortgage by conditional sale**

Defendant 2 who owned a plot of land, executed a document styled as 'Kararkharedi' in favour of Defendant 1 for a sum of Rs 1500 and delivered possession of the land to the latter. There was a stipulation in the document that if the entire amount of Rs 1500 was returned to Defendant 1 before 15-3-1973, the land would be given back to Defendant 2. The land was subsequently transferred by Defendant 2 in favour of the plaintiff for a sum of Rs 5000 by a registered sale deed dated 19-6-1973. After having obtained the sale deed, the plaintiff filed a suit in which it was given out that Defendant 2 had offered the entire amount to Defendant 1 but the latter did not accept the amount and, therefore, Defendant 2 had to send it by money order on 7-6-1973 which was refused by Defendant 1. A notice dated 5-6-1973 had also been sent by Defendant 2 to Defendant 1. It was pleaded that since the document executed by Defendant 2 in favour of Defendant 1 was a mortgage by conditional sale, the property was liable to be redeemed. It was also pleaded in the alternative that if it was held by the Court that the document did not create a mortgage but was an out and out sale, the plaintiff as transferee of Defendant 2, was entitled to a decree for reconveyance of the property as Defendant 2 had already offered the entire amount of sale consideration to Defendant 1 which the latter had refused and which amount the plaintiff was still prepared to offer to Defendant 1 and was also otherwise ready and willing to perform his part of the contract. Defendant 2 admitted the claim of the plaintiff by filing a one-sentence written statement that the claim of the plaintiff was admitted. When the plaintiff entered the witness-box, Defendant 2 did not cross-examine him. He did not put it to the plaintiff that the entire amount of consideration had not been paid by him. Defendant 1 alone raised the question of validity of the sale deed in favour of the plaintiff by pleading that it was a fictitious transaction as the sale consideration had not been paid to Defendant 2 in its entirety. Defendant 1 also pleaded that the document in his favour was not a mortgage by conditional sale but was an out and out sale and since the amount of consideration had not been tendered within the time stipulated therein, the plaintiff could not claim reconveyance of the property in question. Having pleaded these facts and having raised the question relating to the validity of the sale deed on the ground

that the amount of consideration had not been paid, Defendant 1 did not, in support of his case, enter the witness-box. Instead, he deputed his brother to appear as a witness in the case. He did enter the witness-box but could not prove that the sale consideration had not been paid to Defendant 2. On a consideration of the entire evidence on record, the trial court recorded a positive finding of fact that Defendant 2 had mortgaged the land in question to Defendant 1 for Rs 1500 on 24-3-1971, that the sale deed executed by Defendant 2 in favour of the plaintiff was a genuine document and the entire amount of sale consideration had been paid and, therefore, the plaintiff was entitled to redeem the mortgage executed by Defendant 2 in favour of Defendant 1. This finding was affirmed by the lower appellate court but the High Court intervened and recorded a finding that the plaintiff had not paid the entire amount of sale consideration to Defendant 2. Out of a sum of Rs 5000 for which sale deed was executed, a sum of Rs 500 alone had been paid to Defendant 2 before the Sub-Registrar and the rest of the amount was not paid. The High Court further held that the document "kararkharedi" which purports to have been executed for a sum of Rs 1500 by Defendant 2 in favour of Defendant 1 was, in fact, executed for a sum of Rs 800 which was paid before the Sub-Registrar. The High Court then disposed of the suit by directing that the land in question shall be restored to Defendant 2 who shall pay back a sum of Rs 800 (in instalments) to Defendant 1 and a sum of Rs 500 (in instalments) to the plaintiff. On behalf of the plaintiff-appellant it was contended that the sale deed executed by Defendant 2 in favour of the plaintiff was not challenged by Defendant 2 who, on the contrary, had admitted the entire claim set out by the plaintiff in his plaint and, therefore, the High Court was in error in setting aside the sale deed. It was also contended that Defendant 1 who had challenged the sale deed as fictitious had not appeared as a witness in the case and had avoided the witness-box in order to avoid cross-examination and, therefore, an adverse inference should have been drawn against him and this plea ought not to have been rejected by the High Court which, it was also contended, could not have legally set aside the findings of fact in second appeal. It was also contended that Defendant 1 being a stranger to the sale deed should not have been allowed to raise the plea relating to inadequacy or non-payment of consideration money. Respondent-Defendant 1, on the contrary, tried to justify the interference by the High Court at the stage of second appeal by contending that the findings recorded by the courts were not borne out by the evidence on record and were perverse which could be set aside under Section 100 CPC. Defendant 1 also contended that since the plaintiff had filed the suit on the basis of the sale deed executed by Defendant 2 in his favour and had sought possession over that property from Defendant 1, it was open to the latter to show that the plaintiff had no title to the property in the suit and, therefore, the suit was liable to be dismissed. It was contended that in his capacity as a defendant in the suit, it was open to Defendant 1 to raise all the pleas on the basis of which the suit could be defeated. He also contended that the document of title in favour of Defendant 1 was misread as a mortgage deed although it constituted an out and out sale. Moreover, on the commission of default, as contemplated by the document in question, the whole transaction, even if it was a mortgage, converted itself into an absolute sale as agreed upon between the parties. The sale having thus become absolute in favour of Defendant 1, no title was left in Defendant 2 to convey it to the plaintiff through the sale deed in question. Allowing the appeal

Held :

As regards right of Defendant 1 to raise pleas, it is not possible to subscribe to the view expressed in broad terms in *Lal Achal Ram case* by Privy Council that a stranger to a sale deed cannot dispute payment of consideration or its adequacy. A distinction has to be drawn between a deed which was intended to be real or

operative between the parties and a deed which is fictitious in character and was never designed as a genuine document to effect transfer of title. In such a situation, it would be open even to a stranger to impeach the deed as void and invalid on all possible grounds. A person in his capacity as a defendant can raise any legitimate plea available to him under law to defeat the suit of the plaintiff. This would also include the plea that the sale deed by which the title to the property was intended to be conveyed to the plaintiff was void or fictitious or, for that matter, collusive and not intended to be acted upon. Thus, the whole question would depend upon the pleadings of the parties, the nature of the suit, the nature of the deed, the evidence led by the parties in the suit and other attending circumstances. (Para 21)

In the instant case, the property which was mortgaged in favour of Defendant 1 was transferred by Defendant 2, who was the owner of the property, to the plaintiff. This transfer does not, in any way, affect the rights of Defendant 1 who was the mortgagee and the mortgage in his favour, in spite of the transfer, subsisted. (Para 22)

Lal Achal Ram v. *Raja Kazim Husain Khan*, (1905) 32 IA 113 : ILR 27 All 271, *overruled*

Kamini Kumar Deb v. *Durga Charan Nag*, AIR 1923 Cal 521 : 37 Cal LJ 122; *Saradindu Mukherjee* v. *Kunja Kamini Roy*, AIR 1942 Cal 514 : 46 CWN 798; *Jugal Kishore Tewari* v. *Umesh Chandra Tewari*, AIR 1973 Pat 352 : 1973 BLJR 255; *Sanatan Mohapatra* v. *Hakim Mohammad Kazim Mohmmad*, AIR 1977 Ori 194 : 44 Cut LT 606, *approved*

Defendant 1 himself was not a party to the transaction of sale between Defendant 2 and the plaintiff. He himself had no personal knowledge of the terms settled between Defendant 2 and the plaintiff. The transaction was not settled in his presence nor was any payment made in his presence. Nor, for that matter, was he a scribe or marginal witness of that sale deed. Defendant 1 could not have raised a plea as to the validity of the sale deed on the ground of inadequacy of consideration or part-payment thereof. Defendant 2 alone, who was the executant of the sale deed, could have raised an objection as to the validity of the sale deed on the ground that it was without consideration or that the consideration paid to him was highly inadequate. But he admitted the claim of the plaintiff whose claim in the suit was based on the sale deed, executed by Defendant 2 in his favour. The property having been transferred to him, the plaintiff became entitled to all the reliefs which could have been claimed by Defendant 2 against Defendant 1 including redemption of the mortgaged property. (Para 18)

The findings of fact concurrently recorded by the trial court as also by the lower appellate court could not have been legally upset by the High Court in a second appeal under Section 100 CPC unless it was shown that the findings were perverse, being based on no evidence or that on the evidence on record, no reasonable person could have come to that conclusion. In the face of the findings recorded by the trial court as also by the lower appellate court on the question of execution of sale deed by Defendant 2 in favour of the plaintiff with the further finding that it was a valid sale deed which properly conveyed the title of the property in question to the plaintiff, the High Court could not set aside those findings merely on the ground that the circumstances which had already been considered by the lower courts appeared to suggest some other conclusion from proved facts. (Paras 23 and 26)

Suggested Case Finder Search Text (*inter alia*) :

high court appeal concurrent* fact* 100

The High Court erred in commenting upon the production of Defendant 2 as a witness by saying "The plaintiff while examining this witness has not incorporated the name of this witness in the list of witnesses nor any application was made for the

examination of Defendant 2. The willingness of Defendant 2 was also not placed on record to appear as a witness for the plaintiff". Even though the name of Defendant 2 was not mentioned in the list of witnesses furnished by the plaintiff, he was properly examined as a witness and his testimony was not open to any criticism on the ground that he was produced as a witness without being summoned through the Court and without his name being mentioned in the list of witnesses. (Paras 28 and 32)

Rules 1 and 1-A of Order 16 CPC read together clearly indicate that it is open to a party to summon the witnesses to the court or may, without applying for summons, bring the witnesses to give evidence or to produce documents. Since Rule 1-A is subject to the provisions of sub-rule (3) of Rule 1, all that can be contended is that before proceeding to examine any witness who might have been brought by a party for that purpose, the leave of the court may be necessary but this by itself will not mean that Rule 1-A was in derogation of sub-rule (3) of Rule 1. (Para 31)

Mange Ram v. *Brij Mohan*, (1983) 4 SCC 36 : AIR 1983 SC 925 : (1983) 3 SCR 525, *relied on*

The recital in the registered sale deed that out of the amount of Rs 5000, which was the sale price, a sum of Rs 4500 had been paid earlier while Rs 500 was paid before the Sub-Registrar, read in the light of the admission made by Defendant 2 in his written statement and, thereafter, in his statement on oath as a witness clearly establishes the fact that Defendant 2 had executed a sale deed in favour of the plaintiff for a price which was paid to Defendant 2. Even if the findings recorded by the High Court that the plaintiff had paid only Rs 500 to Defendant 2 as sale consideration and the remaining amount of Rs 4500 which was shown to have been paid before the execution of the deed was, in fact, not paid, the sale deed would not, for that reason, become invalid on account of the provisions contained in Section 54, TPA. The definition of sale contained in Section 54 indicates that in order to constitute a sale, there must be a transfer of ownership from one person to another, i.e., transfer of all rights and interests in the properties which are possessed by that person are transferred by him to another person. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. Price constitutes an essential ingredient of the transaction of sale. But the words "price paid or promised or part-paid and part-promised" indicate that actual payment of the whole of the price at the time of the execution of sale deed is not a sine qua non to the completion of the sale. Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs 100, the sale would be complete, the transaction of sale will take effect and the title would pass under that transaction. The real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in praesenti or in future. The intention is to be gathered from the recital in the sale deed, the conduct of the parties and the evidence on record. (Paras 36 to 38)

Gayatri Prasad v. *Board of Revenue*, 1973 All LJ 412; *Sukaloo* v. *Punau*, AIR 1961 MP 176 : ILR 1960 MP 614, *approved*

In the present case, the facts clearly establish that a complete and formidable sale deed was executed by Defendant 2 in favour of the plaintiff and the title in the property passed to the plaintiff. The findings recorded by the High Court on this question cannot, therefore, be upheld. (Para 39)

The judgment of the High Court on this point is also erroneous for the reason that it totally ignored the provisions contained in Section 55(4)(*b*), TPA. They apply to a situation where the ownership in the property has passed to the buyer before the whole of the purchase money was paid to the seller or the vendor. What is contained in this clause is based on the English doctrine of equitable lien as propounded by Baron Rolfe in *Goode* v. *Burton*. This clause confers statutory recognition on the

English doctrine of equitable lien. The statutory charge under this paragraph is inflexible. The charge does not entitle the seller to retain possession of the property as against the buyer but it positively gives him a right to enforce the charge by suit. (Paras 40 and 42)

Goode v. *Burton*, (1847) 74 RR 633 : 1 Ex 189; *Webb* v. *Macpherson*, (1903) 30 IA 238; *Venkataperumal Naidu* v. *M. Rathnasabhapathi Chettiar*, AIR 1953 Mad 821; *Shobhalal Shyamlal Kurmi* v. *Sidhelal Halkelal Bania*, AIR 1939 Nag 210 : ILR 1939 Nag 636; *Basalingaya Revanshiddappa* v. *Chinnava Karibasappa*, AIR 1932 Bom 247 : 34 Bom LR 427, *approved*

In view of the above, the High Court was wholly in error in coming to the conclusion that there was no sale as only a sum of Rs 500 was paid to Defendant 2 and the balance amount of Rs 4500 was not paid. Since the title in the property had already passed, even if the balance amount of sale price was not paid, the sale would not become invalid. The property sold would stand transferred to the buyer subject to the statutory charge for the unpaid part of the sale price. (Para 43)

It is not possible to accept the contention of Defendant 1 that the deed dated 24-3-1971 was not a mortgage deed but an out and out sale with the result that the property having been transferred to Defendant 1 was not available for being sold to the plaintiff. The contents of the document indicate that Defendant 2 had executed a mortgage by conditional sale in favour of Defendant 1. He had promised to pay back Rs 1500 to him by a particular date failing which the document was to be treated as a sale deed. The intention of the parties is reflected in the contents of the document which is described as a mortgage by conditional sale. In the body of the document, the mortgage money has also been specified. Having regard to the circumstances of this case as also the fact that the condition of repurchase is contained in the same document by which the mortgage was created in favour of Defendant 1, the deed in question cannot but be treated as a mortgage by conditional sale. Mortgage by conditional sale is defined under Section 58(*c*). The proviso was introduced in this clause only to set at rest the controversy about the nature of the document, whether the transaction would be a sale or a mortgage. It has been specifically provided by the amendment that the document would not be treated as a mortgage unless the condition of repurchase was contained in the same document. The basic principle is that the form of transaction is not the final test and the true test is the intention of the parties in entering into the transaction. If the intention of the parties was that the transfer was by way of security, it would be a mortgage. As between the parties to the document, the intention to treat the transaction as an out and out sale or as a mortgage has to be found out on a consideration of the contents of the document in the light of surrounding circumstances. (Paras 44, 49, 46, 47 and 48)

Balkishen Das v. *Legge*, (1899) 27 IA 58; *Bhaskar Waman Joshi* v. *Shrinarayan Rambilas Agarwal*, AIR 1960 SC 301 : (1960) 2 SCR 117; *P.L. Bapuswami* v. *N. Pattay Gounder*, AIR 1966 SC 902 : (1966) 2 SCR 918, *relied on*

So far as the contention of Defendant 1 that the mortgage money was not paid within the time stipulated in the document and, therefore, the transaction, even if it was a mortgage, became an absolute sale is concerned, the finding of the courts below is that this money was tendered to Defendant 1 who refused to accept it. Defendant 2 had thus performed his part of the agreement and had offered the amount to Defendant 1 so that the property may be reconveyed to him but Defendant 1 refused to accept the money. He, therefore, cannot complain of any default in not paying the amount in question within the time stipulated in the deed. Since there was no default on the part of Defendant 2, the document would not convert itself into a sale deed and would remain a mortgage deed. The suit for redemption was, therefore, properly filed by the plaintiff who was the assignee of Defendant 2. (Para 50)

I. **Evidence Act, 1872 — S. 114 Ill. (g) — Presumption — If a party abstains from entering the witness-box, an adverse inference would arise against him**

Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. (Para 17)

Sardar Gurbakhsh Singh v. *Gurdial Singh*, AIR 1927 PC 230 : 32 CWN 119; *Kirpa Singh* v. *Ajaipal Singh*, AIR 1930 Lah 1 : ILR 11 Lah 142; *Martand Pandharinath Chaudhari* v. *Radhabai Krishnarao Deshmukh*, AIR 1931 Bom 97 : 32 Bom LR 924; *Gulla Kharagjit Carpenter* v. *Narsingh Nandkishore Rawat*, AIR 1970 MP 225 : 1970 MPLJ 586; *Arjun Singh* v. *Virendra Nath*, AIR 1971 All 29; *Bhagwan Dass* v. *Bhishan Chand*, AIR 1974 P&H 7, *approved*

Suggested Case Finder Search Text (*inter alia*) :

evidence "114 ill (g)" (court or witness* or examine*)

R-M/TZ/20919/C

Advocates who appeared in this case :
S.K. Gambhir, Advocate, for the Appellant;
Makrand D. Adkar, S.D. Singh and Vishwajit Singh, Advocates, for the Respondents.

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21. (1899) 27 IA 58, *Balkishen Das* v. *Legge* 593*g*
22 (1847) 74 RR 633 : 1 Ex 189, *Goode* v. *Burton* 592*d-e*

The Judgment of the Court was delivered by

S. SAGHIR AHMAD, J.— Leave granted.

2. Vidhyadhar, the appellant before us, who shall hereinafter be referred to as the plaintiff, had instituted a suit against the respondents, who shall hereinafter be referred to as Defendants 1 and 2, respectively, for redemption of the mortgage by conditional sale or in the alternative, for a decree for specific performance of the contract for repurchase which was decreed by the trial court on 29-4-1975. The decree was upheld by the lower appellate court by its judgment dated 28-9-1976 but the High Court, by the impugned judgment dated 3-5-1991, set aside both the judgments and passed a unique order to which a reference shall be made presently in this judgment. The plaintiff is in appeal before us.

3. The property in dispute is 4.04 acres of land of Survey Plot No. 15 of Kasba Amdapur, District Buldana. The whole area of Survey Plot No. 15 is 16.09 acres and except the land in dispute, namely, an area of 4.04 acres, the entire land is in possession of the plaintiff. Defendant 2 was the owner of the whole Plot No. 15. On 24-3-1971, he executed a document styled as "kararkharedi" in favour of Defendant 1 for a sum of Rs 1500 and delivered possession thereof to the latter. There was a stipulation in the document that if the entire amount of Rs 1500 was returned to Defendant 1 before 15-3-1973, the property would be given back to Defendant 2.

4. This land was subsequently transferred by Defendant 2 in favour of the plaintiff for a sum of Rs 5000 by a registered sale deed dated 19-6-1973. After having obtained the sale deed, the plaintiff filed the aforesaid suit in which it was given out that Defendant 2 had offered the entire amount to Defendant 1 but the latter did not accept the amount and, therefore, Defendant 2 had to send it by money order on 7-6-1973 which was refused by Defendant 1. A notice dated 5-6-1973 had also been sent by Defendant 2 to Defendant 1. It was pleaded that since the document executed by Defendant 2 in favour of Defendant 1 was a mortgage by conditional sale, the property was liable to be redeemed. It was also pleaded in the alternative that if it was held by the Court that the document did not create a mortgage but was an out and out sale, the plaintiff as transferee of Defendant 2, was entitled to a decree for reconveyance of the property as Defendant 2 had already offered the entire amount of sale consideration to Defendant 1 which the latter had refused and which amount the plaintiff was still prepared to offer to Defendant 1 and was also otherwise ready and willing to perform his part of the contract.

5. Defendant 2 admitted the whole claim of the plaintiff by filing a one-line written statement in the trial court. But Defendant 1 contested the suit and pleaded that the document in his favour was not a mortgage by

conditional sale but was an out and out sale and since the amount of consideration had not been tendered within the time stipulated therein, the plaintiff could not claim reconveyance of the property in question. The trial court framed the following issues:

"*1.* Does the plaintiff prove that Defendant 2 mortgaged the suit field with Defendant 1 for Rs 1500 on 24-3-1971?

2. Does the plaintiff prove that the suit field was purchased by him from Defendant 2 for Rs 5000 on 19-6-1973?

3. Is the plaintiff entitled to redeem the mortgage executed by Defendant 2 in favour of Defendant 1?

4. Was Defendant 2 ready and willing to repurchase the suit field prior to 15-3-1971?

5. Is the plaintiff entitled to claim retransfer of the suit field from Defendant 1?

6. Relief and costs?"

6. The finding on Issue 1 was that Defendant 2 had mortgaged the land in question to Defendant 1 for Rs 1500 on 24-3-1971. On Issue 2, it was found that Defendant 2 had transferred the property in favour of the plaintiff for a sum of Rs 5000 on 19-6-1973 by a registered sale deed and, therefore, the plaintiff was entitled to redeem the mortgage executed by Defendant 2 in favour of Defendant 1. Issues 4 and 5 were decided in the negative as the trial court had held the document in question to be a mortgage deed. In view of these findings, the suit was decreed and the trial court passed the following order:

"It is hereby declared that the amount due to Defendant 1 on the mortgage mentioned in the plaint dated 24-3-1971 is Rs 1500. It is further ordered and decreed that the plaintiff to pay into court on or before 29-10-1975 or any later date into which time for payment may be extended by the Court the said sum of Rs 1500.

That on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due interest as may be payable under Rule 10, together with such subsequent interest as may be payable under Rule 11 of Order 34 of the First Schedule to the Code of Civil Procedure, 1908, Defendant 1 shall bring into court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiff or to such person as he appoints, and Defendant 1 shall, if so required, reconvey or retransfer the said property from the said mortgage and clear of and from all encumbrances created by Defendant 1 or any person claiming under him or any person under whom he claims, and free from all liability whatsoever arising from the mortgage or this suit and shall deliver to the plaintiff quiet and peaceful possession of the said property. And it is further ordered and decreed that, in default of payment as aforesaid, Defendant 1 may apply to the Court for a final

decree that the plaintiff be debarred from all right to redeem the property."

7. This decree was confirmed in appeal but, as pointed out above, was reversed by the High Court in the second appeal.

8. The High Court was of the opinion that the plaintiff had not paid the entire amount of sale consideration to Defendant 2. Out of a sum of Rs 5000 for which sale deed was executed, a sum of Rs 500 alone had been paid to Defendant 2 before the Sub-Registrar and the rest of the amount was not paid. The High Court further held that the document "kararkharedi" which purports to have been executed for a sum of Rs 1500 by Defendant 2 in favour of Defendant 1 was, in fact, executed for a sum of Rs 800 which was paid before the Sub-Registrar. The High Court then disposed of the suit by directing that the land in question shall be restored to Defendant 2 who shall pay back a sum of Rs 800 (in instalments) to Defendant 1 and a sum of Rs 500 (in instalments) to the plaintiff.

9. Learned counsel for the appellant has contended that the sale deed executed by Defendant 2 in favour of the plaintiff was not challenged by Defendant 2 who, on the contrary, had admitted the entire claim set out by the plaintiff in his plaint and, therefore, the High Court was in error in setting aside the sale deed. It is also contended that Defendant 1 who had challenged the sale deed as fictitious had not appeared as a witness in the case and had avoided the witness-box in order to avoid cross-examination and, therefore, an adverse inference should have been drawn against him and this plea ought to have been rejected by the High Court which, it is also contended, could not have legally set aside the findings of fact in second appeal. It is also contended that Defendant 1 being a stranger to the sale deed should not have been allowed to raise the plea relating to inadequacy or non-payment of consideration money.

10. Learned counsel for Defendant 1, on the contrary, has tried to justify the interference by the High Court at the stage of second appeal by contending that the findings recorded by the courts were not borne out by the evidence on record and were perverse which could be set aside under Section 100 CPC. He also contended that the document of title in favour of Defendant 1 was misread as a mortgage deed although it constituted an out and out sale. Moreover, on the commission of default, as contemplated by the document in question, the whole transaction, even if it was a mortgage, converted itself into an absolute sale as agreed upon between the parties. The sale having thus become absolute in favour of Defendant 1, no title was left in Defendant 2 to convey it to the plaintiff through the sale deed in question.

11. Let us examine the respective contentions.

12. Beginning with the pleadings, Defendant 2 in his written statement filed before the trial court, admitted the claim of the plaintiff.

13. Annexure P-III to the special leave petition is the true translation of the copy of the written statement filed by Defendant 2 in the suit. It reads as under:

"IN THE COURT OF THE HON'BLE CIVIL JUDGE,
SENIOR DIVISION,
BULDANA

RCS No. 195 of 1973 FF ...

Plaintiff: *Vidhyadhar Vishnupant Ratnaparkhi*

v.

Defendant: (1) *Manikrao Babarao Deshmukh*
(2) *Pandu Ganu Bhalerao*

Written Statement of Defendant 2, Pandu Ganu Bhalerao

(1) The suit filed by the plaintiff is admitted. Hence this written statement.

Buldana
Dated sd/-
20-12-1973 (Pandu Ganu Bhalerao)

I, Defendant 2 state on oath that the contents of para 1 of the written statement are true as per my personal knowledge.

Hence this affidavit is signed and executed at Buldana on this 20-12-1973.

sd/-
(Pandu Ganu Bhalerao)"

14. The lower appellate court has noticed this and observed in its judgment as under:

"Defendant 2 filed his written statement at Ex. 15 which is extremely brief comprising only a sentence, stating that the suit filed by the plaintiff is admitted by him."

15. Even while the plaintiff was in the witness-box, Defendant 2 declined to cross-examine the plaintiff which shows that Defendant 2 after admitting the case of the plaintiff, had no interest in the litigation particularly as he had already transferred the property in favour of the plaintiff.

16. It was Defendant 1 who contended that the sale deed executed by Defendant 2 in favour of the plaintiff was fictitious and the whole transaction was a bogus transaction as only Rs 500 were paid as sale consideration to Defendant 2. He further claimed that payment of Rs 4500 to Defendant 2 at his home before the registration of the deed was wholly incorrect. This plea was not supported by Defendant 1 as he did not enter the witness-box. He did not state the facts pleaded in the written statement on oath in the trial court and avoided the witness-box so that he may not be cross-examined. This, by itself, is enough to reject the claim that the transaction of sale between Defendant 2 and the plaintiff was a bogus transaction.

17. Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is

not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in *Sardar Gurbakhsh Singh* v. *Gurdial Singh*[1]. This was followed by the Lahore High Court in *Kirpa Singh* v. *Ajaipal Singh*[2] and the Bombay High Court in *Martand Pandharinath Chaudhari* v. *Radhabai Krishnarao Deshmukh*[3]. The Madhya Pradesh High Court in *Gulla Kharagjit Carpenter* v. *Narsingh Nandkishore Rawat*[4] also followed the Privy Council decision in *Sardar Gurbakhsh Singh case*[1]. The Allahabad High Court in *Arjun Singh* v. *Virendra Nath*[5] held that if a party abstains from entering the witness-box, it would give rise to an adverse inference against him. Similarly, a Division Bench of the Punjab and Haryana High Court in *Bhagwan Dass* v. *Bhishan Chand*[6] drew a presumption under Section 114 of the Evidence Act, 1872 against a party who did not enter the witness-box.

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

19. Learned counsel for Defendant 1 contended that since the plaintiff had filed the suit on the basis of the sale deed executed by Defendant 2 in his favour and had sought possession over that property from Defendant 1, it was open to the latter to show that the plaintiff had no title to the property in the suit and, therefore, the suit was liable to be dismissed. It was contended that in his capacity as a defendant in the suit, it was open to Defendant 1 to raise all the pleas on the basis of which the suit could be defeated.

20. In *Lal Achal Ram* v. *Raja Kazim Husain Khan*[7] the Privy Council laid down the principle that a stranger to a sale deed cannot dispute payment of consideration or its adequacy. This decision has since been considered by

1 AIR 1927 PC 230 · 32 CWN 119
2 AIR 1930 Lah 1 · ILR 11 Lah 142
3 AIR 1931 Bom 97 · 32 Bom LR 924
4 AIR 1970 MP 225 : 1970 MPLJ 586
5 AIR 1971 All 29
6 AIR 1974 P&H 7
7 (1905) 32 IA 113 : ILR 27 All 271

various High Courts and a distinction has been drawn between a deed which was intended to be real or operative between the parties and a deed which is fictitious in character and was never designed as a genuine document to effect transfer of title. In such a situation, it would be open even to a stranger to impeach the deed as void and invalid on all possible grounds. This was also laid down in *Kamini Kumar Deb* v. *Durga Charan Nag*[8] and again in *Saradindu Mukherjee* v. *Kunja Kamini Roy*[9]. The Patna High Court in *Jugal Kishore Tewari* v. *Umesh Chandra Tewari*[10] and the Orissa High Court in *Sanatan Mohapatra* v. *Hakim Mohammad Kazim Mohmmad*[11] have also taken the same view.

21. The above decisions appear to be based on the principle that a person in his capacity as a defendant can raise any legitimate plea available to him under law to defeat the suit of the plaintiff. This would also include the plea that the sale deed by which the title to the property was intended to be conveyed to the plaintiff was void or fictitious or, for that matter, collusive and not intended to be acted upon. Thus, the whole question would depend upon the pleadings of the parties, the nature of the suit, the nature of the deed, the evidence led by the parties in the suit and other attending circumstances. For example, in a landlord-tenant matter where the landlord is possessed of many properties and cannot possibly seek eviction of his tenant for bona fide need from one of the properties, the landlord may ostensibly transfer that property to a person who is not possessed of any other property so that that person, namely, the transferee, may institute eviction proceedings on the ground of his genuine need and thus evict the tenant who could not have been otherwise evicted. In this situation, the deed by which the property was intended to be transferred, would be a collusive deed representing a sham transaction which was never intended to be acted upon. It would be open to the tenant in his capacity as a defendant to assert, plead and prove that the deed was fictitious and collusive in nature. We, therefore, cannot subscribe to the view expressed by the Privy Council in the case of *Lal Achal Ram*[7] in the broad terms in which it is expressed but do approve the law laid down by the Calcutta, Patna and Orissa High Courts as pointed out above.

22. In the instant case, the property which was mortgaged in favour of Defendant 1 was transferred by Defendant 2, who was the owner of the property, to the plaintiff. This transfer does not, in any way, affect the rights of Defendant 1 who was the mortgagee and the mortgage in his favour, in spite of the transfer, subsisted. When the present suit for redemption was filed by the plaintiff, Defendant 2, as pointed out above, admitted the claim of the plaintiff by filing a one-sentence written statement that the claim of the plaintiff was admitted. When the plaintiff entered the witness-box, Defendant 2 did not cross-examine him. He did not put it to the plaintiff that

8 AIR 1923 Cal 521 : 37 Cal LJ 122
9 AIR 1942 Cal 514 : 46 CWN 798
10 AIR 1973 Pat 352 : 1973 BLJR 255
11 AIR 1977 Ori 194 : 44 Cut LT 606

the entire amount of consideration had not been paid by him. Defendant 1 alone raised the question of validity of the sale deed in favour of the plaintiff by pleading that it was a fictitious transaction as the sale consideration had not been paid to Defendant 2 in its entirety. Having pleaded these facts and having raised the question relating to the validity of the sale deed on the ground that the amount of consideration had not been paid, Defendant 2 (*sic* 1) did not, in support of his case, enter the witness-box. Instead, he deputed his brother to appear as a witness in the case. He did enter the witness-box but could not prove that the sale consideration had not been paid to Defendant 2. On a consideration of the entire evidence on record, the trial court recorded a positive finding of fact that the sale deed executed by Defendant 2 in favour of the plaintiff was a genuine document and the entire amount of sale consideration had been paid. This finding was affirmed by the lower appellate court but the High Court intervened and recorded a finding that although the property was mentioned to have been sold for a sum of Rs 5000, the plaintiff had, in fact, paid only Rs 500 to Defendant 2. The amount of Rs 4500 which was indicated in the sale deed to have been paid to Defendant 2, prior to registration, was not correct. It was for this reason that the High Court while redeeming the property directed that the amount of sale consideration which was paid by the plaintiff to Defendant 2 shall be returned by Defendant 2 and the property would revert back to him.

23. The findings of fact concurrently recorded by the trial court as also by the lower appellate court could not have been legally upset by the High Court in a second appeal under Section 100 CPC unless it was shown that the findings were perverse, being based on no evidence or that on the evidence on record, no reasonable person could have come to that conclusion.

24. The findings of fact concurrently recorded by the lower courts on the question of title of the plaintiff on the basis of sale deed executed in his favour by Defendant 2 have been upset by the High Court on the ground that the full amount of consideration does not appear to have been paid by the plaintiff to Defendant 2. It will be worthwhile to reproduce the findings recorded by the High Court on this question. The High Court observed:

> "*14.* As already stated above, the plaintiff had paid a nominal amount of Rs 500 before the Sub-Registrar and got the document executed considering the plight of Defendant 2 that his seven acres of land was already mortgaged with the plaintiff and, in fact, no further consideration of Rs 4500, as alleged, had been paid to Defendant 2. This conclusion is supported by the conduct of Defendant 2, who had served the plaintiff with a notice alleging that the sale deed executed in his favour was a sham and bogus one and without any consideration. Even a complaint came to be made before the police about the said bogus transaction, which was subsequently withdrawn in view of the fact that Defendant 2's lands to the extent of 7 acres were already mortgaged with the plaintiff. All these would show that the plaintiff was pursuing Defendant 2 to transfer his property in his favour to the extent of 4 acres

4 gunthas and under pressure, Defendant 2 admitted to have received the sum of Rs 4500. As stated above, this admission was made by Defendant 2 in one sentence. Therefore, considering all these aspects, the learned lower appellate court has held that no consideration has passed in favour of Defendant 2 except the sum of Rs 500 only alleged to have been paid before the Sub-Registrar. It is apparent that the plaintiff might have purchased the property only for Rs 2000, i.e., Rs 1500 which were to be paid to Defendant 1 for redemption of mortgage and Rs 500 paid to Defendant 2 before the Sub-Registrar.

15. Considering all the above facts and circumstances, I am of the view that the conclusion arrived at by the learned lower appellate court directing Defendant 1 to receive the amount of redemption and to deliver the possession of the suit field to the plaintiff is not correct. It is pertinent to note that the transaction between Defendants 1 and 2 itself was a moneylending transaction and that the sale deed was a mortgage sale. Therefore, Defendant 1 cannot become the owner of the property. Even, as held by the learned trial court, that nothing has been placed on record by Defendant 1 to support his contention that he had paid Rs 700 at home and the consideration of Rs 800 had been paid before the Sub-Registrar to Defendant 2, the learned trial court observed that it is doubtful whether this amount of Rs 700 has also been paid to Defendant 2 by Defendant 1. This shows that the said mortgage was only for Rs 800 and that the amount of Rs 700 has not passed to Defendant 2 from Defendant 1. It is clear that except Rs 500, nothing has been paid by the plaintiff to Defendant 2 as the amount of Rs 4500 alleged to have been paid at home to Defendant 2 has not been established. Therefore, the view taken by both the courts below under no circumstances, can be sustained."

25. The circumstances relied upon by the High Court had already been considered by the courts below and ultimately the lower appellate court proceeded to say as under:

"But it would appear as though all this discussion is worthless in view of the fact that Defendant 2 himself admitted in his deposition that he executed the sale deed in favour of the plaintiff and accepted the price. His written statement and deposition is quite eloquent on that point. On the fact of these admissions, there cannot be any other circumstance which would assist the Court to hold that the document executed in favour of the plaintiff by Defendant 2 was bogus, sham and without consideration, notwithstanding the fact that the circumstances and the facts of the case infallibly point out that the document of sale does not convey the real transaction that had taken place between the plaintiff and Defendant 2. As such, although with reluctance, it has to be held that the plaintiff had purchased the property from Defendant 2."

26. In the face of the findings recorded by the trial court as also by the lower appellate court on the question of execution of sale deed by Defendant

2 in favour of the plaintiff with the further finding that it was a valid sale deed which properly conveyed the title of the property in question to the plaintiff, it was not expected of the High Court to set aside those findings merely on the ground that the circumstances which had already been considered by the lower courts appeared to suggest some other conclusion from proved facts.

27. Let us scrutinise the circumstances relied upon by the High Court.

28. In order to prove his case, the plaintiff had examined Defendant 2 as a witness who admitted to have executed the sale deed in favour of the plaintiff and further admitted to have received the entire amount of sale consideration. The High Court has adversely commented upon the production of Defendant 2 as a witness by saying as under:

> "Next witness examined by the plaintiff was Defendant 2. The plaintiff while examining this witness has not incorporated the name of this witness in the list of witnesses nor any application was made for the examination of Defendant 2. The willingness of Defendant 2 was also not placed on record to appear as a witness for the plaintiff."

This is wholly an erroneous view.

29. Summoning and attendance of witnesses has been provided for in Order 16 of the Code of Civil Procedure. Order 16 Rule 1 which speaks of the list of witnesses and summons to witnesses provides as under:

> "1. *List of witnesses and summons to witnesses.*—(1) On or before such date as the court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summons to such persons for their attendance in court.
>
> (2) A party desirous of obtaining any summons for the attendance of any person shall file in court an application stating therein the purpose for which the witness is proposed to be summoned.
>
> (3) The court may, for reasons to be recorded, permit a party to call, whether by summoning through court or otherwise, any witness, other than those whose names appear in the list referred to in sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.
>
> (4) Subject to the provisions of sub-rule (2), summons referred to in this Rule may be obtained by parties on an application to the court or to such officer as may be appointed by the court in this behalf."

30. Rule 1-A which allows production of witnesses without summons provides as under:

> "1-A. *Production of witnesses without summons.*—Subject to the provisions of sub-rule (3) of Rule 1, any party to the suit may, without applying for summons under Rule (1), bring any witness to give evidence or to produce documents."

31. These two Rules read together clearly indicate that it is open to a party to summon the witnesses to the court or may, without applying for summons, bring the witnesses to give evidence or to produce documents.

Sub-rule (3) of Rule 1 provides that although the name of a witness may not find place in the list of witnesses filed by a party in the court, it may allow the party to produce a witness though he may not have been summoned through the court. Rule 1-A which was introduced by the Code of Civil Procedure (Amendment) Act, 1976 with effect from 1-2-1977 has placed the matter beyond doubt by providing in clear and specific terms that any party to the suit may bring any witness to give evidence or to produce documents. Since this Rule is subject to the provisions of sub-rule (3) of Rule 1, all that can be contended is that before proceeding to examine any witness who might have been brought by a party for that purpose, the leave of the court may be necessary but this by itself will not mean that Rule 1-A was in derogation of sub-rule (3) of Rule 1. The whole position was explained by this Court in *Mange Ram* v. *Brij Mohan*[12] in which it was held that sub-rule (3) of Rule 1 and Rule 1-A operate in two different areas and cater to two different situations. It was held: (pp. 43-44, para 10)

> "There is no inner contradiction between sub-rule (1) of Rule 1 and Rule 1-A of Order XVI. Sub-rule (3) of Rule 1 of Order XVI confers a wider jurisdiction on the court to cater to a situation where the party has failed to name the witness in the list and yet the party is unable to produce him or her on his own under Rule 1-A and in such a situation the party of necessity has to seek the assistance of the court under sub-rule (3) to procure the presence of the witness and the court may if it is satisfied that the party has sufficient cause for the omission to mention the name of such witness in the list filed under sub-rule (1) of Rule 1, still extend its assistance for procuring the presence of such a witness by issuing a summons through the court or otherwise which ordinarily the court would not extend for procuring the attendance of a witness whose name is not shown in the list. Therefore, sub-rule (3) of Rule 1 and Rule 1-A operate in two different areas and cater to two different situations."

32. In view of the above, even though the name of Defendant 2 was not mentioned in the list of witnesses furnished by the plaintiff, he was properly examined as a witness and his testimony was not open to any criticism on the ground that he was produced as a witness without being summoned through the Court and without his name being mentioned in the list of witnesses.

33. The next circumstance relied upon by the High Court in discarding the sale deed is that Defendant 2 himself had given a notice to the plaintiff in which it was set out that the sale deed was a sham transaction for which the consideration was not paid. In relying upon this circumstance, the High Court overlooked the fact that Defendant 2 in his capacity as a witness for the plaintiff had stated in clear terms that this notice was issued to the plaintiff at the instance of Defendant 1. Defendant 2 also stated that the complaint made by him to the police in that regard was withdrawn by him. This circumstance, therefore, also could not have been legally relied upon by the High Court in holding that the full amount of consideration was not paid.

12 (1983) 4 SCC 36 : AIR 1983 SC 925 : (1983) 3 SCR 525

34. It could not be ignored that the plaintiff's case had been admitted in unequivocal terms by Defendant 2 in his written statement. It could also not be ignored that when the plaintiff examined himself as a witness in the suit, Defendant 2 refused to cross-examine him. The circumstance which, however, clinches the matter is the statement of Defendant 2 on oath in which he admitted that he had executed a sale deed in favour of the plaintiff and had obtained the full amount of consideration. The sale deed is a registered document which recites that out of the amount of Rs 5000, which was the sale price, a sum of Rs 4500 had been paid earlier while Rs 500 was paid before the Sub-Registrar. This recital read in the light of the admission made by Defendant 2 in his written statement and, thereafter, in his statement on oath as a witness clearly establishes the fact that Defendant 2 had executed a sale deed in favour of the plaintiff for a price which was paid to Defendant 2.

35. Even if the findings recorded by the High Court that the plaintiff had paid only Rs 500 to Defendant 2 as sale consideration and the remaining amount of Rs 4500 which was shown to have been paid before the execution of the deed was, in fact, not paid, the sale deed would not, for that reason, become invalid on account of the provisions contained in Section 54 of the Transfer of Property Act, 1882 which provide as under:

> "54. 'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
>
> Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
>
> In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
>
> Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.
>
> A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.
>
> It does not, of itself, create any interest in or charge on such property."

36. The definition indicates that in order to constitute a sale, there must be a transfer of ownership from one person to another, i.e., transfer of all rights and interests in the properties which are possessed by that person are transferred by him to another person. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. The definition further says that the transfer of ownership has to be for a "price paid or promised or part-paid and part-promised". Price thus constitutes an essential ingredient of the transaction of sale. The words "price paid or promised or part-paid and part-promised" indicate that actual payment of the whole of the price at the time of the execution of sale deed is not a sine qua non to the completion of the sale. Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs 100, the sale would be complete.

37. There is a catena of decisions of various High Courts in which it has been held that even if the whole of the price is not paid, the transaction of sale will take effect and the title would pass under that transaction. To cite only a few, in *Gayatri Prasad* v. *Board of Revenue*[13] it was held that non-payment of a portion of the sale price would not affect validity of sale. It was observed that part-payment of consideration by the vendee itself proved the intention to pay the remaining amount of the sale price. To the same effect is the decision of the Madhya Pradesh High Court in *Sukaloo* v. *Punau*[14].

38. The real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in praesenti or in future. The intention is to be gathered from the recital in the sale deed, the conduct of the parties and the evidence on record.

39. Applying these principles to the instant case, it will be seen that Defendant 2 executed a sale deed in favour of the plaintiff, presented it for registration, admitted its execution before the Sub-Registrar before whom the remaining part of the sale consideration was paid and, thereafter, the document was registered. The additional circumstances are that when the plaintiff instituted a suit on the basis of his title based on the aforesaid sale deed, Defendant 2, who was the vendor, admitted in his written statement, the whole case set out by the plaintiff and further admitted in the witness-box that he had executed a sale deed in favour of the plaintiff and had also received the full amount of consideration. These facts clearly establish that a complete and formidable sale deed was executed by Defendant 2 in favour of the plaintiff and the title in the property passed to the plaintiff. The findings recorded by the High Court on this question cannot, therefore, be upheld.

40. The judgment of the High Court on this point is also erroneous for the reason that it totally ignored the provisions contained in Section 55(4)(*b*) of the Transfer of Property Act which are set out below:

> "55. In the absence of a contract to the contrary, the buyer and seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:
>
> (1)-(3) * * *
>
> (4) The seller is entitled—
>
> (*a*) * * *
>
> (*b*) where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase money, or any part thereof remaining

13 1973 All LJ 412
14 AIR 1961 MP 176 : ILR 1960 MP 614

unpaid, and for interest on such amount or part from the date on which possession has been delivered.

(5)-(6) * * *"

41. Clause (*b*) extracted above provides that where the ownership of the property is transferred to the buyer before payment of the whole of the sale price, the vendor is entitled to a charge on that property for the amount of the sale price as also for interest thereon from the date of delivery of possession. Originally, there was no provision with regard to the date from which interest would be payable on the amount of unpaid purchase money. The Special Committee which suggested an amendment in this section gave the following reason:

> "This clause is also silent as to the date from which the interest on the unpaid purchase money should run. It seems fair that it should run from the date when the buyer is put in possession."

It was on the recommendation of the Special Committee that the words "from the date on which possession has been delivered" were inserted into this clause by Section 17 of the Transfer of Property (Amendment) Act, 1929 (20 of 1929).

42. This clause obviously applies to a situation where the ownership in the property has passed to the buyer before the whole of the purchase money was paid to the seller or the vendor. What is contained in this clause is based on the English doctrine of equitable lien as propounded by Baron Rolfe in *Goode* v. *Burton*[15]. This clause confers statutory recognition on the English doctrine of equitable lien. As pointed out by the Privy Council in *Webb* v. *Macpherson*[16] the statutory charge under this paragraph is inflexible. The charge does not entitle the seller to retain possession of the property as against the buyer but it positively gives him a right to enforce the charge by suit. (See: *Venkataperumal Naidu* v. *M. Rathnasabhapathi Chettiar*[17]; *Shobhalal Shyamlal Kurmi* v. *Sidhelal Halkelal Bania*[18] and *Basalingaya Revanshiddappa* v. *Chinnava Karibasappa*[19].)

43. In view of the above, the High Court was wholly in error in coming to the conclusion that there was no sale as only a sum of Rs 500 was paid to Defendant 2 and the balance amount of Rs 4500 was not paid. Since the title in the property had already passed, even if the balance amount of sale price was not paid, the sale would not become invalid. The property sold would stand transferred to the buyer subject to the statutory charge for the unpaid part of the sale price.

44. Learned counsel for Defendant 1 thereafter contended that the deed dated 24-3-1971 was not a mortgage deed but an out and out sale with the result that the property having been transferred to Defendant 1 was not

15 (1847) 74 RR 633 : 1 Ex 189
16 (1903) 30 IA 238
17 AIR 1953 Mad 821
18 AIR 1939 Nag 210 : ILR 1939 Nag 636
19 AIR 1932 Bom 247 : 34 Bom LR 427

available for being sold to the plaintiff. This contention must meet the same fate as it met in the courts below.

45. The document is headed as MORTGAGE BY CONDITIONAL SALE (KARARKHAREDI). It is mentioned in this deed that the immovable property which was described in areas and boundaries was being mortgaged by conditional sale in favour of Defendant 1 for a sum of Rs 1500 out of which Rs 700 were paid at home while Rs 800 were paid before the Sub-Registrar. The further stipulation in the deed is that the aforesaid amount of Rs 1500 would be returned to Defendant 1 on or before 15-3-1973 and the property would be reconveyed to Defendant 2. If it was not done then Defendant 1 would become the owner of the property.

46. Mortgage by conditional sale is defined under Section 58(*c*) as under:

> "58. (*a*)-(*b*) * * *
>
> (*c*) Where the mortgagor ostensibly sells the mortgaged property—
>
> on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or
>
> on condition that on such payment being made the sale shall become void, or
>
> on condition that on such payment being made the buyer shall transfer the property to the seller,
>
> the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:
>
> Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.
>
> (*d*)-(*g*) * * *"

47. The proviso to this clause was added by Section 19 of the Transfer of Property (Amendment) Act, 1929 (20 of 1929). The proviso was introduced in this clause only to set at rest the controversy about the nature of the document, whether the transaction would be a sale or a mortgage. It has been specifically provided by the amendment that the document would not be treated as a mortgage unless the condition of repurchase was contained in the same document.

48. The basic principle is that the form of transaction is not the final test and the true test is the intention of the parties in entering into the transaction. If the intention of the parties was that the transfer was by way of security, it would be a mortgage. The Privy Council as early as in *Balkishen Das* v. *Legge*[20] had laid down that, as between the parties to the document, the intention to treat the transaction as an out and out sale or as a mortgage has to be found out on a consideration of the contents of the document in the light of surrounding circumstances. The decisions of this Court in *Bhaskar Waman Joshi* v. *Shrinarayan Rambilas Agarwal*[21] and *P.L. Bapuswami* v. *N. Pattay Gounder*[22] are also to the same effect.

20 (1899) 27 IA 58
21 AIR 1960 SC 301 · (1960) 2 SCR 117
22 AIR 1966 SC 902 · (1966) 2 SCR 918

49. The contents of the document have already been considered above which indicate that Defendant 2 had executed a mortgage by conditional sale in favour of Defendant 1. He had promised to pay back Rs 1500 to him by a particular date failing which the document was to be treated as a sale deed. The intention of the parties is reflected in the contents of the document which is described as a mortgage by conditional sale. In the body of the document, the mortgage money has also been specified. Having regard to the circumstances of this case as also the fact that the condition of repurchase is contained in the same document by which the mortgage was created in favour of Defendant 1, the deed in question cannot but be treated as a mortgage by conditional sale. This is also the finding of the courts below.

50. So far as the contention of the learned counsel for Defendant 1 that the mortgage money was not paid within the time stipulated in the document and, therefore, the transaction, even if it was a mortgage, became an absolute sale is concerned, the finding of the courts below is that this money was tendered to Defendant 1 who refused to accept it. Defendant 2 had thus performed his part of the agreement and had offered the amount to Defendant 1 so that the property may be reconveyed to him but Defendant 1 refused to accept the money. He, therefore, cannot complain of any default in not paying the amount in question within the time stipulated in the deed. Since there was no default on the part of Defendant 2, the document would not convert itself into a sale deed and would remain a mortgage deed. The suit for redemption was, therefore, properly filed by the plaintiff who was the assignee of Defendant 2.

51. For the reasons stated above, the appeal is allowed and the impugned judgment passed by the High Court is set aside. The judgment and decree passed by the trial court as upheld by the lower appellate court are restored but without any order as to costs.

(1999) 3 Supreme Court Cases 594

(BEFORE B.N. KIRPAL AND V.N. KHARE, JJ.)

(Record of Proceedings)

STATE OF MAHARASHTRA AND OTHERS .. Petitioners;

Versus

CHHAYA AND OTHERS .. Respondents.

SLP (C) No. ... of 1999† (CC No. 1675 of 1999) with IA No. 1,
decided on April 9, 1999

Service Law — Administrative Tribunals Act, 1985 — S. 5(4)(a) — Scope — Explained — Held, it does not enable the Chairman, if he is a Judicial Member, to act as an Administrative Member or vice versa

Rejecting the petitioners' contention that Section 5(4)(*a*) of the Administrative Tribunals Act, 1985 enabled the Chairman, who was otherwise a Judicial Member, to act as an Administrative Member also, the Supreme Court

† From the Judgment and Order dated 13-11-1998 in WP No. 1394 of 1998 of the High Court of Bombay, Aurangabad Bench, Aurangabad

CS (OS) 1438/2011

Hindustan Pencils Pvt. Ltd. v. Anand Kumar Bajaj

2014 SCC OnLine Del 6505

(BEFORE S.P. GARG, J.)

M/s. Hindustan Pencils Pvt. Ltd. ..... Plaintiff

Mr. Sushant Singh, Advocate with Mr. P.C. Arya, Advocate.

v.

Anand Kumar Bajaj & Ors. ..... Defendants

None.

CS (OS) 1438/2011 & I.A. No. 3178/2014
Decided on November 20, 2014

Intellectual Property — Infringement of trade mark — Suit for permanent injunction — "NATARAJ" stationary items — Registered trade mark of plaintiff — Defendant applied for registration of "ANAND NAMRAAAJ" — Defendant selling stationary items like erasers under trademark "NAMRAAJ" — Trade Mark of defendant similar to that of trade mark of plaintiff — Defendants 1 to 4 did not appear in spite of service of notices — Time Incorporated, (2005) 30 PTC 3, relied upon — Held, defendants continuously infringed copyrights — Defendants directed to pay damages of Rs. 3 lakhs — Suit decreed — Copyright Act, 1857, S. 2(c)

(Paras 2, 5, 8, 12, 13 & 14)

S.P. Garg, J.

1. M/s. Hindustan Pencils Pvt. Ltd. (hereinafter referred to as 'the plaintiff') has filed the present suit for permanent injunction restraining infringement of trademark, copyright, passing off, damages, delivery up, etc. against the defendants. The case set up by the plaintiff in the plaint is as under:

2. The plaintiff earlier a public limited company incorporated under the Indian Companies Act has been converted into a private limited company. Mr. Manoj Dabke is the authorized signatory of the plaintiff to institute the present suit. It is further averred that the plaintiff is well established and is carrying on an old and established business of manufacturing, marketing and selling pencils, erasers, sharpeners, foot rulers and other items of stationery of day-to-day use since 1957. It has conceived, invented, designed and adopted the mark 'NATARAJ' along with a device of 'NATARAJ' in respect of their pencils, sharpeners, erasers and other stationery products in the year 1961 and since then, they have been using the said trademark 'NATARAJ' along with device of 'NATARAJ' in a particular design label having its colour scheme, get up, layout, background in red and black and having its particular characteristics and style continuously, perpetually uninterruptedly and without any hindrance with respect to their stationery items throughout the territory of India. The present action is concerned with the plaintiff's well known and extensively used 'NATARAJ' erasers having its particular get up, style, layout, design and artistic features in the label, which is of red and black colour scheme amongst other features. These are misused by the defendants by copying/reproducing the said colour scheme, get up, layout and distinct features by merely replicating the features. It is further averred that the plaintiff is a registered proprietor of the trademark 'NATARAJ' and the device of 'NATARAJ' in India. The details of the trademarks applied have been reflected in para No. 5 of the plaint. All these trademarks and their registration is valid and subsisting in the Registry of the Trade Marks. It is further stated that the plaintiff is also

registered proprietor of the copyright under No. 25427/79 in respect of carton and label containing the colour scheme, get up and layout of packaging of 'NATARAJ' with the device of 'NATARAJ' along with the various other registrations under the Copyright Act, 1857. The details of the sale figures of the products have been described in para No. 7 of the plaint. In para No. 8 of the plaint the description of the artistic features of the plaintiff's earlier carton and present carton used by it has been described in detail. All these features are artistic features and constitute the original artistic features within the meaning of Section 2(c) of the Indian Copyright Act. The plaintiff is the owner of the copyright therein and is using it continuously and regularly since the year 1989.

3. It is further pleaded that on account of superiority of the goods, long, extensive and continuous user and wide advertisement, the plaintiff's trademark 'NATARAJ' and device of 'NATARAJ' have become very popular with the stationery trade and members of the public associate the trademark 'NATARAJ' with the plaintiff and no one else. The trademark, device and get up of the carton in which the products are sold connote and denote the products manufactured by the plaintiff alone. Among the general purchasing public are the school going children who recognize the plaintiff's products by its trademark and get up of the carton in which these products are sold. The said get up, layout and artistic features of the plaintiff's label have become exclusive proprietary interest and have been associated with the plaintiff and no one else.

4. Grievance of the plaintiff is that in the first week of July, 2009 it came to its knowledge that the defendants have been selling the erasers under the trademark 'NAMRAAJ' by replicating the plaintiff's artistic features i.e. red and black colour scheme and also by aligning their products as nearly identical to that of the plaintiff. The defendants have copied the entire colour scheme including red and black colour scheme and the words of the trademark 'NAMRAAJ', which are also written in white colour as that of the plaintiff. Inside the boxes, the erasers are there which also contain the red and white background. The two rival products have been shown in para No. 11 of the plaint. The comparative chart showing the similarities between the two rival products of the plaintiff and the defendants has been depicted in para No. 12 of the plaint. Apparently, the plaintiff's label and the defendants'' label are identical and is also aligned as closely as possible with that of the plaintiff. It is alleged that the defendants intend to give the impression that their products are either originating from the plaintiff or are of the plaintiff's and are gaining unfair advantage over the goodwill and reputation of the plaintiff under the said packaging and label. Adoption of nearly identical packaging material for the similar colour erasers is a dishonest attempt made by the defendants to cause confusion in the mind of the public.

5. It is further averred that the defendants No. 1, 3 & 4 are manufacturers of the infringing goods. Defendant No. 2 is marketing those products. The mala fide and dishonest intention of the defendants is apparent from the fact that they have not stopped at merely adopting the identical/deceptively similar trademark and packing but have filed the trademark application for the registration of the mark 'ANAND NAMRAAJ' under application No. 1425977, which was opposed by the plaintiff. By virtue of the prior adoption, prior user and extensive publicity and promotion, the packing material, which is the distinctive pack and unique combination of arrangement of features, get up, layout and colour scheme have earned substantial goodwill and reputation to the plaintiff. The defendants have attempted to make a deliberate misrepresentation to the purchasing public and it is bound to cause confusion and deception in the mind of the purchasing public.

6. It is further averred that earlier also CS (OS) 262/2006 was instituted against the defendants. Despite permanent injunction in the said civil suit, the defendants have not stopped infringing the trademark and device of the plaintiff. Hence, the

present suit.

7. By an order dated 01.06.2011 in I.A. No. 9506/2011 (u/O XXXIX R 1 & 2 CPC), the defendants, their directors, partners, proprietors, agents and representatives and all others acting on their behalf were restrained from manufacturing, selling, offering for sale and marketing the erasers and using the trademark 'NAMRAAJ' or any other mark which was deceptively similar to the plaintiff's registered trademark 'NATARAJ'.

8. Defendants No. 1 and 4 did not appear despite service and were proceeded ex-parte by an order dated 30.08.2011. Defendant No. 3 expired during the pendency of the suit. No application to bring on record his legal heirs was moved on record. Defendant No. 2 was also proceeded ex-parte by an order dated 31.05.2013. The amended memo of parties was filed excluding the name of defendant No. 3. The plaintiff was permitted to file affidavit by way of evidence by an order dated 22.05.2014.

9. I have heard the learned counsel for the plaintiff and have examined the file. As observed above, none appeared on behalf of the defendants despite service and they were proceeded ex-parte. Adverse inference is to be drawn against the defendants for not appearing and contesting the claim of the plaintiff. In its ex-parte evidence, the plaintiff has filed on record the detailed affidavit sworn by Mr. Manoj Dabke, Constituted Attorney of the plaintiff who is well conversant with the facts of the case and is competent to swear the affidavit. Mr. Manoj Dabke has proved the copy of resolution in his favour (Ex.PW-1/1); copy of the Power of Attorney (Ex.PW-1/2) and Certificate consequent to the change of name of the plaintiff (Ex.PW-1/3). He has deposed on oath that the plaintiff company is carrying on the old and established business of manufacturing and marketing stationery items including pencils, erasers and sharpeners. It had conceived, invented, designed and adopted the mark 'NATARAJ' along with device of 'NATARAJ' in respect of their stationary articles since 1961. These have been used in a particular design label having its colour scheme, get up, layout, background in red and black and having its particular characteristics and style continuously, perpetually, uninterruptedly and without any hindrance throughout the territory of India. PW-1 (Mr. Manoj) has reiterated and proved the version detailed in the plaint. The testimony of the witness has remained unchallenged and unrebutted. He has proved the copies of the relevant Copyright Certificate collectively exhibited as Ex.PW-1/5 to show that the plaintiff is the registered proprietor under No. 25427/79 in respect of carton and label along with various other registrations under the Copyright Act. Ex.PW-1/6 is the details of the sales figures for the last 46 years. Original invoices of the plaintiff's company have been collectively exhibited as Ex.PW-1/7. Ex.PW-1/8 is the packaging of the 'NATARAJ' of the plaintiff. Copies of the advertisement of the plaintiff's company have been collectively exhibited as Ex.PW-1/9. The packaging material carton used by the defendants are Ex.PW-1/10. Copy of opposition filed by the plaintiff for mark 'ANAND NAMRAAJ' under application No. 1425977, in the office of Registrar of Trade Marks, is Ex.PW-1/11. Copy of the FIR No. 300/09 along with photographs taken during the raid is Ex.PW-1/12.

10. From the unchallenged and unrebutted testimony of the plaintiff, it can safely be concluded that the defendants without any plausible reasons and prior permission or authority of the plaintiff have infringed the trademark 'NATARAJ' and its device 'NATARAJ' by using identical/deceptively similar trademark 'NAMRAAJ 721 PLASTO ERASERS' having red colour predominantly black lines on each side of the packaging carton like that of Annexures 'F' & 'G' which is a colourable imitation or substantial reproduction of the plaintiff's mark 'NATARAJ' along with the device of 'NATARAJ'. On a comparison made between the plaintiff's and defendants' products/carton, the submissions advanced by the learned counsel for the plaintiff are found to be correct as much as the defendants have blindly copied various features of the product of the plaintiff which are deceptively similar.

11. In '*Laxmi Kant Patel* v. *Chetanbhat Shah*', AIR 2002 SC 275, the Supreme Court held:

"A person may sell his goods or deliver his services such as in case of a profession under a trading name or style. With the lapse of time such business or services associated with a person acquire a reputation or goodwill which becomes a property which is protected by courts. A competitor initiating sale of goods or services in the same name or by imitating that name results in injury to the business of one who has the property in that name. The law does not permit any one to carry on his business in such a way as would persuade the customers or clients in believing that he goods or services belonging to someone else are his or are associated therewith. It does not matter whether the latter person does so fraudulently or otherwise. The reasons are two. Firstly, honesty and fair play are, and ought to be, the basic policies in the world of business. Secondly, when a person adopts or intends to adopt a name in connection with his business or services which already belongs to someone else it results in confusion and has propensity of diverting the customers and clients of someone else to himself and thereby resulting in injury.

In an action for passing off it is usual, rather essential, to seek an injunction temporary or ad-interim. The principles for the grant of such injunction are the same as in the case of any other action against injury complained of. The plaintiff must prove a prima facie case, availability of balance of convenience in his favour and his suffering an irreparable injury in the absence of grant of injunction. According to Kerly (ibid, para 16.16) passing off cases are often cases of deliberate and intentional misrepresentation, but it is well-settled that fraud is not a necessary element of the right of action, and the absence of an intention to deceive is not a defence though proof of fraudulent intention may materially assist a plaintiff in establishing probability of deception. Christopher Wad low in Law of Passing Off (1995 Edition, at p.3.06) states that the plaintiff does not have to prove actual damage in order to succeed in an action for passing off. Likelihood of damage is sufficient. The same learned author states that the defendant's state of mind is wholly irrelevant to the existence of the cause of action for passing off (ibid, paras 4.20 and 7.15). As to how the injunction granted by the Court would shape depends on the facts and circumstances of each case. Where a defendant has imitated or adopted the plaintiff's distinctive trade mark or business name, the order may be an absolute injunction that he would not use or carry on business under that name, (Kerly, ibid, para 16.97)".

12. Having regard to the unrebutted testimony of the plaintiff, on account of superiority of goods, long, extensively and continuous user and advertisement by way of print and audio-visual media of the said trademark in India as well as abroad, I am of the view that the plaintiff has succeeded in proving its case in respect of the product mentioned in Ex.PW1/4 that the same has become popular in the stationary trade and members of the public associate them with the goods of the plaintiff and none else. The said packing material (Ex.PW-1/8), in which the erasers are sold, denote and connote the items manufactured by the plaintiff alone. The device in question is used by the plaintiff for the last more than four decades. The registration granted in favour of the plaintiff under Section 31 of the Trademarks Act is a prima facie evidence and it has become conclusive under Section 32 of the said Act. It is evident that the defendants, by taking advantage of the renowned products of the plaintiff, have tried to take undue advantage of the goodwill and reputation being enjoyed by the plaintiff and have tried to pass off their products as that of the plaintiff. By adopting the colour scheme, get up, etc. of the plaintiff's products, deliberately and dishonestly, the defendants have infringed the registered trademark/copyright of the plaintiff and are guilty of such infringement under Section 29 of the Act. Section 28 of the Act confers exclusive rights in favour of the plaintiff. It is certain that the

defendants by using the packing materials (Ex.PW-1/8) in respect of same product i.e. erasers are bound to create an impression in the mind of general purchasing public particularly the school-going children that these erasers originate from the plaintiff. The plaintiff, therefore, is entitled for the decree of injunction as prayed for.

13. Insofar as claim for damages is concerned, as the defendants chose to remain ex-parte and in the absence of exact figures of sales, etc. of the defendants' products under the infringing trademark, the exact damages are not quantified and proved. However, the plaintiff can be benefited by awarding punitive damages in view of the principles laid down in '*Time Incorporated* v. *Lokesh Srivastava*', 2005 (30) PTC 3 and '*Hero Honda Motors Ltd.* v. *Shree Assuramji Scooters*', 2006 (32) PTC 117 (Delhi).

14. Perusal of the record reveals that earlier also CS (OS) 262/2006 was filed against the defendants - (1) Jain Pencils Associates and (2) Anand Stationer, which was decreed on 21.02.2007 by this Court. It appears that despite issuance of restraint order and award of punitive damages to the tune of Rs. 1,00,000/-, the defendants did not stop infringing the trademark of the plaintiff. Accordingly, the defendants can be directed to pay punitive damages to the tune of Rs. 3,00,000/-.

15. In the light of above discussion, the suit of the plaintiff is decreed with costs and the defendants, their servants, officers, agents and representatives are restrained from manufacturing, selling, offering for sale or marketing the erasers using identical/deceptively similar trademark 'NAMRAAJ 721 PLASTO ERASERS' or any other mark which is deceptively similar to the plaintiff's trademark 'NATARAJ'. They are further restrained from using the trademark 'NAMRAAJ 721 PLASTO ERASERS' having red black predominantly black lines from each side of the packaging carton like Annexures 'F' & 'G' which is a colourable imitation or substantial reproduction of the plaintiff's mark 'NATARAJ' along with the device of 'NATARAJ' packaging. The plaintiff shall also be entitled to punitive damages to the tune of Rs. 3,00,000/-. Pending I.A. also stands disposed of.

16. Decree-sheet be prepared accordingly.

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CS (OS) 1097/2009

Sushma Berlia v. Kamal Kumar

2014 SCC OnLine Del 7297 : (2015) 147 DRJ 450

(BEFORE S.P. GARG, J.)

Sushma Berlia & Ors. ..... Plaintiffs

Mr. Amarjit Singh, Advocate with Ms. Vernika Tomar, Advocate.

v.

Kamal Kumar & Ors. ..... Defendants

None.

CS (OS) 1097/2009
Decided on December 18, 2014

S.P. GARG, J.

1. The plaintiffs have instituted the instant suit for permanent injunction against the defendants restraining infringement of trademark, passing off and damages, etc.

2. As per the averments in the plaint, plaintiffs No. 1 and 2 are the joint proprietors and owners of all intellectual property rights in the mark 'APEEJAY'. The plaintiff No. 3, and other business concerns managed and controlled by plaintiffs No. 1 & 2 are using intellectual property assets of plaintiffs No. 1 & 2 as licencee/permitted users. Para No. 7 describes name of the schools and educational institutions managed, administered and run by plaintiff No. 3 society. It is averred that the trademark/trade name/service mark 'APEEJAY' was first conceived and adopted in the year 1967/1968 and put to commercial use with the opening of the first school at Mahavir Marg, Jalandhar, Punjab in the year, 1968. Subsequently, the plaintiffs has expanded the use of its mark 'APEEJAY' widely in respect and in relation to educational services, school management, school development activities, management of teachers-students relationship and promotion of 'APEEJAY' students in their endeavours and career progress. Since the year of adoption of the mark 'APEEJAY', the plaintiffs have continuously and extensively used it in the course of their services and management activities. The said mark has become a symbol of plaintiffs' corporate identity. It is not only a distinctive but is also adapted to distinguish the goods and services of the plaintiffs from the goods and/or services of any other person. It is the mark identified and identifiable only with the plaintiffs and none else. The plaintiffs have acquired and retained an exclusive right to use the mark in respect of goods and services provided by them. It is averred that the plaintiffs are registered proprietors of the trade/service marks and have acquired statutory right to the exclusive use of it to the exclusion of others.

3. It is alleged that defendants have formed an association of persons under the name and style of 'APEEJAY School Parents Association, Faridabad'. The defendant No. 1 has illegally and unauthorizedly used the mark 'APEEJAY' as an essential feature/part of the name of their association and has obtained registration thereof as a society under the Society Registration Act. The services for which the defendant No. 1 has formed the association are the services which are provided by the plaintiffs as their objective. These fall within the exclusive domain of the school management of the plaintiffs and the defendants have no right or justification to interfere with its management or to set

up a parallel body to deal with the issues of school management. The defendants have no right title or interest for the adoption and/or use of the mark 'APEEJAY' or any other deceptively similar mark. Intention of the defendants is to cause damages to the reputation established by the plaintiffs in the said mark. The defendants were requested to desist from using the mark 'APEEJAY' but to no effect. Hence, the present suit.

4. The suit was contested by the defendants. In the written statement, the defendants controverted the allegations of the plaintiffs and submitted that the 'association' was formed for the protection of the fundamental rights of the students/children studying in the plaintiffs' school and for the protection of the rights of the parents of the students as also against unjust and arbitrary actions of the plaintiffs' school. The association is neither a business house nor a profit making organization for competing with the plaintiffs and/or passing of the goods or services. It is only restricted to the parents of the children studying in the plaintiffs' school and none else. The defendants have no intention to cause loss to the reputation of the plaintiffs. The use of mark 'APEEJAY' does not in any way infringe the mark of the plaintiffs as the defendants are not carrying on any trade. It is a general practice that an association of students/parents of students/teachers do include the name of the school they are related to. The association was formed as the complaints of the parents were not being paid any heed by the authorities and the students were being harassed by charging exorbitant fee arbitrarily causing mental agony to the students and their parents. Plaintiff No. 3 arbitrary hiked the fee in the period of recession, which was objected to by the parents of the students. The use of name 'APEEJAY' was only for identification purpose. It was further averred that this Court has no territorial jurisdiction.

5. It appears that subsequently, none appeared on behalf of the defendants on adjourned hearings/dates. By an order dated 20.04.2011, defence of the defendants was struck off. This Court by an order dated 06.09.2011 directed the President and Secretary of 'APEEJAY School Parents Association, Faridabad' to remain present on the next date of hearing. However, when the matter was called that day, none appeared on behalf of the defendants. By an order dated 08.09.2011, they were proceeded ex-parte.

6. The plaintiffs have filed evidence by way of affidavit of Mr. Bharat Bhushan.

7. I have heard learned counsel for the plaintiffs and have examined the file. In its ex-parte evidence, the plaintiffs have filed on record the affidavit of Mr. Bharat Bhushan which is exhibited as Ex.PW-1/A. It relied upon various documents (Ex.PW-1/1 to Ex.PW-1/7, Ex.PW-1/9 to Ex.PW-1/15). Ex.PW-1/18, as per affidavit has been marked as mark PW-1/8. Reliance was also placed on certified copies of Ex.PW-1/5 to Ex.PW-1/7.

8. Mr. Bharat Bhushan, in his evidence (Ex.PW-1/A) proved the averments of the plaint without any variance. He specifically deposed that mark 'APEEJAY' was adopted in the year 1967 by the plaintiffs in respect of services/goods relating to education. The society has continuously and extensively used it in the course of their services and management activities since then. Ex.P-4 is the original brochure of 'APEEJAY' Education Society. It has become a symbol of plaintiffs' society's corporate identity. The mark 'APEEJAY' when used singularly and/or with any other mark, symbol or name is instantly connected in the mind of the relevant section of the public with the business and service of the plaintiffs. The said mark is not only distinctive but is also adopted to distinguish the goods and services of the plaintiffs from the goods and services of any other person. Ex.P-5 is copies of the certificates of the registration of

the mark 'APEEJAY'. Ex.P-6 has been collectively exhibited as the copies of the printouts showing the status of the trademark as registered. Copies of various articles, advertisement, newspapers issued and advertised by the societies are exhibited collectively as Ex.P-8. He further deposed that 'APEEJAY' has acquired an immense reputation and goodwill in the mind of the public and it is directly connected with the service and goods of the society. Ex.P-15 is the legal notice issued to the defendants to desist from infringing plaintiffs' registered trademark. It was further deposed that the defendants by their illegal activities are causing tremendous loss and damages to the goodwill of the plaintiffs by circulating printing material in the form of pamphlets, catalogues as well as in the electronic form on the internet. The defendants have put plaintiffs to loss in business as well as reputation by their illegal trade activities.

9. Testimony of PW-1 (Bharat Bhushan) has remained unchallenged and unrebutted. Adverse inference is to be drawn against the defendants for not contesting the suit on adjourned date and remaining exparte. There are no sound reasons to disbelieve the positive uncontroverted testimony of PW-1.

10. The defendants have not disputed that the mark 'APEEJAY' is associated with the plaintiffs' society and is in use by them since 1967. Only plea of the defendants in the written statement is that this mark was used by them only for identification purpose to indicate that their association consisted of the parents of the students studying in the plaintiffs' school. It had no commercial activity to cause any loss or damage to the plaintiffs' society.

11. There is no denial that the parents of the students studying in plaintiffs' school have every right to form association to carry out its objectives permissible in law. The moot question is whether the defendants' association can be permitted to use the mark 'APEEJAY' without consent and permission of the plaintiffs' society. The plaintiffs' concern is that the defendants by adding their name to their association intend to reflect that the association has been formed with the consent and permission of the plaintiffs' school. I find merit in the plea of the learned counsel for the plaintiffs. There is every possibility of the public at large to get confused to infer that the association has patronage of the plaintiffs' society or that it is associated with it. In fact, the plaintiff society has no concern with it.

12. It is settled law that the tort of passing off is sufficiently wide to be applicable to non-trading business or non-profit making bodies. A professional association may prevent non-members from using a name so as to give impression as representative of the association. In '*British Diabetic Association* v. *Diabetic Society*', (1996) FSR 1, both the parties were charitable societies. Their names were deceptively similar. The word 'Association' and 'Society' were too close since they were similar in derivation and meaning and were not wholly dissimilar in form. Permanent injunction was granted.

13. In the decision in '*Regency Industries Ltd.* v. *Kedar Builders*', Vol.X 1990 PTC 1, it was held that passing off action need not necessarily be associated with goods only. Taking note of the said observations, the argument that the defendants' carrying no trade activity, is devoid of merit.

14. Similarity of the name 'APEEJAY' in the defendant No. 2's association was sufficient to lead to the public to think that the defendants' association was the association of the plaintiffs. It might mislead the people into thinking that the defendants' association was a branch of the plaintiffs' school and sponsored by the school. If the defendants' association is guilty of any misdoing the same is likely to

reflect discredit upon the plaintiffs' school.

15. In '*Helpage India* v. *Helpage Garhwal*', 2001 (21) PTC 872 (Del), this Court held that registration of the name of the defendants under the Societies Registration Act cannot come in the way of this Court for granting the relief prayed for.

16. In the light of above discussion, the suit of the plaintiffs is partly decreed and the defendants are restrained from using the mark 'APEEJAY' or any other identical or deceptively similar mark in any manner as a part of their association's name.

17. Reliefs prayed in para No. 44 (d) to 44 (f) have already been given up.

18. Decree-sheet be prepared accordingly.

19. The suit stands disposed of in the above terms.

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