O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2015

(*OCTOBER*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY

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

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2. Rule 9 Order 26 of CPC

Dr. Bimal Kanta Tripathy Vs. Satya Narayan Mishra and another.
Dr. A.K. Rath , J.
Date of Judgment: 01.10.2015
In the High Court of Orissa: CUTTACK

Issue

Appointment of survey knowing Civil Court Commissioners.

Relevant Extract

The petitioner as plaintiff filed a suit for perpetual injunction restraining the defendant-opposite parties from interfering with the peaceful possession of the suit land or making any construction over the same in the court of the learned Civil Judge (Jr. Divn.), 1st Court, Cuttack, which is registered as C.S. No.213 of 2003. Pursuant to issuance of summons, the defendants entered appearance and filed their written statement denying the assertions made in the plaint. While the matter stood thus, an application was filed by the plaintiff under Order 26 Rule 9 C.P.C. for deputing a civil court commissioner to resolve the dispute. Learned trial court allowed the same and accordingly deputed a survey knowing civil court commissioner to measure the land and submit a report. The commissioner submitted the report on 12.3.2008. The plaintiff filed objection to the same. By order dated 15.7.2008, learned trial court rejected the report of the commissioner.

Thereafter, the plaintiff filed an application on 21.7.2008 for deputing a fresh survey knowing civil court commissioner vide Annexure-3. The defendants filed objection to the same, vide Annexure-4. By order dated 2.8.2008, learned trial court rejected the petition vide Annexure-5. The operative part of the impugned order is quoted hereunder.

"xxx xxx xxx

.....Then in such circumstances, after closer of evidence from both the sides and without considering the actual factum of dispute among the parties in the suit regarding the actual existence of the suit boundary wall at the spot on consideration of the evidence already adduced on record, a party like the plaintiff cannot be assisted by this court to collect any evidence in it's favour

by allowing the present petition and therefore in consideration of all such discussed facts, this court is of the humble view that at this stage the present petition filed by the plaintiff merits no consideration, when the suit posted for hearing argument from both the sides and therefore the same is liable to be rejected at this stage with further observation that, if the court would arrive at a conclusion that neither parties has been able to produce evidence to that effect, then the same can be considered thereof by the court only.

xxx xxx xxx"

On a conspectus of the plaint, it is evident that the dispute pertains to boundary wall. The application was filed by the plaintiff to depute a civil court commissioner to find out the existence of the boundary wall. The earlier application filed by the plaintiff for deputing a survey knowing civil court commissioner under Order 26 Rule 9 C.P.C. was allowed by the learned trial court. The commissioner submitted its report. Since both the parties objected to the same, learned trial court rejected the report.

As has been held by this Court in *Bhabesh Kumar Das v. Mohan Das Agrawal ,2015 (II) CLR 603 ,* when the legislature in its wisdom has not prescribed the stage of appointment of survey knowing commissioner, the power of the Court cannot be cabined, cribbed or confined. The survey knowing commissioner at any stage of the suit provided the pre-conditions enumerated in Order 26 Rule 9 C.P.C. exists.

In view of the same, this Court has no hesitation to quash the order dated 2.8.2008 passed by the learned Civil Judge (Jr. Divn.), 1st Court, Cuttack in C.S. No.213 of 2003. Accordingly, the said order is quashed. The application filed by the plaintiff under Order 26 Rule 9 C.P.C. is allowed. Learned trial court shall do well to appoint a survey knowing civil court commissioner within a period of fifteen days after receipt of the order. Since the evidence is closed, learned trial court shall do well to deliver the judgment after receipt of the report of the commissioner. The petition is allowed.

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3. Order 47 Rule 1 of CPC
Article 227 of Constitution of India

Sukant Kumar Narendra Vs. The Chairman-cum-Managing Director United Commercial Bank & others .
Dr. A. K. Rath , J.
*In the High Court of Orissa, Cuttack***.**
Date of Judgment: 16.10.2015

Issue

Review of a decree / Order passed in the Lok Adalat.

Relevant Extract

The petitioner had availed a term loan amounting to Rs.80, 000/- from opposite party no.2-Bank to purchase a tractor. He became defaulter. Thereafter, opposite party no.2-Bank laid Money Suit No.87 of 1996 in the court of learned Civil Judge (Senior Division), Khurda for realization of Rs.2,44,539/- along with interest. While the matter stood thus, the matter was placed before the Lok Adalat held on 7.5.2000. A joint compromise petition was filed by the parties on certain terms and conditions, vide Annexure-7. The contents of the petition had been read over and explained to the parties. They admitted to be correct. Learned trial court accepted the compromise petition and decreed the suit in terms of the compromise. Learned trial court observed that the compromise petition will form part of the decree. Thereafter, the petitioner deposited the entire amount in terms of the compromise and the same was accepted by the Bank. While the matter stood thus, the plaintiff filed an application under Order 47 Rule 1 CPC to review the order dated 7.5.2000 passed by the learned court below in the Lok Adalat. It is stated that the suit was originally filed for recovery of Rs.2,44,539/- and subsequently the same was increased to Rs.3,09,722/- by way of amendment. The suit was placed

before the Lok Adalat on 7.5.2000 and decreed for Rs.1,15,000/- on the compromise petition signed by defendant no.1 and Assistant Manager of the Bank. While signing the compromise petition, the Assistant Manager put the seal of the Bank and signed the same as if he was an agent of the Bank without any authority to act as a Bank Manager in the Lok Adalat. Further, advocate for the plaintiff had not signed the compromise petition and unaware of the same. The Branch Manager has alone the authority to file a suit, sign the plaint, petition, appoint lawyers and has no authority to transfer power to any other officer/employee. It is further stated that the compromise made in the Lok Adalat was not lawful and the court acted beyond his jurisdiction and accepted the petition for compromise between the Bank and the defendants. To substantiate the case, the Assistant Manager of the Bank, who signed the compromise petition, was examined as P.W.1. By order dated 15.1.2003, learned trial court allowed the application and set aside the order dated 7.5.2000 passed in the Lok Adalat.

The specific language used in sub-section (1) of Section 21 of the Act makes it clear that every award of the Lok Adalat shall be deemed to be a decree of the Civil Court and, as such, executable by that court. Sub-section (2) of Section 21 of the Act provides that every award made by a Lok Adalat shall be final and binding on all the parties to the disputes, and no appeal shall lie to any Court against the award. The decree can be reviewed under Order 47 Rule 1 CPC provided the same satisfies the pre-conditions enumerated under Order 47 Rule 1 CPC.

Order 47 Rule 1 CPC, which is the hub of the issue, is quoted hereunder;

" **Order – XLVII**
REVIEW

1. Application for review of judgment –

(1) Any person considering himself aggrieved —

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;

(b) by a decree or order from which no appeal is allowed; or

(c) by a decision on a reference from a Court of Small Causes; and who, from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review."

On the anvil of the decisions P. T. Thomas v. Thomas Job , (2005) 6 SCC 478 and Kamlesh verma v. Mayabati & Others , AIR 2013 SC 3301 , the instant case may be examined. The matter was placed before the Lok Adalat on 7.5.2000. The Assistant Manager of the Bank as well as defendant no.1-loanee signed the compromise petition. The Assistant Manager of the Bank

had put the seal of the Bank. The contents of the compromise petition had been read over and explained to the parties in presence of their advocates. They admitted the same to be correct. Thereafter, the learned trial court decreed the suit in terms of the compromise and observed that the compromise petition shall do form part of the decree. When a responsible officer of the Bank signed the compromise petition and admitted the same to be correct, this Court fails to understand as to how learned trial court acted beyond its jurisdiction in accepting the compromise petition. Neither there is any material on record to show that the Assistant Manager of the Bank signed the compromise petition at the behest of the Court, nor the decree was obtained by playing fraud on Court. Frivolous allegation has been made against the court without any foundational facts. A litigant cannot be permitted to make frivolous allegation against the Court to get his affairs settled in the manner he wishes. If such a petition is entertained, then it will frustrate the mandate of the Act.

Pursuant to the compromise petition the suit was disposed of. Defendant no.1-loanee has paid the entire amount and the same has been accepted by the Bank. There is no error apparent on the face of the record warranting review of the decree passed in the Lok Adalat. In the wake of the aforesaid, the impugned order dated 15.1.2003 passed by the learned Civil Judge (Senior Division), Khurda in Misc. Case No.84 of 1996 is hereby quashed. Accordingly, the petition is allowed.

* * * * * *

4. Sections 372, 378(3) Cr.P.C.

Satya Pal Singh Vs. State Of M.P. and Ors.
T.S. Thakur & V. Gopala Gowda, JJ.
In the Supreme Court of India.
Date of Judgment: 06.10.2015

Issue

Correctness of the application of Section 378 (3) when appeal filed under Section 372 of Cr.P.C. .

Relevant Extract

The appellant herein made a written complaint dated 19.07.2010 regarding the death of his daughter, Ranjana (hereinafter referred to as "the deceased") to the Addl. Superintendent of Police, Bhind, M.P. The FIR was registered on 27.07.2010. The trial court after the examination of evidence on record passed the judgment and order dated 13.06.2013 acquitting all the accused of the charges levelled against them for the offences punishable under Sections 498A and 304B of Indian Penal Code, 1860 (for short "IPC") and Section 4 of the Dowry Prohibition Act, 1961 and alternatively for the offence punishable under Section 302 of IPC. Being aggrieved of the decision of the trial court, the appellant approached the High Court against the order of acquittal of respondent nos. 2 to 6. The High Court vide its judgment and order dated 04.03.2014 has upheld the trial court's decision of acquittal of all the accused persons. The impugned judgment and order of the High Court is challenged in this appeal before this Court questioning its correctness.

Being aggrieved of the impugned judgment and order the appellant being the legal heir of the deceased filed an appeal before the High Court under proviso to Section 372 of the Code of Criminal Procedure, 1973 (for short "the Cr.P.C."). The High Court, however, has mechanically disposed of the appeal by passing a cryptic order without examining as to whether the leave to file an appeal filed by the appellant as provided under sub-Section (3) to Section 378 of Cr.P.C. can be granted or not. The correctness of the same is questioned by the appellant in this appeal inter alia urging various grounds.

We have carefully examined the above mentioned provisions of Cr.P.C. and the Full Bench decision of Delhi High Court referred to supra upon which strong reliance is placed by the learned counsel for the appellant. There is no doubt that the appellant, being the father of the deceased, has locus standi to prefer an appeal before the High Court under proviso to Section 372 of Cr.P.C. as he falls within the definition of victim as defined under Section 2(wa) of Cr.P.C. to question the correctness of the judgment and order of acquittal passed by the trial court in favour of respondent nos. 2 to 6 in Sessions Case No. 293/2010.

The proviso to Section 372 of Cr.P.C. was amended by Act No.5 of 2009. The said proviso confers a statutory right upon the victim, as defined under Section 2(wa) of Cr.P.C. to prefer an appeal against an order passed by the trial court either acquitting the accused or convicting him/her for a lesser offence or imposing inadequate compensation. In this regard, the Full Bench of Delhi High Court in the case referred to supra has elaborately dealt with the legislative history of insertion of the proviso to Section 372 of Cr.P.C. by Act No. 5 of 2009 with effect from 31.12.2009.

In short, generally speaking, a proviso is intended to limit the enacted provision so as to except something which would have otherwise been within it or in some measure to modify the enacting clause. Sometimes a proviso may be embedded in the main provision and becomes an integral part of it so as to amount to a substantive provision itself." (emphasis supplied) Thus, from a reading of the abovesaid legal position laid down by this Court in the cases referred to supra, it is abundantly clear that the proviso to Section 372 of Cr.P.C. must be read along with its main enactment i.e., Section 372 itself and together with sub-Section (3) to Section 378 of Cr.P.C. otherwise the substantive provision of Section 372 of Cr.P.C. will be rendered nugatory, as it clearly states that no appeal shall lie from any judgment or order of a Criminal Court except as provided by Cr.P.C.

Thus, to conclude on the legal issue:

"whether the appellant herein, being the father of the deceased, has statutory right to prefer an appeal to the High Court against the order of acquittal under

proviso to Section 372 of Cr.P.C. without obtaining the leave of the High Court as required under sub-Section (3) to Section 378 of Cr.P.C.", this Court is of the view that the right of questioning the correctness of the judgment and order of acquittal by preferring an appeal to the High Court is conferred upon the victim including the legal heir and others, as defined under Section 2(wa) of Cr.P.C., under proviso to Section 372, but only after obtaining the leave of the High Court as required under sub-Section (3) to Section 378 of Cr.P.C. The High Court of M.P. has failed to deal with this important legal aspect of the matter while passing the impugned judgment and order.

Adverting to another contention of the learned counsel on behalf of the appellant regarding the failure on the part of the High Court to re- appreciate the evidence it is clear from a perusal of the impugned judgment and order passed by the High Court that it has dealt with the appeal in a very cursory and casual manner, without adverting to the legal contentions and evidence on record. The High Court in a very mechanical way has stated that after a perusal of the evidence on record it found no reason to interfere with the decision of the trial court as the prosecution has failed to establish the charges levelled against the accused beyond reasonable doubt and it has dismissed the appeal by passing a cryptic order. This Court is of the view that the High Court, being the Appellate Court, has to exercise its appellate jurisdiction keeping in view the serious nature of the charges levelled against the accused. The High Court has failed to exercise its appellate jurisdiction properly in the appeal filed by the appellant against the judgment and order of acquittal passed by the trial court.

Hence, the impugned judgment and order of the High Court is not sustainable in law and the same is liable to be set aside by this Court and the case is required to be remanded to the High Court to consider for grant of leave to file an appeal by the appellant as required under sub-Section (3) to Section 378 of Cr.P.C. and thereafter proceed in the matter For the reasons stated supra, this appeal is allowed by setting aside the impugned judgment and order of the High Court. The case is remanded to the High Court to hear the appellant with regard to grant of leave to file an appeal as the appellant is legal heir of the victim as defined under Section 2(wa) of Cr.P.C. and dispose of the appeal in accordance with law in the light of observations made in this order as expeditiously as possible.

* * * * * *

5. Section 439 of Cr.P.C.
Section 37(1) (b)(ii) of N.D.P.S. Act
Sections 20(b)(ii)(C) and 29 of N.D.P.S. Act.

Pankaj Prusty Vs. State of Orissa
Pramod Barik Vs. State of Orissa
Bira Kishore Dwari & Ors. Vs. State of Orissa
S. K. Sahoo , J.
In the High Court of Orissa, Cuttack
Date of order- 26.10.2015
Issue

Decision of granting of bail in N. D. P. S. Cases.

Relevant Extract

On 20.04.2015 one Bibhudata Rautaray, Sub- Inspector of Police, Gochhapada Police Station lodged the First Information Report before Officer-in-Charge, Gochhapada Police Station, District, Kandhamal stating therein that on 19.04.2015 at about 5.30 p.m., the Officer-in-Charge of Gochhapada Police Station received reliable information that one Sumanta Kumar Khatua along with his associates were transporting ganja in a white colour Bolero Car bearing Registration No.OD-27-4015 being escorted by three bikes bearing Registration Nos. OD-31- 0573, OD-27-0623 and OD-02-B-7492 and they were likely to pass through Gochhapada-Balandapada Road. The fact was entered in the Station Diary of the Police Station and then the informant along with the members of the raiding party proceeded to the spot being accompanied by two local witnesses and they reached at Bunduli Chhak and waited there concealing their presence. After about five to ten minutes, the white colour Bolero vehicle being escorted by three bikes came as per prior information and accordingly the raiding party members detained the bikes and the Bolero car. The petitioners in the three bail applications were in the three bikes which were escorting the Bolero vehicle. Two co-accused persons namely, Ashis Pradhan and Bhagat Manira were in the Bolero vehicle. The rider of the first piloting bike bearing Registration No.OD-02-B-7492 ran away towards nearest jungle leaving his bike by the side of the road but the raiding

party members caught hold of him. From the personal search of the petitioners, no incriminating materials were detected but on search, from the Bolero vehicle, seven numbers of big plastic bags containing ganja were found and the total quantity of ganja on weighment became 189 Kg. 460 grams. The weighment of ganja was made in presence of the Block Development Officer, Phiringia -cum- Executive Magistrate. Samples of ganja from each of the seven plastic bags were separately drawn, packed and sealed. The seizure lists in respect of ganja, Bolero vehicle, bikes, articles recovered from personal search of the petitioners were prepared. The petitioners were taken into custody. FIR was lodged against seven accused persons including the petitioners who were in the escorting bikes, two co-accused persons who were in the Bolero vehicle as well as the owner of the Bolero vehicle namely, Sumanta Kumar Khatua.

The bail applications of the petitioners were rejected by the learned Sessions Judge-cum-Special Judge, Kandhamal, Phulbani mainly on the ground that commercial quantity of ganja was recovered from the Bolero vehicle being driven by some of the co-accused persons and the petitioners were escorting the said Bolero in three bikes. It was further observed that even though no ganja was seized from the bikes of the petitioners but they were party to criminal conspiracy for commission of offence under section 20(b)(ii)(C) of N.D.P.S. Act and were caught red handed at the place of incident and admitted before the police officials transporting ganja for their boss Mr. Sumanta Kumar Khatua. It was further held that the investigation was under progress and there was chance of tampering with the prosecution evidence and absconding from the course of justice. Considering the nature, gravity and seriousness of the offence, the bail applications were rejected.

Considering the rival submissions raised at the Bar and looking at the materials available on record, it appears from the statements of Suresh Kanhar, Rohit Kanhar and Ajit Kanhar that the petitioners were escorting the Bolero vehicle in three bikes and when they were intercepted, one of the

petitioners namely, Pankaj Prusty was trying to escape from the spot but was unsuccessful because of the timely intervention of the raiding party members. The conduct of the petitioners, their arrest at the spot coupled with their statements before the raiding party members make out a prima facie case against the petitioners.

Section 37 of the N.D.P.S. Act opens with a non-obstance clause. Non-obstance clause must be given its due importance. The powers of the High Court to grant bail under section 439 Cr.P.C. are subject to the limitations contained in section 37 of the N.D.P.S. Act. The expression "reasonable grounds" used in section 37(1)(b)(ii) of N.D.P.S. Act connotes substantial probable causes for believing that the accused is not guilty of the offence charged which in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of such satisfaction. Whether the grounds are reasonable or not depend on the circumstances in a given situation. The Court while dealing with an application for bail is not called upon to record a finding of not guilty but to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. Additionally, the Court has to record a finding that while on bail, the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.

In view of the available materials on record, nature and seriousness of accusation, conduct of the petitioners in escorting the Bolero vehicle carrying ganja, commercial quantity of ganja seized in the case as well as bar under Section 37 of the N.D.P.S. Act, at this stage when further investigation is under progress, I am not inclined to release the petitioners on bail. Accordingly, the prayer for bail of the petitioners sans merit and hence stands rejected.

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6. Section 341,302,506(II) of IPC

Kamal @ Poorikamal & anr. Vs. State Of Tamil Nadu
Fakkir Mohamed Ibrahim Kalifulla & Uday Umesh Lalit , JJ.
In the Supreme Court of India.
Date of Judgment: 16.10.2015

Issue

Appeal against conviction.

Relevant Extract

One Sultan Meeran hereinafter referred to as Sultan, resident of Coimbatore fell in love with a Hindu girl, converted her to Islam and married her. Thereafter he converted another Hindu girl to Islam and married her as well. This conduct on the part of Sultan, according to the prosecution, enraged the first appellant who one month prior to the incident in question had gone to the house of the deceased. He called Sultan and stated that he was converting Hindu girls to Islam and marrying them and that there was danger to Hindu Religion because of him and that if he were to continue such conversions the things would become different and that he must save his life, if possible. At that time the father of Sultan, i.e. PW 8 Abdul Ajeezkhan was present in the house.

On 26.03.2002 the car belonging to Sultan had gone to the workshop of PW-11 Venu Gopal for repairs. After the car was ready to be picked up, Sultan along with his younger brother PW-1 Abdul Kadhar went to the workshop on the motor-cycle of said PW-1. Sultan had told his elder brother PW 9 Abudhaheer that he and PW-1 would return after having dinner at Galaxy Restaurant. After picking up the vehicle, Sultan and PW-1 had their dinner in the Restaurant and when they came out around 10:35 p.m., Sultan suggested

that they would go to the adjoining club named Snooker World. As they entered, they found the appellants sitting there. The first appellant called Sultan and spoke to him. Thereafter Sultan told PW-1 that they should go home and they came out of the club by about 10:45 p.m. PW-1 then started his motorcycle while Sultan was getting into his car. At that time the appellants came out and asked him to stop the car. The second appellant opened the door and sat in the back seat of the car of Sultan. He held both the hands of the deceased backwards and the first appellant who was standing outside, took out a knife from his trouser and repeatedly stabbed Sultan on the head and neck, stating that he had converted two Hindu girls to Islam and there was danger to Hindu Religion from him. The first appellant no.1 held the neck of Sultan and pulled him, at which point the second appellant came out, took another knife from his pocket and also stabbed him. According to the prosecution, at that stage PW-2 Ismail and PW-3 Sarvan Kumar had also reached the place of occurrence and witnessed the incident. When PWs 1, 2 and 3 tried to apprehend the appellants they were threatened that they would meet the same fate as that of Sultan and the appellants fled away.

Sultan in that injured condition drove the car and while he was near Raj Laxami Clinic he lost control over the vehicle and the car went into a ditch and stopped. PW-1 who was following him on his motor-cycle saw Sultan being unconscious. At that point, PW-9 Abudhaheer also came there. They managed to procure an ambulance and PW-9 took Sultan in the ambulance, followed by PW-1 on his motor-cycle. They reached Government Hospital at about 11:40 p.m. The duty doctor after examining Sultan declared him to be dead. After

putting the dead body in the mortuary, PW-1 went home, wrote down complaint, Ext. P-1 and thereafter reached B-2 Police Station, R.S. Puram and lodged the complaint at about 00:30 hours on 27.03.2002. Crime No.389 of 2002 was accordingly registered for offences punishable under Sections 341, 302, 506 (ii) of the I.P.C. The FIR reached the Magistrate at 11:30 a.m. on 27.03.2002.

The trial court after considering the material on record and rival submissions found the case of the prosecution completely proved and by its judgment and order dated 20.02.2003 convicted the appellants under Section 302 IPC and sentenced them to undergo life imprisonment and to pay fine of Rs.10,000/-, in default whereof to undergo rigorous imprisonment for one year. It also found them guilty under Section 506 (ii) I.P.C. and sentenced them to undergo rigorous imprisonment for 6 months. It however acquitted them of the offence under Section 341 I.P.C. The sentences were directed to run concurrently.

The appellants being aggrieved, filed Criminal Appeal No.572 of 2003 in the High Court which was dismissed by the High Court by its judgment under appeal, thereby affirming the judgment of conviction and order of sentence as recorded by the trial court. This appeal by special leave challenges the said judgment of the High Court.

We have gone through the record and considered rival submissions. The evidence of PW1 is fully consistent with the medical evidence on record and is quite cogent and trustworthy. The presence of PW1 along with the deceased is established through the testimony of PW11 Venu Gopal and such presence was

not seriously challenged by Mr. Basant at all. What was submitted was that there were elements of exaggeration which would create doubts about the case of the prosecution. In our view, there was no exaggeration at all. Further, merely because PW1 a young boy of 17 years had first gone to his house, prepared the complaint and thereafter reached the police station would not be sufficient to discard his testimony. The complaint in question was received at 00.30 hrs., the police had immediately swung into action, prepared inquest panchnama and sent the body of Sultan for post-mortem. Though the FIR reached the Magistrate at about 11:30 am, the post-mortem itself was conducted at 11.45 am and it would not be correct to assume that the FIR was so tailor-made to suit any finding in the post-mortem. To us, there was no delay in the FIR reaching the Magistrate. Moreover, the defence of the first appellant itself accepts his presence at the time and place as alleged by the prosecution. We therefore find the evidence of PW1 reliable and trustworthy, which is supported by the testimony of PWs 2 and 3 as well. According to the medical evidence on record two sharp cutting weapons were used for inflicting the injuries found on the person of Sultan and that the injuries were possible by MO. Nos.1 and 2 recovered from the appellants. The involvement of both the appellant thus stands proved.

In the instant case both the carotid artery and jugular vein were found cut and Sultan had soon thereafter lost consciousness. These features are clearly indicative that injury No.1 was sufficient in the ordinary course of nature to have caused the death. Additionally Dr. Sunder Rajan had also stated that lot of blood should have been lost as a result of 16 stab wounds. In our considered view, this is not a case of culpable homicide not amounting to murder. The assault was deliberate and designed to achieve the result namely the death of Sultan. The courts below were therefore right and justified in convicting and sentencing the appellants for the offences punishable under Sections 341, 302, 506 (ii) IPC. This appeal must therefore fail and is dismissed.

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7. Sections 409,420,467,468,477 - A/34 of IPC
Section 438 of Cr.P.C.

Sudhir Vs. The State of Maharashtra and another .
WITH
Chandrakant Vs. State of Maharashtra and another
WITH
Chandrakant Vs State of Maharashtra and another
Dipak Misra & Prafulla C. Pant , JJ.
In the Supreme Court of India
Date of Judgment: 01.10. 2015.

Issue

Justification of Cancellation of Anticipatory Bail.

Relevant Extract

Brief facts of the case are that appellants Chandrkant Wagh and Sudhir Dahake are Executive Engineer and Sectional Engineer respectively in Rural Water Supply Department of Zilla Parishad, Jalgaon. Two First Information Reports were registered against them with the serious allegations of criminal misappropriation of funds released for implementation of schemes of drinking water in the villages of Waghlud and Sonwad Khurd in Tehsil Dharangaon. C.R. No. 71 of 2013 relates to Waghlud and C.R. No. 73 of 2013 relates to village Sonwad Khurd. The FIRs in respect of these crimes appeared to have been registered only after enquiries were made under directions of Revenue Commissioner, by Deputy Commissioner (Development), Nasik Region, who found substance in the allegations against the appellants. In C.R. No. 71 of 2013 there is allegation of misappropriation of Rs.28.35 lacs, and in C.R. No. 73 of 2013 the allegations relate to misappropriation of Rs.13.75 lacs. In respect of village Waghlud one Mangal Ganpat Patil was shown as contractor, but no such contractor was found in existence. Vouchers shown regarding payment of Rs. 14.94 lacs were found false, which related to construction of overhead water tank in Waghlud village which was already in existence in said village under another scheme. The amount of first installment of Rs.1.43 lacs and second installment of Rs.1.44 lacs for construction of public toilet was found to have been made falsely, as no construction of public toilet was made in the village. The amount was shown to have been made to one Rohitdas

Aawasu Koli. Two measurement books were kept to submit exaggerated revised estimates. Rs.1.30 lacs was shown to have been spent on erection of barbed wire in village Waghlud, but no work of fencing was done in the village. In the village Sonwad Khurd (C.R. No. 73 of 2013) work included relating to digging of bore well, fixing of pump and machinery, construction of pump house, and laying the pipeline. Barbed fence was also one of the works to be executed in village Sonwad Khurd. Most of the payments in respect of these works are shown to have been made in cash.

In ***Gurbaksh Singh Sibbia and others v. State of Punjab***, **(1980)2 SCC 565** , the Constitution Bench of this Court, while laying down the guidelines relating to grant of anticipatory bail, has observed in paragraph 14 as under: -

"**14.** Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges……."

The Constitution Bench in the above mentioned case, in paragraphs 16 and 17, while observing that the relief of anticipatory bail cannot be said to be barred merely for the reason that the allegations relate to economic offences or corruption, has clarified that where the allegations are malafide, the prayer for anticipatory bail can be accepted. In the present case, at this stage, there

appears to be no malice on the part of Revenue Commissioner, who ordered enquiry, or Deputy Commissioner, who conducted enquiry, before getting lodged the First Information Reports against the appellants. In ***Bhadresh Bipinbhai Sheth v. State of Gujarat and Another,*** **2015 (9) SCALE 403** , laying down the principles regarding cancellation of anticipatory bail in sub paras (vi) and (ix) of para 23, this Court has observed as under: -

"(vi) It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the Public Prosecutor or the complainant, on finding new material or circumstances at any point of time."

xxx xxx xxx

(ix) No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with legislative intention, the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case."

Having considered the submissions made by learned counsel for the parties, and after considering the gravity of the offence, circumstances of the case, particularly, the allegations of corruption and misappropriation of public funds released for rural development, and further considering the conduct of the appellants and the fact that the investigation is held up as the custodial interrogation of the appellants could not be done due to the anticipatory bail, we are of the opinion that the High Court has rightly cancelled the anticipatory bail granted to the appellants by the Additional Sessions Judge, Jalgaon. Therefore, we are not inclined to disturb the same. Accordingly, we decline to interfere with the order of cancellation of anticipatory bail, passed by the High Court. All the four appeals are dismissed.

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8. Sections 25, 26 & 27 & Section 3 of the Evidence Act
Section 439 Cr.P.C.
Section 20(b) (ii) (c)/25/29/37 of N.D.P.S. Act.

Abhaya Parichha Vs. State of Orissa.
S. K. Sahoo, J.
In the High Court of Orissa, Cuttack

Date of order- 26.10.2015

Issue

Importance of confessional statement by an accused before a police officer and statement made by co-accused in considering bail application under Section 439 of Code Of Criminal Procedure code and Section 37 of N.D.P.S. Act.

Relevant Extract

On 19.07.2014 one Prabhansu Sekher Mishra, Sub- Inspector of Police, Adava Police Station lodged the First Information Report before the Inspector-in-Charge, Adava Police Station, District-Gajapati stating therein that on 19.04.2014 as per the direction of the Inspector-in-Charge, Adava Police Station, the informant along with other police staffs proceeded towards village Chudangapur to verify the authenticity of the information regarding transportation of contraband ganja. At about 8.30 a.m. the raiding party members noticed one Mahindra Max Pick Up Van bearing Registration No. OR-07-N- 0849 was coming from village Chudangapur and moving towards Antarba side. Out of suspicion, they stopped the vehicle and found two persons inside the vehicle and there were four jerry bags from which acute smell of contraband ganja was coming out. The driver of the Van disclosed his name as Ramesh Raita and the other person disclosed his name as Pradeep Bira. On being interrogated by the police officials, accused Pradeep Bira disclosed that as per the direction of the petitioner, he procured ganja from the locality and packed the same in four jerry bags and transporting it to Chandiput to the house of the petitioner for commercial purpose. As the persons present in the Van failed to produce any authority regarding transportation of contraband ganja, observing all the formalities, the contraband ganja from inside the jerry bags were weighed by weighman in presence of two independent witnesses and S.D.P.O., R. Udayagiri and it was found in total to be 102 kg. 600 grams. Samples of ganja were drawn from each of the packets and the rest ganja were packed and sealed by the informant by using personal brass seal and keeping paper slips with signatures of witnesses and accused persons. As commercial quantity of ganja was found

from the exclusive and conscious possession of co-accused Pradeep Bira and Ramesh Raika, FIR was registered against three persons namely Pradeep Bira and Ramesh Raika, who were found in the vehicle so also against the petitioner under sections 20(b)(ii)(C) /25/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter for short "N.D.P.S. Act").

The Inspector-in-charge of Adava Police Station entrusted Mukesh Lakra, S.I. of Police to investigate the case. During course of investigation, the witnesses were examined, the seized exhibits were sent to Deputy Director, RFSL, Berhampur for chemical analysis. The chemical examination report indicated that the exhibits were found to contain fruiting and flowering tops of cannabis plant i.e. ganja. Though the Investigating Officer conducted several raids in the house of the petitioner to arrest him but he was not traced out and ultimately prayer was made before the learned Sessions Judge -cum- Special Judge, Paralakhemundi to issue non-bailable warrant of arrest against the petitioner. Superintendent of Police, Gajapati supervised the case and as prima facie evidence was found against the petitioner and two co-accused persons, charge sheet was placed against them on 30.09.2014 under section 20(b)(ii)(C) /25/29 of N.D.P.S. Act.

Adverting to the materials on record, it is apparent that except the confessional statement of co-accused Pradeep Bira before police officers that he procured ganja on the direction of the petitioner and was transporting the same to the house of the petitioner and that the petitioner was found absent from his house when raids were conducted by police, there is no other clinching material against the petitioner.

N.D.P.S. Act is a complete Code relating to narcotic substances and dealing with the offences and the procedure to be followed for the detection of the offence as well as for the prosecution and the punishment of the accused. The provisions are purely penal in nature which can, in certain cases, deprive a person of his liberty for a period which can extend to ten years, twenty years and even death sentence under certain circumstances. The provisions therefore have to be strictly construed and safeguards provided therein have to be scrupulously and honestly followed.

In the present case, the informant is a police officer who has mentioned about the confessional statement of co- accused Pradeep Bira in the F.I.R. implicating the petitioner in the crime. The witnesses who are mostly police

officials and members of raiding party have also stated about suchconfessional statement of co-accused. The confessional statement has not been taken down in writing in verbatim.

The object of section 25 of the Evidence Act, wherein it is mentioned that no confession made to a police officer, shall be proved as against a person accused of any offence, is that the officer would make every effort to collect the evidence of the commission of the crime and from the power he possesses, he has the capacity to influence, pressurise or subject the person to coercion to extract confession.

A confessional statement made by a person whilst he is in custody of a police officer shall not be proved as against him unless it is made in the immediate presence of a Magistrate in view of section 26 of the Evidence Act. In the present case, no Magistrate was present when the co-accused Pradeep Bira was stated to have made the confessional statement before the police officers.

Confession of a co-accused does not come within the definition of "evidence" as contained in section 3 of the Evidence Act. It cannot be treated as substantive evidence. Law is well settled that the Court cannot start with confession of a co- accused person. It must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on some other evidence.

Now, embarking upon the case material to determine the complicity of the petitioner in the crime and keeping in view the bar provided under section 37 of N.D.P.S. Act, it appears that the only material available against the petitioner is the confessional statement of one of the co-accused namely Pradeep Bira before police. The confessional statement has not been recorded into writing. There is no corroborating material to lend support to such confession against the petitioner. No incriminating materials were found in spite of several raids of the house of the petitioner. No witness has stated about the petitioner dealing with ganja business. On perusal of the materials on record, I am prima facie satisfied that there are no reasonable grounds for believing that the petitioner is guilty of the offences under which charge sheet has been submitted.

Keeping in view the other requirement under section 37(1)(b)(ii) of N.D.P.S. Act, that the Court is to be satisfied while granting bail that the accused is not likely to commit any offence while on bail, such requirement can be fulfilled in a hypothetical manner keeping in view the past conduct of the accused if there is no allegation of involvement in any previous offence. The learned counsel for the State on instruction submitted on 14.9.2014 that there is no criminal antecedent against the petitioner in Adava police station. No other material was produced by the learned counsel for the State regarding criminal antecedent of the petitioner in any other police station. In absence of any definite material about the past involvement, for the purpose of bail in this case, I proceed on the assumption that the petitioner if released on bail is not likely to commit an offence while on bail. The witnesses are mainly police officials and case is also based on documentary evidence and therefore there is no chance of tampering with the evidence.

In absence of any prima facie materials on record regarding the involvement of the petitioner in the crime in question and also in absence of any criminal antecedent against the petitioner, it would not be just and proper to deny bail to the petitioner only on the ground that the petitioner was found absent from his house when raids were conducted and that non- bailable warrant of arrest was issued against him on the prayer of the Investigating Officer.

Without detailed examination of evidence and elaborate discussion on merit of the case but considering the nature of accusation and absence of prima facie materials against the petitioner regarding his involvement in the commission of offences and also taking into account his period ofdetention in judicial custody, I am of the view that it would be proper to release the petitioner on bail. Accordingly, the prayer for bail of the petitioner is allowed. Let the petitioner be released on bail in the aforesaid case on furnishing bail bond of Rs.2,00,000/-(two lakhs) with two local sureties each for the like amount to the satisfaction of the Court in seisin over the matter with further terms and conditions as the learned Court may deem just and proper. Accordingly, the BLAPL is disposed of. Urgent certified copy of this order be granted on proper application.

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9. Section 24(2)

The Working Friends Co-operative House Building Society Ltd. Vs. The State of Punjab & Ors.
Madan B. Lokur & R.K. Agrawal, JJ.
In the Supreme Court of India
Date of Judgment: 12.10.2015

Issue

Overriding effect of Section 24(2) of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 over land Acquisition Act , 1894.

Relevant Extract

A notification was issued by the State Government under Section 4 of the Land Acquisition Act, 1894 on 12th November, 1992 proposing to acquire a large chunk of land. This was followed by a notification under Section 6 of the Land Acquisition Act issued on 21st July, 1993. Although, a large chunk of land was acquired by virtue of these two notifications, the appellant is concerned only with its land admeasuring about 14.90 acres. The compulsory acquisition of the appellant's land led to proceedings for adjudication of the compensation due from the State Government. Accordingly, an Award was passed by the Land Acquisition Collector on 22nd February, 1995 and the compensation determined at Rs.35,52,528/-. For reasons that are not clear, the compensation was not tendered to the appellant but was deposited in the Treasury. The appellant challenged the quantum of compensation in the Reference Court and when that was enhanced, the enhanced compensation was deposited in the Reference Court.

Feeling aggrieved by the acquisition of its land, the appellant preferred C.W.P. No. 2996 of 1995 in the Punjab and Haryana High Court wherein the above two notifications were challenged. As an interim measure, the High

Court directed the maintenance of status quo and since the appellant was in actual, physical, vacant and peaceful possession it continued to remain so in view of the interim orders.

The writ petition filed by the appellant was eventually dismissed by the High Court by the impugned judgment and order dated 24th April, 2012. The appellant has challenged the decision of the High Court in this Court and during the pendency of this appeal, Parliament enacted the Act which came into force with effect from 1st January, 2014.

Law on the subject

The law on the subject is now no longer *res integra*. The leading judgment in respect of Section 24(2) of the Act was delivered in ***Pune Municipal Corporation.*** It was concluded in paragraph 20 of the aforesaid decision, that the Award had been made by the Land Acquisition Collector more than five years prior to the commencement of the Act and compensation had not been paid to the landowners/persons interested nor deposited in the Court. It was held that the deposit of compensation in the Government Treasury is of no avail. Consequently, there was no option but to hold that the land acquisition proceedings were deemed to have lapsed under Section 24(2) of the Act. Paragraph 20 reads as follows:-

"From the above, it is clear that the award pertaining to the subject land has been made by the Special Land Acquisition Officer more than five years prior to the commencement of the 2013 Act. It is also admitted position that compensation so awarded has neither been paid to the landowners/persons interested nor deposited in the court. The deposit of compensation amount in the Government treasury is of no avail and cannot be held to be equivalent to compensation paid to the landowners/persons interested. We have, therefore, no hesitation in holding that the subject land acquisition proceedings shall be deemed to have lapsed under Section 24(2) of the 2013 Act."

Applying the law laid down by the Constitution Bench, it must be held that the appellant had an accrued right which must be recognized by Section 24(2) of the Act. The Ordinance which purported to take away such an accrued right would have to be treated as prospective unless the legislative intent was clearly to give it retrospective effect. As mentioned above, this issue does not arise in the present case but is being mentioned only to buttress the conclusion arrived at by this Court in ***Karnail Kaur v. State of Punjab ,(2015) 3 SCC 206*** and subsequent decisions**.**

In so far as the facts of the present appeal are concerned, there is considerable doubt whether the appellant is in possession of the acquired land or whether the respondents are in possession of the acquired land. It is not necessary for us to go into this issue at all. This is for the reason that one of the requirements mentioned in Section 24(2) of the Act is that the compensation should have either been paid to the land owner or should have been deposited in the Reference Court. The admitted position is that the compensation of Rs. 35,52,528/- was neither paid to the appellant nor was it deposited in the Reference Court. It was admittedly deposited in the Government Treasury of the State. The deposit was, apart from anything else, made only after the Act came into force and was perhaps with a view to get over the provisions of Section 24(2) of the Act and the prayer made in I.A. No. 4. Unfortunately, even the deposit of the compensation amount in the Reference Court on 26th June, 2014 does not come to the aid of the appellant under any circumstances and cannot be taken as "deemed payment".

Taking into account all the facts of the appeal as well as the consistent view taken by this Court on several occasions, we have no hesitation in coming to the conclusion that acquisition proceedings in so far as the appellant is concerned lapsed with the enactment of the Act.

The judgment and order passed by the High Court is consequently set aside and it is held that the acquisition proceedings initiated by the notifications dated 12th November, 1992 and 21st July, 1993 followed by the Award dated 22nd February, 1995 have lapsed only in so far as the appellant is concerned. The appeal is allowed.

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10. Rule 22 of Orissa High Court Rules
Order XVI -Rule 1 & 1-A of CPC
Article 227 of Constitution of India

M/s. Finolex Plastro Plasson Ltd. Vs. Lalatendu Deo.
Dr. A. K. Rath, J.
In the High Court of Orissa: Cuttack
Date of Judgment: 16.10.2015

Issue

Grounds of rejection.

Relevant Extract

Opposite party as plaintiff laid C.S. No.16 of 2003 in the court of learned Civil Judge (Senior Division), Koraput seeking refund of Rs.64,221/- as subsidy from the defendant. Pursuant to issuance of summons, defendant entered appearance and filed comprehensive written statement denying the assertions made in the plaint. After closure of evidence from the side of the plaintiff, the defendant filed an application to call for certain documents from the Horticulture Department, Koraput. It is stated that the defendant applied for the certified copies of the said documents but copies were not furnished. The petitioner resisted the petition on the ground that the Horticulture Department, Koraput is not a party to the suit. Thus no direction can be given to the said department to produce the said documents. By order dated 20.4.2006, the learned trial court rejected the petition on the ground that no good cause has been shown in calling for the documents soon after settlement of the issues. It was further held that the application was not bona fide.

In paragraph-11 of the report, the apex Court held that the analysis of the relevant provisions would clearly bring out the underlying scheme under Order XVI, Rules 1 and 1-A, and Rule 22 of the High Court Rules would not derogate from such scheme. The scheme is that after the court framed issues which give notice to the parties what facts they have to prove for succeeding in the matter which notice would enable the parties to determine what evidence oral and documentary it would like to lead, the party should file a list of

witnesses with the gist of evidence of each witness in the court within the time prescribed by sub-rule (1). This advance filing of list is necessary because summoning the witnesses by the court is a time consuming process and to avoid the avoidable delay an obligation is cast on the party to file a list of witnesses whose presence the party desires to procure with the assistance of the court. But if on the date fixed for recording the evidence, the party is able to keep his witnesses present despite the fact that the names of the witnesses are not shown in the list filed under sub-rule (1) of Rule 1, the party would be entitled to examine these witnesses and to produce documents through the witnesses who are called to produce documents under Rule 1-A. The Court has no jurisdiction to decline to examine the witness produced by the party and kept present when the evidence of the party is being recorded and is not closed, and the court has no jurisdiction to refuse to examine the witness who is present in the court on the short ground that the name of the witness was not mentioned in the list filed under sub-rule (1) of Rule 1 of Order XVI.

The same view was taken in ***Vidhyadhar v. Mankikrao & another (1999) 3 SCC 573***. The case of the petitioners is required to be examined on the anvil of the decisions cited supra.

In the application it is stated by the defendant that the defendant tried his best to get the copies of those documents but all his attempts ended in fiasco. The documents mentioned in the petition are very much essential for proper adjudication of the same. Thus the finding of the court below that no good cause is shown is not correct. Merely because the application was filed at a belated stage the same is not per se a ground to reject the same. In view of the same, the order dated 20.4.2006 passed by the learned Civil Judge (Senior Division), Koraput in C.S. No.16 of 2003 is quashed. Consequently the application filed by the petitioner calling for the documents from the Horticulture Department, Koraput is allowed. The petition is allowed.

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11. Section 30 & 25 (1) (v)
Article 227 of Constitution of India

Udayanath Swain Vs. Dillip Kumar Rout and others
C.R. Dash, J.
In the High Court of Orissa: Cuttack
Date of Judgment: 16.10.2015

Issue

Validity of Candidature.

Relevant Extract

The present petitioner is the elected Sarpanch of Dudhujori Grama Panchayat under Sukinda Block in the district of Jajpur. He was declared elected in the Grama Panchayat Election held in 2012. The present petitioner along with opposite party nos.1 and 3 to 6 contested in the election. The petitioner having secured the highest number of votes was declared elected. The present opposite party no.1 secured the second highest number of votes and opposite party nos.3 to 6 secured lesser votes than opposite party no.1. Opposite party no.1 initiated the election dispute in the Court of learned Civil Judge (Jr. Division), Jajpur Road –cum-Election Tribunal vide Election Misc. Case No.2 of 2012 on the ground that the petitioner is disqualified under Section 25(1)(v) of the Orissa Gram Panchayat Act, 1964 ('Act' for short), because his fourth child namely Mamali Swain has taken birth on 04.05.1995 after the cutoff date, i.e. 21.04.1995. The admitted case of the parties is that, all the contested parties including the petitioner and opposite party no.1 filed their nomination papers before the Election Officer within the stipulated period from 07.01.2012 to 12.01.2012. The petitioner filed nomination papers vide Ext.8, which is an admitted document. Such nomination paper of the petitioner was objected by opposite party no.1 vide Ext.9. The reply to the objection has been proved as Ext.10 and the order of the Election Officer rejecting the objection vide Ext.9 has been proved as Ext.11. In Ext.8, the petitioner has mentioned in his own handwriting that he has only one child namely Ranjan Kumar Swain. Opposite party no.1 filed election dispute asserting that the petitioner is blessed with four children and they are namely

Ranjan Kumar Swain, Sujata Swain, Babita Swain and Mamali Swain. It is further asserted that the date of birth of the fourth child Mamali Swain is 04.05.1995, which is after the cutoff date, i.e. 21.04.1995.

The petitioner as opposite party no.2 before the Election Tribunal took the plea that his first two children namely Ranjan Swain and Sujata Swain were adopted by him and the date of birth of Mamali Swain is 13.03.1995 and not 04.05.1995. It is further asserted by the petitioner in his written statement that the date of birth of Mamali Swain was shown as 04.05.1995 in the School Admission Register only for the purpose of her service benefits in future. Learned Election Tribunal, on the basis of the pleadings of the parties, framed as many as four Issues.

So far as the fact of the present case is concerned, the present case can however be distinguished. From the material on record, it is found that the present petitioner has not come to litigation with a clean hand. In the nomination papers filed by him, vide Ext.8, he declared that he has only one child namely Ranjan Kumar Swain. Before the Election Tribunal he took the plea that he has adopted Ranjan Kumar Swain and Sujata Swain, but he failed to prove such fact as found from the materials on record. He also took the plea in the written statement that, though the date of birth of Mamali Swain is 13.03.1995, he has shown the same to be 04.05.1995 in the School Admission Register only for the purpose of her service benefits in future. If the difference in the actual date of birth of Mamali Swain, as asserted by the petitioner, and the date of birth as recorded in the School Admission Register is compared, it is found that the difference of days in between both the dates is only one month and 22 days. Such a small period is totally insufficient for Mamali Swain to get any service benefits in future, as asserted by the petitioner. There is also no cogent evidence to prove that the actual date of birth of Mamali Swain is 13.03.1995.

Taking into all such facts and especially the fact that the petitioner has not come with a clean hand to the Court of equity, it is to be held that no finding can be arrived at in his favour only on the basis of presumption, when such presumption is not available to be drawn in the facts and circumstances of the case.

Lastly, it is submitted by learned counsel for the petitioner that the issue of adoption of Ranjan Kumar Swain and Sujata Swain having not been framed, the matter should be remanded back for fresh disposal. This Court, in the case of **Sri Badridas Goenka & Others *Vs*. Sri Gopal Jew Thakur & Others, XXXIII 1967 C.L.T. 995** has held that if the parties went to trial fully knowing the rival case and led all the evidences not only in support of their contention but in refutation of those in the other side, it cannot be said that, absence of an issue was fatal to the case or that there was mis-trial which vitiates the proceeding. In the present case, issue of adoption was raised by the petitioner for the first time before the Election Tribunal. He adduced full evidence being aware of his pleadings, and the learned Courts below also took into consideration the evidence adduced. In view of such fact, I do not find any justification to remand the matter at this stage for fresh disposal.

Taking into consideration the discussions supra and the evidence adduced by the parties, including the impugned judgments, I do not feel inclined to interfere in the matter. In the result, the writ petition is devoid of any merit and the same is accordingly dismissed. Parties are directed to bear their respective costs of litigation.

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