Mohd Nauman Suleman vs Mohd. Saleem on 28 September, 2018

THE HON'BLESRI JUSTICE S.V.BHATT

CIVIL REVISION PETITION Nos.1402 & 1403 of 2009

COMMON ORDER:

Heard Mr. Rishi Kumar holding Mr. N. Ashok Kumar for revision petitioner/landlord and Mr. N. Siva Reddy for respondents.

The landlord of premises No.20-2-638/9, Hussaini Alam, Hyderabad, is the revision petitioner.

CRP.No.1402 of 2009 is directed against the order dated 26.02.2009 in R.A.No.110 of 2006. CRP.No.1403 of 2009 is directed against the order dated 26.02.2009 in R.A.No.107 of 2006. The revision petitioner filed R.A.No.110 of 2006 against the order dated 13.02.2006 in R.C.No.391 of 1994 on the file of IV Additional Rent Controller, Hyderabad. Likewise, the revision petitioner filed R.A.No.107 of 2006 against the order dated 13.02.2006 in I.A.No.190 of 2005 in R.C.No.391 of 1994 on the file of IV Additional Rent Controller, Hyderabad.

The 1st respondent/tenant since died, he is represented by his L.Rs/respondents 2 to 8. For convenience, the parties are referred as landlord and tenant.

There is first round of litigation upto High Court between the parties and now the orders under revision are passed pursuant to the order of remand in CRP.No.1419 of 2001. The learned counsel appearing for parties have treated the issues in CRP.No.1402 of 2009 as substantive issues for consideration and have accordingly made their submissions. This Court refers to the case of landlord and tenant as set out in R.C.No.391 of 1994.

The landlord filed R.C.No.391 of 1994 on the file of IV Additional Rent Controller, Hyderabad for eviction of tenant of premises bearing No.20-2-638/9 at Hussaini Alam, Hyderabad, under Section 10 (2) (i) of A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960 (for short 'the Act'). In the month of September, 1990 the tenant obtained lease of schedule property on rent for a period of one year. The tenancy is evidenced by rental deed Ex.A1. The tenant continued to reside in the schedule property beyond the period covered by Ex.A1. The rent is exclusive of water and electricity consumption charges. On wilful default it is averred that the tenant is irregular in payment of rents from the inception of tenancy and the agreed rent was paid upto December, 1992. The acceptance of rent is evidenced by the receipt issued by the landlord on a plain paper. Petition for eviction was filed for default in payment of rents from January, 1993 to June, 1994 i.e., for 18 months amounting to Rs.12,600/-. The non-payment of rent for 18 months it averred amounts to wilful default and hence the tenant is liable for eviction from the petition schedule property. One Nafees Fathima w/o Mohd Saleem/tenant filed O.S.No.58 of 1994 on the file of V Additional Judge, City Civil Court, Hyderabad for specific performance against landlord. The suit is in no way concerned or connected

with the relationship of landlord and tenant between the parties. The non-payment of rent for 18 months is without reason, deliberate and constitutes wilful default. Hence, the petition for eviction of tenant on the ground of wilful default in payment of rents.

The tenant filed counter and admitted the averments in paras 1 to 4 of the petition. It is stated that on 05.11.1992 as per the negotiations between the landlord and Nafees Fathima, the wife of tenant, agreement of sale was entered into for a sum of Rs.2,60,000/- for the schedule premise. The non-payment of rent is undisputed and the explanation offered for non-payment of rent from December, 1992 is that the landlord permitted the vendee under agreement of sale dated 05.11.1992 and also the tenant to enjoy the petition schedule property free of rent. The tenant categorically asserts that the obligations under the rental agreement ceased to exist with effect from 05.11.1992. The landlord/vendor under agreement of sale dated 05.11.1992 committed breach of agreed obligations resulted in filing O.S.No.58 of 1994 on the file of V Additional Judge, City Civil Court, Hyderabad, for specific performance of the agreement dated 05.11.1992. It is stated that the landlord in all has received Rs.1,90,000/- against the total sale consideration of Rs.2,60,000/-. The balance, according to tenant, payable to landlord is Rs.70,000/-. The tenant pleads that the vendee under agreement of sale dated 05.11.1992 was always ready and willing to perform her part of obligation; landlord committed breach of agreed contractual obligation, the relationship of landlord and tenant in view of execution of agreement of sale and filing of suit for specific performance, ceased to exist. In nutshell, the defence of tenant is that the monthly rents are admitted as not paid from December, 1992 till June, 1994 and the reasons are that landlord permitted to occupy the premises without corresponding legal obligation to paying monthly rent to the landlord. The explanation offered for non-payment of rent is (a) that agreement of sale dated 05.11.1992 was entered into and executed between the landlord and the wife of tenant, (b) the landlord received substantial sale consideration from the vendee, (c) the landlord orally agreed for enjoyment of suit schedule property by the tenant and his wife without the obligation of payment of rent i.e., free from rental obligation. Therefore, the tenant prayed for dismissing the petition for eviction.

The landlord was examined as PW.1 and Exs.A1 to A3 were marked on behalf of landlord. The tenant was examined as RW.1 and one Syed Anwaruddin as RW.2.

On 18.08.1997, RC.No.391 of 1994 was dismissed. The landlord filed R.A.No.295 of 1997 against the order dated 18.08.1997 before the Additional Chief Judge, City Small Causes Court, Hyderabad. On 22.02.2001, RA.No.295 of 1997 was allowed and ordered eviction by granting two months' time to tenant to vacate the schedule premises. The tenant filed CRP.No.1419 of 2001 and in CMP.No.10697 of 2001 stay of eviction was granted. The landlord filed CMP.No.13234 of 2002 for a direction to tenant to deposit arrears of rent amounting to Rs.79,800/-. On 09.08.2002 CMP.No.13234 of 2002 was allowed directing the tenant to deposit arrears of rent of Rs.79,800/- to the credit of RC.No.391 of 1994 before the IV Additional Rent Controller, Hyderabad, on or before 31.08.2002, in default of deposit of rent, the order of stay granted in CMP.No.6139 of 2001 shall stand vacated. On the application i.e., CMP.No.10697 of 2001 filed by the landlord, on 16.04.2001, the stay of eviction granted in CMP.No.6139 of 2001 was vacated. The landlord in E.P.No.34 of 2002 on 22.10.2002 executed the order of eviction in RA.No.295 of 1997 and taken possession of the petition schedule property and landlord continues to retain possession till date. The tenant filed CMP.No.19705 of

2003 to recall the orders vacating the interim stay granted in favour of tenant. On 11.10.2002, CMP.No.19705 of 2003 was dismissed. On 11.03.2003 CRP.No.1419 of 2001 was allowed and the order in R.A.No.295 of 1997 was set aside. The matter was remitted to Rent Controller for fresh disposal in accordance with law. The Rent Controller through order dated 13.02.2006 dismissed RC.No.391 of 1994 and the same is confirmed in R.A.No.110 of 2006 in the judgment dated 26.02.2009. Hence CRP.No.1402 of 2009. The tenant on remand and restoration of RC.No.391 of 1994 filed I.A.No.190 of 2005 for restoration of possession under Section 144 of CPC. On 13.02.2006, I.A.No.190 of 2005 was allowed. The landlord aggrieved by the order in I.A.No.190 of 2005 filed R.A.No.107 of 2006 before the Additional Chief Judge, City Small Causes Court, Hyderabad. The appellate authority dismissed R.A.No.107 of 2006 vide order dated 26.02.2009 and, aggrieved thereby, CRP.No.1403 of 2009 is filed.

Mr. Rishi Kumar contends that the orders under revision ex facie are illegal, unsustainable and the new case has been made out in favour of tenant de hors evidence, hence the revision attracts the jurisdiction of this Court under Section 22 of the Act. He contends that the findings recorded by the Rent Controller as well as the appellate authority are result of new case made out in favour of tenant. The case of alleged wilful default is not considered from the right perspective except burdening the orders under revision with reproduction of entire evidence. According to him, any amount of reliance on agreement of sale dated 05.11.1992 for determining whether the non-payment of rent constitutes wilful default or not is erroneous and illegal. According to him, the alleged right if any created under agreement of sale dated 05.11.1992 firstly does not create a right in the tenant to unilaterally relieve himself of the obligation of a tenant to pay agreed monthly rent or relieve the tenant from performing the obligation the tenant has agreed in the relationship of landlord and tenant. The burden is on tenant to prove that the landlord orally agreed for occupation of suit schedule premises by tenant without paying rent. Firstly, there is no recital in Ex.A1 to the said effect; any amount of oral evidence cannot and could not be substituted for agreed terms and conditions between the landlord and the wife of tenant. According to him, the trial Court misdirected itself with the definition of the word 'tenant' in Section 2

(ix) of the Act and accepted the explanation given by tenant for non- payment of monthly rent. According to him, the definition of tenant at best includes family members of tenant to continue to enjoy possession of tenanted premises along with the tenant. The definition ought not to be understood as taking care of obligations created or rights in favour of one of the members of tenant's family. These obligations and rights are distinct vis-à-vis tenant and landlord. According to him, the cross-examination of RW.1 is not considered in the right perspective in spite of admissions on these crucial aspects, the case of tenant is accepted. Therefore, the finding that there is no wilful default is contrary to the evidence available on record and by reference to the pleading of tenant, the eviction of tenant from schedule premises ought to have been ordered. He submits that for the same reasons or grounds, the order of the appellate authority is also vitiated. He has drawn the attention of the Court to the entire evidence on record, and the evidence would be appreciated while examining whether there is wilful default in payment of rent by the tenant or not. He relies on the decisions in M. Prakasa Rao v. M. Prem Gowri Devi1; C. Devi Dass v. Medisetty Rajanarasaiah2; Teegala 1995 (3) ALT 771 Satyanarayana v. G.S. Bhagwan3; Krushnalal Buxi v. Sudarshan Pani4, K. Hussain (died) by LRs. v. V.R. Krishna Prasad (died) by LRs5; Kanihgolla Gopala Krishna Guptha v. Majeti

Lakshmi Devi6; and M. Naveen Kumar v. P. Satyanarayana7 for the proposition that the non-payment of rent for 18 months and particularly when the tenant fails to prove the case pleaded by him, the failure has to be held as amounting to wilful default warranting eviction of the tenant from the subject premises. He relies on Section 22 of the Act and contends that the jurisdiction of this Court under Section 22 of the Act is not similar to Section 115 of CPC and prays for allowing the CRP. He further contends that the relief in CRP.No.1403 of 2009 is dependent on the outcome of CRP.1402 of 2009.

Mr.Siva Reddy contends that the vendee under Ex.A1 comes within the definition of 'tenant' and the amount paid under Ex.A1 is substantial, therefore, the reason for non-payment of rent is justifiable. According to him, the findings recorded by this Court in CRP.No.1419 of 2001 support the case of tenant in considering whether the non- payment of rent is wilful default or not. He relies on Section 22 and contends that this Court ought not to re-examine the evidence and record the independent findings while disposing of these two CRPs.

I have heard the learned counsel and taken note of the submissions made by them and perused the record.

Now the point for consideration is:

> "Whether the landlord has made out case for eviction of tenant 1990 (Supp) SCC 73 1994 Supp (3) SCC 741 1995 Supp (4) SCC 238 2007 (2) ALD 808 2007 (2) ALD 631 2013 (6) ALD 77 under Section 10(2) (i) of the Act and whether the orders under revision are legal and tenable in the facts and circumstances of the case?
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> Before examining the case on whether wilful default as a fact is made out, this Court refers to a few cases on the precedents on the words "wilful default".

In Chordia Automobiles v. S.Moosa8 case, it is held as follows:

> "8. Wilful default means an act consciously or deliberately done with open defiance and intent not to pay the rent. In the present case the amount of rent defaulted firstly is on account of fact that the agent of the landlord did not come to collect the rent for some reason. Further, notice of default contained the disputed rent. This fact coupled with the fact that eviction suit was filed before maturing a case of wilful default in terms of the explanation to the proviso of Section 10(2). The dispute of rent admittedly was genuine. Further, we find the conduct of the appellant throughout in the past being not of a defaulter or irregular payer of rent. Thus, all these circumstances cumulatively come to only one conclusion that the appellant cannot be held to be a wilful defaulter."

In Krushnalal Buxi case (supra 4), it is held as follows:

> "The word 'wilful' is a word of many meanings with its construction often influenced by its context. Wilful act may be construed as one done intentionally, knowingly, and purposely with supine indifference or without justifiable excuse so distinguished from an act done carelessly, thoughtlessly, needlessly or inadvertently. A wilful act differs essentially from a negligent act. The former is positive and the latter is negative. When the tenant committed default for two months pending proceedings for eviction the (2000) 3 SCC 282 necessary inference drawn was that the act of the tenant in committing default was wilful and is perfectly justified. In this case since the landlord had already filed an application for eviction and while the first application was pending and the tenant had committed further default, in these circumstances, the question of drawing an inference of waiver and an intention of agreeing to receive rent contrary to the contract at irregular intervals does not arise."

In Rakapalli Rajarama Gopala Rao v. Naragani Govinda Sehararao9, it is held as follows:

> "The short question then is whether it can be said that the tenant's default to pay or tender rent from December 1977 to May 1978 was not wilful to avail of the benefit of the proviso extracted above. It may be noticed that in cases where the tenant has defaulted to pay or tender the rent he is entitled to an opportunity to pay or tender the same if his default is not wilful. The proviso is couched in negative form to reduce the rigour of the substantive provision in Section 10(2) of the Act. An act is said to be wilful if it is intentional, conscious and deliberate. The expressions 'wilful' and 'wilful default' came up for consideration before this Court in S. Sundaram Pillai v. V.R. Pattabiraman10. After extracting the meaning of these expressions from different dictionaries (See: pp. 659 &
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> 660. SCC pp. 605 and 606) this Court concluded at p. 661 as under: (SCC 606, para 26) "Thus a consensus of the meaning of the words 'wilful default' appears to indicate that default in order to be wilful must be intentional, deliberate, calculated and conscious, with full knowledge of legal consequences flowing therefrom".

Since the proviso with which we are concerned is couched in negative form the tenant can prevent the (1989) 4 SCC 255 (1985) 1 SCC 591 decree by satisfying the Controller that his omission to pay or tender the rent was not wilful. If the Controller is so satisfied he must give an opportunity to the tenant to make good the arrears within a reasonable time and if the tenant does so within the time prescribed, he must reject the landlord's application for eviction. In the present case, it is not in dispute that the tenant did not pay the rent from December 1977 to May 1978 before the institution of the suit. Under the eviction notice served on him in December 1977 he was called upon to pay the rent from December, 1977 only. The appellant-tenant did not pay or tender the rent from December 1977 to May 1978 not because he had no desire to pay the rent to the respondents but because he bona fide believed that he was entitled to purchase the property under the oral agreement of October 14, 1977. He had also paid Rs.5,000 by way of earnest under the said oral agreement. True it is, his suit for specific performance of the said oral agreement has since been dismissed but he has filed an appeal which is pending. He, therefore, bona fide believed that he was entitled to purchase

the property under the said oral agreement and since he had already paid Rs.5,000 by way of earnest thereunder he was under no obligation to pay the rent to the respondents. In order to secure eviction for non- payment of rent, it must be shown that the default was intentional, deliberate, calculated and conscious with full knowledge of its consequences. Here is a tenant who felt that even though he had invested Rs.5,000 as earnest the vendor has sold the property to the respondents in total disregard of his right to purchase the same. This is not a case of a tenant who has failed to pay the rent without any rhyme or reason. He was not averse to paying the rent but he genuinely believed that he was under no obligation to do so as he had a prior right to purchase the property. We are, therefore, of the opinion that this is a case in which the Controller should have invoked the proviso and called upon the appellant to pay the arrears from December 1977 to May 1978 within a certain time. Failure to do so has resulted in miscarriage of justice. We are, therefore, of the opinion that the ejectment decree cannot be allowed to stand."

In S.Sundaram Pillai v. V.R.Pattabiraman11 it is held as follows:

> "81. Default happens in payment of rents under various contingencies and situations. Default is a fact which can be proved by evidence. Whether the default is wilful or not is also a question of fact to be proved from evidence, direct and circumstantial, drawing inferences from certain conduct. If the courts are free to decide from varying circumstances whether default was wilful or not, then divergence of conclusions are likely to arise, one judicial authority coming to the conclusion from certain circumstances that the default was wilful, another judicial authority coming to a contrary conclusion from more or less same circumstances. That creates anomalies. In order to obviate such anomalies and bring about a uniform standard, the Explanation as I read, explains the expression 'wilful' and according to the Explanation added, a default to pay or tender rent "shall be construed", as wilful if the default by the tenant in the payment of rent continues after issue of two months' notice by the landlord claiming the rent. If that is the position, in a case where the landlord has given notice to the tenant claiming the rent and the tenant has not paid the same for two months, then the same must be construed as wilful default, whatever may be the cause for non-payment - bereavement on the date of payment in the family of near or dear ones or serious heart attack or other ailment of the tenant or of any person sent by the tenant to pay the rent cannot be excused and cannot be considered to be not wilful because the Legislature has chosen to use the expression "shall be construed as wilful" if after a notice by the landlord for two months, failure to pay or tender (1985) 1 SCC 591 rent on the part of the tenant continues, and if it is wilful then under sub-section (2) clause (i) read with the proviso as explained by the Explanation, the Controller must be satisfied and give an order for eviction. The question is whether in other cases, that is to say, in cases where admittedly or by other facts or aliunde the Court comes to the conclusion that the default is wilful, for instance, in a case where there is chronic default, regular defaults or habitual defaults, the two months' notice is necessary or not. It was the argument on behalf of the respondents that in those circus- stances such notice was not necessary and this is the view which has found acceptance by my learned brethren. I am unable to agree,

> with respect. If in cases where there are genuine and bona fide reasons for failure or non-payment of rent which cannot be excused after two months' notice to pay rent, then other causes which lead to inference of wilful default cannot also be construed as 'wilful default' in the context of the Explanation. The Legislature has provided an absolute and clear definition of 'wilful default'. Other circumstances cannot be considered as wilful default.

86. As I read the Explanation it is not so necessary because Legislature has defined 'wilful default' by the expression that "default to pay or tender rent shall be construed"' meaning thereby that it will mean only this and no other. My learned brethren have given instances of difficulties and hardships, if the other defaults, that is to say, default apart from tenant not paying after the expiry of notice by the landlord are not considered as wilful default. It is true that there may be hardships and many problems might arise. I share the apprehension of these problems and hardships but I find no justification to read that these hardships of which Legislature must have been aware, were also intended to be covered by the Explanation. It appears to me that the meaning is clear about the purpose of introduction of the Explanation, i.e., to obviate the difficulties and divergence of judicial opinions depending upon varying circumstances, the Legislature has provided a uniform definition to the concept of 'wilful default'. It is true that where two constructions are possible, one which avoids anomalies and creates reasonable results should be preferred but where the language is clear and where there is a purpose that can be understood and appreciated for construing in one particular manner, that is to say, avoidance of divergence of judicial opinions in construing wilful default and thereby avoiding anomalies for different tenants, one Judge taking a particular view on the same set of facts, another Judge taking a different view on the same set of facts, in my opinion, it would not be proper in such a situation to say that this definition of wilful default was only illustrative and not exhaustive. I cannot construe the expression used in the Explanation to the proviso to sub-section (2) of Section 10 as illustrative when the Legislature has chosen to use the expression "shall be construed".

The landlord seeks eviction of tenant on wilful default in payment of rent for 18 months. The admitted circumstances are that the agreed rent per month is Rs.700/-. The tenant paid rent for the month of November,1992 and has not paid rent nearly for 18 months till the date of filing of RCC in the year 1994. It is matter of record that Ex.A1 is entered into and executed between the landlord and the wife of tenant. The vendee under Ex.A1 filed O.S.No.58 of 1994 for specific performance of Ex.A1. The suit for specific performance is not granted and the decree and judgment in O.S.No.58 of 1994 has become final. This aspect of the matter is referred to for the purpose of appreciating that the rights and obligations created under Ex.A1 with the spouse of tenant are independently worked out and are decided by the Court.

In the light of above admissions, let us examine the plea of tenant on the alleged default in paying the rent which reads thus:

> "The petitioner has executed an agreement of sale in favour of the wife of this respondent. Thus from the date of the agreement of sale the petitioner has permitted the wife of the respondent including the respondent to reside in the suit property free

> of rent. Thus the rental agreement ceased to be enforced from the date of the agreement of sale. The relationship between the parties were very cordial and the wife of the respondent trusted the petitioner that she will receive the balance sale consideration amount and execute the registered sale deed in her favour. But unfortunately the petitioner turned his eye and in order to make wrongful gain for himself started making illegal demands and ultimately he has refused to execute and register the sale deed of the suit property in favour of the wife of the respondent, therefore, she has already filed a suit O.S.No.58/94 on the file of V Additional Judge, City Civil Court, Hyderabad for specific performance of the agreement of sale followed with a petition for temporary injunction restraining the petitioner herein from alienating or encumbering the suit schedule property in any manner till the disposal of the suit and the interim orders granted in the said petition are still enforced. The respondent submits that the petitioner after executing the agreement of sale in favour of wife of this respondent has received further amounts of Rs.4,19,000/- on various dates by passing the receipts on the overleaf of the first page of the agreement of sale executed by her. The petitioner so far has received a total sum of Rs.1,90,000/- on various dates from the wife of the respondent and there remains a balance of Rs.70,000/- to be paid to the petitioner for getting the sale deed executed in respect of the suit schedule property.
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> xxx As a matter of fact, there exists no relationship of landlord and tenant between the parties from the date of agreement of sale executed by the petitioner dated 5th November 1992 and this Honourable court has got no jurisdiction to entertain the petition. "For all the reasons the petition is liable to be dismissed with exemplary cost"."

(emphasis added) The tenant not only admits non-payment of rent as agreed between the parties, but goes that far to say that there is no relationship of landlord and tenant upon the execution of Ex.A1. The reason given in the evidence of tenant is "the petitioner in view of the agreement made, he stated not to pay rents and continuing possession in the capacity of purchaser." In the cross-examination, he admits that there is no document evidencing that the tenancy has come to an end. He denies the suggestion that he is in default of rent since January, 1993 and also that the vendee under Ex.A1 claimed possession of petition premises. The tenant admits "it is true there is no mention of rental agreement in Ex.A1". Wilful default has been the subject matter of several reported decisions. A few circumstances are examined for ascertaining whether the non-payment of rent for 18 months amounts to wilful default or not. The words "wilful default" are considered and decided in many cases. The broad legal proposition of what constitutes wilful default is not in dispute, and what falls for consideration is a decision on admitted circumstances read with admission of RW.1. This Court since is conscious of the scope of revision under Section 22 of the Act does not prefer to give approval to the findings recorded by the Courts below and reject the CRP. Secondly, on the other hand re-examine every one of the aspects to come to an independent conclusion on whether wilful default exists or not. This Court takes up the pleadings which have bearing on the issue and the evidence adduced by the parties to consider whether the conduct in non-payment of rent for 18 months amounts to wilful default or not.

Considering the case from the above perspective, this Court is the view that Ex.A1 does not refer to the existing tenancy with the tenant. On the other hand, Ex.A1 refers to executing a document at future point of time and taking possession after reciprocal obligations are discharged. The vendee under Ex.A1 has been unsuccessful in the suit filed for the relief of specific performance of Ex.A1 deed. The reliance on Ex.A1 by tenant for not paying rent for 18 months cannot, but be called as amounting to wilful default. The tenant by choice has pleaded an oral understanding between the landlord and the vendee under Ex.A1. The simplest thing the tenant ought to have done in the matter is examination of the vendee under Ex.A1. It may not be necessary for this Court to consider whether oral evidence contrary to the written terms agreed between the parties is admissible or not, at least to probablise that having regard to the substantial amounts said to have been paid by the vendee to landlord, there was some understanding at least a collateral understanding not to pay the rent. There is no evidence on the plea of just reason raised by the tenant. The admission of tenant is that no rent is paid or need be paid with the execution of Ex.A1. The suit filed by the tenant's wife is dismissed. The tenant has not paid rent nearly for 18 months and, if we take all the above circumstances into consideration, this Court is of the view that the landlord has made out the case that the tenant has committed wilful default in payment of rent. Therefore, the findings in R.A.No.110 of 2006 are unsustainable and accordingly are set aside and CRP.No.1402 of 2009 is allowed.

In view of the findings recorded in CRP.No.1402 of 2009, CRP.No.1403 of 2009 is also allowed for the tenant is not entitled for possession of subject premises.

Both the CRPs are allowed as indicated above. No order as to costs.

As a sequel, miscellaneous petitions if any pending shall stand closed.

_____ S.V.BHATT,J September 28, 2018 vv