O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2016

(*JUNE*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY

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

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Indian penal Code

2. Section 302of IPC

State Versus Ananta Murmu

B.K. Nayak & Biswanath Rath , JJ.

In the High Court of Orissa, Cuttack

Date of Judgment: 22.6.2016

Issue

Appeal against acquittal for murder.

Relevant Extract

Prosecution led the story that on 21.4.1996 at about 3 P.M. while the son of the accused was counting money, the accused demanded for immediate handing over the money to him failing which accused threatened to kill his son. Son of the accused being afraid of the same ran away from the place and it is alleged that after the above, the accused chased his daughter, namely, Salma and assaulted her by means of a spade inflicting several blows resulting death of his daughter Salma in the backyard near the fence. Prosecution has the further story that at the above point of time, wife of the accused, namely, Basanti, who had been to fetch water, on her arrival protested the drastic act of the husband. Unfortunately, the husband then chased his wife Basanti and killed her by use of same spade. Prosecution story further reveals that for the ghastly act of the accused-respondent people from the neighborhood fled away from their houses and gathered at the end of the village. When the informant, who is the immediate neighbor of the accused, returned to village he was told about the incident by the villagers as well as his mother, who were all then assembled at the end of the village. Where after the informant rushed to the house and found the dead body of Salma lying near their common fence. As per informant, he also heard the shoutings raised by the accused being present inside the house. The informant along with two other villagers proceeded to Kamakhyanagar Police Station and reported the

incident, which was reduced in to writing by the Officer-In Charge, Kamakhyanagar Police Station on 21.4.1996 at about 8 P.M. Upon completion of investigation, the police submitted charge sheet against the accused-respondent under Section 302 of the Indian Penal Code facing the trial.

The plea of the accused is a complete denial. The accused took his defence on his examination under Section 313 of the Code of Criminal Procedure that he was not only innocent but had no idea regarding the alleged incident and he was not even in a position to say as to who is the author of the crime and who are responsible for killing his wife and daughter. The accused had also disclosed in the said statement that two months preceding to the date of occurrence he was suffering from fever. Basing on the prosecution story, depending on the evidence of P.W.2 disclosing that the accused was semimad and was howling on the date of occurrence further applying the provisions under Section 84 of the Indian Penal Code, particularly, the general exception in Chapter-IV of the Indian Penal Code, the Sessions trial was concluded with an order of acquittal, thereby further directing setting the accused to liberty forthwith.

Challenging the aforesaid judgment, the State filed the Government Appeal which was admitted by this Court vide its order dated 24.11.2003. On a close scrutiny of the impugned judgment, this Court finds that the trial court relying on the evidence of P.W.2 after observing that the evidence of this witnesses should not be discarded in toto and further relying a decision of this Court in the case of *Shama Tudu v. State, 1986 (I) OLR 536* deciding the principle governing the application of Section 84 of the Indian Penal Code and drawing an analogy between the words 'medical insanity' and 'legal insanity' and partial reliance of some of the evidence of P.W.1, the informant,

observed that the prosecution witness supports the case of the defence regarding madness the accused had at the relevant point of time. Taking resort to the provision contained in Section 84 of the Indian Penal Code and in further reliance of the decision of this Court reported in (1993) 6 O.C.R. 41, the case between *Ajaya Mahakud v. State*, gave the benefit of Section 84 of the Indian Penal Code to the accused respondent and consequently passed the judgment and the order of acquittal. Looking to the prosecution case including the evidence in the side of the prosecution and the observation of the Sessions Court, this Court finds that there is a clear observation of Section 84 of the Indian Penal Code in committing the double murder. In absence of challenge to the said, this Court is now required to see whether the application of Section 84 of the Indian Penal Code to the present case is justified or not. In the process, this Court now looks first of all the F.I.R. story vide Ext.7. The F.I.R. story remains wholly silent on the claim of insanity with the accused-respondent. From recording of the statement of accused under Section 313 of the Code of Criminal Procedure, the accused while claiming that he is innocent, he has a clear statement that he had absolutely no idea regarding the alleged incident and he also cannot say as to who is the author of the crime, further that he was suffering from fever from two months preceding to the date of occurrence. P.W.1, the informant in cross-examination on the issue of madness of the accused stated as follows:

"The accused was semi-mad by the date of occurrence. I cannot say as to if the accused was complete mad at that time".

P.W.2, the sole eye witness, is the son of the accused-respondent and he was 13 years of age at the time of incident and has been examined as a child witness. In his examination in chief, this witness stated as follows:

"On the date of occurrence the accused was mad for which my mother asked me to bring out money for his treatment".

In cross-examination, P.W.2 stated as follows:

"My father was complete mad by the date of occurrence. He used to throw away his wearing apparels and most of the times was remaining naked. He was unable to distinguish good from bad. He was not sleeping at all and roaming hither and thither aimlessly and sometimes howling unnecessarily".

Prayer of the Public Prosecutor to recall this witness and declare him hostile was allowed. In further cross-examination by prosecution with the permission of the court below in paragraph-6, this witness admitted that he had not disclosed before the Police that his father was mad and that he was moving hither and thither naked and that he was unable to distinguish true from falsehood with a further disclosure that he did not say that as the police did not ask him any such question. His deposition further reveals a specific statement that before arrest of his father and putting him in jail, his father was earning and giving money to this witness, the son, to prosecute his studies. In the cross-examination by the accused, this witness in paragraph-7 stated that the madness developed with his father intermittently once or twice a year and when madness developed with him, he used to remain idle without taking up any work and at the end he also deposed that his father and mother used to tend their goats and sheeps. P.W.6, the Officer-In-Charge, who investigated the matter, in his cross examination at paragraph-6 while deposing that when he visited the spot being informed about the incident, he found the accused sitting near the dead body of his wife. At the same time he also deposed that he had never suspected the

symptoms of insanity with the accused prior to the occurrence. Now coming to consider the aspect of Section 84 of the Indian Penal Code. Section 84 of I.P.C. reads as follows:-

"Act of a person of unsound mind-Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

The requirement of this provision is that insanity or unsoundness of mind must be available with the person doing the act at the time of the occurrence. The term 'insanity' is not defined in the Indian Penal Code.

Section 105 of the Indian Evidence Act reads as follows:

"Burden of proving that case of accused comes within exceptions. existence of circumstances bringing the case within any f the General Exceptions in the Indian Penal Code, (45 of 1860) or within any special exception or provision contained in any other part of the same Code, or in any law defining the offence, is upon him, and he Court shall presume the absence of such circumstances
xxxx xxxx Illustrations xxxx xxxx
(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A"

Reading of both the above legal provisions makes it clear that legal insanity as distinguished from medical insanity envisaged and covered by Section 84 IPC is narrower and is applicable only if the person accused was incapable of knowing the nature of the act or knowing that what he was doing was

either wrong or contrary to law and that too at the time of incident and not otherwise. In the case of *Siddhapal Kamala Yadav v. State of Maharashtra, AIR 2009 SC 97*, it clarified that to establish insanity under Section 84 IPC, it has to be established that the accused was laboring under such disability, i.e. unsoundness of mind, as not to know the nature or quality of the act he was committing or the act was wrong/contrary to law. Further, the crucial time for ascertaining insanity is the time when crime was committed i.e. the time when the incident has occurred and more, particularly, unsoundness of mind after or before commission of the offence is not relevant.

From the discussions in the aforesaid paragraphs, this Court has considered the defence plea of insanity of the accused and the reading of the factual evidence available on record did not at all establish the defence of insanity of the accused at the time when the offence was committed. Section 84 IPC has no mere application to the case claiming insanity. Such claim has to be established with preponderance of probability. There is no establishment of this claim either conclusively or beyond reasonable doubt to get the benefit of Section 84 IPC. Therefore, this Court is of the firm view that the defence has totally failed in establishing the plea of insanity of the accused. Thus, this Court finds that the observation of the Sessions court in the matter of application of Section 84 IPC in the present case is improper and defective. This Court has gone through the decisions relied on by the Sessions Judge as reported in the case of *S.W.Mohammed v. State of Maharashtra, AIR 1972 SC 2443.* Reading of the

aforesaid decision, this Court also observes that there has been improper application of the principle laid down therein by the Sessions Court and under the circumstances, this Court sets aside the impugned order of acquittal dated 4.5.1999 passed by the learned Sessions Judge, Dhenkanal-Angul, Dhenkanal in S.T .Case No.71-D of 1996 and find the accused-respondent guilty of the offence of murder and accordingly convict him under Section 302,IPC.

Now, coming to the question of sentence, this Court finds that the Sessions court has given a clear finding that the prosecution succeeded in proving that the murder of the wife and daughter has been committed by none else than the accused-respondent. There is some evidence that the incident had occurred involving family quarrel, though the testimony is silent as to who initiated quarrel and for what reason. However, looking to the materials available on record, particularly the background and the manner in which the crime has taken place, it is not possible to bring this case within the frame of a murder rarest among the rare. Consequently, this Court sentences the accused to undergo rigorous imprisonment for life and also with a fine of Rs.2,000/- (Rupees two thousand), in default of which the accused-respondent has to undergo rigorous imprisonment for two months.

The bail of the respondent stands cancelled and he is directed to surrender to custody forthwith to serve the sentence. Send back the L.C.R. forthwith.

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3. Section 304-B, 498-A & Section 306 of IPC
Section 3, 4 & 6 of Dowry Prohibition Act
Satish Shetty Versus State of Karnataka.
Dipak Misra & Shiva Kirti Singh, JJ.
In the Supreme Court of India.
*Date of Judgment – 03. 06.2016**.***

Issue

Reversing of the Order in part- Challenged

Relevant Extract

The story of the deceased young lady, aged about 25 years who was forced to commit suicide by the unfortunate situation and circumstances surrounding her life, resembles the tale of so many similar young ladies who end their life due to untold miseries and hardships faced by them within the confines of the four walls of their matrimonial home. All of them enter such home with hope of leading a long and blissful married life but this hope, invariably, does not last long, nor their life. In the present case the victim left behind a son then aged about ten months and she was also mothering a life of twenty weeks in her womb. The deceased Rekha @ Baby was married with the appellant on 5.06.1991 and immediately she began her stay in matrimonial home with her husband and in-laws and a son was also born to them who on the date of her death i.e. 19.11.1993 was aged about ten months. There is no dispute regarding her death and even as per the Unnatural Death Report (UDR) exhibit Ex.P.20, lodged by the appellant with the local police station on 19.11.1993 at 9.45 a.m, she died of some poison which she had consumed allegedly because the appellant forbade her from going to her mother's place in the morning hours of 18.11.1993. As described in the said report, the victim had consumed a poison which was kept for spray in the fields. She had been taken to hospital but expired there at around 8 a.m. As per version of the

occurrence given by the appellant, the deceased and he were living a very happy life. He was satisfied with the money and gold given at the time of marriage as dowry and was apparently at a loss as to why the deceased consumed poison.

The High Court has considered the issue whether Section 498-A and 306 of the IPC are attracted or not and after extracting the relevant provisions as well as Section 113A of the Evidence Act, has held the appellant guilty of the offences under Section 498-A and 306 of the IPC. For that the High Court has relied upon relevant materials consisting of oral evidence available on record as well as documentary evidence in the forms of letters. Before discussing whether the High Court has committed any error of facts or law on this issue, it is useful to examine the first contention advanced on behalf of the appellant that the High Court should not have interfered with the acquittal of appellant.

As already noticed, on the issue whether the marriage was performed after demanding and accepting dowry, the High Court found the approach of the trial court totally erroneous. The findings were found to be vitiated on account of trial Judge ignoring the glaring facts emerging from deposition of PW-6, 9 and 20 as well as PW 13 and 16 and also by ignoring the admission of the accused in the UDR complaint at Ex.P.20.

The High Court has further rightly held that the trial Judge failed to look for the relevant documents already available on the record and wrongly drew inference against the prosecution for not producing the statements of PW-6 and other relations of the deceased recorded by Taluka Executive Magistrate under Section 174 CrPC proceedings. Presently it is not disputed that those

statements were/are available on record along with the inquest report. It is noted that such erroneous approach of the trial court had strong influence on its judgment rendering it perverse. In fact, had the trial court applied its mind to the scope of Section 174 of the CrPc as explained by this Court in the case of **Pedda Narayana and others v. State of Andhra Pradesh, AIR 1975 SC 1252** such gross error could have been avoided because such statements do not have much legal weight as they are beyond the scope of inquest proceedings under Section 174 of Cr.P.C.

On the basis of relevant facts the High Court appears to be justified in holding that there is good explanation for the delay in lodging the FIR on 22.11.1993 because PW-15 delayed the inquest proceedings without valid reasons leading to delay in the postmortem examination as well and only on knowledge of the injuries etc. the mother of the deceased gathered strength to lodge the FIR. When the deceased died leaving a son of ten months old the mother of the deceased had many other things to worry for, including cremation of the dead body and in such circumstances the High Court was justified in criticizing the trial court for its hyper technical approach in blaming the mother of the deceased for lodging a delayed complaint. It will be useful to remember that delay in lodging the FIR or complaint is not fatal in all cases. The Court must show some sensitivity in cases of present nature where the victim's closest relation - mother is a poor helpless lady. Even a well to do person may suffer a state of mental confusion when struck by such a tragedy. The prosecution in such cases is likely to be delayed further if the deceased has left behind children. The issues relating to their safety and custody often require higher priority. Occurrences of the present nature require lodging of criminal case against persons who are already in the category of relation by virtue of matrimonial ties

through the deceased and it is not always easy to take a decision whether to lodge a criminal case against a relation or not. Hence in such cases the factum of delay has to be dealt with sympathetically keeping in mind the mental condition of the close relations of the victim. The trial court miserably failed on this count too.

On a plain reading of Section 498-A it transpires that if a married woman is subjected to cruelty by the husband or his relative, the offender is liable to be punished with the sentence indicated in the Section. But cruelty can be of different types and therefore what kind of cruelty would constitute offence has been defined under the explanation. As per first definition contained in clause (a) – it means a willful conduct of such a nature which is likely to drive the victim woman to commit suicide or to cause grave injuries to health and life, limb or health (mental or physical). The other definition of cruelty is in clause (b) and is attracted when a woman is harassed with a view to coercing her or any of her relation to meet any unlawful demand for any property or valuable security or is on account of failure to meet such demand.

In the present case after noticing the injuries on the person of victim which is not at all explained by the appellant husband although in the fateful night he and the deceased slept together in the same room before she consumed poison, the High Court has come to a well considered finding in paragraph 42 of the impugned judgment that the deceased was being harassed both physically and mentally and in direct as well as indirect ways for non compliance with the demand of the accused for Rs.1,00,000/- for investment in his wine business. The High Court found that such harassment falls squarely under clause (b) of the

explanation of Section 498-A of the IPC. We find no good reason to take a different view.

The High Court after recording the aforesaid finding proceeded to consider whether Section 306 of the IPC is also attracted against the appellant or not. Since the High Court had, on relevant material returned a finding of guilt under Section 498-A of the IPC, it found the circumstances of the case right and proper for resorting to Section 113A of the Evidence Act which permits raising of presumption as to abetment to suicide by a married woman. Such a statutory presumption though discretionary, may be presumed by the Court in appropriate cases where the question of abetment of suicide by a woman is under consideration in respect of her husband or any of his relative and if the suicide has been committed within seven years of marriage, provided the husband or such relative had subjected her to cruelty.

Since the High Court had recorded a finding against the appellant of causing cruelty to the deceased for his conviction under Section 498-A, all the essential ingredients for raising of presumption under Section 113A of the Evidence Act were clearly made out. But the issue raised before us is whether the High Court was justified in resorting to exercise such a discretion as was available to it under Section 113A or not.

Once the prosecution succeeds in establishing the component of cruelty leading to conviction under Section 498A, in our view only in a rare case, the Court can refuse to invoke the presumption of abetment, if other requirements of Section 113A of the Evidence Act stand satisfied. This proposition is amply

supported by the view taken by the three-Judge Bench of this Court in the case of **K. Prema S. Rao and Anr.** (2003)1 SCC 217 . Further, the High Court has given good reasons on the basis of facts brought on record through evidence for exercising the discretion of invoking the presumption under Section 113A of the Evidence Act and thereafter it has discussed in detail the explanations given by the appellant in the initial version by way of Unnatural Death Report as well as the later explanations. The High Court found the later explanations unacceptable and the initial explanation that the deceased committed suicide because she was not permitted to go to her mother's place does not inspire confidence and has rightly been rejected by the High Court. Only for such a trivial matter, a hale and hearty young woman having a ten months old son and a pregnancy of twenty weeks is not at all expected to take her life. The appellant not only gave absolutely no explanation for the injuries on the person of the deceased, rather he chose to conceal them by keeping mum. Clearly the appellant failed to rebut the presumptions raised against him under Section 113A of the Evidence Act. Having gone through the relevant facts and the reasonings of the trial court we are not persuaded to take a different view.

In the result the appeal must fail. We order accordingly. As a consequence, the bail bonds of the appellant are cancelled. He be taken into custody forthwith to serve out the remaining part of the sentence as per law.

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4. *Section 376(2) (g) of IPC*

Bhakta Kisan Versus State of Orissa

D. Dash, J.

In the High Court of Orissa, Cuttack

Date of Judgment: 03.06.2016

Issue

Conviction and sentence for rape during communal or sectarian violence –challenged.

Relevant Extract

Prosecution case is that on 12.07.2009, it was between 1 to 1.30 P.M. the victim girl P.W.6 was on her way to the market. It is stated that when she arrived near Bharat Gas Godown situated by the side of the State Highway, accused Bijaya Majhi with four others including the present appellant forcibly dragged her near the boundary wall of the godown. It is alleged that accused-Bijaya and the appellant entered inside the premises of the gas godown by scaling over the boundary wall and then the three other accused persons lifted the victim so as to facilitate Bijaya and this appellant to take her inside the premises of the gas godown. It is further alleged that thereafter accused-Bijaya forcibly undressed the victim, laid her on the ground with her face upward and did sexual intercourse upon her. During the process, the appellant assisted the accused-Bijaya by holding the hands of the victim and gagging in seeing that no resistance is aired. Still when the victim did not remain silent accused-Bijaya had slapped her. It is stated that one Tibraj Rohidas- P.W.3 was then passing nearby and hearing the cry of the victim, she with other co-villagers, including P.W.2 went near the godown and found those four boys sitting on the boundary wall when accused- Bijaya was sleeping over the victim inside the godown. All of them fled away at their sight. Although they made the attempt to apprehend them, yet the same did not succeed. Thereafter, they saw the

victim lying inside the godown in an unconscious state being naked, with her garments lying scattered. She was shifted to the District Headquarter Hospital, Sundargarh for necessary treatment. The police arrived at the spot on receiving information about the incident and one Sukanta Rohidas-P.W.2 lodged the F.I.R. before the I.I.C. of Town Police Station.

The trial court as is seen from the judgment having formulated the points required for determination as regards the factual aspect of the case concerning the allegations levelled against the appellant has taken up the exercise of examination of evidence and their scrutiny to find out if those have been proved. It has ultimately recorded the answer in favour of the prosecution in saying that this appellant is guilty for commission of offence under section 376 (2)(g) of the I.P.C. and accordingly sentenced as stated above has been awarded.

In view of above rival submission, now the prosecution evidence are required to be scanned so as to test the sustainability of the finding of guilt recorded by the trial court against the appellant.

It may be kept in mind that there is no legal bar for the court to base a finding and record conviction for the offence of rape placing reliance on the solitary testimony of the victim, if the same is found to be worthy of credence. It is not the absolute rule of law that the solitary testimony must receive corroboration from independent sources so as to form the basis of a finding of guilt. The corroboration is not always the requirement. However, corroboration is insisted upon when the solitary testimony of the victim is not found to be trustworthy.

The star witness for the prosecution in this case is the victim-P.W.6. When she has stated her age to be 10 years, the assessment of the court during the examination stands that she was by then about 14 years of age. She has stated that when on the date of occurrence she was going to bazaar around 1 P.M. near Bharat Gas Godown accused-Bijaya dragged her forcibly and four persons associated with him including the appellant who has been identified caught hold up her and took her to the side of the boundary wall of the godown. She has further stated that as to how she was finally taken inside the godown by accused-Bijaya and so far as the role of the appellant is concerned, her evidence is specific and pinpointed that when accused-Bijaya was sexually assaulting her, this appellant had caught hold her hands by force and gagged her so as to prevent her from raising any hulla and pose any resistance. She has further stated that during the incident she lost her sense and that she regained around 5 P.M. when she found herself in the hospital and immediately thereafter she claims to have narrated the incident before the police. The narration goes like natural flow. She has also stated to have identified this appellant in the test identification parade held inside the District Jail in presence of the Magistrate stating about the role in nutshell played by this appellant in the said incident. During cross-examination, she has further reiterated about the presence of this appellant. So far as the incident is concerned right from the beginning till she regained her sense despite

scathing cross-examination, no such material appears to have been surfacing on record so as to doubt her testimony of any of the above aspects. The medical evidence fully corroborates the version of this victim that recent sign and symptom of sexual intercourse had been noticed. The witnesses arriving shortly after the incident of rape have consistently deposed about the presence of the appellant and as to how he took to his heels at their sight. There remains no such material on record even to remotely suggest as to why this minor victim would choose this appellant in roping him in the said crime.

Thus, I find that P.W.6-the victim is a wholly reliable witness and her testimony is accordingly found to be above board so as to be accepted in so far as the role of the appellant in the entire incident is concerned. This clearly leads to conclude that the prosecution in has successfully proved its case beyond reasonable doubt against the appellant and for that he has been rightly fastioned with the finding of guilt for commission of offence under section 376(2)(g) of the I.P.C., which needs no interference. The sentence as imposed is also found to be just and proper. Accordingly, the judgment of conviction and order of sentence which have been impugned in this appeal are hereby confirmed. In the result, the appeal stands dismissed.

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5. Section 452,302 and Section 109 of IPC

Gagan Jani Versus State of Orissa.

Sanju Panda & S.K. Sahoo , JJ.

In the High Court of Orissa, Cuttack

Date of Judgment- 20.06.2016

Issue

Appeal against conviction when one accused acquitted.

Relevant Extract

The prosecution case, as unraveled from the First Information Report lodged by Prasant Kumar Sahoo (P.W.2), the brother-in-law (wife's brother) of the deceased is that both the informant and the deceased were residing in nearby houses in village Badala with their respective families. The informant was maintaining his family from out of the earnings of his tiffin shop situated near Badla Chhak. On 28/29.11.2002 in the night at about 3.00 a.m., the son of the deceased namely, Muna @ Nirakar Behera came to the house of the informant and told him that the appellant was creating disturbance in their house and shouting to kill. The informant along with others rushed to the house of the deceased and tried to convince the appellant not to create disturbance but the appellant challenged them and told that his son had died and if they would not be able to give life to his son then he would kill all of them. It is the further prosecution case that the son of the appellant was suffering from jaundice and his wife had taken him to the hospital at Phulbani for treatment but during treatment, the son of the appellant died. When the appellant challenged the informant and others, out of fear they came back in order to give message to the village Sarpanch, ward member and others and accordingly they were informed and when all of them came near the house of the deceased, they were told that the appellant after severing the

head of the deceased had fled away somewhere with the severed head. The informant marked the trunk of the body of the deceased was lying and he further ascertained from his sister (wife of the deceased) that the appellant was suspecting the deceased to have practiced witchcraft on his son and was responsible for the death of his son and basing on such suspicion, the appellant entered inside the house of the deceased on the fateful night and killed him and fled away holding the severed head.

After completion of investigation, the Investigating Officer submitted charge sheet on 4.2.2003 under sections 452 and 302 of Indian Penal Code against the appellant and 302/109 of the Indian Penal Code against the co-accused persons Ambika Jani and Pratima Jani. The learned Trial Court in the impugned judgment has been pleased to disbelieve the abetment part played by the female co-accused persons and observed that there was no clear, cogent and definite evidence against them. So far as the appellant is concerned, the learned Trial Court held that the oral testimony of eye witness P.W.3 gets adequate support from P.W.4 and P.W.6. The learned Trial Court also accepted the medical evidence and taking note of the findings of the chemical analysis report found the appellant guilty under sections 452 and 302 of the Indian Penal Code.

Adverting over the nature and the cause of death of the deceased, we find that apart from the three inquest reports Exts. 1, 4 and 5, the prosecution has also relied upon the evidence of P.W.5 Dr. Susant Kumar Garnaik who conducted the post mortem examination over the cadaver of the deceased on 30.11.2002 and found that there was decapitation of head from the trunk. The sharp cutting injury on the neck was opined to be ante mortem in nature. Another sharp cutting incised looking wound of size 2.5

c.m. x 0.5 c.m. x 0.3 c.m. was detected on the left forearm which was also opined to be ante mortem in nature. There was surrounding bruise to the injury on the left forearm. The cause of death of the deceased was opined to be massive hemorrhage and shock as a result of decapitation of head with transaction of spinal cord and cut of internal and external carotid arteries and all the injuries were opined to be ante mortem in nature. The doctor proved the post mortem report as Ext.7. The learned Trial Court has accepted the medical evidence. The learned counsel for the appellant did not challenge the findings of the post mortem report.

The star witness of the prosecution is none else than P.W.3 Satyabhama Behera, widow of the deceased who depose as an eye witness to the occurrence.

Close relationship of a witness with the deceased is not a ground for disbelieving his testimony and he cannot be branded as a highly interested witness. Ordinarily, a close relative does not screen/spare the real offender. If on an overall careful examination of the statement of the witness, it is found that his testimony is trustworthy, it can be relied upon and the Court should not unnecessarily doubt the credibility and worthiness of such witness. In the case of Dalip Singh and Ors. –Vrs.- The State of Punjab reported in (1954) 1 SCR 145, it has been held as follows:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run

high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

The evidence of P.W.3 gets ample corroboration from the medical evidence. P.W.2 has not only stated about the presence of the appellant at the spot and his conduct in challenging them being armed with weapons but also stated that P.W.3 narrated the incident to him and accordingly, he lodged the First Information Report. The immediate conduct of P.W.3 in disclosing about the incident before P.W.2 and naming the appellant to be the assailant of the deceased is admissible as res gestae under section 6 of the Evidence Act. The rationale of making certain statements or facts admissible under Section 6 of the Evidence Act was on account of spontaneity and immediacy of such statement or fact, in relation to the "fact in issue" and thereafter, such facts or statements are treated as a part of the same transaction. The evidence of P.W.3 that the appellant carried the severed head of the deceased and left the spot with tangia is also corroborated by the recovery of the same from the possession of the appellant at Adenigarh Police outpost which has been stated by the Investigating Officer. P.W.6 also stated to have seen the appellant proceeding towards Adenigarh Police outpost holding a tangia in his right hand and some object in a concealed condition in his left hand from where blood was coming out. The tangia which was seized from the possession of the appellant was sent

for chemical analysis and found to have contained human blood of group 'B'. Similarly the check lungi and baniyan of the appellant were also found to have contained human blood of group 'B'. The same human blood group was detected in the wearing apparels of the deceased. This is a very weighty circumstance against the appellant and there is absolutely no explanation offered by the appellant of this highly incriminating circumstance. All these factors lend support to the testimony of P.W.3.

Thus we are of the view that the evidence of P.W.3 is clear, cogent, trustworthy and above board and therefore, we have no hesitation at all to place implicit reliance on such evidence.

The prosecution has also proved a strong motive on the part of the appellant to commit the crime. Even though the son of the appellant died on account of jaundice, the appellant was suspecting that the deceased had practised black magic which led to the death of his son. Proof of motive recedes into the background in cases where the prosecution relies upon an eyewitness account of the occurrence. If the Court upon a proper appraisal of the deposition of the eyewitness comes to the conclusion that the version given by him is credible, absence of evidence to prove the motive is rendered inconsequential. Conversely, even if the prosecution succeeds in establishing a strong motive for the commission of the offence, but the evidence of the eyewitness is found unreliable or unworthy of credit, existence of a motive does not by itself provide a safe basis for convicting the accused. Proof of motive in a case which rests on an eyewitness account lends strength to the prosecution case and fortifies the Court in its ultimate conclusion.

The manner in which under the grasp of patent misconception, the appellant thought that the deceased had practised black magic on his son which brought his untimely tragic end, challenged the deceased and did not pay any attention to the advices of others to pacify the matter and during midnight, in spite of the protest of the wife of the deceased, entered inside the house of the deceased and mercilessly assaulted the deceased by tangia and severed his head and left the spot with the severed head and tangia clearly proves the intention of the appellant to commit the murder of the deceased. Even though the murder appears to have been the result of an extreme emotional and psychological disturbance but it does not mollify the felonious propensity of offence and squarely brings the act within the purview of section 302 of the Indian Penal Code.

Thus on critical examination of record, the irresistible conclusion surfaces is that the prosecution has established the guilt of the appellant to the hilt beyond all reasonable doubt and therefore, we are of the view that the impugned judgment and order of conviction which has been imposed by the learned Trial Court and the sentence passed there under does not suffer from any infirmity to warrant interference and therefore, the Jail Criminal Appeal being devoid of merits, stands dismissed. Accordingly, the Jail Criminal Appeal is dismissed.

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Constitution of India

6. Article 226 & 227

Soumya Ranjan Prusty versus OPSC , represented through its Secretatary & others.

Indrajit Mahanty & Dr. D. P. Choudhury
In the High Court of Orissa, Cuttack
Date of Judgment: 21.06.2016

Issue

Inappropriate action of the OPSC –Challenged

Relevant Extract

The factual context as depicted is that the petitioner was a candidate for the Odisha Judicial Service Examination 2013-2014 bearing Roll No.3780. In the preliminary written examination he was selected but in the written test his name did not figure in the list called for viva voce test. While he unveiled the reasons for not getting his call for viva voce test, it was revealed that in the paper "Law of Property" he has not secured correct mark and consequently in the aggregate mark. In order to find out the reason of disqualification, he applied for Xerox answer scripts pursuant to the procedure adopted by the Odisha Public Service Commission (hereinafter called 'OPSC'). It is further asserted that on verification of the Xerox copy of the answer scripts he became astonished that he was awarded '0' mark against question No.12(b)(i) although his answer was correct.

It is stated that as per the Scheme of Examination he was required to secure not less than 45% of marks in aggregate and minimum 33% of marks in each paper in the Main written examination. From the website of the OPSC the petitioner came to know that his total mark is 336 purportedly falling short of two marks from the aggregate marks which evidently for wrong evaluation of his paper in "Law of Property". He is deprived of

three marks in such paper for gross negligence, illegality in evaluating his answer script in the paper "Law of Property". Under Section-C Question No.12 (b) (i) is read as follows:-

"12 (b) Whether the following illustrations are sufficient acknowledgement of liabilities:

(i) "I am ashamed that the account has stood so long." Petitioner has answered to such question in following manner: "No.12 (b)

(i) I am ashamed that the account has stood so long – It is a valid acknowledgement." It is alleged, inter alia, that the answer of the petitioner to the said question is apparently available from the Text Book and as such the petitioner has answered correctly although he was awarded '0' mark instead of three marks in such question. Had the three marks added to the paper Law of Property, his aggregate would have been raised by giving him qualifying mark of 45% in aggregate. On the other hand, he could have been qualified for the viva voce test in the event of adding such three marks to the paper Law of Property. So, the petitioner alleged that the faulty and arbitrariness in evaluation of his paper has deprived him to get justice and compelling him to knock the door of the Court seeking relief of revaluation of Question No.12 (b) (i) and consequently the OPSC be given direction as deemed fit and proper by the Court.

Whether the petitioner has answered correctly in Question No.12 (b) (i) of paper "Law of Property" and being deprived of the three marks and consequently in aggregate marks.

Since the petitioner has given the correct answer to Question No.12 (b) (i) in paper "Law of Property" in the Main Written Examination and is entitled to three marks against such

answer, we are of the considered view that petitioner is entitled to the re addition of marks to the paper concerned and consequently to the re-addition of the total marks. At the same time, we are conscious that the Court cannot sit as an examiner but can opine about the injustice meted out to the petitioner. It is appropriate for the opposite parties to reevaluate the answer in Question No.12 (b) (i) of the petitioner and make fresh tabulation of aggregate of marks. In the event of fresh evaluation and tabulation if the petitioner qualifies, he should be given consequential benefits.

Hence, we direct the opposite parties in the following manner:-

(i) The opposite parties shall re-evaluate the answers of the petitioner to the Question No.12 (b) (i) in the light of the observation made above and make fresh tabulation of marks in aggregate. In the event of his success in the main written examination, opposite parties shall arrange a special interview for the petitioner.

(ii) In the event he comes out successful in the interview, he should be given appropriate place in the final merit list of OJS Examination 2014 and should be given appointment accordingly with full protection of his seniority amongst successful candidates of the said Examination 2014 as per redrawal of merit list as we are aware that there were 69 vacancies in the said year.

All these exercises should be completed by opposite parties within a period of two months from today and necessary compliance be reported on 25.8.2016. The writ petition is disposed of accordingly.

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7. Rule 45-AA and Rule 45-DD "The Wild Life (Protection) (Orissa) Rules, 1974

Amruti Pradhan versus State of Orissa represented through its Secretary, Forest and Environment Department & Five others.

Vineet Saran, Chief Justice & Dr. B.R. Sarangi , J.

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

Date of Judgment: 20.06.2016

Issue

Payment of compensation in case of death caused by wild animals –Challenged.

Relevant Extract

The admitted facts of the case are that the husband of the appellant had gone into the reserved forest area for collecting mushroom, when he was attacked by wild animal and had succumbed to the injuries. The appellant claims that under Rule 45-AA of the Rules, 1974, compensation of Rs. 2.00 lakh is to be paid in case of death being caused by attack of the wild animal.

The Parliament has enacted an Act, to provide for the protection of wild animals, birds and plants and for matters connected therewith or ancillary or incidental thereto with a view to ensuring the ecological and environmental security of the country, called " The Wild Life (Protection) Act, 1972 (hereinafter referred to "1972 Act"). Section 64 of the 1972 Act states about the power of the State Government to make Rules. As per sub-section(1) of Section 64, the State Government may, by notification, make rules for carrying out the provisions of 1972 Act in respect of matters which do not fall within the purview of Section 63. In exercise of the powers conferred by Section 64 of the 1972 Act, the State Government has framed the Rules called "The Wild Life (Protection)(Orissa) Rules, 1974 (hereinafter

referred to "1974 Rules"). Chapter-VAA has been substituted by incorporating Rule 45-AA to 45-JJ. Rule 45-AA and Rule 45-DD being relevant are extracted hereunder:

"45-AA. Compassionate payment on account of Human Kills- In case of death of human beings caused by attack of Tiger, Leopard, Elephant, Crocodile, Sloth Bear, Indian Wolf locally called as 'Ram Siala', Boar, Gaur and Wild Dogs within a forest area or within a belt of five kilometers from the limits thereof compassionate payment of Rupees one lakh shall be made.

45-DD. Exception in certain cases – Notwithstanding anything contained in Rules 45-AA, 45-BB, and 45-CC, no compassionate payment shall be made under the said rules:

(i) for any case of death or injury caused a reserve forest, sanctuary, National Park, Game Reserve or inside a closed area if the entry of the human being thereto was not legally authorized:

(ii) for any case of death or injury caused during the period when the human being was engaged in an illegal activity punishable under the Wild Life (Protection) Act, 1972, the Orissa Forest Act, 1981, the Orissa Kendu Leaves (Control of Trade) Act, 1961 and the Rules made thereunder:

(iii) for any case of death of cattle caused inside a reserved forest, Sanctuary, National Park, Game Reserve or inside a closed area"

The appellant claims compensation in view of the provisions contained in Rule 45-AA but Rule 45-DD of 1974 Rules provides for exception in certain cases. Sub-rule(1) of Rule 45-DD specifies that no compassionate payment shall be made under the rules, in case of death or injury caused in the reserved forest area, if the entry of the human being thereto was not legally authorized. It is not the case of the appellant that her husband

was legally permitted to go inside the forest area for collection of mushroom. The husband of the appellant had entered into the reserved forest area at his own risk for which he was legally not permitted and as such, the case of the appellant would not be covered under the provisions of Rule 45-AA and would be squarely covered by the exception Clause (i) of Rule 45-DD of 1974 Rules.

The State legislature has enacted an Act to consolidate and amend the laws relating to protection and management of forests in the State called "The Orissa Forest Act, 1972". Section 27 of the said Act states about offences. The husband of the appellant having admittedly entered into the reserved forest area for the purpose of removal of forest goods, which is not legally authorized, is liable for commission of offence punishable under the said provisions of the Act.

There is no ambiguity in the provisions of the Act and Rules referred to above and giving a plain meaning to the same it appears that the husband of the appellant having violated the provisions of the Act and Rules by entering into the reserved forest area, where his death was caused by the wild animal, for the purpose of collecting forest produce, it would not entitle the appellant to claim compensation, particularly when exception has been given under Rule 45-DD of the 1974 Rules that no compensation is to be paid in case of death or injury caused inside reserved forest area.

In the above view of the matter, this Court is of the considered opinion that the claim made by the appellant for grant of compensation due to the death of her husband has no merit. Accordingly, the writ appeal stands dismissed.

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8. Section 34 , 34(3)(a) and section 51 of the Odisha Consolidation and Prevention of Fragmentation of Land Act, 1972

Judhistir Sahu and others Versus Jubaraj Sahu and others.

D. Dash, J.

In the High Court of Orissa, Cuttack.

Date of Judgment –21.06.2016

Issue

Legality of transfer of land without any consideration –challenged.

Relevant Extract

The plaintiff nos. 1 and 2 are the sons of defendant no. 4 and plaintiff no. 3 is their mother whereas the defendant no. 5 and 6 are the parents of defendant no. 7. It is their case that the properties described in schedules 'A' and 'B' are their joint family property. It is alleged that the defendant nos. 4 and 5 illegally without any consideration have transferred those lands to defendant nos. 1 to 3. These sales are also challenged as void being in violation of the provisions of section 34 of the Odisha Consolidation and Prevention of Fragmentation of Land Act, 1972 (in short hereinafter called as the OCH & PFL Act).

The defendant no. 7 has challenged the validity of the sales as without legal necessity. The defendant no. 3 has stated that the sales have been made for payment of joint family debts and in order to meet other legal necessity as well as for the benefit of the joint family. The defendant no. 3 thus prayed to dismiss the suit.

The trial court on such rival pleadings framed six issues. Taking up issue nos. 2 and 3 as regards the validity of the sales made by defendant nos. 4 and 5 to defendant nos. 1 to 3 vide

registered sale deeds dtd. 27.9.91 which have been admitted in evidence and marked as Ext.A and Ext. B, the certified copies of which are Exts. 1 and 2; particularly in view of challenge as regards the sale as without consideration and lack of legal necessity as asserted by the plaintiffs, the answers on evaluation of evidence have been recorded against the plaintiffs that the sales are not liable to be declared void and inoperative on those grounds which have not been proved in the case. With the above, the trial court having set at rest the dispute as raised by the plaintiffs in respect of schedule 'B' land which are non-consolidable, it has next gone to address another important issue i.e. issue no. 4. This issue raises the question as to if in the case, in respect of land in schedule 'A' which are consolidable, the sale is void for want of required permission under section 34 (3) of the OCH & PFL Act. The finding has been that its void and thus the consequential conclusion has been recorded that the title over schedule 'A' land has not passed under the sale deed to the hands of the vendees and they have thus derived no such right, title and interest over the land under schedule 'B' on account of that sale deed which is not even worth the paper written on. In view of above, the trial court decreed the suit in part only in respect of schedule 'A' land as aforementioned.

The lower appellate court being moved both by the plaintiffs and the defendant nos. 1 to 3 in two separate appeals as stated above, has finally confirmed the judgment and decree as passed

by the trial court having affirmed the findings of the trial court as above.

This appeal has been admitted on the following substantial questions of law:-

"i) Whether in view of the specific averment made in the written statement that such sale of schedule-A land with the permission as required under section 34 of sub-Section (3) of the Act and when that very fact finds mention in clear terms in the sale deed concerning schedule 'A' land, the finding of the courts below that such sale is void being in contravention of the provision of section 34 of the Act is wholly erroneous more particularly when the plaintiffs have failed to prove that such mention as regards permission in the sale deed is factually false?

ii) Whether in view of the provision of section 35 (1) of the OCH & PFL Act, the Civil Court has no jurisdiction to hold the sale deed in respect of schedule 'A' land as void being in contravention of the provision of section 34 of the Act and whether the jurisdiction is barred under section 51 of the Act?

iii) Whether the finding of the courts below that by such sale in respect of schedule 'A' land there has been fragmentation, is the outcome of misreading and misconstruction of the provisions of law as contained in the OCH & PFL Act governing the subject?

The provision of sub-section 1 of section 34 of the OCH & PFL Act creates a bar for transfer or partition of the agricultural land in a locality so as to create a fragment. Next sub-section 2 of said section permits such transfer of fragment only to a land owner of contiguous chaka. However, sub-section 1 of section 35

of the OCH & PFL Act declares such transfer of fragment to a person other than the land owner of a contiguous chaka or partition creating fragment in contravention of the provision of Section 34 of the Act as void.

As per provision of sub-Section 3 of section 34 of the Act such transfer of fragment or partition creating fragment is permissible only when the same is with the prior permission of the competent authority. Thus a bare reading of the above statutory provisions clearly leads to conclude that an owner of a chaka land is prohibited to transfer the fragment of it or to partition creating fragment to another, save and except to the contiguous chaka owner and in c se of any other person, it has to be with the prior permission of the said authority under the Act.

In the case in hand, the specific case of the contesting defendants is that the vendors of Ext. A had taken required permission under the OCH & PFL Act. They have been very specific by giving the case number which again finds mention in the registered sale deed in clear terms with the particular as regards the case number, date of order and the factum of its communication. Although the validity and legal force as well as the effect of the sale deed are attacked on other grounds, nonetheless its execution stands admitted. The courts below have found the sale to have been made for legal necessity. The recitals in the sale deed remain on the score of grant of the permission by the authority under OCH & PFL Act especially in view of the fact that the subject matter falls within the purview of the Act which prescribes prohibition and thus it has to satisfy the conditions laid down in the provision in terms of undertaking by the parties to the transaction for the registering authority to admit it for registration. The vendees namely Baikuntha and Sebaka as also Judhistir and Tapeswar for and on behalf of

Ekadanta, are all bound by it. Such undertaking as stands is on the score that there has been no violation of above legal provision and in support of full compliance of the provisions of the said Act at the cost of inviting the attraction of the penal consequences as per law if found to be incorrect. In the event the said undertaking is shown to be in-correct than the vendors as well as vendees squarely stand in the position of violators of the provisions of law and thus remain equally guilty and the doctrine of 'in peri delicto' in my considered view very much comes into play where the suitor stands in the disadvantageous position unless he establishes to have done so without the requisite knowledge of said facts which have been so mentioned by way of manipulation or otherwise by the other party/ies or someone at their behest. This being the case before us, the party who challenges the transaction on that ground of non-compliance of the provisions of law in my considered view has to discharge the onous of proof of the factum of said non-compliance which stands shifted to him upon the proof of the execution of that document. The vendors are required to obtain permission and thus they or anyone claiming through them or those having interest in common with them cannot take the advantage and wriggle out of it by simply alleging non-compliance of the provisions of law especially in the above factual settings as narrated in throwing the burden upon the beneficiary. Since the registering authority has admitted the deed in question for registration basing upon such solemn declaration by the parties, the same binds the challenger very much until duly rebutted.

In the instant case the courts below have lost sight of such important facts while going ultimately going to hold the transaction to be void on the ground of absence of permission even though the plaintiffs having the interest as same as the

vendees have failed to discharge the onus of proving such recitals in Ext. A to be factually incorrect by leading clear and acceptable evidence. So the finding on this score as recorded by the courts below clearly suffers from the vice of perversity and being a flawed one, thus cannot be allowed to stand. This being the case, for the aforesaid on the above ground alone the finding of the trial court on issue no. 4 as affirmed by the lower appellate court is liable to be set aside and that this court hereby so does.

Above being the answer to the first substantial question of law in the affirmative running in favour of the appellants which itself is found to be enough to set aside the judgments and decrees impugned in this appeal and non-suit the plaintiffs, this court feels no further necessity to delve into the other two substantial questions of law which at this stage simply stand as of academic interest.

In the upshot of aforesaid discussion and reasons, the appeal is allowed. The suit i.e. T.S. No. 3 of 1992 of the court of Civil Judge (Sr.Divn.), Bargarh thus stands dismissed in its entirety holding the plaintiffs as not entitled to any of the reliefs as prayed for. In the facts and circumstances, the parties are, however, directed to bear their respective cost of litigation.

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Essential Commodities Act, 1955

9. Section 7(1) (a)(ii) of the E.C. Act, 1955

Ashok Kumar Gupta versus State.

Dr. D.P. Choudhury

In the High Court of Orissa, Cuttack

Date of Judgment- 18.06.2015

Issue

Punishment for illegal possession of rice – challenged.

Relevant Extract

The factual matrix leading to the case of the prosecution is that on 28.10.1988, while the Inspector of Supplies Kotpad was patrolling on the border area, he found a truck bearing registration No.ORK-3999 standing with 100 bags of paddy at Dhanamahandi village. The Inspector of Supplies asked the driver of the truck about the stock of paddy to which the driver replied that the stock belongs to the appellant (hereinafter called the "accused") and as per the instructions of the accused, the stock has been brought from Bansuli. The accused reached the spot and claimed the stock of paddy. Since the accused was in possession of more than 10 quintals of paddy, contravening the provisions of the Act, the Inspector of Supplies seized the said stock of paddy from the possession of the accused. During enquiry, it was further found that the accused had purchased the paddy from different persons at lesser price than fixed by the Government. After due enquiry, it is alleged by prosecution that the accused had contravened Cl.3(2) and Cl.11(aa) of the Orissa Rice and Paddy Control Order, 1965 (hereinafter called the

"Order"), punishable under section 7(1)(a)(ii) of the Act. Hence, P.R. was filed against the accused.

Plea of the accused, as revealed from his statement recorded under section 313 of the Cr. P.C. and crossexamination made to P.Ws., is that the paddy in question belongs to him, which was harvested from his paddy land. He completely denied the charge levelled against him.

Learned Special Judge, after examining six witnesses from the side of prosecution and two witnesses from the side of defence and after going through some documents filed by prosecution held that prosecution has not been able to prove that the accused had purchased paddy at a lesser price than fixed by the Government, but the prosecution has well proved about illegal possession of the seized paddy by the accused, in contravention of Cl.3 of the Order. So, the learned Court below convicted the accused and sentenced him to undergo rigorous imprisonment for four months.

The main point for consideration is whether the accused was selling the paddy in question, which was loaded in a truck after being collected from different persons ? The other point as to selling of paddy at a lesser price than the price fixed by the Government needs no elaboration, as the learned Court below has not believed the story of the prosecution in this context.

Adverting to the facts and circumstances of the present case, as has been discussed above, prosecution has not been able to prove that paddy in question has been collected or purchased by the accused from different persons and the same has been stored; but it is revealed from the cross-examination of P.Ws.2, 3 & 4 that paddy has been raised by the accused in his father's land. When prosecution has failed to prove the storage of paddy, as understood under the law as per the above discussion, and seizure of the same from the running truck is not an offence under Cl.3 of the Order, it must be held that the ingredient of Cl.3(2) of the Order has not been established by the prosecution. When prosecution fails to discharge the onus, no onus is liable to be shifted to the accused to disprove the same for which the evidence of D.Ws.1 & 2 are not necessary to be dealt.

Cl.11(aa) of the Order states in the following manner :

"purchase paddy at prices lower than those declared by the Government by a Notification in the *Official Gazette* to be the prices at which paddy may be bought; Provided that it shall be competent for the Government to fix different Kharif years, each beginning on 1st October". The ingredient of this clause is that where there is purchase of paddy by the dealer at prices lower than those declared by the Government, he is found to have contravened the provision under Cl.11(aa) of the Order. In the instant case, it has already been discussed that prosecution has failed to prove that paddy was being collected from different

persons for which ingredient of Cl.11(aa) of the Order remained far from proof. Now, it appears that prosecution has not been able to prove the violation of Cl.3 or Cl.11(aa) of the Order, for which section 7 of the Act does not come to play. Learned Court below has committed error by not paying attention to all these provisions of law and wrongly based her finding to the effect that the seized truck was not having the produce of the land of the accused and he was in illegal possession of the seized paddy. But, at the same time, learned Court below has rightly observed that prosecution has not been able to prove that the accused purchased the paddy at a lesser price than fixed by the Government. Hence, I am in disagreement with the incorrect finding of the learned Court below. In that view of the matter, having regard to the facts and circumstances of the case and the evidence on record, as discussed above, it must be held that there is neither contravention of Cl.3 nor Cl.11(aa) of the Order, punishable under section 7 of the Act.

In the result, the appeal is allowed, the impugned order of conviction and sentence passed by learned Court below is set aside and the accused is acquitted of the charge levelled against him. The bail-bonds furnished stand discharged.

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Foreign Exchange Regulation Act, 1973

10. Section 18(2) section 18(3), section 56 (1) (i) of Foreign Exchange Regulation Act, 1973

M/S Videocon Industries Ltd & anr. versus State Of Maharshtra & Ors.

Dipak Misra & Shiva Kirti Singh,JJ.

In the Supreme Court of India.

Date of Judgment – 19.06.2016

Issue

***Dislodging the Order of discharge*.**

Relevant Extract

As the factual matrix would depict, when the matter was pending for trial before the learned Chief Metropolitan Magistrate, the adjudicating authority vide order dated 30.03.2005 imposed penalty of Rs.2,00,00,000/- (Rupees two crore only) against the appellant-company and penalty amounting to between Rs.50,000/- (Rupees fifty thousand only) to Rs.2,00,000/- (Rupees two lac only) on each of the Directors. Being grieved by the order passed by the adjudicating authority, the company as well as the Directors preferred Appeal No.517 of 2005 and other connected appeals before the Appellate Tribunal for Foreign Exchange (for short, 'the tribunal'). The tribunal reproduced Section 18 of the Act, analysed the scheme of the provisions, scrutinized the allegations made by the Department, discussed the stand put forth by the assessees and came to hold that:-

"Thus, it is simple and clear from the language that goods which were purchased from Korea and Japan are not covered under Section 18(1)(a). From this sequence, it further flows that Section 18(2) is not applicable to the goods which were sold in international market by way of international transactions because these provisions are made applicable to the goods which are

otherwise covered under Section 18(1) (a) and not otherwise. As the goods in question were never exported outside India so Section 18(2) is in no way can be applied to these transactions because such international selling is not governed by Section 18(1)(a) of FER Act. The impugned order has repeatedly said that for purchase of CPT colour tubes from Japan and Korea the appellant spent the foreign exchange. May it be so. But such spending of foreign exchange in international trade by an Indian person is not forbidden by Section 19 of FER Act. Shri A.C. Singh, ALA could not point out any other provision in FER Act where spending of foreign exchange is prohibited in international trade by a person resident in India. It is well known fact that international trade is transacted by spending foreign exchange but the earning of foreign exchange is also made by person resident in India. There is no law whereby Indian resident is regulated from entering into international trade. If that is so, the appellant cannot be held guilty for Section 18(2) read with Section 18(3) of FER Act, 1973."

[Emphasis added]

After so stating, the tribunal proceeded to opine that:-

"11. The act of transferring trade license which was earlier in the name of Videocon Appliances Ltd in favour of the appellant firm hardly has any bearing on the question at hand. Moreover, M/s. Videocon Appliances Ltd. Is not held guilty by the impugned order. In that situation, it is difficult to understand that how individual Directors of M/s. Videocon Appliances Ltd. Can be held guilty by the impugned order. It is apparent from the impugned order that partner appellants as well as Director appellants are held guilty doubly and separately even when these names are over-lapping and all of them are also shown as directors of M/s. Videocon Appliances Ltd.

12. The Reverse Bank of India by two letters of dated 21.1.1992 and dated 18.2.1994 as at page 46 and 52 of the

records has also stated that international transactions of trade by purchase of goods from Japan and Korea and sale to M/s. Radio Exports, Russia does not require any filling up of the GRI form along with declaration under Section 18(1)(a) nor are covered under Treat Agreement mechanism with Russia about payment. We have not been led to anything wherefrom this Tribunal can find that RBI has gone wrong. RBI functions as delegated authority of Parliament under FER Act and in this sense of term functions as Controller and Regulator of foreign exchange, hence, the advice of RBI given by aforesaid two letters is required to be accepted when it is totally in consonance with the legal provisions."

[Underlining is ours]

Presently, we shall advert to the scenario in the court of the learned Magistrate. During the process of adjudication and the delineation of the assail by the tribunal, the criminal proceeding continued and after the controversy was put to rest by the tribunal, an application was filed under Section 245 of the Code of Criminal Procedure for discharge of the accused. The learned Magistrate taking note of the fact that there has been an adjudication on merits by the tribunal, thought it appropriate to discharge the accused persons and accordingly so directed.

The order passed by the learned Chief Metropolitan Magistrate was challenged in Criminal Revision Application No. 716 of 2008 and the learned Additional Sessions Judge dislodged the view expressed by the learned Magistrate and allowed the revision. Being dissatisfied, the appellant preferred Criminal Application No. 497 of 2011 before the High Court. The learned single Judge referred to the decision ***Radheshyam Kejriwal v. State of West Bengal & Anr.*** (2011) 3 SCC 581 noted that the revisional court had relied on the minority view, reflected on the

principles culled out in the said case, adverted to the findings recorded by the tribunal and thereafter opined that:-

"… In the present case, however, what is noted is that though the goods were physically shipped from Korea and Japan, the same were shipped on behalf of the accused and in my considered opinion it amounted to export. It is stated to be third country export. In such a case of export, in my view, it is not necessary that the goods shall necessarily be shipped from the shores of India. It is noted that permission was obtained by the accused to ship the goods from South Korea and Japan directly. Foreign exchange was paid to the Japanese and Korean companies. The payment was to be received in Indian rupees and same was supposed to be received in India at Indian Bank, Nariman Point Branch, Mumbai. This being nature of transaction, it follows that the export of goods was deemed export from India and foreign exchange was spent for buying the goods from South Korea and Japan. The payment was to be received in Indian Bank, Nariman Point Branch, Mumbai. No steps were taken by the accused to see that the payments are received within a stipulated time. I do not subscribe the view expressed by the Tribunal that Sections 18(2) and 18(3) of the Act were not applicable to the transaction in question."

[Emphasis supplied]

Being of this view, the High Court has expressed the opinion that the tribunal has not given any finding on the merits of the case and its findings are based on technical grounds. The said appreciation has led to the dismissal of the criminal application preferred by the assessee.

It is obligatory to note at the outset that the findings recorded and the conclusions arrived at by the tribunal are founded on analysis of statutory provisions, the applicability of the letters issued by the Reserve Bank of India and the nature of transaction carried out between the parties. It is beyond any stretch of doubt that the decision rendered by the tribunal is on merits. It is not an adjudication on any technical foundation. The decision on merits was allowed to rest by the revenue. The learned Magistrate, as has been stated earlier, relying upon the decision in ***Radheshyam Kejriwal*** (supra) discharged the accused person. The learned Additional Sessions Judge, as is evident, followed the view expressed in the dissenting opinion. The High Court has noted the same and has not really adverted to the said facet. At this juncture it is necessary to state that the revisional court should have followed the view expressed by the majority and not the minority. The approach is absolutely erroneous. Be that as it may, as the order passed by the High Court would show, it has referred to the principles culled out in ***Radheshyam Kejriwal*** (supra) and thereafter had proceeded, as has been indicated earlier, to record its opinion about the transaction on which the tribunal has rendered its verdict. It is submitted by Mr. Singh, learned senior counsel appearing for the appellant that the order of the tribunal was not under assail before the High Court and, hence, the High Court could not have commented on the merits of the same. We find substance in the aforesaid argument. As the order passed by the tribunal was not under challenge, the High Court should not have deliberated on the justification of the view expressed by the tribunal. It is interesting to note that the High Court has relied on the principles of the majority in ***Radheshyam Kejriwal*** (supra) and declined to quash the proceedings. Mr. Panda, learned senior counsel appearing for the revenue would strenuously argue that the ***Radheshyam Kejriwal*** (supra) is contrary to the view expressed

in the case of ***Standard Chartered Bank*** ,(2006) 4 SCC 278 and, therefore, the matter requires to be reconsidered by the larger Bench. As we find, that the decision in ***Standard Chartered Bank, (***2006) 4 SCC 278 has been copiously referred to in the opinion by the majority and on facts it has been distinguished. Therefore, the pronouncement in ***Radheshyam Kejriwal*** (supra) is a binding precedent.

The heart of the matter would be whether the distinction made in ***Radheshyam Kejriwal*** (supra) applies to the factual score to the case at hand. The majority has reproduced paragraph 24 from ***Standard Chartered Bank*** (supra) wherein it has been held as follows:-

"… There is nothing in the Act to indicate that a finding in an adjudication is binding on the court in a prosecution under Section 56 of the Act. There is no indication that the prosecution depends upon the result of the adjudication. We have already held that on the scheme of the Act, the two proceedings are independent. The finding in one is not conclusive in the other. In the context of the objects sought to be achieved by the Act, the elements relied on by the learned Senior Counsel, would not justify a finding that a prosecution can be launched only after the completion of an adjudication under Section 51 of the Act."

In that context, the majority in ***Radheshyam Kejriwal*** (supra) has proceeded to pose the issue required to be adjudicated in the said case. It is as follows:-

"However, in a case like the present one in which the penalty proceeding under Section 51 of the Act and the prosecution under Section 56 of the Act though launched together but the penalty proceeding culminated earlier exonerating the person, the question would arise as to whether continuance of the prosecution would be permissible or not. In other words, the

question with which we are concerned is the impact of the findings which are recorded on the culmination of adjudication proceedings on criminal proceeding and in case in the adjudication proceedings the person concerned is exonerated can he ask for dropping of the criminal proceeding on that ground alone".

Thereafter, it has referred to various authorities, namely, ***Collector of Customs v. L.R. Melwani*** , AIR 1970 SC 962, ***B.N. Kashyap v. Emperor***, AIR 1945 Lah 23, ***K.G. Premshankar v. Inspector of Police*** ,(2002) 8 SCC 87, ***Iqbal Singh Marwah v. Meenakshi Marwah*** ,(2005) 4 SCC 370, ***Uttam Chand v. ITO*** ,(1982) 2 SCC 543, ***G.L. Didwana v. ITO ,***(1995) Supp (2) SCC 724 and ***K.C. Builders v. CIT,*** (2004) 2 SCC 731 and eventually ruled that:-

"We find substance in the submission of Mr Sharan. There may appear to be some conflict between the views in *Standard Chartered Bank (1)* and *L.R. Melwani* holding that adjudication proceedings and criminal proceeding are two independent proceedings and both can go on simultaneously and finding in the adjudication proceedings is not binding on the criminal proceeding and the judgments of this Court in *Uttam Chand*, *G.L. Didwania* and *K.C. Builders* wherein this Court had taken a view that when there is categorical finding in the adjudication proceedings exonerating the person which is binding and conclusive, the prosecution cannot be allowed to stand. The judgments of this Court are not to be read as a statute and when viewed from that angle there does not seem any conflict between the two sets of decisions. It will not make any difference on principle that latter judgments pertain to cases under the Income Tax Act".

In the ultimate eventuate, the following principles were culled out from the decisions referred to in the judgment. The majority has put it thus:-

"The ratio which can be culled out from these decisions can broadly be stated as follows:

(*i*) Adjudication proceedings and criminal prosecution can be launched simultaneously;

(*ii*) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;

(*iii*) Adjudication proceedings and criminal proceedings are independent in nature to each other;

(*iv*) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;

(*v*) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(*vi*) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

(*vii*) In case of exoneration, however, on merits where the allegation is found to be not sus14 tainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases".

Coming to the facts of the case, we find that the tribunal has arrived at a conclusion that the appellant cannot be held guilty for Section 18(2) read with Section 18(3) of FER Act, 1973 and the

advise of the Reserve Bank of India given in its letters dated 21.1.1992 and 18.2.1994 deserve to be accepted as they are totally in consonance with legal provisions. The High Court, without an assail to the order passed by the tribunal, has adverted to the same and opined that it does not subscribe to the view expressed by the tribunal that Section 18(2) and 18(3) of the Act were not applicable to the transaction in question. The High Court could not have done that. We may note with profit that the High Court after stating that has reproduced paragraph 38 and (vi) and opined that the findings given by the tribunal are based on technical grounds and, therefore, the prosecution is liable to continue. As we perceive, the judgment of the tribunal is on merits, inasmuch as findings have been recorded after analysis of facts and the conclusion has been arrived at that the appellants have not violated the provisions of the Act. In such a situation, it cannot be said that it is a judgment rendered on technical grounds and, therefore, we are compelled to hold that the High Court has totally erred in law.

In view of the aforesaid analysis, we allow the appeals, set aside the judgments and order passed by the High Court as well as by the learned Additional Sessions Judge and direct that the order passed by the learned Magistrate discharging the accused persons shall stand restored.

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11. ***Section 21 & 42 read with Section 50 of NDPS act***

Sekhar Suman Verma versus The Superintendent of N.C.B. & Anr.

Abhay Manohar Sapre & Ashok Bhushan , JJ.

In the Supreme Court of India

Date of Judgment - 29. 06. 2016

Issue

Conviction and sentencing –Challenged.

Relevant Extract

Acting on an information received on 21.05.1998, a batch of officers of N.C.B., EZU, Calcutta led by a Gazetted Officer proceeded for New Sarat Lodge at 77/1A, Acharya Prafulla Chandra Road, Calcutta. After reaching there, the N.C.B. officers searched the room of the appellant herein who was staying in Room No.1 of New Sarat Lodge. The officers asked the appellant in writing as to whether he wanted to be searched in the presence of a Gazetted officer or a Magistrate and informed the appellant that one Gazetted officer was already with them and if he so desired, he might be searched by the said Gazetted officer as well.

After search being done by the raiding party, a polythene packet containing brown coloured powder weighed 250 grams of heroin was recovered from the left side pocket of his wearing trouser. Thereafter, the appellant was arrested on the same day at 22.30 hrs.

As a follow up action of the said recovery, one Anjan De was arrested from the Bidhan Nagar Railway Station at Calcutta by the said N.C.B. officers possessing 245 grams of heroin on 22.05.1998.

During the trial, the prosecution examined eight witnesses and the defence examined nine witnesses.

The learned Judge VIth Bench, City Sessions Court acting as the Judge, Special Court under the N.D.P.S. Act by his judgment and orders dated 11.04.2002 and 12.04.2002 found the appellant guilty of the offence punishable under Section 21 of the NDPS Act, convicted him thereunder and sentenced him to suffer rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/-, in default to suffer further rigorous imprisonment for one year. However, the appellant was acquitted of the offence charged under Section 29 of the NDPS Act. So far as another accused- Anjan De was concerned, he was not found guilty of both the offences under Sections 29 and 21 of the NDPS Act and was accordingly acquitted thereof.

Challenging the said order of conviction and sentence, the appellant preferred an appeal being C.R.A. No. 269 of 2003 before the High Court. The High Court, by impugned judgment and order dated 31.08.2004, dismissed the appeal filed by the appellant.

The point urged by the learned counsel for the appellant was dealt with by the High Court as under:

"Now, we come to the main area which has detained Shri Jash at length. His argument that there was no compliance of Section 42 of the said Act. This ground has to be discarded at the very outset in view of the latest decision of Supreme Court in State of Haryana Vs. Jarnail Singh and Ors. [2004 SAR (Criminal) 535] wherein Their Lordships had held:

"Moreover it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in M. Prabbulal vs. Assistant Director, Directorate of Revenue Intelligence: (2003) 8 SCC 449 that where a search is conducted by a gazetted officer himself acting under Section 41 of the NDPS Act, it was not necessary to comply with the requirement of Section 42. For this reason also, in the facts of this case, it was not necessary to comply with the requirement of the proviso to Section 42 of the NDPS Act."

Such being the position the argument of Shri Jash so far as infraction of Section 42 of the said Act is concerned has no merit at all since PW7 was a Gazetted Officer himself and he conducted the raid and also effected the search and seizure from the Appellant. Now, this brings us to the last ground of Shri Jash that Section 50 of the said Act was not strictly complied with. We have carefully gone through the evidence of P.Ws 4,6, and 7 in this regard and we feel that the provisions of Section 50 of the said Act have been complied with.

P.W.4, who conducted the Raid, stated:

"We gave him off in writing whether he likely to be searched in presence of a Magistrate or a Gazetted Officer or a Gazetted Officer accompanying the raiding party. He agreed to be searched before the accompanying Gazetted Officer. Prior to search, we gave offer to him if he likes he can search the Gazetted Officer, N.C.B. Officers etc. But he declined."

P.W.6, conducting the raid on the relevant date and time of seizure, supported the said version and stated:

"We gave written offer that we want to search and disclosed to him whether he would like to be searched by a Gazetted Officer or a Magistrate or the accompanying Gazetted Officer, who was with us. He stated to us that he could be searched before our accompanying Gazetted Officer. We asked him to search us before we started conducting search to him. He expressed his unwillingness."

P.W.7 the Gazetted Officer similarly stated:

"One of our officers offered the accused to be searched in presence of a Gazetted Officer or a Magistrate. We also told him that one Gazetted Officer accompanied the raiding party. The accused agreed to be searched in presence of the accompanying Gazetted officer."

The decision of KRISHNA KANWAR (SMT) ALIAS THAKURAEEN (supra), relied upon by the Revenue has full application in the fact situation of the instant case (see also Prabha Shankar Dubey Vs. State of M.P. [(2003) 8 Supreme 565.

From a broad analysis of the entire evidence and other materials on record we find from the Seizure List (Ext.9) which discloses seizure of contraband articles from the place of occurrence (New Sarat Lodge at 77/1A, A.P.C. Road, Calcutta – 700 009) on 21.5.98 at about 16-00 hours in presence of the witnesses and being signed by the Appellant himself. The said contraband articles in question, which was seized from the possession of the Appellant

were found to be HEROIN on the basis of the Report (Ext.2) submitted by Chemical Analyst (P.W.2) and even if we leave out the Statement (Ext.6) made by him as he had disclosed on the second day of his production (08.6.98) that

"he was forced to write his confessional statement on the threat and torture. It is also his allegation that his signature on more or less 18 blank papers were taken by the prosecution" we find that the other evidence on record is quite sufficient to prove the Charge against the Appellant. We find that the Prosecution has been able to prove its case beyond any shadow of doubt against the Appellant and the points canvassed by Shri Jash have no manner of application in view of the discussion held hereinabove."

The High Court was, therefore, right in upholding the procedure followed by the raiding party for ensuring compliance of Section 50 and rightly held against the appellant on this issue. We find no ground to take a different view than the one taken by the High Court and accordingly uphold the finding on this issue against the appellant.

We have also carefully examined the record with a view to find out as to whether the appeal involves any ground other than the one urged. Having so examined, we find none except the one urged and decided against the appellant.

In the light of foregoing discussion, we find no merit in this appeal. It thus fails and is accordingly dismissed. As a result, the bail granted to the appellant by this Court by order dated 17.09.2007 is hereby cancelled and the appellant is directed to surrender before the Trial Court to undergo the remaining period of sentence awarded to him by the courts below.

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Land Acquisition Act, 1894 (the Act)

12. Section 4(1) and Section 17(4) of the Land Acquisition Act, 1894 (the Act)

Greater Noida Ind. Dev. Authority versus Savitri Mohan & Ors.

Anil R. Dave & Adarsh Kumar Goel , JJ.

In the Supreme Court of India.

Date of Judgment - 29. 06. 2016.

Issue

Quashing of acquisition proceeding –challenged

Relevant Extract

Leave granted. This appeal has been preferred against judgment and order dated 30th May, 2012 of the High Court of Judicature at Allahabad in Civil Miscellaneous Writ Petition No.13109 of 2009 whereby the High Court allowed the writ petition and set aside the notification dated 12th March, 2008 under Section 4(1) and Section 17(4) of the Land Acquisition Act, 1894 (the Act) and the notification dated 3rd February, 2009 under Section 6 read with Section 17(1) of the 1894 Act.

The notified purpose for acquisition of land is 'planned industrial development' of Greater Noida Industrial Development Authority (GNIDA). Land of the respondents is in Village Chhapruala and is part of larger area of land acquired falling in many adjoining villages. The Award was declared on 31st March, 2011.

The original petitioners did not receive the compensation as they had already filed a petition in the High Court on 3rd March, 2009 mainly on the ground that the urgency clause could not have been invoked so as to deprive the land owners of their right to file objections. On coming to know of the proposed acquisition,

the respondents made representation dated 11th April, 2008 stating that they were running an agro based industry and floriculture for producing hybrid seeds of flowers. Case of the writ petitioners was that possession was wrongly shown to have been taken on 9th March, 2009 as interim order was already passed on 5th March, 2009.

GNIDA has challenged the view of the High Court mainly on the ground that the Division Bench has taken a view contrary to the view taken by the Full Bench which by now stands affirmed by this Court in ***Savitri Devi versus State of Uttar Pradesh ,*** *(2015) 7 SCC 21*. Subject to the moulding of relief as above, the Full Bench had upheld the acquisition relating to village Chhapraula covered by the very same notification as in the present case. It was submitted that large scale development work had already been executed on the acquired land. 82 per cent land owners had accepted compensation which covered 76 per cent of the land in terms of the area, the GNIDA had constructed roads, laid down sewer lines, electric transmission lines, developed green belts, provided drinking water facility and other infrastructure. In these circumstances, the impugned judgment could not be sustained. Learned counsel for the respondents supports the impugned judgment.

We have heard learned counsel for the parties at length and perused the record including the lay out plan showing Sectors 13 and 16 (Ind.) in Greater Noida (West).

Only question for consideration is whether the matter is covered by the judgment of this Court in ***Savitri Devi (supra)***, as claimed by the appellant in which case the respondents will be entitled to relief of higher compensation and allotment of land instead of quashing of acquisition proceedings.

As observed by this Court in ***Savitri Devi (supra),*** in spite of the finding that invocation of urgency clause was uncalled for, the relief of setting aside the acquisition was not granted having regard to the development that had already undertaken on substantial part of the land. However, to balance the equities higher compensation and allotment of land was ordered to meet the ends of justice.

Learned counsel for the respondents vehemently submitted that present case calls for the relief of quashing the acquisition as in the present case, the writ petitioners have approached the Court without any delay.

This argument cannot be accepted in view of the fact that Full Bench judgment as upheld by this Court is not based on the extent of delay in individual cases. Consideration for not granting the relief of quashing the acquisition is overall development on substantial part of the acquired land as noted in para 50 of the Full Bench judgment already quoted hereinabove. Filing of prompt petitions by an individual is not the only consideration for grant of relief of quashing acquisition when almost entire land has already been developed. The Full Bench has quashed acquisition only where substantial part of the land had not been developed. The category of the judgment where acquisition has not been

quashed covers the entire village where land of the respondents is located.

The respondents are, thus, entitled to be treated at par with other similarly placed persons. They are entitled to the following relief as per para *48.1* to *48.3* of the judgment of this Court in ***Savitri Devi (supra)***:

" 48.1. Increasing the compensation by 64.7%;

48.2. Directing allotment of developed abadi land to the extent of 10% of the land acquired of each of the landowners;

48.3. Compensation which is increased @64.7% is payable immediately without taking away the rights of the landowners to claim higher compensation under the machinery provided in the Land Acquisition Act wherein the matter would be examined on the basis of the evidence produced to arrive at just and fair market value. "

As earlier noted in para 11 earlier, allotment of 10% of the acquired land to the concerned land owners is subject to maximum of 2500 sq. meters.

In view of the above, we allow this appeal, set aside the impugned judgment and direct disposal of the writ petitions of the respondents in terms of the judgment of this Court in ***Savitri Devi (supra)***. There will be no order as to costs.

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13. ***Section 32 and 33 of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995***

Rajeev Kumar Gupta & Others versus Union of India & Others

J. Chelameswar & Abhay Manohar Sapre , JJ.

In the Supreme Court of India.

*Date of Judgment – 30.06.2016****.***

Issue

Two office memoranda that deprived statutory benefit –challenged.

Relevant Extract

The petitioners are employed with Prasar Bharati Corporation of India (hereinafter, "Prasar Bharati"), a statutory corporation brought into existence by the Prasar Bharati (Broadcasting Corporation of India) Act, 1990 (hereinafter "the 1990 Act"). The petitioners are 'persons with disability' (hereinafter, "PWD") as defined under Section 2(t) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter "the 1995 Act"). They filed this writ petition aggrieved by two office memoranda No.36035/16/91-Estt. (SCT) dated 18.02.1997 and No.36035/3/2004-Estt. (RES) dated 29.12.2005 (hereinafter impugned memorandum I and II respectively) issued by the Department of Personnel and Training, Government of India. The petitioners' grievance is that the impugned memoranda deprive them of the statutory benefit of reservation under the 1995 Act w.r.t. Group A and Group B posts in Prasar Bharati.

Posts in Prasar Bharati are classified into four groups – A to D. Each group consists of a number of classes of posts and in each class there are a number of posts. Certain posts were *identified* by the Government of India *vide* notification No. 16 70/2004-DD.III dated 18.01.2007 (hereinafter, "NOTIFICATION") as posts suitable for being filled up with PWD (hereinafter "IDENTIFIED POSTS"); an exercise in compliance with the mandate under Section 32 of the 1995 Act.

Section 32- "Identification of posts which can be reserved for persons with disabilities.—Appropriate Governments shall-

(a) identify posts, in the establishments, which can be reserved for the persons with disability;

(b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology."

The 1995 Act was enacted on 01.01.1996 pursuant to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asia and Pacific Region adopted in the meeting convened by the Economic and Social Commission for Asian and Pacific Region at Beijing in December 1992 to launch the Asian and Pacific Decade of Disabled Persons 1993-2002. The proclamation was to ensure "opportunities for full participation and equality for people with disabilities, especially in the fields of rehabilitation, education and employment". As a signatory to this proclamation, India passed the 1995 Act.

After such identification, the 'appropriate Government' is mandated under Section 33 to reserve not less than three per cent of IDENTIFIED POSTS in favour of PWD.

Section 33- "Reservation of posts.— Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent shall be reserved for persons suffering from-

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy; in the posts identified for such disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section." The term "establishment" as referred to in Section 33 is defined in Section 2(k) of the 1995 Act.

Under the regulations framed under the 1990 Act, various posts (falling in groups A to D) in Prasar Bharati are to be filled up by three different modes i.e. direct recruitment, promotion and some posts partly by direct recruitment and partly by promotion.

Memorandum II provides for reservation in favour of PWD to the extent of three per cent in all the IDENTIFIED POSTS in Prasar Bharati, when these are filled up by direct recruitment. However, it provides for three per cent reservation in IDENTIFIED POSTS falling in Groups 'C' and 'D' irrespective of the mode of recruitment i.e. whether by direct recruitment or by promotion. As a consequence, the statutory benefit of three per cent reservation in favour of PWD is denied insofar as IDENTIFIED POSTS in Groups 'A' and 'B' are concerned, since these posts,

under relevant regulations of Prasar Bharati are to be filled up exclusively through direct recruitment.

The crux of the issue before us is legality of denial by the impugned memoranda of the statutory benefit of three per cent reservation in IDENTIFIED POSTS falling in Groups A and B. Such denial, the petitioners contend, violates the State's obligation under Sections 32 and 33 of the 1995 Act and subverts of the object of the said Act enacted by Parliament inter alia to secure opportunities for full participation of PWD in matters of employment.

It is relevant to notice the history and background of the impugned memoranda. After enactment of the 1995 Act, impugned memorandum-I was issued purporting to extend the benefit of reservation to certain IDENTIFIED POSTS falling in Groups A and B, which under relevant regulations of Prasar Bharati are to be filled only through direct recruitment. This memorandum was followed by several others (examination of each of them is not necessary for our present purpose) leading to significant confusion regarding the intendment of the Government of India with respect to reservation to PWD candidates. The impugned memorandum II was issued to clarify government's understanding of the problem. The legality (correctness of the government's understanding of the law) of impugned memorandum-II is the issue for our consideration.

Whether any post under the State is to be reserved for being filled up exclusively by some persons belonging to any "constitutionally deserving" class of persons or otherwise is a matter of policy choice of the State. Such a policy is either laid down by a statute or executive orders. Various factors are to be taken into consideration for framing any policy such as the nature of responsibilities which a particular post carries, the number of

posts available in that class and the representation already existing in that class of posts for persons of the class to which reservation is sought to be provided and myriad other things.

But such factors ought to be germane to purposes sought to be achieved by the policy apart from being relevant in the context of the scheme of Articles 14 and 16 of the Constitution. The same principles of law apply even to the question, as to the mode of filling up of any post or class of posts.

The policy of the State w.r.t. the issue on hand is regulated by the 1995 Act. It authorises (under Section 32) the appropriate Government to identify the posts suitable to be filled up by PWD. The Government of India has exercised the power and identified the posts *vide* the NOTIFICATON. The NOTIFICATION includes some of the posts in Group A and Group B.

For some of these IDENTIFIED POSTS in Group A and Group B, the mode of recruitment is only through promotions.6 The purpose underlying the statutory exercise of identification under Section 32 of the 1995 Act would be negated if reservation is denied to those IDENTIFIED POSTS by stipulating that either all or some of such posts are to be filled up only through the mode of promotion. It is demonstrated before us that PWD as a class are disentitled to some of the IDENTIFIED POSTS in Groups A and Group B because of the impugned memoranda and the relevant regulations, under which the only mode of appointment to those IDENTIFIED POSTS is through promotion. Once posts are identified under Section 32, the purpose behind such identification cannot be frustrated by prescribing a mode of recruitment which results in denial of statutory reservation. It would be a device to defraud PWD of the statutory benefit under Section 33 of the 1995 Act.

We now examine the applicability of the prohibition on reservation in promotions as propounded by ***Indra Sawhney***. Prior to ***Indra Sawhney***, reservation in promotions were permitted under law as interpreted by this Court in ***General Manager, Southern Railway & Another*** *v.* ***Rangachari***, AIR 1962 SC 36. ***Indra Sawhney*** specifically overruled ***Rangachari*** to the extent that reservations in promotions were held in ***Rangachari*** to be permitted under Article 16(4) of the Constitution. ***Indra Sawhney*** specifically addressed the question whether reservations could be permitted in matters of promotion under Article 16(4)7. The majority held8 that reservations in promotion are not permitted under our constitutional scheme.

The principle is that the State shall not discriminate (which normally includes preference) on the basis of any one of the factors mentioned in Article 16(1). Though under the doctrine of "reasonable classification", it has always been held that State can identify classes of people who have distinct characteristics or disadvantages and treat them separately under law. Having regard to the history, the social and demographic context of our nation, the Constitution framers thought it appropriate to enable the State under Article 16(4) to identify citizens for preferential treatment for the purpose of employment under the State.

This Court in ***Indra Sawhney*** was dealing with the action of the State in providing reservation in employment under the State to various classes of citizens, identified by the State to be backward classes. The process of such identification and the nature and extent of reservations that could be provided under Article 16(4) were the main issues before this Court. It is in this context, this Court held that reservation in the context of

promotions to higher posts under the State are constitutionally impermissible.

To remove the basis of the rule propounded in ***Indra Sawhney case***, Parliament enacted the Constitution (Seventy-Seventh Amendment) Act, 1995. By inserting Article 16(4A), an exception iscreated in favour of citizens belonging to the Scheduled Castes and the Scheduled Tribes, from the rule laid down in ***Indra Sawhney***.

The principle laid down in ***Indra Sawhney*** is applicable only when the State seeks to give preferential treatment in the matter of employment under State to certain classes of citizens identified to be a backward class. Article 16(4) does not disable the State from providing differential treatment (reservations) to other classes of citizens under Article 16(1)11 if they otherwise deserve such treatment. However, for creating such preferential treatment under law, consistent with the mandate of Article 16(1), the State cannot choose any one of the factors such as caste, religion etc. mentioned in Article 16(1) as the basis. The basis for providing reservation for PWD is physical disability and not any of the criteria forbidden under Article 16(1). Therefore, the rule of no reservation in promotions as laid down in ***Indra Sawhney*** has clearly and normatively no application to the PWD.

The 1995 Act was enacted to fulfill India's obligations under the 'Proclamation on the Full Participation and Equality of the People with Disabilities in the Asia and Pacific Region'. The objective behind the 1995 Act is to integrate PWD into the society and to ensure their economic progress.12 The intent is to turn PWD into 'agents of their own destiny'.13 PWD are not and cannot be equated with backward classes contemplated under Article 16(4). May be, certain factors are common to both

backward classes and PWD such as social attitudes and historical neglect etc.

It is disheartening to note that (admittedly) low numbers of PWD (much below three per cent) are in government employment long years after the 1995 Act. Barriers to their entry must, therefore, be scrutinized by rigorous standards within the legal framework of the 1995 Act.

A combined reading of Sections 32 and 33 of the 1995 Act explicates a fine and designed balance between requirements of administration and the imperative to provide greater opportunities to PWD. Therefore, as detailed in the first part of our analysis, the identification exercise under Section 32 is crucial. Once a post is identified, it means that a PWD is fully capable of discharging the functions associated with the identified post. Once found to be so capable, reservation under Section 33 to an extent of not less than three per cent *must* follow. Once the post is identified, it must be reserved for PWD irrespective of the mode of recruitment adopted by the State for filling up of the said post.

In light of the preceding analysis, we declare the impugned memoranda as illegal and inconsistent with the 1995 Act. We further direct the Government to extend three percent reservation to PWD in all IDENTIFIED POSTS in Group A and Group B, irrespective of the mode of filling up of such posts. This writ petition is accordingly allowed.

CIVIL APPEAL NO. 5389 OF 2016
(Arising out of SLP (C) No.244 of 2016)

In view of our decision in Writ Petition (Civil) No.521 of 2008, this Civil Appeal is also disposed of, with no order as to costs.

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