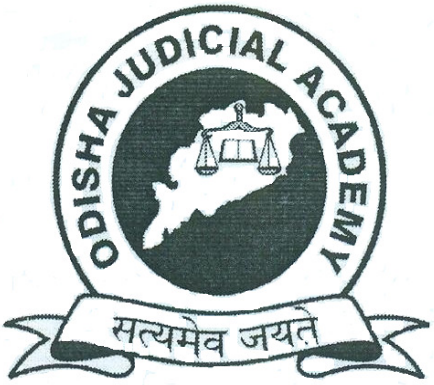
O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2015

(*SEPTEMBER*)



Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY

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

I N D E X

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2. Section 24 of CPC
Subhashree Dash vs. Subhashish Raybabu
Dr. A. K. Rath , J.
In the High Court of Orissa, Cuttack
Date of Judgment: 04.09.2015
Issue

***Transfer of Civil Proceeding*.**

Relevant Extract

The marriage between the petitioner and the opposite party was solemnized on 5.2.2013 as per Hindu rites and customs at Puri. As it appears that the dissensions cropped up in the family, where after the opposite party-husband filed an application under Section 13 of the Hindu Marriage Act for dissolution of marriage in the court of Judge, Family Court, Balasore, which is registered as Civil Proceeding No.83 of 2015. Thereafter, the instant application is filed under Section 24 CPC to transfer the same to the court of learned Judge, Family Court, Puri. It is stated that the petitioner is now serving at Bangalore and her father is staying at Puri. Her father is suffering from old age diseases. Thus it is impossible on her part to look after the case at Balasore. Further, there is none at Balasore to look after the case. She also apprehends danger to her life.

Pursuant to issuance of notice, a counter affidavit has been filed by the opposite party. It is stated that the petitioner is serving at Bangalore. Therefore, she will not face any inconvenience for attending the court at Balasore. Further, the brother of the petitioner is an advocate practising at Puri. The sister and brotherin- law of the petitioner are residing at Bhubaneswar. Opposite party has

been threatened by the in-laws number of times. Thus he will not be able to defend his case in the event the case is transferred from Balasore to Puri.

The apex Court in the case of Sumita Singh v. Kumar Sanjay and another, AIR 2002 SC 396, held that wife's convenience must be looked at while considering the application for transfer of the case.

The case of the petitioner may be examined from another angle. The petitioner is at present serving at Bangalore. Though it is asserted by the petitioner that she will face inconvenience to attend the court at Balasore, this Court is of the opinion that no inconvenience will be caused to her, if she attends the Family Court at Bhubaneswar, since Bhubaneswar is centrally located.

Thus, for the ends of justice, C.P.No.83 of 2015 pending in the court of learned Judge, Family Court, Balasore is transferred to the court of the learned Judge, Family Court, Bhubaneswar. This Court directs learned Judge, Family Court, Balasore to transmit the entire record of Civil Proceeding No.83 of 2015 to the court of the learned Judge, Family Court, Bhubaneswar immediately after production of a certified copy of this order. The petition is disposed of.

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3. Order 39 Rule 1 and 2 of CPC &
Article 227 of the Constitution of India.
Rohita Kumar Beura Vs. Pramila Samantaray & another.
DR. A. K. Rath , J.
In the High Court of Orissa, Cuttack
Date of Judgment: 23.09.2015
Issue

Refusing to stay further proceedings of the interim application.

Relevant Extract

Opposite parties as plaintiffs filed a suit, for declaration of right, title and interest over suit schedule property and for permanent injunction restraining the defendant from coming over the suit land, in the court of learned Civil Judge (Senior Division), 1st Court, Cuttack, which is registered as C.S. No.398 of 2006. The case of the plaintiffs, in a nut-shell, is that the suit schedule land was recorded in the names of Siba Sahoo and others with forcibly note of possession of the defendant in the remarks column of the Hal Settlement R.O.R. published in the year 1989. To press the legal necessity, Siba Sahoo and others alienated the land in favour of Ramachandra Samantaray, the husband of the plaintiff no.1 and father of plaintiff no.2 by means of registered sale deed no.4781 dated 17.11.1989 for a valid consideration and thereafter delivered possession. Thereafter, Ramachandra Samantaray filed an application under Section 15(b) of the Orissa Survey and Settlement Act before the Commissioner, Land Records and Settlement, Orissa, Cuttack (hereinafter referred to as "the Commissioner") to record the land in his favour and delete the note of forcible possession of the defendant, which was registered as R.P. Case No.5341 of 1994. The Commissioner allowed the application and directed the petitioner to move before the Tahasildar, Sadar, Cuttack for mutation. Thereafter, Mutation Case No.1647 of 1995 was instituted before the Tahasildar, Sadar, Cuttack. As per the direction of the Commissioner, the Tahasildar prepared the R.O.R. and deleted the forcible possession of the defendant from the remarks column. Assailing the order of the Commissioner, the defendant filed a writ petition being OJC No.16815 of 1998 before this Court, on the ground that in a proceeding under Section 145 Cr.P.C. his possession was declared, which is pending adjudication. It is further stated that the plaintiffs filed OLR Case No.63 of 2006 before the Tahasildar, Sadar, Cuttack under Section 19(1) of the Orissa Land Reforms Act

(hereinafter referred to as “the OLR Act”) for partition. The Tahasildar passed the order and prepared the R.O.R. in the names of the plaintiffs separately.

Pursuant to issuance of notice, the petitioner, who was defendant in the court below, entered appearance and filed a comprehensive written statement denying the assertions made in the plaint. The case of the defendant is that he is in physical possession of the suit land to the knowledge of the plaintiffs and their vendors for more than the statutory period peacefully, openly and continuously and, as such, has perfected title by way of adverse possession. The suit schedule land is a part and parcel of the residential premises. The suit property was recorded in favour of Pankaj Lenka, who died in the year 1950 without leaving any heir. Pankaj was a bachelor. He transferred the suit property along with other property in favour of Banamali Beura, father of the defendant, on the full moon day of Magha of the year 1945 for a consideration of Rs.45/- and thereafter delivered the physical possession. In the settlement, the area has been reduced by Ac.0.009 dec. His father made oral gift of the property in his favour in 1954. In the settlement, the suit property was wrongly recorded in the names of Souri Sahoo and others but physical possession of the defendant was noted in the draft R.O.R. At a subsequent stage, the note possession was deleted behind him. The Commissioner as well as A.S.O. had no jurisdiction to delete the note of possession of the defendant. It is further asserted that when some outsider including Rama Chandra Samantray interfered with his possession, he initiated a proceeding under Section 145 Cr.P.C., which was registered as Criminal Misc. Case No.951 of 1989. The possession of the defendant was declared by order dated 30.8.1990. Rama Chandra Samantray, the predecessor-in-interest of the plaintiffs filed Mutation Case No.1248 of 1994 before the Tahasildar, Sadar, Cuttack against the defendant.

In the mutation case, it was found that the purchaser was not in possession of the land. Accordingly, it was held that the case was not maintainable. While the matter stood thus, one Ramani Kanta Pattnaik filed R.P. Case No.4804 of 1994 on the strength of the sale deed dated 18.11.1989 before the Commissioner. The Commissioner held that the revision was not maintainable. Again, Ramani Kanta Pattnaik and Kishore Parida filed Mutation Case Nos.1925 and 1926 of 1995 before the Tahasildar, Sadar, Cuttack. The

same was rejected. While the matter stood thus, Rama Chandra Samantray filed Mutation Case No.5314 of 1994 to record his name. It is further stated that after publication of Hal record-of-right, Siba Sahoo and five others filed R.P. Case No.5494/47 suppressing the material facts. By order dated 3.11.1997, the Commissioner allowed the revision. Against the said order, he filed a writ petition being OJC No.16815 of 1998. By order dated 8.2.2001, a Bench of this Court passed an interim order of injunction. It is further asserted that the order of the OLR Court is a nullity. After coming to know about the order, he filed an application for review.

During pendency of the suit, plaintiffs filed an application under Order 39 Rule 1 and 2 CPC, which is registered as I.A. No.329 of 2006. The defendant filed an application to stay further proceeding of the said interim application till disposal of OLR Appeal No.8 of 2007 pending before the Sub-Collector, Sadar, Cuttack. By order dated 12.11.2007, the learned trial court rejected the application.

The sole question that hinges for consideration of this Court is as to whether the Civil Court has jurisdiction to try and decide a declaratory suit with a prayer for permanent injunction when an appeal under Section 58 of the OLR Act is pending against the order of the Revenue Officer passed under Section 19(1)(c) of the OLR Act ?

Section 19 of the OLR Act provides for effecting partition among co-sharer raiyats. Sub-section (1) of Section 19 of the OLR Act reads as under :

"**19. Partition among co-sharer raiyats how to be effected -** (1) No partition of a holding among cosharer raiyats shall be valid unless made by –

(a) a registered instrument; or

(b) a decree of a Court or ; or

(c) an order of the Revenue Officer in the manner prescribed, on mutual agreement."

On a bare reading of Section 19(1)(c) of the OLR Act, it is crystal clear that the Revenue Officer can effect partition of a holding among co-sharer raiyats on mutual agreement.

Section 67 of the OLR Act, which is the hub of the issue, is quoted below;

"**67. Bar of jurisdiction of Civil Courts** - Save as otherwise expressly provided in this Act, no Civil Court shall have jurisdiction to try and decide any suit or proceedings so far as it relates to any matter which any officer or other competent authority is empowered by or under this Act to decide."

In the instant case, the plaintiffs filed an application under Section 19 (1)(c) of the OLR Act for partition of the property among the co-sharer raiyats. The same does not pertain to the dispute between the landlord and tenant. The bar under Section 67 of the OLR Act does not apply when a suit is not one as between the landlord and tenant. The defendant petitioner does not claim to be a tenant. He asserts title by means of sale deed of the year 1945.

In view of the same, this Court holds that the suit is in the present form is maintainable. There being no illegality or perversity in the order dated 12.11.2007 passed by the learned Civil Judge (Senior Division), 1st Court, Cuttack, in I.A No.329 of 2006, vide Annexure-1, this Court is not inclined to interfere with the same in exercise of its supervisory jurisdiction under Article 227 of the Constitution. Accordingly, the petition is dismissed. No costs.

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4. Rules 1 and 2 of Order III of CPC

Sankarsan Mohapatra (dead) Vs. Smt. Sailabala Mishra

Dr. A. K. Rath, J.

In the High Court of Orissa, Cuttack

Date of Judgment: 04.09.2015

Issue

***Appearance in a case by a person himself and through an recognized Agent*.**

Relevant Extract

The petitioner as plaintiff has filed a suit for declaration of right, title and interest and for conformation of possession in the court of the learned Civil Judge (Junior Division), Boudh, which is registered as Title Suit No.7 of 1999. During pendency of the said suit, the defendant opposite party filed a special power-of-attorney executed by her in favour of the husband to adduce evidence. She filed a petition in the court below to accept the same and allow her husband to adduce evidence on her behalf, since she is sick and unable to attend the court. The petitioner objected to the same.

By order dated 4.4.2003, the trial court accepted the power of attorney and held that the power of attorney holder can look after the case and adduce evidence on behalf of the party. The petitioner has unsuccessfully challenged the same before the learned Additional District Judge, Boudh in Civil Revision No.1 of 2003. The learned Additional District Judge, Boudh dismissed the revision holding that the revision is not maintainable.

Rules 1 and 2 of Order III CPC, which are hub of the issues, are quoted hereunder:-

Order-III

"1. Appearances, etc., may be in person, by recognized agent or by pleader.- Any appearance, application or act in or to any Court, required or authorized by law to be

made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader [appearing, applying or acting, as the case may be,] on his behalf : Provided that any such appearance shall, if the Court so directs, be made by the party in person.

2. Recognized agents.- The recognized agents of parties by whom such appearances, applications and acts may be made of done are-

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on

behalf of such parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agents is expressly authorized to make and do such appearances, applications and acts."

The question does arise as to whether a power of attorney holder in exercise of power granted by the instrument can depose for the principal for the acts done by the principal ?

The subject of dispute is no more res integra. The apex Court in the case of ***Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd. and others,*** AIR 2005 SC 439, in paragraph-13 held as follows:-

"13. Order III, Rules 1 and 2, CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2, CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined." (emphasis laid).

In view of the authoritative pronouncement of the apex Court in the case of Janki Vashdeo Bhojwani (supra), the learned trial court fell into patent error of law in holding that the power of attorney holder can adduce evidence on behalf of the party. But then the power of attorney holder may depose for the principal in respect of such acts, if he has done some acts pursuant to power of attorney.

In the wake of the aforesaid, the order dated 4.4.2003 passed by the learned Civil Judge (Jr. Division), Boudh in Title Suit No.7 of 1999 is quashed. Accordingly, the petition is allowed. There shall be no order as to costs.

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5. Section 439 of Cr.P.C
Neeru Yadav Vs. State of U.P. and Anr.
Dipak Misra & Prafulla C. Pant ,JJ.
IN THE SUPREME COURT OF INDIA
Date of Judgment - 29.09.2015
Issue

Seeking cancellation of Bail.

Relevant Extract

One Salek Chand s/o. Satpal Singh lodged an FIR at P.S. Kavinagar, Ghaziabad on 25.02.2013 about 11.45 a.m. against certain persons relating to the murder of his elder brother, Yashvir Yadav. On the basis of the lodging of the FIR, the criminal law was set in motion and eventually chargesheet was filed which formed the subject matter of Case Crime No. 237 of 2013 for the offences punishable under Sections 147, 148, 149, 302, 307, 394, 411, 454, 506, 120B read with Section 34 IPC. After the application for bail was rejected by the learned trial Judge, the accused person, respondent no.2, moved the High Court in Criminal Misc. Bail Application No. 25466 of 2014. It was contended before the High Court that an omnibus role had been ascribed to him and the other accused persons that they had indulged in general firing as a consequence of which one person had died, for he had received three gun shot injuries. It was also contended that there was no credible evidence against the accused persons. The real plank of submission before the High Court, as is perceptible, was that prayer for bail in respect of 11 accused persons including Mitthan Yadav had already been allowed, and there was no justification to deny him the said benefit as he was similarly placed.

The prayer for bail was resisted by the Public Prosecutor contending, inter alia, that there was indiscriminate firing by the accused person causing fatal injuries. The High Court, after hearing both the parties, has passed following order:-

"In view of above facts, considering the nature of allegation, severity of punishment and period of detention, without expressing any opinion on merit, it is a fit case for bail. Let the applicant Budhpal @ Buddhu be enlarged on bail on his furnishing a personal bond with two heavy sureties each in the like amount to the satisfaction of court concerned in case crime no. 237 of 2013 under Section

147,148,149,302,307,394,411,454,506, 120B, 34 I.P.C. Police Station Kavi Nagar, District Ghaziabad with the following conditions:

(i) The applicant will not tamper with the evidence during the trial.
(ii) The applicant will not pressurize/intimidate the prosecution witness.
(iii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.
In case of breach of any of the above conditions, the court below shall be at liberty to cancel the bail."
The said order is the subject matter of assail in the present appeal by special leave.

At the outset we are obliged to clarify that it is not an appeal seeking cancellation of bail in the strictest sense. It actually calls in question the legal pregnability of the order passed by the High Court. The prayer for cancellation of bail is not sought on the foundation of any kind of supervening circumstances or breach of any condition imposed by the High Court. The basic assail is to the manner in which the High Court has exercised its jurisdiction under Section 439 Cr.P.C. while admitting the accused to bail. To clarify, if it has failed to take into consideration the relevant material factors, it would make the order absolutely perverse and totally indefensible. That is why there is a difference between cancellation of an order of bail and legal sustainability of an order granting bail.

On a perusal of the aforesaid list, it is quite vivid that the respondent no.2 is a history-sheeter and is involved in heinous offences. Having stated the facts and noting the nature of involvement of the accused in the crimes in question, there can be no scintilla of doubt to name him a "history-sheeter". The question, therefore, arises whether in these circumstances, should the High Court have enlarged him on bail on the foundation of parity. It is a well settled principle of law that while dealing with an application for grant of bail, it is the duty of the Court to take into consideration certain factors and they basically are, (i) the nature of accusation and the severity of punishment in cases of conviction and the nature of supporting evidence, (ii) reasonable apprehension of ampering with the witnesses for apprehension of threat to the complainant, and (iii) Prima facie satisfaction of thecourt in support of the charge **.**

We will be failing in our duty if we do not take note of the concept of liberty and its curtailment by law. It is an established fact that a crime though committed against an individual, in all cases it does not retain an individual character. It, on occasions and in certain offences, accentuates and causes harm to the society. The victim may be an individual, but in the ultimate eventuate, it is the society which is the victim. A crime, as is understood, creates a dent in the law and order situation. In a civilized society, a crime disturbs orderliness. It affects the peaceful life of the society. An individual can enjoy his liberty which is definitely of paramount value but he cannot be a law unto himself. He cannot cause harm to others. He cannot be a nuisance to the collective. He cannot be a terror to the society; and that is why Edmund Burke, the great English thinker, almost two centuries and a decade back eloquently spoke thus:-

"Men are qualified for civil liberty, in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love to justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsel of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things that men of intemperate minds cannot be free. Their passions forge their fetters.

14. E. Barrett Prettyman, a retired Chief Judge of US Court of Appeals had to state thus:-

"In an ordered society of mankind there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product of restraints; it is inherently a composite of restraints; it dies when restraints are withdrawn. Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systematized restraint. Restraints are the substance without which liberty does not exist. They are the essence of liberty. The great problem of the democratic process is not to strip men of restraints merely because they are restraints. The great problem is to design a system of restraints which will nurture the maximum development of man's capabilities, not in a massive globe of faceless animations but as a perfect realisation, of each separate human mind, soul and body; not in mute, motionless meditation but in flashing, thrashing activity."

This being the position of law, it is clear as cloudless sky that the High Court has totally ignored the criminal antecedents of the accused. What has weighed with the High Court is the doctrine of parity. A history-sheeter involved in the nature of crimes which we have reproduced hereinabove, are not minor offences so that he is not to be retained in custody, but the crimes are of heinous nature and such crimes, by no stretch of imagination, can be regarded as jejune. Such cases do create a thunder and lightening having the effect potentiality of torrential rain in an analytical mind. The law expects the judiciary to be alert while admitting these kind of accused persons to be at large and, therefore, the emphasis is on exercise of discretion judiciously and not in a whimsical manner.

That apart, it has to be remembered that justice in its conceptual eventuality and connotative expanse engulfs the magnanimity of the sun, the sternness of mountain, the complexity of creation, the simplicity and humility of a saint and the austerity of a Spartan, but it always remains wedded to rule of law absolutely unshaken, unterrified, unperturbed and loyal.

Before parting with the case, we may repeat with profit that it is not an appeal for cancellation of bail as the cancellation is not sought because of supervening circumstances. The annulment of the order passed by the High Court is sought as many relevant factors have not been taken into consideration which includes the criminal antecedents of the accused and that makes the order a deviant one. Therefore, the inevitable result is the lancination of the impugned order

Resultantly, the appeal is allowed and the order passed **by** the High Court is set aside. If the respondent no.2 is at large, he shall be taken into custody forthwith; and if he is still in custody because of certain other cases, he shall not be admitted to bail in connection with the present case. We make it clear that we have not expressed any opinion with regard to other cases and simultaneously we also clearly state that our observations in this case are only meant for purpose of setting aside the order granting bail and would have no impact or effect during the trial.

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6. Sections 302 and 201 of IPC
Nizam & anr. Vs. State of Rajasthan
DIPAK MISRA & R. BANUMATHI ,JJ.
IN THE SUPREME COURT OF INDIA
Date of Judgment- 04-09- 2015
Issue

Correctness of judgment sentences of life imprisonment with fine and default sentence consequent upon non - payment of fine.

Relevant Extract

Case of the prosecution is that deceased-Manoj was the helper on the truck No.MP-07-2627 and had gone to Pune and thereafter to Barar alongwith his first driver Raj Kumar (PW-2) and second driver Ram Parkash (PW-1) and from Barar they loaded the truck with pipes for destination to Ghaziabad on 23.01.2001. Accused-appellants Nizam and Shafique who were the driver and cleaner respectively on the truck No.DL-1GA-5943 also loaded their truck with pipes from the same company on the same day at Barar and started for Ghaziabad alongwith truck No.MP-07-2627. During this period drivers and cleaners of both the trucks developed acquaintance with each other. While on the way to Ghaziabad, driver Raj Kumar (PW-2) of truck No.MP-07-2627 got into quarrel with some local persons and consequently Barar police detained him alongwith his truck. Faced with such situation, Raj Kumar (PW-2) instructed his second driver Ram Parkash (PW-1) to hand over the amount of Rs.20,000/- to Manoj with instructions to give the money to the truck owner. Accordingly, Manoj left for Gwalior with accused persons by the truck No.DL-1GA-5943 on 23.01.2001.

Dead body of deceased-Manoj was found on 26.01.2001 under suspicious circumstances in a field near village Maniya. On 26.01.2001 at about 3.00 O'clock, one Koke Singh (PW-13) went to collect the fodder and found a dead body lying in the field and the same was informed to Shahjad Khan (PW-4). Based on the written information by Shahjad Khan (PW-4), case was registered in FIR No.16/2001 under Sections 302 and 201 IPC on 26.01.2001 at Thana-Maniya, District Dholpur.

We have considered the rival contentions and perused the impugned judgment and material on record.

Case of the prosecution is entirely based on the circumstantial evidence. In a case based on circumstantial evidence, settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete, forming a chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused totally inconsistent with his evidence.

The principle of circumstantial evidence has been reiterated by this Court in a plethora of cases. In *Bodhraj @ Bodha And Ors.* vs. *State of Jammu & Kashmir,*(2002) 8 SCC 45, wherein this court quoted number of judgments and held as under:-

"**10.** It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See *Hukam Singh* v. *State of Rajasthan (1977) 2 SCC 99*, *Eradu* v. *State of Hyderabad AIR 1956 SC 316*, *Earabhadrappa* v. *State of Karnataka (1983) 2 SCC 330*, *State of U.P.* v. *Sukhbasi (1985) Suppl. SCC 79*, *Balwinder Singh* v. *State of Punjab (1987) 1 SCC 1* and *Ashok Kumar Chatterjee* v. *State of M.P., 1989 Suppl. (1) SCC 560)* The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram* v. *State of Punjab AIR 1954 SC 621* it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

We may also make a reference to a decision of this Court in *C. Chenga Reddy* v. *State of A.P. (1996) 10 SCC 193,* wherein it has been observed thus: (SCC pp. 206-07, para 21)

"*21*. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

In *Trimukh Maroti Kirkan* vs. *State of Maharashtra*, (2006) 10 SCC 681, this court held as under:

"**12.** In the case in hand there is no eyewitness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with
their innocence."

The same principles were reiterated in *Sunil Clifford Daniel* vs. *State of Punjab,* (2012) 11 SCC 205, *Sampath Kumar* vs. *Inspector of Police, Krishnagiri* (2012) 4 SCC 124 and *Mohd. Arif @ Ashfaq* vs. *State (NCT of Delhi)*, (2011) 13 SCC 621 and a number of other decisions.

By perusal of the testimonies of PWs 1, 2 and 3, it is seen that PW1-Ram Parkash and PW2-Raj Kumar along with deceased cleaner Manoj got their truck No. MP-07-2627 loaded with pipes at Barar and at the same time another truck No.DL-1GA-5943 of the accused Nizam and Shafique was also loaded with pipes. On the way to Ghaziabad, quarrel took place between the drivers of the truck No. MP 07-2627 and some local persons and Raj Kumar (PW-2) was detained by the police. Raj Kumar (PW-2) instructed Ram Parkash (PW-1) to hand over the amount of Rs.20,000/- to Manoj with instructions to give this money to the truck owner and he was sent along with accused Nizam and Shafique in the other truck DL-1GA-5943. PWs 1 and 2 further stated that after

being released from the police station, they went to Gwalior and enquired about Manoj from their owner Rajnish Kant (PW-3) who had no knowledge about Manoj. In the meanwhile, based on the bilty and the receipt recovered from the pocket of the trouser of deceased-Manoj, Maniya police contacted PW-3-owner of the truck and on being so contacted, PWs 1 to 3 went to Maniya Police Station and identified the deceased person as Manoj through his clothes and photographs.

Based on the evidence of PWs 1 and 2, courts below expressed the view that motive for murder of Manoj was the lust for the money which Manoj was carrying. Courts below based the conviction of the appellants on the circumstances "*last seen theory"* as stated by PWs 1 and 2 along with recovery of bilty and receipt by PW-6 on which the name of the accused person (Nizam) was printed. The appellants are alleged to have committed murder of Manoj for the amount which Manoj was carrying. But neither the amount of Rs.20,000/- nor any part of it was recovered from the appellants. If the prosecution is able to prove its case on motive, it will be a corroborative piece of evidence lending assurance to the prosecution case. But even if the prosecution has not been able to prove the motive, that will not be a ground to throw away the prosecution case. Absence of proof of motive only demands careful scrutiny and deeper analysis of evidence adduced by the prosecution.

Apart from non-recovery of the amount from the appellants, serious doubts arise as to the motive propounded by the prosecution. By perusal of the evidence of Sudama Vithal Darekar (PW-17) it is clear that driver Raj Kumar came to the police station complaining that by five to seven people of other vehicle have robbed him and the money. However, after investigation it was discovered that Raj Kumar gave false information and a case under Section 182 IPC was registered against him. Raj Kumar was produced before the Court and court imposed fine of Rs.1,000/- on him. This fact was also verified from PW-16-investigating officer during his cross-examination.

Courts below convicted the appellants on the evidence of PWs 1 and 2 that deceased was last seen alive with the appellants on 23.01.2001. Undoubtedly, "*last seen theory"* is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen *theory*" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the

deceased. It is well-settled by this Court that it is not prudent to base the conviction solely on "*last seen theory*". "*Last seen theory"* should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

In the light of the above, it is to be seen whether in the facts and circumstances of this case, whether the courts below were right in invoking the "*last seen theory*." From the evidence discussed above, deceased-Manoj allegedly left in the truck DL-1GA-5943 on 23.01.2001. The body of deceased-Manoj was recovered on 26.01.2001. The prosecution has contended the accused persons were last seen with the deceased but the accused have not offered any plausible, cogent explanation as to what has happened to Manoj. Be it noted, that only if the prosecution has succeeded in proving the facts by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act.

During their questioning under Section 313 Cr.P.C., the accused-appellants denied Manoj having travelled in their truck No.DL-1GA-5943. As noticed earlier, body of Manoj was recovered only on 26.01.2001 after three days. The gap between the time when Manoj is alleged to have left in the truck No.DL-1GA-5943 and the recovery of the body is not so small, to draw an inference against the appellants. At this juncture, yet another aspect emerging from the evidence needs to be noted. From the statement made by Shahzad Khan (PW-4) the internal organ (penis) of the deceased was tied with rope and blood was oozing out from his nostrils. Maniya village, the place where the body of Manoj was recovered is alleged to be a notable place for prostitution where people from different areas come for enjoyment.

In view of the time gap between Manoj left in the truck and the recovery of the body and also the place and circumstances in which the body was recovered, possibility of others intervening cannot be ruled out. In the absence of definite evidence that appellants and deceased were last seen together and when the time gap is long, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of Manoj and are guilty of committing murder of Manoj. Where time gap is long it would be unsafe to base the conviction on the "*last seen theory"*; it is safer to look for corroboration from other

circumstances and evidence adduced by the prosecution. From the facts and evidence, we find no other corroborative piece of evidence corroborating the last seen theory.

In case of circumstantial evidence, court has to examine the entire evidence in its entirety and ensure that the only inference that can be drawn from the evidence is the guilt of the accused. In the case at hand, neither the weapon of murder nor the money allegedly looted by the appellants or any other material was recovered from the possession of the appellants. There are many apparent lapses in the investigation and missing links:–(i) Non-recovery of stolen money; (ii) The weapon from which abrasions were caused; (iii) False case lodged by PW-2 alleging that he was being robbed by some other miscreants; (iv) Non-identification of the dead body and (v) Non-explanation as to how the deceased reached Maniya village and injuries on his internal organ (penis). Thus we find many loopholes in the case of the prosecution. For establishing the guilt on the basis of the circumstantial evidence, the circumstances must be firmly established and the chain of circumstances must be completed from the facts. The chain of circumstantial evidence cannot be said to be concluded in any manner sought to be urged by the prosecution.

Normally, this Court will not interfere in exercise of its powers under Article 136 of the Constitution of India with the concurrent findings recorded by the courts below. But where material aspects have not been taken into consideration and where the findings of the Court are unsupportable from the evidence on record resulting in miscarriage of justice, this Court will certainly interfere. The *"last seen theory"* seems to have substantially weighed with the courts below and the High Court brushed aside many loopholes in the prosecution case. None of the circumstances relied upon by the prosecution and accepted by the courts below can be said to be pointing only to the guilt of the appellants and no other inference. If more than one inferences can be drawn, then the accused must have the benefit of doubt. In the facts and circumstances of the case, we are satisfied the conviction of the appellants cannot be sustained and the appeal ought to be allowed. The conviction of the appellants under Sections 302 and 201 IPC is set aside and the appeal is allowed. The appellants are in jail and they are ordered to be set at liberty forthwith if not required in any other case.

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7. Sections 341/302 /304 I & II of IPC
***Ranjit Sarkar Vs. State of Tripura*.**
Dipak Misra & Prafulla C. Pant ,JJ.
IN THE SUPREME COURT OF INDIA
Date of Judgment - 23.09. 2015.
Issue

Conviction and sentence of the life imprisonment and fine be covered under culpable homicide not amounting to murder.

Relevant Extract

Prosecution story, in brief, is that on 17.06.2007 at about 10.00 a.m. an altercation took place between appellant Ranjit Sarkar and Anil Das (deceased) over draining out of rain water through paddy field in Village Tuichindrai. PW-1 Sabitri Das, PW-6 Rina Das and PW-11 Sumitra Das intervened in the quarrel between the two, and subsided the matter. At about 9.00 p.m. on the same day (17.06.2007), Anil Das accompanied by PW-2 Ajit Das, was returning from Tuichindrai market, and when they reached near the house of Ranjit Sarkar, he (Ranjit Sarkar) came from his house armed with wooden file and gave a severe blow on the head of Anil Das, as a result he got injured and fell down. PW-2 Ajit Das raised alarm and neighbours reached at the spot. The injured was immediately taken to Teliamura Hospital from where he was shifted to G.B. Hospital, but finally succumbed to his injuries on the next day. A First Information Report was lodged by PW-1 Sabitri Das with Police Station Teliamura which was registered as PS case No. 45 of 2007 relating to offence punishable under Sections 341/302 IPC. PW-16 S.I. Akhter Hossen investigated the crime. After taking the dead body in his possession, he got prepared the inquest report, through PW-14 A.S.I. Siba Prasad Sur. The dead body was sent in sealed condition for post mortem examination. The autopsy was conducted by PW-15 Dr. Ranjit Kumar Das on 18.6.2007, who recorded ante mortem injuries in the report (Ext. 5), and opined that the deceased had died of coma resulting from head injury caused by an impact of blunt object, sufficient to cause death in ordinary course of nature. After interrogating witnesses and on completion of investigation, charge sheet was filed by the Investigating Officer against the appellant before the Magistrate concerned. The case was committed to the Court of Sessions.

The Additional Sessions Judge, West Tripura, Khowai, after hearing the parties, framed charge in respect of offence punishable under Section 302 IPC against accused Ranjit Sarkar, who pleaded not guilty and claimed to be tried. On this prosecution got examined PW-1 Sabitri Das, PW-2 Ajit Das (eye witness), PW-3 Bimal Das, PW-4 Satish Sarkar, PW-5 Nirmal Sarkar, PW-6 Rina Das, PW-7 Uttam Das (all neighbours), PW-8 Suklal Malakar, PW-9 Mani Kanchan Chowdhary, PW-10 Dilip Sarkar, PW-11 Sumitra Das, PW-12 Sankar Das (neighbor), PW-13 Constable Kalidas Ghosh (who took the dead body for post mortem examination), PW-14 A.S.I. Sibaprasad Sur (who prepared the inquest report), PW-15 Dr. Ranjit Kumar Das (who conducted autopsy) and PW-16 S.I. Akhter Hossen (who investigated the crime).

Oral and documentary evidence appears to have been put to the accused Ranjit Sarkar under Section 313 of Code of Criminal Procedure, 1973, in reply to which he pleaded that the evidence against him is false, but adduced no evidence in his defence. The trial court after hearing the parties found that the charge of offence punishable under Section 302 IPC is sufficiently proved against the accused Ranjit Sarkar. Accordingly, he was convicted, and after further hearing, sentenced the convict to imprisonment for life and directed to pay fine of Rs.5000/-, in default of payment of which he was further directed to undergo rigorous imprisonment for a period of six months.

Aggrieved by said judgment and order dated 19.11.2008, the convict preferred appeal before Gauhati High Court, and the same was dismissed vide impugned order challenged before us.

In the grounds of appeal before us, it is admitted in ground (A) that an altercation did take place on 17.06.2007 at about 10.00 a.m. between Anil Das and the appellant over draining of rain water in the paddy field. In ground (C) it is pleaded that since the appellant has already undergone seven years imprisonment, a compassionate view be taken and the conviction be converted to one punishable under Section 304 Part II IPC. We have carefully gone through the statement of PW-15 Dr. Ranjit Kumar Das, who conducted post mortem examination on the dead body of Anil Das on 18.6.2007. In fact, first four ante

mortem injuries mentioned by the Medical Officer relate to single injury. The first one is stitched wound. The second is haematoma on the deeper layer of scalp over right parietal region. The third injury also relates to the same as it discloses fracture on the depressed bone of the head on anterior part of right parietal bone. The fourth ante mortem injury also relates to above three injuries, which discloses subdural haemorrhage present over cerebral hemispheres. The only ante mortem injury No. 5 is actually the second injury which is an abrasion measuring 3cm x 2cm over the dorsum of left wrist joint.

PW-2 Anil Das also does not state about more than one blow given by the appellant on the head of the deceased with wooden file. The injury on the dorsum of left wrist joint could have been caused when the injured fell down on the ground. As such, in substance the evidence on record suggests only one blow given by the appellant on the head of the deceased which appears to have been given with full force.

In the above facts and circumstances, having re-assessed the depositions of witnesses and other evidence on record, we are of considered opinion that the act on the part of the appellant is covered by Part I of Section 304 IPC. Therefore, we set aside the conviction and sentence under Section 302 IPC, awarded by the trial court and affirmed by the High Court. Instead, the appellant Ranjit Sarkar is convicted under Section 304 Part I, and sentenced to rigorous imprisonment for a period of ten years. With this modification in the conviction and sentence, the appeal stands disposed of.

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8. Article 16, 16(1),16(4)
Akhilesh Kumar Singh Vs. Ram Dawan & Ors.
Dipak Misra |& Prafulla C. Pant ,JJ.
IN THE SUPREME COURT OF INDIA
Date of Judgment- 23-09- 2015
Issue

Reservation by the state for backward classes in public employment.

Relevant Extract

As the factual narration would unveil, the first respondent submitted a representation to the Joint Director of Education on 22.6.2006, but nothing affirmative ensued and in the meantime the present appellant Akhilesh Kumar Singh was appointed. Being dissatisfied with the same, the first respondent invoked the jurisdiction of High Court in Writ Petition No. 39738 of 2006. The learned Single Judge taking note of the fact that the claim of the writ petitioner seeking promotion to the post of Clerk was untenable inasmuch as there was a singular post in the cadre of Clerk duly sanctioned and created in the institution and in such circumstances the said post could not be reserved for promotion from amongst the Class IV employees. However, the learned single Judge observed that if the writ petitioner felt that the appointment of the selected candidate by direct recruitment was patently illegal and de hors the rules, he could submit a representation to the District Inspector of Schools and, in that event, the authority concerned shall pass a reasoned and speaking order keeping in view the various provisions of the 1921 Act.

Being dissatisfied with the said order, the 1st respondent herein preferred Special Appeal No. 648 of 2006. The Division Bench encapsuled the controversy in a short compass, that is, whether a single post of Class III available in an intermediate college governed by the Act could be
filled up only by promotion or by direct recruitment. The Division Bench referred to an earlier Division Bench judgment in ***Jai Bhagwan Singh v. District Inspector of Schools, Gautambudh Nagar & Ors. 2006 (3)*** **UPLBEC 2391** and came to hold that a single post of Class III available in intermediate college governed by the 1921 Act can be filled up by promotion and the earlier decision in ***Palak Dhari Yadav case (1999 (3)*** **UPLBEC 2315*)*** was not legally sound. On the base of the said reasoning, the Division Bench annulled the decision

rendered by the learned Single Judge. The said judgment and order passed by the Division Bench is under assail in this appeal by special leave.

We have heard Mr. Parmanand Gaur, learned counsel for the appellant and Mr. Hariom Yaduvanshi, Mr. Gagan Gupta and Mr. Vivek Vishnoi, learned counsel for the respondents. It is imperative to note at the outset that there is no dispute with regard to the factual score. The institution is covered by the 1921 Act. A set of Regulations has been framed under the said Act providing for promotion from Class IV to Class III. Regulation 2 which is relevant for the present purpose is reproduced below:-

"2. (1) For the purpose of appointments of clerks and Fourth class employees the minimum educational qualification would be the same as has been fixed from time to time for the equivalent employees of Government Higher Secondary Schools.

(2) Fifty percent of the total number of sanctioned posts of head clerk and clerks shall be filled among the serving clerks and employees through promotion. If employee possesses prescribed eligibility and he has served continuously for 5 years on his substantive post and his service record is good, then promotion shall be made on the basis of seniority, subject to rejection of the unfit. If any employee is aggrieved by any decision or order of the management committee in this respect then he can make representation against it to the Inspector within two weeks from the date of such decision or order. Inspector on such representation can make such orders as he thinks fit. Decision of the Inspector would be final and promptly executed by the management.

Note:- In calculating fifty percent of posts parts less than half would be left and half or more that half post would be deemed as one."

On a plain reading of the aforesaid Regulation, it is quite luminous that the "Note" appended to it makes it abundantly clear that there is a singular post. The Regulation lays down the postulates for filling up of the post. The crux of the matter is whether in the instant case a cadre that constitutes of a single post has been reserved. In ***Post Graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association and others***,(1998) 4 SCC 1 the Constitution Bench was considering the correctness of the decision rendered in ***Union of India v. Madhav ,(1997)2 SCC 332*** Apart from many a contention, it was also submitted before this Court that for implementing 50-point roster,

isolated and separate posts in different specialities cannot be clubbed together and reservation of posts by applying the roster can be made only where there are more than one post and reservation of only one post cannot be made because such reservation would amount to 100% reservation which would violate Article 16(1) and Article 16(4) of the Constitution. The Constitution Bench after discussing the law at length has held:-

"**34.** In a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such a single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent per cent reservation for the backward classes is not permissible within the constitutional framework. The decisions of this Court to this effect over the decades have been consistent.

35. Hence, until there is plurality of posts in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with the device of rotation of roster in a single post cadre is bound to create 100% reservation of such post whenever such reservation is to be implemented. The device of rotation of roster in respect of single post cadre will only mean that on some occasions there will be complete reservation and the appointment to such post is kept out of bounds to the members of a large segment of the community who do not belong to any reserved class, but on some other occasions the post will be available for open competition when in fact on all such occasions, a single post cadre should have been filled only by open competition amongst all segments of the society."

From the aforesaid enunciation of law, it is eminently explicit that reservation for a single post in a cadre will keep the general members of the public in total exclusion and the question of reservation will arise when there is plurality of post in the cadre. Needless to say that the Constitution Bench has been stating about the reservation with regard to the Scheduled Castes, Scheduled Tribes and Other Backward Classes. It does not lay down that if a post is meant to be filled up by promotion from amongst the employees working in the feeder cadre, it would tantamount to reservation. Reservation is only restricted to the Scheduled Castes, Scheduled Tribes and Other Backward Classes. It does not relate to the persons serving in the feeder cadre.

In ***State of Punjab and others v. R.N. Bhatnagar and Another*, (1999)2 SCC 330** , it has been laid down that when posts in a cadre are to be filled in from two sources, whether the candidate comes from the source of departmental promotees or by way of direct recruitment, once both of them enter a common cadre, their birthmarks disappear and they get completely integrated in the common cadre and it is in consonance with the thrust of Article 16(1) of the Constitution of India. The Court further observed that no question of exception to the said general thrust of the constitutional provision would survive as Article 16(4) would be out of the picture in such a case.

The purpose of referring to the aforesaid decisions is that the concept of reservation finds place in Article 16(4) and does not apply to the concept of quota from the feeder cadre. In the instant case, the Regulation provides for 50% of the total number of posts to be promoted through promotion. The "Note" appended is an inseparable part of the Regulation and it lays down that in calculation of the 50% of the post less than half would be left and half or more than half post would be deemed as one. Therefore, if a singular post in the clerical cadre is there, it would be filled up by promotion from amongst the eligible candidates from the feeder cadre. Adopting such a method or taking such route does not remotely touch the idea of reservation. Hence, the submission put forth by the learned counsel for the appellant sans substance.

In view of the aforesaid premises, we do not perceive any merit in this appeal and accordingly, the same stands dismissed without any order as to costs.

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