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BEST OF THE REST

1. Appellate Tribunal – Part time Member – Delegated legislation – Rule framed by delegatee cannot travel beyond Parliament statute – Cannot also go beyond rule making power conferred by statute. Constitution of India, Article 246 – FEMA 1999

A batch of appeals by way of special leave under Article 136 of the Constitution had been filed. The three reliefs which were sought before the High Court were – Rule 5 of the Appellate Tribunal for Foreign Exchange (Recruitment, Salary and Allowances and Other Conditions of Service of Chairperson and Members) Rules, 2000 ('the Rules') is *ultra vires* the Foreign Exchange Management Act, 1999; for quashment of certain notifications issued by the Government of India, Ministry of Law, Justice and Company Affairs, appointing part time Members of the Appellate Tribunal by issue of a writ of *quo warranto* as they did not satisfy the eligibility criteria as stipulated in the Act; and further to quash the appointment of respondent No. 3 to act as the Chairperson as he was a part time Member and also was not eligible to hold the post.

It was urged before the High Court that when the Act did not conceive of part time Members, even a person meeting the eligibility criteria could not be appointed as a part time Member. It was further contended that a part time Member who was disqualified to hold the post could not have been allowed to act as the Chairperson as that would destroy the spirit of the Act.

The High Court declared the first and second proviso to Rule 5 of the Rules as *ultra vires* section 21(1)(b) of the FEMA Act and quashed the appointments of respondent Nos. 3 and 4 who were appointed as part time Members and further quashed the appointment of respondent No. 3 as the acting Chairperson of the Appellate Tribunal.

The Hon'ble Supreme Court observed that the Appellate Tribunal has been conferred jurisdiction to decide an appeal from orders passed by adjudicating authorities and Special Director Appeal and it has to deal with matters relating to foreign exchange. A fixed tenure has been stipulated for the Chairperson and Members. They are entitled to resign subject to certain conditions and they can be removed on proven misbehaviour or incapacity. Thus, if the object and purpose of the Act is to confer power on the Appellate Board to deal with the issue of economy under the scheme of the Act, it is well high impossible to conceive of the appointment of a part time member. S. 20 the enabling provision, empower's the Central Government to fix such number of persons as the Government may deem fit. The main part of Rule 5 provides that a Tribunal shall have one Chairperson and Members not exceeding four. To that extent, Rule 5 is in consonance with the Act and it comes within the framework of the

provision. The first proviso to Rule 5 stipulates that the number of either full time Members or part time Members shall not exceed two. This proviso introduces the concept of part time Member. Section 46 which is the enabling provision to frame Rules nowhere envisages about the part time members. The first proviso to Rule 5 thus travels beyond the enabling provision and is totally inconsistent with it. The proviso also does not conform to the main enactment. The first proviso to Rule 5 is therefore *ultra vires* the Act.

The second proviso to Rule 5 provides for qualification of a part time Member who can be appointed from amongst officers belonging to the Indian Legal Service who fulfil the qualification prescribed under Clause (b) of sub-rule (1) of Rule 2 of the Rules. Once it is held that there cannot be a part time Member there remains no justification for the introduction of the second proviso to bring in officers from the Indian Legal Service who are qualified to become district judges to be part time Members. The second proviso to Rule 5 is therefore also *ultra vires*.

If a rule goes beyond the rule making power conferred by the statute, the same has to be declared *ultra vires*. If a rule supplants any provision for which power has not been conferred, it becomes *ultra vires*. The basic test is to determine and consider the source of power, which is relelatable to the rule. Similarly, a rule must be in accord with the parent statute, as it cannot travel beyond it.

As the appointment of part time Member was quashed by the High Court as a logical corollary, such a person could not be allowed to be appointed to the post of Chairperson.

Union of India & Ors. vs. S. Srinivasan AIR 2012 SC 3791

2. Stamp duty payable – Lease granted for 15 years rectified and extended up to 30 years – Stamp duty for earlier 15 years lease deed already paid by lessee – Levy of stamp duty for entire period of rectified lease deed i.e. 30 years, improper. Stamp Act of 1899, Art. 31(v)

M/s. Hindustan Petroleum Corporation Limited invited applications for establishment of a petroleum outlet. The applicant must be either a owner of the land, which is required for establishment of the outlet, or a lessee. The Petitioner submitted application for establishment of the outlet by taking a land in the locality on lease. He was granted licence. As required under the business regulations or conditions, the petitioner took the property on lease for a period of 15 years through a document, dated 18-11-2009. Stamp duty of ₹ 2,46,300/- and registration charges of ₹ 3,210/- were paid. The document was submitted to the Corporation. However, the Corporation is said to have insisted that the lease must be for a period of 30 years. In view of this, the Petitioner obtained a deed of rectification, dated 11-10-2010, from the lessors for a period of 30 years. The document was presented for registration before the Sub-Registrar who was Respondent No. 3 in the petition for registration. The grievance of the petitioner was that instead of collecting the stamp duty and registration charges for the extended period of lease, the sub-registrar has collected the stamp duty for the entire 30 years period.

The Hon'ble Court held that had the lease deed for a period of 30 years been executed for the first time, there would certainly have been justification for sub-registrar in levying the entire amount referred to above. The very deed of rectification discloses that there existed a lease deed for a period of 15 years and the rectification has the effect of extending the term of lease by another 15 years. Sub-Registrar at the most, could have collected the stamp duty and registration charges for the extended period may be in terms of Clause (v) of Article 31 of the Act. The reason is that the parameters for determination of the stamp duty on lease deed fluctuate depending upon the duration of the lease. Once the Petitioner has paid the stamp

duty and registration charges for the lease for a period of 15 years, the same was required to be taken into account. There was no justification for Sub-Registrar in collecting the stamp duty for the entire period on the deed of rectification.

The Court directed Sub-Registrar to refund the stamp duty and registration charges paid on lease deed to the petitioner in case the stamp duty and registration charges for the entire period of 30 years is levied on the deed of rectification.

Gopal Singh vs. Inspector General, Stamps and Registration NTR Cross Roads Hyderabad & Ors. AIR 2012 Andhra Pradesh 189

3. Review Petition – Maintainability – Petitioner had already preferred appeal against the order passed in writ petition – Doctrine of merger –Applicability CPC – Sec. 114, O. 47

The question raised for consideration in the review petition, was having already preferred an appeal and the appeal having been dismissed, whether it is still open to the appellants of the said appeal to seek review of the judgment and order passed against which the Appeal, had been preferred and dismissed?

The jurisdiction, conferred by Article 136 of the Constitution, is divisible into two stages. The first stage is up to the disposal of the prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal. The doctrine of merger is not a doctrine of Universal or unlimited application.

Under Article 136 of the Constitution, the Supreme Court may reverse, modify or affirm the judgment decree or order appealed against only when it exercises appellate jurisdiction (i.e., after the leave to appeal is granted) and not while it exercises the discretionary jurisdiction on the question as to whether the petition for special leave to appeal shall be granted or not. The doctrine of merger, therefore, in such cases, comes into play if the special leave to appeal is granted and not when the question as to whether the leave would be granted or not is considered and decided.

Once leave to appeal has been granted and the appellate jurisdiction of Supreme Court has been invoked, the order passed, in appeal, having been converted into an appeal before the Supreme Court, the jurisdiction of High Court to entertain a review petition is lost, thereafter, as provided by sub-rule (1) of Rule (1) of Order 47 of the Code of Civil Procedure.

The facts of the present case, is that there is no dispute that the judgment and order passed in the writ petition, was appealable and that the review applicants had the option of either preferring an appeal or applying for review of the order and the review applicants expressed their option by preferring appeal. With the dismissal of the appeal, which had been so preferred by the present review petitioners, the review petitioners are debarred from preferring review petition against the directions, which were given in the writ petition. Thus, the judgment and order, which were, otherwise, appealable, have been made non-appealable by the act or omission of the review petitioners themselves.

Anup Kumar Roy & Ors. vs. State of Tripura & Ors. AIR 2012 Guwahati 163

4. Grant of Succession Certificate – Validity – Wife of deceased had walked out on him during his lifetime and started living with another man – No divorce between deceased and his wife – Unchastity of widow is no bar to inherit her deceased husband's estate – Grant of succession certificate proper. Succession Act, S. 372 – Hindu Marriage Act, 1955, Ss. 5(i), 24 & 28

One Ashok Moti Ram Kamley died and Respondent Nos. 1 to 3 claiming to be wife and children of late Ashok Moti Ram Kamley filed an application under section 372 of the Act for

grant of Succession certificate, to receive retiral dues as well as various deposits in the banks with the LIC. The trial court held, marriage of Respondent No. 1 with deceased Ashok Moti Ram Kamley as null and void; Respondent Nos. 2 and 3 as his illegitimate children; appellant as legally wedded wife of deceased; and respondent No. 8 as his mother, granted succession certificate in their favour.

On appeal preferred by Respondent Nos. 1 to 3, the First Appellate Court held, the appellant (Wife) re-married with one Chandan Singh in the life time of deceased and has forfeited her right to succeed the estate of the deceased, modified, the order and granted succession certificate in favour of Respondent Nos. 2, 3 (Children) and 8 (Mother). Hence Revision filed under section 384 (3) of the Indian Succession Act, 1925 against the appellate order passed by District Judge.

The Learned Counsel of Appellant referring to sections 24 to 28 of Hindu Marriage Act and submitted that in view of section 5(i) of Hindu Marriage Act, 1955 the marriage is no marriage in the eye of law. The Appellant is also nominee in the service record of deceased Ashok Motiram Kamley and the mother of deceased also deposed the same.

The learned Counsel for Respondent submitted that Appellant walked out of her husband and started living with Chandan Singh. Walking out of appellant from the house of her first husband/ deceased was irretrievable and irreversible and raises an inference that their marriage stands dissolved and, therefore the first Appellate Court had rightly decided the matter which does not call for any interference.

The Hon'ble Court observed that under the old Hindu Law, a widow who is unchaste at the time of her husband's death was not entitled to inherit his estate. But section 28 of the Hindu Marriage Act, 1956 discards almost all the grounds, which imposed exclusion from inheritance. It rules out disqualification on any ground whatsoever excepting those expressly recognised by any provisions of the Act. Unchastity of a widow is not a disqualification under the Act of 1956.

The unchastity of a wife is certainly a ground for divorce but in the absence of a decree of divorce, cannot be pressed into service to disinherit even an unchaste wife from claiming her rights as a widow. A decree of divorce can only be granted by a Court of competent jurisdiction, exercising powers under the Hindu Marriage Act. The mere fact that a woman is abandoned by her husband or that a woman after being abandoned by her husband lives with another man, would not raise an inference that their marriage stands dissolved and, therefore, in the absence of proof of divorce between appellant and deceased, appellant's right to inherit the property of her husband cannot be denied.

Enquiry for grant of Succession Certificate is summary enquiry to facilitate collection of debts to deceased and prevent their being time barred and to afford protection to debtors by appointing a representative of deceased and authorising him to give a valid discharge for debt. Grant of certificate does not give absolute right to debt nor does it bar regular suit for adjustment of claims of heir *inter se*.

The order of first Appellate court was set aside and order passed by trial court was restored.

Ranjana Kamble vs. Smt. Ranjana alias Vimaltai & Ors. AIR 2012 Chhattisgarh 167

5. Gift – Ex parte registration of deed of cancellation – Validity – Mutual consent of both parties – Ex parte Registration held not proper – Persons professing Islam: Transfer of Property Act, 1882, S. 123 – Registration Act, 1908, S. 68

The Petitioner is the younger brother of Respondent No. 3. The latter owned the property near Hyderabad. He executed a gift deed in favour of the petitioner. There was a recital to the effect

that possession of the property is delivered to the petitioner on the same day.

The Petitioner contends that after the gift became complete with the delivery of possession, entries were made in his name, in the municipal records. The ration card and other amenities are extended to him with reference to the address of the said house and that he is paying the electricity and other charges for the property.

Respondent No. 3 executed a deed of cancellation on cancelling the gift deed. The document was registered by the Sub-Registrar, Respondent No. 2. The Petitioner challenges the action of the Respondent No. 2 in registering the deed of cancellation. He contends that the registration of document by Respondent No. 2 is contrary to Rule 26 (k) (i) of the A. P. Rules under the Registration Act, 1908 and the law laid down by the Hon'ble Supreme Court.

The Respondent No. 2 stated that the judgment rendered by the Hon'ble Supreme Court in Civil Appeal No. 317 of 2007 is in relation to the cancellation of a sale deed and the same does not apply to the cancellation of a gift deed. The Respondent No. 3 stated that though there is a recital in the gift deed, to the effect that possession of the property was delivered, the physical possession of the property is still with him. Since the possession was not actually delivered, no transaction of gift contemplated under Mohammedan Law can be said to have taken place.

The Hon'ble Court observed that the procedure prescribed under the Transfer of Property Act in relation to the gifts does not apply to the gifts to be made by persons professing Islam. However, there is no prohibition for them, to adopt the procedure prescribed under the Act. In India, they have the option either to follow their personal law, in the matter of making the gifts, or to follow the law contained in the Act.

Whether a gift is made either in terms of Section 123 of the Act, or orally by a Mohammedan, the necessary ingredients that must exist to bring about the valid gift are; a) making of gift by donor; b) acceptance of the same by the donee; and c) delivery of possession of the gifted property. A party to transfer can certainly cancel it in case necessary ingredients as provided for under the law, are established. Though transaction such as sale and gift are brought into existence with unilateral acts of execution of the documents, the legal effect thereof is that the title in respect of the property stands transferred in favour of the transferee may not have subscribed his signature in that documents. From this point of view the sale deed on the one hand and the gift deed on the other hand, stand on the same footing.

The questions are whether a sale deed which is validly executed can be cancelled by the vendor at a subsequent point of time and whether the very act of registration of such deeds of cancellation can be challenged? The Hon'ble Supreme Court in Civil Appeal No. 317 of 2007 took the view that once the title in respect of the property is transferred through a transaction, the same cannot be cancelled without the participation of both the parties. Reference was made to Rule 26 (i) (k) of the Rules framed by the Government. A perusal of the said Rule discloses that it covers not only the sale deeds but also transactions of conveyance, which obviously would take in its fold the transactions of gift also. It has already been mentioned that whether it is a sale deed or gift deed, they are executed by the owners of the property and the beneficiaries thereunder get the title by way of transfer. The only difference is that a sale is supported by consideration whereas in case of gift, consideration in terms of money or other tangible asset is absent. Hence the writ petition was allowed and the registration of the deed of cancellation executed by the Respondent No. 3 was set aside. It was left open to Respondent No. 3 to pursue his remedies in accordance with law.

Fazalullah Khan vs. State of Andhra Pradesh AIR 2012 Andhra Pradesh 163.