O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2014

(JULY)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY

MONTHLY REVIEW OF CASES ON CIVIL, CRIMINAL & OTHER LAWS, 2014 (July)

I N D E X

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1. Sec.100

Amar Nath Vs. Kewla Devi and Anr. ***2014 (II) OLR (SC)-88***

Gyan Sudha Misra & V. Gopala Gowda, JJ.

Issue

Whether the High Court was correct in deciding the appeal without formulating substantial questions of law?-High Court has committed a grave error in procedure by not framing substantial question of law and setting aside the judgment and decree of the first appellate Court-High Court has failed to discharge its duty by not framing the mandatory substantial questions of law in order to examine the correctness of the Judgment and decree passed by the first appellate Court- In the interest of Justice, the judgment and decree of the High Court has to be set aside as it has omitted to frame substantial questions of law and answer the same and thus has failed to discharge its duty under the section.

We have heard the learned counsel for both the parties. The following questions arise before us:

a. Whether the High Court was correct in deciding the appeal without formulating substantial questions of law and whether the matter must be remitted back to the High Court?

b. Whether the suit of the appellant was barred by Section 49 of the UP Consolidation of Land Holdings Act and Section 331 of the UP Zamindari Abolition and Land Reforms Act?

c. Whether the order passed by the Consolidation Officer dated 14.02.1970 must be declared illegal and void?

d. What order/decree to be passed?

We will deal with each of these issues separately along with supplementary issues that would arise out of them.

Answer to point no.1:

In our considered viewpoint, the High Court has committed a grave error in procedure by not framing substantial question of law and setting aside the judgment and decree of the first appellate court. The finding of fact recorded by the first appellate court on the contentious issues was

based on re-appreciation of the pleadings and evidence on record and careful perusal of the law and the High Court has failed to discharge its duty by not framing the mandatory substantial questions of law in order to examine the correctness of the judgment and decree passed by the first appellate court. In the interest of justice, the judgment and decree of the High Court has to be set aside as it has omitted to frame substantial questions of law and answer the same and thus has failed to discharge its duty under S.100 of the CPC. The learned counsel for the respondent has relied on the cases of Surat Singh v. Hukam Singh Negi: (2010) 15 SCC 525 and Hardeep Kaur v. Malkiat Kaur: **(**2012) 4 SCC 344 in order to establish that the High Court is bound to formulate substantial questions of law at the initial stage itself if it has to satisfy itself that the matter deserves to be admitted and the second appeal to be heard and decided on such questions and further even at the time of hearing of the second appeal, it is open to the High Court to reformulate substantial questions of law. In the judgments relied upon, the impugned judgments of the High Court were set aside and the matter was remitted to the High Court for consideration afresh after formulation of the substantial questions of law. The learned counsel for the respondents has prayed for the same.

We therefore hereby declare the order of the Consolidation Officer to be null and void on grounds of patent illegality and acting with legal malice. The appellant has contended that he had no idea about the Consolidation order and was made aware of it only when he asked for his half share of crop which the defendants refused to him, and that he was made to sign an agreement in which he signed over his rights to the property and that he has been taken advantage off due to his illiteracy. We find all this extremely murky and it was incumbent upon the Consolidation Officer to properly enquire into the ownership of the land before recording the defendant's name in the revenue records. We further hold that the appellant - Amar Nath is entitled to be recorded in the revenue records by the competent authorities as half share owner of the land in dispute, as he has a right to half the share in the property and crops, as it being the ancestral property of his father –Vaij Nath. It has been proved by examining the evidence on record, such as the election identity card, that Amar Nath is indeed the s/o

Vaij Nath thereby it has demolished the contention of the defendants that the appellant is not the s/o Vaij Nath.

In view of the foregoing reasons, we hold that the appellant is the half share owner of the land in question and further uphold his right to the ancestral property. We direct the competent authority to record the name of the appellant – Amar Nath in the revenue records as half share owner of the land in dispute. Thus, we hereby set aside the impugned judgment and decree of the High Court and uphold the judgment of the first appellate court. The appeal is allowed in the aforesaid terms with no order as to costs. Appeal allowed as indicated.

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2. Sections 115 &35-B

Jhau Lal & Anr Vs. Mohan Lal & Ors. ***2014(II) CLR (SC)-161***

H.L. Dattu & Dipak Misra, JJ.

Issue

Revision –Matters at large –Revisional Court ,held, should examine only grounds / determination of issues based on which Court below had passed the order Impugned in revision :in this case only the ground on which suit was dismissed by the Trail Court –Suit for declaration of permanent injunction claiming ownership of property on basis of adverse possession –Trail Court dismissed suit on ground of non –payment of costs under Section 35-B , IPC- In revision ,High Court held that suit based on claim of ownership of property by adverse possession was not maintainable –Held ,High Court ,instead of going into ground of dismissal of suit by Trail Court ,erred in taking view that suit itself was not maintainable before Trail Court –Matter remanded to High Court for fresh disposal.

Leave granted. These appeals are directed against the judgments and orders passed by the High Court of Punjab and Haryana in Civil Revision Petition (O & M) Nos.6838 and 6840 of 2010, dated 29.05.2012. By the impugned judgments and orders, the High Court has given a finding that the suit filed by the plaintiffs/appellants for declaration of permanent injunction claiming ownership of the property on the basis of adverse possession itself is not maintainable.

The Trial Court had dismissed the suit by invoking its powers under Section 35-B of the Code of Civil Procedure, 1908 ('the Code' for short) for non-payment of costs. Being aggrieved by the said order of the learned Trial Judge, the plaintiffs/appellants had filed the Civil Revision Petition Nos.6838 and 6840 of 2010. While disposing of the aforesaid Civil Revision Petitions, the High Court has observed that the suit filed by the plaintiffs/appellants is not maintainable, based on the claim made that they are the owners of the property on the basis of adverse possession.

In our view, while deciding the Civil Revision Petitions, the High Court should have concentrated primarily on the ground on which the trial Court had dismissed the suit of the plaintiffs/appellants. There was no

reason for the High Court to have observed in its order that the suit itself was not maintainable before the Trial Court. In that view of the matter, we cannot sustain the impugned judgments and orders passed by the High Court. Therefore, while disposing of these appeals, we remand the matters to the High Court for fresh disposal in accordance with law, keeping in view the aforesaid observations made by us in the order. No costs. Ordered accordingly.

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3. Order 21, Rule 89

Annapurna Vs. Mallikarjun & Anr. ***2014(II) OLR (SC)-112***

Anil R. Dave & Shiva Kirti Singh, JJ.

Issue

Deposit of the requisite amount in the Court is a condition precedent or a sine qua non to application for setting aside the execution of sale and such an amount must be deposited within the prescribed time for making the application otherwise the application must deposit made by the Judgment-debtor within the time mandated by law, such an exercise would be only an exercise in futility because the Executing Court does not have any option but to reject the petition.

The moot question of law raised in this appeal does not require this Court to go into facts in any detail. The issue of law raised on behalf of the Appellant is whether the High Court could have ignored the settled law that under Article 127 of the Limitation Act,1963 an application to set aside a sale under Order XXI Rule 89, CPC has to be filed within 60 days from the date of sale and same is the period for making the required deposit.

On facts, it is sufficient to notice that after success in O.S.No.26/1969, the decree-holder instituted execution proceedings in E.P.No.17/1993. The property in question was sold through Court Sale on 07.08.2004. The judgment-debtor filed an application under Order XXI Rule 89, CPC on 03.09.2004 to set aside the Court Sale along with an application to appoint a Court Commissioner to find out the market value of the sold property. Decree-holder filed objections and thereafter by different orders passed on 18.12.2004 the Executing Court rejected the applications of the judgment-debtor and issued Certificate of Sale in favour of the auction purchaser. On 15.01.2005, the Executing Court closed the Execution Petition as fully satisfied. Admittedly, at no point of time, the judgment-debtor made any deposit as required by Order XXI Rule 89, CPC before the Executing Court. As noticed earlier, judgment-debtor's Miscellaneous Appeal was dismissed as not maintainable. In the Writ Petition preferred by him, the High Court agreed that Miscellaneous Appeal was not maintainable but primarily because the judgment-debtor, on an opportunity given by the Writ Court, had deposited Rs.25,000/- over and above the amount for which the

property was sold, impugned order was passed to remit the matter back to the Executing Court for fresh disposal of the application under Order XXI Rule 89 of the CPC with liberty to the writ petitioner to place available materials before the Executing Court to show that the value of the property is more than the price obtained in the Court auction. A careful perusal of the provisions in Rules 89 and 92 of Order XXI, CPC and Article 127 of the Limitation Act leaves no manner of doubt that although Order XXI Rule 89, CPC does not a prescribe any period either for making the application or the required deposit, Article 127 of the Limitation Act now prescribes 60 days as the period within which such an application should be made. In absence of any separate period prescribed for making the deposit, as per judgment of the Constitution Bench in the case of Jammlu Ramulu (supra) the time to make the deposit and that for making the application would be the same.

In the case of Ram Karan Gupta (supra), it has been held, after considering the Constitution Bench judgment and other relevant case laws, that deposit of the requisite amount in the court is a condition precedent or a sine qua non to application for setting aside the execution of sale and such an amount must be deposited within the prescribed time for making the application otherwise the application must be dismissed.

In view of the settled law on the issue as noted above, in this case it must be held that the High court committed grave error of law in not noticing the relevant provisions of CPC and the Limitation Act and in allowing the Writ Petition for re-consideration of the petition under Order XXI Rule 89, CPC. In absence of required deposit made by the judgment-debtor within the time mandated by law, such an exercise would be only an exercise in futility because the Executing Court does not have any option but to reject the petition. In such a situation, the judgment under appeal is set aside and the Appeal is allowed with a cost of Rs.10,000/- (Rupees Ten Thousand) payable by Respondent no.1to the Appellant. Appeal allowed with cost.

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4. Order 37 , Rules 4 & 3(5)

M/s. TVC Skyshop Ltd. Vs. M/s. Reliance Communication and Infrastructure Ltd. ***2014(II) CLR (SC)-145***

G.S. Singhvi & V. Gopala Gowda ,JJ.

Issue

Summary procedure –Leave to defend not applied for –Court' power to set aside decree and grant leave to defend the suit –"Special circumstances " –What are –Special Circumstances ,held ,must be shown to exist which prevented defendant from applying for leave to defend.

An analysis of Order XXXVII shows that the provisions contained therein are applicable to the suits specified in Rule 1(2). Rule 2(1) prescribes the particulars to be incorporated in the suit. Sub-rule (3) of Rule 2 lays down that the defendant shall not defend the suit unless he enters appearance and in default of his appearance, the allegations contained in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for a sum not exceeding the sum specified in the summons together with interest at the specified rate, if any. Rule 3 contains the procedure for the appearance of the defendant. Sub-rule (5) prescribes time limit of ten days from the service of summons for judgment within which the defendant can apply for leave to defend. The concerned Court can grant leave to defend unconditionally or conditionally. First proviso to this sub-rule lays down that leave to defend cannot be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has substantial defence or that the defence is frivolous or vexatious. Second proviso to sub-rule (5) lays down that if the defendant admits part of the amount claimed by the plaintiff then he shall not be granted leave to defend unless the admitted amount is deposited in the Court. Sub-rule (6) provides for the consequences of the defendant's failure to apply for leave to defend or refusal of prayer for leave to defend. In such an eventuality, the plaintiff is entitled to judgment forthwith. Sub- rule (7) lays down that if the defendant is able to show sufficient cause, the Court can excuse the delay in entering of appearance or in making an application for leave to defend. Rule 4 gives power to the Court to set aside the decree provided special circumstances exist for doing so. The Court can also stay or set aside execution and grant leave to the defendant to defend the suit.

The expression special circumstances appearing in Order XXXVII Rule 4 was considered by this Court in Rajni Kumar v. Suresh Kumar Malhotra (2003) 5 SCC 315 and it was observed: The expression special circumstances is not defined in the Civil Procedure Code nor is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extraordinary, significant, and uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly be a special circumstance. In an application under Order 37 Rule 4, the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extraordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to post-decree matters, namely, staying or setting aside the execution and also in regard to pre-decree matters viz. to give leave to the defendant to appear to the summons and to defend the suit. In the present case, we find that the application filed by the appellant for setting aside decree dated 7.11.2006 did not disclose any special circumstance which could justify an order under Order XXXVII Rule 4. In his affidavit, Shri Mahesh Katudia had merely stated that sum of Rs.11,00,000/- had been paid in terms of order dated 13.4.2006 passed by the learned Company Judge and proper instructions could not be given to the Advocate engaged for defending the suit. Therefore, it is not possible to find any fault with the view taken by the Division Bench of the High Court on the tenability of the appellant's prayer for setting aside decree dated 7.11.2006.

Respondent Company's summary suit against defendant Company (appellant) for payment of money due with interest @30% p.a. decreed by single Judge of High Court in view of defendant's failure to file application for leave to defend and to appear despite service of summons – Application filed by Company Secretary of Defendant for setting aside decree and grant of leave to defend stating that in compliance with an earlier order passed by Company Judge in company petition filed u/s 433 & 434 of Companies Act by respondent, a specified amount had been deposited by defendant and that the Executive Assistant to Chairman of

Defendant having resigned ,proper instruction could not be given to advocate engaged for defending suit as a result of which application fr leave to defend could not be filed –Application rejected by Single Judge and appeal before Division Bench of High Court dismissed –Held , application did not disclose any special circumstance-Even liability of appellant to pay amount claimed in plaint was not contested and mere fact that one of the officials of appellant had resigned ,would not constitute a valid ground to negate policy underlying Order 37 in general and Rule 3(5) in particular – In view of this position ,defendant's submission that even in absence of application for leave to defend ,single Judge of High Court was duty-bound to scrutinize respondent's claim and could have decreed suit only on being satisfied that claim was bona fide and not vexatious ,cannot be accepted so as to reverse impunged judgment of High Court.

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5. Sec. 245 (2)

Manoj Ranjan Nayak Vs. Purna Chandra Das. **(2014) 58 OCR- 695**

B.K. Patel, J.

Issue

Power under-As per the evidence in record, if prima facie allegations are not made out, the Court may not frame charge and the accused may be discharged from the said offences.

The complainant is power of attorney holder and grand-father of one Pradipta Kumar Mohanty. It is alleged in the complaint petition that Pradipta Kumar Mohanty purchased the disputed land on the strength of registered sale deed dated 18.04.1989 and is in possession by construction boundary wall around the same. On 16.11.2007 said Pradipta Kumar Mohanty executed a registered power of attorney in favour of the complainant. On the date of occurrence, i.e. on 02.11.2008 evening, the complainant came to know that some persons were preparing to demolish the boundary wall. He along with others went there and found the co-accused along with seven to eight labour class people and five to six persons wearing uniform like security guards demolishing boundary wall using Crowbar and Gainthi etc. and removing the laterite stones from the spot by tractor. On protest raised by the complainant, persons wearing uniform told that they were security guards of the Petitioner and the petitioner had instructed them to demolish the boundary wall. Co-accused instructed the workers to finish demolition work quickly and he also joined the works in demolishing the wall. Co accused also threatened that if anybody obstructed them, they would kill him. It is alleged that the petitioner was monitoring the illegal acts of demolition of wall, removal of stones and intimidation over telephone which the complainant overheard from the co-accused. Out of fear, the complainant left the spot and lodged report at Khandagiri Police Station. As there was no action on the complainant's report, the complainant filed complaint petition allegation commission of offence under Sections 109,427,379, 506 and 431 read with 34 of the I.P.C. against the Petitioner and the co-accused. After recording of the initial statement of the complainant and enquiry under Section 202 of the Cr.P.C., in the course of which two witnesses were examined, cognizance of

commission of offences under Sections 427, 506 and 120-B of the I.P.C was taken.

"Charge may although be directed to be framed when there exists a strong suspicion but it is also trite that the Court must come to a prima facie finding that there exist some materials therefor. Suspicion alone, without anything more, cannot form the basis therefor or held to be sufficient for framing charge."

On a close scrutiny of materials on record it is found that in the complaint petition the sole allegation against the petitioner is that some of the persons engaged in demolishing the wall told that they have been asked to demolish the boundary wall by the petitioner and that the complainant overheard from the co-accused that the petitioner was monitoring the unlawful acts over telephone. In the initial statement complainant stated that it was the co-accused who gave out that he has been asked by the petitioner to break the wall. However, one of the witnesses Damodar Sahoo examined by the complainant in course of enquiry under Section 202 of the Cr.P.C stated that it was the co-accused who claimed the disputed land and stones of the boundary wall to be his own. Though the complainant himself does not allege presence of petitioner at the spot, this witness stated that both the accused persons threatened the complainant holding crowbar and other articles. In the impugned order itself, learned S.D.J.M. has come to the finding that the materials available on record are sufficient for framing of charge on the basis of one sentence only which reads.

"In the present case from the complaint, it appears that the co-accused persons had categorically stated at the spot that they have been engaged by the present accused Manoranjan Nayak to demolish the boundary wall of the plot of the complainant and they had threatened to kill the informant as per the instruction of the present accused".

Thus, save and except vague statement that co-accused gave out that they were engaged in demolishing the boundary wall on being instructed by the petitioner, there is no material to implicate the petitioner with the alleged occurrence. It is well settled that statement of co-accused is not admissible in evidence against another co-accused. At the time of framing of charge, court has to consider the material which has been collected during investigation or enquiry in order to satisfy as to whether there exists

sufficient ground to proceed against an accused. It has been pointed out by the Hon'ble Supreme Court in Suresh Budharmal Kalani alias Pappu Kalani v. State of Maharashtra: (1998) 7 Supreme Court Cases 337 that at the stage of framing of charge, the Court is required to confine its attention to only those materials collected during investigation or enquiry which can be legally translated into evidence and not upon further evidence (dehors those materials) that the prosecution may adduce in the trial which would commence only after the charges are framed and the accused denies the charges. In the present case, there being no other materials save and except vague allegation to the effect that co-accused made a statement that he had been instructed by the petitioner to commit the unlawful acts, there was no basis for the learned S.D.J.M. to conclude that there is sufficient ground to proceed against the petitioner by framing of charge. There exist no material on record which can be converted into evidence in course of trial to raise grave suspicion against the petitioner. The impugned order under Section 245 (2) of the Cr.P.C. has been passed without application of mind and without keeping in view above referred settled principles of law. Therefore, the impugned order is not sustainable and is liable to be set aside. In view of the above, the CRLREV is allowed. The impugned order is set aside. Petitioner is discharged of the accusation of the offences made against him in I.C.C. No.4641 of 2008 of the courts of S.D.J.M., Bhubaneswar.

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6. Secs.306, 460 (g)

P.C. Mishra Vs . State (C.B.I.) & another. ***AIR 2014 SC 1921***

K.S. Radhakrishnan & Vikramajit Sen , JJ.

Issue

Tender of pardon to accomplice-Both Special Judge as well as Magistrate has concurrent jurisdiction to grant pardon during investigation-Order granting pardon passed by Magistrate in good faith even after appointment of Special Judge under Prevention of Corruption Act. Is only a curable irregularity which do not vitiate proceedings since case was under investigation?

On a harmonious reading of Section 5(2) of the PC Act with the provisions of Section 306, specially Section 306(2)(a) of the Code and Section 26 of the PC Act, this Court is of the opinion that the Special Judge under the PC Act, while trying offences, has the dual power of the Sessions Judge as well as that of a Magistrate. Such a Special Judge conducts the proceedings under the court both prior to the filing of charge-sheet as well as after the filing of charge- sheet, for holding the trial.

We have already held, both the Magistrate as well as the Special Judge has concurrent jurisdiction in granting pardon under Section 306 Cr.P.C. while the investigation is going on. But, in a case, where the Magistrate has exercised his jurisdiction under Section 306 Cr.P.C. even after the appointment of a Special Judge under the PC Act and has passed an order granting pardon, the same is only a curable irregularity, which will not vitiate the proceedings, provided the order is passed in good faith. In fact, in the instant case, the Special Judge himself has referred the application to Chief Metropolitan Magistrate/Metropolitan Magistrate to deal with the same since the case was under investigation. In such circumstances, we find no error in Special Judge directing the Chief Metropolitan Magistrate or the Metropolitan Magistrate to pass appropriate orders on the application of CBI in granting pardon to second Respondent so as to facilitate the investigation. Appeal lacks merit and the same is dismissed.

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7. Sec.319

Babubhai Bhimabhai Bokhiria & Another Vs. State of Gujarat &Others.

AIR 2014 SC 2228

Chandramauli Kr. Prasad & Pinaki Chandra Ghose, JJ.

Issue

Power to add new accused-Exercise of-Evidence much stronger than showing mere probability of complicity-Necessary-Degree of satisfaction necessary for exercise of power under S.319 is much higher than mere Prima facie case. Note found in pocket of deceased written year before his death-Expressing mere suspicion that appellant sought to be added may cause his death-Not sufficient to arraign appellant as accused.

Shorn of unnecessary details, facts giving rise to the present petition are that one Mulubhai Gigabhai Modhvadiya was murdered on 16th of November, 2005 and for that a case was registered at Kalambaug Police Station, Porbandar, under Section 302, 201, 34, 120B, 465, 468 and 471 of the Indian Penal Code and Section 25 of the Arms Act. Police after usual investigation submitted the charge-sheet and the case was ultimately committed for trial to the Court of Session. When the trial was so pending, the wife of the deceased filed an application for further investigation under Section 173(8) of the Code of Criminal Procedure (hereinafter referred to as 'the Code'), alleging petitioner's complicity in the crime, inter alia, stating that the petitioner was a business rival of the deceased whereas one of the main accused is his business partner with whom he conspired to kill the deceased. It was alleged that petitioner was a Minister earlier from the party which was in power in the State and therefore, he was let off during investigation. It was also pointed out that a letter written almost a year ago by the deceased was recovered from his purse in which it was stated that in the event of his death, the petitioner shall be held responsible as he intended to kill him. In reply to the said application, the Investigating Officer filed his affidavit stating therein that during the course of investigation, nobody supported the plea of the wife that the deceased was apprehending any threat from the petitioner or for that matter, any other person. In another affidavit filed by the Investigating Officer, a firm stand as taken that no material had surfaced to show the complicity of the petitioner in the offence. It was pointed out by the Investigating Officer that the deceased filed an application for arms licence and in that

application also he did not disclose any threat or apprehension to his life from any person, including the petitioner herein. Notwithstanding the aforesaid affidavit of the Investigating Officer, the Sessions Judge directed for further investigation. In the light of the aforesaid, the investigating agency submitted further report stating therein that the call records of the period immediately preceding the death of the deceased do not show any nexus between him and the petitioner and the deceased did not have any threat from the petitioner. In this way, the police did not find the complicity of the petitioner in the crime.

Section 319 of the Code confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. On the degree of satisfaction for invoking power under Section 319 of the Code, this Court observed that though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued, the degree of satisfaction under Section 319 of the Code is much higher.

From what we have observed above, it is evident that no evidence has at all come during the trial which shows even a prima facie complicity of the appellant in the crime. In that view of the matter, the order passed by the Trial Court summoning the appellant, as affirmed by the High Court, cannot be allowed to stand. To put the record straight, Mr. Bobde has raised various other contentions to show that the appellant cannot be put on trial, but in view of our answer to the aforesaid contentions, we deem it inexpedient to either incorporate or answer the same. In the result, we allow this appeal and set aside the order of the trial Court summoning the appellant to face trial and the Order of the High Court affirming the same.

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8. *Sections 320, 320(2) & 482*

Narinder Singh & Ors. Vs. State of Punjab & anr. **CLT (2014) II Supp.Cri.80 (SC)**

K.S. Radhakrishanan & A.K. Sikri , JJ.

Issue

Section 320 (1) is applicable to minor offences where permission of the Court is not required. Section 320(2) applies to serious offences & compounding required permission of the Court. Power under section 482 is not limited by Section 320 –Court under section 320 is guided solely by compromise between the parties –Court is required to take a decision to meet the ends of justice, in section 482.

It may be stated at the outset that the petitioners herein, who are three in number, have been charged under various provisions of the IPC including for committing offence punishable under Section 307, IPC i.e. attempt to commit murder. FIR No.121/14.7.2010 was registered. In the aforesaid FIR, the allegations against the petitioners are that on 9.7.2010 at 7.00 A.M. while respondent No.2 was going on his motorcycle to bring diesel from village Lapoke, Jasbir Singh, Narinder Singh both sons of Baldev Singh and Baldev Singh son of Lakha Singh attacked him and injured him. Respondent No.2 was admitted in Shri Guru Nanak Dev Hospital, Amritsar. After examination the doctor found four injuries on his person. Injury No.1 to 3 are with sharp edged weapons and injury No.4 is simple. From the statement of injured and MLRâ€™s report, an FIR under sections 323/324/34 IPC was registered. After X-ray report relating to injury No.3, section 307 IPC was added in the FIR

After the completion of investigation, challan has been presented in the Court against the petitioners and charges have also been framed. Now the case is pending before the Ld. Trial Court, Amritsar, for evidence. During the pendency of trial proceedings, the matter has been compromised between the petitioners as well as the private respondent with the intervention of the Panchayat on 12.07.2013. It is clear from the above that three years after the incident, the parties compromised the matter with intervention of the Panchayat of the village. It is on the basis of this compromise, the petitioners moved aforesaid criminal petition under section 482 of the Code for quashing of the said FIR. As per the petitioners,

the parties have settled the matter, as they have decided to keep harmony between them to enable them to live with peace and love.

Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment. B.S.Joshi, Nikhil Merchant, Manoj Sharma and Shiji do illustrate the principle that the High Court may quash criminal proceedings or FIR or complaint in exercise of its inherent power under Section 482 of the Code and Section 320 does not limit or affect the powers of the High Court under Section 482. Can it be said that by quashing criminal proceedings in B.S.Joshi, Nikhil Merchant, Manoj Sharma and Shiji this Court has compounded the non-compoundable offences indirectly? We do not think so. There does exist the distinction between compounding of an offence under Section 320 and quashing of a criminal case by the High Court in exercise of inherent power under Section 482. The two powers are distinct and different although the ultimate consequence may be the same viz. acquittal of the accused or dismissal of indictment.

Apart from narrating the interplay of Section 320 and Section 482 of the Code in the manner aforesaid, the Court also described the extent of power under Section 482 of the Code in quashing the criminal proceedings in those cases where the parties had settled the matter although the offences are not compoundable. In the first instance it was emphasized that the power under Sec. 482 of the Code is not to be resorted to, if there is specific provision in the Code for redressal of the grievance of an aggrieved

party. It should be exercised very sparingly and should not be exercised as against the express bar of law engrafted in any other provision of the Code. The Court also highlighted that in different situations, the inherent power may be exercised in different ways to achieve its ultimate objective. Formation of opinion by the High Court before it exercises inherent power under Section 482 on either of the twin objectives, (i) to prevent abuse of the process of any court, or (ii) to secure the ends of justice, is a sine qua non.

We find from the impugned order that the sole reason which weighed with the High Court in refusing to accept the settlement between the parties was the nature of injuries. If we go by that factor alone, normally we would tend to agree with the High Court's approach. However, as pointed out hereinafter, some other attendant and inseparable circumstances also need to be kept in mind which compels us to take a different view.

We have gone through the FIR as well which was recorded on the basis of statement of the complainant/victim. It gives an indication that the complainant was attacked allegedly by the accused persons because of some previous dispute between the parties, though nature of dispute etc. is not stated in detail. However, a very pertinent statement appears on record viz., a respectable persons have been trying for a compromise up till now, which could not be finalized. This becomes an important aspect. It appears that there have been some disputes which led to the aforesaid purported attack by the accused on the complainant. In this context when we find that the elders of the village, including Sarpanch, intervened in the matter and the parties have not only buried their hatchet but have decided to live peacefully in future, this becomes an important consideration. The evidence is yet to be led in the Court. It has not even started. In view of compromise between parties, there is a minimal chance of the witnesses coming forward in support of the prosecution case. Even though nature of injuries can still be established by producing the doctor as witness who conducted medical examination, it may become difficult to prove as to who caused these injuries. The chances of conviction, therefore, appear to be remote. It would, therefore, be unnecessary to drag these proceedings. We, taking all these factors into consideration cumulatively, are of the opinion that the

compromise between the parties be accepted and the criminal proceedings arising out of FIR No.121 dated 14.7.2010 registered with Police Station LOPOKE, District Amritsar Rural be quashed. We order accordingly. Appeal is allowed. No cost.

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9. Sections 482,173,190,216,228,240,323,386,397,399 &401.
Umesh Kumar Vs. State of Andhra Pradesh. ***(2014) 58 OCR (SC)-733***
Dr. B.S. Chauhan & S. A. Bobde, JJ.
Issue

Partial quashment of Charge-Sheet (in present case in respect of one of the several offence), by High Court-Non-finality of such order-Subsequent power of Trial Court to try the accused for those offence(s) in relation to which charge-sheet quashed-Held, under Section 216, Cr.P.C., Trial Court at any stage before pronouncement of judgment can add or alter charges according to evidence produced before it. Hence, order as to partial quashment of charge-sheet in relation to offence (s) concerned passed by High Court on basis of material available before it at that stage, which could not be termed as substantive evidence, held, is not final and the same is subject to further orders which could be passed by Trial Court under Section 216, Cr.P.C. -Holding otherwise would render the provisions of Section 216, Cr.P.C. otiose/nugatory.

Quashment of charge/charge sheet-Appreciation of evidence-Impermissibility of-Extent to which documents on record to be evaluated while exercising power under Section 482, restated.

Quashment of charge-sheet-Petition for, before charges are framed or application of discharge is filed or even during pendency of such application-Permissibility of-Held, is permissible-High Court cannot reject said petition merely on ground that accused can argue legal and factual issues at the time of framing of charge-However held, inherent power should not be exercised to stifle legitimate prosecution but can be exercised to save accused can argue legal and factual issues at the time of framing of charge-However held, inherent power should not be exercised to stifle legitimate prosecution but can be exercised to save accused from undergoing agony of criminal trial.

Quashment of criminal complaint-Grounds-Complaint moved with malice or based on documents procured by improper or illegal Means–Effect of-If there is substance in allegations made in such complaint and material exists to substantiate the culpability of the person concerned, held, issue of mala fides or illegal/improper procurement of the evidence

loses its significance-Proceedings in such a case should not be quashed merely on the ground that the same had been initiated with mala fides to wreak vengeance or to achieve an ulterior goal.

Affidavit-Essential requirements of-Duty to state on oath on the part of deponent is sacrosanct- "Undated affidavit" though attested-Filling of by Chief Secretary to State Government-Supreme Court, Federal Court and Privy Council- Value and effect-Such an affidavit being in utter discharged to provisions of Section 139, CPC, held cannot be taken on record-Act of officer concerned stringly deprecated.

Be that as it may, facts of the case warranted some enquiry in respect of the allegations of acquiring huge properties by Shri V. Dinesh Reddy – respondent no.2. The State took the courage to flout the order of the Central Government and did not look into the contents of the complaint and misdirected the enquiry against Umesh Kumar, appellant. In such a fact-situation, this court would not fail in its duty to direct the enquiry in those allegations.

In view of the above, the appeals are disposed of directing the CBI to investigate the matter against Shri V. Dinesh Reddy – respondent no. 2 on the allegations of acquiring the disproportionate assets. However, this should not be considered as expressing any opinion upon the merits of the case. The Chief Secretary to the Government of Andhra Pradesh is directed to make the copies of the said sale deeds available to the CBI for investigation. Case of Umesh Kumar – appellant would proceed before the Trial Court as explained hereinabove. A copy of the judgment and order be sent to the Director, CBI, forthwith. The CBI shall submit the Status Report to this Court within four months.

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10. Sec. 149

Om Prakash & Others Vs. State of Haryana. **(2014) 58 OCR (SC) 645**
K.S. Radhakrishnan & Dipak Misra, JJ.
Issue

Liability is vicarious-All accused persons armed with lathis-One of them armed with gun-All accused assaulting the deceased-Common object evident-Section 149 attracted.

Shorn of unnecessary details, the prosecution version is that on 28.06.1993 the informant, Satbir Singh, PW3, along with his two brothers, namely Mahinder Singh, PW 7 and Prabhu Dayal (deceased) had gone to Hisar to enroll themselves in the Border Security Force for which interviews were being held at Hisar. About 3.00 P.M. all of them returned from Hisar in a Machanised Cart (Pater Rehra) and alighted at the bus stand of their village, Sadalpur. At that time, the accused-appellants, namely, Man Singh, Radhy Sham, Bhal Singh, Ram Kanwar, Raja Ram, Mange Ram, Kripa Ram and Prem Singh emerged from the rear of Kotha (chamber), located nearby, Het Ram armed with a gun and all others armed with lathis. All of them raised a lalkara with the intention to assault the informant and his two brothers, Mahinder Singh and Prabhu Dayal, as the later had earlier caused injuries to them. Forming an unlawful assembly, with the common object they inflicted injuries on Prabhu Dayal with their lathis and butt of the gun. Prabhu Dayal fell down on the road. Being scared, the informant and his brother Mahinder Singh ran away and stood near the wall of the water reservoir. Thereafter, Om Prakash came on a tractor bearing registration No.HR-20A-8022, ran over Prabhu Dayal and fled away from the scene of occurrence along with their weapons in the tractor. The informant and his brother Mahinder Singh went to see the condition of Prabhu Dayal who had sustained injuries on his arms, legs, waist and head and bleeding profusely. He was taken to the Government Hospital in a Mechanised Cart and first aid was given to him. During his examination by the medical officer he succumbed to his injuries at 5.50 PM and the hospital staff informed the nearby police station about his death. The Investigation Officer, Ronaski Ram, PW-8, recording the statement of

Satbindar Singh, PW-3, and on that base registered an FIR No.100/93 at 7.45 P.M. and the criminal law was set in motion.

It is submitted by learned counsel for the appellants that the so called eye witnesses have not ascribed any specific overt act to each of the accused and there are only spacious allegations that they were armed with lathis and inflicted injuries on the deceased. In essence, the submission is that in the absence of any specific ascription or attribution of any particular role specifically to each of the accused Section 149 IPC would not be attracted. In this regard, we may refer to a passage from Baladin and others v. State of Uttar Pradesh AIR 1956 SC 181 wherein a three-Judge Bench and opined thus.

"It is well settled that mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under Section 142, Indian Penal Code."

The aforesaid enunciation of law was considered by a four-Judge Bench in Masalti v. The State of Uttar Pradesh AIR 1965 SC 202 which distinguished the observations made in Baladin (supra) on the foundation that the said decision should be read in the context of the special facts of the case and may not be treated as laying down an unqualified proposition of law. The four-Judge Bench after enunciating the principle, stated as follows.

"It would not be corrected to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, S.149 make it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment

prescribed by S. 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

Common object of an unlawful assembly can also be gathered from the nature of the assembly, the weapons used by its members and the behaviour of the assembly at or before the scene of occurrence. It cannot be stated as a general proposition of law that unless an overt act is proven against the person who is alleged to be a member of the unlawful assembly, it cannot be held that he is a member of the assembly. What is really required to be seen is that the member of the unlawful assembly should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141 IPC. The core of the offence is the word "object" which means the purpose or design and in order to make it common, it should be shared by all. Needless to say, the burden is on the prosecution. It is required to establish whether the accused persons were present and whether they shared the common object. It is also an accepted principle that number and nature of time of incident.

In the case at hand, as the evidence would clearly show, all the accused persons had come together armed with lathis. Het Ram, who died during the pendency of the appeal, was armed with a gun. The eye witnesses who are natural witnesses, being brothers, have deposed in an unequivocal manner about the assault by all the accused persons. The common object is clearly evident. In such a situation, attribution of specific individual overt act has no role to play. All the requisites tests to attract Section 149 IPC have been established by the Prosecution. In view of our aforesaid analysis, as all the contentions raised by the learned counsel for the appellants are sans substratum, the appeals, being devoid of merit, stand dismissed.

Lalji v. State of U.P. (1989) 1 SCC 437, Bhargavan and others v. State of Kerala (2004) 12 SCC 414, Debashis Daw and others v. State of West Bengal (2010) 9 SCC 111 and Ramchandran and others v. State of Kerala (2011) 9 SCC 257).

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11. Sec.376

Vinod Kumar Vs. State of Kerala. ***2014 (II) OLR (SC)-143***

K.S. Radhakrishnan & Vikramajit Sen, JJ.

Issue

Criminal Trial-Rape

Not possible to convict a person who did not hold out any promise or make any misstatement of facts or law or who presented a false scenario which had the consequence of involving the other party into the commission of an act- There may be cases where one party may, owing to his or her own hallucinations, believe in the existence of a scenario which is a mirage and in the creation of which the other party has made no conclusion-If the other party is forthright or honest in endeavouring to present the correct picture, such party cannot obviously be found culpable.

What began as a telephonic friendship strengthened into close acquaintance between the appellant and the prosecutrix (P.W.2) which later blossomed into love, eventually leading them to elope-Despite arriving at this conclusion learned Judge has nevertheless termed P.W.2 as the victim-An incongruous factual finding leading to a misconception and consequently a misapplication of the law.

Trial Court and High Court found the appellant guilty for the reprehensible crime of the rape of the prosecutrix- Appeal before Apex Court- Verdict manifests a misunderstanding and misapplication of the law and misreading of the facts unraveled by the examination of the witnesses-Role of the prosecution is to unravel the truth and to bring to book the guilty, and not so sentence the innocent Court is duty bound when assessing the presence or absence of consent, to satisfy itself that both parties are ad idem on essential features. In the present case held, the prosecutrix was aware that the appellant was already married-Appellant is culpable for the offence of rape, nay, reason relentlessly points to the commission of consensual sexual relationship-Rape is indeed a reprehensible act and every perpetrator should be punished expeditiously, severally and strictly-This is only possible when guilt has been proved beyond reasonable doubt-There was no seduction, just two persons fatally in love, their youth blinding them to the futility of their relationship-Conviction of appellant set aside.

So far as the facts are concerned, it is uncontroverted that at the material time PW2 was twenty years old and was studying in College for a

Degree and that she appeared in and successfully wrote her last examination on 19.4.2000, the fateful day. Thereafter, when she did not return home from college, her father conducted a search which proved to be futile. Accordingly, on the next day, 20th April, 2000, he lodged the First Information Report, Exhibit P-1. It transpires that the prosecutrix (PW2) has since got married on 11th March, 2001 and at the time of her deposition had already been blessed with children. It is also not controverted that a document was registered with Sub-Registrar Office Kazhakoottam (SRO) which has been variously nomenclatured, including as a marriage registration. The Appellant's case is that he had met PW2 in the University College and after some meetings and their getting to know each other better she had threatened to commit suicide if he did not marry her; that he immediately informed her that he was already married and had two children and that he had even given his marriage photographs to her, which she had entrusted to her friend, Fathima; that she asked him to divorce his wife; that she informed him that since her religion permitted a man to marry four times at least some documentation should be prepared to evidence their decision and compact to marry each other. It has been contended by the Appellant that sexual intercourse transpired post 19.4.2000 only and was with the free consent of both persons. The Trial Court had applied the Fourth Explanation to Section 375 and, thereafter, held the Appellant guilty, inter alia, of the commission of rape.

We are in no manner of doubt that in the conspectus that unfolds itself in the present case, the prosecutrix was aware that the Appellant was already married but, possibly because a polygamous relationship was not anathema to her because of the faith which she adheres to, the prosecutrix was willing to start a home with the Appellant. In these premises, it cannot be concluded beyond reasonable doubt that the Appellant is culpable for the offence of rape; nay, reason relentlessly points to the commission of consensual sexual relationship, which was brought to an abrupt end by the appearance in the scene of the uncle of the prosecutrix. Rape is indeed a reprehensible act and every perpetrator should be punished expeditiously, severally and strictly. However, this is only possible when guilt has been proved beyond reasonable doubt. In our deduction there was no seduction; just two persons fatally in love, their youth blinding them to the futility of their relationship.

The Appellant is not an innocent man inasmuch as he had willy-nilly entered into a relationship with the prosecutrix, in violation of his matrimonial vows and his paternal duties and responsibilities. If he has suffered incarceration for an offence for which he is not culpable, he should realise that retribution in another form has duly visited him. It can only be hoped that his wife Chitralekha will find in herself the fortitude to forgive so that their family may be united again and may rediscover happiness, as avowedly the prosecutrix has found. It is in these premises that we allow the Appeal. We set aside the conviction of the Appellant and direct that he be released forthwith.

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12. Dying Declaration

Jumni and Others Vs. State of Haryana . ***2014 (II) OLR (SC)-52***
Ranjana Prakash Desai & Madan B. Lokur, JJ.
Issue

When a person is on his or her death bed, there is no reason to state a falsehood-It is equally true that it is not possible to delve into the mind of a person who is facing death-In the present case the death of 'AD' and the circumstances in which she died are extremely unfortunate but at the same time it does appear that for some inexplicable reason she put the blame for her death on all her in-laws without exception-A more effective investigation or a more effective cross examination of the witnesses would have brought out the truth but unfortunately on the record as it stands, there is no option but to give the benefit of doubt to 'J' and 'SL' and to hold that they were not proved guilty of the offence of having murdered 'AD'.

Six relatives (by marriage) of deceased Asha Devi were accused of having murdered her and thereby having committed an offence punishable under Section 302 of the Indian Penal Code. The accused persons were Rati Ram (father-in-law, now died), Jumni (mother-in-law and appellant in Criminal Appeal No. 1159 of 2005), Sham Lal (brother-in-law and appellant in Criminal Appeal No. 1159 of 2005), Balbir Prasad (brother-in-law and appellant in Criminal Appeal No.1159 of 2005,who, we were told has since died), Prem Nath (brother-in-law and appellant in Criminal Appeal No.603 of 2005) and Raj Bala (wife of Prem Nath and appellant in Criminal Appeal No. 603 of 2005).

Asha Devi was married at the age of 16 to Jagdish who was employed in the army. According to her father, Asha Devi lived with Jagdish for about one year and thereafter she lived in village Bhojpur in district Jagadhari, Haryana, in a one room tenement along with her two children aged 5 years and 1½ years. Her in- laws were staying in an adjacent tenement. There is no allegation or evidence of any matrimonial disharmony between Jagdish and Asha Devi who had been married for about nine years nor is there any allegation of any demand or harassment for dowry from Asha Devi.

The two questions for consideration and discussion relate to the value of the testimony of alibi witnesses and the severability of a dying declaration. In the present appeals, we are of the opinion that the testimony of the alibi witnesses of two of the four appellants deserves acceptance and the dying declaration so closely concerns all four appellants that it is not possible to sever the role of the sets of appellants, resulting in our giving the benefit of doubt to the remaining two appellants.

The next question is whether Asha Devi's dying declaration can be split up to segregate the case of Prem Nath and Raj Bala from the case of the other accused persons.

In Godhu v. State of Rajasthan: (1975) 3 SCC 241 this Court found itself unable to subscribe to the view that if a part of the dying declaration is found not to be correct, it must result in its rejection in entirety. It was held,

"The rejection of a part of the dying declaration would put the court on the guard and induce it to apply a rule of caution.

There may be cases wherein the part of the dying declaration which is not found to be correct is so indissolubly linked with the other part of the dying declaration that it is not possible to sever the two parts. In such an event the court would well be justified in rejecting the whole of the dying declaration. There may, however, be other cases wherein the two parts of a dying declaration may be severable and the correctness of one part does not depend upon the correctness of the other part. In the last mentioned cases the court would not normally act upon a part of the dying declaration, the other part of which has not been found to be true, unless the part relied upon is corroborated in material particulars by the other evidence on record. If such other evidence shows that part of the dying declaration relied upon is correct and trustworthy the court can act upon that part of the dying declaration despite the fact that another part of the dying declaration has not been proved to be correct."

On a reading of the dying declaration it is quite clear that Asha Devi was very disturbed on the morning of 5th April 1996 and that is why

she broke her bangles in the presence of Jumni. This may be because of the events of the previous day or her being a victim of continuous harassment. This, coupled with a lack of response from Jumni on the morning of 5th April 1996 may have completely frustrated Asha Devi leading her to commit suicide. Whatever be the cause of Asha Devi being upset, the evidence of Puran Chand has not been challenged and so it cannot be glossed over. In the face of this, it is not possible to discount the theory suggested by learned counsel that the case was possibly one of the suicide out of extreme frustration and not of murder.

It is true that when a person is on his or her death bed, there is no reason to state a falsehood but it is equally true that it is not possible to delve into the mind of a person who is facing death. In the present case the death of Asha Devi and the circumstances in which she died are extremely unfortunate but at the same time it does appear that for some inexplicable reason she put the blame for her death on all her in-laws without exception. Perhaps a more effective investigation or a more effective cross-examination of the witnesses would have brought out the truth but unfortunately on the record as it stands, there is no option but to give the benefit of doubt to Jumni (and Sham Lal) and to hold that they were not proved guilty of the offence of having murdered Asha Devi.

The plea of alibi set up by Prem Nath and Raj Bala deserve acceptance and are accepted. They are found not guilty of having murdered Asha Devi. Jumni and Sham Lal are given the benefit of doubt and the charge against them of having murdered Asha Devi is not proved beyond a reasonable doubt. Both the appeals are accordingly allowed.

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13. *Sec. 74*

*Smt. Baijanti Nanda Vs. Sri Jagannath Mahaprabhu.***2014 (II) CLR-106**

Dr. B.R. Sarangi, J

Issue

Public Document - Whether plaint of a suit is a public document.

The facts of the case, in hand, is that the petitioner being the plaintiff filed a suit bearing T.S. No. 136 of 1992 before the learned Civil Judge (Junior Division), Puri for declaration of her right, title and interest and confirmation of possession over the suit land. 'The defendants being summoned appeared in the suit. Besides defendant No. 4, Mina Samantaray and defendant No. 5, Santanu Mohapatra, none filed the written statement in the suit. The written statement filed by the defendant No. 5 was not accepted by the-Court. However, defendant No. 4 contested the suit by filing her written statement. On the basis of the pleadings available, issues were framed and hearing of the suit commenced and witnesses from both the sides were examined and in course of such hearing documents were also exhibited.

In the suit itself, defendant-opposite party No. 4 herein, was examined as D.W. 4. Neither in the written statement nor during her examination she has stated anything regarding filing or pendency of C.S. No. 80 of 2006 and its relevancy to the present suit. But after closure of evidence of defendant No. 4, she examined one Upendra Samantaray as D.W. 5 in the suit who disclosed regarding pendency of C.S. No. 80 of 2006, in consequence thereof defendant No. 4, filed petitions vide Annexure-1 series for admitting the certified copy, of the plaint in C.S. No. 80 of 2006 as evidence facilitating D.W. 4 for making the same as exhibit, granting permission to file certified copy of the plaint in C.S. No. 80 of 2006 and to call for the file of the said suit.

The plaintiff-petitioner objected vide Annexure-2 to the petitions filed in Annexure-1 series stating, inter alia, that the plaint in C.S. No. 80 of 2006 is quite irrelevant to the suit before the Court and the plaint being not a public document as per the provisions of Section 74 of the Evidence Act, the same cannot be admitted into evidence and thus, prayed for dismissal/rejection of the petitions.

Learned Court below after hearing the parties allowed the petitions vide Annexure-1 series and admitted the plaint into evidence and marked the same as exhibit vide order dated 16.08.2007 under Annexure-3.

In view of the analysis of the judgments cited before the Court in the forgoing paragraphs, the ratio decided in Jagdishchandra Chandulal Shah (supra), may constitute to be a per incuriam judgment as the earlier judgment available has not been taken into consideration whereas in Gulab Chand and others (supra) various judgments in the subject has been taken into consideration and after analyzing Section. 74 of the Evidence Act, cogent reason has been assigned that plant may be admissible in proof of fact that a particular suit was brought by a particular person against someone on a particular allegation; but it cannot be admissible to prove the correctness of a statement contained therein unless it is proved by direct evidence or by secondary evidence as provided in the Evidence Act. In the present case, neither there is any whisper in the written statement filed by the defendant-opposite party No. 4 with regard to pendency of C.S. No. 80 of 2006 nor in her evidence as D.W. 4 has she stated anything about the same. The same has been spoken through evidence adduced by D.W. 5, Upendra Samantaray who incidentally disclosed regarding pendency of C.S. No. 80 of 2006. The plaintiff-petitioner is not a party to the said suit and the said suit has been filed by Sailabala Pattnaik and Bibhuti Pattnaik and none of them examined as a witness in the present suit. Therefore, any application filed by them cannot be taken into consideration to exhibit the plaint as a public document so as to prove the case of defendant-opposite party No. 4 applying the ratio of the judgment in Radhashyam Mohanty and another (supra), the pleadings in the suit were that of plaintiffs and defendants and the evidence therefore, is bound to be confined to the said pleadings. Hence, evidence should be led to prove or disprove any of the facts comprised in the pleadings of the plaintiffs or defendants but they cannot be permitted to lead evidence on a plea which was not there before the Court.

Considering the above facts and circumstances of the case and the law governing the field, this Court is of the definite conclusion that the plaint in C.S. No. 80 of 2006 is not a public document within the meaning of Section 74 of the Evidence Act and therefore, the same cannot be admitted

into evidence and marked as exhibit without proving the contents thereof. In that view of the matter, the order dated 16.8.2007 passed by the learned Civil Judge (Junior Division), Puri in T.S. No. 136 of 1992 is hereby set aside and the writ petition is allowed. No cost.

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Constitution of India

14. Arts.16, 226

M/s Bharat Coking Coal Ltd. and others Vs. Chhota Birsa Uranw. ***AIR 2014 SC 1975***

Mrs. Gyan Sudha Misra & Pinaki Chandra Ghose, JJ.

Issue

Date of birth-Correction in service record-Ought to be done as per rules applicable-Being question of fact, has to be decided by appropriate forum- Not by writ Court-Correction in service record - Claim made when employer gave chance to identify and rectify discrepancies in service record. Claim for correction cannot be rejected on technical ground of being belated claim-Having admitted by employer that earlier service record needs rectification-Claim of employer that other non-statutory documents like school leaving certificate should not be given precedence over service record cannot hold good -Correction in service record-Rule that school leaving certificates which can be relied upon "were issued" prior to joining service-Certificate issued after joining service but on basis of school record containing date of birth-Cannot be disregarded as one issued after joining service.

The Rule permitting rectification of the date of birth by treating the date of birth mentioned in the school leaving certificate to be correct provided such certificates were issued by the educational institution prior to the date of employment, will not apply where the school records containing the date of birth were available long before the starting of the employment. The date of issue of certificate actually intends to refer to the date with the relevant record in the school on the basis of which the certificate has been issued. A school leaving certificate is usually issued at the time of leaving the school by the student, subsequently a copy thereof also can be obtained where a student misplaces his said school leaving certificate and applies for a fresh copy thereof. The issuance of fresh copy cannot change the relevant record which is prevailing in the records of the school from the date of the admission and birth date of the student, duly entered in the records of the school. The school leaving certificate issued after joining service but on basis of school record available long before cannot be put out of consideration.

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15. Article 19(1)(g)

Pramati Educational & Cultural Trust ® & Ors. Vs.Union of India & Ors.

2014 (II) CLR (SC)-164

R.M. Lodha , CJI. ,A. K. Patnaik ,Sudhansu Jyoti Mukhopadhaya, Dipak Misra & Fakkir Mohamed Ibrahim Kalifulla, JJ.

Issue

Educational institutions –Held ,establishment and running of an educational institution "is occupation" –Right to establish and administer private educational institutions –Right and autonomy of occupation –Will not be affected by giving freeships or scholarships to small percentage of students belonging to weaker and backward sections of the society –Charitable element of the right.

We may now consider whether clause (5) of Article 15 of the Constitution has destroyed the right under Article 19(1)(g) of the Constitution to establish and administer private educational institutions. It is for the first time that this Court held in *T.M.A. Pai Foundation* (supra) that the establishment and running of an educational institution "is occupation" within the meaning of Article 19(1)(g) of the Constitution. In paragraph 20 of the majority judgment, while dealing with the four components of the rights under Articles 19 and 26(a) of the Constitution in respect of private unaided non-minority educational institutions, Kirpal, CJ. has held that education is *per se* regarded as an activity that is charitable in nature.

Thus, the content of the right under Article 19(1)(g) of the Constitution to establish and administer private educational institutions, as per the judgment of this Court in *T.M.A. Pai Foundation* (supra), includes the right to admit students of their choice and autonomy of administration, but this Court has made it clear in *T.M.A. Pai Foundation* (supra) that this right and autonomy will not be affected if a small percentage of students belonging to weaker and backward sections of the society were granted freeships or scholarships, if not granted by the Government. This was the charitable element of the right to establish and administer private educational institutions under Article 19(1)(g) of the Constitution. Hence, the identity of the right of private educational institutions under Article 19(1)(g) of the Constitution as interpreted by this Court, was not to be destroyed by admissions from amongst educationally and socially backward classes of citizens as well as the Scheduled Castes and the Scheduled Tribes.

Article -15(5)

Article 15(5) aims at providing equal opportunity to a large number of students belonging to the socially and educationally backward classes of citizens or for the Schedule Castes and Schedule Tribes to study in educational institutions and equally of opportunity –Clauses (5) is an enabling provision to make equality of opportunity promised in the preamble –It is not an exception or proviso overriding article 15.

We have considered the submissions of learned counsel for the parties and we find that the object of clause (5) of Article 15 is to enable the State to give equal opportunity to socially and educationally backward classes of citizens or to the Scheduled Castes and the Scheduled Tribes to study in all educational institutions other than minority educational institutions referred in clause (1) of Article 30 of the Constitution. In the result, we hold that the Constitution (Ninetythird Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution and the Constitution (Eighty-Sixth Amendment) Act, 2002 inserting Article 21A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid. We also hold that the 2009 Act is not *ultra vires* Article 19(1)(g) of the Constitution. We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is *ultra vires* the Constitution. Accordingly, Writ Petition (C) No.1081 of 2013 filed on behalf of Muslim Minority Schools Managers' Association is allowed and Writ Petition (C) Nos.416 of 2012, 152 of 2013, 60 of 2014, 95 of 2014, 106 of 2014, 128 of 2014, 144 of 2014, 145 of 2014, 160 of 2014 and 136 of 2014 filed on behalf of non-minority private unaided educational institutions are dismissed. All I.As. stand disposed of. The parties, however, shall bear their own costs.

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16. Art .350 A

Nallur Prasad & Ors Vs. State of Karnataka & Ors.

With

R.G. Nadadur & Ors. Vs. Shubodaya Vidya Samasthe & Anr

And

State of Karnataka & Ors. Vs. Mohamed Hussain Jucka. ***AIR 2014 SC 2094***

R.M. Lodha,C.J.I., A.K.Patnaik, Sudhansu Jyoti Mukhopadhaya, Dipak Misra and Fakkir Mohamed Ibrahim Kalifulla, JJ.

Issue

Mother tongue-Means languages of linguistic minority in State-Does not mean language in which child is comfortable-Child's mother tongue is decided by its parent.

Facts leading to the reference to the Constitution Bench:

The Government of Karnataka issued a Government Order dated 19.06.1989 prescribing that "from 1st standard to IVth standard, mother tongue will be the medium of instruction". On 22.06.1989, the Government of Karnataka issued a corrigendum substituting the aforesaid words in the earlier Government Order dated 19.06.1989 by the following words:

"from 1st standard to IVth standard, where it is expected that normally mother tongue will be the medium of instruction."

The orders dated 19.06.1989 and 22.06.1989 were challenged before this Court and a Division Bench of this Court in its judgment dated 08.12.1993 in English Medium Students Parents Association v. State of Karnataka & Ors. [(1994) 1 SCC 550]: (AIR 1994 SC 1702) held that the two orders of the Government of Karnataka were constitutionally valid.

Thereafter, in cancellation of all earlier orders pertaining to the subject, the Government of Karnataka issued a fresh order dated 29.04.1994 regarding the language policy to be followed in primary and high schools with effect from the academic year 1994-1995. Clauses 2 to 8 of the Government Order dated 29.04.1994, with which we are concerned in this reference, are extracted herein below:-

The medium of instruction should be mother tongue or Kannada, with effect from the academic year 1994-95 in all Government recognized schools in classes 1 to 4.

The students admitted to 1st standard with effect from the academic year 94-95, should be taught in mother tongue or Kannada medium.

However, permission can be granted to the schools to continue to teach in the pre-existing medium to the students of standards 2 to 4 during the academic year 94-95.

The students are permitted to change over to English or any other language as medium at their choice, from 5th standard.

Permission can be granted to only students whose mother tongue is English, to study in English medium in classes 1 to 4 in existing recognized English medium schools.

The Government will consider regularization of the existing unrecognized schools as per policy indicated in paragraphs 1 to 6 mentioned above. Request of schools who have complied with the provisions of the code of education and present policy of the government will be considered on the basis of the report of the Zilla Panchayat routed through commissioner for public instructions.

It is directed that all unauthorized schools which do not comply with the above conditions, will be closed down."

Thus, these clauses of the Government order dated 29.04.1994 provided that medium of instruction should be mother tongue or Kannada with effect from the academic year 1994-1995 in all Government recognized schools in classes I to IV and the students can be permitted to change over to English or any other language as medium of their choice from class V. The Government Order dated 29.04.1994, however, clarified that permission can be granted to only those students whose mother tongue is English, to study in English medium in classes I to IV in existing recognized English medium schools.

Aggrieved by the clauses of the Government Order dated 29.04.1994 which prescribed that the medium of instruction in classes I to IV in all Government recognized schools will be mother tongue or Kannada only, the Associated Management of Primary and Secondary Schools in Karnataka filed Writ Petition No.14363 of 1994 and contended inter alia that the right to choose the medium of instruction in classes I to IV of a school is a fundamental right under Articles 19(1)(a), 19(1)(g), 26, 29 and 30(1) of the Constitution and that the impugned clauses of the order dated 29.04.1994 of the Government of Karnataka are ultra vires the Constitution.

Article 350A of the Constitution casts a duty on every State and every local authority within the State to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups. Hence, the expression 'mother tongue' in Art. 350-A means the mother tongue of the linguistic minority group in a particular State and this would obviously mean the language of that particular linguistic minority group. It is the parent or the guardian of the child who will decide what the mother tongue of child is. The Constitution nowhere provides that mother tongue is the language which the child is comfortable with, and while this meaning of "mother tongue" may be a possible meaning of the 'expression' this is not the meaning of mother tongue in Art. 350-A of the Constitution or in any other provision of the Constitution and hence neither power of the State can be expanded nor a fundamental right can be restrict by saying that mother tongue is the language in which the child is comfortable with.

The right to freedom of speech and expression under Art. 19 (1) (a) of the Constitution includes the freedom of a child to be educated at the primary stage of school in a language of the choice of the child and the State cannot impose controls on such choice just because it thinks that it will be more beneficial for the child if he is taught in the primary stage of school in his mother tongue. A child or on his behalf his parent or guardian therefore has a right to freedom of choice with regard to the medium of instruction in which he would like to be educated at the primary stage in school.

The right of the child to choose medium of instruction cannot be excluded from the right to freedom of speech and expression only for the reason that the State will have no power to impose reasonable restrictions on this right of the child for purposes other than those mentioned in Art. 19 (2) of the Constitution. The Constitution makers did not intend to empower the State to impose reasonable restrictions on the valuable right to freedom of speech and expression of a citizen except for the purpose mentioned in CL. (2) of Art. 19 of the Constitution because they thought that imposing other restrictions on the freedom of speech and expression will be harmful to the development of the personality of the individual citizen and will not be in the larger interest of the nation.

Under Arts. 21 and 21-A of the Constitution, a child has a fundamental right to claim from the State free education up to the age of 14 years. The language of Art. 21-A of the Constitution further makes it clear that such free education which a child can claim from the State will be in a manner as the State may, by law, determines by law that in schools where free education is provided under Art.21-A of the Constitution, the medium of instruction would be in the mother or in any language, the child cannot claim as of right under Art. 21 or Art.21 A of the Constitution that he has a right to choose the medium of instruction in which the education should be imparted to him by the State. Therefore, a child, and on his behalf his parent or guardian, has the right to choose the medium of instruction at the primary school stage under Art. 19(1) (a) and not under Art. 21 or Art 21-A of the Constitution.

The State has power to adopt regulatory measures. The power to legislate in respect of primary of secondary education is exclusively vested in the States. This power of the State to prescribe the medium of instruction in primary or secondary schools cannot be exercised in contravention of the rights guaranteed under Art. 19 (1) (a) and 19 (1) (g) of the Constitution. Only if the medium of instruction has a direct bearing or impact on the determination of standards in institutions of higher education, the legislative power can exercised by the Union to prescribe a medium of instruction. Prescribing the medium of instruction in schools to be mother tongue in the primary school stage in Classes I to IV has no direct bearing

and impact on the determination of standards of education, and will affect the fundamental rights under Arts. 19 (1) (a) and 19 (1) (g) of the Constitution. The imposition of mother tongue would affect the fundamental rights under Arts. 19, 29 and 30 of the Constitution.

The questions referred to the Constitution Bench:

All these matters were heard by a Division Bench of this Court and on 05.07.2013, the Division Bench passed an order referring the following questions for consideration by the Constitution Bench:

"(i)What does Mother tongue mean? If it referred to as the language in which the child is comfortable with, then who will decide the same?

(ii)Whether a student or a parent or a citizen has a right to choose a medium of instruction at primary stage?

(iii)Does the imposition of mother tongue in any way affect the fundamental rights under Article 14, 19, 29 and 30 of the Constitution?

(iv) Whether the Government recognized schools are inclusive of both government-aided schools and private & unaided schools?

(v) Whether the State can by virtue of Article 350-A of the Constitution compel the linguistic minorities to choose their mother tongue only as medium of instruction in primary schools?"

Mother tongue in the context of the Constitution would, therefore, mean the language of the linguistic minority in a State and it is the parent or the guardian of the child who will decide what the mother tongue of child is. The Constitution nowhere provides that mother tongue is the language which the child is comfortable with, and while this meaning of "mother tongue" may be a possible meaning of the 'expression', this is not the meaning of mother tongue in Article 350A of the Constitution or in any other provision of the Constitution and hence we cannot either expand the power of the State or restrict a fundamental right by saying that mother tongue is the language which the child is comfortable with. We accordingly answer question no. (i).

Therefore, once we come to the conclusion that the freedom of speech and expression will include the right of a child to be educated in the medium of instruction of his choice, the only permissible limits of this right will be those covered under clause (2) of Article 19 of the Constitution and we cannot exclude such right of a child from the right to freedom of speech and expression only for the reason that the State will have no power to impose reasonable restrictions on this right of the child for purposes other than those mentioned in Article 19(2) of the Constitution.

Under Articles 21 and 21A of the Constitution, therefore, a child has a fundamental right to claim from the State free education upto the age of 14 years. The language of Article 21A of the Constitution further makes it clear that such free education which a child can claim from the State will be in a manner as the State may, by law, determine. If, therefore, the State determines by law that in schools where free education is provided under Article 21A of the Constitution, the medium of instruction would be in the mother tongue or in any language, the child cannot claim as of right under Article 21 or Article 21A of the Constitution that he has a right to choose the medium of instruction in which the education should be imparted to him by the State. The High Court, in our considered opinion, was not right in coming to the conclusion that the right to choose a medium of instruction is implicit in the right to education under Articles 21 and 21A of the Constitution. Our answer to Question No.(ii), therefore, is that a child, and on his behalf his parent or guardian, has the right to choose the medium of instruction at the primary school stage under Article 19(1)(a) and not under Article 21 or Article 21A of the Constitution.

We are of the considered opinion that though the experts may be uniform in their opinion that children studying in classes I to IV in the primary school can learn better if they are taught in their mother tongue, the State cannot stipulate as a condition for recognition that the medium of instruction for children studying in classes I to IV in minority schools protected under Articles 29(1) and 30(1) of the Constitution and in private unaided schools enjoying the right to carry on any occupation under Article 19(1)(g) of the Constitution would be the mother tongue of the children as such stipulation. We accordingly answer question No.(iii)

referred to us and hold that the imposition of mother tongue affects the fundamental rights under Articles 19, 29 and 30 of the Constitution.

From the aforesaid discussion of the law as developed by this Court, it is clear that all schools, whether they are established by the Government or whether they are aided by the Government or whether they are not aided by the Government, require recognition to be granted in accordance of the provisions of the appropriate Act or Government order. Accordingly, Government recognized schools will not only include government aided schools but also unaided schools which have been granted recognition.

We have extracted Article 350A of the Constitution above and we have noticed that in this Article it is provided that it shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups. We have already held that a linguistic minority under Article 30(1) of the Constitution has the right to choose the medium of instruction in which education will be imparted in the primary stages of the school which it has established. Article 350A therefore cannot be interpreted to empower the State to compel a linguistic minority to choose its mother tongue only as a medium of instruction in a primary school established by it in violation of this fundamental right under Article 30(1). We accordingly hold that State has no power under Article 350A of the Constitution to compel the linguistic minorities to choose their mother tongue only as a medium of instruction in primary schools. In view of our answers to the questions referred to us, we dismiss Civil Appeal Nos.5166-5190 of 2013, 5191-5199 of 2013, the Civil Appeal arising out of S.L.P. (C) No.32858 of 2013 and Writ Petition (C) No.290 of 2009. There shall be no order as to costs.

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17. Chapter 3, Section 13 (1)

Smt. Birajini Panda & Others Vs. State of Orissa (Vigilance). ***(2014) 58 OCR-590***

S.K. Mishra, J.

Issue

Confiscation

Can a confiscation proceeding continue against other persons in whose name the property was acquired by the accused where the accused died during pendency of the trial and the trial abated against him?-Held-No- when the accused died and the charges are not proved, confiscation proceeding cannot run against other person.

Husband of the appellant while facing trial under the P.C. Act for possession of disproportionate assets, died-Trial against him abated on whole- After his death, proceeding was initiated before the Authorised Officer for confiscation of the property left by the deceased-Hon'ble Court held that confiscation of property and money depends upon the final outcome of the trial-If the accused is proved guilty under the P.C. Act, then the property and money may be liable for confiscation-But in a case where there is no conviction and no adjudication confiscation of criminal trial against the accused person, already sets in, no conflucation proceeding can be initiated**.**

The facts of the case are not disputed. Permananda Panda (hereinafter referred to as the deceased person affected) was a public servant holding high public office. A prosecution was lodged against him under Section 13 (1) (e) read with Section 13 (2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the "P.C. Act" for brevity). In this connection, Berhampur Vigilance P.S. Case No. 15/1995 was registered. It is alleged that he was possessing disproportionate assets of Rs.43,86,343.00. Upon completion of investigation, charge sheet was submitted and the case was transferred to the Court of Special Judge, Special Court, Bhubaneswar, which was registered as T.R. Case No. 18/45 of 2008/1999, against Premananda Panda. During pendency of the case, the accused Premananda Panda died on 19.05.2009. Accordingly, as per

the order dated 09.09.2009 the Trial Court directed that criminal case abates in its entirety and orders were passed to drop the proceeding.

In the meantime, after death of the said Premanada Panda, on 07.07.2009, confiscation proceeding under Section 13(1) of the OSC Act was initiated against the said Premananda Panda, his wife and children. It was alleged that wife of Premananda Panda and their children were holding properties which were acquired by commission of the offence by Premananda Panda. The persons affected namely, Birajini Panda, Manoranjan Panda, Chitaranjan Panda, Brajaranjan Panda and Madhusmita Panda filed an application to drop the proceeding of confiscation before the learned Authorised Officer. The learned Authorised Officer as per order dated 21.09.2013 in Confiscation Case No.4/2009 rejected their application to drop the proceeding. However, on 21.09.2009 the learned Authorised Officer held that because of the death of Premananda Panda-Opposite Party No.1, the case abates against him. In other words, learned Authorised Officer has ordered that as far as Premananda Panda is concerned confiscation shall abates, but the said proceeding will continue as against other opposite parties, who happens to be the relations of Premananda Panda.

In order to property adjudicate the issue in question, it is necessary to take note the scheme of confiscation of property as laid down in Chapter III of the OSC Act. But before that this Court takes note of the fact that the offence has been defined in Section 2 of Clause (d) of O.S.C. Act as the offence of criminal misconduct within the meaning of clause (e) of Sub-section (1) of Section 13 of the P.C Act.The legal question which arises in this appeal for adjudication is whether the confiscation proceeding as envisaged under Chapter III of the Orissa Special Courts Act, 2006 (hereinafter referred to as the "OSC Act" for brevity) shall continue against other persons in whose name property has allegedly been acquired by the accused, after his death and abatement of the criminal trial initiated against him?

Broadly speaking, from this scheme of the Act, two opinions emerges. Firstly, confiscation to the proceeding shall be done if it is found that the

property and the money has been acquired by means of “the offence”. Secondly, the confiscation of the property or money or both shall be contingent upon the final outcome of the criminal trial faced by the person affected for the offence under Section 13 (1) (e) of the P.C. Act. Thus, it is clear that the confiscation is being carried out in anticipation of the fact that the prosecution shall in future date prove the guilt of the accused as far as the offence is concerned. On the contrary, if he is acquitted of the offence then the confiscation property is to be returned to him. So the natural corollary to this provision is that if there is no possibility of recording any conviction as in the case of death of the person affected and abatement of the criminal trial against him, a confiscation cannot be made as there is no possibility of the person affected being convicted for the offence under the P.C. Act. Therefore, if the person affected or the accused in the criminal trial dies and the case abates against him, then the confiscation proceeding cannot proceed against the other persons in whose name he allegedly held property or money which he amassed by means of the offence. Hence this Court comes to the conclusion that the order dated 21.09.2013 passed by the learned Authorised Officer, Special Court, Bhubaneswar in Confiscation Case No.4/2009 is not sustainable and the confiscation proceeding has to be dropped. With this observation, the CRLA is allowed and the confiscation proceeding pending before the learned Authorized Officer, Special Court, Bhubaneswar against the appellants be dropped.

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18. Matrimonial Discords /Disputes/Offences /Proceedings

*Bheemraya Vs. Suneetha***. *2014(II)CLR (SC)-158***

Surinder Singh Nijjar & Fakkir Mohamed Kalifulla, JJ.

Issue

Proper mode of disposal –Paramount duty of Court –Both parties were minors when respondent (alleged wife) claims that they were married and a daughter was born when parties lived together as husband and wife –Relief sought by respondent was for restitution of conjugal rights and maintenance for child –High Court dismissing first appeal, and directing initation of criminal proceedings for prosecution of appellant for offence punishable under Section 376,IPC –Held ,High Court while rightly observing that even an illegitimate child would be entitled to maintenance failed to appropriate that essentially it was seized of a matrimonial dispute between the parties –Attitude of Court in such matters should be to encourage and persuade parties to reconcile ,and to refer parties to conciliation/mediation –In various proceedings between parties there is no reference to any effort made by Court to adopt such a course –Instead ,observations made in impunged judgment would push parties further into conflict –Paramount duty of Court in matrimonial matters should be restore peace in family –Attitude should not be further encourage parties to litigate.

We have heard the learned counsel for the parties at length.

Undoubtedly, both the parties were minor at the time when the respondent claims that they were married. She further alleges that she gave birth to a daughter when the parties lived together as husband and wife.

Respondent filed a suit with a prayer that the appellant be restrained from marrying anyone else during her life time. She also filed another suit claiming that she and her daughter are entitled to 1/3rd share of the property owned by the appellant and his father. She, therefore, prayed for a perpetual injunction restraining the appellant and his father from alienating the suit property. In the two suits filed by the respondent, the trial Court in spite of recording findings of fact that parties were minor at the time of the alleged marriage, proceeded to decide the two suits on merits. The first appellate Court affirmed the findings of the trial Court in both the suits.

The respondent filed two Regular Second Appeals in the High Court. The finding that the plaintiff (respondent) was minor at the time of the

marriage was affirmed by the High Court. However, the High Court held that since the plaintiff/respondent was a minor, at the time when the suits were filed, they were not maintainable. Therefore, the trial Court had no jurisdiction to decide the same on merits. The findings recorded on merits were set aside. The Regular Second Appeals were partly allowed as indicated above. The respondent had also filed a petition under Section 9 of the Hindu Marriage Act, 1955, which was dismissed. She then filed Misc. First Appeal No.31408 of 2009, in which the High Court passed the impugned order, dismissing the same. Whilst dismissing the appeal, the High Court held that in view of Section 5(iii) of the Hindu Marriage Act, 1955, clearly, the marriage would be void. In view of this finding, the High Court further observed that it would be open to the respondent to initiate criminal proceedings for prosecution of the appellant for an offence punishable under Section 376 of the Indian Penal Code. In our opinion, the High Court was not justified in making such observations. The only relief sought by the respondent was for restitution of conjugal rights and maintenance for the child. The High Court had rightly observed that even an illegitimate child would be entitled to maintenance. The High Court failed to appreciate that essentially it was seized of a matrimonial dispute between the parties. The attitude of the Court in such matters should be to encourage and persuade the parties to reconcile. It was an ideal case to be referred to conciliation/mediation. Having perused all the orders in various proceedings between the parties, we do not see any reference to any effort made by the Court to adopt such a course. Instead the observations made in Paragraph 4 of the impugned judgment would push the parties further into conflict. Paramount duty of the Court in matrimonial matters should be to restore peace in the family. The attitude should not be to further encourage the parties to litigate. Only as a last resort the Court ought to decide the suit/proceeding on merits. Therefore, we are unable to approve the observations made by the High Court in the impugned judgment. In that view of the matter, the appeal is allowed; the observations made in Para 4 of the impugned judgment are deleted. No costs.

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