O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2016

(*JULY*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY

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

I N D E X

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2. Section 96 & 100 of CPC

Maheswar Amat and another Versus Smt. Ujala Amat (dead) her L.R.

D. Dash, J.

In the High Court of Orissa, Cuttack.

Date of Judgment-01.07.2016

Issue

Appeal against the modified order of the Additional District Judge.

Relevant Extract

The respondent no. 1 as the plaintiff had filed the suit for declaration of her right, title and interest over the suit land, confirmation of possession and permanent injunction, with alternative prayer for recovery of possession in case of dispossession during the suit. It was specifically prayed for division of the suit property in two equal half; one in her favour and the other one in favour of defendant no. 2 in case he is held to be the adopted son of her deceased brother namely, Judhistir.

For the sake of convenience, in order to bring in clarity and avoid confusion, the parties hereinafter have been referred to as they have been arraigned in the trial court.

Satyabadi Padhan is the father of the plaintiff and her brother Judhistir. They became the absolute owners of the suit land as on the death of Satyabadi in the year 1971. The plaintiff and Judhistir succeeded to the property left by him. The plaintiff asserts that on 23.11.91 Judhistir died issueless and his wife Bila pre-deceased him having died in the year 1988. So the plaintiff claims to be the sole owner coming to possess the suit land with the aid and assistance of her husband. The defendants are said to be in no way related to her, although defendant no. 2 is falsely stating himself to be the adopted son of Judhistir and defendant no. 1 being his father is falsely declaring to have given defendant no. 2 in adoption to Judhistir. The plaintiff having come to learn that defendants are declaring to oust her

from the suit land, apprehending serious disturbance, the suit has come to be filed.

The defendants contested the suit. It is stated that Satyabadi died in the year 1969 and Judhistir being his son became exclusive owner in possession of the suit land to the exclusion of all others including the plaintiff. It is specifically pleaded that during the lifetime Judhistir when he lost all the hope of begetting a child through his wife Bila, they approached the defendant no.1 and his wife in the year 1980 to take their child who was then in the womb of the mother for being given in adoption after birth. The proposal was accepted and as such in the year 1981 when defendant no. 2 was born, he was given in adoption to Judhistir and his wife on the auspicious Janmastami day in the month of Bhadraba by performance of giving and taking ceremony in the Siva temple of village Barajhua. And five years thereafter Judhistir's wife died. It is also stated that on 5.9.88 after the death of Bila, Judhistir executed a registered deed of acknowledgement of adoption in favour of defendant no.2 declaring defendant no. 2 to be his adopted son. Thus, it is stated that defendant no. 2 possessed the land along with his adoptive father and he also performed all the funeral rites and obsequies of Judhistir. It is stated that the plaintiff has filed the suit being instigated by some persons in inimical terms with the defendants being well aware of the factum of adoption and the status of defendant no. 2 as the adopted son of Judhistir and as such the plaintiff's brother.

Faced with such rival pleadings, the trial court framed six issues. Rightly taking up issue nos. 3 and 4 first for decision as those concern with the claim of the plaintiff vis-a-vis the claim of defendant no. 2 as regards his status and consequently the claim over the property in question, the trial court on evaluation of evidence has recorded a finding that defendant no. 2 is the adopted son of Judhistir and that both are entitled to equal share over the property having been succeeded by them being the successors of Satyabadi, the original owner of the property. Thereafter, coming to the factum of possession,

the defendant no. 2 has been found to be in possession of the suit property. However, lastly, going to answer issue no. 6 as regards the entitlement to the relief, the trial court declared that the plaintiff has got 1/4th share over the suit property save and except the dwelling house of the family.

Being aggrieved by the same, the plaintiff carried an appeal under Section 96 of the Code of Civil Procedure which came to be heard by the learned Addl. District Judge, Sonepur. The lower appellate court sitting over to judge the sustainability of the finding of the trial court firstly on issue nos.3 and 4 has gone to churn the evidence in finding out as to whether the defendant no. 2 has been able to discharge the burden of proof that he had been adopted by Judhistir during his lifetime and as such his status as the adopted son of Judhistir has been accepted. The answer upon independent examination of evidence has been recorded in favour of defendant no. 2 and against the plaintiff. Thus, it has affirmed the finding of the trial court on this aspect. Eventually going to the allotment of share to the plaintiff and defendant no. 2 over the suit property, it has of course modified the quantification made by the trial court by declaring half share of each over the entire property without any exception concerning dwelling house by keeping it beyond the purview of partition as had been done by the trial court.

In the above premises, the defendants have filed this second appeal under Section 100 of the Code of Civil Procedure, mainly challenging the modification of the decree made by the trial court in relation to the quantification of the share of plaintiff and defendant no. 2 over the property and also the inclusion of the undivided dwelling house within the purview of partition for the plaintiff, the sister to have her share over it. It may be mentioned here that the plaintiff has not further carried any challenge in accordance with law either by filing any independent appeal or by filing any cross-objection, feeling aggrieved by the concurrent finding of the courts below as regards the status of the defendant no. 2 as the adopted son of Judhistir. So, this

finding has attained its finality and is no more thrown open for decision before this Court in the present second appeal. Learned counsel for the parties of course fairly agree on the point at the time of hearing.

The present appeal has thus been admitted on the following substantial questions of law:-

i. Whether sections 6 and 8 of the Hindu Succession Act, 1956 will apply to this case as determined by the trial court?

ii. Whether the plaintiff-respondent is entitled to claim partition and get a share from the dwelling house in view of the bar contained in Section 23 of the Hindu Succession Act?"

Upon hearing the learned counsel for the parties although the appeal had been admitted on above substantial questions of law, those stand reformulated as under:-

"i) Whether the lower appellate court is right in holding the plaintiff as entitled to half share over the entire suit property being in conformity with the provision of Hindu Succession Act?"

Admitted case of the parties is that Satyabadi was the absolute owner of the property and therefore the allotment of share in two equal half to the plaintiff and defendant no. 2 as done by the lower appellate court is unassailable.

At this juncture, the question arises as to whether the plaintiff being the daughter coming as class-I heir under the schedule of the Hindu Succession Act, is entitled to claim partition and get the share as per her entitlement allotted in her favour in so far as the dwelling house of the parties are concerned. The suit was instituted in the year 1992 and the first appeal came to be filed in the year 2001, whereafter this Court has been moved with the present second appeal in the year 2004 which has been admitted on framing the substantial questions of law as stated in aforesaid npara-6. During the suit and first appeal, the provision of section 23 of the Act containing the temporary bar of claiming partition of dwelling house by daughter till happening of

certain events was there in the statute and the same then stood as under:-

"23. Special provision respecting dwelling houses:- Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

The proviso as above confers right on unmarried daughter, the daughter who has been deserted or is separate from her husband and a widowed daughter giving the right of residence notwithstanding the fact that her husband has left a dwelling house. The right of a female heir to claim partition of the family dwelling house although restricted so long as the male heirs do not choose to effect partition of the same yet it expressly recognizes that those category of female heirs have the right to reside therein.

The above provision came to be totally omitted by the 2005 Act, which came into force on 09.09.2005 without any other provision either having any sort of nexus with the earlier existing provision as contained in Section 23 of the Act or corresponding to it as also not remaining with any changes being introduced. The provision as it stood was that when a Hindu intestate leaves by surviving both male and female heirs as indicated in class-I of the schedule of the Act and the property includes a dwelling house wholly occupied by the members of the family, the right of the female heirs to claim partition

of the same is thereby not wholly denied or taken away nor barred forever. But the provision was creating a mere temporary logjam that the right to claim partition shall remain under suspension being not pressable to get the final outcome for that period until the male heirs choose to divide their respective shares therein and till then, the schedule-I female heirs as sub-classified under the proviso will be simply having the right of residence. The object and importance of the provision is clearly discernable.

But now in view of the total omission of the said section from the statue, the temporary bar and abeyance of right for the female heirs to the claim of partition of the dwelling house during the lifetime of the male heirs and till such time that such male heirs choose to partition the property as also until such time that the male heirs go to occupy it otherwise does no more stand. The provision by which the right to claim partition of dwelling house only springing up on the happening of the above enumerated incidents and fructifying in case of all the eventualities happening has been swept away and thrown to the dustbin. It may be kept in mind that though the right over the property was remaining all along when prior to the 2005 Act, its exercise was restrictive and contingent; it is now after omission of the provision of section 23 of the Act by virtue of the 2005 Act become exercisable even without the fulfillment of the conditions as those enumerated and notwithstanding such occasion since the provision restricting the exercise of right has stood omitted altogether and there stands the removal of the bar thereby.

The provision as it was there before omission by the 2005 Act, in my considered view was purely standing as a temporary bar for exercising the right to partition by the female heirs over the dwelling house wholly occupied by the members of the family. The female had the right over the property to the extent of her share as a class –I heir, but it was remaining under suspension or abeyance so as to be exercised and worked out in reality. Thus the right over the dwelling house of the family wholly occupied by the members of the family standing recognized as such was put under restriction only for being

exercised. It was therefore a restrictive right with restrictions put therein to get the same wholly worked out. This in no way was thus creating or clothing any vested right in favour of male heirs although standing as a weapon in their arms to put the right of class-I female heirs on hold from being exercised till such time the male heirs either choose to divide or put the said dwelling house into use in a manner running counter or offending the very objective sought to be achieved by that provision as then existing for the purpose of maintaining the sanctity of the family dwelling house respecting tradition of preserving family dwelling house to effectuate family unity and prevent its fragmentation or disintegration. Even if in a suit for non-fulfillment of those conditions, she was not being allowed with a share over the dwelling house but a suit or suits at a later date on happening of all those events was not legally barred. The provision was in relation to the exercise of the right at appropriate time but not concerning total de-recognition or negation of the right to claim for all times to come. The right over the property by virtue of that provision had not been given a total burial but it was as if being larva inside the volcano in readiness for eruption, at the moment of environmental disorder suiting the purpose when the conditions getting fulfilled. Thus, no finality was attached to such judgment of the courts denying the right to the female heirs to claim partition over the dwelling house. The exercise of the right was remaining in a dormant stage and springing up to life so as to be put into action on the happening of the enumerated eventualities.

Therefore, even in the instant suit, assuming for the sake of argument if we say that the plaintiff being the female heir is not entitled to exercise the right of partition over the dwelling house; however, in view of the omission of the said provision in the statute, she can very well file a suit again for the very same relief on the very day of disposal of the suit or on the next day onwards. So, when the present lis is continuing in the second appeal which has already been admitted and this Court finds that the provision creating the temporary bar to exercise the right has already been omitted, there arises no legal objection or impediment in answering it in favour of the plaintiff that she can well seek for partition of the said dwelling house in accordance with her share as the class-I heir of the Satyabadi against the defendant no. 2, the other class-I heir of Satyabadi. The provision of section 23 of the Act as was existing within all its four was thus a

procedural one prescribing the appropriate time so as to the institution of the lis to enforce the right and it was merely a restriction for such time that its exercisable at such point of time when the events would so happen.

Although omission of the said section is not expressly stated to be retrospective yet now regard being had to the object behind such omission, it has to be said to be having the application to the pending lis at any stage in the court since the omission is not reopening a decision which had been rendered in that very lis that has reached its finality. But as it has earlier been said that there was no finality to the decision and the right under the earlier provision in the Act was exercisable on the happening of eventualities, the female heirs having been denied with the right to claim partition in a lis now can very well file it again in view of the omission of the provision from the statute and can get a decree if it is otherwise permissible in law even without establishing the eventualities which were required to happen as per earlier provision (since omitted) as the preconditions for grant of decree for partition of the dwelling house at the instance of the female heirs and notwithstanding all those.

In view of the aforesaid, this Court finds no reason at this moment to interfere with the decision of the lower appellate court in view of omission of the provision of section 23 of the Act from the statute, which is the subsequent event arising in view of the change of law that under no circumstance cannot be lost sight of but has certainly to be taken note of as discussed above. The above discussion and reasons accordingly provide the answer to the substantial questions which run against the appellant. In view of aforesaid, the ultimate preliminary decree passed by the lower appellate court modifying the preliminary decree passed by the trial court is held as not liable to be set aside.

In the result, the appeal stands dismissed. In the facts and circumstances, the parties are to bear their respective cost of the litigation throughout.

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3. Section 152 of CPC

Netrananda Dalai Versus Ratnabati Nayak (dead) and another

A.K. Rath, J.

In the High Court of Orissa, Cuttack.

Date of Judgment: 16.07.2016

Issue

Question of correction of a decree.

Relevant Extract

The petitioner as plaintiff instituted Title Suit No.30 of 1992 before the learned Civil Judge (Junior Division), Phulbani for permanent injunction impleading the predecessors-in-interest of opposite parties 1 and 2 as defendants. In the schedule of the plaint, the suit schedule property has been described as khata no.16, plot no.753, measuring an area Ac.0.20 decimal of mouza-Jiringapada. The suit was decreed. Thereafter the plaintiff levied execution case, being E.P.No.1 of 2004. The executing court refused to execute the decree since khata number was wrongly mentioned. Assailing the order of the executing court, he filed W.P.(C) No.14601 of 2005. The said petition was withdrawn so as to file an appropriate application in the executing court. This Court observed that if an application under Section 152 CPC is filed, the same shall be considered by the executing court. While the matter stood thus, he filed an application under Section 152 CPC for correction of the decree by inserting khata no.25, instead of 16. It is stated that khata number of the suit land is 25, but not 16. The executing court came to hold that wrong khata number in the plaint, judgment and decree is not due to accidental slip or arithmetical mistake and omission by the court. It will not be appropriate to allow the amendment of khata number in the decree alone without amending the khata number in the plaint and judgment. Held so, the learned trial court rejected the application.

Assailing the said order, Mr.Pattnaik, learned Advocate for the petitioner submitted that the learned trial court committed an error in not allowing the application for correction of decree. He further submitted that the Court has inherent power to amend the decree even if mistake has been committed by the parties. He relied on the

decisions of different High Courts in the case of Appat Krishna Poduval Vrs. Lakshmi Nathiar and others, AIR 1950 Madras 751, Shankergouda Vrs. Garangouda and others, AIR 1976 Karnataka 204, Rayappa Basappa Killed Vrs. The Land Tribunal and others, AIR 1976 Karnataka 205, Mohinder Singh and others Vrs. Teja Singh and others, AIR 1979 Punjab and Haryana 47 and Santosh Kumar Sahoo Vrs. Radhanath Sahoo and four others, 2013(I) OLR-363.

Per contra, Mr.T.Barik, learned counsel for the opposite parties supported the impugned order.

The subject matter of dispute is no more re integra. An identical question came up for consideration before this Court in the case of Jayanta Kumar Rath (since dead) through L.Rs. Vrs. Pravas Kumar Rath (since dead) through L.Rs, 2016(I)-CUT-969. This Court, on a survey of the earlier decisions held thus:-

"8. In Papu Khan (supra), this Court held that when there is no clerical or arithmetical mistake or error arising from any accidental slip or omission, Section 152 CPC has no application.

In Niyamat Ali Molla (supra), the apex Court held that a decree may be corrected by the court both in exercise of its power under Section 152 CPC as also under Section 151 CPC.

In Bishnu Charan Das v. Dhani Biswal and another, AIR 1977 Orissa 68, this Court held that if the decree is not in conformity with the judgment it must be allowed to be amended under Sections 152 and 151 CPC to bring it in line with the judgment and that in exercising the power under Sections 151 and 152 CPC the Court merely corrects the mistake of its ministerial officer by whom the decree was drawn up. Paragraph-4 of the report is quoted hereunder:

"Section 152, CPC is based on two important principles. The first of them is the maxim that an act of the Court shall prejudice no party and the other that the Courts have a duty to see that their records are true and that they represent the correct state of affairs. In proceedings

for amendment of a decree, the inquiry is confined only to seeing whether the decree correctly expresses what 5 was really decided and intended by the Court. Order 20, Rule 6 clearly provides that the decree shall agree with the judgment. If the decree is not in harmony with the judgment the Court has no alternative but to rectify the mistake which has been committed. As the power to amend is exercised for the promotion of justice, it should be exercised liberally so as to make the decree conform to the judgment on which it is founded. I am fortified in this view by an earlier decision of this Court reported in AIR 1966 Ori 225, (Sagua Barik v. Bichinta Barik) wherein it was held on a review of the authorities that if the decree is not in conformity with the judgment it must be allowed to be amended under Sections 152 and 151 to bring it in line with the judgment and that in exercising the power under Sections 151 and 152 the Court merely corrects the mistake of its ministerial officer by whom the decree was drawn up."

The case of the petitioners may be examined on the anvil of the decisions cited supra. On a bare perusal of Section 152 CPC, it is evident that clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either on its own motion or on the application of any of the parties. If clerical or arithmetical mistakes in the judgments, decrees or orders or errors arising therein from the accidental slip or omission has been committed by the court, then the court may correct the same on its own motion or on the application of any of the parties. It does not comprehend the correction of any error on the part of any of the litigating parties. The error must be on the part of the court. In an application under Section 152 CPC, the Court cannot ascertain the intention of the parties making the compromise and filing the application. The said section

cannot be invoked for the purpose of explaining as to what was the intention of the parties in arriving at the compromise. Since the parties have filed a compromise petition admitting the contents to be correct and thereafter the court has recorded the same, Section 152 CPC cannot be pressed into service to correct the compromise petition and decree." (emphasis laid)

In view of the authoritative pronouncement of this Court in the case of Jayanta Kumar Rath (supra), this Court prefers to take the same view since the same is the binding precedent. The ratio laid down in the cases of Appat Krishna Poduval (supra), Shankergouda (supra), Rayappa Basappa Killed (supra) and Mohinder Singh and others *(supra)* cannot be said to be the binding precedent.

In Municipal Corporation of Delhi Vrs. Gurnam Kaur, (1989) 1 Supreme Court Cases 101, the apex Court in paragraph-10 of the report in no uncertain terms held that when a direction or order is made by consent of the parties, the court does not adjudicate upon the rights of the parties nor does it lay down any principle. Quotability as 'law' applies to the principle of a case, its ratio decidendi. The only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided. Statements which were not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. In the result, the petition is dismissed. No costs.

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Criminal Procedure Code

4. Section 31(1), (2) of Cr. P. C.

Muthuramalingam & ors. Versus State Rep. By Insp. of Police

T.S. Thakur , CJI. & Fakkir Mohamed Ibrahim Kalifulla , A.K. Sikri ,S.A. Bobde , R. Banumathi ,JJ.

In the Supreme court of India

Date of Judgment -19.07.2016

Issue

"Whether consecutive life sentences can be awarded to a convict on being found guilty of a series of murders for which he has been tried in a single trial?."

Relevant Extract

A Bench comprising three-Judges of this Court has referred to us the following short but interesting question:

"Whether consecutive life sentences can be awarded to a convict on being found guilty of a series of murders for which he has been tried in a single trial?."

The question arises in the following circumstances:

The appellants were tried for several offences including an offence punishable under Section 302 of the Indian Penal Code, 1860 (for short, "the IPC") for several murders allegedly committed by them in a single incident. They were found guilty and sentenced to suffer varying sentences, including a sentence of imprisonment for life for each one of the murders committed by them. What is important is that the sentence of imprisonment for life for each one of the murders was directed to run consecutively. The result was that the appellants were to undergo consecutive life sentences ranging between two to eight such sentences depending upon the number of murders committed by them. Criminal appeals preferred against the conviction and the award of consecutive life sentences having failed, the appellants have filed the present appeals to assail the judgments and orders passed by the courts below.

When the appeals came up for hearing before a three-Judge Bench of this Court, learned counsel for the appellant appears to have

confined his challenge to the validity of the direction issued by the Trial Court and affirmed by the High Court that the sentences of imprisonment for life awarded to each one of the appellants for several murders allegedly committed by them would run consecutively and not concurrently. It was argued that in terms of Section 31 of the Criminal Procedure Code, 1973 (for short, "the Cr.P.C.") the sentence of life imprisonment awarded to the appellants for different murders alleged to have been committed by them could run concurrently and not consecutively as ordered by the Trial Court and the High Court. Reliance in support of that submission was placed upon a decision of a three-Judge Bench of this Court in *O.M. Cherian @ Thankachan vs. State of Kerala & Ors.,* (2015) 2 SCC 501 and a three-Judge Bench decision of this Court in *Duryodhan Rout vs. State of Orissa* (2015) 2 SCC 783.

We have heard learned counsel for the parties at considerable length. Section 31 of the Cr.P.C. which deals with sentences in cases of conviction of several offences at one trial runs as under :

"31. Sentences in cases of conviction of several offences at one trial.

(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefore which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court: Provided that-

(a) in no case shall such person be sentenced to imprisonment for longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence."

A careful reading of the above would show that the provision is attracted only in cases where two essentials are satisfied *viz.* (1) a person is convicted at one trial and (2) the trial is for two or more offences. It is only when both these conditions are satisfied that the Court can sentence the offender to several punishments prescribed for the offences committed by him provided the Court is otherwise competent to impose such punishments. What is significant is that such punishments as the Court may decide to award for several offences committed by the convict when comprising imprisonment shall commence one after the expiration of the other in such order as the Court may direct unless the Court in its discretion orders that such punishment shall run concurrently. Sub-section (2) of Section 31 on a plain reading makes it unnecessary for the Court to send the offender for trial before a higher Court only because the aggregate punishment for several offences happens to be in excess of the punishment which such Court is competent to award provided always that in no case can the person so sentenced be imprisoned for a period longer than 14 years and the aggregate punishment does not exceed twice the punishment which the court is competent to inflict for a single offence.

The legal position is, thus, fairly well settled that imprisonment for life is a sentence for the remainder of the life of the offender unless of course the remaining sentence is commuted or remitted by the competent authority. That being so, the provisions of Section 31 under Cr.P.C. must be so interpreted as to be consistent with the basic tenet that a life sentence requires the prisoner to spend the rest of his life in prison. Any direction that requires the offender to undergo imprisonment for life twice over would be anomalous and irrational for it will disregard the fact that humans like all other living beings have

but one life to live. So understood Section 31 (1) would permit consecutive running of sentences only if such sentences do not happen to be life sentences. That is, in our opinion, the only way one can avoid an obvious impossibility of a prisoner serving two consecutive life sentences.

In the cases at hand, the appellants were not convicts undergoing life sentence at the time of commission of multiple murders by them. Their cases, therefore, fall more appropriately under Section 31 of the Code which deals with conviction of several offences at one trial. Section 31(1) deals with and empowers the Court to award, subject to the provisions of Section 71 of the IPC, several punishments prescribed for such offences and mandates that such punishments when consisting of imprisonment shall commence one after the expiration of the other in such order as the Court may direct unless the Court directs such punishments shall run concurrently. The power to award suitable sentences for several offences committed by the offenders is not and cannot be disputed. The order in which such sentences shall run can also be stipulated by the Court awarding such sentences. So also the Court is competent in its discretion to direct that punishment awarded shall run concurrently not consecutively. The question, however, is whether the provision admits of more than one life sentences running consecutively. That question can be answered on a logical basis only if one accepts the truism that humans have one life and the sentence of life imprisonment once awarded would require the prisoner to spend the remainder of his life in jail unless the sentence is commuted or remitted by the competent authority.

We may now turn to the conflict noticed in the reference order between the decisions of this Court in *Cherian and Duryodhan's* cases (supra) on the one hand and *Kamalanatha and Sanaullah Khan's* cases (supra) on the other.

This Court upon a review of the case law on the subject held that Section 31 of the Cr.P.C. vested the court with the power to order in its discretion that the sentences awarded shall run concurrently in case

of conviction of two or more offences. This Court declared that it was difficult to lay down a straightjacket rule for the exercise of such discretion by the courts. Whether a sentence should run concurrently or consecutively would depend upon the nature of the offence and the facts and circumstances of the case. All that could be said was that the discretion has to be exercised along judicial lines and not mechanically. Having said that, the Court observed that if two life sentences are imposed on a convict the court has to direct the same to run concurrently. That is because sentence of imprisonment for life means imprisonment till the normal life of a convict.

We are not unmindful of the fact that this Court has in several other cases directed sentences of imprisonment for life to run consecutively having regard to the gruesome and brutal nature of the offence committed by the prisoner. For instance, this Court has in *Ravindra Trimbak Chouthmal vs. State of Maharashtra* (1996) 4 SCC 148, while commuting death sentence penalty to one of imprisonment for life directed that the sentence of seven years rigorous imprisonment under Section 207 IPC shall start running after life imprisonment has run its due course. So also in *Ronny vs. State of Maharashtra* (1998) 3 SCC 625 this Court has while altering the death sentence to that of imprisonment for life directed that while the sentence for all other offences shall run concurrently, the sentence under Section 376 (2)(g) shall run consecutively after running of sentences for other offences. To the extent these decisions may be understood to hold that life sentence can also run consecutively do not lay down the correct law and shall stand overruled.

In conclusion our answer to the question is in the negative. We hold that while multiple sentences for imprisonment for life can be awarded for multiple murders or other offences punishable with imprisonment for life, the life sentences so awarded cannot be directed to run consecutively. Such sentences would, however, be super imposed over each other so that any remission or commutation

granted by the competent authority in one does not *ipso facto* result in remission of the sentence awarded to the prisoner for the other.

We may, while parting, deal with yet another dimension of this case argued before us namely whether the Court can direct life sentence and term sentences to run consecutively. That aspect was argued keeping in view the fact that the appellants have been sentenced to imprisonment for different terms apart from being awarded imprisonment for life. The Trial Court's direction affirmed by the High Court is that the said term sentences shall run consecutively. It was contended on behalf of the appellants that even this part of the direction is not legally sound, for once the prisoner is sentenced to undergo imprisonment for life, the term sentence awarded to him must run concurrently. We do not, however, think so. The power of the Court to direct the order in which sentences will run is unquestionable in view of the language employed in Section 31 of the Cr.P.C. The Court can, therefore, legitimately direct that the prisoner shall first undergo the term sentence before the commencement of his life sentence. Such a direction shall be perfectly legitimate and in tune with Section 31. The converse however may not be true for if the Court directs the life sentence to start first it would necessarily imply that the term sentence would run concurrently. That is because once the prisoner spends his life in jail, there is no question of his undergoing any further sentence. Whether or not the direction of the Court below calls for any modification or alteration is a matter with which we are not concerned. The Regular Bench hearing the appeals would be free to deal with that aspect of the matter having regard to what we have said in the foregoing paragraphs. The reference is accordingly answered.

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5. Section 482 of Cr.P.C. &
Section 409 , 468 read with 471 of IPC

U. Subhadramma & Ors. versus State OF A.P. Rep. By Pub. Prosecutor & anr.

S. A. Bobde & Amitava Roy , JJ.

In the Supreme Court Of India.

Date of Judgment -04.07.2016

Issue

Appeal against judgment and order.

Relevant Extract

The appellants being legal representatives of one Ramachandraiah who was accused of offences under Sections 409, 468 read with Section 471 of the Indian Penal Code, have filed this appeal against the Judgment and order dated 28-6-2006 of the High Court of Andhra Pradesh at Hyderabad dismissing their petition under Section 482 of the Criminal Procedure Code. Ramachandraiah, since deceased, who was the husband of Appellant No.1 and father of Appellant Nos. 2 and 3, was prosecuted under the aforesaid sections in respect of misappropriation of funds. He was charged with misappropriation of an amount of Rs. 6,57,355.90 during the period 31-7-1987 to 29-6-1988 along with him one Subbarayudu was charged as Accused No.2. In October, 1991, U. Ramachandraiah expired during the trial. The trial court acquitted the Accused No.2 Subbarayudu by Judgment dated 25.10.1993. However, the trial court observed on the basis of oral and documentary evidence that Ramachandraiah alone committed the offence as alleged by the prosecution. Further, that there was no oral or documentary evidence placed before the Court to show that Subbarayudu the surviving accused assisted Ramachandraiah in committing the alleged offence. In effect, the trial court found Ramachandraiah responsible for the offences though he could not be adjudged guilty since he had expired.

Proceedings under the Criminal Law Amendment Ordinance against the property of the deceased

In 1997, the State moved an application under the Criminal Law Amendment Ordinance, 1944 (Ordinance No. XXXVIII of 1944) for

attachment of property of the appellant under the criminal law. Thereon, the District Judge passed an order of interim attachment under Clause 4 of the ordinance on the basis that Ramachandraiah has committed the scheduled offences or that he has procured money or the property in question from the proceeds of such offence. The District Judge issued notice calling upon the appellants to show cause why the order of attachment should not be made absolute. In this order, the District Judge observed that according to the state as many as 30 items mentioned in the schedule were acquired by the said Ramachandraiah either in his own name or his wife's name or in the names of his sons due to illegal amounts drawn by him and a case was filed against Ramachandraiah as accused No.1 and Subbarayudu as accused no.2. The District Judge further observed that the trial court i.e. first Additional District Munsif, Cuddapah found Ramachandraiah had committed the offence as alleged by the prosecution and, therefore, the said Ramachandraiah committed the offence. It was observed by the learned District Judge that Ramachandraiah had been found to have prepared bills in the fictitious names of 21 lecturers during the relevant period and had drawn cash on the basis of the pay bills including the bogus bills since May 1991 and drawn about Rs.38,00,000/- to Rs.40,00,000/-.

Thereafter on 1-10-2002, the learned District Judge heard both sides and made the order of interim conditional attachment absolute. He observed that the High Court has refused to interfere with the order of interim conditional attachment and though no counter affidavit had been filed by the appellants, the learned District Judge observed that the appellants have failed to prove that the properties as mentioned in the schedule are the self-acquired properties of U. Ramachandraiah and, therefore, the order is being made absolute.

The appellants then challenged the order of the learned District Judge making an interim attachment absolute by way of a petition under Section 482 of the Criminal Procedure Code. The learned Single Judge held that the amount misappropriated is 6,57,355.90; strangely,

on the basis of the charge sheet. The learned Single Judge also observed that Ramachandraiah who alone had committed the offence and not Subbarayudu, must be taken to have misappropriated the said amount since the Trial Court held the latter to be innocent. Against the aforesaid order, the appellants have preferred this appeal.

As far as the circumstances of this case are concerned, we find that there has been a gross mis-carriage of justice at several steps. In the first place, the finding of the trial court that Ramachandraiah was alone responsible for the offences is completely vitiated as null and void since Ramachandraiah had admittedly died on the date this finding was rendered. It is too well settled that a prosecution cannot continue against a dead person. *A fortiori* a criminal court cannot continue proceedings against a dead person and find him guilty. Such proceedings and the findings are contrary to the very foundation of criminal jurisprudence. In such a case the accused does not exist and cannot be convicted.

Consequently, the learned District Judge committed a gross error of law in acting upon such a finding and treating Ramachandraiah as guilty of such offences while making the order of attachment and while confirming the said order of attachment of properties.

In such circumstance, the courts below erred in recording the finding that Appellant No.1 had committed the offence as alleged by the prosecution. Further, finding recorded by the learned Single Judge of the High Court that Appellant No.1 alone had committed the offence and nor Appellant No.2, must be taken to have misappropriated the said amount is perverse.

"A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged …….…… In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worthy and the animus of witness.

The facts involved herein did not warrant presumption of commission of offence by Appellant No.1 and thus the findings recorded by the courts below are not tenable.

In fact, we find that the learned District Judge could not have proceeded with the attachment proceedings at all since the attachment proceedings were initiated by the State against Ramachandraiah under clause 3 of the Criminal Law Amendment Ordinance, 1944, who was actually dead. Clause 3 contemplates that such an application must be made to the District Judge within the local limits of whose jurisdiction the said person ordinarily resides or carries on business, in respect of property which the State Government believes the said person to have procured by means of the offences. It is incomprehensible, therefore, that such an application could have been made in regard to a dead person who obviously cannot be said to be ordinarily resident or carrying on business anywhere. There is no legal provision which enables continuance of prosecution upon death of the accused. We must record that the proceedings and the decisions of the courts below are disturbing, to say the least. In the first place, though the accused had died, the trial court proceeded with the trial and recorded a conviction two years after his death. Then, this null and void conviction was used as a basis for making an attachment of his properties before the Sessions Court. Astonishingly, all applications succeeded, the attachment was made absolute and over and above all, the High Court upheld the attachment**.**

The orders of the Criminal Court vis-a-vis Ramachandraiah are illegal and liable to be set aside. We also find that the impugned judgment in appeal is unsustainable and is liable to be set aside. The orders of the Courts below are accordingly set aside. The appeal succeeds.

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Indian Penal Code

6. Section 147,148,149,302 and 201 of IPC

Devraj Versus State Of Chhattisgarh

S.A. Bobde & Ashok Bhushan ,JJ.

In the Supreme Court Of India

Date of Judgment - 25. 07.2016.

Issue

Justifiability of conviction of the accused –Challenged.

Relevant Extract

The prosecution case in brief is:

There existed a land dispute between the deceased Devi Prasad @ Prachar and Devraj, Dinda @ Deenanath. Devraj and Dinda @ Deenanath are real brothers whereas deceased Devi Prasad was their cousin brother. On 26th June, 2006, after 8 p.m. when deceased Devi Prasad was going along with one Ratan Singh Guruji in a motorcycle he was intercepted by five persons near pakkar tree. The deceased was beaten by geda and lathi by Devraj, Dinda and others and after killing him his body along with motorcycle was thrown below Rakhet Pulia. The body was seen on next day morning by a boy of village who informed the wife of the deceased. Thereafter, First Information Report was lodged by Anita Bai at 10.15 a.m. on 27th June, 2006. Police official came on the spot prepared death panchnama and site plan. The statements from various persons were recorded. The charges were framed against six accused under Section 147, 148,149, 302 and 201 IPC. The accused Sheonath, Thema @ Vishwanath, Devraj, Dinda @ Deenanath, Khoru and Dayalal were sent for trial.

The prosecution examined 20 witnesses and placed reliance on various exhibits. Learned Additional Sessions Judge after examining the statements of witnesses held charges under Section 302 and 201 IPC proved against accused Devraj and Dinda @ Deenanath, other four accused were acquitted by the Trial Court.

This appeal has been filed against the judgment and order dated 7th January, 2013 of the High Court of Chhattisgarh in Criminal Appeal No. 780 of 2008. The First Additional Sessions Judge in Sessions Trial

No.396 of 2006 had convicted the appellant-Devraj and Dinda @ Deenanath under Section 302 and 201 IPC and awarded imprisonment for life and to pay fine of Rs.1,000/- each for the charge levelled under Section 302 IPC and RI for three years and to pay fine of Rs.1,000/- each for the charge under Section 201 IPC. Four other accused were acquitted by the First Additional Sessions Judge. The High Court in Criminal Appeal No.780 of 2008 although acquitted the accused Dinda @ Deenanath, it confirmed the conviction of the appellant under Section 302 IPC. The High Court has set aside the conviction and sentence of Devraj under Section 201 IPC. Aggrieved by the judgment and order of the High Court, Devraj has come up in this appeal.

It is relevant to note that the trial began against six accused persons. Shivlochan-PW.13 in his examination-in-chief took the name of Devraj alone who was stated to have assaulted Devi Prasad. Shivlochan did not mention in his examination-in-chief about the presence of other accused which may be a reason for the prosecution to get the witness declared as hostile. It is, however, relevant to note that even in the cross-examination the witness repeated that he heard Devraj saying "Maro Sale Ko" who had assaulted Devi Prasad and Devi Prasad @ Prachar cried "Bachao Bachao". The factum of assault by Devraj was throughout maintained by the witness. Thus, even though witness was declared as hostile witness his evidence so far as the role of Devraj is unshaken. Similarly, evidence of Ajar Das-PW.16, where in his examination-in-chief he stated that accused Devraj gave three lathi blows to Devi Prasad which was seen by him. The witness further stated that Devraj threatened him to run away otherwise he shall also be assaulted. Even after the witness was declared hostile he maintained his stand that he forbidden Devraj from assaulting Devi Prasad. He further stated that he saw Devraj and Dinda assaulting Devi Prasad in the night and on the next day the dead body was found below Rakhet Pulia. The witness further stated that due to land dispute Devraj and Dinda had assaulted Devi Prasad. In cross-examination he voluntarily stated that he had seen the accused giving three lathi blows. Further, he stated that he did not see that whom he has beaten

because it was dark. The statement in cross-examination in no manner dilute the value of the evidence. It was Devi Prasad who received injury whose dead body was found next day morning. The statement that it was Devraj who gave three lathi blows obviously referred to lathi blow to Devi Prasad-deceased. Thus, we conclude that in spite of witnesses PW.13 and PW.16 having been declared as hostile witnesses their evidence that Devraj assaulted Devi Prasad is unshaken and has rightly been relied by the courts below in recording conviction.

Thus, there are more than one reasons for rejecting the theory of accident and there was evidence to prove that the deceased was assaulted and murdered and thereafter body and the motorcycle was brought and put below the Pulia. Both Trial Court and the High Court have referred to and relied on sufficient evidence for convicting the accused. We, ourselves after going through the evidence relied on by the courts below for convicting the accused, are of the opinion that the prosecution has successfully proved beyond reasonable doubt that it was accused who had caused homicidal death of the deceased.

We are also conscious that the jurisdiction which this Court exercises under Article 136 has its own self-imposed restrictions. It is sufficient to refer to this Court's decision reported in ***Ganga Kumar Srivastava v. State of Bihar, (2005) 6 SCC 211***, where this Court after referring to various decisions has laid down certain principles for exercising the power of this Court under Article 136. It is useful to refer to paragraph 10 of the judgment, which is :

"**10.** From the aforesaid series of decisions of this Court on the exercise of power of the Supreme Court under Article 136 of the Constitution following principles emerge:

(*i*) The powers of this Court under Article 136 of the Constitution *are very wide* but in criminal appeals this Court does not interfere with the concurrent findings of fact *save in exceptional circumstances*.

(*ii*) It is open to this Court to interfere with the findings of fact given by the High Court, if the High Court has *acted perversely or otherwise improperly*.

(*iii*) It is open to this Court to invoke the power under Article 136 only in *very exceptional circumstances* as and when a question of law

of general public importance arises *or a decision shocks the conscience of the Court*.

(*iv*) When the evidence adduced by the prosecution *fell short of the test of reliability and acceptability* and as such it is highly unsafe to act upon it.

(*v*) Where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or *where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record*."

To the similar effect, another judgment of this Court reported in ***Alamelu v. State, (2011) 2 SCC 385***, where this Court held that even though the powers of this Court under Article 136 are very wide, but in criminal appeals, this Court would not interfere with the concurrent findings of facts, save in very exceptional cases. Following was laid down in paragraph 19:

*"**19**. We have considered the submissions made by the learned counsel for the parties. Before we embark upon an examination of the evidence, we may point out that even though the powers of this Court under Article 136 of the Constitution are very wide, but in criminal appeals, this Court would not interfere with the concurrent findings of facts, save in very exceptional cases. In an appeal under Article 136 of the Constitution, this Court does not normally appreciate the evidence by itself and go into the question of credibility of witnesses. The assessment of the evidence by the High Court is accepted as final except where the conclusions recorded by the High Court are manifestly perverse and unsupportable by the evidence on record. Keeping in view the aforesaid principles, we have examined the findings recorded by the courts below."*

On the principles as laid down by this Court for exercise of jurisdiction under Article 136, we are satisfied that the findings recorded by the courts below from the evidence on record fully justify the conviction of accused. The findings recorded by the courts below can neither be said to be perverse nor contain any such illegality which may render the findings not reliable. We thus do not find any merit in this appeal. The appeal is dismissed.

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7. Section 302 of IPC

Gedu @ Parameswar Patra Versus State of Orissa

I. Mahanty & S. K. Sahoo , JJ.

In the High Court Of Orissa, Cuttack

Date of Judgment- 13.07.2016

Issue

Conviction of life sentence basing under circumstantial evidence - challenged.

Relevant Extract

The prosecution case, as per the First information report (Ext.3) presented by Lalbahadur Singh (P.W.1), the husband of the deceased on 28.11.1998 before the officer in charge, Banki Police Station is that he was running a tea stall at Birotola village Square where he was also residing with the deceased. On 27.11.1998 at about 8 p.m. the informant and the deceased took their supper and the deceased went to sleep inside the thatched house -cum- tea stall. The informant and covillager Suguna Munda (P.W.3) were warming themselves in front of the tea stall by sitting by the side of the fire. At about 10 p.m. the appellant arrived there and sat with them. Sometimes thereafter, the informant and P.W.3 left the spot to join their duties as watchmen. At that time the appellant was sitting near the house of the informant. On the next day morning at about 6 a.m. when the informant returned from his duty, he found that the deceased was not present in the house and the bed was lying as such. At that point of time, Bhagirathi Nayak (P.W.4) who was a neighbour of the informant came there and informed him that the dead body of a woman was lying in the front courtyard of his house. The informant went there and found the deceased lying dead with bleeding injuries on different parts of her body. He also found dragging mark from his house to the place of occurrence and the saree of the deceased was lying at a separate place. The informant suspected that after his departure in the night, the appellant might have committed murder of the deceased and dragged her from the house and threw the dead body in the front courtyard of the house of P.W.4 and absconding. It is also indicated in the First Information Report that the appellant was involved in a

murder case and was acquitted just a month back. On the basis of the First Information Report, Purna Chandra Moharana (P.W.11), who was attached to Banki Police Station as officer-in-charge registered Banki P.S. Case No. 29 dated 28.11.1998 under section 302 of the Indian Penal Code against the appellant and himself took up investigation of the case.

We have thoughtfully considered the rival contentions vis-a-vis the evidences on record. There is no dispute that the entire prosecution case hinges on circumstantial evidence. While assessing a case based on circumstantial evidence, the Court has a duty to see that the circumstances on which the prosecution relies must be proved beyond all reasonable doubt and such circumstances must be capable of giving rise to an inference which is inconsistent with any other hypothesis except the guilt of the accused. It is only in such an event that the conviction of the accused, on the basis of the circumstantial evidence brought by the prosecution, would be permissible in law.

In the case of Sharad Birdhichand Sarda -Vrs.- State of Maharastra reported in AIR 1984 SC 1622, their Lordships have laid down five golden principles so as to constitute "Panchasheel" in the proof of a case based on circumstantial evidence which are as follows:-

1. The circumstances from which the conclusion of guilt is to be drawn should be fully established;
2. The facts so established should be consistent only with the hypothesis of the guilt of the accused that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
3. The circumstances should be of a conclusive nature and tendency;
4. They should exclude every possible hypothesis except the one to be proved, and
5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

Coming to the materials available on record, it is very clear that the prosecution has failed to establish any motive on the part of the

appellant to commit the crime. No doubt it is only the perpetrator of the crime who knows as to what circumstances prompted him to a certain course of action leading to the commission of crime. In a case based on circumstantial evidence, motive assumes pertinent significance as existence of the motive is an enlightening factor in a process of presumptive reasoning in such a case. The absence of motive, however, puts the Court on its guard to scrutinize the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof. P.W.1 has stated that they had no prior enmity with the appellant. In view of the available materials on record, we are of the view that the prosecution has failed miserably to establish any kind of motive on the part of the appellant to commit the crime.

Since the prosecution has failed to establish any motive on the part of the appellant, we are to scrutinize the other circumstances available on record more carefully to see whether the guilt of the appellant is established or not. The main circumstance against the appellant is the last seen theory. The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased was found dead was so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in such a case.

Thus we are of the view that there is no positive evidence to conclude that the appellant and the deceased were last seen together in the night of occurrence and therefore, the last seen theory as advanced by the prosecution miserably fails.

As we have disbelieved the last seen theory, the other circumstance that the appellant boarded the bus at Birtola square on

28.11.1998 at about 6.45 a.m. is not very much relevant to come to a finding of guilt of the appellant. Moreover this circumstance has not been put to the appellant in his statement recorded under section 313 Cr.P.C. Law is well settled that when the attention of the accused is not drawn to the incriminating circumstance during his examination under section 313 Cr.P.C., such circumstance cannot be used against him. Non-questioning of this particular circumstance and utilizing the same against him has certainly caused prejudice to the appellant. Examination of an accused is not a mere formality. It has practical utility for criminal Courts in affording opportunity to the accused to explain the incriminating circumstances. (Ref:- (1997) 13 Orissa Criminal Reports (SC) 57, Ratan Sinha -Vrs.- State of H.P.).

Thus we are of the view that the learned Trial Court was not justified in holding that the appellant was found going away from Birtola in a bus which was consistent with the fact that in between 10 p.m. of 27.11.1998 and 6.45 p.m. of 28.11.1998, he was at Birtola.

The next circumstance relied upon by the learned Trial Court was that the appellant was absconding from 28.11.1998 till 05.10.1999. It is the case of the appellant that he was staying in his brother's house at Sector-6, Rourkela. Except making a statement that he raided at different places including the relations' houses to apprehend the appellant, the I.O. has not proved any search list. No witness has been examined to corroborate the statement of the I.O.

We are of the view that the assessment of evidence has not been done in accordance with law by the learned Trial Court and basing mainly conjecture and suspicion, the appellant was found guilty.

The conclusion arrived at by the learned Trial Court in convicting the appellant and the reasonings assigned for arriving at such a conclusion is not borne out of the record and it seems that the learned Trial Court has proceeded pedantically without making an in depth analysis of facts and circumstances and evidence led in the trial. In our

opinion, the legal duty to separate the grain from the chaff has been abandoned by him and therefore, his entire approach is faulty and infallible which deserves to be rectified and upturned.

In case of Jaharlal Das (AIR 1991 SC 1388), it is further held as follows:-

"The Court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and the legal proof. At times it can be a case of "may be true". But there is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions."

Law is well settled that the suspicion, howsoever strong or emotional consideration cannot take the place of proof. Fouler the crime, the higher should be the proof. In the absence of legal proof of a crime, there can be no legal criminality. Moral conviction regarding the involvement of the appellant in the commission of crime cannot be a substitute for a legal verdict based upon facts and law. In view of the facts and circumstances discussed above, we are not able to agree with the findings of the Trial Court and we hold that the case against the appellant has not been established by the prosecution beyond all reasonable doubt. In the result, the appeal is allowed and the impugned judgment and order of conviction and sentence passed there under is hereby set aside and the appellant is acquitted of the charge under section 302 of the Indian Penal Code. The appellant who was released on bail by this Court during pendency of the appeal vide order dated 03.04.2013 in Misc. Case No.58 of 2012 was subsequently taken into custody as per the order of this Court dated 29.10.2014. The appellant is directed to be released forthwith if his detention is not required in connection with any other crime. Lower Court Records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

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8. Article 32 of the Constitution of India

Anil Kumar Gupta Versus Union of India & Ors.

T.S. Thakur , CJI & Uday Umesh Lalit ,J.

In the Supreme Court of India.

Date of Judgment -05.07.2016

Issue

Public Interest petition for direction and to lay guide lines for future so that such tragedy is not repeated.

Relevant Extract

The incident highlighted in the petition was:-

a. In a recruitment drive aimed at filling up 416 posts of Class IV employees, Indo Tibetan Border Police (ITBP, for short) had called candidates from eleven States at its headquarter located at Bareilly, a small town in Uttar Pradesh on 1.2.2011. The aspiring candidates for said posts were required to remain present in person and submit their forms for registration. In response to said recruitment drive, aspirants started arriving at Bareilly and by morning of 1.02.2011 more than two lakh aspirants had arrived. The gathering was swelling and increasing in number. The officers of ITBP found themselves incapable of managing the situation because of such large gathering and as such they suspended and postponed the drive.

b. The consequent resentment and shouting of slogans in protest by aspirants provoked the higher officers of ITBP to use lathi charge to push the crowd. This resulted in a chaotic situation with some aspirants resorting to violence. The armed police then had to use tear gas shells to disperse the crowd. Massive disturbance and lawlessness prevailed all over the town causing law and order problem. Some buses were burnt and damage was caused to public and private property. In the backdrop of such situation the crowd of aspiring candidates rushed to rail and road terminals to return back to their homes.

c. Because of congestion and crowd in large members, the train coaches were all jam packed. Hundreds of young men then climbed atop Himgiri Express that was on its way to eastern U.P. and Bihar from where large number of aspirants had come.

d. When Himgiri Express left Shahjahanpur Railway Station with hundreds of men on roof top and headed towards Rosa town, an accident took place at Hathaurda Railway Over Bridge near Mohammadabad crossing in Shahajahanpur. The Railway Over Bridge was not tall enough and the gap between the roof of the coach and the bottom of the over bridge was hardly three feet. The train was speeding fast and by the time the young men on roof top saw the approaching bridge it was too late. At least 14 young men were crushed there and then with 20 others seriously injured having been hit by the Over Bridge and fallen from roof top. At this time, some high tension wire broke and fell over the train as a result of which some received electric shocks. Despite this mishap, the train continued running for a while and it finally stopped some 3 kms from the place of incident.

e. The roof top of coaches was full of blood. The dead bodies and injured were brought down. People rushed back to find out those who had fallen from the roof top. The train driver, guard and other employees had run away from the spot.

f. The incident provoked those young aspirants, some of whom torched two coaches of the train. What followed thereafter was total chaos putting tremendous pressure on the Administration in carrying out relief work and taking injured to Hospitals for medical attention.

With the aforesaid assertions this petition was filed on 7.2.2011.

The Report dated 09.09.2011 indicates that requests were made by the Railway and Civil Officials to get the roof riders come down from the roof and announcements were made in that behalf. Though the roof riders refused to come down, in view of the volatile situation, a decision was taken to move the train out of Bareilly. According to the Report, the civil and police officials insisted for the movement of the train as quickly as possible with an idea to disperse the crowd. One may accept this as a reasonable and proper exercise as the crowd had to be dispersed which had congregated in Bareilly. However, this does not explain and justify further movement of the train for more than 60 KMs from Bareilly Station. What is more worrisome is that the fact that train was running at a speed of 75 kilometers per hour.

Those who were in charge of Railway Administration in the concerned Divisions ought to have taken sufficient precaution. The Administration can certainly be taken to be aware of the fact that the Foot-Over Bridges or any structures on the way could possibly be a hindrance and could have caused such incident with people in large number on roof top. The Administration alone would be in a position to know about the existence of infringements with regard to certain structures and what could be possible implications if the train were to run at a great speed with large number of people on roof top. Reasonable care would naturally be expected of those in charge of the Administration. We therefore do not agree with the conclusion in the Report that Railway Administration was not responsible.

In ***Chairman, Railway Board*** v***. Chandrima Das***, **(2000) 2 SCC 465 ,**while considering the liability of Railways when some of the employees had taken a lady from Bangladesh to Rail Yatri Niwas and subjected her to rape, it was observed by this Court,

"**42.** Running of the Railways is a commercial activity. Establishing the Yatri Niwas at various railway stations to provide lodging and boarding facilities to passengers on payment of charges is a part of the commercial activity of the Union of India and this activity cannot be equated with the exercise of sovereign power. The employees of the Union of India who are deputed to run the Railways and to manage the establishment, including the railway stations and the Yatri Niwas, are essential components of the government machinery which carries on the commercial activity. If any of such employees commits an act of tort, the Union Government, of which they are the employees, can, subject to other legal requirements being satisfied, be held vicariously liable in damages to the person wronged by those employees."

In ***M.S. Grewal*** v. ***Deep Chand Sood,*** **(2001) 8 SCC 151** , this Court considered the concept,

"Duty of care" in a fact situation where teachers who had accompanied school children for a picnic on the bank of a river when the mishap happened and stated as under:-

"**16.** Duty of care varies from situation to situation — whereas it would be the duty of the teacher to supervise the children in the playground but the supervision, as the children leave the school, may not be required in the same degree as is in the playfield. While it is true that if the students are taken to another school building for participation in certain games, it is sufficient exercise of diligence to know that the premises are otherwise safe and secure but undoubtedly if the students are taken out to a playground near a river for fun and a swim, the degree of care required stands at a much higher degree and no deviation therefrom can be had on any count whatsoever. Mere satisfaction that the river is otherwise safe for a swim by reason of popular sayings will not be a sufficient compliance. As a matter of fact the degree of care required to be taken, especially against the minor children, stands at a much higher level than adults: children need much stricter care.

.....

"**23.** Turning attention, however, on to the issue of vicarious liability, one redeeming feature that ought to be noticed at this juncture is that to escort the children was the duty assigned to the two teachers and till such time thus the period of escorting stands over, one cannot but ascribe it to be in the course of employment — the two teachers were assigned to escort the students: the reason obviously being — the children should otherwise be safe and secure and it is the act of utter negligence of the two teachers which has resulted in this unfortunate tragedy and thus it is no gainsaying that the teachers were on their own frolic and the School had done all that was possible to be done in the matter — safety of the children obviously was of prime concern so far as the school authorities are concerned and till such time the children returned to school, safe and secure after the picnic, the course of employment, in our view continued and thus resultantly, the liability of the School.

In the case Chandrima Das (2000) 2 SCC 465) compensation of Rs.10 lakhs as awared by the High Court was upheld while in the case

M.S. Grewal (2001) 8 SCC 15) , this Court sustained the order awarding compensation of Rs.5 lakhs in case of death.

In the backdrop of the aforesaid precedents, in our view, it must be expected of the persons concerned to be aware of the inherent danger in allowing the train to run with such speed having large number of persons travelling on roof top. Though the people who travelled on roof top also contributed to the mishap, the Railway Administration, in our view, was not free from blame. Concluding so, we direct that the next of kin of those who died in the incident and those who sustained injuries must be duly compensated by the Railway Administration. Those who died were obviously very young in age for they had come to compete for the jobs. Taking all these factors in consideration we direct Railway

Administration to pay:

(a) Compensation of Rs.5 lakhs to the next of kin in case of every death;

(b) Compensation of Rs.1.5 lakhs in every case of permanent disability suffered by anyone in the incident;

(c) Compensation of Rs.75,000/- in case of any grievous injury suffered by anyone; and

(d) Compensation of Rs.25,000/- in case of simple injury suffered by anyone.

It is distressing that despite Paragraph No.9.2 of the Report, the Railway Administration has not considered collecting data in Divisions other than Lucknow Division whether there are any infringements as per Schedule of Dimensions stated in said Paragraph 9.2. The Administration must take every care so that such tragedy is not repeated. The first step in that behalf is to have an assessment if any such infringements exist and then to create a road-map to remove such infringements. We, therefore, direct the Railway Administration to implement directions stated in Paragraph No.9.2 of the Report dated 09.09.2011. The Committee headed by a senior officer and assisted by at least three persons from the administration having technical

knowledge and expertise be constituted to have an assessment of all such infringements and to chalk out an action plan to remove such infringements. It is possible that in some cases road over bridges may have been built by State Governments, Municipal Administrations or such bodies. Nonetheless, the action plan must contemplate ways and means to deal with and remove such infringements. We direct that the Committee as aforesaid be constituted within a period of four weeks from the date of this order. We hope and trust that the Committee shall take appropriate steps in collecting data as stated above and creating road map or action plan to remove such infringements, in the shortest possible time.

As regards the infringements pointed in Lucknow Division, the aforesaid Committee shall take immediate steps. If the clearances are specified and stipulated in Schedule of Dimensions Rules, 2004 the Committee may do well to ensure strict compliance. Every dispensation sought, may be considered threadbare and be granted only as a last resort.

We direct the Committee to complete the work as early as possible so that all infringements could be removed in shortest possible time and, in any case, not later than two years. We direct the Committee to file periodic status Reports every six months in this Court.

We also direct that copies of this Order be sent by the Registry to the Minister, Railways and Secretary, Railways who are requested to ensure compliance of the directions as aforesaid.

Further, all Central Police Organisations must issue guidelines or Standing Order akin to Standing Orders Nos. 1 of 2011 and 5 of 2013 of ITBP ensuring that only 600 candidates or such number of candidates as could easily be managed or taken care of be called in one cycle on a particular day. For compliance in that behalf, a copy of this Order be sent by the Registry to the Secretary, Ministry of Home Affairs. With these directions, the petition stands disposed of.

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Consumer Protection Act, 1986

9. Section 2(1) (d) and Section 2 (1)(d) (i) and (ii) of the Consumer Protection Act

Bunga Daniel Babu Versus M/S Sri Vasudeva Constructions & ors

Dipak Misra & N.V. Ramana, JJ.

In the Supreme Court Of India

Date of Judgment -22.07.2016.

Issue

Whether Complainant is a "consumer" as per section 2 (1) (d) – Discussed.

Relevant Extract

The assail in the present appeal, by special leave, is to the judgement and order passed by the National Consumer Disputes Redressal Commission, New Delhi (for short "the National Commission") in Revision Petition No. 258 of 2013 whereby the said Commission has approved the decision of the State Consumer Disputes Redressal Commission, Hyderabad which had reversed the view of the District Consumer Forum that the complainant is a "consumer" within the definition under Section 2(1)(d) of the Consumer Protection Act, 1986 (for brevity, "the Act") as the agreement of the appellant with the respondents was not a joint venture. The District Forum had arrived at the said decision on the basis of legal principles stated in ***Faqir Chand Gulati v. Uppal Agencies Pvt. Ltd. and anr.(2008)10 SCC 345***. The State Commission had opined that the claim of the appellant was not adjudicable as the complaint could not be entertained under the Act inasmuch as the parties had entered into an agreement for construction and sharing flats which had the colour of commercial purpose. Thus, the eventual conclusion that the State Commission reached was that the complainant was not a consumer under the Act. The said conclusion has been given the stamp of affirmance by the National Commission.

The factual score that is essential to be depicted is that the appellant is the owner of the plot nos. 102, 103 and 104 in survey no. 13/1A2, Patta no. 48 admeasuring 1347 sq. yards situate at

Butchirajupalem within the limits of Visakhapatnam Municipal Corporation. Being desirous of developing the site, the land owner entered into a Memorandum of Understanding (for short "the MOU") with the respondents on 18.07.2004 for development of his land by construction of a multi-storied building comprising of five floors, with elevator facility and parking space. Under the MOU, the apartments constructed were to be shared in the proportion of 40% and 60% between the appellant and the respondent No. 1. Additionally, it was stipulated that the construction was to be completed within 19 months from the date of approval of the plans by the Municipal Corporation and in case of non-completion within the said time, a rent of Rs. 2000/- per month for each flat was to be paid to the appellant. An addendum to the MOU dated 18.07.2004 was signed on 29.04.2005 which, *inter alia*, required the respondents to provide a separate stair case to the ground floor. It also required the respondents to intimate the progress of the construction to the appellant and further required the appellant to register 14 out of the 18 flats before the completion of the construction of the building in favour of purchasers of the respondents.

As the factual matrix would further unfurl, the plans were approved on 18.05.2004 and regard being had to schedule, it should have been completed by 18.12.2005. However, the occupancy certificates for the 12 flats were handed over to the occupants only on 30.03.2009, resulting in delay of about three years and three months. In addition, the appellant had certain other grievances pertaining to deviations from sanction plans and non-completion of various other works and other omissions for which he claimed a sum of Rs.19,33,193/- through notices dated 6.6.2009 and 27.6.2009. These claims were repudiated by the respondents vide communications dated 17.07.2009 and 16.08.2009.

Being aggrieved by the aforesaid communications, the appellant approached the District Forum for redressal of his grievances. The District Forum appreciating the factual matrix in entirety framed two issues for determination, which in essence are, whether the complainant was a "consumer" within the definition of Section 2(1)(d)

of the Act; and whether there was any deficiency in services on the part of the opposite party. The District Forum after analysing various clauses of the MOU and the addendum and placing reliance on the decision of the Court in ***Faqir Chand Gulati*** (supra) came to hold that the transaction between the parties could not be termed as a joint venture, in order to exclude it from the purview of the Act. Accordingly, the District Forum opined that the complainant came under the definition of Consumer under Section 2(1)(d)(ii) of the Act. On the second point of deficiency as well, it partly allowed the claim in favour of the appellant-complainant by awarding a sum of Rs. 15,96,000/- towards rent for delayed construction, Rs. 19,800/- as reimbursement of vacant land tax, Rs. 70,000/- as cost for rectification of defects in the premises and Rs. 25,000/- for mental agony. It was further directed that the abovesaid sum shall carry interest @ 9% *per annum* from the date of filing of the complaint. Be it stated, cost of Rs. 10,000/- was also awarded.

The respondent constrained by the decision of the District Forum preferred an appeal before the State Commission which did not agree with the finding of the District Forum and came to hold that the appellant-complainant did not come within the ambit of definition of "consumer" under the Act and accordingly dismissed his claims as not maintainable. The appellate forum expressed the view that as the agreement was entered into by the appellant-complainant for more than two plots and there was an intention to sell them and let them on rent and earn profit, the transaction was meant for a commercial purpose. Grieved by the said decision, the appellant-complainant invoked the revisional jurisdiction of the National Commission which concurred with the view expressed by the State Commission by holding that the State Commission had rightly distinguished the authority in ***Faqir Chand Gulati's case*** on facts because the flats were not for personal use and the complainant had already sold four of the twelve flats.

The seminal issue that emanates for consideration is whether the appellant-complainant falls within the definition of "consumer" under

Section 2(1)(d) read with the Explanation thereto of the Act. The issue that further arises for determination is whether the National Commission has rightly distinguished the authority in ***Faqir Chand Gulati's case***. It is necessary to mention that the controversy involved in the case had arisen prior to the 2002 amendment by which the definition of the term "consumer" has been amended in the dictionary clause.

To appreciate the heart of the dispute, we think it apposite to x-ray the definition of the term "consumer" from the inception till today. Section 2(1)(d) at the commencement of the Act read as follows:-

"Section 2(1)(d) "consumer" means any person who —

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person;"

The aforesaid definition, as is manifest, did not include a person who obtained such goods for resale or for any commercial purpose.

The definition under Section 2(1)(d) that defined "consumer" after the amendment of 1993 read as follows:- "Section 2(1)(d) "consumer" means any person who —

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or

partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires **or avails of** any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires **or avails of** the services for consideration paid or promised, or partly paid and partly when such services are availed of with the approval of the first mentioned person;

Explanation.—For the purposes of sub-clause (i), "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment."

It is necessary to mention here that the definition of the term "consumer" has been amended by the Consumer Protection (Amendment) Act, 2002 (62 of 2002) with effect from 15.03.2003. Be it stated, clause 2(1)(d)(ii) was substituted. We think it appropriate to reproduce the same:-

"Section 2(1)(d) "consumer" means any person who —

x x x x x

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person **but does not include a person who avails of such services for any commercial purpose**;

Explanation.—For the purposes of this clause, "commercial purpose" does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment."

In this context, we may usefully refer to the recent pronouncement in ***Punjab University v. Unit Trust of India and others ,****(2015) 2 SCC 669,* wherein a two-Judge Bench, while dealing with the term "consumer", observed that it is clear that "consumer" means any person who hires or avails of any services for a consideration, but does not include a person who avails of such services for any commercial purpose and the "commercial purpose" does not include services availed by him exclusively for the purposes of earning his livelihood by means of self-employment. Be it noted, the Court was considering whether the deposit of money in mutual fund scheme could amount to availing of services for "commercial purposes". The Court after referring to few passages from ***Laxmi Engineering Works*** (supra) has observed that:-

"21. It is thus seen from the above extracts from *Laxmi Engg. Works (supra)* that Section 2(1)(*d*)(*i*) is discussed exclusively by this Court. We are of the opinion that clauses (*i*) and (*ii*) of Section 2(1)(*d*) of the Act must be interpreted harmoniously and in light of the same, we find that the Explanation following Section 2(1)(*d*)(*ii*) of the Act would be clarificatory in nature and would apply to the present case and as held by this Court in *Laxmi Engg. Works (supra)*, the term "commercial purpose" must be interpreted considering the facts and circumstances of each case."

Though the said decision was rendered in a different context, yet the principle that commercial purpose is required to be interpreted considering the facts and circumstances of each case has been reiterated. We respectfully concur with the same.

The obtaining factual matrix has to be tested on the touchstone of the aforestated legal position. The National Commission has affirmed the order passed by the State Commission on the ground that the complaint is not a consumer as his purpose is to sell flats and has already sold four flats. In our considered opinion, the whole approach is erroneous. What is required to be scrutinised whether there is any joint venture agreement between the appellant and the respondent. The MOU that was entered into between the parties even remotely

does not indicate that it is a joint venture, as has been explained in ***Faqir Chand Gulati*** (supra). We think it appropriate to reproduce the relevant clauses from the MOU:-

"3. The apartments shall be shared by the owner and the builder in the proportion of 40% and 60% respectively in the built-up area including terrace rights all additional constructions in the said complex. The common areas shall be enjoyed jointly.

xxxxx xxxxx

The builder shall commence construction and complete the same within a period of nineteen months from the date of granting of approval for the plans by the Municipal Corporation, Visakhapatnam. In case of non-completion of the constructions in the complex within the above mentioned time, builder should pay rent Rs.2,000/- per month for each flat in a 40% share of the owner.

xxxxx xxxxx

The builder shall pay a sum of Rs.5 lakhs (Rupees five lakhs only) to the owner as interest free security deposit. The security deposit of Rs.5 lakhs shall be refunded at the time of completion of the apartment by way of cash.

xxxxx xxxxx

The owner hereby agrees that out of his 40% share in the built-up area of the Apartment complex to be given to him by the builder, the owner shall register one flat of his choice of a value of Rs.6,00,000/- in the fourth floor of the said building in favour of the builder or his nominee towards the cost of the items set out in the specifications hereto attached agreed to be provided by the builder for

the benefit of the owner in the apartments intended for the share of the owner. In case the cost of the flat is found to be more or less than Rs.6 lakhs, then both parties shall adjust the difference by payment of the same by way of cash."

On a studied scrutiny of the aforesaid clauses, it is clear as day that the appellant is neither a partner nor a co-adventurer. He has no say or control over the construction. He does not participate in the business. He is only entitled to, as per the MOU, a certain constructed area. The extent of area, as has been held in ***Faqir Chand Gulati*** (supra) does not make a difference. Therefore, the irresistible conclusion is that the appellant is a consumer under the Act.

As the impugned orders will show, the District Forum had allowed the claim of the appellant. The State Commission had dismissed the appeal holding that the claim of the appellant was not entertainable under the Act, he being not a consumer and the said order has been given the stamp of approval by the National Commission. Therefore, there has to be appropriate adjudication with regard to all the aspects except the status of the appellant as a consumer by the appellate authority. Consequently, the appeal is allowed, the judgments and orders passed by the National Commission and the State Commission are set aside and the matter is remitted to the State Commission to re-adjudicate the matter treating the appellant as a consumer. We hereby make it clear that we have not expressed any opinion on the merits of the case. In the facts and circumstances of the case, there shall be no order as to costs.

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Prevention of corruption act

10. Section 5(1)(d) read with Section 5 (2) of the PC Act & Section 161 of IPC

Pradipta Kumar Jena versus State of Orissa

D. Dash, J.

In the High Court of Orissa, Cuttack

Date of judgment: 04.07.2016

Issue

Appeal against conviction

Relevant Extract

Prosecution case is as follows:-

On 30.03.1988 the appellant was working as the Welfare Extension Officer at Sadar Block, Balasore. That the complainant P.W.8 is a member of Scheduled Caste. He had the intention to sell a piece of his land to one Narahari Sahu and his brothers in order to meet the expenses for the marriage of his sister. But being a member of scheduled caste in view of restriction for transfer of any immovable property as provided in the O.L.R. Act and as it was only possible with prior permission, he made an application seeking said permission. It is stated that for the purpose, he approached the appellant who was then the Welfare Extension Officer of Sadar Block, Balasore for obtaining a caste certificate. The allegation next runs that the appellant for extending the said help demanded bribe of Rs.100/-. Finally it was settled at Rs.50/- to which the complainant yielded against his will. So he lodged the F.I.R., Ext.9 with the D.S.P., Vigilance, Balasore which necessitated the registration of the case against the appellant and thereafter trap was decided to be laid after observing all other formalities. It is stated that the complainant and over-hearing witnesses went in a rickshaw to the Block Office. Other members of the raiding party including the Magistrate and another Govt. Official went to the office and remained at such position within the visible range. The appellant was then absent in the office and a little while thereafter he arrived. It is alleged that no sooner did the appellant see the complainant, he asked him as to if he had brought money. On his

asking, the complainant bringing out the tainted currency notes from his left side chest pocket from inside the white paper, handed those notes to the appellant who then having accepted the same, kept those notes being earlier smeared with phenolphthalein powder inside the right side back pocket of his trouser. At this time, the witnesses as per earlier arrangement receiving the signal arrived, when they found that the appellant was coming out side followed by the complainant. It was then pointed out by the complainant to the Investigating Officer and the members of the raiding party. They took the appellant inside his room and told him to have received the bribe which he initially denied. The appellant was then asked to give his hand-wash in sodium carbonate solution, which although was not immediately agreed to, yet when finally taken, the colour became pink. It is further alleged that during the period, the appellant brought out the currency notes from his pocket and threw those away. The hand-wash so collect was then kept in a clean, dry and empty bottles which were sealed and signed in presence of the witnesses. The currency notes thrown were collected and compared by the Magistrate with the copy of the preparation report written and kept by him and the numbers tallied. The hand wash of the Magistrate and witnesses were also taken and that also changed to pink colour and accordingly preserved in clean and dry bottles, duly sealed and signed. The dresses of the appellant were taken. When the right side back pocket of his trouser was washed with sodium carbonate solution, the colour also changed to pink which was preserved. The detection report was made. Seizure of tainted notes, clean glass bottles, bottles with hand wash & other wash, solutions etc. were also seized and sent for chemical examination. The case record of the O.L.R. Case No.68/88 was seized from the office of Sub-Divisional Officer, Balasore. The report from the Chemical Examiner, S.F.S.L., Rasulgarh being received, the Investigating Officer placed the relevant papers including his consolidated report before the Sanctioning Authority. Necessary sanction being accorded, charge sheet was placed against the appellant for facing the trial for the offences as stated above.

The appellant during trial admitted that a person had come to him on 28.3.88 with a request to give a caste certificate but then he told him to approach the Tahasildar or Revenue Officer as the case may be for the purpose of grant of caste certificate, they being the competent authority. It is also his case that on 30.3.88 that person again came and renewed his request as made before and then he forcibly kept the currency notes in the back pocket of his trouser which were immediately thrown by him and under that situation he was compelled to leave the room. It is stated that only near the gate of the Block Office, he was caught hold of and brought back. It is also his case that by then he had no information from any quarter even as regards any enquiry if required to be made by him in relation to the issue of the cast certificate if any.

The trial court in view of such case and counter case, as it appears, has rightly formulated the following points for determination:-

(i)Whether the appellant is a public servant being the welfare Extension Officer of Sadar Block, Balasore demanded and accepted the cash of Rs.50/- as gratification other than the remuneration from P.W.8 as a motive or reward for doing an official act for submitting an enquiry report regarding issuance of caste certificate; and

(ii)Whether the appellant being a public servant by illegal means or official abusing his position as such obtaining for himself the pecuniary advantage to the extent of Rs.50/- from P.W.8.

Going to answer the aforesaid points as is seen, the trial court has taken up the exercise of examination of evidence and their evaluation in searching the answers to the above points. Finally, the answers having been recorded in favour of the prosecution, the appellant has been convicted and visited with the sentence as aforesaid.

The authority in case of B.Jayaraj vs. State of A.P.; AIR 2014 SC (suppl) 1837, may next be placed. Here the complainant did not support the prosecution version and had stated in his deposition that the amount that was paid by him to the accused was with a request that it may be deposited in the bank as fee for renewal of his licence

for the fair price shop. The court referred to Section 7 of the Act and observed as follows:-

"Insofar as the offence under Section 7 is concerned, it is a settled position of law that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of this Court. By way of illustration, reference may be made to the decision in C.M. Sharma v. State of A.P. AIR 2011 SC 608 and C.M. Girish Babu v. C.B.I.; AIR 2009 SC 2022. Having observed as above, the court proceeded to state as under:-

"In the present case, the complainant did not support the prosecution case insofar as demand by the accused is concerned. The prosecution has not examined any other witnesses, present at the time when the money was allegedly handed over to the accused by the complainant, to prove that the same was pursuant to any demand made by the accused. When the complainant himself has disowned what he had stated in the initial complaint (Ext.P-11) before LW-9, and there is no other evidence to prove that the accused had made any demand, the evidence of PW-1 and contents of Ext.P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused. We are, therefore, inclined to hold that the Ld. Trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact, such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section7. The above also will be conclusive insofar as the offence under Section 13(1)(d)(i)(ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal

means or abuse of position as a public servant to obtain any valuable thing of pecuniary advantage cannot be held to be established.

The said principle has been followed in M.R. Purushottam v. State of Karnataka giving a careful reading to the aforesaid decisions, it is found that the court disbelieved the story of the prosecution as no other evidence was brought on record. In N.Narsinga Rao case (supra) the accused was charged for the offences punishable under Section 7 read with Section 13 (1)(d) & (2) of the Act of 1988. The court, as already stated, had referred to section 20(1) of the said Act and opined that from the proven facts the court can legitimately draw a presumption that the delinquent officer had received and accepted money. Therefore, it is clear that the authorities in B.Jayaraj (surpa) and M.R. Purushottam (supra) do not lay down as a proposition of law that when the complainant turns hostile and does not support the case of the prosecution, the prosecution cannot prove its case otherwise and the court cannot legitimately draw the legal presumption as available in the statute.

Adverting to the evidence on the factum of acceptance of bribe by the appellant, the specific plea of the appellant be seen first. It is stated that he had told to have no competency to grant a caste certificate. When he was going out, there was insertion of something in the back pocket of his trouser and the appellant then immediately brought those out and finding those to be currency notes threw away. This version of the appellant finds corroboration from the evidence let in by the prosecution that the money was seized from the verandah near the office room. In order to reconcile, the prosecution has led evidence that when the appellant was asked about the receipt of bribe and Vigilance Officials were discussing with him in the matter, he threw the money. Then he was asked for his hand-wash. It is in the evidence of P.W.1 in cross-examination that after receipt of the signal, the members of the trap party rushed in and the Inspector caught hold of the hand of the appellant there and it was after the appellant was pointed out by Balram and then his pockets were not searched. So if the Vigilance Officials had caught hold of the hands of the appellant,

hardly there was the scope for him to bring out the currency notes from inside the back pocket of his trouser and throw those. Admittedly in this case, the appellant was caught at a distance of forty feet apart from the Block Office Building. Even accepting for a moment that he brought out the currency notes and threw those, it is also hard to believe that three currency notes of denominations of Rs.20+Rs.20+Rs.10 in total coming to Rs.50.00 would get spread beyond the office room. All these rather lead to believe the case of the appellant to be a probable one that no sooner did the currency notes were inserted in the back pocket of his trouse those were thrown and at that time he was near the door of the office room proceeding towards the office of the B.D.O.. The evidence that seeing the vigilance people and after discussion with them, he threw those notes is rendered unbelievable.

The Chairman of the Panchayat Samiti has been examined as D.W.1 from the side of the appellant. He has deposed that when the appellant was going with him, the complainant kept something in the back pocket of his trouser. So the appellant immediately brought those and threw away, where-after the Vigilance Inspector and other staff caught hold of the hands of the appellant. His evidence has been discarded on the ground of some discrepancy with regard to the timing. The examination of this witness having been made after lapse of about twenty years, the trial court ought not to have attached any importance to such discrepancies particularly when the presence of this D.W.1 is not specifically denied. Above being the state of affair in the evidence on record, taking a cumulative view on all those, I hold that the proved facts do not lead to draw a legitimate presumption that the appellant received or accepted the said currency notes on his own volition so as to hold that the factum of presumption and the testimony of the witnesses examined on behalf of the prosecution go to prove the case of the prosecution as laid as regards demand and acceptance. For the aforesaid discussion and reasons, the finding of guilt as recorded by the trial Court against the appellant is held as unsustainable. Thus, the judgment of conviction and order of sentence which have been impugned in this appeal are hereby set aside. In the result, the appeal stands allowed.

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Employees Provident Funds and Miscellaneous Provisions Act, 1952

11.*Section 14 B 7 Q and Section 148 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 Regional Provident Fund Commission versus Orissa State Road Transport Corporation and another.*

S. N. Prasad ,J.

In the High Court of Orissa , Cuttack

Date of Judgment - 21.07.2016

Issue

Quashing of order of Employees Provident Funds Appellate Tribunal.

Relevant Extract

The short fact of the case of the petitioner is that the Orissa State Road Transport Corporation (OSRTC), Berhampur in the district of Ganjam was covered under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter to be referred to as the "Act, 1952", in short) bearing Code No.OR/87, but failed to remit the PF dues within due dates granted under the statute and accordingly, notice was issued upon the Corporation under Sections 14B and 7Q of the Act, 1952 for assessment for the period 3/1990 to 2/1993 along with details of the belated remittance of the payments. In response to the said notice, the Divisional Manager of the establishment appeared and admitted the delay reason being was not intentional. Accordingly, the competent authority has passed order on 12.5.2010 levying damages of Rs.19,03,862.00 under Section 148 and nil amount under Section 7Q of the Act, 1952. Assessment was done as per Para 32A of the Employees Provident Fund Scheme, 1952 (hereinafter to be referred to as the "Scheme, 1952"). Opposite party- Corporation challenged the same before the appellate Tribunal as per Section 7I of the Act, 1952 and the said appeal has been registered as ATA No. 456(10) of 2010. The appellate authority remitted the matter back to the petitioner with a direction to assess the dues @ 17% inclusive of interest. The petitioner aggrieved with the order passed by the appellate authority is before this Court in the present writ petition inter alia challenging on the ground that the rate of damages, which is to be

levied under Section 14B of the Act, 1952 has been fixed as per Para 32A of the Scheme, 1952 with effect from 1.9.1991 and as such, since the rate of damages has been provided under the statute, the Tribunal, who is only the fact finding authority, cannot go beyond the statute. It has also been contented by the learned counsel for the petitioner that the authority is duty bound to assess the quantum of damage in view of the specific provision as contained in Para 32A, which has been implemented w. e. f. 1.4.1991.

After being noticed, opposite party-Corporation appeared and filed counter affidavit. Learned counsel representing the opposite party-Corporation has submitted that the learned Tribunal has not committed error in passing the order and taking into consideration the situation, which the Corporation was facing at that time and taking a lenient view, the learned Tribunal has reduced the assessment to 17%, which is not contrary to rule and does not suffer from illegality. Learned counsel for the opposite party-Corporation has placed reliance upon one letter issued on 29.5.1990 in which reference has been made regulating levy of damages at the revised rates in respect of all defaults arising on and after 1.6.1990, i.e. defaults arising in the payment of dues for the month of May 1990 onwards subject to the condition as specified in the preceding paragraphs. Placing reliance on the same, it has been submitted the Tribunal has not committed any error and as such, the writ petition is not worthy to be considered and accordingly, is fit to be dismissed.

So far as the case in hand is concerned, the factual position, which is not in dispute is that the Corporation which is coming under the purview of the Act, 1952 has defaulted in depositing the statutory contribution in the PF account and as such proceeding under Section 14B and 7Q has been initiated and the authorities after hearing the establishment passed order determining the damages due from the establishment under the Act, 1952. The Corporation being aggrieved with the decision of the authority dated 18.8.2008 has preferred an appeal before the EPF Tribunal taking therein the ground that the Corporation had sustained huge loss and as such, the delay in deposit of the contribution was not intentional rather it is due to the situation

beyond its control and taking into consideration this aspect of the matter, the Tribunal has passed the following order:

"9. Thus, in view of the discussion held above, since the delay in payment of dues does not appear to be intentional one, the imposition of penalty and interest on a higher side does not appear to be justified. Hence ordered, the appeal is remanded back to the EPF Authority with direction to assess the dues @ 17% inclusive of interest. The appellant is directed to appear before Authority within one month of this order, failing which, the respondent may decide the matter as per law. Copy of order be sent to the parties and the file be consigned to record room." The petitioner being aggrieved with the order regarding direction to assess the dues @ 17% inclusive of interest is before this Court on the ground that the Tribunal has got no jurisdiction to sit over the statutory provision.

On perusal of the provisions as contained in Section 14B, it is evident that the said statute has provided in a situation when the employer makes default in payment of any contribution to the Fund and the provision for fixing the quantum of damages as per Para 32A, which has been implemented with effect from 1.9.1991 wherein specific rate of damages (percentage of arrears per annum) has been provided.

After a close scrutiny of the provisions as contained in Para 32B, it is evident that the provisions contained therein provides the power to the Central Board to reduce or waive the damages levied under Section 14B of the Act, 1952 in relation to the establishments specified in the second proviso to Section 14B subject to certain terms and conditions. From a bare perusal of the second proviso to Section 14B, it is evident that the said provision confers power upon the Central Board to reduce or waive damages levied under this Section in relation to an establishment, which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction (BIFR) established under Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, but this is not the case of the opposite party-Corporation, which

was ever been declared as a sick industrial company by the BIFR and as such, there is no question of application of the provisions of Para 32B of the Scheme, 1952.

There is no dispute about the fact that the Court of law or the Tribunal or quasi judicial authority is expected to follow the statute and they are duty bound to follow it. The Act, 1952 being a Central Act has been promulgated to provide the benefit to the down trodden people being a beneficial legislation. In order to implement the provisions of the Scheme in a proper manner, power has been conferred upon the competent authority under Section 5 to frame a Scheme. In pursuance to the power conferred under Section 5 of the Act, 1952, the Central Government promulgated a provision under the Scheme, 1952 containing therein Para 32A, which provides the procedure to assess the rate of damages percentage wise per annum. Thus, the Scheme, 1952 has a statutory force and as such, the same is to be followed in its letter and spirit.

The opposite party-Corporation has challenged the order passed by the competent authority under Section 14B of the Act, 1952 stating therein that the rate of percentage of damages may be reduced considering the precarious financial condition of the Corporation and accepting the said contention, the Tribunal by exceeding its jurisdiction has modified the order passed by the competent authority by giving a go bye to the statutory provision as contained in Para 32A of the Scheme, 1952. Thus, there is no doubt in my mind that the Tribunal has never been conferred with any power to sit over the statutory provision on whatsoever ground may be, otherwise, there will be no sanctity of the statutory provision. Moreover, it is not the duty of the Court or Tribunal to sit over the statutory provision, rather it is the duty of the Court of law to see as to whether the order passed is in accordance with law and certainly if the order is not in accordance with law, the Tribunal or Court of law has got power to rectify the same in consonance with the statute or direct the authorities to rectify the mistake, but in no circumstances, the Court of law or Tribunal can sit over the statutory provision on the basis of sympathy. To note here that in our democratic system, Parliament and Legislature are supreme

and once the rule making body has framed a Rule, the Court is to see that the rule of law is to be followed. But without considering this, the Tribunal has passed order travelling beyond the statute as provided under Para 32A of the Scheme, 1952. Further, on perusal of the powers conferred under Section 7I, 7L or even under Rules,1997 no such power has been conferred upon the Tribunal. The Tribunal is only to see the fact whether there is any error in the fact finding or not and not by calling upon the witnesses or evidence assuming the power of a Civil Court, but no where it has been reflected in the statute that the Tribunal can go beyond the statute.

There is no dispute about the fact that if the manner of doing a particular act is prescribed in any statute, the act must be done in that manner. Reference in this regard may be made to the judgment rendered by the Apex Court rendered in **State of Jharkhanda v. Ambay Cements and another,** 2005(I) SCC 368 wherein it has been held that it is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way.

In **Babu Verghese and others v. Bar Council of Kerala and others,** (1993) 3 SCC 422 their Lordships of the Apex Court has been pleased to hold as under:

"31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all."

The aforesaid principle has since been approved by the Apex Court in **Rao Shiv Bahadur Singh v. State of U.P.**, AIR 1954 SC 322 and in **Deep Chand v. State of Rajasthan,** AIR 1961 SC 1527. These two cases have again been considered by the Apex Court in the case of **State of U.P. v. Singhara Singh**, AIR 1964 SC 358. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognized as a salutary principle of administrative law. In this respect, reference may also be made to the judgment rendered by the Apex Court in the case of **Zuari Cement Ltd. v. Regional Director, E.S.I. Corporation and another**, (2015) 7 SCC 690 and in paragraph 15, it has been held as follows :

"15. Where there is want of jurisdiction, the order passed by the Court/ tribunal is a nullity or non-est. What is relevant is whether the Court had the power to grant the relief asked for. ESI Court did not have the jurisdiction to consider the question of grant of exemption, order passed by the ESI Court granting exemption and consequently setting aside the demand notices is non-est. The High Court, in our view, rightly set aside the order of ESI Court and the impugned judgment does not suffer from any infirmity warranting interference."

In view of the aforesaid settled proposition of law, in my considered view, the Tribunal has exceeded its jurisdiction in passing the order impugned by remitting the matter back to the authority to assess the rate of damage @ 17% per annum. Accordingly, the impugned order being not sustainable, is quashed. In consequence thereof, the order passed by the authority under Section 14B of the Act, 1952 vide Annexure-1 is confirmed. The writ petition stands allowed. No costs.

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