THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

SECOND APPEAL NO.729 OF 2008

JUDGMENT:

Sole defendant in O.S.No.1390 of 2001 on the file of XI Junior Civil Judge, City Civil Court, Secunderabad filed this Second Appeal under Section 100 of Code of Civil Procedure (for short, hereinafter, referred to as "C.P.C.") challenging the decree and Judgment passed by the trial Court and affirmed by the I Additional Chief Judge, City Civil Court, Secunderabad in A.S.No.159 of 2005 on various grounds.

For the sake of convenience, the parties to the appeal will be referred hereinafter throughout the judgment as arrayed before the trial Court.

Plaintiff filed the suit for ejectment of the defendant from the schedule premises alleging that the plaintiff is the owner of the suit schedule premises and the defendant obtained the same on lease in the year 1993 on monthly rent and it was enhanced from time to time and the on the date of filing of the suit, monthly rent was Rs.970/- which is exclusive of electricity consumption charges and water charges. In addition to monthly rent, the defendant has to pay property tax of Rs.800/- per annum to the Municipal Corporation of Hyderabad (then existing), which comes to Rs.66.66 ps. Per month and the monthly rent including property tax works out to Rs1036.66 ps. As the building is more than 10 years old and rent payable for the premises is more than Rs.1,000/- which is inclusive of property tax payable to the Municipal Corporation, the building is governed by the provisions of Transfer of Property Act and not by A.P. Buildings (Lease, Rent and Eviction) Control Act (for short "the Rent Control Act"). The plaintiff issued a quit notice dated 18.05.2001 directing the defendant to vacate the premises within 15 days from the date of receipt of notice ending either by 30.06.2001 or 01.07.2001 and to deliver vacant possession of the premises, but the defendant failed to vacate the premises and no replay was issued to the notice.

As the tenancy was terminated on 30.06.2001 or 01.07.2001; continuation in possession of the property by the defendant is unauthorised with effect from 01.07.2001. Therefore, the defendant is liable for payment of damages for use and occupation from 01.07.2001 as the building would fetch not less than Rs.4,000/- per month and claimed mesne profits at Rs.4,000/- per month with effect from 01.08.2001. As the defendant failed to vacate the premises as demanded in quit notice dated 18.05.2001, the plaintiff filed the suit for eviction/ejectment of the defendant from the schedule premises and for damages for use and occupation.

The defendant filed written statement resisting the claim of the plaintiff while admitting that the rent payable for the premises is Rs.970/- per month excluding electricity and water charges and liable to pay property tax to the Municipal Corporation of Hyderabad while contending that the rent is not inclusive of property tax at Rs.66.66 ps. per month. Thus, the property is governed by the provisions of the Rent Control Act and not by the Transfer of Property Act. Therefore, the Civil Court has no jurisdiction to entertain the suit filed by the plaintiff.

The defendant also denied the validity of quit notice dated 18.05.2001 and liability to pay damages at Rs.4,000/- per month while contending that the plaintiff is not entitled to eject the defendant from the premises and to claim damages from the defendant as her occupation is authorised and prayed for dismissal of the suit.

The defendant also filed counter-claim, but the said counter-claim was dismissed by both the trial Court and the first appellate Court and no appeal was preferred against the counter-claim. Therefore, this Court need not examine the validity of the decree in dismissing the counter-claim, in the present second appeal.

Based on the above pleadings, the trial court framed the following seven issues for trial:

(1) Whether the quit notice dated 18.05.2001 is legal, valid and binding on the defendant?

(2) Whether the plaintiff is entitled to vacant possession of suit schedule property as prayed for?

(3) Whether the plaintiff is entitled to mesne profits? If so, at what rate?

(4) Whether the tenancy is permanent in nature?

(5) Whether this Court has no jurisdiction to entertain the suit?

(6) Whether the defendant is entitled to specific performance of agreement dated 01.12.1993 as prayed for?

(7) To what relief?

During trial, on behalf of the plaintiff P.Ws.1 and 2 were examined and marked Exs.A.1 to A.3. On behalf of the defendants, D.Ws.1 and 2 were examined and marked Exs.B.1 to B.50.

Upon hearing argument of both the counsel, the trial Court decreed the suit directing the defendant to vacate and deliver the vacant possession of the suit schedule premises to the plaintiff within 2 months from the date of judgment and also directed to pay damages to plaintiff at Rs.2,200/- per month from 01.08.2001 to 30.09.2001 amounting to Rs.4,400/-.

Aggrieved by the decree and judgment of the trial Court, the defendant filed A.S.No.159 of 2005 before the I Additional Chief Judge, City Civil Court, Secunderabad, which ended in dismissal by decree and judgment dated 17.01.2008 affirming the decree and judgment passed by the trial Court.

Aggrieved by the decree and judgment of the trial Court, affirmed by the first appellate Court, the present second appeal is preferred on various grounds and the main contention of the defendant before this Court is that the judgment of both trial Court and judgment is contrary to the judgment of larger Bench (5 judges) of this Court rendered in "***Ramvilas Bajaj v. Ashok Kumar***[1]" and the defendant shall not be evicted in view of amendment to Section 32 by Act No.17 of 2005 with effect from 28.05.2005 and the building is governed by the provisions of the Rent Control Act in view of Section 10 (1) of the Act. Thereby the decree and judgment passed by the trial Court and affirmed by the first appellate Court is erroneous and prayed to set aside the decree and judgment of both the Courts below.

The defendant framed the following substantial questions of law for consideration:

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[1] 2007 (4) ALT 348

"a. Whether the Trial Court judgment and Decree dated 18.07i.2005 is a nullity in view of the Amendment to Section 32 (c) of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960, which came into force on 28.05.2005, thereby making the Trial Court Coram Non-Judice i.e. Court without jurisdiction in respect buildings in the limits of Municipal Corporations whose rent did not exceed Rs.3,500/- per month (like the Suit Scheduled Property which is in East Marredpally, Secunderabad)? [The judgment of this Hon'ble High Court in Ramvilas Bajaj v. Ashok Kumar reported in 2007 (4) ALT 348 (5 Judges Bench)].

b. Whether the First Appellate Court's Judgment and Decree dated 17.01.2008 is per incuriam in view of the ratio laid down by our High Court in Ramvilas Bajaj v. Ashok Kumar reported in 2007 (4) ALT 348 (5 Judges Bench) para 127 (v).

c. In the absence of any registered lease deed for a period of lease exceeding initial 11 months, when the lease is deemed as oral and month to month tenancy, is it not necessary in law to agree every month afresh with regard to the term of lease between landlord and the tenant as regards rent and other outgoings like Municipal taxes?

d. if there is no evidence on record of the Trial Court and the First Appellate Court with regard to such an agreement from month to month regarding the municipal tax payable for the demised premises between the Appellant and the Respondent, then can in law it be said, that the appellant is liable to pay municipal tax?

e. Whether the Trial Court erred in Law in adding the Municipal Taxes paid in past by the appellant at Rs.66.66 p.m. which the appellant stopped paying admittedly long before the quit notice was issued by the respondent, and thereby wrongly derived jurisdiction to decide the present case?

f. Whether the Trial Court and First Appellate Court's Judgment and Decree are per incuriam in view of the ratio laid down by the Hon'ble Supreme Court in AIR 1970 SC 1636 (para 6) and AIR 1985 SC 111 (paras 8 and 9)?"

Upon hearing both the counsel, this Court formulated the following substantial question of law?

Whether the premises is governed by the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960 in view of amendment to Section 32 by Act No.17 of 2005 with effect from 28.05.2005 as the defendant was not evicted from the premises by the date of commencement of the Act 17 of 2005 in view of Section 10 (1) of the Act?

SUBSTANTIAL QUESTION OF LAW:

From the beginning the plea of the defendant is that the rent payable for the premises was less than Rs.1,000/-. Therefore, the building was governed by the provisions of the Rent Control Act not by the Transfer of Property Act, but the rent payable by the defendant is Rs.970/- besides property tax, which is directly payable by the defendant to the Municipal Corporation of Hyderabad (Rs.800/- per annum). If the tax payable for the premises is included in the rent, the rent payable by the defendant for the premises is more than Rs.1,000/- by the date of filing of suit, therefore it is governed by Transfer of Property Act.

The word 'rent' was not defined in the Rent Control Act, but under Transfer of Property Act, it is defined as follows:

> "**105. Lease defined :-** A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.
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> *Lessor, lessee, premium and **rent** defined :-* The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

The rent defined under the Transfer of Property Act can be taken into consideration in the absence of definition under Rent Control Act. However, the law declared by this Court and the Supreme Court is in support of plaintiff's case. In "***Pushpa Sen Gupta v. Sushma Ghosh***[2]" the Apex Court held that "the rents includes payments in respect of amenities and services provided by the landlord such as payment in lieu of consumption of electricity in the premises of the tenant." In "***M/s.Harichand HUF rep. by Kavitha Chain Chand Challani v. Kanchan Cycle Trading Company***[3]" this Court held that "the rent includes amount agreed to be paid by the tenants towards amenities."

[2] (1990) 2 SCC 651
[3] 1990 (1) ALT 315

Of course, the amount agreed to be paid to the Municipal Corporation is property tax but not price for the amenities provided to the tenant in the building. However, trial Court and the appellate Court based on facts and unequivocal admissions made by the defendant in the evidence, concluded that the rent payable for the premises is more than Rs.1,000/-. This fact finding cannot be disturbed by this Court while exercising power under Section 100 of C.P.C. Therefore, this Court has to decide the inherent jurisdiction of the Civil Court in view of the subsequent changes in the law.

Section 32 of the Act was suitably amended by Act 17 of 2005 enhancing the rent payable for the premises in Clause (c) to bring those properties within the jurisdictional limits of Rent Controller, which is extracted hereunder.

> "32. Act not apply to certain buildings: the provisions of this Act shall not apply-
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> (c): to any building the rent of which as on the date of commencement of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control (Amendment) Act, 2005, exceeds rupees three thousand and five hundred per month in the areas covered by the Municipal Corporations in the State and rupees two thousand per month in other areas."

In view of this amendment, to any building the rent of which exceeds Rs.3,500/- per month exempted from application of the Act. In the present case, rent payable for the premises is Rs.1,036.66 ps. per month. Thus, by the date of filing of the suit, the rent controller has no jurisdiction since it was not governed by the Act as rent payable for the premises is more than Rs.1,000/- per month. But the trial Court decided suit on 18.07.2005, just one prior to the commencement of amended Act i.e. Act 17 of 2005, but the first appeal was preferred during the interregnum period. The amendment came into force by Act No.17 of 2015 with effect from 28.05.2005 exempting the building fetching rent more than Rs.3,500/- per month within the Municipal Corporation from application of provisions of the Act. In such case, the schedule premises, for which the defendant is paying Rs.1036.66 ps. per month would come within the Rent Control Act from the date of commencement of amended Act 17 of 2005 but not by the Transfer of Property Act.

Section 10 (1) of the Act deals with eviction of tenants on various grounds. Section 10 (1) of the Act is relevant for decidindg the real controversy between the parties, which is as follows:

> "10. Eviction of tenants: (1) A tenant shall not eviction "whether in execution of a decree" or otherwise except in accordance with the provisions of this Section or Sections 12 and 13".

Thus, on account of subsequent amendment to the Act by Act No.17 of 2005, the subject building is governed by the Rent Control Act and at best the plaintiff can evict the defendant by executing decree by following the procedure under Order XXI of C.P.C. subject to executability, though decree was passed by the trial Court prior to commencement of Act 17 of 2005, still the tenant cannot be evicted even in execution of decree except under the provisions contained in Section 10 (2) to (8) and Sections 12 and 13 of the Rent Control Act. Thus, it means even if any decree was obtained by the landlord against the tenant for eviction invoking the provisions of Transfer of Property Act, such landlord is disentitled to evict the tenant, who is in occupation. Thus, the dispute is with regard to jurisdictional issue. There are conflicting judgments regarding date of determining the jurisdiction. Normally, the date of filing suit would determine the jurisdiction of the Courts, but in view of the language employed in Section 10 (1) of the Rent Control Act, the subsequent amendment of the Act would take away the power of the Civil Court. In "***M/s. Heerachand Poonamchand v. M/s.Kanchan Cycle Trading Co.***[4]" it was held that the "Court has power to consider the question of jurisdiction even if not raised by both the parties. Order of eviction obtained by landlord from the court not having jurisdiction not being valid, the tenant is entitled to restitution of property."

This issue was clarified by the Larger Bench of this Court in "***Ramvilas Bajaj v. Ashok Kumar***" (referred supra) and held as follows:

> "(i) with effect from 28-5-2005, when the amended Section 32 (c) came into force, persons, by whom rent payable for a building does not exceed Rs. 3,500/- p.m. within Municipal Corporations of the State and does not exceed Rs. 2,000/- p.m. in other areas, would come within the definition of "tenant" under Section 2 (ix) of Act 15 of 1960.
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> (ii) even if such persons have suffered a decree for eviction prior thereto, they are entitled for the protection of Act 15 of 1960 provided they continue in possession of the building.
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> (iii) after 28-5-2005, such tenants cannot be evicted in execution of a decree in view of the protection conferred on them by Section 10 (1) of Act 15 of 1960.
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> (iv) after the amended Section 32 (c) came into force, with effect from 28-5-2005, the civil Court must be held to have become coram non-judice, not to have jurisdiction to pass a decree of eviction in respect of buildings the rent of which in areas within Municipal Corporations of the State does not exceed Rs. 3,500/- p.m. and in other areas not exceeding Rs. 2,000/- p.m. and its proceedings, resulting in the decree, a nullity.
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> (v) even if at the time of institution of the suit, or when a decree for eviction was passed, the amended Section 32 (c) was not in force, but was introduced during the pendency of the appeal a tenant, who continues to remain in possession of a building whose rent is below the limits prescribed in the amended

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[4] 1990 (1) RLR 696 (AP)

> Section 32 (c), for being exempted from the provisions of the Act, is entitled for the protection of Act 15 of 1960, more particularly Section 10 (1) thereof, and the appellate Court is divested of its jurisdiction to pass a decree of eviction."

In view of those principles, the tenants in occupation after commencement of amended Act No.17 of 2005 with effect from 28.05.2005 if the rent payable for the building is less than Rs.3,500/- per month, the Rent Control Act would apply. Even if the decree for eviction prior thereto, they are entitled for protection of Act.17 of 2005 i.e. the tenant cannot be evicted after 28.05.2005, even in execution of decree in view of protection conferred on tenant by Section 10 (1) of the Act.

In view of the principle laid down by the larger bench of this Court, even if the plaintiff in the suit obtained a decree from the trial Court and appeal is pending, which is continuation of suit, the jurisdiction that conferred on Civil Court was taken away by Act No.17 of 2005 amending Section 32 of the Rent Control Act and in view of Section 10 (1) of the Act, the tenant in occupation cannot be evicted even in execution of decree passed by Civil Court.

Curiously, learned counsel for the plaintiff has drawn the attention of this Court to the judgment of Apex Court rendered in "***Smt.Noorunnissa Begum v. Brij Kishore Sanghi***[5]", wherein the Apex Court, after elaborate consideration of various provisions of Rent Control Act, in paragraph Nos.52 and 53 held as follows:

> "52. (a) Part of-Section 32 is prospective and some part of it is retrospective.
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> (b) The exemption granted by the State Government Under Section 26 of the Act by G.O. Ms. 636 dated 29th December, 1983 has overriding effect over rest of the provisions of the Act.

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[5] AIR 2015 SC 2322

> (c) The buildings whose rents are upto Rs. 3,500/- in the Municipal areas and Rs. 2,000/- in other areas were already covered by the Act and after amendment it continues to be covered by the Act but the tenants of buildings, rent of which is more than Rs. 1,000/- and does not exceed Rs. 3,500/- in the Municipal area or Rs. 2,000/- in other area even after amendment of Section 32 cannot claim protection in view of the exemption granted Under Section 26 of the Act.
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> (d) Section 26 and Section 32 of the Act operate in two different fields. Section 32 relates to non applicability of the Act to a class of building(s) whereas Section 26 deals with the power of the State to exempt the building or class of buildings to which Act is applicable. In fact, there is no clash between Section 26 and Section 32, as they operate in two different fields and, therefore, the question of overriding of one over another does not arise.
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> (e) Clause (a) of G.O. Ms. 636 dated 29th December, 1983 has become redundant. However, Clause (b) of the G.O. Ms. 636 dated 29thDecember, 1983 still holds good.
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> (f) The suit(s), appeal(s), revision application(s) or execution case(s) which are pending for determination under the General Law are not affected by amended Section 32 and will continue to be decided in accordance with General Law.
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> 53. In view of the aforesaid discussion and the judgment (majority) dated 30th April, 2007 passed by the High Court of Andhra Pradesh is upheld in so far as it relates to prospective operation of Section 32 (c) and its effect on the pending proceedings."

In view of the principle laid down by the Apex Court in the above judgment, the judgment (majority) dated 30.04.2007 passed by this Court is upheld insofar as it relates to prospective operation of Section 32 (c) and its effect on the pending proceedings.

Thus, the provisions of Act No.17 of 2005 with effect from 28.05.2005 would operate prospectively i.e. from the date of commencement of the Act, but in paragraph No.53 of the judgment the Apex Court made it clear that though Section 32 (c) of the Act has got prospective operation, the effect on the pending proceedings is also upheld. In such case, in view of the power under Section 10 (1) of the Act, the plaintiff is not entitled to execute the decree and evict the defendant from the premises as the subject premises is governed by the Rent Control Act. Thus, the Apex Court virtually upheld the larger Bench judgment of this Court with regard to effect of obtaining decree under Transfer of Property Act and application of Section 32 (c) of the Act, for which rent is payable is less than Rs.3,500/- per month after amendment.

Though, the decree was obtained prior to application of Act No.17 of 2005, the plaintiff is disentitled to evict the defendant in view of the larger Bench judgment of this Court and affirmed by the Apex Court in ***Smt.Noorunnissa Begum v. Brij Kishore Sanghi"*** (referred supra), in such case the plaintiff is disentitled to claim the eviction of the tenant from the premises.

Learned counsel for the appellant also relied on two other judgments of larger Bench of Apex Court regarding application of provisions of amended Act during pendency of the proceedings.

In "***N.S.Giri v. Corporation of City of Mangalore***[6]" the Apex Court held that "however, suffice it to observe that the Constitution Bench decision in "The New Maneck Chowk Spinning and Weaving Co. Ltd., Ahmedabad v. Textile Labour Association, Ahmedabad and Ors. (AIR 1961 SC 867)" and also the decision of this Court in "Hindustan Times Ltd. New Delhi V. Their Workmen (AIR 1963 SC 1332) which is four Judges' Bench decision, were not placed before the learned Judges deciding the LIC of India's case. A decision by the Constitution Bench and a decision by a Bench of more strength cannot be overlooked to treat a later decision by a Bench of lesser strength as of binding authority; more so, when the

[6] AIR 1999 SC 1958

attention of the Judges deciding the latter case was not invited to the earlier decisions available."

In "***State of Madhya Pradesh Rajesh Kumar Verma v. State of Madhya Pradesh Chitreshkasliwal***[7]" the Apex Court held that if there are two conflicting judgments, the Course open to the Court is to refer the matter to a larger Bench. But such situation would not arise in this case as the judgment of the larger Bench of this Court is already affirmed by the Apex Court.

In "***Shyam Sunder v. Ram Kumar***[8]" the Apex Court by relying on "Rikhi Ram v. Ram Kumar (AIR 1975 SC 1869)" held that a preemptor who claims the right to pre-empt the sale on the date of the sale must continue to possess that right till the date of the decree. If the claimant loses that right before passing of the decree, no decree for pre-emption can be granted by the Court even though he may have had such right on the date of the suit.

In "***Didar Singh v. Ishwar Singh***[9]" three judges Bench of Apex Court laid down that "in a suit for pre-emption, the claimant must prove that his right to pre-empt is subsisted till the date of the decree of the First Court and the loss of right after the date of the decree by an act beyond his control or by statutory intervention during pendency of the appeal against the decree of the trial Court would not disentitle the claimant to maintain his claim of preemption already exercised and decreed."

After analysing the entire law, the Apex Court laid down the following principles:

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[7] AIR 1995 SC 1421
[8] AIR 2001 SC 2472
[9] 1995 (1) Scale 1

"1. The preemptor must have the right to pre-empt on the date of the sale, on the date of filing of the suit and on the date of passing of the decree by the Court of the first instance only.

2. The preemptor who claims the right to pre-empt the sale on the date of the sale must prove that such right continued to subsist till the passing of the decree of the first court. If the claimant loses that right or a vendee improves his right equal or above the right of the claimant before the adjudication of suit, the suit for pre-emption must fail.

3. A preemptor who has a right to preempt a sale on the date of institution of the suit and on the date of passing of decree, the loss of such right subsequent to the decree of the first court would not affect has right or maintainability of the suit for pre-emption.

4. A preemptor who after proving his right on the date of sale, on the date of filing the suit and on the date of passing of the decree by the first court, has obtained a decree for preemption by the Court of first instance, such right cannot be taken away by subsequent legislation during pendency of the appeal filed against the decree unless such legislation has retrospective operation."

In "***Lakshmi Narayan Guin v. Niranjan Modak***[10]" the Apex Court held that a change in the law during the pendency of an appeal has to be taken into account and will govern the rights of the parties.

Thus, in view of the principles laid down in the above judgments when an enactment is followed by fresh legislation by an amending Act such legislation is prospective in operation and does not effect substantive or vested rights of the parties unless made retrospective either expressly or by necessary intendment and the Apex Court further expressed its view that there is a presumption against the retrospective operation of a statue and further a statute is not to be construed to have a greater retrospective operation than its language renders necessary, but an amending Act which affects the procedure is presumed to be retrospective, unless amending Act provides otherwise.

In the present case, though the amendment to Section 32 (1) by Act No.17 of 2005 is given prospective effect, but its

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[10] AIR 1985 SC 111

consequences under Section 10 (1) of the Rent Control Act has to be taken into consideration, thereby the plaintiff in this case is disentitled to evict the defendant from the schedule premises, but the first appellate Court did not frame any issue with regard to the right of the plaintiff to evict the tenant by invoking provisions of the Transfer of Property Act in view of bar under Section 10 (1) of the Rent Control Act and committed an error in affirming the decree and judgment of the trial Court. Hence, in view of the law laid down by the larger Bench of this Court and affirmed by Apex Court, I find that the building is governed by the provisions of the Rent Control Act in view of Section 32 (c) of the Act and the defendant is not liable to be evicted in view of interdict contained in Section 10 (1) of the Act. Consequently, the decree and judgment passed by the trial Court and affirmed by the first appellate Court is liable to be set aside. Accordingly, the point is answered.

In the result, the second appeal is allowed setting aside the decree and judgment dated 18.07.2005 passed in O.S.No.1390 of 2001 by the XI Junior Civil Judge, City Civil Court, Secunderabad, affirmed in A.S.No.159 of 2005 by the I Additional Chief Judge, City Civil Court, Secunderabad.

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

JUSTICE M. SATYANARAYANA MURTHY

28.04.2017
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