O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2015

(*NOVEMBER*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY

MONTHLY REVIEW OF CASES ON CIVIL, CRIMINAL & OTHER LAWS, 2015 (November)

I N D E X

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2. Order 1 Rule 10(2) of CPC

Gopal @ Gopal Chandra Ojha and others Vs. Ramakanta Ojha and others.

Dr. A.K. RATH, J.

In the High Court of Orissa, Cuttack.

Date of Judgment: 10.11.2015

Issue

Transposition of plaintiff.

The instant petition is filed to laciniate the order dated 18.8.2004 passed by the learned Civil Judge (Jr. Division), Bhadrak in C.S.No.43 of 1999-I, whereby and whereunder, the learned trial court allowed the application of defendant no.13 for transposition to the position of plaintiff. One Rama Chandra Ojha filed a suit for declaration of title and confirmation of possession along with the defendants 11 to 19, for declaration that the Consolidation Record of Right is wrong and for permanent injunction restraining the defendants 1 to 10 from disturbing his possession in the court of the learned Civil Judge (Jr. Division), Bhadrak, which was registered as C.S.No.43 of 1999-I. Opposite party no.1 was defendant no.13 and the present petitioners were the contesting defendants no. 1 to 10 except the defendant no.6. During pendency of the suit, defendant nos.6 and 16 died and due to non-substitution, the suit has abated against them on 3.10.2002. Similarly, during pendency of the suit, the sole plaintiff died on 2.11.2002 leaving behind his widow and daughters. After the death of the plaintiff, his legal heirs did not

take steps for their substitution. But then defendant no.13 filed an application for transposition as plaintiff on 1.2.2003. He had also filed another application for substitution of the legal heirs of the plaintiff. Defendants 1 to 10 filed an objection to the same. By order dated 18.8.2004, the learned trial court allowed the application of defendant no.13 and transposed him as plaintiff.

Heard Mr. D. P. Mohanty, learned Advocate for the petitioners and Mr. A.C. Mohapatra, learned Advocate for the opposite parties. The sole question that hinges for consideration of this Court is as to whether application for transposition of defendant no.13 as plaintiff can be allowed when the suit had abated ? The Court may transpose the defendant as plaintiff in exercise of its power under Rule 10(2) of Order 1 C.P.C.. The same is quoted hereunder:- "(2) Court may strike out or add parties.- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

What is the meaning of the words "at any stage of the proceedings" appearing in Order 1 Rule 10(2) of C.P.C. ? At any stage of the proceedings means during pendency of the suit. Power under Rule 10(2) of Order 1 C.P.C. can be exercised, if the proceedings are alive and pending. When the suit has abated and is no longer pending, application for transposition under Order 1 Rule 10 (2) C.P.C. filed by the defendant no.13 as plaintiff is not maintainable.

The sole plaintiff died on 2.11.2012 leaving behind his widow and daughters. No application for substitution was filed within the stipulated period. The suit had abated. Thereafter, defendant no.13 filed an application under Order 1 Rule 10 (2) C.P.C. for transposition as plaintiff. In view of the fact that the suit had abated and was no longer pending, the learned trial court has travelled beyond its jurisdiction in allowing the application for transposition. In wake of the aforesaid, the order dated 18.8.2004 passed by the learned Civil Judge (Jr.Division), Bhadrak in C.S.No.43 of 1999-I is quashed. Accordingly, the petition is allowed. No costs.

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3. Order 22 Rule 5 of CPC

Krushna Chandra Pati (dead) through Lrs 1 (a) to 1(h) Vs. Smt. Basanta Panigrahi and others.

Dr. Justice A. K. RATH, J.

*In the High Court of Orissa, Cuttack***.**

Date of Judgment: 20.11.2015

Issue

Substitution of parties.

Relevant Extract

The petitioner as plaintiff instituted a suit for partition impleading his brothers as defendants 1 and 2 and the purchasers of the suit property as defendants 3 to 50 in the court of the learned Civil Judge (Sr. Division), Bhadrak, which is registered as T.S.No.253 of 1991. All the defendants, except defendant no.41-opposite party no.1 herein, have been set ex parte. During pendency of the suit, defendant no.1 died on 23.7.1997. Defendant no.41 claiming to be the adopted daughter of defendant no.1 filed an application for substitution in place of defendant no.1 on 28.1.1998. By order dated 6.12.2005, the learned trial court directed to hold an inquiry under Order 22 Rule 5 C.P.C to determine the right of defendant no.41 for being substituted in place of deceased defendant no.1. Since the plaintiff disputed the claim of adoption, an application was filed to recall the order dated 6.12.2005 stating therein that an inquiry on the question of adoption will be lengthy and time consuming process. Thus, it is appropriate to take on record the plea taken by the defendant no.41, objection filed by the plaintiff, frame an issue and decide the suit. The same was rejected by the learned

trial court on 25.1.2006, which is impugned in this petition. The only question that arises for consideration in this case is when the defendant no.1 died during pendency of the suit and an application for substitution of the legal heirs of deceased defendant no.1 has been filed, whether the Court shall determine the said question under Order 22 Rule 5 C.P.C. or defer the same, frame an issue and proceed with the trial of the suit?

Order 22 Rule 5 C.P.C. deals with determination of question as to legal representative. The said rule provides that where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court. The word 'determine' cannot be equated with the word 'decide'. An inquiry in the matter of determination of legal representative under this rule is summary in nature. Thus, the inescapable conclusion is that where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the court forthwith. It is not permissible to defer the said question to be decided in the suit by framing an issue.

There being no patent error and gross injustice in the view taken by the learned trial court, this Court is not inclined to interfere with the impugned order in exercise of its power for judicial superintendence under Article 227 of the Constitution of India. The petition, being devoid of any merit, is dismissed.

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4. Section 294 and 313 of Cr.P.C.

Shamsher Singh Verma Vs. State of Haryana

Dipak Misra & Prafulla C. Pant , JJ.

In the Supreme Court of India

Date of Judgment : 24.11.2015

Issue

Effect of recording of evidence under section 313 Cr.P.C. and when application under section 294 –when there is no formal proof of certain documents exists.

Relevant Extract

Briefly stated, a report was lodged against the appellant (accused) on 25.10.2013 at Police Station, Civil Lines, Kaithal, registered as FIR No. 232 in respect of offence punishable under Section 354 of the Indian Penal Code (IPC) and one relating to Protection of Children from Sexual Offences Act, 2015 (POCSO) in which complainant Munish Verma alleged that his minor niece was molested by the appellant. It appears that after investigation, a charge sheet is filed against the appellant, on the basis of which Sessions Case No. 33 of 2014 was registered. Special Judge, Kaithal, after hearing the parties, on 28.3.2014 framed charge in respect of offences punishable under Sections 354A and 376 IPC and also in respect of offence punishable under Sections 4/12 of POCSO. Admittedly prosecution witnesses have been examined in said case, where after statement of the accused was recorded under Section 313 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C"). In defence the accused has examined four witnesses, and an application purported to have been moved under Section 294 Cr.P.C filed before the trial court with following prayer: -

"In view of the submissions made above it is therefore prayed that the said gadgets may be got operated initially in the court for preserving a copy of the text contained therein for further communication to F.S.L. for establishing their authenticity. It is further prayed that the voice of Sandeep Verma may kindly be ordered to be taken by the experts at FSL to be further got matched with the recorded voice above mentioned."

In said application dated 19.2.2015, it is alleged that there is recording of conversation between Sandeep Verma (father of the victim) and Saurabh (son of the accused) and Meena Kumari (wife of the accused). The application appears to have been opposed by the prosecution. Consequently, the trial court rejected the same vide order dated 21.2.2015 and the same was affirmed, vide impugned order passed by the High Court.

Section 294 Cr.P.C. reads as under: -

"**294. No formal proof of certain documents.** –

(1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed: Provided that the Court may, in its discretion, require such signature to be proved."

The object of Section 294 CrPC is to accelerate pace of trial by avoiding the time being wasted by the parties in recording the unnecessary evidence. Where genuineness of any document is admitted, or its formal proof is dispensed with, the same may be

read in evidence. Word "document" is defined in Section 3 of the Indian Evidence Act, 1872, as under: -

" 'Document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustration

A writing is a document; Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document."

We are not inclined to go into the truthfulness of the conversation sought to be proved by the defence but, in the facts and circumstances of the case, as discussed above, we are of the view that the courts below have erred in law in not allowing the application of the defence to get played the compact disc relating to conversation between father of the victim and son and wife of the appellant regarding alleged property dispute. In our opinion, the courts below have erred in law in rejecting the application to play the compact disc in question to enable the public prosecutor to admit or deny, and to get it sent to the Forensic Science Laboratory, by the defence. The appellant is in jail and there appears to be no intention on his part to unnecessarily linger the trial, particularly when the prosecution witnesses have been examined.

Therefore, without expressing any opinion as to the final merits of the case, this appeal is allowed, and the orders passed by the courts below are set aside. The application dated 19.2.2015 shall stand allowed. However, in the facts and circumstances of the case, it is observed that the accused/appellant shall not be entitled to seek bail on the ground of delay of trial.

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5. Section 482 Cr.P.C.
Sections 326 & 366 of IPC
Dharmendra Kumar Beuria & other. Vs. State of Orissa.
S. K. Mishra , J.
In the High Court of Orissa, Cuttack.
Date of Judgment: 20.11.2015
Issue

Quashing the cognizance of offence taken under Sections 326 & 366 of IPC.

Relevant extract

This case was initiated on the FIR lodged by the Child Welfare Committee (CWC), Bhubaneswar, Dist: Khurda on 08.02.2014. It is alleged in the FIR that the victim girl, aged about 12 years was rescued by the police and was produced before the CWC on 06.02.2014. It is alleged that in her statement, the victim girl stated that she is 4th child of Ananta Lohara and Kanakalata Lohara of Vill:Mugapala, P.S.:Kuakhia, District: Jajpur. Her father is a daily labourer and he was having difficulty to look after his eight children. The sister of her father, namely, Tara Lehar brought the victim to her home and she was studying Class-III in Kamarda Cromite Prathamik Vidyalay, At:Kumarda, P.O.:Kansa, P.S.Tamka, Dist:Jajpur. It is further alleged in the FIR that as Tara Lehar required money for her daughter's marriage, she sold Saraswati-victim girl to the present petitioners, namely, D.K. Behuria and his wife Sagarika Sahoo, who are residing At:13/9, BDA Colony, Chandasekharpur, Bhubaneswar for Rs.15,000/-. It is alleged that this was done without the knowledge of her father.

The Child Welfare Committee alleged in the FIR that the victim girl has been working as a bonded labour with the aforesaid couple for the last two months. She was used to clean their home, wash their clothes, clean the toilet and did all other household chores as well as she looked after their baby. It is further alleged that she has been physically tortured by both the

petitioners. As a result of such assault, she has got several marks and grievous injury over her body. In these two years, she was not allowed to meet her father. She has not even spoken to them. It is further alleged that when she cries with pain in her body, her employer threatened her that if she tells about the torture they will put her parents and herself in prison. Therefore, it is alleged that she was living with a traumatic state of mind with fear and pain.

On 06.02.2014, it was alleged that she was thrown out from the employer's house. As a result, she got an opportunity to escape from the bonded slavery and the story of her suffering and cruelty by her employer came to light. The Committee took the view that it is a gross violation of child right. In the aforesaid facts, this Court is at loss to understand why the aunt (Pisi) of the victim girl, whose name is Tara Lehar has not been arrayed as an accused in this case as there is specific allegation that she sold her to the present petitioners. The investigation of the case has not directed in that line also and even if materials on record the learned SDJM, Bhubaneswar mechanically took cognizance of the offence and did not thought proper to issue process against the said Tara Lehar.

In course of hearing, the Court carefully examined the statement of the victim girl. It is apparent from her statement that when she was very young her mother died of lighting. Thereafter, Tara Bati Das, who happens to be her aunt, took her to Lambay. She was plucking flowers in the morning and it was going to the house of relations of the petitioners. On 07.05.2012, she came to the house of the present petitioners. The petitioners engaged her in all kinds of domestic work like washing of latrine, cleaning of house, looking after the baby girl of the petitioners. In the meantime, the said Tara Lehar took Rs.15,000/- towards the

service rendered by the victim to the petitioners. In her statement she has narrated the torture meted out to her and how she was assaulted by the petitioners and ultimately she was driven out on 07.01.2014 after inflicting injuries on her body. Then, she came out of their house and asked some people present in the street about way to Jajpur. When the public saw that she has sustained injuries, she was taken to child line. The child line approached C.W.C. and C.W.C. lodged an FIR as narrated above.

Now, the question remains to be seen whether offence under Section 326 and 366 of the IPC is made out or not. In this connection, the Court takes note of the reported case of ***R.P. Kapur Vs. The State of Punjab,*** **AIR 1960 SC 866.** In the aforesaid case, the Hon'ble Supreme Court held that it is well-established that the inherent jurisdiction of High Court can be exercised to quash a proceeding in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. The Supreme Court further held that ordinarily the criminal proceeding instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, the Apex Court indicated certain type of cases where proceeding can be quashed by in exercise of inherent jurisdiction of the court. It is appropriate to take note of the exact words used by the Hon'ble Supreme Court. It reads as follows:

" xxx…we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for

the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under s.561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is

the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained…xxx." (Emphasis Supplied.)

As far as the present case is concerned, it comes into the 2nd category annunciated by the Hon'ble Supreme Court. It is apparent from the materials available on records, i.e. FIR, statements of the victim girl and other witnesses that the offence under Sections 326 and 366 of the IPC are not made out. So, the order passed by the learned SDJM, Bhubaneswar so far as it relates to taking cognizance offences along with other offences is bad. So, the order of taking cognizance so far as it relates to offence under Sections 326 and 366 of the IPC is bad and the same requires to be quashed. However, in course of examining the case, this Court also took the pains to examine Section 370 of the IPC as to whether it is attracted or not.

After careful examination of Section 370 of the IPC, this Court finds it appropriate to find out whether the ingredients are prima facie available in this case or not. There is no dispute that there is severe allegation, which is supported by independent materials that the victim girl was exploited and harboured as a person similar to slave. Secondly, it is also apparent from the records that the petitioners by giving money (payments) obtained consent of the person having control over the victim. So, there is prima facie material before the Court indicating that the victim girl was, for the purpose of exploitation, recruited and harboured

in the house of the petitioners by inducing, i.e. payment of money and the exploitation is akin to slavery or practices similar to slavery or servitude. This Court is of the opinion that the ingredients of Section 370 of the IPC are made out. Hence, this Court finds that the act of the police officer in not charging the petitioners under Section 370 of the IPC and instead of charging them under Sections 326 and 366 of the IPC is illegal.

On the basis of the aforesaid discussion, facts of law and citations, this Court is of the opinion that taking of cognizance of offences under Sections 326 and 366 of the IPC by the learned SDJM, Bhubaneswar is illegal and requires to be quashed. However, to prevent abuse of process of law, necessary directions be given to the learned Magistrate to examine the records in the light of the observations made in this judgment and if he finds that a prima facie case under Section 370 of the IPC is made out, he should pass appropriate orders thereon. Accordingly, the CRLMC is disposed of quashing the cognizance of offence under Sections 326 and 366 of the IPC with a direction to learned SDJM to reexamine the records so far as it relates to a commission of offence under Sections 363 and 370 of the IPC and pass appropriate orders.

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Indian Penal Code

6. Sections 364/302/394/201/34 of IPC
Sections 273/278/279 &465 of Cr.P.C.

Biswanath Sasamal Vs. State of Orissa.

Vinod Prasad & S.K. Sahoo, JJ.

*In the High Court of Orissa , Cuttack**.***

Date of Judgment: 19.11.2015

Issue

Recording of evidence in inquires and trials the method and its importance in adjudication.

Relevant Extract

The prosecution case, as per the F.I.R. lodged by Balaram Samantaray (P.W.1) on 10.10.2002 before Inspector-incharge, Khandagiri Police Station, Bhubaneswar was that he was the owner of one auto rickshaw bearing Registration No. OR-02- K-8224 which was plying from Khandagiri Auto rickshaw Stand and he had engaged the deceased as the driver of his auto rickshaw. On 09.10.2002 the informant returned home in the night and found that the auto rickshaw had not returned back and accordingly he searched for the auto rickshaw but could not locate the same. On 10.10.2002 the informant went to Khandagiri auto rickshaw stand and ascertained from one Ramesh Mohanty and Muna Samantaray that on the previous day night at about 9.30 p.m., two Muslim boys namely Tiki and Tuku along with another young man took the auto rickshaw of the deceased on hire towards Salia Sahi. The informant along with one Jitan Jena went towards Salia Sahi for the search of the deceased and auto rickshaw. As they could not locate the deceased and the auto rickshaw, suspecting that the deceased might have been kidnapped and the auto rickshaw might have been taken forcibly from him, the F.I.R. was lodged.

On receipt of the written report of P.W.1, Khandagiri P.S. Case No. 333 dated 10.10.2002 was registered under sections 363, 392 read with section 34 of Indian Penal Code against one Tiki, Tuku and another. P.W.16 Manoranjan Mohanty, Inspector-in-charge of Khandagiri Police Station himself took up investigation of the case. He examined the informant, visited the spot and sent V.H.F. message to all the Police Stations of the district intimating them regarding missing of the auto rickshaw and its driver (deceased). He received V.H.F. message from officer-in-charge of Chandaka Police Station that the missing auto rickshaw had been traced out and it had been detained in Mendhasala out post. P.W.16 proceeded to Mendhasala out post and found the auto rickshaw there and accordingly seized the same. The appellant had also been detained at the Police Station and basing on the confessional statement of the appellant, the dead body of the deceased was recovered. P.W.16 seized the auto rickshaw, sword and katari under seizure list Ext. 13 and the wearing apparels of the appellant under seizure list Ext.14. P.W.16 prepared the spot map and held inquest of the dead body under inquest report Ext.2. He also seized blood stained earth, sample earth, a pair of chappals lying at the spot under seizure list Ext.4. He also sent the dead body to Capital Hospital, Bhubaneswar for post mortem examination. The Investigating Officer searched for the absconding co-accused persons but could not locate them. The informant produced the original documents of the auto rickshaw bearing Registration No. OR-02-K-8224 along with the driving licence of the deceased which were seized under seizure list Ext.19. On 25.10.2002 the I.O. arrested the absconding accused Tiki @ Sk. Anwar Khan at Baramunda Bus Stand and arrested him. On the confessional statement of co-accused Tiki @ Sk. Anwar Khan on 26.10.2002, the Investigating Officer recovered one colour full pant and full shirt and seized the same under seizure list Ext.21. He made a prayer to S.D.J.M.,

Bhubaneswar for sending the seized materials for chemical examination to State F.S.L., Rasulgarh, Bhubaneswar. On completion of investigation, the Investigating Officer submitted charge sheet against the accused persons including the appellant under sections 364, 302, 394, 201 read with section 34 of Indian Penal Code showing accused Tuku @ Mustaqe Ali as absconder.

After observing due committal formalities, the case of the appellant was committed to the Court of Session for trial where the learned 2nd Addl. Sessions Judge, Bhubaneswar framed charge against the appellant and co-accused Tiki @ Anwar Khan under sections 364/302/394/201/34 of IPC on 28.06.2004 and since the appellant denied the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him along with the co-accused persons and to establish their guilt.

From the scrutiny of the records of the two sessions trials, it is apparent that P.W.2 Ramesh Chandra Mohanty and P.W.3 Rajendra Samantaray were examined, cross-examined and discharged in S.T. case No. 12/355 of 2004 in which accused Sk. Mustaq Ali was facing trial and those two witnesses were never examined in-chief in S.T. Case No. 8/283 of 2004/03 in which the appellant and co-accused Tiki @ Anwar Khan were facing trial. But after the cases were clubbed up and P.W.2 and P.W.3 were recalled for cross-examination, the counsels for the appellant and co-accused Tiki @ Anwar Khan were afforded opportunity to cross examine those two witnesses.

The question which has cropped up as to whether the evidence of P.W. 2 and P.W. 3 which were recorded in the connected sessions trial can be utilized against the appellant merely because after clubbing up both the sessions trials, an

opportunity of cross-examination was afforded to him? Whether non-recording of examination-in-chief of P.W.2 and P.W.3 again has caused prejudice to the appellant?

Chapter XXIII of Code of Criminal Procedure 1973 deals with the evidence in inquiries and trials. So far as the mode of taking and recording evidence is concerned, for the purpose of adjudicating the points involved in this case, sections 273, 278 and 279 are very relevant.

Section 273 of Cr.P.C. mandates that all evidence in a criminal trial must be recorded in the presence of the accused except as otherwise expressly provided. The use of word 'shall' in the provision makes it mandatory for ensuring the presence of the accused at the time of recording of the evidence. When a power is coupled with duty, its exercise ceases to be discretionary and it becomes mandatory. From the scheme of the statute, nature of the duty imposed, it has to be ascertained whether a duty under a statute is obligatory, mandatory or directory. The exception has been provided in the section 273 Cr.P.C. itself that where personal attendance of the accused was dispensed with and the evidence of the witness is recorded in the presence of his pleader. Thus, even if the accused is not present and his personal attendance has been dispensed with by the learned trial court, there would be no procedural irregularity in case the evidence of a witness is taken in the presence of the pleader of the absentee accused. But in a case where personal appearance of the accused was dispensed with and the evidence of the witness is recorded in the absence of his pleader, it would be definitely a non-compliance of the provision under section 273 Cr.P.C. The purpose of recording the evidence of a witness in presence of the accused or his pleader is obviously for the purpose of a fair trial in as much as the accused has every right of opportunity of hearing of the evidence against him and he should also know as

to which witnesses are deposing in the case and what they are deposing, so that he can give valuable instruction to his pleader to defend him properly and he can also give effective reply to the questions put to him by the Presiding Officer in the accused statement. Recording the evidence behind the back of the accused and not in his presence and that to in absence of his lawyer and utilizing the same against him would certainly cause serious prejudice to him. Thus the trial Court has a solemn duty to provide such opportunity of hearing to the accused for a fair trial. The accused has a right to request the Court for exempting him from personal appearance and if such request is accepted and the personal attendance of the accused is dispensed with then the evidence of the witnesses can be recorded in presence of the pleader representing the accused. Section 278 Cr.P.C. also indicates that after completion of the recording of the evidence of each witness, it shall be read over to the witness in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader. Section 279 Cr.P.C. indicates that if the evidence is given in a language which was not understood by the accused and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him. Similarly, if the accused appears by pleader who does not understand the language of the evidence then such evidence shall be interpreted to the pleader in the language of the Court. These three sections clearly envisage the importance of presence of the accused or his counsel at the time of recording of evidence by the Court.

The fundamental requirement is that a Judge presiding over a criminal trial has the sacrosanct duty to demonstrate that he applies the correct principles of law to the facts of the case. During the course of trial, the learned presiding Judge is expected to work objectively and in a correct prospective. Section 465

Cr.P.C. is intended to cure any error, omission, irregularity or infraction of procedural law committed by the Court of competent jurisdiction, unless such irregularity or illegality has in fact occasioned a failure of justice. The object of the section is to secure justice by preventing the invalidation of a trial on the ground of technical breaches of any provisions of the Code causing no prejudice to the accused. The procedural laws are designed to further the ends of justice and not frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along with certain well established and well-understood principles that accord with our notions of natural justice. If there is substantial compliance with the requirements of law providing the accused a full and fair trial in accordance with principle of natural justice, no order of a competent Court should be reversed or altered in appeal or revision on account a procedural irregularity unless the same results in miscarriage of justice. In judging the question of prejudice, Courts must act with a broad vision and look to the substance and not to technicalities and their main concern should be to see whether the accused had a fair trial; whether he knew that he was being tried for; whether the main facts sought to be established against him were explained to him fairly and clearly; and whether he was given a full and fair chance to defend himself.

In view of what we have discussed above, the procedure adopted by the learned trial Court after clubbing up both the cases on the prayer of the Associate Public Prosecutor in summoning P.W.2 and P.W.3 for cross-examination is wholly illegal and cannot be sustained in the eye of law. The evidence of P.W.2 and P.W.3 were initially recorded in the connected Sessions trial where the co-accused was facing the trial. Such recording of evidence is obviously in the absence of the appellant and his counsel. Therefore, mere affording of opportunity for cross examination to the appellant is not sufficient. P.W.2 and P.W.3 should have been examined afresh. In our opinion, the procedure adopted by the learned trial Court is not a case of mere irregularity curable under section 465 Cr.P.C. but an illegality. The very use of such evidence against the appellant is by itself a proof of prejudice to him. The consent of the appellant or his counsel to cross-examine those two witnesses will not cure this procedural irregularity which has resulted in causing substantial illegality.

Accordingly, we are of the view that the impugned judgment and order of conviction of the appellant and the sentence passed thereunder is not sustainable in the eye of law and therefore the same is hereby set aside so far as the appellant is concerned. Matter is remitted back to the learned trial Court for examination of P.W.2 and P.W.3 afresh affording sufficient opportunity for cross-examination to the counsel for the appellant. Since the

recording of the other witnesses was in the presence of the appellant and his counsel and opportunity of cross-examination have been provided to the counsel for the appellant, those witnesses need not be examined again. However, after completion of the recording of the evidence of P.W.2 and P.W.3, if any petition is filed under section 311 Cr.P.C. by either of the parties to recall any other witness already examined for the exigencies mentioned therein, the same should be considered in accordance with law by the learned trial Court.

The trial Court is directed to record the accused statement afresh and give an opportunity to the appellant to adduce defence evidence and thereafter proceed to hear the argument and deliver the judgment. The entire exercise should be completed within a period of three months from the date of receipt of the judgment with the L.C.R. Any observation made in this judgment shall not influence the learned trial Court to adjudicate the matter afresh in accordance with law. Since the appellant was on bail during trial granted by this Court in BLAPL No.1741 of 2009 vide order dated 22.7.2009, he should be allowed to be released on bail pending disposal of the trial. Registry is directed to send back the L.C.R. along with a copy of the judgment to the learned trial Court for compliance.

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7. Clause-10 of the Letters Patent

Sri Kasinath Nayak Versus State of Odisha & others.

D.H. Waghela, C.J.I. , Pradip Mohanty & Raghubir Dash, JJ.

*In the High Court of Orissa, Cuttack**.***

Date of Judgment: 19.11.2015

Issue

Maintainability of appeal under Clause-10 of the Letters Patent against a single judge judgment.

Is the instant writ appeal, filed against the judgment of the learned Single Judge rendered in a writ petition in which direction for further investigation in a criminal case was sought for, maintainable? This is the short question required to be answered in the reference.

When the writ appeal came up for hearing before a Division Bench of this Court, the State Government raised serious objection regarding its maintainability. Feeling that the question of maintainability may have a far reaching effect, the Division Bench was inclined to examine the matter in depth and accordingly vide order dated 20.08.2014 appointed Mr. Goutam Mishra as amicus curiae to assist the Court. As the learned amicus curiae apprised the Court that there are divergent views by different High Courts on the issue, vide order dated 11.09.2014 the Division Bench of this Court referred the matter to the Full Bench. Hence, this Full Bench has been constituted and called upon to answer the following question:

"Whether any decision rendered by a Single Judge of this Court vis-à-vis a criminal matter in exercise of the writ jurisdiction under Article 226 of the Constitution of India is appealable under Clause-10 of the Letters Patent before a Division bench of this Court or not?"

While Mr. Sarkar, learned counsel for the appellant contended that an appeal under clause 10 of the Letters Patent is maintainable against a judgment passed by the learned Single Judge in a petition under Article 226, according to Mr. Misra, learned Advocate General appearing for the State an appeal under clause 10 of Letters Patent Appeal is not maintainable against the judgment of learned Single Judge even when passed under Article 226, if the power is exercised under criminal jurisdiction.

It is worthwhile to mention here that at the commencement of the 20th Century, Bengal Presidency was a vast province including Assam, Bihar and Orissa. Administrative exigencies required separation of such areas which originally did not form part of Bengal. Bihar and Orissa were separated from Bengal Presidency to form new province of Bihar. By a notification dated 22.03.1912 new province of Bihar and Orissa was formed. However, still the said new province of Bihar and Orissa was under the jurisdiction of Calcutta High Court.

On 09.02.1916, in exercise of the powers under section 113 of the Government of India Act, 1915, the King of England issued Letters Patent constituting High Court of Patna. Orissa was placed under the jurisdiction of Patna High Court..On 01.04.1936 Orissa was made a separate province but no separate High Court was provided for it. ..In exercise of the powers conferred by Section 229(1) of the Government of India Act, 1935, the Government of India, on 30.04.1948, issued Orissa High Court Order, 1948 declaring that from 05.07.1948 there shall be a Court of the Province of Orissa which shall be a Court of Record. Subsequently by Orissa High Court (Amendment) Order, 1948 issued on 08.06.1948, the date of establishment of High Court was changed from 05.07.1948 to 26.07.1948. Hence, on 26.07.1948 Orissa High Court was inaugurated by H.J.Kania, the then Chief Justice of the Federal Court of India. Since the bifurcation of Orissa High

Court, the Letters Patent Appeals (present writ appeals) are being filed under Clause 10 of the Letters Patent Constituting the High Court of Judicature at Patna read with Article 4 of the Orissa High Court (Amendment) Order, 1948, which provided inter alia that the law in force regarding practice and procedure in the High Court in Patna shall be applicable to the Orissa High Court.

Clause-10 of the Letters Patent Constituting the High Court of Judicature at Patna, under which the writ appeal has been filed, reads thus:

"Clause-10. And we do further ordain that an appeal shall lie to the said High Court of Judicature at Patna from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of Government of India Act and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made [on or after the first day of February one thousand nine hundred and twenty nine] in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to

Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided."

From a bare reading of the clause, as quoted above, it would be evident that a Letters Patent appeal can be laid to a Division Bench of this High Court from a judgment of a learned Single Judge, if it is not covered by the excluded category of cases as specified in the bracketed portion of the clause. In other words, filing of intra-Court appeal to a Division Bench of this Court is debarred against judgment of learned Single Judge if it is passed in exercise of (i) revisional jurisdiction, (ii) the power of superintendence and (iii) the criminal jurisdiction. Therefore, it is to be seen whether the impugned judgment passed by the learned Single Judge comes under any of these three excluded categories.

During the course of hearing, learned counsel for both the parties in support of their respective submissions placed reliance upon a large number of judgments of various High Courts in India. Mr. Goutam Mishra, learned amicus curiae also placed before this Court the judgments wherein conflicting views have been expressed by different High Courts. Before delving into those judgments, it is pertinent to mention here that Clause-10 of the Letters Patent Constituting the High Court of Judicature at Patna, which is applicable to Orissa High Court, is pari materia to the corresponding clause followed in the respective High Courts.

The controversy that a writ proceeding under Article 226 of the Constitution of India is a "civil proceeding" or "criminal proceeding" was considered at great length by the Constitution Bench of the apex Court in S.A.L. Narayan Row v. Ishwarlal Bhagwandas, AIR 1965 SC 1818. In the said case, the apex Court opined that whether the proceedings are civil or not depends upon the nature of the right violated and the appropriate relief which may be claimed and not upon the nature of the Tribunal

which is invested with authority to grant relief. While so opining, the apex Court in Para-8 of the judgment observed as follows:

".....The expression "civil proceedings" is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed...."

(Emphasis Supplied) From the aforesaid it follows that a civil proceeding is one in which a person seeks to redress by appropriate relief the alleged infringement of his civil rights against another person or the State. A criminal proceeding is one in which the proceeding, if ultimately carried to its conclusion, may result in imposition of sentences such as death, imprisonment, fine or forfeiture of property. The term "criminal proceeding" has also been defined in Black's Law Dictionary as "one instituted and conducted for the purpose either of preventing the commission of crime, or for fixing the guilt of a crime already committed and punishing the offender; as distinguished from a "civil proceeding", which is for the redress of a private injury."

Referring to the above Constitution Bench judgment of the apex Court in S.A.L. Narayan Row (supra), the High Court of Judicature at Gujarat in Sanjeev Rajendrabhai Bhatt v. State of Gujarat, 1999 Cr.L.J. 338 came to hold as follows:

"80. In our considered opinion, in the instant case, the proceedings can be said to be criminal proceedings inasmuch as, carried to its conclusion, they may result into imprisonment, fine etc. as observed by the Supreme Court in Narayana Row.

81. From the totality of facts and circumstances, we have no hesitation in holding that the learned single Judge has passed an order in exercise of criminal jurisdiction. At the cost of repetition, we reiterate what we have already stated earlier that the proceedings were of a criminal nature. Whether a criminal Court takes cognizance of an offence or sends a complaint for investigation under Sub-section (3) of Section 156 of the Code of Criminal Procedure, 1973 does not make difference so far as the nature of proceedings is concerned. Even if cognizance is not taken, that fact would not take out the case from the purview of criminal jurisdiction.

82. In our judgment, a proceeding under Article 226 of the Constitution arising from an order passed or made by a Court in exercise or purported exercise of power under the Code of Criminal Procedure is still a 'criminal proceeding' within the meaning of Clause 15 of the Letters Patent. A proceeding seeking to avoid the consequences of a criminal proceeding initiated under the Code of Criminal Procedure will continue to remain 'criminal proceeding' covered by the bracketed portion of Clause 15 of the Letters Patent.

83. As Clause 15 of the Letters Patent expressly bars an appeal against the order passed by a single Judge of the High Court in exercise of criminal jurisdiction, LPAs are not maintainable and deserve to be dismissed only on that ground. We accordingly hold that the Letters Patent Appeals are not maintainable at law and they are liable to be dismissed."

The issue raised herein also fell for consideration before a Division Bench of Bombay High Court in M/s Nagpur Cable Operators Association v. Commissioner of Police Nagpur reported

in AIR 1996 BOM 180. The said Division Bench, after taking note of various cases decided by other High Courts and the apex Court, observed thus:

"21. ....Applying the tests laid down by the Apex Court in Narayan Row's case (supra), we are of the view that if the writ petition/application under Articles 226 and/or 227 of the Constitution arises out of or relates to a proceeding in which, if carried to its conclusion ultimately it may result in sentence of death or by way of imprisonment, fine or forfeiture of the property then such writ petition/application under Article 226 of the Constitution of India and / or under Article 227 of the Constitution, should be treated as a "criminal writ petition" and styled as such. For hearing and decision of such petition, it should be listed before the Division Bench allocated such business by Hon'ble the Chief Justice or if it pertains to the single Judge jurisdiction, before the Bench assigned such work. As regards petitions/applications under Article 226 of the Constitution seeking writs or orders in the nature of habeas corpus, Rule 1 of Chapter XXVIII of Appellate Side Rules, also provides only allocation of such writ petitions to the Division Bench taking criminal business of the Appellate Side of the High Court. Obviously, since the petitions/applications under Article 226 of the Constitution of India for issuance of writs of habeas corpus arise out of the unlawful detention, in its very nature, such petitions too should be styled as criminal writ petitions. Criminal writ petitions would also cover those writ petitions which arise out of the orders and the matters relating to prevention or breach of peace or maintenance of peace and order or such orders aimed at preventing vagrancy contemplated to be passed. 'Criminal writ petition' shall also take in its embrace the petitions/applications under Article 226 or 227 of the Constitution of India if it arises out of or relates to investigation, enquiry or trial of the offences

either under special or general statute.... However, such cases are to be distinguished from the cases where an act may be prohibited or commanded by the statute in such a manner that the person contravening the provision is liable to pecuniary penalty and such recovery is to be made a civil debt. In such type of cases the contravention would not bea crime and, therefore, petitions/applications* under Articles 226 and 227 of the Constitution of India arising therefrom would not be criminal proceeding."

(Emphasis supplied)

Apart from the above, in C.S. Agarwal v. State, (2011) ILR 6 DELHI 701, a Full Bench of the Delhi High Court, after making elaborate discussions, followed the above view of the Division Bench of the Gujarat High Court in the case of Sanjeev Rajendrabhai Bhatt (supra). It is of relevance to note, while holding writ appeals to be not maintainable, the Full Bench of the Delhi High Court in C.S. Agarwal (supra) took note of the decision of the apex Court in State of Haryana v. Bhajan Lal, AIR 1992 SC 604. Subsequently, a Division Bench of the Delhi High Court in Vipul Gupta v. State, 208(2014) DLT 468, reiterated the view taken in C.S. Agarwal (supra). In Nitin Shantilal Bhagat v. State of Gujarat, 2012 CRL.L.J. 886, the Full Bench of the Gujarat High Court relying on the Constitution Bench judgment of the apex Court in S.A.L. Narayan Row (supra) came to hold that the writ appeal was not maintainable.

The following are the cases, cited before this Court at the time of hearing, in which some of the High Courts have taken a divergent view on the issue which falls for consideration before this Court.

(i) In Gangaram Kandaram v. Sunder Chhkha Amin and others, 2000 (2) ALT 448, where the learned Single Judge while

exercising extraordinary jurisdiction under Article 226 quashed the criminal proceedings, the Full Bench of the Andhra Pradesh High Court held that such exercise of powers is not in exercise of "criminal jurisdiction".

(ii) In the case of Adishwar Jain v. U.O.I. reported in 2006 Crl.L.J. 3193, the High Court of Judicature at Punjab and Haryana while dealing with the question of maintainability held that an appeal under the Letters Patent is maintainable against the judgment of a learned Single Judge in the petition under Article 226 of the Constitution praying for issuance of Habeas Corpus.

(iii) This Court in the case of Bholanath Rout v. State of Orissa & others reported in 2013 (I) OLR 341, while entertaining a writ appeal (Letters Patent Appeal) filed against the judgment of the learned Single Judge refusing to direct investigation by an independent agency, set aside the judgment and directed that the case should be re-investigated by an independent agency like the Crime Branch.

On careful perusal of these judgments, this Court finds that the view taken by the Full Bench of the Andhra Pradesh High Court in Gangaram Kandaram (supra) is not acceptable inasmuch, as the same is not in consonance with the ratio laid down in the case of S.A.L. Narayan Row (supra). Similarly, since in the case of Bholanath Rout (supra) the question of maintainability was not raised and in the case of Adishwar Jain (supra) dealt with habeas corpus petition, those judgments are not relevant for the purpose of the present reference.

From the above analysis of the decisions of the apex Court and other High Courts, this Court arrives at the conclusion that the question, whether an order passed by learned Single Judge in a writ petition under Article 226 of the Constitution of India is a proceeding under civil jurisdiction or criminal jurisdiction, can be determined by taking into consideration the nature of proceeding. That means, if the relief asked for in a writ petition is against exercise of power under criminal law or the proceeding would be a criminal proceeding, or the proceeding if carried to its conclusion ultimately may result in sentence of death or imprisonment or fine or forfeiture of property, such writ petition should be treated as filed against a proceeding under criminal jurisdiction. In such a case, the Letters Patent Appeal/Writ Appeal is not maintainable.

In view of the above settled position of law, it is to be seen whether the writ petition, from which this appeal arises, was filed invoking the "criminal jurisdiction" of this Court and/or the impugned order was passed "in exercise of criminal jurisdiction". As it appears from the records produced before this Court, the appellant being the informant filed a writ petition {W.P.(Crl.) No.1066 of 2013} challenging the action of the I.I.C., Khaira Police Station, Balasore. His grievance was that he lodged an FIR, which was registered as Khaira P.S. Case No.61 of 2011 under Sections 498-A, 302,304-B and 34, I.P.C. read with Section 4 of the Dowry Prohibition Act. But, the I.I.C. filed charge- sheet deliberately omitting three other accused persons named in the FIR. Therefore, alleging that the investigation conducted by the IIC was not fair and proper, the appellant in the aforesaid writ

application prayed for further investigation. The learned Single Judge ultimately found that there was no serious irregularity or mala fides in the investigation and was pleased to dismiss the writ petition vide order dated 06.03.2014. Aggrieved by the said order, the appellant has filed this appeal. If this appeal is allowed and relief sought for in the writ petition is acceded to, it would amount to directing further investigation to Khaira P.S. Case No.61 of 2011. In such event, it may lead to filing of charge-sheet by the Investigating Officer, framing of charge and can result in conviction and order of sentence. Therefore, in terms of the ratio laid down in S.A.L. Narayan Row (supra), it can be safely held that in the instant case the writ petition was filed invoking "criminal jurisdiction" of the learned Single Judge and the learned Single Judge has passed the impugned order "in exercise of criminal jurisdiction". As such, the instant writ appeal clearly comes under the third excluded category of Clause-10 of the Letters Patent which bars filing of a writ appeal.

For the foregoing discussions, the reference is answered in negative and the writ appeal is required to be dismissed as not maintainable.

Before parting with the case, this Court deems it proper to place on record its appreciation for the assistance rendered by learned amicus curiae Mr. Goutam Mishra in deciding the reference.

The matter may be placed before the Bench concerned for appropriate final orders.

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8. Sections 1, 5, 16 & 35 of NDPS Act

Baldev Singh Vs. State Of Haryana

Jagdish Singh Khehar & R. Banumathi ,JJ.

*In the Supreme Court of India**.***

Date of Judgement : 04.11.2015

Issue

Conscious possession of Narcotic Drugs and Psychotropic Substances Act etc. and conviction thereof.

Relevant Extract

Briefly stated case of the prosecution is that on 16/17.09.1990 mid night at about 12.15 a.m., Chander Singh-SI alongwith Ram Singh-ASI and team of police personnel with Government Jeep No. HNN 3108 and a private jeep were holding Nakabandi on both sides of Kacha path leading to village Kingre from G.T. Road for detection of the contraband. At that time, a tractor No.RJV 6299 with trolley was heading towards the road from the village and the same was stopped and the appellant was apprehended and he was inquired about the gunny bags of poppy husk lying in the trolley. The appellant was served with a written notice to the effect that as to whether he wanted to be examined before First Class Magistrate or Gazetted Officer in connection with the recovery of poppy husk from his trolley. The appellant had shown faith in Sub Inspector-Chander Singh and as per rules Sub-Inspector searched the trolley. Thirty three yellow coloured gunny bags containing poppy husk were recovered from the trolley attached to tractor and on weighing the bags, each bag was found to be of forty kilograms i.e. in total about thirteen quintals and twenty kilograms of poppy husk was recovered. From each bag, sample of hundred grams was taken out and parcels were made and remaining poppy husk lying in the gunny

bags were sealed with seal 'CS' and were seized and taken into police possession alongwith the said tractor with its trolley. On the basis of rukka, case bearing No.234 dated 17.09.1990 under Sections 15, 16, 61 and 85 of the NDPS Act was registered at P.S. Sadar, Dabwali. Subsequently, samples were sent for chemical analysis and were found to be poppy straw. On completion of investigation, chargesheet was filed under Sections 15and 16 of the NDPS Act.

To substantiate the charges against the appellant, the prosecution examined only one witness Ram Singh-ASI-PW-1, affidavits of MHC Mohinder Singh and Constable Om Prakash and also the documents including FSL Report were filed. Sessions Judge, Sirsa vide its judgment dated 22.04.1994 acquitted the appellant observing that no other witness except Ram Singh-PW-1 was examined and that Ram Singh-PW-1's evidence was not trustworthy to base the conviction. Aggrieved by the verdict of acquittal, State preferred appeal before the High Court of Punjab and Haryana at Chandigarh. The High Court vide impugned judgment reversed the judgment of acquittal and convicted the appellant under **Section 15** of NDPS Act and sentenced him to undergo rigorous imprisonment and imposed fine as aforesaid. Aggrieved, the appellant has filed the instant appeal.

Section 35 of the NDPS Act reads as under:-

35. Presumption of culpable mental state.—(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.—In this section "culpable mental state" includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation to sub-section (1) of **Section 35** expanding the meaning of 'culpable mental state' provides that 'culpable mental state' includes intention, knowledge of a fact and believing or reason to believe a fact. Sub-section (2) of **Section 35** provides that for the purpose of Section 35, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of the probability. Once the possession of the contraband by the accused has been established, it is for the accused to discharge the onus of proof that he was not in conscious possession. Burden of proof cast on the accused under **Section 35** of the NDPS Act can be discharged through different modes. One of such modes is that the accused can rely on the materials available in the prosecution case raising doubts about the prosecution case. The accused may also adduce other evidence when he is called upon to enter on his defence. If the circumstances appearing in the prosecution case give reasonable assurance to the Court that the accused could not have had the knowledge of the required intention, the burden cast on him under Section 35 of the NDPS Act would stand discharged even if the accused had not adduced any other evidence of his own when he is called upon to enter on his defence.

The appellant has only pleaded that he being falsely implicated and that a false case has been foisted against him in the police station. In his statement under Section 313 Cr.P.C., the appellant had not stated anything as to why would the police foist the false case against the appellant. It is to be noted that huge quantity of poppy straw was recovered from the possession of the appellant. Admittedly, the police officials had no previous enmity with the appellant. It is not possible to accept the contention of the appellant that he is being falsely implicated as it is highly improbable that such a huge quantity has been arranged by the police officials in order to falsely implicate the appellant.

From the evidence led by the prosecution, it has been proved beyond reasonable doubt that the accused being the driver of the tractor was in conscious possession of the thirty three bags of poppy husk in the trolley attached to the tractor. Upon appreciation of evidence, High Court rightly reversed the acquittal and convicted the appellant under Section 15 of the NDPS Act. The occurrence was in the year 1990 and the appellant has suffered a protracted proceeding of about twenty five years. In the facts and circumstances of the case, the sentence of imprisonment imposed on the appellant is reduced from twelve years to ten years.

The conviction of the appellant under Section 15 of the NDPS Act is confirmed and the sentence of imprisonment imposed on the appellant is reduced to ten years and the appeal is partly allowed. The appellant is on bail and his bail bonds are cancelled. The appellant be taken into custody forthwith to serve the remaining part of the sentence.

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9. Sections 30 and 33 of the Arbitration Act

M/s Cochin Shipyard Ltd. Vs. M/s Apeejay Shipping Ltd.
Dipak Misra & Prafulla C. Pant , JJ.
In the Supreme Court of India.
Date of Judgment: 06.11.2015
Issue

Legal tenability of order under section 30 & 33 of the Arbitration Act challenged.

Relevant Extract

The facts which are essential to be stated for the adjudication of this appeal are that an agreement was entered into between the parties on 29.11.1980. As per the terms and conditions of the agreement, the appellant, a Government undertaking, had agreed to build and deliver a cargo ship to the respondent for the price of Rs. 32.527 crores. Certain differences arose between the parties which led to an arbitration proceeding and a former Judge of this Court was appointed as the arbitrator/sole umpire to resolve the disputes between the parties. As facts would unveil, the learned arbitrator after holding series of sittings passed an award on 15.07.2009. After the award was sent to the civil court, the claimant-appellant moved the Court for passing a decree under Section 17 of the 1940 Act in terms of the award and the respondent filed O.P. (Arb.) No. 30 of 2009 under Sections 30 and 33 to set aside the award. During the pendency of the said petition, the respondent almost after expiry of two years filed an application, that is, I.A. No. 5625 of 2011 seeking permission to examine the learned arbitrator and the General Manager of the respondent as witnesses. The learned Additional Subordinate Judge, vide order dated 23.12.2011, rejected the application holding that there was no justification to examine the arbitrator; that the Court while considering the

objections under Sections 30 and 33 of the 1940 Act does not sit in appeal over the arbitrator's award; that the Court does not assess or re-appreciate the evidence; that the award passed by the learned arbitrator can only be assailed on the grounds as engrafted under Sections 30 and 33 of the 1940 Act; and that no reason had been disclosed by the respondent, the applicant before the Subordinate Judge, to examine the witness No. 2, that is, the General Manager.

The aforesaid rejection of the application constrained the respondent to file a Writ Petition before the High Court which concurred with the view expressed by the court below opining that there was no necessity to examine the arbitrator as a witness as more than five years had elapsed since the award was passed. The High Court further appreciated the reasoning expressed by the rule making Court and ruled that even if umpire would be examined, no fruitful purpose will be served and, accordingly, gave the stamp of approval to the same. However, the High Court granted liberty to the writ petitioner to produce other available evidence to substantiate its claim and specifically permitted to examine its employee as a witness in the proceeding. The High Court further observed that his evidence would be appreciated bearing in mind the scope of Sections 30 and 33 of the 1940 Act and, accordingly, modified the order passed by the civil court. Be it noted, further liberty was granted to summon the entire record including the orders passed in the course of the arbitral proceeding.

To appreciate the controversy in proper perspective, it is pertinent to refer to Sections 30 and 33of the 1940 Act. They read as under:-

"Section 30. Grounds for setting aside award.– An award shall not be set aside except on one or more of the following grounds, namely:-

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is otherwise invalid.

Section 33. Arbitration agreement or award to be contested by application.– Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

In the present case, the issue that has travelled to this Court does not even remotely relate to Section 33 of the 1940 Act. It centres around Section 30 of the 1940 Act. Though certain grounds have been provided under Section 30, we only require to deal with the ambit and sweep of legal misconduct on the part of the learned arbitrator inasmuch as there are allegations as regards non-consideration of relevant documents, ascription of reasons of passing of the award which do not flow from the

material on record and further the conduct of the arbitrator during the arbitral proceedings in recording of the minutes. The assail does not pertain to personal misconduct or moral misconduct of the learned arbitrator.

We have referred to series of decisions to appreciate the concept of misconduct and how a party is entitled to make it the fulcrum of assail in his objection under Sections 30 and 33 of the 1940 Act. Misconduct, as has been laid down, does not always have a moral connotation. To elaborate, it may not have any connection with the individual/personal conduct of the arbitrator. The said conduct would be in sphere of moral misconduct. As far as legal misconduct is concerned, as the authorities would demonstrate, the same must be manifest or palpable from the proceedings before the arbitrator. To elaborate, a person urging the ground of legal misconduct has to satisfy the court from the records of the arbitral proceedings that there has been a legal misconduct on the part of the arbitrator as a consequence of which the award gets vitiated. The question of adducing any kind of oral evidence to substantiate the plea or stand or stance does not arise. It has to be shown from the proceedings carried on before the arbitrator and the evidence adduced before the arbitrator. Evidence cannot be adduced in court to substantiate the challenge on the score of legal misconduct. We are not entering upon any discussion pertaining to moral misconduct as that is not the issue in the case at hand. The decision in Fiza Developers and Inter-Trade Private Limited (supra) has been rendered by this Court while interpreting Section 34 of the 1996 Act. The context being different, we are not inclined to apply the principles enumerated therein to the objection filed under Sections 30 and 33 of the 1940 Act, for the simon pure reason that the authorities are plenty to make it limpid that the issue of

legal misconduct on the part of the arbitrator should be manifestly discernable from the record.

In the instant case, the High Court has granted liberty to the respondent herein to examine its General Manager to substantiate its claim and further opining that the said evidence should be considered within the parameters of Sections 30 and 33 of the 1940 Act. The learned senior counsels for the parties have pressed their argument relating to legal misconduct. Both the learned senior counsels for the parties have construed the order that the said liberty has been granted to establish the misconduct and precisely that is the subject matter of challenge before us. Therefore, we have clearly opined that to substantiate a stance of legal misconduct on the part of the arbitrator, examination of any witness in court is impermissible. It is because it must be palpable from the proceedings and the learned single Judge has already directed that the proceedings before the arbitrator to be requisitioned by the civil court. Least to say, it will be open for the respondent to establish the ground of legal misconduct from the arbitral proceedings. We may hasten to add that we have not said anything as regards legal misconduct pertaining to the present case, although we have referred to certain authorities as regards the legal misconduct.

In view of the aforesaid premises, the appeal is allowed in part as far as it grants permission/liberty to the respondent to examine any witness in court. The learned Civil Judge would requisition the records from the learned arbitrator, if not already done, and the respondent would be at liberty to advance its arguments for pressing the factum of misconduct from the said records. There shall be no order as to costs.

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10. Section 12 of P.W.D.V. Act

Krishna Bhatacharjee Vs. Sarathi Choudhury and Anr.

Dipak Misra & Prafulla C. Pant, JJ.

In the Supreme Court of India

Date of Judgment : 20.11.2015

Issue

Maintainability of section 12 for getting back stridhan as being ceased to be an aggrieved person under section 2(a) of P.W.D.V. Act

Relevant Extract

The marriage between the appellant and the respondent No. 1 was solemnised on 27.11.2005 and they lived as husband and wife. As the allegations proceed, there was demand of dowry by the husband including his relatives and, demands not being satisfied, the appellant was driven out from the matrimonial home. However, due to intervention of the elderly people of the locality, there was some kind of conciliation as a consequence of which both the husband and the wife stayed in a rented house for two months. With the efflux of time, the husband filed a petition seeking judicial separation before the Family Court and eventually the said prayer was granted by the learned Judge, Family Court. After the judicial separation, on 22.5.2010 the appellant filed an application under Section 12 of the 2005 Act before the Child Development Protection Officer (CDPO), O/O the District Inspector, Social Welfare & Social Education, A.D. Nagar, Agartala, Tripura West seeking necessary help as per the provisions contained in the 2005 Act. She sought seizure of *Stridhan* articles from the possession of the husband. The application which was made before the CDPO was forwarded by the said authority to the learned Chief Judicial Magistrate, Agartala Sadar, West Tripura by letter dated 1.6.2010.

The learned Magistrate issued notice to the respondent who filed his written objections on 14.2.2011.

Before the learned Magistrate it was contended by the respondent that the application preferred by the wife was barred by limitation and that she could not have raised claim as regards *Stridhan* after the decree of judicial separation passed by the competent court. The learned Magistrate taking into consideration the admitted fact that respondent and the appellant had entered into wedlock treated her as an "aggrieved person", but opined that no "domestic relationship" as defined under Section 2(f) of the 2005 Act existed between the parties and, therefore, wife was not entitled to file the application under Section 12 of the 2005 Act. The learned Magistrate came to hold that though the parties had not been divorced but the decree of judicial separation would be an impediment for entertaining the application and being of this view, he opined that no domestic relationship subsisted under the 2005 Act and hence, no relief could be granted. Be it stated here that before the learned Magistrate, apart from herself, the appellant examined three witnesses and the husband had examined himself as DW-1. The learned Magistrate while dealing with the maintainability of the petition had noted the contentions of the parties as regards merits, but has really not recorded any finding thereon.

The aggrieved wife preferred criminal appeal No. 6(1) of 2014 which has been decided by the learned Additional Sessions Judge, Agartala holding, *inter alia*, that the object of the 2005 Act is primarily to give immediate relief to the victims; that as per the decision of this Court in ***Inderjit Singh Grewal v. State of Punjab,*** that Section 468 of the Code of Criminal Procedure applies to the proceedings under the 2005 Act and, therefore, her application was barred by time. Being of this view, the appellate court dismissed the appeal.

The facts that we have enumerated as regards the "status of the parties", "judicial separation" and "the claim for *Stridhan*" are not in dispute. Regard being had to the undisputed facts, it is necessary to appreciate the scheme of the 2005 Act. Section 2(a) defines "aggrieved person" which means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. Section 2(f) defines "domestic relationship" which means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Section 2(g) defines the term "domestic violence" which has been assigned and given the same meaning as in Section 3. Sub-section (iv) of Section 3 deals with "economic abuse". As in the facts at hand, we are concerned with the "economic abuse", we reproduce Section 3(iv) which reads as follows:-

"**Section 3. Definition of domestic violence.**

(iv) "economic abuse" includes-
(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;
(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the

domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and
(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.-For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration."

Regard being had to the aforesaid statement of law, we have to see whether retention of *stridhan* by the husband or any other family members is a continuing offence or not. There can be no dispute that wife can file a suit for realization of the *stridhan* but it does not debar her to lodge a criminal complaint for criminal breach of trust. We must state that was the situation before the 2005 Act came into force. In the 2005 Act, the definition of "aggrieved person" clearly postulates about the status of any woman who has been subjected to domestic violence as defined under Section 3 of the said Act. "Economic abuse" as it has been defined in Section 3(iv) of the said Act has a large canvass. Section 12, relevant portion of which have been reproduced hereinbefore, provides for procedure for obtaining orders of reliefs. It has been held in ***Inderjit Singh Grewal v. State of Punjab,*** that Section 498 of the Code of Criminal Procedure applies to the said case under the 2005 Act as envisaged under Sections 28 and 32 of the said Act read with Rule 15(6) of the Protection of Women from Domestic Violence

Rules, 2006. We need not advert to the same as we are of the considered opinion that as long as the status of the aggrieved person remains and *stridhan* remains in the custody of the husband, the wife can always put forth her claim under Section 12 of the 2005 Act. We are disposed to think so as the status between the parties is not severed because of the decree of dissolution of marriage. The concept of "continuing offence" gets attracted from the date of deprivation of stridhan, for neither the husband nor any other family members can have any right over the *stridhan* and they remain the custodians. For the purpose of the 2005 Act, she can submit an application to the Protection Officer for one or more of the reliefs under the 2005 Act. In the present case, the wife had submitted the application on 22.05.2010 and the said authority had forwarded the same on 01.06.2010. In the application, the wife had mentioned that the husband had stopped payment of monthly maintenance from January 2010 and, therefore, she had been compelled to file the application for *stridhan*. Regard being had to the said concept of "continuing offence" and the demands made, we are disposed to think that the application was not barred by limitation and the courts below as well as the High Court had fallen into a grave error by dismissing the application being barred by limitation. Consequently, the appeal is allowed and the orders passed by the High Court and the courts below are set aside. The matter is remitted to the learned Magistrate to proceed with the application under Section 12 of the 2005 Act on merits.

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11. Section 276 of Indian succession act

Vishwanath Dadu Gurav (D) Th. Lrs & others Vs. Dattatray Ganapati Gurav

Dipak Misra & Prafulla C. Pant , JJ.

In the Supreme Court of India.

Date of Judgment : 16.11.2015

Issue

Probate of will.

Relevant Extract

Briefly stated, one Chandrabai, issueless widow, resident of Khochi, Taluka Hatkanangale, District Kolhapur, died on 2.12.1984. She was owner of certain properties in the Village. An application was moved under Section 276 of Indian Succession Act, 1925 before Civil Judge, Senior Division, Kolhapur, by appellant Vishwanath Dadu Gurav who sought probate of Will dated 11.9.1984, said to have been executed by Chandrabai. In said application, which was registered as Civil Application No. 20 of 1989, the appellant pleaded that Chandrabai, widow of Annappa Gurav was his cousin aunt, and she used to live with him. Chandrabai and her husband, being issueless, were maintained by the appellant till their death. It is also pleaded that a Will dated 11.9.1984 was executed in a sound condition of mind by Chandrabai in the appellant's favour in respect of properties mentioned in the application in presence of Dr. B.A. Herwade (PW-2), and two witnesses, namely, Mahadev Ramngiri Gosavi (PW-4) and Dinkar Shripati Patil. The deed was written by one Sayed. Out of the two attesting witnesses Dinkar Shripati Patil died on 24.5.1985. On the basis of Will, the appellant got his name entered in the revenue record in respect of property in question, vide mutation entry No. 1637 dated 25.1.1985, but on

the objection of respondent the entry was cancelled. Therefore, the petition for probate was filed by the appellant.

Undisputedly, the Will (Ex.-38) in question was unregistered, but evidence was led to prove it on record by the attesting witness. It is also not disputed that the respondents were not related to Chandrabai (deceased). As against said fact there is specific plea that Chandrabai (deceased) was cousin aunt of the original applicant Vishwanath Dadu Gurav, and she used to live with him. PW 2 Dr. Herwade, who used to visit the deceased when she was ill before her death, was got examined on behalf of original applicant to corroborate the fact that Chandrabai used to live with Vishwanath Dadu Gurav. Though trial court recorded finding in favour of the applicant, but the appellate court reversed the same.

No doubt, when there existed no ground of challenge on merits in the writ petition, High Court could not have adverted to it. We are also conscious of the fact that if a party is allowed to seek amendment in the grounds of appeal or writ petition after its disposal, it can lead to abuse of process of law, and the parties would not let the proceedings come to an end. As such, we are not inclined to allow the appellants to add grounds in writ petition by way of amendment, after its disposal. However, considering the peculiar facts and circumstances of the present case, we are of the view that to do complete justice between the parties, the matter needs to be remitted to the appellate court, as the reasons given by said court reversing the findings of the trial court, are not sufficient, and do not answer properly the issues raised in the appeals.

Therefore, without expressing any opinion as to final merits of the case, we direct the appellate court (Additional District Judge, Kolhapur) to decide the appeals afresh after re-appreciating the evidence on record. Accordingly, the present appeals stand disposed of.

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