O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2016

(*SEPTEMBER*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY

MONTHLY REVIEW OF CASES ON CIVIL, CRIMINAL & OTHER LAWS, 2016 (SEPTEMBER)

I N D E X

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Criminal Procedure Code

2. Section 239, 200,301 & 302

Dhariwal Industries Ltd. **Versus** *Kishore Wadhwani & Ors.*

Dipak Misra & Adarsh Kumar Goel, JJ.

In the Supreme Court of India.

Date of Judgment -06.09.2016

Issue

Whether a private person be permitted to conduct the prosecution in the magistrate's Court at every stage of the case – Challenged.

Relevant Extract

The facts which are requisite to be stated for the purpose of adjudication of the present appeal are that the appellant filed a complaint under Section 200 CrPC for the offences punishable under Sections 109, 193, 196, 200, 465, 467 and 471 read with Section 120-B of Indian Penal Code (IPC). The learned Magistrate exercising the power under Section 156(3) CrPC, directed the police to investigate into the allegations. The investigating agency registered an FIR and eventually laid the charge-sheet before the Court and thereafter the case was registered as C.C. No. 927/PW/2007.

After the charge-sheet was filed, the accused persons filed an application under Section 239 CrPC seeking discharge. At that juncture, the appellant made an oral prayer before the learned Magistrate seeking permission to be heard along with the Assistant Public Prosecutor. The learned Magistrate after hearing the learned counsel for the parties observed that the original complainant is not alien to the proceeding and, therefore, he has a right to be heard even at the stage of framing of charge and, accordingly, granted the permission. Being dissatisfied with the aforesaid order, the accused-respondents preferred the criminal writ petition before the High Court. The High Court referred to Section 301 CrPC and certain authorities of this Court and came to hold thus:-

"Undoubtedly the first informant now enjoys a role higher than earlier as already seen in the preceding paragraphs. In fact perusal of the petition shows that the petitioners also not wish to deny participation of the first informant altogether. They only want his role to be limited as under Section 301 Cr.P.C. An application

for discharge can result into putting an end to the prosecution either partly or fully. This stage is in that respect similar to the stage of consideration of the police report by the Magistrate under Section 173(2) Cr.P.C and the proceedings for quashing of the complaint filed by the accused person. The first informant, therefore, is likely to be interested in seeing that the matter reaches the stage of trial and is disposed off after recording of evidence. If by judicial pronouncements, he is now granted hearing at the earlier two stages, he can be granted hearing at the stage of discharge also, though the Criminal Procedure Code does not make provision for hearing to him at that stage. If the first informant appears before the Court and desires to participate in the application, opportunity cannot be refused to him. Now the next question would be about the nature of the hearing to be given to the first informant. Should the hearing be independent to the hearing to the Public Prosecutor or it be through the Public Prosecutor. In my opinion, his role will have to be limited as under Section 301 Cr.P.C. for the same reasons, as given in Anthony D'Souza's case and keeping in focus the role of the Public Prosecutor. He cannot be allowed to take over the control of prosecution by allowing to address the court directly. Therefore, the petition is partly allowed. The impugned order is modified to the extent that the Counsel engaged by respondent no. 2 shall act under the directions of the Assistant Public Prosecutor in-charge of the case."

Section 301 Cr.P.C. reads as follows:-

" Appearance by Public Prosecutors.-

(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case."

Section 302 Cr.P.C which is pertinent for the present case reads as follows:-

" Permission to conduct prosecution-(1)Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:
Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader."

In the backdrop of the above provisions we have to understand the purport of Section 301 of the Code. Unlike its succeeding provision in the Code, the application of which is confined to magistrate courts, this particular section is applicable to all the courts of criminal jurisdiction. This distinction can be discerned from employment of the words any court in Section 301. In view of the provision made in the succeeding section as for magistrate courts the insistence contained in Section 301(2) must be understood as applicable to all other courts without any exception. The first sub-section empowers the Public Prosecutor to plead in the court without any written authority, provided he is in charge of the case. The second sub-section, which is sought to be invoked by the appellant, imposes the curb on a counsel engaged by any private party. It limits his role to act in the court during such prosecution under the directions of the Public Prosecutor. The only other liberty which he can possibly exercise is to submit written arguments after the closure of evidence in the trial, but that too can be done only if the court permits him to do so."

As the factual score of the case at hand is concerned, it is noticeable that the trial court, on the basis of an oral prayer, had permitted the appellant to be heard along with the public prosecutor. Mr. Tulsi, learned senior counsel submitted such a prayer was made before the trial Magistrate and he had no grievance at that stage but the grievance has arisen because of the interference of the High Court that he

can only participate under the directions of the Assistant Public Prosecutor in charge of the case which is postulated under Section 301 Cr.P.C.

We have already explained the distinction between Sections 301 and 302 Cr.P.C. The role of the informant or the private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of public prosecutor. As far as Section 302 Cr.P.C is concerned, power is conferred on the Magistrate to grant permission to the complainant to conduct the prosecution independently.

Regard being had to the rivalised submissions, we only observe that it would be open to the appellant, if so advised, to file an application under Section 302 CrPC before the learned Magistrate. It may be clearly stated here that the said provision applies to every stage including the stage of framing charge inasmuch as the complainant is permitted by the Magistrate to conduct the prosecution. We have said so to clarify the position of law. If an application in this regard is filed, it shall be dealt with on its own merits. Needless to say, the order passed by the learned Magistrate or that of the High Court will not be an impediment in dealing with the application to be filed under Section 302 Cr.P.C. It is also necessary to add that we have not expressed any opinion on the merits of the application to be filed. The criminal appeal is, accordingly, disposed of.

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3. Section 482 of Cr. P. C.
Section 341,354,394 of IPC
Bipul Parua Versus Kakali Jena & Another **.**
S.K. Sahoo, J.

In the High Court of Orissa

Date of Hearing and Judgment- 16.09.2016

Issue

Challenging the order of cognizance under section 341,354 and 394 of IPC.

Relevant Extract

It is the prosecution case as per the complaint petition filed by the opposite party no.1 Smt. Kakali Jena that after her dispute with her husband, she was residing at her father's place and the petitioner was very closely related to her father and he use to come to her father's place and in that process, the complainant got acquaintance with the petitioner. The petitioner assured the complainant to arrange a job for her in any private nursing home. On 30.04.2008 at about 4.00 p.m. the petitioner came to the father's place of the complainant and took her in a Hero Honda motor cycle towards Jaleswar as she was told to join her service by evening. It is the further case of the complainant that she brought gold ornaments as well as cash of Rs.10,000/- with her and the petitioner reached at Karmada at about 10.00 p.m. and stopped the motor cycle and asked the complainant to wait in a waiting room so that he can bring some tiffin for both. The petitioner returned after some time, sat near the complainant and outraged her modesty. The petitioner took away the gold ornaments of the complainant so also cash. When the complainant shouted, others arrived there and they caught hold of the petitioner who confessed his guilt and requested them to settle the matter which was fixed to the next day. The witnesses kept the petitioner in the night with them but cunningly the petitioner escaped with his vehicle.

A first information report was lodged before Officer in charge, Kamarda Police Station on 10.05.2008 but no action was taken on the report and it was not even registered as the petitioner was an outsider and accordingly, the complaint petition was filed.

The learned Magistrate recorded the statement of the complainant-opposite party no.1 under section 200 Cr.P.C. and after going through the complaint petition as well as the statement of the complainant found prima facie case under sections

341/354/394 of the Indian Penal Code and accordingly, took cognizance of such offences and since the offences under sections 354/394 of the Indian Penal Code are non-bailable in nature, he directed for issuance of non-bailable warrant of arrest against the petitioner.

Considering the submissions made by the learned counsel for the petitioner and the fact that the petitioner who is an accused in the complaint case is a resident of village Bajabadia under Bhagabanpur Police Station in the district of East Mednipur, West Bengal and the complaint petition was filed in the Court of J.M.F.C., Jaleswar and the place of residence of the petitioner is beyond the area in which the Magistrate exercises jurisdiction, I am of the view that the Magistrate before issuance of process should have followed the procedure as laid down under section 202 of Cr.P.C.

Another illegality has been committed by the learned Magistrate in the impugned order that after taking cognizance of offences in a complaint case, he has straight away issued nonbailable warrant of arrest on the ground that the offences under sections 354/394 of the Indian Penal Code are non-bailable in nature. In case of Inder Mohan Goswami & Anr. -Vrs.- State of Uttaranchal & Ors. reported in (2008) 39 Orissa Criminal Reports (SC) 188, it is held as follows:-

"54. In complaint cases, at the first instance, the Court should direct serving of the summons along with the copy of the complaint. If the accused seems to be avoiding the summons, the Court, in the second instance should issue bailable warrant. In the third instance, when the Court is fully satisfied that the accused is avoiding the Court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to."

Since it is a complaint case and after taking cognizance, at first instance the learned Magistrate has issued non-bailable warrant, such order is also not sustainable in the eye of law.

Law is well settled that the inherent jurisdiction of the High Court under section 482 of Cr.P.C. though wide has to be exercised sparingly, carefully and with caution. If any abuse of process leading to injustice is brought to the notice of

the Court or if any statutory bar before issuance of process has been overlooked then the High Court would be fully justified in invoking its inherent power to prevent miscarriage of justice. The law relating to exercise of power under section 482 Cr.P.C. has seen crystallized in case of R.P. Kapur -Vrs.- State of Punjab: A.I.R. 1960 S.C.866, Smt. Nagawwa -Vrs.- Veeranna Shivalingappa : A.I.R. 1976 S.C. 1947,State of Karnataka -Vrs.- L. Muniswamy : A.I.R. 1977 S.C. 1489, Janta Dal -Vrs.- H.S. Chowdhary : A.I.R. 1993 S.C. 892, Dr. Raghubir Sharan -Vrs.- State of Bihar : A.I.R. 1964 S.C.1, State of Haryana -Vrs.- Bhajan Lal : A.I.R. 1992 S.C. 604, Zandu Pharmaceutical -Vrs.- Mohd. Sharaful Haque : (2005) 30 Orissa Criminal Reports (SC) 16, Devendra -Vrs.- State of Uttar Pradesh : (2009) 43 Orissa Criminal Reports (SC) 680, State of A.P. -Vrs.- Gauri Sheety Mahesh : (2010) 11 Supreme Court Cases 226, M. Mohan -Vrs.- The State: (2011) 48 Orissa Criminal Reports (SC) 961.

It seems that the learned Magistrates while passing the impugned order has neither followed the mandatory provisions under section 202 Cr.P.C. nor kept the settled principle of law in mind.

Accordingly, the CRLMC application is allowed and the impugned order dated 06.06.2008 passed by the learned J.M.F.C., Jaleswar in I.C.C. No. 111 of 2008 is set aside. The matter is remitted to the Court of learned J.M.F.C., Jaleswar for passing fresh order after complying the procedure laid down under section 202 of Cr.P.C. within two months from the date of receipt of this order. It is made clear that if after complying the procedure as laid down under section 202 of Cr.P.C., the Magistrate is of the opinion that there is sufficient ground for proceeding then he is at liberty to proceed in accordance with section 204 of Cr.P.C.

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4. Section 148,307,149 of IPC
Saheba Bisoi Versus State of Orissa
S.K. Sahoo ,J.
In the High Court of Orissa
Date of Argument and Judgment- 01.09.2016
Issue
Acquitting the co- accused of all charges, when conviction made under section 307 of the appellant –challenged.

Relevant Extract

The prosecution case, as per the First Information Report dated 05.06.1993 lodged by one Khadala Swain (P.W.7) is that on 04/05.06.1993 at about 11 p.m., P.W.7 slept on the open verandah of the house of his paternal uncle Kalu Swain (P.W.9). P.W.9 was also sleeping there near him. During midnight, P.W.7 had been to river embankment to attend the call of nature twice and returned at about 2 O' clock and slept near P.W.9. At that time, he found that some persons were standing near the house of one Rama Chandra Bisoi and out of them, two persons came near the place of sleeping of P.W.7 being armed with Kati. Looking at them when P.W.7 shouted, the petitioner dealt a blow by means of a Kati aiming towards the neck of P.W.9. The co-accused Mohan Bisoi was also standing by the side of the petitioner being armed with a Kati. P.W.7 shouted and also chased the accused persons but they escaped from the spot. P.W.7 identified the five persons who were standing near the house of Rama Chandra Bisoi as coaccused persons Sukuta Bisoi, Narayan Bisoi, Narahari Bisoi, Syama Bisoi and Duryodhan Bisoi. All the accused persons entered inside the house of co-accused Syama Bisoi. It is further stated in the F.I.R. that P.W.7 clearly identified all the accused persons as it was a full moon night. The co-accused Duryodhan Bisoi was holding a farsa. On return to the spot, P.W.7 found that P.W.9 had sustained severe bleeding injury on his face. Hearing hullah of P.W.9, daughter of P.W.7 namely Sujata Swain (P.W.1) who was also sleeping nearer to P.W.9 got up and shouted that P.W.9 was being assaulted. P.W.7 along with others appeared at Bellaguntha Outpost and as per the oral report given by P.W.7 which revealed a cognizable case, Benudhar Bhoi (P.W.11), Sub- Inspector of Police attached to Bellaguntha outpost reduced the

report into writing and forwarded the report to the Inspector in charge, Bhanjanagar police station for registration and accordingly, Bhanjanagar P.S. Case No. 89 of 1993 was registered under sections 307/34 of the Indian Penal Code against seven accused persons including the petitioner and the Inspector in charge, Bhanjanagar police station directed P.W.11 to take up investigation.

The learned Trial Court held that P.W.1 and P.W.7 are very close relations of the victim and that apart P.Ws.2, 4 and 6 are also closely related to the victim. The learned Trial Court further held that the evidence of P.W.1, P.W.7 and the victim regarding injuries gets corroboration from the statements of other witnesses so also the medical evidence. It was further held that P.W.1, P.W.7 and P.W.9 are natural witnesses and occurrence having taken place at the dead hour of the night when most of the villagers were asleep; merely because the witnesses are related to the victim, their evidence cannot be thrown out. The learned Trial Court further held that the prosecution has failed to prove that the accused persons Durjyodhan Bisoi, Sukuta Bisoi, Narayana Bisoi, Narahari Bisoi and Syama Bisoi were seen at or near the place of occurrence armed with deadly weapons and that they were the members of the unlawful assembly. The learned Trial Court acquitted coaccused Mohan Bisoi under section 307 read with 148 of I.P.C. but held that it is the petitioner who had dealt Kati blow on the mouth of the victim covering chin and cheek which are the vital parts of the body and accordingly, convicted the petitioner under section 307 of the Indian Penal Code. Finding of the Appellate Court

The learned Appellate Court in the impugned judgment held that nothing can be read to discredit the evidence of P.W.7 regarding the identification of the petitioner as it was a moonlit night. The learned Appellate Court further held that it is highly unlikely that the injured and his relation P.W.7 would falsely implicate the petitioner with whom they had no direct enmity if he was not the assailant leaving the acquitted accused persons against whom they had enmity. It was further held by the learned Appellate Court that the petitioner used a sharp cutting weapon and the severity of the blow on a vital portion of the body clearly established an intention on his part to kill the injured who accidentally survived and accordingly, upheld the impugned judgment and order of conviction passed by the learned Trial Court.

In the present case from the framing of the charge, it is apparent that the petitioner was not made aware that it is he who assaulted the injured (P.W.9) by means of a Kati. When the charge was so pointedly vague, the petitioner was not bound to direct his attention in his defence to the question as to whether he was the person who assaulted the injured by means of Kati. There is every possibility that he might have been mislead in his defence due to absence of charge for substantive offence under section 307 of the Indian Penal Code. When specific material regarding the assault on the injured came against the petitioner during the evidence, the learned Trial Court should have amended the charge and framed specific charge. The petitioner was never called upon to meet a charge under section 307 of the Indian Penal Code simpliciter and therefore, in defending himself, he could have very well considered it unnecessary to concentrate on that part of the prosecution case during the cross-examination of the prosecution witnesses.

In view of the aforesaid discussion, when the evidence of the eye witnesses are full of material contradictions, the presence of the petitioner at the spot at the relevant point of time without taking any precaution to concea his identity becomes doubtful, the medical evidence runs contrary to the ocular evidence, the injured himself has not seen the actual assault and the petitioner has been prejudiced by non-framing of a specific charge under section 307 of the Indian Penal Code, since all theses aspects have not been considered by the learned Trial Court as well as Appellate Court, I am of the view that accepting the concurrent findings of fact will lead to miscarriage of justice and perversity and therefore, as special and exceptional circumstances and in the interest of justice, I am inclined to hold that the prosecution has failed to establish the case against the petitioner beyond all reasonable doubt.

In the result, the Criminal Revision petition is allowed and the impugned judgments and order of conviction and sentence passed there under is hereby set aside and the petitioner is acquitted of the charge under section 307 of the Indian Penal Code. The petitioner is on bail by virtue of the order of this Court. He is discharged from liability of his bail bond. The personal bond and the surety bond stand cancelled.

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5. Section 302 of IPC

Dhal Singh Dewangan vs State Of Chhattisgarh

Ranjan Gogoi , Uday Umesh Lalit , Prafulla C. Pant, JJ.

In the Supreme Court of India

Date of Judgment -23.9.2016

Issue

Sentencing of death punishment under section 302-Challenged.

Relevant Extract

The appellant along with his wife Thaneswari aged about 32 years and five daughters, namely, Nisha, Lakshmi, Sati, Nandini and Sandhya, aged 15, 14, 13, 8 and 5 years respectively and his mother Kejabai (examined as PW-6 in the trial) was residing in Village Mohandipat, P.S. Arjunda, Chhattisgarh. Their house, a single storey structure with five rooms, a verandah and a courtyard, opened in a gali. Opposite to this house, were the houses of Aman Dewangan, Khemlal Dewangan and Derha Dewangan. On either side of their house the immediate neighbours were Bhan Singh Dewangan on one side and Yogendra Sahoo on the other. The appellant with his wife and two daughters had gone to attend a marriage at Nagpur on 11.02.2012 and had returned to the village at about 4-5 p.m. on 19.02.2012. After having dinner everyone had gone to sleep by about 8:00 p.m. Nisha, Lakshmi, Sati and Nandini were with their grandmother Kejabai in one room while the appellant, his wife and daughter Sandhya had slept in the adjoining room.

According to the prosecution, at about 1:30 a.m. on 20.02.2012 a report vide General Diary Entry No.671 was made by PW-1 Ishwar Pradhan and PW-2 Santosh Kumar, Village Kotwar. The entry Ext.P-37 was certified in the General Diary by PW-13, Sub-Inspector Krishna Murari Mishra and was to the following effect:

"The information is related to the Station Officer, K.M. Mishra, Kotwar and Ishwar Pradhan s/o Avadh Pradhan, age 38 years, R/o Mohandipat, are present at the police station Mohandipat and stated that sounds of shouting are coming out from the house of the Dhal Singh Dewangan of village Mohandipat so that it is expected that incident like beating has taken place inside the house. In order to verify the above said incident, I departed to the place of occurrence along with my

staff, 1373, 358, 252, 1316, R. 683, 1512, 664 mayak 320 and handed over the work of the police station to the HCM -1118.

Sd/- Illegible
Station Officer Arjunda,
Distt. Balod, Chhattisgarh"

According to the prosecution, the police immediately reached the village and thereafter recorded Dehati Nalisi Ext.P-18 at the instance of PW-6 Kejabai who allegedly informed that at about 10:00 p.m. on 19.02.2012 she woke up after hearing cries of her daughter-in-law Thaneshwari and had thereafter seen the appellant attacking his wife and five daughters with a sharp edged object. This Dehati Nalisi Ext.P-18 was recorded at about 3:00 a.m. on 20.02.2012, whereafter PW-13 Sub-Inspector Krishna Murari Mishra sent dead bodies of Thaneshwari, Nisha, Lakshmi, Sati, Nandini and Sandhya to the mortuary at Gunderdehi. According to PW-13, the bodies of Thaneshwari, Nisha, Lakshmi, Sandhya and Sati were lying in a room marked as Room No.4 in the site map Ext.P-25 and the appellant was found lying in one corner of the same room in an unconscious position with an iron knife lying near his left hand. The body of Nandini was lying in Room No.1, as mentioned in the site map Ext.P-25. PW-13 also sent the appellant in an ambulance to Primary Health Centre, Arjunda with a constable.

After considering the evidence on record, the Sessions Court, District Durg by its judgment and order dated 23.04.2013 in Sessions Case No.96 of 2012 found the appellant guilty of offence punishable under Section 302 IPC on six counts. Though the statement of PW-6 Kejabai in court had not attributed any criminal act to the appellant, in the opinion of the trial court, her version implicating the appellant, as spoken to by PWs 1, 2 , 3 and 5 would be admissible under Section 6 of the Evidence Act. Placing reliance on those statements of PWs 1, 2, 3 and 5 as well as failure on part of the appellant in not offering any explanation how the crime was committed, the trial court found that the Prosecution was successful in bringing home the case against the appellant. Having thus convicted the appellant on six counts under Section 302 IPC, by a separate order of even date, the trial court awarded death sentence to the appellant, subject to confirmation by the High Court in terms of Chapter 28 of the Code.

The Reference under Section 366 of the Code for confirmation of death sentence was registered as Criminal Reference No.4 of 2013 in the High Court of Chhattisgarh at Bilaspur. The appellant also filed an appeal against his conviction and sentence vide Criminal Appeal No.563 of 2013. The Reference as well as the appeal were dealt with and disposed of by the High Court vide its judgment and order dated 08.08.2013. It was observed by the High Court as under:

"23. Minute examination of the evidence, oral and documentary available on record, makes it clear that on 19.2.2012 the accused/appellant had killed his wife and five daughters by causing them number of injuries on their vital parts by chopper/knife used for cutting hen.

It was argued on behalf of the appellant that as stated by all the prosecution witnesses including the Investigating Officer, the appellant was found in an unconscious condition and was removed to the hospital but no medical reports were placed on record by the prosecution. The High Court dealt with the submission as under:

"30. We also find no force in the argument of counsel for the appellant that the police has not produced medical report of the appellant clarifying his position as to how he fell unconscious when bodies of the deceased persons were recovered from his house and what treatment was given to him in hospital. It appears that during killing of six persons and after seeing their blood, the accused/appellant might have tired or lost his mental balance. In such a situation, even if the appellant was lying unconscious near the dead bodies, it hardly makes any difference for proving his involvement in commission of the offence. It is not the case of the defence that some third person had entered the house, assaulted the appellant and then committed murder of six persons."

Having affirmed the conviction of the appellant as recorded by the trial court, the High Court observed that the instant case did satisfy the parameters laid down by this Court and was "rarest of rare cases" justifying capital punishment. The High Court thus confirmed the death sentence awarded to the appellant.

In this appeal challenging the correctness of the orders of conviction and sentence, we have gone through the entire record and considered rival submissions.

The matter principally raises two questions (a) whether the statements of PWs 1, 2, 3 and 5 are admissible under Section 6 of the Evidence Act and could be relied upon and (b) whether the circumstances on record satisfy the principles laid down by this Court in its various judgments as regards appreciation of cases based on circumstantial evidence.

In Sharad Birdichand Sarda's case (1984) 4 SCC 116, the absence of explanation and/or false explanation or a false plea was considered in the context of appreciation of a case based on circumstantial evidence. It was observed:- "150. The High Court has referred to some decisions of this Court and tried to apply the ratio of those cases to the present case which, as we shall show, are clearly distinguishable. The High Court was greatly impressed by the view taken by some courts, including this Court, that a false defence or a false plea taken by an accused would be an additional link in the various chain of circumstantial evidence and seems to suggest that since the appellant had taken a false plea that would be conclusive, taken along with other circumstances, to prove the case. We might, however, mention at the outset that this is not what this Court has said. We shall elaborate this aspect of the matter a little later.

151. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.

161. This Court, therefore, has in no way departed from the five conditions laid down in Hanumant case (1952) SCR 1091. Unfortunately, however, the High Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it

merely to reinforce the conclusion of the court. Where the prosecution is unable to prove any of the essential principles laid down in Hanumant case , the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General."

Even otherwise, the fact that the appellant was lying unconscious at the scene of occurrence is accepted by all the prosecution witnesses including the Investigating Officer, who sent the appellant to the Primary Health Centre for medical attention. Since he was sent by the Investigating Officer himself, the prosecution ought to have placed on record the material indicating what made him unconscious, what was the probable period of such unconsciousness and whether the appellant was falsely projecting it. However, nothing was placed on record. Neither any doctor who had examined him was called as witness, nor any case papers of such examination were made available. In the absence of such material, which the prosecution was obliged but failed to place on record, his explanation cannot be termed as false. The explanation that he knew nothing as he was unconscious cannot be called, 'absence of explanation' or 'false explanation'. So the last item in the list of circumstances cannot be taken as a factor against the appellant.

Coming to the circumstance at Sl. No.(e) as mentioned above, the clothes of the accused were not seized immediately at the place of occurrence. He was first sent to the Primary Health Centre for medical attention and later in the day was brought back to the police station, where the seizure took place. The seizure memo Ext.P-16 does not mention the word "lungi" but uses the expression "Istamali". Even if "Istamali" is taken to be 'lungi', the Arrest Memo Ext.P-62 mentions his clothes to be "Full Pant and Shirt" and further mentions, "nothing found on the person of the accused except clothes worn by him". According to FSL report

Ext.P-69 and serological report Ext.P-72 what was sent for examination and analysis was a lungi which was found to be stained with blood of human origin. It is not clear how lungi could be seized if the appellant was in 'full pant and shirt" and there was nothing else on his person. The constable who had taken the appellant to the Primary Health Centre and who could have thrown better light on this aspect, was not examined. Apart from the fact that the clothes were not seized immediately at the place of occurrence, if the appellant was found lying in the room in an unconscious state with five dead bodies around, the possibility that his clothes had otherwise got stained with blood which was spotted everywhere including the verandah cannot be ruled out. In our view, therefore, this circumstance is not conclusive in nature and tendency which could be considered against the appellant.

Normally, it is not the duty of the accused to explain how the crime has been committed. But in the matters of unnatural death inside the house where the accused had his presence, non-disclosure on his part as to how the other members of his family died, is an important reason to believe as to what has been shown by the prosecution through the evidence on record is true. It is nobody's case that any dacoity or robbery had taken place in the fateful night of the incident. There are six members of the family who have been killed brutally. Simple reply by the accused in his statement under Section 313 CrPC that he did not know as to how the incident happened, particularly when he was in the house, does certainly make easier to believe the truthfulness of the evidence that has been adduced by the prosecution in support of charge against him. As far as statement of PW-6 Kejabai is concerned, she has turned hostile. But the reason as to why she has turned hostile is not difficult to be found out. She was going to lose the only son left with her.

As to the fact that in the General Diary entry (Ext. P-37) there is no mention of commission of murder of his wife and children by the appellant, it is sufficient to say that the General Diary entries are summary entries relating to movement of police, or relating to the fact that some information regarding an offence has been given at the police station. The doubts created in the present case on the ground that what more could have been mentioned in the General Diary, or that there are minor variations in the statements of PW-1 Ishwar Pradhan, PW-2 Santosh Kumar Mahar, PW-3 Neelkanth Sahu and PW-5 Dan Singh Dewangan, cannot be said to be reasonable doubt. And this Court cannot close its eyes to the ring of truth in the prosecution evidence. In Himachal Pradesh Administration v. Shri Om Prakash[9], in paragraph 7, this Court has observed as under: - "……..It is not beyond the ken of experienced able and astute lawyers to raise doubts and uncertainties in respect of the prosecution evidence either during trial by cross-examination or by the marshalling of that evidence in the manner in which the emphasis is placed thereon. But what has to be borne in mind is that the penumbra of uncertainty in the evidence before a court is generally due to the nature and quality of that evidence. It may be the witnesses as are lying or where they are honest and truthful, they are not certain. It is therefore, difficult to expect a scientific or mathematical exactitude while dealing with such evidence or arriving at a true conclusion. Because of these difficulties corroboration is sought wherever possible and the maxim that the accused should be given the benefit of doubt becomes pivotal in the prosecution of offenders which in other words means that the prosecution must prove its case against an accused beyond reasonable doubt by a sufficiency of credible evidence. The benefit of doubt to which the accused is entitled is reasonable doubt — the doubt which rational thinking men will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind which fights shy — though unwittingly it may be — or is afraid of the logical

consequences, if that benefit was not given. Or as one great Judge said it is "not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism". It does not mean that the evidence must be so strong as to exclude even a remote possibility that the accused could not have committed the offence. If that were so the law would fail to protect society as in no case can such a possibility be excluded. It will give room for fanciful conjectures or untenable doubts and will result in deflecting the course of justice if not thwarting it altogether. It is for this reason the phrase has been criticised. Lord Goddard, C.J., in Rox v. Kritz [1950 (1) KB 82 at 90], said that when in explaining to the juries what the prosecution has to establish a Judge begins to use the words "reasonable doubt" and to try to explain what is a reasonable doubt and what is not, he is much more likely to confuse the jury than if he tells them in plain language. "It is the duty of the prosecution to satisfy you of the prisoner's guilt". What in effect this approach amounts to is that the greatest possible care should be taken by the Court in convicting an accused who is presumed to be innocent till the contrary is clearly established which burden is always in the accusatory system, on the prosecution. The mere fact that there is only a remote possibility in favour of the accused is itself sufficient to establish the case beyond reasonable doubt….." In the light of the law laid down, as above, on careful scrutiny of the evidence on record, in my opinion, there is no room for reasonable doubt in the present case as to the truthfulness of the evidence adduced against the appellant that he has committed murder of his wife and five daughters on 19.02.2012 between 10.00 and 11.00 p.m. in his house.

In the above circumstances, I concur with the view taken by the trial court and the High Court that it is proved on record beyond reasonable doubt that accused Dhal Singh Dewangan has committed murder of his wife and five daughters. As such, the conviction deserves to be upheld.

Now, I come to the issue of sentence. Mr. Colin Gonsalves, learned senior counsel appearing for the appellant, submitted that the High Court has erred in affirming the death sentence awarded by the trial court. He further contended that no adequate opportunity was given to the convict to present the mitigating circumstances. He further argued that the burden of proof to show the impossibility of reformation of the accused was on the State.

On the other hand, learned counsel for the State submitted that it is one of the rarest of rare cases. It is further submitted that considering the brutality of the offence, the convict deserves no leniency and the courts below have rightly awarded/confirmed the death sentence.

I have carefully considered the aggravating and mitigating circumstances in the present case in the light of law laid down by this Court on the point. In Bachan Singh v. State of Punjab[10], in paragraph 206, this Court has given examples of some of the mitigating circumstances which include the probability of the accused not committing criminal acts of violence as would constitute a continuing threat to society, and the probability that the accused can be reformed and rehabilitated.

In the instant case, the State has failed to show that the appellant is a continuing threat to the society or that he is beyond reformation and rehabilitation. Both the courts below, in my opinion, appear to have been influenced by the brutality and the manner in which the crime is committed. But this Court cannot ignore the fact that there are no criminal antecedents of the appellant. Also, it cannot be said that he is continuing threat to the society or that he cannot be reformed or rehabilitated. It is also pertinent to mention here that the accused is from socially and economically disadvantaged strata of the society. Therefore, considering all the facts, circumstances and the established principle of law laid down by this Court, in the present case, sentence of imprisonment for life would meet the ends of justice.

Accordingly, the appeals are partly allowed. The conviction of the appellant under Section 302 IPC stands affirmed. However, the sentence of death is set aside, instead the appellant is sentenced to imprisonment for life.

* * * * *

6. Section 302/34 of IPC
Kuna Dehury & Pahali Dehury Versus State of Orissa
B. K. Nayak & K.R. Mohapatra ,JJ.
In the High Court of Orissa.
Heard & Disposed of: 06.09.2016
Issue
Conviction altered from under section 302 to section 304 first part –discussed.

Relevant Extract

Prosecution case in brief runs as under.— On 02.11.2002 at 1.00 PM, the accused-appellants picked up quarrel with Anand Pradhan (the deceased) and assaulted him with wooden dengis in front of the shop of Nilamani Sahu. On being assaulted, the deceased fell down with bleeding injuries on his head and other parts of the body and succumbed to the injuries on the spot. Smt. Rama Pradhan, wife of the deceased, being informed by her daughter, lodged an FIR at Bhapur Outpost at about 5.00 PM on the same day. The Sub-Inspector of Police of the Outpost entered the case in the Station Diary of the Outpost and sent the original report to the Sadar Police Station, where the Officer in-charge registered PS Case on the basis of the FIR and took up investigation. In course of investigation, the I.O. visited the spot; examined the prosecution witnesses and held inquest over the dead body of the deceased and sent the same for postmortem examination. The IO also seized the weapons of offence, i.e., wooden Dangis (MOs.I and II), wearing apparels of the accused persons and the deceased, as well. He sent the MOs and seized clothes to S.F.S.L., Bhubaneswar for examination and opinion. The IO also produced M.Os. I and II before the Medical Officer for his opinion, as to whether the injuries sustained by the deceased were possible by M.Os. I and II. On completion of investigation, the IO submitted charge sheet against the accused-appellants for commission of offence under Section 302/34 of IPC.

Merely because PW-4 is the daughter of the deceased she cannot be branded as a partisan or interested witness. A partisan or interested witness is one who is interested in securing conviction of a person out of vengeance, enmity or dispute [See (2010) 1 SCC 722 : *Ram Bharosey Vs. State of U.P.*]. There is nothing on record to show that the deceased and PW-4 are either inimical to the accused persons, or that PW-4 had any reason to falsely implicate the accused persons. Her evidence is quite clear, cogent and unimpeachable, which unerringly prove the fact that the accused persons were the assailants of the deceased. The testimony of PWs 6 and 7, the other two eyewitnesses to the occurrence resiling from their statements made before the IO cannot have any adverse impact on the credibility and acceptability of the evidence of PW-4.

Now it remains to be seen whether the accused persons can be held guilty for commission of the offence of murder punishable under section 302 IPC or of culpable homicide not amounting to murder under Section 304, IPC. It appears from the prosecution evidence, particularly that of PW-4, that there was a quarrel between the deceased and the accused persons in course of which the occurrence took place. However, there is nothing on record to show as to who initiated the quarrel and what was the reason for it. It also appears from the evidence of PW-4 that in course of such quarrel, both the accused persons picked up two wooden planks (wooden Dangis), which were lying in front of shop of PW- 6 and assaulted the deceased by means of the same. It is, thus clear that the accused persons had no pre-mediation and they did not come to the spot with any arms. The assault by them on the deceased was on the heat of passion during the sudden quarrel and finding the wooden planks lying on the spot they picked up the same and assaulted the deceased therewith. Therefore, the case squarely falls within Exception-4 of Section 300 of the Penal Code and hence the appellants can be said to have committed offence of culpable homicide not amounting to murder.

The next question that remains to be seen as to whether accused persons had the intention to cause death of the deceased or had only the knowledge that the assault by them was likely to cause death without having any intention. Having regard to the number and nature of injuries sustained by the deceased, particularly a large number of fractures on the skull bones and removal of brain materials, it must be held that the assault by means of the wooden planks by the appellants was quite merciless and forceful and therefore it cannot be said that they had mere knowledge that their assault might lead to death of the deceased. Keeping in view the nature, number and the seat of injuries on the deceased it must be held that the appellants intended to cause the death of the deceased. Hence, we are of the view that the case falls under first Part of Section 304 of IPC. Further, since both the accused persons jointly assaulted the deceased by identical weapons and it cannot be said as to who dealt how many blows, we are of the view that they had developed common intention to cause death of the deceased.

In the aforesaid analysis, we set aside the conviction and sentence of the appellants under Section 302/34 of IPC and acquit them of the said charge, and instead, convict them under the first part of Section 304 read with Section-34, IPC and sentence each of them to undergo RI for 10 years and pay fine of Rs.1,000/- each, in default of payment of fine, to undergo RI for further period of one month. It is stated by the learned counsel for the appellants that both the appellants are in jail custody for over 13 years. If it is so, we direct that the appellants be released forthwith, or else, they have to be released after serving the sentence imposed hereby The order be communicated to the learned trial Court immediately.

* * * * *

7. Section 366(A), 363, 364, 376(2)(f)/511 and 201 of the Indian Penal Code
Tattu Lodhi @ Pancham Lodhi Versus State of Madhya Pradesh
J. Chelameswar , Shiva Kirti Singh , Abhay Manohar Sapre , JJ.

In the Supreme Court India

Date of Judgment -16.09.2016

Issue

Conviction based on circumstantial evidence and without any eye witness-challenged.

Relevant Extract

The appellant, charge-sheeted for offences under Section 366(A), 363, 364, 376(2)(f)/511 and 201 of the Indian Penal Code (for brevity 'IPC') was tried by the Twelfth Additional Sessions Judge, Jabalpur in Sessions Trial No. 324 of 2011. He was found guilty of committing the murder of a minor girl, aged about seven years and also of kidnapping and attempt to commit rape on her and for destruction of evidence relating to the crime. The trial court awarded punishment of death under Section 302 IPC, RI for life and a fine of Rs.1,000/- with default stipulation for offence under Section 364 IPC, RI for seven years with similar fine for offence under Section 363 IPC, RI for seven years with similar fine for offence under Section 376(2)(f)/511 IPC and RI for seven years with similar fine for offence under Section 201 IPC. All the punishments of imprisonment were directed to run concurrently. By the impugned judgment the High Court of Madhya Pradesh agreed with the findings of the trial court and answered the criminal reference in affirmative, confirming the death sentence and dismissed the criminal appeal preferred by the appellant.

Learned senior advocate for the appellant, Ms. Meenakshi Arora initially made an attempt to challenge the conviction of the appellant itself by pointing out absence of any eye-witness of the incident and dependence of the entire prosecution case on circumstantial evidence alone. Learned counsel for the State countered the challenge to conviction by submitting that in law there is no hurdle in securing conviction purely on circumstantial evidence. On facts, he highlighted that the trial court considered the entire evidence on record fairly and in detail and found the following five circumstances proved against the accused:

(i) The accused asked the victim soon before the incident to purchase and bring "Gutka" for him and after sometime she became untraceable.

(ii) Victim was last seen alive with the accused

(iii)The accused avoided to hand over the keys of his house for the search of victim.
(iv) Recovery and seizure of victim's dead body in a gunny bag from the house of the accused.
(v) Seizure of blood-stained clothes including bed sheet from the house of accused pursuant to his memorandum statement.

Be that as it may, we have now to consider the next plea advanced on behalf of the appellant that the facts of the case do not make the crime to be "rarest of rare" and hence in such a case the Courts below should not have awarded the death sentence. In support of the aforesaid plea, learned senior counsel has submitted that at the time of occurrence accused was aged only about twenty seven years and there was no material to negate the chance of accused being reformed on account of sentence of imprisonment and gaining further maturity. On the basis of injuries which can be associated with rape, learned senior counsel submitted that no doubt it was a heinous offence as the victim was only seven years old but there were neither any broken bones nor brutal tearing etc. to make out a case of extreme brutality. Learned senior counsel referred to the statement of the accused recorded under Section 313 of the Code of Criminal Procedure to point out that since sometime back the accused was living alone as his wife had deserted him and he also admitted that there was only one case under Section 354 IPC pending against him. Reference was also made to memorandum statement of the accused recorded by the police in presence of some witnesses to show that as per such statement the accused killed the deceased because of loud cries by her. According to learned counsel the murder was in a state of panic and not a premeditated act and therefore, the appellant deserves a lenient punishment, anything other than death.

The submissions advanced on behalf of the State will be considered hereinafter, but keeping in mind all the submissions, it is clear that there is no opposition to the contention advanced by learned senior counsel for the appellant on the basis of **Swamy Shraddananda(2),** (2008) 13 SCC 767 and the Constitution Bench Judgment in **Sriharan** (2016) 7 SCC 1 **.** In that view of the matter and even otherwise we are in respectful agreement with the views expressed in those judgments. The judicial innovation of bridging the gap between death sentence on the one extreme and only 14 years of actual imprisonment in the name

of life imprisonment on the other, in our view serves a laudable purpose as explained in those judgments and does not violate any positive mandate of law in the Indian Penal Code or in the Code of Criminal Procedure. Hence, for doing complete justice in any case, this court can definitely follow the law laid down in the aforesaid judgments even by virtue of Article 142 of the Constitution of India. The innovative approach reflected in the aforesaid judgments, on the one hand helps the convict in getting rid of death penalty in appropriate cases, on the other it takes care of genuine concerns of the victim including the society by ensuring that life imprisonment shall actually mean imprisonment for whole of the natural life or to a lesser extent as indicated by the court in the light of facts of a particular case. Since there is no party who is actually a looser on account of such an approach in appropriate cases, we feel no hesitation in accepting the submissions advanced by the appellant. Hence the law is reiterated that in appropriate cases where this court is hesitant in maintaining death sentence, it may order that the convict shall undergo imprisonment for whole of natural life or to a lesser extent as may be specified.

Learned counsel for the State has made a strong attempt to support the death sentence. According to him the judgments in the case of **Rajendra Pralhadrao Wasnik** v. **State of Maharashtra ,**(2012) 4 SCC 37 and **Shankar Kisanrao Khade** v. **State of Maharashtra ,**(2013) 5 SCC 546 catalogue the relevant factors which should be looked for and examined for awarding or confirming death sentence. He highlighted factors such as brutality, helplessness of the victim, unprovoked and pre-meditated attack as well as societal concern in respect of a particular brutal or heinous crime. According to him the facts of the case showed brutality, helplessness of the victim as well as unprovoked and pre-meditated design to assault. Learned counsel for the State also referred to some other cases where death penalty had been confirmed by this Court on the basis of peculiar facts of those cases. Since there are large number of judgments either confirming death sentence or commuting the same into life imprisonment, rendered on the basis of peculiar facts of those cases, it would not be of any real help to consider those

judgments for deciding the issue as to whether in the facts of the present case death sentence should be confirmed or commuted.

Having considered the rival submissions as well as judgments relied upon, we are of the considered view that the facts of this case do not make out a "rarest of rare" case so as to confirm the death sentence of the appellant. The death penalty is therefore not confirmed. The question as to what would be the appropriate period out of imprisonment for the whole natural life that the appellant must spend in prison is not an easy one to be answered. As per submissions of learned counsel for the appellant in total an actual period of 20 years behind the bars would serve the ends of justice in the present case. Contra, learned State counsel has argued for whole of natural life.

The occurrence is of the year 2011 when the appellant was said to be about 27 years old. Considering the fact that the deceased, a helpless child fell victim of the crime of lust at the hands of the appellant and there may be probabilities of such crime being repeated in case the appellant is allowed to come out of the prison on completing usual period of imprisonment for life which is taken to be 14 years for certain purposes, we are of the view that the appellant should be inflicted with imprisonment for life with a further direction that he shall not be released from prison till he completes actual period of 25 years of imprisonment. With this modification in the sentence, the appeals of the appellant are dismissed.

* * * * *

8. Section 452,307,302 and 34 of IPC
Pankaj Versus State of Rajasthan
V. Gopala Gowda & R.K. Agrawal , JJ.
In the Supreme Court of India
Date of judgment -09.09.2016
Issue
When Acquittal under section 457 but conviction under section 302 whether sustainable on sole testimony of an interested witness - discussed.
Relevant Extract

According to the case of the prosecution, on March 19, 1998, when the informant (PW-8) was in his juice shop, the appellant-accused, along with 3 (three) others, visited the shop. When Raj Kumar (since deceased) – elder brother of the informant came to the shop, Pankaj called him inside and opened fire at him using a country made pistol which hit him on his neck. Raj Kumar fell down on the ground and PW-8 took him to the hospital at Bharatpur. He succumbed to his injuries on March 25, 1998 at Agra. The appellant-accused along with others was convicted by the Court of Additional District and Sessions Judge, (Fast Track), Bharatpur under Sections 302 read with 34 of the IPC and under Section 3 read with Section 25 of the Arms Act. In appeal before the High Court, the conviction and sentence of the appellant-accused was maintained while the other accused persons were acquitted of all the charges.

It is evident from material on record that when Raj Kumar was shot at, he was taken to the General Hospital, Bharatpur wherefrom he was transferred to Agra for further treatment. The dying declaration of Raj Kumar was allegedly recorded at 10:45 p.m. on 19.03.2008 at Agra by Shri Naresh Pal Gangwal, who was the then SDM. Dr. Vanay Singh (PW-6), who first examined the body of the deceased at the General Hospital categorically stated in his statement that he was unconscious when he was brought to the hospital at 12:45 p.m. The dying

declaration is also alleged to have been recorded on the said date at 10:45 p.m. It is really very hard to believe that Raj Kumar, who was unconscious in the noon, regained consciousness in front of SDM that too in the absence of certificate of the duty doctor that the patient is fit to make a statement. In view of such infirmities in the dying declaration, we are of the opinion that the High Court has rightly discarded the same. It has already been held by this Court in a catena of cases that when a dying declaration is suspicious, it should not be acted upon without corroborative evidence.

At the time of the alleged incident, Ram Babu (PW-8) was present at the spot. Meaning thereby, he was the sole eye-witness to the incident. In his statement, he has very specifically stated that Pankaj fired a shot at his brother in front of him and fled away from the crime scene along with others. As per the prosecution, the case rests upon the sole testimony of PW-8, which gets corroboration from the statement of Shyam Sunder (PW-5), who was present at the relevant time in a nearby shop. Shyam Sunder (PW-5), in his statement has stated that as soon as he heard the sound of a bullet, he came out of the shop and noticed that Pankaj was having revolver in his hand and was fleeing away at the relevant time along with three others. But it is also pertinent to mention here that PW-5 is a resident of village Dehra which is situated at a distance of 12-13 kms. (approx.) from Bharatpur. In his statement, he also stated that he came to Bharatpur in order to inquire about a locker in the name of his father in the Punjab National Bank. Vijay Kumar (DW-2) was examined from the other side who deposed that in the year 1997-1998 no locker was operated in the name of the father of Shyam Sunder (PW-5). In this view of the matter, it is suspicious and hard to believe that he visited the place of the incident at a distance of about 12-13 kms.(approx.) just for hair cut.

In a case where death is due to injuries or wounds caused by a lethal weapon, it is always the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. In the case on hand, the contradiction, i.e., the distance of fire, is material and in our considered opinion, it would not be appropriate to convict the appellant-accused by ignoring such an important aspect.

An objection was raised by learned senior counsel for the appellant-accused that recovery of fire arm at the instance of appellant-accused was planted by the police and it could not have been relied upon. This Court, in a number of cases, has held that the evidence of circumstance *simplicitor* that an accused led a police officer and pointed out the place where weapon was found hidden, would be admissible as conduct under Section 8 of the Evidence Act, irrespective of whether any statement made by him contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act. In the above backdrop, it would be appropriate to quote the Forensic Report dated 25.06.1999 with regard to the alleged recovery of the country-made pistol recovered at the behest of the appellant-accused which is as under:-

"Result of Examination

1. One .32 country made pistol (W/1) from packet 'D' is a serviceable firearm.
2. The examination of the barrel residue indicates that submitted .32 country made pistol (W/1) had been fired. However, the definite time of its last fire could not be ascertained.
3. Based on stereo and comparison microscopic examination it is the opinion that one .32 lead bullet (B/1) from packet 'C' has not been fired from submitted .32 country made pistol (W/1)."

It is clear from the above that there is no material on record to connect that the gunshot injury suffered by the deceased was due to the shot fired from the firearm of the appellant-accused. It is also discernible that though the bullet was recovered but the same has not been connected with the weapon. Moreover, the prosecution is not able to prove the motive clearly. Though motive is not *sine qua non* for the conviction of the appellant-accused, the effect of not proving motive raises a suspicion in the mind. In the present case, it appears that the theory behind motive has been given after much thought process.

It is a well-settled principle of law that when the genesis and the manner of the incident is doubtful, the accused cannot be convicted. Inasmuch as the prosecution has failed to establish the circumstances in which the appellant was alleged to have fired at the deceased, the entire story deserves to be rejected. When the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence. After having considered the matter thoughtfully, we find that the evidence on record in the case is not sufficient to bring home the guilt of the appellant. In such circumstances, the appellant is entitled to the benefit of doubt.

After giving our careful consideration, we are unable to place any reliance on the evidence of PW-8. Since the same inspires no confidence at all, therefore, we are constrained to set aside the conviction and sentence awarded to the appellant. The appeal is allowed.

* * * * *

9. Section 138 of NI Act

Sampelly Satyanarayana Rao Versus Indian Renewable Energy Development Agency Limited

Dipak Misra & Adarsh Kumar Goel , JJ.

In the Supreme Court of India.

Date of Judgment -19.09.2016

Issue

Post dated cheque for repayment of loan as scrutiny whether covered under section 138 of the NI Act –Discussed.

Relevant Extract

The appellant is Director of the company whose cheques have been dishonoured and who is also the co-accused. The company is engaged in the field of power generation. The respondent is engaged in development of renewable energy and is a Government of India enterprise. *Vide* the loan agreement dated 15th March, 2001, the respondent agreed to advance loan of Rs.11.50 crores for setting up of 4.00 MW Biomass based Power Project in the State of Andhra Pradesh. The agreement recorded that post-dated cheques towards payment of installment of loan (principal and interest) were given by way of security. The text of this part of the agreement is quoted in the later part of this order. The cheques carried different dates depending on the dates when the installments were due and upon dishonor thereof, complaints including the one dated 27th September, 2002 were filed by the respondent in the court of the concerned Magistrate at New Delhi.

The appellant approached the High Court to seek quashing of the complaints arising out of 18 cheques of the value of about Rs.10.3 crores. Contention of the appellant in support of his case was that the cheques were given by way of security as mentioned in the agreement and that on the date the cheques were issued, no debt or liability was due. Thus, dishonour of post-dated cheques given by way

of security did not fall under Section 138 of the Act. Reliance was placed on clause 3.1 (iii) of the agreement to the effect that deposit of post-dated cheques toward repayment of installments was by way of "security". Even the first installment as per the agreement became due subsequent to the handing over of the post-dated cheque. Thus, contended the appellant, it was not towards discharge of debt or liability in *presenti* but for the amount payable in future.

The High Court did not accept the above contention and held :-

"10. In the present case when the post-dated cheques were issued, the loan had been sanctioned and hence the same fall in the first category that is they were cheque issued for a debt in present but payable in future. Hence, I find no reason to quash the complaints. However, these observations are only prima facie in nature and it will be open for the party to prove to the contrary during trial."

It will be appropriate to reproduce the statutory provision in question which is as follows :

"138. ***Dishonour of cheque for insufficiency, etc., of funds in the account.*** *- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:*

Provided that nothing contained in this section shall apply unless –

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand or the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. - For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

Clause 3.1(iii) of the agreement may also be noted :-

" 3.1 SECURITY FOR THE LOAN The loan together with the interest, interest tax, liquidated damages, commitment fee, up front fee prima on repayment or on redemption, costs, expenses and other monies shall be secured by ;

(i) xxxxx

(ii) xxxxx

(iii) Deposit of Post dated cheques towards repayment of installments of principal of loan amount in accordance with agreed repayment schedule and installments of interest payable thereon."

Crucial question to determine applicability of Section 138 of the Act is whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. While approving the views of different High Courts noted earlier, this is the underlying principle as can be discerned from discussion of the decided cases

in the judgment of this Court. We are in respectful agreement with the above observations. In the present case, reference to the complaint (a copy of which is Annexures P-7) shows that as per the case of the complainant, the cheques which were subject matter of the said complaint were towards the partial repayment of the dues under the loan agreement (para 5 of the complaint).

As is clear from the above observations of this Court, it is well settled that while dealing with a quashing petition, the Court has ordinarily to proceed on the basis of averments in the complaint. The defence of the accused cannot be considered at this stage. The court considering the prayer for quashing does not adjudicate upon a disputed question of fact.

In ***Rangappa versus Sri Mohan,*** (2010) 11 SCC 441**,** this Court held that once issuance of a cheque and signature thereon are admitted, presumption of a legally enforceable debt in favour of the holder of the cheque arises. It is for the accused to rebut the said presumption, though accused need not adduce his own evidence and can rely upon the material submitted by the complainant. However,\ mere statement of the accused may not be sufficient to rebut the said presumption. A post dated cheque is a well recognized mode of payment as decided in the case of Goaplast (P) Ltd. verses Chico Ursula D' Souza (2003) 3 SCC 232.

Thus, the question has to be answered in favour of the respondent and against the appellant. Dishonour of cheque in the present case being for discharge of existing liability is covered by Section 138 of the Act, as rightly held by the High Court.

Accordingly, we do not find any merit in this appeal and the same is dismissed. Since we have only gone into the question whether on admitted facts, case for quashing has not been made out, the appellant will be at liberty to contest the matter in trial court in accordance with law.

* * * * *

Hindu Marriage Act

10. Section 9, 13-B of the Hindu Marriage Act
Sri Pravakar Muduli Versus Smt. Satyabhama Muduli
Vinod Prasad & K. R. Mohapatra ,JJ.
In the High Court of Orissa.
Date of Judgment :16.09.2016
Issue
Rejecting the application for divorce by mutual consent –challenged.
Relevant Extract

The appellant (husband) instituted Civil Proceeding No. 175 of 2014 in the court of learned Judge, Family Court, Puri under Section 9 of the Act, 1955 against the respondent (wife) for a decree for restitution of conjugal rights. During pendency of the said proceeding, both the parties to this appeal decided to dissolve the marriage mutually by a decree of divorce and accordingly, they filed a joint petition under Section 13-B of the Act, 1955, which was registered as C.P. No. 249 of 2014. In the said petition filed under Section 13-B of the Act, 1955, both the parties agreed that the appellant (husband) would pay a sum of Rs. 40,500/- to the respondent (wife) towards permanent alimony. On 17.8.2015, both the parties were examined as P.W. 1 and R.W. 1 respectively. In course of examination, the respondent (R.W.1) admitted that she had received a sum of Rs. 40,500/- from her husband (appellant). The matter was then posted to 22.8.2015 for argument and on that date, the argument was closed. The matter was then posted to 2.9.2015 for judgment. On 2.9.2015, the respondent (wife) filed an objection petition praying, inter alia, not to pronounce the judgment and to dismiss the petition under Section 13-B of the Act, 1955. In the said petition, the respondent (wife) had taken a stand on affidavit that at the instance of the gentlemen of the village, namely, Pramod Swain, Pravakar Jena, Surath Biswal and Ramesh Muduli, she had signed on revenue stamp and deposed before the learned Judge, Family Court, Puri that she had received the amount of Rs. 40,500/-, as the above named gentlemen assured to

pay her the said amount later after reaching the village on the plea of possibility of theft of money, if paid in Court. Believing such assurances of the gentlemen, she had signed on the affidavit and deposed before the Court that she had received money from the appellant towards her permanent alimony but in fact she was never paid agreed amount nor she has received the same and hence divorce by mutual consent should not be allowed.

The appellant filed objection to the said petition denying the allegations made therein. The appellant re-affirmed that the respondent had signed on Ext. 1, i.e. the receipt, after receiving the amount of Rs. 40,500/-. Thus, he prayed to reject the wife's application and allow the petition under Section 13-B of the Act, 1955.

The learned Judge, Family Court, Puri upon hearing the parties held that since there was no mutual consent between both the parties for divorce, the case filed under Section 13-B of the Act, 1955 for divorce by mutual consent would not be maintainable in the eye of law and dismissed the same vide impugned order dated 15.10.2015, which is assailed in this appeal.

The power under Section 13-B of the Act, 1955 can only be exercised on consent of both the spouses. Sub-section (2) of Section 13-B of the Act, 1955 provides as follows:

"13-B. Divorce by mutual consent.-

(1) xxx xx xx

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

Thus, Section 13-B (2) of the Act, 1955 casts a duty on the Court to make an enquiry on the petition filed under Section 13-B of the Act, 1955 and record its satisfaction with regard to the averments made therein before passing a decree under the aforesaid provision.

In the case at hand, after recording of the evidence of the parties and on closure of argument, the matter was posted to 2.9.2015 for judgment. On the said date, the respondent (wife) filed a petition not to pronounce the judgment and to dismiss the petition filed under Section 13-B (1) of the Act, 1955 on the ground that she had not received the permanent alimony to the tune of Rs. 40,500/- as agreed upon. Learned Judge, Family Court, Puri accepting such petition made an enquiry and dismissed the petition under Section 13-B of the Act, 1955 holding the same to be not maintainable as both the parties did not give their consent to the said petition.

The Court has all rights during avizandum to make an enquiry and record its satisfaction on any petition or objection filed interregnum, by any of the parties to the proceeding before pronouncement of the judgment. The Hon'ble Supreme Court in the case of *Smt. Sureshta Devi –v- Om Prakash*, reported in AIR 1992 SC 1904, has categorically held at

paragraph-13 as follows:

"13. From the analysis of the Section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be party to the joint motion under sub-section (2). There is nothing in the Section which prevents such course. The Section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition

and not the time when they subsequently move for divorce decree. This approach appears to be untenable. At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub- section (2) of Section 13-B is clear on this point. It provides that "on the motion of both the parties .... if the petition is not withdrawn in the meantime, the Court shall..... pass a decree of divorce..” What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the Court shall be satisfied about the bonafides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the Court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent.”

Further, it has been held therein that the consent must continue to decree nisi and must be a valid consent when the case is heard. Thus, the consent given by the parties in the petition under Section 13-B of the Act, 1955 must remain alive till the judgment is pronounced. If, at any stage interregnum, any of the parties resiles from the consent so given, then a decree under Section 13-B of the Act, 1955 cannot be passed.

In the case at hand, the respondent (wife) resiled from her consent given in the petition under Section 13-B of the Act, 1955 on the ground that she had not received the permanent alimony as agreed upon between the parties. That, in our considered view, is relevant to be considered. Thus, we find no infirmity or illegality in the impugned order.

In view of the above, the Matrimonial Appeal merits no consideration and the same is accordingly dismissed, but in the circumstances, there shall be no order as to costs.

* * * * *

11. Section 13(1)(d) , Section 13 (2) of the PC Act
Section 120-B , 427,447,506 read with 34 of the IPC
Section 156(3) ,190 of Cr.P.C.
L. Narayana Swamy Versus State of Karnataka & ors.
A.K. Sikri & N.V. Ramana ,JJ.

In the Supreme Court of India.

Date of Judgment -06.09.2016

Issue

Whether sanction necessary ,when somebody is not holding the post he misused during cognizance –discussed .

Relevant Extract

Respondent No.2 (hereinafter referred to as the 'complainant') filed a complaint on the basis of which a case has been registered against the appellants, who are accused Nos. 3 and 5, for the offences punishable under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1947 (for short, 'P.C. Act') and Sections 120(b), 427, 447 and 506 read with Section 34 of the Indian Penal Code, 1860. The complaint of the complainant contained the following allegations:

One Smt. Amararnmal was the original owner of immovable property measuring 259.95 acres in Survey No. 597-B and an area measuring 57.30 acres in Survey No. 601-A of Bellari, having purchased the same from the Government of India under a registered sale deed dated January 19, 1940, registered in the office of the Sub-Registrar, Bellari. The complaint further states that one Smt. Akula Lakshmamma and her children had obtained money decree against one Pitarnbara Modaliyar and in the execution of the said decree the decree holder purchased the land measuring 27.25 acres through court and, thus, became owner of the said property which is situated at Survey No. 597-B. Out of this 27.25 acres of land, an area measuring 10 acres of land was later acquired by the Government for forming high level canal by Thungabhadra Project. However, the revenue authorities failed to demarcate the remaining extent of land measuring 17.25 acres which forced Smt. Akula Lakshmamma and her children to file a suit seeking mandatory injunction. In the meantime, they sold the said 17.25 acres of land to one Mr. Parameshwara Reddy, father-in-law of Mr. Gali Janardhana Reddy. On the same day, i.e. on October 24, 2002, Smt. Akula Lakshmamma and her family members

also entered into an agreement for sale with accused No.6 (Mr. B. Sriramulu) for an area measuring 27.25 acres, which included 10 acres of land that had already been acquired by the Government. Thus, accused No.6 entered into agreement for sale even in respect of the acquired land. More over, accused No.6 and Mr. Gali Janardhana Reddy are close friends and, therefore, there was no reason to hold that accused No.6 was not aware of the transaction between Smt. Akula Lakshmamma and Mr. Parameshwara Reddy. Accused No.6 filed a suit for specific performance based on the said agreement to sell in which *ex-parte* decree dated April 08, 2003 came to be passed. On April 21, 2003, Mr. Parameshwara Reddy (with whom the first agreement to sell was entered into) sought for change of land use (though in respect of this very land accused No.6 had filed a suit for specific performance). The then Deputy Commissioner accorded his permission for change of land use vide order dated June 17, 2003. After this conversion order, Mr. Parameshwara Reddy gifted the entire land measuring 17.25 acres in faour of his daughter, Smt. Gali Laxmi Aruna, w/o. Mr. Gali Janardhana Reddy vide gift deed dated March 21, 2006. It is alleged that accused No.6 was fully aware of these facts. Notwithstanding the same, on the basis of the *ex-parte* decree of specific performance obtained by him, he filed execution petition and obtained the sale deed from the court in respect of the entire 27.25 acres of land. It was notwithstanding the fact that out of this 27.25 acres of land, in respect of which accused No.6 obtained the sale deed, 17.25 acres was claimed by Mr. Parameshwara Reddy as well and has been gifted to his daughter and the remaining 10 acres of land had been acquired by the Government. Not only this, accused No.6 also applied for conversion of use of this very land and the authorities passed the order of conversion in his favour as well. As on the date of the order of conversion, accused No.6 was holding the post of Cabinet Minister. It is alleged that because of this reason he could obtain the order of conversion by exerting influence on the revenue authorities. Accused Nos. 3 and 5 (appellants herein) are the Government officials working as Assistant Commissioner and Deputy Director of Land Records respectively. In respect of the Government officials, it is alleged that accused No.1, Revenue Inspector, had conducted spot inspection on January 17, 2011; accused No.3, who is the Tehsildar, had recommended case for conversion on the same day and accused No.5, who is the Assistant Commissioner, had given an endorsement to accused No.6 on the very next day to the effect that property in question is not the subject matter of acquisition. On this basis, it is

alleged that all the officials aided accused No.6 by abusing their official position. We may state at this stage itself that the appellants cannot argue that there are no allegations against them in the complaint warranting taking cognizance *qua* them. On the basis of the aforesaid allegations, prayer was made in the complaint to secure the presence of accused persons and the complaint be referred to the Karnataka Lokayukta Police for investigation under Section 156(3) of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') since the case required investigatory powers to unearth several other documents relating to the case.

With this factual background, we advert to the questions of law that arise for consideration:

(1) Whether an order directing further investigation under Section 156(3) of the Cr.P.C. can be passed in relation to public servant in the absence of valid sanction and contrary to the judgments of this Court in ***Anil Kumar & Ors.*** v. ***M.K. Aiyappa & Anr.***1 and ***Manharibhai Muljibhai Kakadia and Anr.*** v. ***Shaileshbhai Mohanbhai Patel and Ors.***2?

(2) Whether a public servant who is not on the same post and is transferred (whether by way of promotion or otherwise to another post) loses the protection under Section 19(1) of the P.C. Act, though he continues to be a public servant, albeit on a different post?

Since requirement of obtaining sanction is contained in Section 19(1) of the P.C. Act, it would be proper to reproduce the same. For our purposes, reproduction of sub-section (1) of Section 19 of the P.C. Act shall suffice which we reproduce hereinbelow:

"19. **Previous sanction necessary for prosecution.—**

(1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013]—

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office."

As is clear from the plain language of the said Section, the Court is precluded from taking "cognizance" of an offence under certain sections mentioned in this provision if the prosecution is against the public servant, unless previous sanction of the Government (Central or State, as the case may be) has been obtained. What is relevant for our purposes is that this Section bars taking of cognizance of an offence. The question is whether it will cover within its sweep order directing investigation under Section 156(3) of the Cr.P.C? High Court has taken the view, in the impugned judgment, that bar is from taking cognizance which would not apply at the stage of investigation by investigating officer. It is observed that sanction is required only after investigation and that too when, after investigation, it is found that there is substantial truth in the investigation report as to what amounts to cognizance of offence. The High Court has referred to Section 190 of the Cr.P.C. which stipulates that cognizance of an offence is to be taken under three contingencies viz. (a) upon receiving a complaint of facts which constitute such offence, or (b) on the basis of police report stating such facts which constitute an offence or upon information received from any person other than police officer, or (c) *suo moto* when Magistrate acquires that such an offence has been committed. This position is clearly discernible from the reading of Section 190 of the Cr.P.C. and we extract the same hereinbelow:

"**190. Cognizance of offences by Magistrates.-** (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under Sub-Section (2), may take cognizance of any offence-

1. upon receiving a complaint of facts which constitute such offence;
2. upon a police report of such facts;
3. upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

In the case of the present appellants, there was no question of the appellants' getting any protection by a sanction. The High Court was absolutely right in

relying on the decision in ***Prakash Singh Badal*** to hold that the appellants in both the appeals had abused entirely different office or offices than the one which they were holding on the date on which cognizance was taken and, therefore, there was no necessity of sanction under Section 19, P.C. Act. Where the public servant had abused the office which he held in the check period but had ceased to hold "that office" or was holding a different office, then a sanction would not be necessary. Where the alleged misconduct is in some different capacity than the one which is held at the time of taking cognizance, there will be no necessity to take the sanction.

Insofar as argument of the appellants that there is no specific averment in the complaint for having committed the alleged act by them is concerned, we are unable to agree with this argument. As already pointed out above, allegations against these two appellants are that after conducting spot inspection by accused No.1 on 17.01.2003, first appellant (accused No.3) who was working as Tehsildar had recommended it on same day and thereafter second appellant (accused No.6) who was working as Assistant Commissioner had given an endorsement on the very next day to the effect that property is not the subject matter of acquisition. On this basis, it is alleged that these officials have abused their official position. We may record that learned counsel for the appellants have contended that they merely acted on the court decree. However, it may be two innocent explanation on the facts of this case as alleged in the case inasmuch as it is alleged that these two appellants did not bother to find out that there were two decrees in two different names in respect of same land and further that 10 acres of land in question had already been acquired and could not be the subject matter of decree. These were the aspects which were, *prima facie*, to be looked into by these appellants. On the basis the aforesaid purported defence, therefore, the proceedings cannot be quashed. It would be a matter of evidence on the basis of which culpability of the appellants shall be judged.

The aforesaid discussion leads us to the conclusion that the judgment of the High Court though on the issue of obtaining the sanction at the time of taking cognizance may not be correct insofar as question No.1 formulated above is concerned, in the facts of the present case, insofar as question No.2 is concerned, it is rightly decided. Effect thereof would be to hold that sanction was not needed as the appellants, at the time of taking cognizance, were not holding the post which is alleged to have been misused. As a consequence, these appeals fail and are, accordingly, dismissed with no order as to costs.

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Industrial Disputes Act, 1947

12. Section 25 F ID Act

The Management of M/s Chemflo Industries(India) Pvt. Ltd., Bhubaneswar. Versus Sri Sahadev Pandav

Sanju Panda & Sujit Narayan Prasad , JJ.

In the High Court of Orissa .

Date of hearing and Judgment: 1.9.2016

Issue

Giving notice before retrenchment whether binding or the employer and accordingly compensation be decided –discussed.

Relevant Extract

Case of the petitioner-Management that there is relationship of employer-employee between the parties. Opposite party-workman was never appointed as an employee. He was engaged by the petitioner-Management on commission basis to collect credit from different dealers and as such he cannot be said to be workman within the meaning of the Industrial Disputes Act and as such the opposite party-workman is not entitled for any relief. 3. While on the other hand, case of the opposite party-workmen is that he had been working as Sales Executive in the establishment of the first party since August,2003 with a monthly salary of Rs.5000/- which was revised from time to time and on the last date of his work he was getting Rs.5550/- per month. The principal work he used to perform was clerical in nature. He used to collect sale proceeds from different parties to deposit in the bank account of the petitioner-Management. While performing his duties he met with an accident on 30.7.1008 and remained under medical treatment for a period of about two months, but after his discharge from hospital when he resumed duties on 4.10.2008 the petitioner-Management refused employment to him, neither any disciplinary action has been initiated against him nor was he served with any notice under section 25-F of the Act , hence termination of service of the opposite party-workman is illegal and unjustified and he is entitled to be reinstated with back wages. 4. In order to appreciate rival submissions of the parties, the following three issues have been formulated.

1*) Whether the action of the management of M/s Chemflo Industries(India) Pvt. Ltd., in terminating the services of Sri Sahadev Pandab w.e.f. 4.10.2008, Ex-Sales Executive is legal and/or justified ?*

2) If not, what relief Sri Pandab is entitled to ?

3) Whether there exists employer-employee relationship between the parties.

Thereafter, Issue Nos.1 and 2 has been answered by taking into consideration the fact that admittedly the opposite party-workman who met with an accident on 30.7.2008 and remained under medical treatment for about two months and after discharge from hospital when he resumed duties on 4.10.2008 he was not allowed to join. The fact about meeting with an accident has been found to be substantiated by putting reliance upon the medical expenses occurred in the treatment of the opposite party-workman. The Tribunal has taken into consideration Ext.2 and Ext.2/1 which reflects that he was directed to handover motorcycle along with helmet and key and other related papers on 22.10.2008. In the cross-examination Management Witness No.1 has stated that the workman has voluntarily did not come for work and taking into consideration these aspects of the matter the Tribunal has come to conscious finding that the opposite party-workman has been denied to resume his duties which amounts to retrenchment by way of refusal of employment. Before doing that, it was incumbent upon the petitioner-Management to follow provisions of section 25-F of the Act, but admittedly the same has not been followed and accordingly in spite of reinstatement, award of compensation to the tune of Rs.1,50,000/- has been passed.

Since the issue regarding employer-employee relationship has been established in between the parties and the fact that the workman met with an accident has also been substantiated by providing sufficient evidence in this regard by the opposite party-workman and he was not allowed to resume his duties which amounts to retrenchment in service and once a conscious finding has been given in this regard, automatically provision of section 25-F will come into place which mandates that before termination or retrenchment of service of the workman, notice is required to be issued, for ready reference section 25-F of the Industrial Disputes Act,1947 is reproduced herein below:

“25F. Conditions precedent to retrenchment of workmen

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until- (a) The workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; (b) The workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days’ average pay **2**[for every completed year of continuous service] or any part thereof in excess of six months; and (c) Notice in the prescribed manner is served on the appropriate Government **3**[for such authority as may be specified by the appropriate Government by notification in the Official Gazette].” Although reference has been made to answer as to whether termination of the opposite party-workman is justified or not, but while dealing with the issue the Tribunal has taken note of the fact that Section 25-F of the Industrial Disputes Act,1947 does not mandatorily mandate reinstatement in service, rather it also mandates to compensate the workman in lieu of reinstatement and accordingly the Tribunal has awarded by directing to pay a sum of Rs.1,50,000/- by way of compensation in lieu of reinstatement with back wages in favour of the opposite party-workman.

We, after going through the award, is of the considered view that the same is in no way suffers with perversity, there is no error apparent on the face of the award and as such this Court, sitting under Article 226 of the Constitution of India by not assuming the power of appellate court, decline to interfere with the award since scope of High Court sitting under Article 226 is limited, reference in this regard needs to be made of the judgment rendered by Hon’ble Apex Court in the case of **Syed Yakoob Vrs. K. S. Radhakrishnan and others, AIR 1964 SC 477** wherein it paragraph 7 their Lordships have been pleaded to hold as follows:- “7.The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Art. 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals; these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or in excess of it, or as a result of failure to exercise jurisdictions. A writ can similarly be issued where in exercise of jurisdiction

conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of tact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the. Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was' insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Art. 226 to issue a writ of certiorari can be legitimately exercised."

The proposition laid down by the Hon'ble Apex Court in the case of Syed Yakoob (supra) still holds good since the same has been considered by Hon'ble Apex Court recently in the case of **M/s.Pepsico India Holding Pvt. Ltd. Vrs. Krishna Kant Pandey, (2015) 4 SCC 270** wherein their Lordships while discussing the scope of Article 226 of the Constitution of India in the matter of showing interference with the finding of the Tribunal has been pleased to hold after placing reliance upon the judgment rendered in the case of **Chandavarkar Sita Ratna Rao Vrs. Ashalata S. Guram, (1986) 4 SCC 447** as follows: "*17. In case of finding of facts, the court should not interfere in exercise of its jurisdiction under Article 227 of the Constitution. Reference may be made to the observations of his Court in Bathutmal Raichand Oswal v. Laxmibai R. Tarta where this Court observed that the High*

Court could not in the guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the legislature has not conferred a right of appeal. The High Court was not competent to correct errors of facts by examining the evidence and reappreciating. Speaking for the Court, Bhagwati, J. as the learned Chief Justice then was, observed at p. 1301 of the report as follows: (SCC p. 864, para 7) "The special civil application preferred by the appellant was admittedly an application under Article 227 and it is, therefore, material only to consider the scope and ambit of the jurisdiction of the High Court under that article. Did the High Court have jurisdiction in an application under Article 227 to disturb the findings of fact reached by the District Court? It is well settled by the decision of this Court in Waryam Singh v. Amarnath that the ... power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in Dalmia Jain Airways v. Sukumar Mukherjee to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. This statement of law was quoted with approval in the subsequent decision of this Court in Nagendra Nath Bose v. Commr. of Hills Division and it was pointed out by Sinha, J., as he then was, speaking on behalf of the court in that case: It is thus, clear that the powers of judicial interference under Article 227 of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the power under Article 226 of the Constitution. Under Article 226 the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Article 227 of the Constitution, the power of interference is limited to seeing that the tribunal functions within the limits of its authority."

There is no dispute about the settled proposition that this court sitting under Article 226 of the Constitution of India cannot act as a court of appeal to differ with the finding given by the Tribunal which is based upon cogent evidence and the materials placed before it subject to exceptions that if there is perversity in finding or there is error apparent on the face of record or order is without jurisdiction, but we find in this case that it is not coming under these exception warranting interference with the award. Accordingly, we do not find merit in the writ petition, hence the same is dismissed.

* * * * *

13. Section 17(1) (b), 17(1)(a)(i),13(2)(c),13(3)(4), Section 19 and Section 19 A
Ms. Jaya Foods Represented through its Proprietor Indrajit Vishwakarma Versus State Consumer Disputes Redressal omission ,Odisha ,Cuttack & others
Dr. D.P. Choudhury , J.
In the High Court of Orissa.
Date of Judgment: 19. 09.2016
Issue
Where Appeal provision is available in the statue a writ of certiorari under Articles 226,227 not lies.

Relevant Extract

The factual matrix leading to the petitioner's case is that the petitioner has got a factory at Chandaka Industrial Estate, Bhubaneswar in the name and style of M/s. Jaya Foods. The petitioner had two insurance policies under New India Assurance Company Limited, opposite party No.2 and it was effective from 7.3.2007 to 6.3.2008. It is averred that on 18.4.2007 night, there was a fire accident in the factory for which the petitioner claimed damages of plant and machineries to the tune of Rs.16,56,650/- but the surveyor of the Insurance Company made assessment for Rs.1,57,000/-. So, the petitioner filed Consumer Complaint No.09/2008 before the opposite party no.1 claiming the aforesaid loss along with loss of interest, compensation towards loss sustained for payment of interest, compensation towards payment of salary and other components making total Rs.27,18,650/- payable by the opposite parties 2 and 3.

It is also averred that during pendency of Consumer Complaint No.09/2008, the petitioner filed Misc. Case No.386/2010 for amendment of the complaint petition which was allowed on 13.4.2010. Another misc. case, i.e., Misc. Case No.385/2010 came to be filed by petitioner with a prayer to direct the opposite party No.2 therein not to take any coercive action against the petitioner till disposal

of the said consumer complaint case. Be it stated, Misc. Case No.385/2010 was fixed to 5.7.2011 to be heard in presence of the learned counsel appearing for the complainant since the learned counsel for the complainant remained absent on the last date. This misc. case was actually listed on 5.7.2011 under the heading "ORDERS". On that date, learned counsel for the complainant remained absent for which it was dismissed for default. On the same day, the State Commission also dismissed the main consumer complaint which is allegedly illegal. It is averred inter alia that the complainant was not given a notice about the hearing of the main consumer complaint case for which he could not take appropriate steps and the State Commission had committed gross error by dismissing the main consumer complaint case. As such the principles of natural justice has been violated in the instant case as the complainant was not given due opportunity of hearing in the main consumer complaint case, of being heard. So, the writ petition came to be filed to quash the order dated 5.7.2011 passed in main Consumer Complaint No.09/2008.

Mr. Nayak, learned counsel for the petitioner further submitted that when the misc. case was posted for hearing under "ORDERS", the State Commission has committed error by dismissing the main consumer complaint case along with the misc. case. In support of his submission, he has filed the certified copy of the cause list dated 5.7.2011 showing that at Sl. No.6, the misc. case no.385/2010 arising out of Consumer Complaint No.09/2008 was listed for "ORDERS". Mr. Nayak, learned counsel for the petitioner submitted that the petitioner, having no any efficacious remedy to ventilate the claim, has filed the present writ petition alleging that no due opportunity of hearing in the main consumer complaint case was afforded, resultantly, he has lost his valuable right case before the State Commission.

Whether in the facts and circumstances of the case, the writ petition is maintainable?

DISCUSSIONS

It is the admitted case of both the parties that the Consumer Complaint No.09/2008 was filed by the petitioner against the opposite parties before the State Commission. It is also admitted that Misc. Case No.385/2010 arising out of said Consumer Complaint No.09/2008 was filed by the petitioner to pass order for not taking coercive steps against the petitioner for recovery of the dues and the misc. case was posted to 5.7.2011 for "ORDERS". The same fact is also available from the certified copy of the cause list dated 5.7.2011 under Flag-B annexed to the memo dated 19.2.2016 filed by the learned counsel for the petitioner.

It is also admitted fact that on 5.7.2011, the misc. case and the main consumer complaint were dismissed for non-prosecution by the State Commission because of the learned counsel for the complainant was remained absent.

On going through Annexure-3, it appears that the petitioner filed consumer complaint against the present opposite parties 2 and 3 claiming compensation of Rs.27,18,650/- with 12% interest and further prayed to adjust the outstanding dues to be recovered by the present opposite party No.3 against the compensation amount to be recovered from opposite party No.2.

For better appreciation, Section 17(1) of the Act is placed below:

"17.Jurisdiction of the State Commission -- (1) Subject to the other provisions of this Act, the State Commission shall have jurisdiction--

(a) to entertain--

(i) complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees twenty lakhs but does not exceed rupees one crore; and

(ii) appeals against the orders of any District Forum within the State; and

(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity."

From the aforesaid provision, it is clear that the case was filed essentially under Section-17(1)(a)(i) of the Act because with effect from 15.3.2003, then value of the goods or services and compensation where it should exceed Rs.5.00 lakhs but should not exceed Rs.20.00 lakhs. However, this is a case under Section-17(a)(i) filed before the State Commission.

Section-18 of the Act states that the provisions of Sections- 12, 13 and 14 of the Act and Rules made thereunder for disposal of the complaint by District Forum shall, with such modifications as may be necessary, be applicable to the disposal of the disputes by the State Commission.

There is no provision made in the Act or the Rules made thereunder to restore the complaint by the State Commission. Section-19 of the Act is placed below for better appreciation:

"l9. Appeals.--Any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of section 17 may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed:

Provided that the National Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the State Commission, shall be entertained by the National Commission unless the appellant has deposited in the prescribed manner fifty per cent of the amount or rupees thirty-five thousand, whichever is less:

19A. Hearing of appeal - An appeal filed before the State Commission or the National Commission shall be heard as expeditiously as possible and an endeavour shall be made to finally dispose of the appeal within a period of ninety days from the date of its admission:

Provided that no adjournment shall be ordinarily granted by the State Commission or the National Commission, as the case may be, unless sufficient cause is shown and the reasons for grant of adjournment have been recorded in writing by such Commission:

Provided further that the State Commission or the National Commission, as the case may be, shall make such orders as to the costs occasioned by the adjournment as may be provided in the regulations made under this Act.

Provided also that in the event of an appeal being disposed of after the period so specified, the State Commission or, the National Commission, as the case may be, shall record in writing the reasons for the same at the time of disposing of the said appeal."

From the aforesaid provisions, it is clear that any order passed by the State Commission in exercise of its power conferred by Sub-clause (i) of Clause-a of Sub-section(1) of Section 17 of the Act is appealable before the National

Commission under the Act. It is already observed in the earlier paragraphs that this is a case filed by the petitioner under Section-17(a)(i) before the State Commission. So, the provisions of appellate Court are well enshrined against the impugned order.

With due regard to the decision of the Hon'ble Apex Court, it is clear that in the event complaint being dismissed for default, provisions of Order 9 Rule 9 C.P.C. can be invoked by the State Commission to restore the complaint on good cause to be shown for non-appearance of the complainant.

From the aforesaid discussion, it is clear that where any authority created by the statute has no inherent power to review or recall its decision unless prescribed by the statute itself. In the aforesaid decision, the Hon'ble Apex Court have analyzed the provisions of the Act and arrived at the aforesaid conclusion and accordingly the Hon'ble Supreme Court remitted the matter back to the National Commission who has been endowed with the power by insertion of Section 22-A in the Act during the year 2002, to consider the complaint expeditiously and dispose of the same within three months.

Next question arises whether the writ application is maintainable in spite of efficacious remedy available to the petitioner. The principles of law on this score is no more res integra. Learned counsel for the petitioner contended that the singe Bench of this Court in the Oriental Bank of Commerce case reported in 121 (2016) CLT 333 (supra) have been pleased to observe that writ petition is maintainable. After going through the said decision it is revealed that the said decision was rendered while the order of the State Commission passed under Section 17 (1)(b) was challenged. In the same decision it has been observed that neither any appeal nor any second revision lie against the order passed under Section 17 (1)(b) of the

Act. So, this Court held that writ petition is maintainable. Since the impugned order is passed under Section 17 (a)(i) of the Act but not under Section 17 (1) (b) of the Act, the decision of this Court is not applicable as the facts and circumstances of that case are completely different from the facts and circumstances of this case.

With due regard to the aforesaid decision, it is derived that writ of certiorari can be issued in spite of the efficacious remedy is available by keeping away the appellate and revisional jurisdiction provided the error is manifest and apparent on the face of record and grave injustice and gross failure of justice has occasioned thereby. At the same time, caution has been made by self impose rule of discipline to exercise the power by the High Court. It has been well observed that High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character. In the instant case exercise of jurisdiction of this Court directing the Tribunal to restore the case to its file on being modified by petitioner will amount to sit over the matter as the appellate court and correct errors.

With due regard to the decision, it appears that the Hon'ble Apex Court have been pleased to caution the High Courts to entertain the writ applications against the orders passed by the Commission, as a statutory appeal is provided and lies to Hon'ble Apex Court under the provisions of the Act. It is explicitly observed that once the legislature has provided for a statutory appeal to a higher court, it cannot be proper exercise of jurisdiction to permit the parties to bypass the statutory appeal to such higher court. Moreover, in the aforesaid case the appeal lies to the Supreme Court against the order of the National Commission. But the High Court exercises jurisdiction under Article 226 of the Constitution of India for which

Their Lordships cautioned about the improper exercise of the jurisdiction by the High Court in entertaining the writ petition and also such decisions have been issued by the Hon'ble Apex Court to different High Courts for proper observance of the principles of law enunciated by Their Lordships. It is well assimilated that even when there is efficacious remedy available under the provisions of the Act, the Court should restrict itself to exercise its jurisdiction under Article 226 of the Constitution of India as a general principle. There may be exception to such rule but in the fact and circumstances of this case, exercise of jurisdiction under Article 226 of the Constitution of India is impermissible.

From the foregoing discussions, writ petition is not maintainable in view of the facts and circumstances of the case and the petitioner can well file appeal before the National Commission to restore the case to file when it has been dismissed for non-prosecution.

It is submitted by learned counsel for the petitioner that in case of dismissal of complaint for non-prosecution, a party is to visit New Delhi for restoring the case at National Commission, the consumer is unable to get justice by inexpensive speedy manner although the same is the object of the Act. Learned counsel for the opposite parties also conceded the argument of the learned counsel for the petitioner but they submit that for the provisions made in the Act, there is no other alternative than to proceed to the proper forum to agitate the matter. Under the Act 62 of 2002 which is effective from 15.3.2003, the National Commission was vested with power to make Regulations and accordingly Regulations were made. Similarly, the jurisdiction of the National Commission was also expanded by insertion of Section 22A whereunder the power has been given to the National Commission to set aside ex parte orders in the interest of justice. Section 30 has also allowed the Central Government and State Government to make rules for

implementation of different provisions of the Act. Section 30 has given power to the Central Government to make Rules for carrying out the provisions of Clause-VI of sub-section (4) of Section 13 which states that the power of Civil Court other than in Clause (I) to (V) of Sub-Section (4) can be exercised if they are persuaded by rules or regulations. So, it is for the Parliament to consider to make suitable amendment to the Rules or Regulations under the Act for District Forum and State Commission on the same line of amendment as made in 2002 for National Commission to review or recall their own orders so as to render inexpensive, speedy and simple redressal to the consumers.

The suggestion as suggested above is only a suggestion to the Central Legislature to have a relook into the provisions of the Act for their effective implementation. At the same time the writ petition being not maintainable in the facts and circumstances of the case, is dismissed without awarding any cost to either of the parties. The petitioner is at liberty to file an appeal before the National Commission within a period of four weeks along with a petition for condonation of delay, which may be considered according to law by the National Commission. A copy of this judgment be handed over to Mr.A.K.Bose, learned Assistant Solicitor General of India for its onward transmission to the Ministry of Consumer Affairs, Food & Public Distribution, Government of India for information.

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