Placido Francisco Pinto(D) By Lrs vs Jose Franciso Pinto . on 30 September, 2021

Author: Hemant Gupta

Bench: V. Ramasubramanian, Hemant Gupta

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1491 OF 2007

PLACIDO FRANCISCO PINTO (D) by LRs & ANR. .

VERSUS

JOSE FRANCISCO PINTO & ANR. ...

JUDGMENT

HEMANT GUPTA, J.

1. The legal representatives of the plaintiff have appealed before this Court, aggrieved by the judgment and decree of the First Appellate Court dated 6.7.2005 affirmed by the High Court in the Second Appeal on 16.8.2006.

2. The plaintiff filed a suit1 (Special Civil Suit No. 55/77/I) seeking possession and accounts from his younger brother-defendant No. 1 (respondent No. 1) who was given the southern portion of the property in question by virtue of a gift deed dated 10.5.1957 executed by the parents of the parties involved. The northern portion was allotted to the plaintiff by the same gift deed.

3. The plaintiff had inter-alia pleaded that Defendant No. 1 – Jose 1 Hereinafter referred to as the 'first suit' Francisco Pinto earlier sold his one of his properties to the plaintiff due to failure in timely discharging the debts raised by him in the year 1962. Subsequently, the plaintiff purchased the southern portion of the property from defendant No. 1 by a registered sale deed after settling the creditors of defendant No. 1 so as to save their ancestral property. The plaintiff, as an elder brother, allowed his younger brother to stay in the house for five years. Defendant No. 1 collected rents from

the other defendants as well during this period. The plaintiff filed the first suit on 10.5.1977 relying upon the sale deed executed on 14.9.1970 and registered on 23.9.1970 in respect of southern half of the property called "Pedda". It is pleaded that defendant Nos. 3 to 9 are occupying the premises as tenants of the six tenements existing in the premises.

4. The plaintiff had pleaded that the suit property after the same was purchased from the defendant No. 1 and his wife Defendant No. 2, the said defendants had created several charges and encumbrances thereon and the plaintiff to prevent its compulsory auction-sale at the instance of one of the creditors, had paid and cleared all those charges and encumbrances thereby spending much more than the market value of the suit property, and that the Defendant No. 1 executed sale deed in favour of the plaintiff on 14.9.1970. Since defendant No. 1 did not vacate the property after the expiry of five years, an Advocate's notice was sent by registered post on 6.11.1976 calling upon him to surrender the suit property and also to stop collecting rent from the other defendant Nos. 3 to 9. Therefore, the suit was filed claiming vacant possession of the house occupied by defendant Nos. 1 and 2 and directing defendant Nos. 1 and 2 to render accounts of the money received by him from defendant Nos. 3 to 9 as rent. In the written statement filed on 11.8.1977, the defendant Nos. 1 and 2 have pleaded as under:

> "2. With reference to paragraph 2 of the plaint, these defendants submit that they are not aware of any property sold by these defendants to the plaintiff. Defendants however recollect that the plaintiff had represented to them in the office of the Sub Registrar of Margao certain documents purported to be a document in respect of an amount of Rs.12000/- which was paid by him to the creditors of defendant no. 1. Under such pretext the plaintiff managed to obtain the signatures of the defendants no. 1 and 2 who do not know to read or write except that they write their own name. These defendants deny having sold their property to the plaintiff mentioned in paragraph 2 of the plaint."
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> 5. Another suit, namely, Special Civil Suit No. 71/80/I 2 was filed by the respondents on 1.7.1980 against the appellants, inter alia, on the ground that they had never sold the southern half of the suit property to the appellants nor intend to sell the same to any person. It was also claimed that they had never executed any sale deed in favour of the appellants nor received any amount as consideration of the sale. It was specifically pleaded as under:
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> "13. The plaintiffs state that they never executed the sale deed of the suit property and they had never gone in the office of the Sub-Registrar of Margao to register the sale deed. However, the defendant no. 1 in the year 1970 had taken the plaintiffs in the office of Sub-Registrar, Margao and asked them to sign the stamp paper purported to be a document in respect of the loan amount of Rs.12000/- 2 Hereinafter referred to as the 'second suit' (Rupees twelve thousand only) paid by the defendant no.1 to the creditors of the plaintiff no. 1. He further explained that it is necessary for him to take in writing from the plaintiff about the amount paid to the creditors of plaintiffs and that amount was due to him by the plaintiffs. The writings on the stamp was in

Roman scripts and the language not known to the plaintiffs and now learnt that it is in Portuguese."

6. The parties went to trial on following issues in the first suit:

"(i) Whether the plaintiff proves that the defendant nos. 1 and 2 sold to the plaintiff the southern half of the property Peda situated Navelim and identified in paragraph 2 of the plaint?

(ii) Whether the plaintiff proves that he allowed the defendants no. 1 and 2 to continue to live in the corresponding portion of the house for five years free of any charge?

(iii) Whether the plaintiff proves that he suggested to the defendant No. 1 to surrender the suit premises after 5 years had passed?

(iv) Whether the defendant Nos. 1 and 2 prove that the sale deed was obtained by fraud by the plaintiff?

(v) What relief, what order?

(vi) Whether the defendants prove that the suit is undervalued."

7. The plaintiff examined himself as PW-1 and deposed as pleaded by him in the plaint filed. Silvester Coutinho (PW-2) deposed that there was some beat of drum on the road in front of the Chapel near the house of the plaintiff and that his house is situated behind the plaintiff's house. The Bailiff told the witness that the house of the defendant is being auctioned by the Court. Devidas Chari (PW-

3) had seen the parties residing at one and the same place.

8. Defendant No. 1 appeared as DW-1. In examination-in-chief, he deposed as under:

"I know the plaintiff who is my brother. The suit property including the house has been divided between us into two halves. I have not obtained any loan at any time in respect of the half of the house and the property belonging to me I have obtained loan of Rs.12,000/- but this has no connection of whatsoever nature in respect of my half of the share in respect of the suit property and my house. The loan of Rs.12,000/- which I secured has been repaid by my brother (plaintiff). I have not repaid the suit amount to my brother. But on one occasion the plaintiff asked me in my house as to when I am going to repay the amount which is paid on my behalf. As I could not paid the amount the plaintiff asked me to execute a document mentioning therein that he would pay Rs.12,000/- which he had paid. The plaintiff then asked me to come to a hotel near Margao Municipality in order to execute the said document. The plaintiff

> three days thereafter once again he came to my house and asked me to come near the Municipality in order to prepare the said documents. This he told me at 2:30 at my house. Accordingly myself and my wife came near the Municipality to execute the said documents.
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> After me and my wife came near my municipality the obtained my signature and also my wife signature on the stamp papers. The plaintiff, however did not explained to me and my wife the contents of the documents on which he obtained my signature and my wife. I say that he and his wife made two signatures each on the said stamp paper. Out of said two signatures made by each of us signature was obtained outside the Municipal Building and other signature was obtained in side the M. Building. Even when the plaintiff obtained second signature from me and my wife, we were not explained the contents of the documents. The person before whom me and my wife made signatures in the M. Building did not explain to use the contents of the said documents. I do not know to read and to write English so is the case of my wife. I have not sold the half of the house in my possession and belonging to me and also my land to anyone."

9. In cross-examination, defendant No. 1 admitted that the plaintiff has repaid two of his loans. One loan was of Jose Minguel Pereira of Chandor amounting to Rs.6,000/-. He further deposed that he went along with the plaintiff to execute a document in connection with the loan amount of Rs.12,000/- paid by the plaintiff on his behalf. He further deposed that he did not ask the Officer to explain the contents of the said document to him. He and his wife were present on the said day. He further denied selling the property to the plaintiff vide sale deed dated 14.9.1970 (Ex.P/1).

10. DW-2 is Eduardo Pinto. In cross-examination, he stated that the loan taken by defendant No. 1 from one Mr. Pareira was cleared by the plaintiff. He further admitted that the plaintiff had filed a criminal case against him for the theft of his cow. Romeo D'Costa (DW-3) deposed that in the year 1970 on Carnival Day, two persons from the Court had come to the suit property with a beating drum in order to attach the property. At that time, the appellant told the employees of the Court in presence of defendant No. 1 that he would clear the debt on the property and seek release of the property. In cross-examination, he admits that when the Court employees came with a drum for announcement, he was present in the house of the appellant but he was unaware of the amount of debt accrued by the defendant.

11. The learned trial court found that the evidence presented by the defendants does not rebut the duly registered sale deed (Ex.P/1) in respect of Issue Nos. 2 and 3, which were decided in favour of the plaintiff. However, in respect of Issue No. 4, the Court returned the following finding:

> "12. From the deposition of D.W.1 it is borne out that there has never been any intention on the part of the plaintiff to deceive the defendants nor they have caused any inducement to them to enter into any contract. The silence which has been discussed in the evidence of D.W.1 shows willingness of a person to enter into a contract. It is the duty of the person keeping silent to speak or unless he is silent it is

> equivalent to speech. Thus, none of the ingredients of section 17 have bene fulfilled by the defendants in this case."

12. Thus, it was held that the defendants had failed to prove that the sale deed was obtained by fraud. The first suit was decreed on 24.2.1997.

13. The second suit filed by the respondents was to declare the registered sale deed dated 14.9.1970 as null and void. In the said suit, the defendants pleaded that no consideration was received by them for sale. The second suit was dismissed on 16.1.2001, inter alia, holding that the suit is barred by the principle of res judicata and the sale deed is valid.

14. The respondents herein filed two appeals from the judgment and decree passed in the first and second suit. Such appeals were heard and decided together. The respondents sought amendment in the written statement and also in the plaint in the first and second suit respectively during the pendency of the appeal before the First Appellate Court. Such amendments were allowed on 8.9.2004 after many years of filing of the suit and the written statement. The first appeals against both the judgment and decree were allowed by the learned First Appellate Court, inter alia, on the following grounds:

> (i) The appellant has produced oral evidence contrary to the terms of the sale deed. Therefore, such oral evidence is barred by Section 91 of the Evidence Act as there is no recital in the sale deed that he has paid and cleared all dues of respondent No. 1 for purchasing the suit property.
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> (ii) The appellant has not pleaded that he had paid Rs.3,000/-

as consideration under the sale deed. Therefore, the sale is null and void for want of consideration.

(iii) The fact that respondent No. 1 continued to occupy the house goes to show that respondent No. 1 was not given to understand that it was a sale deed. The signatures on such sale deed by respondent No. 1 were obtained by misrepresentation and concealment.

(iv) The sale consideration is inadequate; therefore, the consent of the vendor was not freely given.

15. It is an admitted fact that consequent to the amendment in the plaint and in the written statement, no evidence was led. Mr. Dhruv Mehta, learned senior counsel for the respondents stated that the evidence was already on record in respect of misrepresentation leading to fraud, therefore, the pleadings were amended so as to support the evidence.

16. The learned counsel for the appellants has argued that the amendment of the pleadings should not have been allowed at the first appeal stage and that the second suit is barred by the principle of res judicata. But we do not find that such questions need to be examined as the first suit and the second suit were pending in appeal and were decided by the common judgment. Still further, since the amendment in the plaint and the written statement has been allowed in exercise of discretion

vested with the First Appellate Court, we do not find that such amendment can be permitted to be disputed at this stage.

17. The appellants relied upon judgment of this Court in Bellachi (Dead) by LRs v. Pakeeran3 to contend that the burden of proof regarding the genuineness of documents lies upon the vendee. In case of a registered document, there is a presumption that it was executed in accordance with law. This Court held as under:

> "17. In a given case it is possible to hold that when an illiterate, pardanashin woman executes a deed of sale, the burden would be on the vendee to prove that it was (sic) the deed of sale was a genuine document. It is, however, a registered document. It carries with it a presumption that it was executed in accordance with law. Again a concurrent finding of fact has been arrived at that the appellant was not an illiterate woman or she was incapable of understanding as to what she had done."

18. The primary finding recorded by the First Appellate Court as affirmed by the High Court is that the signatures of respondent No. 1 were obtained by misrepresentation. Mr. Mehta vehemently argued that misrepresentation is another facet of fraud and the oral evidence of sale consideration led by the plaintiff had been rightly not accepted.

3 (2009) 12 SCC 95

19. We have heard the learned counsels for the parties and find that the findings of the First Appellate Court as affirmed by the High Court are clearly erroneous. Respondent No. 1 in the written statement has admitted payment of Rs.12,000/- to his creditors by the appellant No.1. It is also admitted by him that his and his wife's signatures were obtained outside the Municipal Office and also before the Officers in the Municipal Building when there were about 10-12 people in the office.

20. The sale deed (Ex.P/1) had a recital that the suit property was sold for a sum of Rs.3,000/-. The First Appellate Court returned a finding that such sale consideration was not mentioned in the plaint and that the evidence has come on record that there were loans which were settled by the appellant No.1 which fact is also not recited in the sale deed. Thus, it is a sale without consideration. Reliance was placed upon Section 25 of the Indian Contract Act, 18724. We find that such finding is not correct in law. Section 25 of the Contract Act is to the effect that an agreement without consideration is void but if a document is registered on account of natural love and affection between the parties standing in a near relation to each other, then such an agreement is not void. Section 25 of the Contract Act reads as under:

> "25. Agreement without consideration void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law. - An agreement made without consideration is void, unless— 4 For short, the 'Contract Act' (1) it is expressed in writing and registered under the law for the time being in force for registration of documents, and is made on account of

> natural love and affection between parties standing in a near relation to each other; or unless (2) xx xx In any of these cases, such an agreement is a contract.
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> xx xx xx Illustration (b). A, for natural love and affection, promises to give his son, B, Rs.1,000. A puts his promise to B into writing and registers it. This is a contract."

21. The parties are in near relations, the appellant No.1 being the elder brother and the sale was executed to help his younger brother who was facing auction of the property gifted by the parents of the parties. Even the defendants' witnesses have admitted that there was a notice of Court auction of the property in question by beat of drum. Therefore, if elder brother had come to the help of the younger brother, discharging his debtors and executing a sale deed mentioning a nominal sale consideration, it cannot be said to be a sale without consideration. It is admitted by respondent No.1 that a sum of Rs.12,000/- was paid by the appellant No. 1 to discharge his debts. Once there is an admission of the respondent No. 1 of discharge of his debts by appellant No.1, the sale deed registered in normal course of official duties carries the presumption of correctness which cannot be said to be illegal only on the basis of feigned ignorance that his signatures were obtained on papers which respondent No. 1 and his wife did not know. The Judgment of this Court in Bellachi supports the argument raised by the appellants.

22. The only stand of respondent No.1 is ignorance of the nature of the document on which his signatures were obtained. Such ignorance is not an instance of misrepresentation or a fraud in the facts of the present case which would vitiate a sale deed executed and registered with the Sub-Registrar. It has been admitted by respondent No. 1 that he went to the Sub-Registrar's office with his wife, signed once outside the Municipal Building and once before the Officers, shows that tactically he has admitted execution of the sale deed without expressly stating so. We find that the findings of the Courts below that the document is without consideration or the consideration having not pleaded in the plaint or the fact that appellant No. 1 has discharged the debtors of respondent No. 1 will not render the document of sale deed as void.

23. Order VI Rule 2 of the Code of Civil Procedure, 1908 5 is to the effect that every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies upon for his claim or defence as the case may be, but not the evidence by which they are supposed to be proved. Appellant No.1 has relied upon the sale deed which contains the recital of payment of Rs.3,000/- as the sale consideration. The evidence in support of such sale deed was not required to be pleaded in the plaint filed by the appellant. Still further, in terms of Order VI Rule 4 of the Code, 5 For short, the 'Code' in all cases in which the party pleading relies on any misrepresentation, fraud, or undue influence shall state in the pleadings the particulars with dates and items in the pleadings. The extract from the written statement or the plaint does not show that there is any pleading of misrepresentation or fraud. The evidence led by the respondents is not indicative of any instance of fraud or misrepresentation as well. Respondent No. 1 was candid enough to admit that there were debts of Rs.12,000/- which were paid off by appellant No.1. He also admits that he was taken to the Municipal Office and signed once outside the Municipal Office and once inside the Municipal Office. His wife had accompanied him. With such facts on record, we find that the findings recorded by the Courts below that the sale deed was result of fraud or

misrepresentation are clearly not sustainable.

24. Mr. Dhruv Mehta relied upon judgments of this Court reported as Smt. Gangabai w/o Rambilas Gilda v. Smt. Chhabubai w/o Pukharajji Gandhi6 and Roop Kumar v. Mohan Thedani7 to contend that the respondents can lead oral evidence to rebut the contents of the document but not the appellants who had relied upon the sale deed. In Gangabai, the plaintiff entered into an agreement with the appellant for a loan of Rs.2,000/- and it was decided that simultaneously the plaintiff would execute a nominal document of sale and a rent note. It was alleged by the plaintiff that documents were never intended to be acted upon. The trial 6 (1982) 1 SCC 4 7 (2003) 6 SCC 595 court decreed the suit holding that the sale deed was never intended to be acted upon but the First Appellate Court held that the sale has taken place but the transaction between the parties constitutes a mortgage. The High Court held that Section 92 of the Indian Evidence Act, 18728 did not prevent plaintiff from establishing the true nature of the transaction. In appeal, this Court held that first proviso to Section 92 permits any fact which may prove which would invalidate any document, such as fraud, intimidation, illegality, want of due execution can be led into evidence. This Court while dismissing appeal of the defendant held as under:

> "11. ...It is clear to us that the bar imposed by sub-section (1) of Section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction.

In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties..." (Emphasis Supplied)

25. A reading of the aforesaid judgment would show that it was open to the plaintiff to assert that the document was never intended to be 8 For short, the 'Evidence Act' acted upon and the document is a sham. Such question arises when one party asserts that there has been a different transaction altogether than what is recorded in the document. It is for that purpose oral evidence is admissible.

26. In Roop Kumar, this Court was seized of an appeal filed by the defendant arising out of a suit for possession and for rendition of accounts. The plaintiff claimed that he entered into an agency-cum-deed of license with the appellant-defendant on 15.5.1975 and the terms of such agency-cum-licensing agreement was incorporated in an agreement dated 15.5.1975. The stand of the defendant was that he was in lawful possession as a tenant under the plaintiff. The trial court decreed the suit holding that the transaction between the respondent and the appellant evidenced by an agreement dated 15.5.1975 amounts to license and not sub- letting. The question before the

High Court was whether a relationship between the parties is that of a licensor and licensee or that of a lessor and lessee. The first appeal was dismissed. This Court held that it is general and most inflexible rule that in respect of written instruments, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It was held that in Section 92 of the Evidence Act, the legislature has prevented oral evidence from being adduced for the purpose of varying the contract, such contract can be proved by production of such writing. It was held that Section 91 is concerned with the mode of proof of a document with limitation imposed by Section

92. If after the document has been produced to prove its terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. This Court held as under:

> "17. It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than oral evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See Starkie on Evidence, p. 648.)
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> 18. In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Section 91. Having regard to the jural position of Sections 91 and 92 and the deliberate omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing.
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> 21. The grounds of exclusion of extrinsic evidence are: (i) to admit inferior evidence when the law requires superior would amount to nullifying the law, and (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory.
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> 22. This Court in Gangabai v. Chhabubai [(1982) 1 SCC 4 :

AIR 1982 SC 20] and Ishwar Dass Jain v. Sohan Lal [(2000) 1 SCC 434 : AIR 2000 SC 426] with reference to Section 92(1) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties." (Emphasis Supplied)

27. A perusal of the above judgment would show that the oral evidence of a written agreement is excluded except when it is sought to be alleged the document as a sham transaction.

28. It is beyond dispute that a sale deed is required to be registered i.e. a document required by law to be reduced to the form of a document. Therefore, no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding or subtracting from its terms. The proviso (1) of Section 92 of the Evidence Act on which reliance was placed is a proof of such fact which would invalidate any document such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law. Section 92 of the Evidence Act reads as under:

"92. Exclusion of evidence or oral agreement. - When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law."

29. The respondents were free to prove fraud in execution of the sale deed. However, factually, the respondents have not alleged any fraud in their suit or in the written statement in the suit filed by appellant No. 1. The feigned ignorance about the nature of document cannot be said to be an instance of fraud. In the absence of any plea or proof of fraud, respondent No.1 is bound by the written document on which he admitted his signatures and of his wife. There is no oral evidence which could prove fraud, intimidation, illegality or failure of consideration to permit the respondents to lead oral evidence to dispute the sale deed dated 14.9.1970. Therefore, the judgments referred to by Mr. Mehta are of no help to support his arguments. Thus, the findings recorded by the First Appellate Court as affirmed by the High Court are clearly

erroneous in law and are, thus, set aside.

30. Accordingly, the appeal is allowed and the judgment and decree passed by the trial court in Special Civil Suit No. 55/77/I is restored.

Special Civil Suit No. 71/80/I is dismissed. The respondents are given two months' time to vacate and hand over the vacant physical possession of the property in question.

.....J. (HEMANT GUPTA) .....J. (V. RAMASUBRAMANIAN) NEW DELHI;

SEPTEMBER 30, 2021.