CASE NO.:
Appeal (civil) 2003 of 2008

PETITIONER:
Vimalben Ajitbhai Patel

RESPONDENT:
Vatslabeen Ashokbhai Patel and others

DATE OF JUDGMENT: 14/03/2008

BENCH:
S.B. SINHA & V.S. SIRPURKAR

JUDGMENT:
JUDGMENT

CIVIL APPEAL NO 2003 OF 2008
[Arising out of SLP (Civil) No. 1061 of 2007]
WITH
CRIMINAL APPEAL NO. 502 OF 2008
[Arising out of SLP (Crl.) No. 213 of 2007]

Ajitbhai Revandas Patel and another \005 Appellant
Versus
State of Gujarat and another \005 Respondents

S.B. SINHA, J :

1. Leave granted in both the matters.

2. These two appeals being inter related were taken up together for hearing and are being disposed of by the common judgment.

3. Vimlaben Ajitbhai Patel (Appellant in Civil Appeal is the mother in law of Sonalben Rameshchandra Desai - respondent No.3 in Civil Appeal and respondent No.2 in Criminal Appeal) while she alongwith her husband are the appellants in the Criminal Appeal. For the purpose of disposal of these appeals, Vimalben Ajitbhai Patel is being described as Appellant No.1 while her husband Ajitbhai Revandas Patel is being described as Appellant No.2.

4. Sonalben Rameshchandra Desai was married to Jitendra Ajitbhai Patel (son of the appellants) on 4th May, 1992. The couple fell apart. In 1993 a complaint petition was filed by the 3rd respondent against her husband and the appellants alleging commission of an offence under Sections 406 and 114 of the Indian Penal Code. In the said complaint the 3rd respondent accepted that her husband had incurred huge losses in the business in United States. Appellants were granted bail subject to the condition that they would not leave India without prior permission of the Court. Allegedly on the premise that Appellant No.2 requires medical treatment, an application for permission was filed in October 1997 but they left India without obtaining the same from the Court.

5. An application was filed for cancellation of the bail which was rejected by the Metropolitan Magistrate as also by the Sessions Judge. The 3rd respondent filed an application before the High Court being Special Criminal Application NO.1360 of 1997. The said application was allowed by the High Court by its order dated 18th November, 1997 cancelling the bail of the appellants. The learned Metropolitan Magistrate was directed to

issue Standing Warrant of arrest against the appellants as and when they returned to India.

6. On an application filed by the 3rd respondent on 24th April, 1998 the husband of the appellant was declared an absconder and a public proclamation was issued in terms of Section 82(2) of the Code of Criminal Procedure attaching her properties if she did not present before the Learned Magistrate within 30 days from the issuance of the said publication. There is nothing on record to show that the said order was served on the appellants. It, however, is not disputed that on their failure to remain present within a period of 30 days their properties were subjected to order of attachment under Section 85 of the Code of Criminal Procedure. By an order dated 5th January, 2004 the District Magistrate was asked by the Leaned Metropolitan Magistrate to take further action in terms of Section 85 of the Code of Criminal Procedure by holding a public auction of the said properties. In the said order it was wrongly sated that the properties belonged to the appellants and husband of the 3rd respondent, whereas in fact Appellant No.1 alone was the owner thereof.

7. The 1st Respondent (tenant) and the subsequent auction purchaser filed an application before the High Court of Gujarat which was marked as Special Civil Application No.15377 of 2004 against the Mamlatder. A learned Judge of the High Court by an order dated 5th April, 2005 directed :-

"8. In view of the above, I am inclined to pass the following order:

8.1) Rule. By interim order it is directed that the Mamlatdar - Respondent No.1 shall proceed with the auction of the premises in question on condition that the auction which may be held shall be subject to the further condition that -

i) the possession of the premises shall be handed over by the Mamlatdar to the auction purchaser, after the conclusion of the proceedings as ordered hereinafter by the ULC Authority against the petitioner as well as respondent No.3;

ii) after the auction, it would be open to the Mamlatdar to notify the said aspect regarding the transfer effected by auction in the conspicuous part of the premises and such an intimation may also be given to the concerned local authority;

iii) it is further directed that the Mamlatdar - Respondent No.1 herein shall make reference to competent Authority under ULC Act to examine the aspects as to whether the transaction between the absconder and Respondent No.3 can be said in breach of the condition of Scheme under Section 21 of the ULC Act and he shall also make reference on the aspects to the competent authority under ULC Act as to whether the action of the absconder and subsequently rectification by respondent No.3 to give the possession of the petitioner as tenant can be said in breach of the conditions of the Scheme under Section 21 on the basis of which the premises came to be allotted to the absconder \026 original allottee. Such reference shall be made within a period of two weeks from today and the Mamlatdar shall request the concerned authority to decide the reference within

a period of three months from the date of receipt of the reference. In the event it is found by the competent authority under ULC Act that the action of absconder of entering into transaction with respondent No.3 and for handing over the possession to the petitioner as unlawful, the Mamlatdar shall be at liberty to take possession of the premises in question from the petitioner and thereafter he shall further be at liberty to hand over the vacant possession of the premises to the auction purchaser.

iv) It is further directed that until the aforesaid reference is made and is decided by the Mamlatdar, the petitioner shall deposit the amount at the rate of Rs.1,500/= per month with the Mamlatdar without prejudice to the proceedings of the reference and the said amount shall remain as deposited with the Mamlatdar. In the event it is found by the competent authority under ULC Act as an outcome of the reference and the inquiry that the possession is unlawful of the petitioner and the transaction is unlawful of the absconder with respondent No.2, the Mamlatdar shall be at liberty to refund the amount. However, in the event it is found that the possession is lawful and there is no breach of the condition of allotment as per the scheme under Section 21 of the ULC Act, the Mamlatdar shall be at liberty to appropriate the amount in accordance with law."

v) The aforesaid exercise of holding auction shall be completed within a period of five weeks from today.

9. The report of the proceedings and the outcome of the reference shall also be made by the Mamlatdar to this Court."

8. However, the appellant and her husband were not made parties therein. Against the said order, an LPA, which was marked as LPA NO. 1792 of 2005, was filed by the 1st respondent and a Division Bench of the High Court directed that the amount of rent deposited by him with the Mamlatder be deposited in the High Court and the 3rd respondent will be permitted to withdraw the same without prejudice to the rights and contentions of the parties. The said order was passed, purported to be on the premise, that the 3rd respondent had placed reliance on an order dated 13th May, 2005 passed by another Bench of the High Court in First Appeal No. 2626 of 2004 whereby her husband was directed to deposit a sum of Rs.10,000/- per month towards arrears of maintenance and to continue to deposit the same.

9. By an order dated 25th January, 2006 the 1st respondent was asked to deposit a sum of Rs. 4 lakhs (as he expressed his intention to purchase the said property) apart from a sum of Rs.10,000/- per month which was to be deposited with the Registrar by him from 10th February, 2006. It was furthermore directed :-

"6.2 The withdrawal of Rs.10,000/- by respondent No. 2-Sonalben Rameshchandra Desai shall be adjusted against any amount which may be payable to her by

Jitendra Ajitbhai Patel under any orders in First Appeal No. 2626 of 2004, in any other matrimonial proceedings or in any civil or criminal case between her, her husband and her mother in law."

10. Appellant No.1 made an application to get herself impleaded as a party but her application was dismissed by the High Court on 11.9.2006. On or about 21st November, 2006 the High Court directed the first respondent to pay a sum of Rs.17 lakhs to respondent No.3 in regard to the auction sale of the property in question. Respondent No.2, Mamlatdar, was also directed to execute the deed of conveyance and register the same in the name of the 1st respondent upon full payment.

11. Appellant and her husband returned to India. They filed an application for cancellation of the said Standing Warrants. By an order dated 27th June, 2006 the said application was allowed directing :-

"Application is granted and warrant against both the applicant accused are ordered to be cancelled with a fine of Rs.3,000/- (Rupees three thousand only) each and with condition to submit one new surety of Rs.10,000/- (Ten thousand) and on executing the bond of such like amount.

CONDITIONS

1. Accused shall not leave India, without prior permission of the court.

2. Accused shall surrender his passport before the court."

12. Indisputably pursuant to the said order the Passports were deposited on 28th June, 2006 by them.

13. The 3rd respondent filed an application for setting aside the said order by filing a Criminal Miscellaneous Application before the Sessions Judge, Ahmedabad inter alia contending that the Passports had not been deposited by the accused pursuant to the said order of 27th June, 2006. The learned Additional Sessions Judge set aside the said order dated 27th June, 2006 and non-bailable warrants were directed to be issued against the appellants herein. Aggrieved thereby she filed Criminal Misc. Application No. 14340 of 2006 before the High Court on 13th December, 2006 which by reason by of the impugned judgment and order dated 27th December, 2006 has been dismissed.

14. The questions which arise for consideration are :-

(i) Whether in the facts and circumstances of the case, the property of Appellant No.1 could have been sold in auction?
and
(ii) Whether in a case of this nature, the bail granted to the appellants should have been directed to be cancelled?

15. Submissions of learned counsel appearing on behalf of the appellants are :

i) Having regard to the provisions of the Hindu Adoptions and Maintenance Act, 1956 duty to maintain a wife being on the husband and not on her mother-in-law, the impugned judgments are wholly unsustainable;
ii) The property of a person who is no longer absconding, cannot be subjected to continuous attachment or sale thereof.
iii) Appellants having surrendered their Passports and having been attending the Court subsequently, the High Court committed a manifest error in directing cancellation of their bail without appreciating that the factors relevant for interfering with the order granting bail and directing cancellation of bail are distinct

and different.

16. Submissions of Mr. Mayur Shah, learned counsel appearing on behalf of the 3rd respondent, are :-

i) That her husband being the only son of his parents and the properties having been acquired through ancestral funds and there being no assertion that the properties are self acquired properties, she has a right of maintenance out of the Joint Family Property in terms of Section 18 of the Hindu Adoption and Maintenance Act.
ii) In terms of Section 84 of the Code of Criminal Procedure, keeping in view the fact that her husband had been directed to pay maintenance @ Rs.10,000/- per month and which having not been paid, respondent No.3 could have prayed for realization of the said amount of maintenance from the sale proceeds of the auction sale.
iii) Even an offer was made that one residential property would be transferred in her name, apparently goes to show that the properties are Joint Family Properties. She, having been denied her right of maintenance, could initiate the proceeding before the Metropolitan Magistrate as also before the High Court.
iv) The Metropolitan Magistrate committed a serious error in granting bail upon cancellation of Standing Warrants as appellants have breached the conditions for grant of bail. They had, although placed a large number of documents and in particular medical certificates to show that they were ill, there is nothing on record to show that they were bed ridden and not permitted to move out.
v) Their near relatives in India would be deemed to have knowledge of the pendency of the said proceeding and in that view of he matter neither under the guise of the medical certificates nor on the ground of age, they deserve any sympathy of the Court.

17. Mr. Nikhil Goel, learned counsel appearing on behalf of the 1st respondent (Auction Purchaser) would submit :

i) The tenant has a right to reside in the property irrespective of the order of attachment and the same could not have been interfered with by Mamlatdar under the orders of the Learned Metropolitan Magistrate of the District Magistrate.
ii) The 1st respondent had deposited a sum of Rs.10,000/- (Rupees ten thousand only) each month for a period of ten months which have been withdrawn by the 3rd respondent. Out of the total auction amount of Rs.17 lakhs, the 1st respondent had deposited Rs. 4 lakhs which has been invested in a short term deposit, besides a sum of Rs.1 lakhs. He has also deposited a further sum of Rs.12 lakhs which sum have, however, since been refunded. The learned counsel would contend that in this view of the matter the amount deposited by him should be directed to be refunded with interest.

18. Sonalben Rameshchandra Desai is an Advocate. She filed a large number of cases against her husband and in-laws. She initially filed a Complaint Petition before the Metropolitan Magistrate, Ahmedabad, under Section 498A of the Indian Penal Code which was registered as Case No.1662 of 1996. It was transferred to the Court of Chief Judicial Magistrate, Baroda. It has since been dismissed for default. She initiated another criminal proceeding against the appellants and their family members under Sections 323, 452, 427, 504, 506 and 114 of the Indian Penal Code, the same proceeding has also been dismissed as withdrawn. Another criminal case was initiated by her against appellant No.2, his son and another, being Case No.47 of 1996 under Section 406, 420, 468 and 114 of the Indian Penal Code, which is still pending. Another case, being No.2338 of 2006 was filed by her under Section 500 of the Indian Penal Code. Another case under Section 406 of the Indian Penal Code being Case No.2145 of 1993 was filed against the appellants.

19. Before embarking on the questions of law which arise our

consideration, we may notice some statutory provisions.

20. The matter relating to grant of maintenance are now governed by the provisions of Hindu Adoptions and Maintenance Act, 1956. Sections 3 (b), 18 and 19 of the said Act read as under :-

"3. (b) "Maintenance" includes-
(i)in all cases, provision for food, clothing, residence, education and medical attendance and treatment;

Section 18 - Maintenance of wife

(1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life time.

Sub-section (2) of Section 18 thereof, however, lays down certain exceptions therefor.

Sub-section (3) of Section 18 reads :-

"(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion."

Section 19 - Maintenance of widowed daughter-in-law
(1) A Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained after the death of her husband by her father-in-law:
Provided and to the extent that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance-
(a) from the estate of her husband or her father or mother, or
(b) from her son or daughter, if any, or his or her estate.
(2) Any obligation under sub-section (1) shall not be enforceable if the father-in law has not the means to do so from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share, and any such obligation shall cease on the re-marriage of the daughter-in-law."

21. Maintenance of a married wife, during subsistence of marriage, is on the husband. It is a personal obligation. The obligation to maintain a daughter-in-law arises only when the husband has died. Such an obligation can also be met from the properties of which the husband is a co-sharer and not otherwise. For invoking the said provision, the husband must have a share in the property. The property in the name of the mother-in-law can neither be a subject matter of attachment nor during the life time of the husband, his personal liability to maintain his wife can be directed to be enforced against such property.

22. Wholly un-contentious issues have been raised before us on behalf of Sonalben (wife). It is well settled that apparent state of affairs of state shall be taken a real state of affairs. It is not for an owner of the property to establish that it is his self-acquired property and the onus would be on the one, who pleads contra. Sonalben might be entitled to maintenance from her husband. An order of maintenance might have been passed but in view of the settled legal position, the decree, if any, must be executed against her husband and only his properties could be attached therefor but not of her mother-in-law.

23. Sections 4 and 28 of the Hindu Adoptions and Maintenance Act read as under :-

"4. Overriding effect of Act
Save as otherwise expressly provided in this Act,-
(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act.

28. Effect of transfer of property on right to maintenance
Where a dependant has a right to receive maintenance out of an estate, and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right or if the transfer is gratuitous; but not against the transferee for consideration and without notice of the right."

24. Section 4 provides for a non obstante clause. In terms of the said provision itself any obligation on the part of in-laws in terms of any text, rule or interpretation of Hindu Law or any custom or usage as part of law before the commencement of the Act, are no longer valid. In view of the non obstante clause contained in Section 4, the provisions of the Act alone are applicable. Sections 18 and 19 prescribe the statutory liabilities in regard to maintenance of wife by her husband and only on his death upon the father-in-law, Mother-in-law, thus, cannot be fastened with any legal liability to maintain her daughter-in-law from her own property or otherwise.

25. In Unnamalai Ammal vs. F.W. Wilson : AIR 1921 Madras 1187 the obligation to maintain wife by a husband has been held to be a personal obligation. This Court in Kirtikant D. Vadodaria vs. State of Gujarat : (1996) 4 SCC 479 has held as under :-

"8. We have given serious thought and consideration to the submissions made above by the learned counsel for the appellant and notice that Dhayalal Hirachand, the husband of Respondent 2 Smt Manjulaben, has been found to be a person of sufficient means and income. It is also true that there are 5 natural born sons of Respondent 2 besides 2 daughters, who are all major. It is also a fact that Dalip one of the sons had contested the Municipal Election and two other sons are carrying on various businesses. According to the Law of the Land with regard to maintenance, there is an obligation of the husband to maintain his wife which does not arise by reason of any contract \027 express or implied \027 but out of jural relationship of husband and wife consequent to the performance of marriage. Such an obligation of the husband to maintain his wife arises irrespective of the fact whether he has or has no property, as it is considered an imperative duty and a solemn obligation of the husband to maintain his wife."

It was, furthermore, observed :-

"Further, according to Section 20 of the Hindu Adoptions and Maintenance Act, 1956, a Hindu is under a legal obligation to maintain his wife, minor sons, unmarried daughters and aged or infirm parents. The obligation to maintain them is personal, legal and absolute in character and arises from the very existence of the relationship between the parties. But the question before us is whether

a stepmother can claim maintenance from the stepson under Section 125 of the Code. In other words, whether Section 125 of the Code includes within its fold the stepmother also as one of the persons to claim maintenance from her stepson."

26. We may notice that in Balwant Kaur vs. Chanan Singh : (2000) 6 SCC 310, this Court reiterated the said principle in the following words :-

"21. This provision clearly indicates that if the widowed daughter-in-law is a destitute and has no earnings of her own or other property and if she has nothing to fall back upon for maintenance on the estate of her husband or father or mother or from the estate of her son or daughter, if any, then she can fall back upon the estate of her father-in-law. This provision also indicates that in case of a widowed daughter-in-law of the family if she has no income of her own or no estate of her husband to fall back upon for maintenance, then she can legitimately claim maintenance from her father or mother. On the facts of the present case, therefore, it has to be held that Appellant 1, who was a destitute widowed daughter of the testator and who was staying with him and was being maintained by him in his lifetime, had nothing to fall back upon so far as her deceased husband's estate was concerned and she had no estate of her own. Consequently, as per Section 19(1)(a) she could claim maintenance from the estate of her father even during her father's lifetime. This was a pre-existing right of the widowed daughter qua testator's estate in his own lifetime and this right which was tried to be crystallised in the Will in her favour after his demise fell squarely within the provisions of Section 22(2) of the Maintenance Act."

27. The Domestic Violence Act provides for a higher right in favour of a wife. She not only acquires a right to be maintained but also thereunder acquires a right of residence. The right of residence is a higher right. The said right as per the legislation extends to joint properties in which the husband has a share.

28. Interpreting the provisions of the Domestic Violence Act this Court in S.R. Batra vs. Taruna Batra : (2007) 3 SCC 169 held that even a wife could not claim a right of residence in the property belonging to her mother-in-law, stating :

"17. There is no such law in India like the British Matrimonial Homes Act, 1967, and in any case, the rights which may be available under any law can only be as against the husband and not against the father-in-law or mother-in-law.
18. Here, the house in question belongs to the mother-in-law of Smt Taruna Batra and it does not belong to her husband Amit Batra. Hence, Smt Taruna Batra cannot claim any right to live in the said house.
19. Appellant 2, the mother-in-law of Smt Taruna Batra has stated that she had taken a loan for acquiring the house and it is not a joint family property. We see no reason to disbelieve this statement."

29. Reliance placed by Mr. Goel on V. Tulasamma and others vs. Sehsa Reddy (Dead) by L.Rrs. : [1977] 3 SCR 261 is wholly misplaced. The question which arose for consideration therein was the nature or the right, a widow acquires in the property in which she had been in possession in lieu of maintenance. Interpreting sub-section (1) of Section 14 of the Hindu Succession Act this Court held that the term "possessed" should receive a wide meaning. It is in this context this Court noticed the authorities from

Sastric Hindu Law whereupon our attention has been drawn :-

"Similar observations have been made by the learned author at p. 528 of the book which may be extracted thus: 'According to both the schools, the lawfully wedded wife acquires from the moment of her marriage a right to the property belonging to the husband at the time and also to any popery that may subsequently be acquired by him. so that she becomes a co-owner of the husband, though her right is not co-equal to that of the husband, but a subordinate one. owing to her disability founded on her status of perpetual or life long tutelage or dependence.
...
This right of the wife to maintenance from her husband is not lost even if the husband renounce Hinduism.
This right subsists even after the husband's death although her husband's right as distinguished from hers may pass by survivorship or by succession to sons or even to collaterals; these simply step into the position of her husband, and she is required by Hindu law to live under their guardianship after her husband's death.' "

30. The orders passed by the High Court which are impugned before us are, thus, wholly unsustainable. They suffer from total non-application of mind.

31. The said orders might have been passed only on consideration that Sonalben is a harassed lady, but the fact that the appellant is also a much harassed lady was lost sight of. She has more sinned than sinning. Appellant and her husband are old. They suffer from various diseases. They have been able to show before the Court that they had to go to the United States of America for obtaining medical treatment. They, we would assume, have violated the conditions of grant of bail but the consequence therefore must be kept confined to the four corners of the statutes.

32. The provisions contained in Section 82 of the Code of Criminal Procedure were put on the statute book for certain purpose. It was enacted to secure the presence of the accused. Once the said purpose is achieved, the attachment shall be withdrawn. Even the property which was attached, should be restored. The provisions of the Code of Criminal Procedure do not warrant sale of the property despite the fact that the absconding accused had surrendered and obtained bail. Once he surrenders before the Court and the Standing Warrants cancelled, he is no longer an absconder. The purpose of attaching the property comes to an end. It is to be released subject to the provisions of the Code. Securing the attendance of an absconding accused, is a matter between the State and the accused. Complainant should not ordinarily derive any benefit therefrom. If the property is to be sold, it vests with the State subject to any order passed under Section 85 of the Code. It cannot be a subject matter of execution of a decree, far less for executing the decree of a third party, who had no right, title or interest thereon.

33. The learned Metropolitan Magistrate had, in his order dated 5th January, 2004 wrongly asked the District Magistrate to put the said properties on auction sale stating that to be belonging to the appellants and their son. The Mamlatdar appears to have exceeded his jurisdiction in trying to evict the 1st respondent. His right as a tenant could not have been affected by reason of any order of attachment. An order of attachment of a property has nothing to do with the right of tenancy. The terms and conditions of tenancy, being governed by statute, the tenant cannot be evicted except in accordance with law. It is a matter of grave concern that an independent right was also sought to be interfered with at the instance of Sonalben

34. Right to object in terms of Section 84 of the Code to which reliance has been placed by Mr. Mayur Shah, could not have been invoked by the wife as she has no independent claim over the property. The said provisions

also could not have been invoked for the purpose of execution of a decree.

35. It is in the aforementioned context that we may now consider the impugned judgment of the High Court directing cancellation of bail of the appellants.

36. The fact that they have surrendered is not in dispute. They are of old age as also the fact that they have been suffering from various diseases has also not been disputed.

37. The contention of Sonalben that the passports had not been deposited, appears to be wholly incorrect. Ajitbhai Revandas Patel was the holder of U.S. Passport. The same having expired another Passport bearing No. 217921248 was issued. It is that passport which was deposited. This is the current Passport. Allegations that they are having other passports and may leave the country appears to be wholly without any basis. They have been attending the courts. The observation made by the Metropolitan Magistrate that they had not come of their own is unfortunate. Nobody wants to come to court of law and that too as an accused, of his own.

38. The High Court committed a manifest illegality in directing cancellation of bail in so far as it failed to take into consideration that the factors relevant for setting aside an order granting bail and directing cancellation of bail are wholly distinct and different. An application for cancellation of bail must be premised on the factors envisaged under sub-section (2) of Section 439 of the Code of Criminal procedure. The learned Metropolitan Magistrate in passing the order dated 27th June, 2006 while granting bail took into consideration all the relevant factors. He imposed a fine on them. Even the passports had been surrendered. Application for cancellation of bail was filed on a mis-statement that the passports had not been surrendered. Various contentions, as noticed hereinbefore, in regard to purported suffering of the wife appears to have been taken into consideration which were wholly irrelevant. We have noticed hereinbefore that such contentions have also been raised before us not on the basis that there exists and legal principle behind the same but as an argument of desperation.

39. In Gurcharan Singh and others vs. State (Delhi Adminsitration) : 1978 (2) SCR 358 this Court held :

"24. Section 439(1) Cr. P.C. of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), Cr. P.C. against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1) Cr. P.C of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1) Cr. P.C. of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out.

25. The question of cancellation of bail under Section

439(2) Cr. P.C. of the new Code is certainly different from admission to bail under Section 439(1) Cr. P.C. The decisions of the various High Courts cited before us are mainly with regard to the admission to bail by the High Court under Section 498 Cr. P.C. (old). Power of the High Court or of the Sessions Judge to admit persons to bail under Section 498 Cr. P.C. (old) was always held to be wide without any express limitations in law. In considering the question of b ail justice to both sides governs the judicious exercise of the Court's judicial discretion."

[See also Bhagirath Singh s/o. Mahipat Singh Judeja vs. State of Gujarat : [1984] 1 SCR 839 and Jayendra Saraswathi Swamigal vs. State of Tamilnadu : 2005 (2) SCC 13].

40. We may notice that recently a Bench of this Court considered the consequence of issuance of warrant of arrest at some length in Inder Mohan Goswami and another vs. State of Uttaranchal and others : (2007) 12 SCALE 15. It was held :-

"26. Before parting with this appeal, we would like to discuss an issue which is of great public importance, i.e. how and when warrants should be issued by the Court? It has come to our notice that in many cases that bailable and non-bailable warrants are issued casually and mechanically. In the instant case, the court without properly comprehending the nature of controversy involed and without exhausting the available remedies issued non-bailable warrants. The trial court disregard the settled legal position clearly enumerated in the following two cases."

It was furthermore observed

"51. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable- warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants."

41. Keeping in view the entirety of the facts and circumstances of the case we are of the opinion that gross injustice has been caused to the appellant. She did not deserve such harsh treatments at the hands of the High Court. Respondent No.3 speaks of her own human rights, forgetting the human rights of the appellant, far less the funadamental right of life and liberty conferred on an accused in terms of Article 21 of the Constitution of India.

42. The right of property is no longer a fundamental right. But still it is a constitutional right. Apart from constitutional right it is also a human right. The procedures laid down for deprivation thereof must be scrupulously complied with [See-Devinder Singh and Ors. vs. State of Punjab and Ors. : JT 2007 (12) SC 256].

43. Last but not the least, a plea of equity has been raised by Mr. Shah stating that this Court should issue some directions keeping in view the equitable principles. Reliance has been placed on Chandra Bansi Singh vs. State of Bihar : (1984) 4 SCC 316, wherein it was observed :-

"16. On an analysis of the various steps taken by the parties and others in the taking of possession, there is undoubtedly a delay of about 1 years and for the purpose

of calculation and convenience when rounded off, the delay may be taken to be of two years. So far as this delay is concerned, the appellants have undoubtedly a case for payment of some additional compensation in equity though not under law and as this Court is not only a Court of law but a Court of equity as well, it will be impossible for us to deny this relief to the appellants. After taking into consideration the various shades and aspects of the case we are clearly of the opinion that apart from compensation which may be awarded by the Collector or enhanced by the Judge or a higher Court, the appellants should get an equitable compensation in the form of interest calculated at the rate of 7 per cent per annum for two years on the value of land owned by each land-owner. This equitable compensation has been awarded in the special facts of this case and will not be the subject-matter of appeal, if any, under the Act on the amount of compensation. "

44. The said case arose out of a proceeding under the Land Acquisition Act which has no relevance to the issues involved in these appeals.

45. On cancellation of bail Mr. Shah has relied upon a decision of this Court in Raghubir Singh vs. State of Biahr: (1986) 4 SCC 481 wherein this Court observed :-

"22. The result of our discussion and the case-law is this: An order for release on bail made under the proviso to Section 167(2) is not defeated by lapse of time, the filing of the charge-sheet or by remand to custody under Section 309(2). The order for release on bail may however be cancelled under Section 437(5) or Section 439(2). Generally the grounds for cancellation of bail, broadly, are, interference or attempt to interfere with the due course of administration of justice, or evasion or attempt to evade the course of justice, or abuse of the liberty granted to him. The due administration of justice may be interfered with by intimidating or suborning witnesses, by interfering with investigation, by creating or causing disappearance of evidence etc. The course of justice may be evaded or attempted to be evaded by leaving the country or going underground or otherwise placing himself beyond the reach of the sureties. He may abuse the liberty granted to him by indulging in similar or other unlawful acts. Where bail has been granted under the proviso to Section 167(2) for the default of the prosecution in not completing the investigation in 60 days, after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect very strong grounds indeed. "

46. A bare perusal of the decision of this Court demonstrates that the ratio laid therein runs counter to the submissions of the learned counsel.

47. Reliance has also been placed on I.J. Divakar and others vs. Govt. of Andhra Pradesh and another : (1982) 3 SCC 341. The said decision was rendered under the Industrial Law.

Regularization was directed to be provided to the workmen. A Constitution Bench of this Court in Secretary, State of Karnataka and others vs. Umadevi and others : (2006) 4 SCC 1 opined that all such decisions shall stand overruled.

Sympathy or sentiment, as is well known, should not allow the Court to have any effect in its decision making process. Sympathy or sentiment can be invoked only in favour a person who is entitled thereto. It should never be taken into consideration as a result whereof the other side would suffer civil or evil consequences.

48. We are at a loss to understand as to on what premise such a contention has been raised. If we accept the contention of the learned counsel the same would mean that we send the old couple to jail or deprive them of their lawful right of a valuable property and/or ask them to meet obligations which statutorily are not theirs. Such a direction, in our opinion, should also not be passed, keeping in view the conduct of the 3rd respondent. She not only filed a large number of cases against her in-laws, some of which have been dismissed for default or withdrawn but also have been filing applications for cancellation of their bail on wholly wrong premise.

49. We may also notice that after the arguments were over, a strange submission was made before us. Learned counsel for respondent No.3 submitted that he may be permitted to withdraw from the case and the 3rd respondent be allowed to argue in person. Such a submission was not expected from a counsel practicing in this Court or form a party, who herself is an Advocate. We deprecate such practice.

50. Having regard to the facts and circumstances of this case we are of the opinion that the interest of justice shall be subserved if the impugned judgments are set aside with the following directions :-

i) The property in question shall be released from attachment.

ii) The 3rd respondent shall refund the sum of Rs. 1 lakh to the respondent with interest @ 6% per annum.

iii) The amount of Rs. 4 lakhs deposited by the 1st respondent shall be refunded to him immediately with interest accrued thereon.

iv) The 3rd respondent should be entitled to pursue her remedies against her husband in accordance with law.

v) The Learned Magistrate before whom the cases filed by the 3rd respondent are pending should bestow serious consideration of disposing of the same, as expeditiously as possible.

vi) The 3rd respondent shall bear the costs of the appellant which is quantified at Rs.50,000/- (Rupees fifty thousand) consolidated.

51. The appeals are allowed with the aforesaid directions.

I.A. for direction

Dismissed.