

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

CIVIL REVISION PETITION No. 3081 of 2018

Between:

1. Medida Veeraiah @ Veera Reddy, and 2 others

.....Petitioners

AND

1. Medida Vijaya Narasimha Rao, and 5 others

.....Respondents

Date of Judgment pronounced on : 28.09.2018

THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

1. Whether Reporters of Local newspapers : Yes / No
May be allowed to see the judgments?
2. Whether the copies of judgment may be marked : Yes / No
to Law Reporters/Journals:
3. Whether The Lordship wishes to see the fair copy : Yes / No
Of the Judgment?

GUDISEVA SHYAM PRASAD, J

THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD**CIVIL REVISION PETITION No. 3081 of 2018**

% 28.09.2018

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.....Petitioners

Versus

\$ 1. Medida Vijaya Narasimha Rao, and 5 others

..... Respondents.

< GIST:

> HEAD NOTE:

! Counsel for the Petitioners : Sri Karri Murali Krishna

^ Counsel for the Respondents : Sri Kondapally Syam Sunder

? Cases referred

¹ (2010) 8 Supreme Court Cases 633

² 2005 (3) ALD 78 SC

³ 1993 (3) SCC 418

⁴ (2003) 4 SCC 493

⁵ (2010) 8 SCC 633

⁶ 2008 (2) ALT 348

⁷ 2015 (5) ALT 580

THE HON' BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

CIVIL REVISION PETITION No. 3081 of 2018

ORDER:

This civil revision petition is directed against the order dated 16.03.2018 in I.A.No.1340 of 2013 in O.S.No.591 of 2012 passed by the learned Senior Civil Judge, at Khammam. The revision petitioner is the plaintiff who filed a suit for partition and separate possession against the respondents 1 to 8/defendants. In the said suit, the petitioner has filed above interlocutory application under Order XXVI Rule 10 of Civil Procedure Code praying the Court to forward the blood samples of the petitioner/plaintiff and respondent No.1/defendant No.1 for scientific examination of the DNA profile. The brief averments of the petition affidavit filed before the trial court in the said application of the petitioner is that the petitioner has filed suit O.S.No.591 of 2012 partition and separate possession against the respondents herein. The petitioner has also filed the above application for sending the samples of the blood of the petitioner and respondent No.1 for scientific examination to determine the paternity of the 1st defendant, as the defendants have denied the relationship between 1st defendant and the plaintiff. It is the contention of the plaintiff that he was born to the 1st defendant and one Yakamma. The 1st defendant has denied that the petitioner was born to them. Therefore, the petitioner/plaintiff has filed the petition to prove his paternity.

respondents/defendants have filed their counter contending that the petitioner is not at all the son of respondent No.1 and the mother of the petitioner Yakamma married G. Mallesam and later developed illicit intimacy with several persons, namely Saidulu and Veerabhadram and others.

The trial Court, on consideration of the pleadings of the petitioner and respondents, has allowed the application ordered for a DNA test to prove the paternity of the petitioner plaintiff.

Aggrieved by the impugned order this revision has been preferred.

The point for consideration in this revision is that whether the order passed by the learned Senior Civil Judge is suffering with any infirmity and whether it is illegal, as it may affect the rights of the parties.

Admittedly, the plaintiff has filed a suit for partition and separate possession against the defendants 1 to 8. The case of the plaintiff is that he is the son of defendant No.1. He was born to defendant No.1 and one Yakamma. Therefore, there is a dispute with regard to paternity of the plaintiff for claiming his rights in the property. Unless the plaintiff establishes that he is the son of 1st defendant, he cannot claim any rights in the suit schedule property.

Admittedly, this is a suit filed for partition and separate possession and the relationship of the plaintiff and defendant must be established for dividing the shares. The burden is on the plaintiff to prove that he is the son of 1st defendant, as the 1st defendant has denied the relationship between the plaintiff and himself. Therefore, the plaintiff has filed an interlocutory application before the trial court under Order XXVI Rule 10 CPC praying the Court to forward the blood samples of petitioner/plaintiff for scientific examination of DNA profile.

Order XXVI Rule 10 CPC deals with the procedure of Commissioner to be adopted in a case where a Commissioner was appointed for local investigations. The said provision is not applicable to the facts of the present case.

Order XXXVI Rule 10A may be applicable to the facts of the present case. Rule 10A reads as under.

Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the court, be conveniently conducted before the Court, the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court.

2) The provisions of rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9.

In this regard, Rule 12 assumes importance. Rule 12 reads as under:

The court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

2) Proceedings and report to be evidence: Code may direct further inquiry – The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

In view of the above provisions under Order XXVI Rule 10, Rule 10A, and Rule 12, the Court has to pass an Order giving specific instructions to the Commissioner as to conducting of local inspection or the scientific investigation.

In the instant case, the Court has not given any specific direction to the Commissioner as to what he has to do in respect of the scientific investigation. As per Rule 10A, the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court. A perusal of the petition filed by the plaintiff reveals that it was filed and Order XXVI Rule 10 CPC to send the blood samples of the petitioner and respondent No.1 for scientific examination of their DNA profile. The petitioner has not sought for appointment of Commissioner for the said purpose. The trial Court has

also not passed any order in respect of the appointment of Commissioner in that regard giving specific directions as to what the Commissioner has to do in this matter. These observations may appear to be technical in nature but in view of the fact that there are no specific directions for appointment of Commissioner, and the purpose of appointment of Commissioner and the duty the appointed Commissioner should perform in this matter, the order passed by the trial Court is very vague and unspecific, and not in accordance with the provisions are Order XXVI Rule 10, Rule 10A of CPC.

As far as the contentions of the learned counsel for petitioner and respondents are concerned, they have argued on this point of sending the blood samples for DNA testing. The learned counsel for petitioner submitted that the order passed by the trial Court did not suffer with any infirmity. As the petitioner intends to prove his relationship, the trial Court has allowed his application permitting to take the blood samples of the respondent No.1 for forwarding it to the expert for DNA analysis.

The contention of the respondents is that the DNA test has to be ordered in exceptional cases. This is not a fit case where a DNA test can be ordered. The burden is on the petitioner to prove that he is the son of defendant No.1. It is argued that the petitioner is not entitled to seek the relief of DNA testing in this case.

Learned counsel for the petitioner relied on the decision of the Hon' ble Supreme Court in **Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Another**¹. The purport of the decision is that when a matrimonial dispute between the parties was pending in the court of competent jurisdiction, all aspects concerning matrimonial dispute raised by the parties should be adjudicated and determined by the matrimonial court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without use of such test. The result of a genuine DNA test may not be enough to escape from the conclusiveness of Section 112. When there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. In a

¹ (2010) 8 Supreme Court Cases 633

matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. Any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course. The order of the High Court directing DNA test, is, therefore, set aside. Respondent 2 wife, however would not be precluded from claiming maintenance or any other order of financial support against the appellant in appropriate proceedings from the court of competent jurisdiction or in the petition filed by the appellant before the District Judge. Obviously the appellant husband would be at liberty to contest the claim of Respondent 2 on all available grounds and the court concerned would consider and determine such claim in accordance with law on its own merits.

Reliance was also placed by the petitioner's counsel in **Banarasi Das v. Teeku Dutta and another**², wherein the Hon' ble Supreme Court has held as under:

"In order to succeed in the succession application the applicant has to adduce cogent and credible evidence in support of the application. The respondents, if they so chooses, can also adduce evidence to oppose grant of succession certificate. The trial court erroneously held that the documents produced by the respondents were not sufficient or relevant for the purpose of adjudication and DNA test was conclusive. This is not a correct view. It is for the parties to place evidence in support of their respective claims and establish their stands. DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given, as was noted in Goutam Kundu's case (supra). Present case does not fall to that category. High Court's judgment does not suffer from any infirmity.

Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.

Section 112 of the Indian Evidence Act, 1872 requires the party disputing the parentage to prove non-access in order to dispel the presumption of the fact under Section 112 of the Evidence

² 2005 (3) ALD 78 (SC)

Act. There is a presumption and a very strong one, though rebuttable one. Conclusive proof means proof as laid down under Section 4 of the Evidence Act.

Section 112 of the Evidence Act is based on the well-known maxim pater est quem nuptial demonstrare (he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married women is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage of filiation (parentage) may be presumed, the law in general presuming against vice and immorality.

It is rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.”

In the above decision, the petitioner has filed for a succession certificate to facilitate him to collect the debts on succession. In that context, the decision was rendered with regard to the direction to conduct a DNA test. It was held that the DNA test cannot be directed in view of the provision under Section 112 when there is a presumption of legitimacy of child. In an application for grant of succession certificate, such test cannot be ordered.

Learned counsel for the respondent relied on the judgment in **Narayan Dutt Tiwari v. Rohit Shekhar and another**, and contended that DNA Test was ordered to decide paternity. The High Court held that Court can use reasonable force by taking police assistance if blood

sample is not willingly given. The Hon' ble Supreme Court while dismissing putative father's SLP, modified the High directions to the extent that confidentiality would be afforded to the petitioner by taking sample at his residence and in that case detailed directions were issued. Putative son and his mother were also permitted to be present at the time of taking sample. In paragraphs 2 to 5 of the said judgment, it was held as under:

"We have been informed that presently, the Petitioner is residing at Anant Van, FRI Campus, Dehradun, Uttarakhand and is not in a position to move freely on account of his old age. 3. We, therefore, direct that the Civil Surgeon of Government Hospital at Dehradun along with a Pathologist, the District Judge of Dehradun and the Joint Registrar Original Side of the Delhi High Court, would visit the residence of the Petitioner on Tuesday, the 29th May, 2012 at 10.30 A.M. and the Pathologist would take the blood sample of the Petitioner in confidentiality in their presence for DNA profile test and the said sample shall be sent in a proper seal immediately to Centre for DNA Fingerprinting and Diagnostics (CDFD), Bldg.7, Gruhakalpa, 5-4-399/B, Nampally, Hyderabad - 500 001 for analysis, by a Special Messenger of Delhi High Court who shall not be below the rank of Assistant Registrar. After test of DNA profile, the Centre for DNA Fingerprinting and Diagnostics (CDFD), Hyderabad will forward the Report of the Analyst as soon as possible by a Special Messenger in a sealed cover to the Registrar General of Delhi High Court who will place the said Report before the Court.

We direct the Petitioner to remain himself present at his residence i.e. Anant Van, FRI Campus, Dehradun, Uttarakhand, on Tuesday, the 29th May, 2012, positively. 5. Respondents, if they so desire, may remain present either in person or through their representatives and also a representative of Petitioner may remain present at the aforesaid date and time of taking blood sample of the Petitioner at his residence.

The Secretary General of this Court is directed to forward a copy of this Order by Fax to the Registrar General of Delhi High Court,

Registrar General of Uttarakhand at Nainital, District Judge of Dehradun and the Head of the Centre for DNA Fingerprinting and Diagnostics (CDFD), Hyderabad, forthwith. The District Judge, Dehradun is directed to inform of this Order to the Civil Surgeon, Government Hospital, Dehradun immediately so as to take necessary steps for collecting the blood sample of the Petitioner.

The impugned order of the High Court stands modified to the extent as stated above. 8. We also make it clear that this Order would be without prejudice to any of the parties as the civil suit is still pending in the court below.”

The Hon’ ble Supreme Court has dealt with the provisions under Section 51(e) and Order 39 Rules 2 and 1 of CPC, Section 114 of the Evidence Act, 1872, Articles 21, 19(1)(a), 136 and 32 of the Constitution of India, Sections 53, 53A and 54 of Cr.P.C.

No doubt in the above decision, the Hon’ ble Supreme Court has referred to a case in **Goutam Kundu v. State of West Bengal**³, and **Sharda v. Dharmapal**⁴ and **Bhabani Prasad Jena v. Orissa State Commission for Women**⁵. In the context of the case in Narayan Dutt Tiwari, the Hon’ ble Supreme Court has passed orders accordingly. In the instant case, the facts are otherwise.

Reliance was also placed on **Marada Venkateswara Rao v. Oleti Vara Lakshmi and another**⁶, in a petition filed under Section 45 of the

³ 1993 (3) SCC 418

⁴ (2003) 4 SCC 493

⁵ (2010) 8 SCC 633

⁶ 2008 (2) ALT 348

Evidence Act, this Court held that it was essential to order DNA test to set at rest the dispute for partition of suit schedule property.

The purport of the decision in **Marada Venkateswara Rao** is that when there is a dispute as to matrimony of parties to partition suit, ordering of DNA test to set at rest the conflict is not improper. It is however in that context, in the above decision, left to the party concerned to go for DNA test as ordered by Court. Placing reliance on this decision, it is argued that in a suit for partition, the DNA test may be ordered as the petitioner/plaintiff himself who is the son of the defendant No.1 has sought for the DNA test.

The learned counsel for the respondent has placed reliance on **Chinta Madhusudhan Rao v. Chinta Naga Lakshmi and another**⁷, this Court held that the DNA test proposed to be conducted was essential to establish the rights of the parties. It was held in paragraphs 13 and 14 as under:

13. From the two judgments of the Supreme Court referred supra, it is clear that the Court has a wide discretion to direct a party to undergo any medical test including the DNA test. But, the discretion has to be exercised by the Court properly on being satisfied about the party requiring the Court to direct such a test to establish a strong prima facie case. The party against whom an order directing to undergo medical test is passed, is not permitted to contend that it offends his personal liberty. When the right of a party to the proceeding comes into conflict with the so-called right to privacy and personal liberty of the opposite party, the Court has to look into the competing interests of the parties.

⁷ 2015 (5) ALT 580

14. In the instant case, the petitioner baldly denied any sort of relationship with the respondents. This apart, he made wild allegations against the 1st respondent and her family members. The respondents came forward with a specific theory that on 08-8-2001 the marriage of the 1st respondent was performed with the petitioner in a temple and thereafter, the spouses led conjugal life. The 2nd respondent was said to have born to the 1st respondent through the petitioner during the wedlock and also that the petitioner paid the medical bills of the hospital at the time when the 1st respondent delivered the 2nd respondent. Even the petitioner admitted in the written statement that the 1st respondent raised several disputes before the elders in this regard claiming to be the legally wedded wife of the petitioner and that the 2nd respondent was born to her through the petitioner. The petitioner contended that he has no sort of any relationship with the respondents, he has a legally wedded wife and has a female child through her. In view of the total denial of relationship by the petitioner and making wild allegations against the 1st respondent touching her moral character, the right of the respondents to establish their relationship has to be adequately protected by the trial Court. If the trial Court refuses the prayer made by the respondents to direct the petitioner to undergo DNA test, it would be in the considered view of this Court is nothing but refusal to protect the rights of the respondents. The learned trial Court upon considering the relevant materials before it, arrived at the conclusion that directing the petitioner to undergo NDA test is proper. Having regard to the facts and circumstances of the case, this Court is of the opinion that the learned trial Court exercised discretion properly and allowed the petition filed by the respondents. As this Court is of the view that the DNA test proposed to be conducted is essential to establish the rights of the respondents, the order passed by the trial Court does not require any interference in the revision.”

The purport of the decision in **Chinta Madhusudhan Rao** is that the court has wide discretion to direct a party to undergo DNA test to protect right of the party to establish marital relationship with other

party and to prove the paternity of the child born to them which was denied by the other party.

The facts of the present case are otherwise. In the decision in **Chinta Madhushudhan Rao**, the respondents therein came forward with a specific theory that on 08.08.2001, the marriage of first respondent was performed with the petitioner in a temple and thereafter the spouses led conjugal life. The 2nd respondent was said to have born to the 1st respondent through the petitioner during wedlock and also the petitioner paid the medical bills and there is prima facie material to show the connection between petitioner and respondent.

In the instant case, the learned Senior Civil Judge has not discussed anything about *prima facie* case in respect of the relationship between the parties by placing reliance on the material on record. Therefore, the above decision is not applicable to the present case.

On consideration of the judgements referred above, it is obvious that a DNA test can be ordered in appropriate cases where there is necessity. It is also clear that a DNA test cannot be ordered in a routine manner. The facts and circumstances of the each case have to be taken into consideration for ordering DNA test. The parties have to bring their prima facie evidence on record to show their relationship. If the court is not satisfied with the prima facie evidence, then the court may order DNA test in appropriate cases by following the ratio laid down in

the judgements referred above. The court cannot merely order DNA test on mere asking of the parties to decide the relationship. Generally in criminal cases, and matrimonial offences, DNA test is being ordered. In cases like partition and civil disputes, Courts are slow in ordering DNA test; the reasons being that there is a presumption under section 112 of Indian Evidence Act with regard to the paternity. The petitioner has to come forward with specific denial of his paternity, and his *prima facie* case to prove his paternity, and then only he can ask the court for a DNA test. There are disadvantages in ordering DNA test in some cases. The DNA test asked in this case by the petitioner who claims to be son of respondent No.1. This is a case where the petitioner is raised about 35 years. There must be *prima facie* some material to connect the relationship with the petitioner and the 1st respondent. It is obvious that the trial Court has not considered any *prima facie* case brought by the petitioner on record. There is no discussion with regard to the relationship between the petitioner and respondent No.1 basing on any documents. The trial Court has merely passed an order stating that as there is a dispute between the petitioner and respondent No.1 with regard to paternity, the DNA test is ordered. In the light of the above decisions of Hon' ble Supreme Court held that a DNA test cannot be ordered in a routine manner.

This is a case where the trial Court has very casually, in a routine manner, ordered DNA test, without considering the prime facie case of

the petitioner, without discussing the material placed before the Court, and the contents of the pleadings therein. It is also pertinent to note that the trial Court has not appointed a Commissioner for the said purpose as per the provisions under Order XXVI Rule 10, or Rule 10A of CPC. There are no specific directions to the Commission as to what he has to do for conducting a DNA test. There are no reasons given for allowing the petition filed for seeking DNA test. The order passed by the trial Court is not based on any plausible reasoning.

It is also pertinent to note that the personal liberty of an individual is at stake in cases of ordering DNA testing. The consent of the party whose blood samples are to be drawn is required. The court may not, in all cases, direct taking of blood samples from the respondent without his consent. At this juncture, it is appropriate to see the standard of proof that is required in each case. In a criminal case the standard of proof is beyond reasonable doubt. In a civil case, it is preponderance of probabilities. Therefore, the standard of proof in a criminal case is different from the standard of proof in a civil case. As far as the ordering of DNA test is concerned, in my opinion, the Court has to see the requirement of standard of proof; in civil cases, the standard of proof being preponderance of probabilities. When there is a presumption under Section 112 of Evidence Act, the parties have to produce evidence to prima facie show that the presumption can be invoked. The parties may lead evidence to rebut the said presumption

as the presumption is a rebuttable presumption. At this juncture the reference of Section 112 of the Evidence Act assumes importance.

Section 112 of Evidence Act reads as under;

Birth during marriage, conclusive proof of legitimacy.—

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

To prove paternity, there is a presumption in favour of the person who is claiming paternity. The petitioner has to bring on record the material to raise the said presumption. In case the petitioner fails to bring any material prima facie to show that there is a nexus between the respondent No.1 and the petitioner's mother, there is no point in ordering a DNA test. A stranger who is not having a connection cannot be directed to undergo a test. Therefore, the petitioner has to come out with a prima facie case that there is a marriage between his parents, or that there is a relationship between his parents which led to his birth. In the instant case, there is no material considered by the trial Court as to the nature of relationship between the petitioner's mother and the 1st respondent. The 1st respondent is denying his relationship with the mother of the petitioner; and in such a case the burden is on the petitioner to show that there is prima facie evidence to rebut the presumption under Section 112 of the Evidence Act.

In the instant case, the petitioner is raised about 35 years. There must be lot of material available to him to prima facie show that he is the son of the 1st defendant. The trial Court ought to have considered all the material to come to a conclusion that there is prima facie relationship between the petitioner's mother and the respondent No.1 before ordering DNA test. Without there being any formal proof of relationship or connection between the parties, it does not appear that there is any reason for ordering a DNA test. In such cases if DNA test is ordered without there being any prima facie proof of her relationship between the parties in a case like this where the petitioner claims that he's 35 years old, without producing any record that he is related to the defendant No.1, it is not appropriate to order a DNA test.

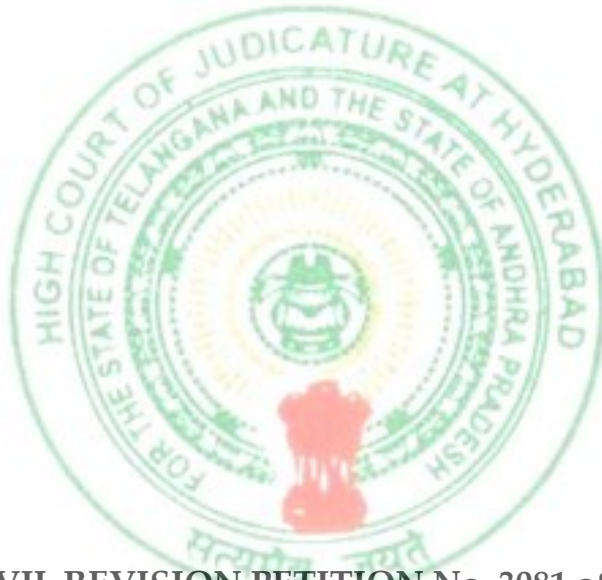
In view of the foregoing reasons the orders passed by the trial Court are liable to be set aside.

IN THE RESULT, the civil revision petition is allowed, setting aside the order dated 16.03.2018 passed by the trial Court in I.A.No.1340 of 2013 in O.S.No.591 of 2012. No costs. Miscellaneous petitions, if any pending, shall stand closed.

GUDISEVA SHYAM PRASAD, J

28th September, 2018
KSM

THE HON' BLE SRI JUSTICE GUDISEVA SHYAM PRASAD



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