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N. SRIHARI (D) THROUGH LRS. & ORS.

v.

N. PRAKASH & ORS.

(Civil Appeal Nos.1420-1421 of 2008)

FEBRUARY 19, 2008

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(DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.)

Evidence Act, 1872:

ss.62 and 63 – Primary evidence and secondary evidence – Suit claiming title to properties through a will – Executor of the will herself enjoying the property under another earliest will – Original of earliest will not produced before court – Parties and courts referring to the earliest will – Neither trial court nor High Court recording any finding with regard to the earliest will – Held: In the absence of a specific finding as to the earliest will, matter remitted to High Court – Defendants would place the original of the earliest will for consideration of High Court – If original will is not available, a certified copy thereof may be placed on record – High Court would consider the same as also the objections that may be raised, in accordance with law – The matter being old, High Court would decide it expeditiously – Till then parties would maintain status quo – Practice and Procedure.

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One 'NS', who had two sons, was stated to have bequeathed all his properties including 19 acres and 15 guntas of land in favour of his wife 'C' and 'P', the wife of his elder son 'NB', by a will dated 2.1.1956. The beneficiaries of the will were to enjoy the properties jointly. 'C' was given life time interest under the will. Later 'C' and 'P' jointly purchased 1 acre 30 guntas of land raising their joint holding to 21 acres and 5 guntas. On 6.3.1969, 'C' executed a registered settlement deed transferring 2982

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sq. yards of land from the joint holding in favour of 'S', the wife of the second son 'SG'. By another registered release deed she transferred her undivided share in favour of 'P'. On the same day 'S' executed a registered disclaimer deed disclaiming any right over the property that vested with 'C' and 'P'. In the year 1970, the second son of 'P' and 'NB', pledged the documents of the suit land with Andhra Bank against a loan. On failure of payment of the loan amount, the Bank successfully filed O.S.No.403 of 1976 wherein the will dated 2.1.1956 and the release deed dated 6.3.1969 were marked as exhibits. After the death of 'NB' in 1981 and 'C' in 1984, the sons of 'SG' filed a suit claiming the entire share of 'C' through a will dated 28.9.1979. The suit was decreed. The defendants-appellants filed A.S.No.78 of 1994 and CMP No.17581 of 2001 before the High Court, which dismissed the appeal and disposed of the CMP. Aggrieved by the judgment in A.S.No.78 of 1994 and the order in the CMP, the defendants filed C.A.Nos.1420-1421 of 2008. The incidental orders gave rise to C.A.Nos.1422 to 1429 which were filed by the other defendants and some third parties.

It was contended for the main appellants-defendants that the trial court as also the High Court failed to consider the earliest will dated 2.1.1956 merely because the original thereof was not placed before the court and, therefore, the judgments of both the courts below could not be sustained.

Disposing of the appeals, the Court

HELD: 1.1 The pleadings as well as the discussion by the trial court clearly show about existence of the earliest Will dated 2.1.1956 executed by 'NS'. The fact

A remains that though the plaintiffs themselves placed a certified copy of the said Will, original of the same has not been produced by the defendants. It is their case that the original had been filed in O.S. No. 403 of 1976 filed by Andhra Bank. Though steps had been taken by the High B Court for transfer of the said document, till its final decision, the same was not reached and ultimately the High Court disposed of the appeal on the basis of the available materials and confirmed the judgment and C decree of the trial court. [Para 13] [73-G; 74-A, B]

1.2 It is significant to note that the plaintiff themselves referred to the Will dated 2.1.1956 in their plaint, contesting defendants asserted the same in their written statement and specific reference to the same was made by the trial D court as well as the High Court in their judgments. But, in the absence of specific finding as to the Will dated 2.1.1956, in the interest of justice, the matter has to go back to the High Court for fresh consideration in respect E of the earliest Will dated 2.1.1956. The matter is remitted to the High Court for fresh disposal. The appellants/ contesting defendants are permitted to place the original Will dated 2.1.1956 for consideration of the High Court. [Para 14-15] [74-B, C, D, E]

F 1.3 In case, the original will is not available in view of the earlier proceedings, the contesting defendants are free to place the certified copy of the Will dated 2.1.1956 and, in that event, it is for the High Court to consider the same G including objections to be raised by the other parties in accordance with law. Inasmuch as the appeal is of the year 1994, the High Court would expeditiously dispose of the same afresh in the light of the observations made in the judgments. Till then parties are directed to maintain

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status quo prevailing as on date. [Para 15] [74-E, F, G] A

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1420-1421 of 2008

From the final Judgment and Order dated 17/2/2005 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Appeal No. 78/1994 and C.M.P. No.17581/2001. B

WITH

C.A. Nos. 1422-1423, 1424-1425, 1426, 1427-1428 and 1429 of 2008. C

Harish N. Salve, L.N. Rao, P.S. Mishra, Mukul Rohtagi, Dushyant A. Dave, Vishwanathan Shetty, T.L. Vishwanatha Iyer, Suyodhan Byrapaneni, Siddharth Patnaik, G. Arun, Govind Reddy, G. Ramakrishna Prasad, D.V. Shiva Prasad, Pramod Dayal, Nikunj Dayal, Taghagat H. Vardhan, Dhruv Kumar Jha, Ravi C. Prakash, O.P. Singh, Upendra Mishra, Manu Shanker Mishra, K. Raghavacharayulu, Sridhar Potaraju, D. Julius Riamei, S. Udaya Kumar Sagar, Bina Madhavan, B.D.L. Nirmal Kumar, Nupur Kanungo, Hemal K. Sheth (for M/s. Lawyer's Knit & Co.), Aribam Guneshwar Sharma for the appearing parties. D E

The Judgment of the Court was delivered by F

P. SATHASIVAM, J. 1) Leave granted.

2) The appellants herein are the unsuccessful defendants in O.S. No.9 of 1993 on the file of the trial Court as well as the High Court. The LRs of the deceased parties as well as the purchasers and third parties who were not parties before the trial Court and the High Court also filed appeals. The respective claim/stand of the parties is being explained hereunder. In order to understand their claim, entitlement etc., let us refer to the geneology table of the family of N. Saya Goud. G H

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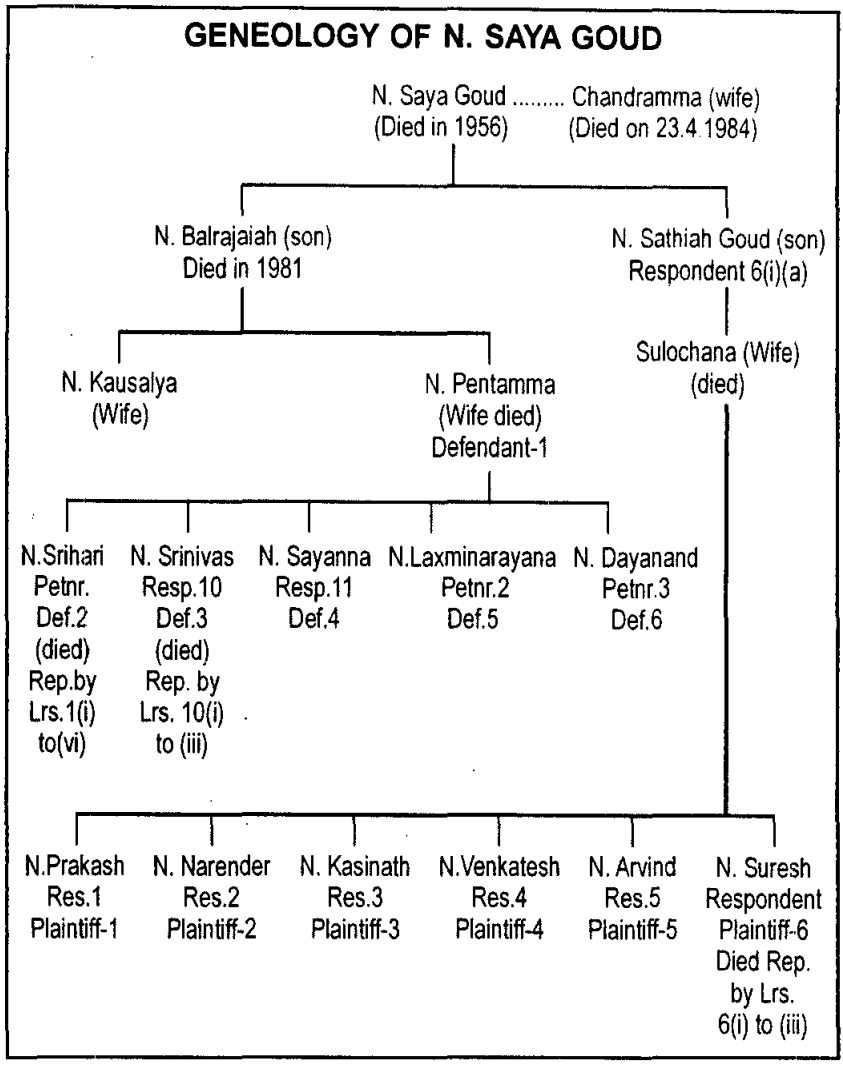

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3) One Shri N. Saya Goud had a wife by name, Smt. Chandramma and two sons, namely, Balarajiah Goud and Sathaiah Goud. Balarajiah Goud had two wives, Pentamma (first wife) and Kausalya (second wife), five sons and three daughters through his first wife and the second wife was issueless. Sathaiah Goud had a wife, Sulochana and six sons. On 2.1.1956, Shri Saya Goud executed a Will under which he mentioned that the lands bearing Survey Nos. 284, 285, 290, 292 and 293 admeasuring 19 acres and 15 guntas situated in

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Lothukanta, Alwal, Ranga Reddy District were in his protected tenancy and that the other movable properties mentioned therein, were acquired by himself and his wife Chandramma and bequeathed all the movable and immovable properties jointly held by him and his wife in favour of his wife, Smt. Chandramma and his eldest daughter-in-law Pentamma. The beneficiaries of the Will were to enjoy the properties jointly. Smt. Chandramma was given life time interest under the said will. Sathaiah Goud, second son of Shri Saya Goud, was an attestator of the Will dated 2.1.1956 executed by his father. After the demise of Shri Saya Goud, the pattadars of the land for which shri Saya Goud acquired the right of protected tenancy had transferred their pattadars right and interest in favour of Smt. Chandramma and Smt. Pentamma jointly as the heirs of Shri Saya Goud upon payment of the required consideration in respect of the land of an extent of 19 acres 15 guntas and consequently the Deputy District Collector passed an award dated 17.4.1956 in favour of Smt. Chandramma and Smt. Pentamma as per his award No. T/85/1954. Thereafter in 1959, Smt. Chandramma and Smt. Pentamma jointly purchased an extent of 1 acre 30 guntas of land, therefore, their joint holding had risen to 21 acres 05 guntas. On 6.3.1969, one Registered Settlement Deed was executed by Smt. Chandramma transferring an extent of 2982 sq. yards of land from the joint holding in favour of Smt. Sulochana and one Registered Release Deed transferring her undivided share in favour of Pentamma. On the same day, Smt. Sulochana executed a registered Disclaimer Deed claiming any right over the property that is vested with Smt. Pentamma and Smt. Chandramma. In the year 1970, the second son of Shri Balarajiah Goud and Smt. Pentamma pledged the documents concerning the houses and the land in an extent of 21acres with Andhra Bank and obtained loan for business purposes. In failure of payment of outstanding dues of the loan amount, the Andhra Bank filed O.S. No. 403 of 1976 for recovery of the amount and thereby obtained a decree in the year 1977 wherein both the registered Release Deed executed on 6.3.1969 and the Will of Shri Saya Goud dated

A 2.1.1956 were marked as exhibits. In the year 1977, eldest son of Smt. Pentamma, Shri N. Srihari, filed a suit for partition against the other defendants/petitioners herein and Smt. Chandramma. In the year 1981, the suit for partition was compromised. Shri Balarajiah Goud expired on 24.5.1981.

B 4) After the demise of Smt. Chandramma, i.e. on 23.4.1984, the sons of Shri Sathaiah Goud claimed the entire share of Smt. Chandramma through a Will dated 28.9.1979 purported to have been executed in their favour which is supposed to have been found in a box. They filed O.S. No. 456 C of 1984 on the file of the Principal Sub-Judge, Ranga Reddy District. In the year 1993, the said suit was transferred to the District Judge, Ranga Reddy District and renumbered as O.S. No.9 of 1993. By judgment and decree dated 8.9.1993, the District Judge allowed the suit in favour of the plaintiffs/ D respondents herein and passed a decree in their favour. Aggrieved by the judgment and decree passed by the learned District Judge, the defendants/appellants herein preferred an appeal bearing No. 78 of 1994 and CMP No. 17581 of 2001 before the High Court of Judicature Andhra Pradesh at E Hyderabad. By the impugned judgment dated 17.2.2005, the learned single Judge of the High Court dismissed the appeal and ordered the Civil Miscellaneous Petition.

5) Aggrieved by the judgment in A. S. No. 78 of 1994, N. Srihari (since deceased), N. Laxminarayana and N. Dayanand F (defendant Nos. 2, 5 and 6) filed SLP (C) No. 17808 of 2005. The very same parties aggrieved by the decision in CMP No. 17581 of 2001 preferred SLP (C) No. 17809 of 2005. While ordering notice in the above SLPs, this Court passed an interim order to the effect that "final decree proceedings may go on, G but the final decree as such shall not be signed unless permitted by this Court". Based on the said interim order, when the final decree proceedings were in progress Ms. N. Anuradha, N. Saivenkataramana and B. Sai Nagraj, defendant Nos. 18-20 filed I.A. No. 2017 of 2006 under Section 151 CPC and H requested the trial Court not to proceed with the enquiry in

relation to the suit schedule property on the ground that the "Occupancy Rights Certificate" was issued in favour of the first defendant in respect of the entire suit schedule property and that the land covered by the provisions of Andhra Pradesh (Telangana) Area Abolition of Enams Act, 1955 cannot constitute the subject-matter of a partition suit. The trial Court dismissed the application by order dated 13.07.2006. Questioning the said order, the petitioners filed CRP No. 3726 of 2006 before the High Court. By order dated 30.08.2006, learned Single Judge of the High Court confirming the order of the trial Court dismissed the revision. Against that order of the High Court, the petitioners therein (defendant Nos. 18-20) filed SLP (C) No. 18481 of 2007.

6) Against the judgment dated 17.02.2005 in A.S. No. 72 of 1994 and CMP No. 17581 of 2001 Mr. Sai Venkataramana, Ms. N. Anuradha and B. Sai Nagraj (appellant Nos. 7, 6 and 8 in the High Court) preferred SLP (C) Nos. 24682 and 24683 of 2005.

7) Against the very same judgment dated 17.02.2005 in A.S. No. 78 of 1994 and CMP No. 17581 of 2001 One Ramesh Chawla S/o Manohar not a party before the High Court has filed SLP (C) No. 26425-26426.

8) Assailing the order in A.S.M.P.14246 of 2004 in A.S. No. 78/1994 filed for impleading him as respondent No. 23 in A.S. 78 of 1994 which was dismissed by the High Court on 17.02.2005 the said Ramesh Chawla a third party has filed SLP (C) No. 26429 of 2005.

9) Against the same judgment dated 17.02.2005 in A.A. No. 78 of 1994 in CMP No. 17581 of 2001 defendants 2, 4 to 6 and LRs of the third defendant filed SLP (C) No. 23029-23030 of 2007.

10) We heard Mr. Harish N. Salve, Mr. L.N. Rao, Mr. P.S. Mishra and Mr. Mukul Rohtagi, learned senior counsel for the appellants and Mr. Dushyant A. Dave, Mr. Vishwanathan Shetty

A and Mr. T.L. Vishwanatha Iyer, learned senior counsel for the contesting respondents.

11) Mr. Harish N. Salve, learned senior counsel appearing for the main appellants, after taking us through the pleadings of all the parties, the judgment of the trial Court and the High Court B contended that in spite of the fact that the plaintiffs themselves referred to the earlier Will dated 02.01.1956 executed by Saya Goud, merely because the original of the same was not placed before the Court by the contesting defendants, the same was not considered, hence the decision arrived by the trial Court as C well as the High Court cannot be sustained. He very much commented the impugned judgment of the High Court which, according to him, failed to take note of the earliest Will dated 02.01.1956. While elaborating the above point, he submitted that out of 92 page judgment, the High Court referred to pleadings D of the parties and arguments up to page 85 and from page 86-92 alone discussed the Will (Exh.A-1) dated 28.09.1979 and Release Deed (Exh.A-7) dated 06.03.1969 and dismissed the appeal and confirmed the judgment and decree of the trial Court. In the same order, the High Court has also disposed of CMP E No. 17581 of 2001 by marking original of Exh.A-7 as Exh.B-64. We heard the submissions of other counsel.

12) In the light of the submissions made, we have gone through the judgments of the trial Court, High Court as well as the material documents, namely, (i) Will dated 02.01.1956 (ii) F Release Deed (Exh.A-7) dated 06.03.1969 (iii) Settlement Deed (Exh.B-6) dated 06.03.1969 and (iv) Will (Exh.A-1) dated 28.09.1979. As rightly pointed out by Mr. Salve, though the contesting defendants were not in a position to place the original Will dated 02.01.1956, admittedly, the plaintiffs have made a G reference to the same Will in their plaint. In O.S. No. 456 of 1984 filed by N. Prakash and 5 of his brothers against N. Pentamma (Defendant no. 1) and her sons in more than one place referred the Will dated 02.01.1956. In para 4 it was submitted before the trial Court:

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"4. During his life time, the late Nemuri Saya Goud executed a Will on 02.01.1956 under which he mentioned that the lands bearing Survey Nos. 284, 285, 290, 292 and 293, admeasuring 19 Acres and 15 Guntas, situate in Lothukanta, Alwal, Ranga Reddy District were in his protected tenancy and that the other movable properties mentioned therein, were acquired by himself and his wife Nemuri Chandramma by their joint exertions and hard labour. Under the said Will, he bequeathed all the properties movable and immovable jointly held by him and his wife, jointly to Nemuri Pentamma, the defendant No.1 herein and his wife Nemuri Chandramma. Nemuri Saya Goud died a few months later and the immovable properties standing in the name of Nemuri Saya Goud came into the joint possession and enjoyment of Nemuri Chandramma and Defendant No.1 herein. Subsequently, Nemuri Chandramma and the Defendant No.1 purchased the rights of the pattedar under the registered sale deed and thus they become the absolute owners of the Agricultural Lands mentioned in the Will of late Nemuri Saya Goud. Later, they also jointly purchased Agricultural Lands bearing Survey No. 291 and 602, situated at plaintiffs are herewith filing a Geneological Tahsil showing the relationship of parties."

Apart from the above, specific reference, the plaintiffs have also enclosed a copy of the Will dated 02.01.1956 executed by N. Saya Goud along with list of documents filed along with the plaint.

S.No.	Date of Document	Parties to	Description of Document
1 to 6.	Xxxx	Xxxx	Xxx
7.	02.01.1956	N. Saya Goud & Defendants	Copy of Will executed by N. Saya Goud

A In the written statement filed by the 3rd defendant, there is a reference to the Will dated 02.01.1956 in para 5, which reads thus:

> "5. xxx Therefore, Saya Goud executed a Will dated 0.01.1956. Under the said Will, he intended to bequeath B the said property to the wife of Balaraj Goud, Pentamma so that her children (sons the wife of Balaraj Goud) would benefit from his estate. He, however, made specific mention in the effective part of the Will to the effect that during the life time of Chandramma, Pentamma should C look after the welfare of Chandramma and that Pentamma should spend the income from the properties for the welfare and maintenance of both, thereby he had safeguarded the well being and maintenance of Chandramma for the rest of her life time by making Pentamma responsible for D the same."

It is also useful to refer the stand taken in the written statement filed by the first defendant. Para 4 and 5 reads:

> "4. As regards para 4, it is submitted that the late Nemuri E Saya Goud bequeathed his properties, movable and immovable held by him and his wife, Nemuri Chandramma, jointly to the defendant No.1 herein and his wife late Nemuri Chandramma. It is submitted that Namuri Saya Goud died in the year 1956. After his death, all the properties devolved F upon his wife Chandramma and his daughter-in-law, Pentamma, who is the defendant No.1 herein and arms into the joint possession and enjoyment of Nemuri Chandramma and the defendant No.1 herein. Thus, Nemuri Chandramma and defendant No.1 herein become the absolute owners of the agricultural lands as mentioned in G the Will executed by late Saya Goud. Thereafter, the said Nemuri Chandramma and defendant No.1 herein purchased agricultural lands bearing S.No. 284, 285, 290, 291, 292, 293 and 602, situate at Lothucunta, Alwal, R.R. District. It is submitted that thereafter the late Nemuri H Chandramma executed a release deed in favour of the

defendant No.1 herein. As such the defendant No.1 herein alone has been in continuous possession and enjoyment of the agricultural lands as absolute owner.

5. xxx The Will executed by late Saya Goud clearly shows that late Nemuri Chandramma had only life interest in the properties and thereafter all the rights in her favour have been relinquished in favour of the defendant No.1 herein."

13) While considering the claim of the parties, learned trial Judge has also adverted to the Will dated 02.01.1956.

12. Since the common question of law and facts arise in deciding these three issues, these three issues are being dealt together. For deciding these issues, it is necessary to advert to some admitted facts and conditions of parties. The plaintiffs, defendants 2 to 6 and 15 to 17, are the grand children of Saya Goud. Plaintiffs are children of Sathaiah Goud, Defendant No.1 is the wife of Balarajaiah Goud, Defendants 2 to 6 and 15 to 17 are the children of Balarajaiah Goud and the 1st defendants, 2 to 5 and 15 to 17, executed a Will dated 2.01.1956 (the execution of the said Will by Saya Gouyd is not denied or disputed but the contents of the Will are under dispute).

"13. Since the Will executed by Saya Goud is not brought on record by either of the contesting parties, evidence available on record has to be considered to find the contents of the Will of Saya Goud. In fact, plaintiffs filed a copy of the Will dated 02.01.1956, executed by Saya Goud along with other documents as document No.7 with the plaint. But neither side brought that document on record as an exhibit. Neither side took steps to send for the original of the Will, which as per the evidence of DW-1 is in the custody of Andhra Bank."

The above pleadings as well as the discussion by the trial Court clearly show about the existence of earliest Will dated 02.01.1956 executed by Saya Goud. The fact remains that though the plaintiffs themselves placed a certified copy of the

A said Will, original of the same has not been produced by the defendants. It is their case that the original had been filed in a connected suit being O.S. No. 403 of 1976 filed by a Bank Andhra Bank. Though steps had been taken by the High Court for transfer of the said document, till its final decision, the same B was not reached and ultimately the High Court disposed of the appeal on the basis of the available materials and confirmed the judgment and decree of the trial Court.

14) In view of the fact that the plaintiff themselves referred to the Will dated 02.01.1956 in their plaint, asserted the same C by the contesting defendant in their written statement and specific reference to the same by the trial Court as well as the High Court, in the absence of specific finding as to the Will dated 02.01.1956, we are of the considered view that in the interest of justice, the matter has to go back to the High Court for fresh D consideration in respect of the earliest Will dated 02.01.1956.

15) In view of the above conclusion, without going into the merits of the claim made by the parties and without expressing any opinion, we remit the matter to the High Court for fresh disposal. We permit the appellants/contesting defendants to E place the original Will dated 02.01.1956 for consideration of the High Court. In case, if the original is not available in view of the earlier proceedings, they are free to place the certified copy of the Will dated 02.01.1956 and in that event, it is for the High Court to consider the same including valid objections to be F raised by the other parties in accordance with law. Inasmuch as the appeal is of the year 1994, we request the High Court to dispose of the same afresh in the light of the observations made above by giving priority not later than 30.09.2008. All the parties to the proceedings including the subsequent purchasers are G free to place their respective stand and it is for the High Court to consider uninfluenced by any of the observations made above. Till such final decision being taken by the High Court, parties are directed to maintain status quo prevailing as on date. All the appeals are disposed of accordingly. No costs.

H R.P. Appeals disposed of.