O.J.A. MONTHLY REVIEW OF CASES ON CRIMINAL , CIVIL & OTHER LAWS,2013 (OCTOBER)

CODE OF CRIMINAL PROCEDURE

1. Secs.203, 482

Narayan Chandra Muduli V. Mahendra Kumar Mishra & another. 2013 (II) OLR -669

DR.B.R.SARANGI, J.

Issue

Complaint petition- Dismissal—Order challenged—If the Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of the provisions of Sec.200 and 202 Cr.P.C., the order of the Magistrate may be vitiated but then the relif an aggrieved accused can obtain at that stage is not invoking Sec.203,Cr.P.C. because the Cr.P.C. does not contemplates a review of an order—In the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Sec.482,Cr.P.C.—In the present case held, Magistrate has committed grave error apparent on the face on the record by dismissing the complaint petition—Impugned order suffers from gross material irregularity—Directions issued.

In view of the law laid down by the apex Court, it is apparently clear that the learned S.D.J.M., Kendrapara has committed grave error apparent on the face on the record by dismissing the complaint petition. More so, when application was filed to examine two witnesses on behalf of petitioners to provide materials, non-consideration of such application and proceeding with the matter afresh, amounts to arbitrary and unreasonable exercise of power by the learned Magistrate. Rather after permitting the petitioner to examine two witnesses as per his application and considering the materials on record, he should have proceeded with the matter instead of dismissing the complaint petition at the threshold. Thus, I am of the opinion that the impugned order dated 10.09.2004 passed in I.C.C. NO.80 of 1998 under Annexure-1 suffers from gross material irregularity. Accordingly, the same is quashed. The learned Magistrate is directed to examine the two witnesses, namely, Arakhita Jena and Gunanidhi Jena for recording their evidence during enquiry and reconsider the matter afresh on the basis of the materials, which will be in conformity with the order dated 26.08.2003 passed in Criminal Misc. Case No.2909 of 1999.

With the aforesaid observation and direction, the CRLMC is allowed.

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2. Section -378

State of Punjab v. Madan Mohan Lal Verma. (2013) 56 OCR (SC)-425

B.S.CHAUHAN AND S.A.BOBDE, JJ.

Issue

Appeal against acquittal- Principles reiterated.

Facts and circumstances giving rise to this appeal are that:

The Complainant-Naresh Kumar Kapoor was contacted by the respondent-the Income Tax Inspector who threatened him with reopening the assessment order, particularly in respect of the house owned and possessed by his wife Smt. Neeru Kapoor bearing No.456, Model Town, Jalandhar and for purchasing the car which had not been disclosed by the complainant in his income tax return. The complainant and the respondent-accused had been in touch with each other and the respondent demanded a sum of Rs.25, 000/- as illegal gratification for not reopening the said assessment.

Raj Kumar Sharma (PW.3) went to the house of respondent-accused i.e., 638, Mota Singh Nagar, Jalandhar to negotiate for not reopening the assessment. The respondent-accused asked for a sum of Rs.25, 000/- as illegal gratification and the complainant expressed his inability. On this, respondent agreed to accept a sum of Rs.10, 000/- as part payment of the illegal gratification to be paid on the same day, and a further sum of Rs.15, 000/- on the next day. The complainant made a false promise of paying a sum of Rs.10, 000/- on the same day i.e., 1.6.1994. The complainant approached Harish Kumar (PW.12), DSP (Vigilance), Jalandhar and they prepared to lay a trap.

The Complainant arranged the money i.e. 20 notes in the denomination of Rs.500/- each. Phenolphthalein powder was applied on the notes and the same were given to the complainant. The number of those notes were noted separately on a piece of paper. The complainant and the shadow witness Raj Kumar Sharma (P.W.3) washed their hands and approached the respondent-accused at his house. The complainant gave the money to the respondent-accused. He put it on the table and covered it with a newspaper. The shadow witness Raj Kumar (PW.3) gave the appointed signal to Harish Kumar Sharma (PW.12) DCP, Gurlebleen Singh (PW.2), the Executive Magistrate and other members of the raiding party and the money was recovered. Hands of the respondent-accused were washed is the sodium carbonate solution, which turned pink. In view thereof, the criminal prosecution started.

After investigation, a charge sheet was filed against the respondent- accused. The prosecution examined 12 witnesses in support of its case and the defence also examined 9 witnesses. On conclusion of the trial, the respondent was convicted and sentenced as referred to hereinabove.

Aggrieved, the respondent preferred the crimi9nal appeal before the High Court which has been allowed vide impugned judgment and order dated 3.3.2009.

Hence, this appeal.

Undoubtedly, the reasoning given by the High Court does not deserve to be accepted for the reason that even if the complainant had a criminal background, he can still be forced by the officer of the Income Tax Department to pay illegal gratification for not reopening the assessment of a particular year. The subsequent cases against the respondent-accused for having disproportionate assets cannot be correlated with the incident of trap case. The incident in which the respondent had been arrested for taking illegal gratification has to be examined on its own merit. The courts below have not taken note of the statement made by Gurlebleen Singh (PW.2) who is an Executive Magistrate and must be treated to be the most reliable and independent person and admittedly, he had been associated with the trap party. The case of the complainant was that on 1.6.1994 he went to the house of the respondent-accused and after bargaining, agreed to pay a sum of Rs.10,000/- on the same day as part payment of the illegal gratification of Rs.25,000/-. He immediately went along with Raj Kumar Sharma (PW.3), the shadows witness to Harish Kumar (PW.12), DCP and the plan for trap was prepared and the trap was laid. Gurlebleen Singh (PW.2), the Executive Magistrate has categorically stated that he had been directed by the Deputy Commissioner in writing on 31.5.1994 to join the trap party on 1.6.994. Therefore, it is evident that in case the complainant himself had gone to Harish Kumar (PW.12) for having a trap on 1.6.1994, the question of receiving a direction from the Deputy Commissioner on 31.5.1994 could not arise. Gurlebleen Singh (PW.2) is a witness only for recovery and not of accepting the bribe money. This statement alone made it evident that the prosecution has not disclosed the genesis of the case correctly.

In view of the above, we do not find any cogent reason to interfere with the conclusion reached by the High Court. The appeal is accordingly dismissed.

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3. Sec.482

Bibhudhendu Prasad Mohanty V. State of Orissa (Vigilance).(2013)56 OCR ---532

M. M. DAS, J.

Issue

Entire material produced by the prosecution do not make out a case against the accused- Held, continuance of criminal proceeding would amount to abuse of process of the Court will be a travesty of justice. Cognizance taken of the offences under Section 13(2) read with Section 13(1)(d) 17 of P.C. Act—Recovery of currency notes of Rs.3000/- from the possession of the petitioner---Petitioner stated before the T.L.O to have accepted the money from the complainant towards repayments of the loan amount---Absence of evidence regarding demand of bribe—Held, mere recovery cannot prove the charge- No prospect of the case ending in conviction---Held, order of cognizance stands quashed.

The short facts involved in both the cases are that one Debadutta Mishra, who happens to be a reporter of the daily Oriya newspaper, "The Dharitri", lodged a report before the Superintendent of Police, Vigilance, Cuttack regarding a land dispute, inter alia, alleging that he lodged an F.I.R. about the said land dispute before the present petitioner, who was discharging the duty as I.I.C., Jajpur Town Police Station and the said F.I.R. was entered as a Station Diary by the petitioner, but he did not take any action thereon. It was alleged in the said report lodged by Mr. Debadutta Mishra that when he again and again requested the petitioner to take action against the culprits, the petitioner demanded Rs. 3,000/- for taking action. On such information being lodged, the Vigilance police on maintaining proper procedure along with the official witnesses proceeded to Jajpur Police Station, where it was found that the petitioner was in the Government quarters. The complainant and the over hearing witnesses went to the petitioner's quarter and they were asked by the petitioner to sit on the Sofa which was on his verandah and instructed the complainant to follow him to his bed room, where he demanded and accepted the gratification from the complainant. After receipt of the money, he examined the notes and kept the tainted money in his right side Pant pocket. Then the money was immediately recovered from his Pant pocket and his hand was washed with Sodium Carbonate solution when the colour of the solution turned light pink.

The petitioner's case is that the allegation of demand of illegal gratification by him is not corroborated by any witness including the over hearing witness. The report of the Vigilance Department itself categorically indicates that the over hearing witness has not heard regarding the demand, but has seen the acceptance, which is evident from the detection report available in the case diary. The further case of the petitioner is that the dispute is purely civil in nature between the informant's father-in-law and the land owner, where the petitioner had nothing to do

in the criminal case initiated by the informant by lodging information before him. Admittedly, the over hearing witness has not seen the occurrence, but has only stated to have seen the acceptance of the money which, according to the petitioner, is not sufficient to prove the case, once the demand is not proved.

It was contended on behalf of the petitioner that even if there is acceptance of money in absence of any demand, it cannot be accepted to be a case of bribery.

In the above backdrop, on consideration of the facts involved in the present case, this Court is firmly certain that there is no prospect of the case ending in conviction of the petitioner and allowing the criminal case to be continued would amount to wastage of valuable time of the court for holding a fruitless trial for the purpose of formality of completion of the procedure to pronounce the conclusion on a future date. It is an admitted position that most of the Vigilance Courts in the State are under heavy pressure of work and in such situation, if a case of the present nature is allowed to be continued, it would amount to adding fuel to the fire, ultimately serving no purpose. This Court, therefore, concludes that the learned court below should not have taken cognizance of the offences as done in his order dated 23.12.2008 against the accused-petitioner and the case should not be permitted to be continued as otherwise the same would amount to abuse of the process of the Court as well as a travesty of justice.

In the result, the order dated 23.12.2008 passed by the learned Special Judge, Vigilance, Cuttack taking cognizance of the offences, as stated above, against the accused-petitioner stands quashed and, consequently, the proceedings in T. R. Case No. 27 of 2008 pending before the said court also stands quashed. Both the Criminal Misc. Cases are allowed.

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4. Sec.482

Akshaya Kumar Swain V. Dolagobinda Swain and others. (2013)56 OCR --552

DR.B.R.SARANGI, J.

Issue

Complainant filed petition seeking incorporation of age of the accused persons in the complaint petition---Prayer of the complainant was rejected on the ground of non availability of specific provision in the Cr.P.C. to that effect—Held,by incorporating the age of the accused persons there would not be any change as to nature and character of the complainant petition and no prejudice to be caused to the accused persons—Hon'ble Court allowed the prayer and directed the Magistrate to incorporate the age of the accused persons.

The petitioner's case in nut-shell is that, he being the complainant, filed I.C.C. Case No.15 of 1999 in the court of learned S.D.J.M., Kendrapara against the opposite parties alleging commission of offences under Sections 323/294/147/379/506 read with Section 34 I.P.C.,basing upon which the learned S.D.J.M., Kendrapara took cognizance of the offence after examining the complainant on oath. After the cognizance of the offence was taken, the learned S.D.J.M. transferred the case to the court of learned J.M.F.C., Kendrapara. While the case was pending before the learned J.M.F.C., Kendrapara, a petition under Annexure-2 was filed seeking for incorporation of ages of the accused persons in the complaint petition, which is necessary for adjudication. The accused-opposite parties after being released on bail, objected to the said petition filed by the complainant. By order dated 27.05.2004 under Annexure-3, learned J.M.F.C. rejected the prayer of the complainant stating that there is no specific provision in the Code of Criminal Procedure for amendment of a complaint petition and therefore, the petition filed on behalf of the complainant to add the ages of the accused persons in the complaint petition is devoid of merit. Thereafter the complainant filed Criminal Revision No.16 of 2004 before the learned Additional Sessions Judge, Kendrapara, who by order dated 26.7.2004 rejected the revision petition with the observation that the order of the Magistrate did not suffer from any infirmity and by rejection of such petition, no right of the party was decided nor the case was disposed of finally. He further observed that as the order was interlocutory in nature, the revision petition was not maintainable.

In view of the aforesaid facts and circumstances in my considered opinion, the orders passed by the learned J.M.F.C., Kendrapara in Annexure-3 and the learned Additional District & Sessions Judge, Kendrapara in Annexure-4 are liable to be set aside. Accordingly, the same are set aside with a direction to the learned J.M.F.C. to incorporate the ages of the accused persons in the complaint petition in order to secure the ends of justice. The complaint case being an age old case of the year 19999, learned J.M.F.C. is directed to complete the proceeding by the end of November, 2013. With the aforesaid observation and direction, the CRLMC is allowed accordingly.

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EVIDENCE ACT

5. Sec.3

Suresh Jalli @ Gedu Suria and another V. State of Orissa. (2013)56 OCR ---543

S.PANDA &DR.B.R.SARANGI, JJ.

Issue

Circumstantial Evidence

The prosecution case in brief is that a double murder had taken place within the jurisdiction of Jankia Police Station on the preceding night of 3rd November, 1993. Balabhadra Pradhan (P.W.15), an A.S.I. of Police in-charge of Nirakarpur Out-post left his out-post at about 8.00 A.M. for Jankia Police Station for some routine work. No sooner did he reach Khajuriapada, he saw a mob to have congregated on the canal embankment, where he took a pause and found that two unidentified dead bodies of age group of 25-30 years were lying in the paddy fields of Sudam Parida and Mumtaz Saha with multiple injuries on their body. Guarding the said dead bodies, he lodged a report (Ext.20) at the spot and sent the same to O.I.C., Jankia Police Station. By the time the written report (Ext.20) reached Jankia Police Station, Girija Prasad Das (P.W.16), the then Circle Inspector of Police, Khurda had already arrived at Jankia Police Station. So, he registered P.S.Case No. 239 dated 3.11.1993 under Section 302, IPC on the basis of which, P.W.15 treating the same as F.I.R., took up investigation of the case by himself from that moment. Arriving at the spot, barely 4 K.Ms. from the police station, within an hour, he conducted inquest over the unidentified dead bodies in presence of witnesses (P.Ws.1 and 2) and prepared two separate reports marked as Exts.11 and 12. At about 1 P.M. on the same day, he dispatched both the dead bodies to G.B.S. Hospital, Khurda for post-mortem under two separate dead body challans marked as Exts.13 and 14.

Thereafter, through the Revenue Inspector of Nirakarpur, he got a spot map (Exts.6) prepared on the same day making a requisition therefor. At about 3 P.M. on the same day, he made seizure of two nos. of leather half shoes (black in colour) and one plastic chappal of the left leg (brown in colour). He also seized blood stained earth and sample earth from the spot under a seizure list marked Ext.4 in presence of P.Ws.3 & 7 and proceeded with the investigation. On 4.11.1993 at about 3 P.M. he

seized one empty bottle of XXX rum smelling liquor, one plastic jerricane, two steel glass tumblers smelling liquor from the house under the possession of the accused at Nirakarpur given on rent by Parbasia Bhoi and prepared seizure list marked Ext.2 in the presence of witnesses. Thereafter, he apprehended both the appellants and arrested them on 8.11.1993 at 10 A.M. and submitted charge-sheet against both the appellants.

From the circumstances stated and discussed, it is clear that the deceased and accused were last seen together on 2.11.1993 as per the version of P.Ws.9 and 11 and the same has been corroborated by the confessional statement made by the accused before P.W.13 and recovery of 'bhujali' as well as 'iron rod', M.Os. I & II respectively, on the basis of leading to discovery made by both the accused, establish the factum of committing the offence by the accused persons. To fortify the stand, reliance has also been placed on the evidence of the doctor, P.W.14, who had categorically stated relying on the post-mortem report that the cause of death was due to hemorrhage and shock and the injuries were ante-mortem in nature and the time since death was within 48 hours of examination vide Ext.18 so far as dead body no.1 is concerned and the examination was conducted on 3.11.1993. So far as the examination on 2nd dead body is concerned, the doctor (P.W.14) opined that the cause of death was due to hemorrhage and shock and that all the injuries were antemortem in nature and were sufficient to cause the death of the deceased in ordinary course of event and the time since death is 48 hours vide Ext.19. Construing the time of post mortem in respect of two dead bodies at 3 P.M. and 4 P.M. of 3.11.1993, 48 hours fell within the last seen i.e. at 2 P.M. of 2.11.1993. With the above circumstances relied upon by the trial court for convicting the appellants, we find that the principles laid down by the apex court in various decisions have been satisfied and the circumstances narrated above as held by the trial court were all established without any doubt and are conclusive in nature. They were not explainable with any other possibility. The circumstances are consistent only with the hypothesis of the guilt of the appellants and nothing else. The said circumstance excludes all other hypothesis and shows

that in all humor probability the killing of the deceased must have been done only by the appellants. The motive along with the chain of circumstances, which stood proved against the appellants only go to show that the appellants alone were responsible for the killing of the deceased. The appellants miserably failed to show any missing link in the chain of circumstances demonstrated by the prosecution for the offence alleged against them. We are in full agreement with the conclusions arrived at by the trial court and we find no good ground to interfere with the same since the appellants did not dispute the identity of the dead bodies at any point of time that they did not state anything in course of recording their statement under Section 313, Cr.P.C. questioning about the last seen together and there was no missing link in the chain of circumstances demonstrated before the court below.

Having regard to our above conclusions, we do not find any merit in this appeal. Accordingly, we confirm the conviction of the appellants under Section 302/34, IPC and the sentence imposed there under. The appeal fails and the same is dismissed. The bail bonds of the accused-appellants stand cancelled. They shall be apprehended to serve the remaining period of the sentence.

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6. Section 32, 63 & 65

Kalia v. State of Madhya Pradesh. (2013) 56 OCR (SC) ---490

DR.B.S.CHAUHAN AND S.A. BOBDE ,JJ.

Issue

Dying declaration recorded by Doctor, duly corroborated---Original dying declaration could not be traced—Carbon copy exhibited and taken on record---Issue of putting a thumb impression on the dying declaration by 100% burnt person.

Fact:- Deceased, daughter-in-law of appellant, was admitted in a hospital in a burnt condition—Her dying declaration was recorded by the Doctor and she died of burn injuries on the same day---Prosecution case that on her dying declaration, deceased had allegedly stated that while she was lying on a cot, her mother-n-law poured kerosene oil on her and set her on fire and ran away- She had also stated that she was subjected to harassment by her mother-in-law (appellant),her father-in-law and her husband—Trial court convicted appellant under Section 302, IPC while her father-in-law and husband were convicted under Section 498-A IPC---On appeal, High Court dismissed appeal of appellant but acquitted husband and father-in-law of deceased—Trial Court and the High Court relied mainly upon the dying

declaration made by deceased—Deceased was admitted in the hospital with 100% burns—Doctor (PW.18) who recorded her dying declaration deposed that deceased was in a fit mental condition when he recorded her dying declaration and that the deceased appended her thumb impression on the dying declaration----His statement was fully corroborated by the evidence of the staff nurse---Original dying declaration could not be traced and its carboin copy was exhibited and relied upon--- Whether conviction of appellant as recorded by Courts below was sustainable---Held, Yes.

Held, Section 65(c) of the Act, 1872 provides that secondary evidence can be adduced relating to a document when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason, not arising from his own default, or neglect, produce it in reasonable time. The Court is obliged to examine the probative value of documents produced in Court or their contents and decide the question of admissibility of a document in secondary evidence. However, the secondary evidence of an ordinary document is admissible only and only when the party desirous of admitting it has proved before the Court that it was not in his possession or control of it and further, that he has done what could be done to procure the production of it. Thus, the party has to account for the non-production in one of the ways indicated in the section. The party further has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. When the party gives in evidence a certified copy/secondary evidence without proving the circumstances entitling him to give secondary evidence, the opposite party must raise an objection at the time of admission. In case, an objection is not raised at that point of time, it is precluded from being raised at a belated stage. Further, mere admission of a document in evidence does not amount to its proof. Nor, mere marking of exhibit on a document does not dispense with its proof, which is otherwise required to be done in accordance with law.

Dr.Nirmal Kumar Gupta (PW.18), deposed that 100% burnt patient can also be in a fit mental and physical condition to give statement. Dr. V.K. Deewan (PW.14), who performed the postmortem of deceased Guddi, deposed that she was completely burnt and the burn injuries were anti-mortem. She had died due to Asphyxia, due to burn injuries, her death was homicidal.

In view thereof, both the courts below were of the considered opinion that the appellant was responsible for causing the death of Guddi, deceased.

The defence taken by the appellant that she had gone out of her house to provide water to the buffalo has been disbelieved by the Court. As the incident

occurred in the house of the appellant, and she was present therein at the relevant time, she could have furnished the explanation as to how and under what circumstances Guddi died. The matter was within her special knowledge. In view of the above, the appeal lacks merit and is accordingly dismissed.

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INDIAN PENAL CODE

7. Sec.354

State Of M.P. V. Najab Khan & Ors. AIR 2013 SC 2997

P. SATHASIVAM & M.Y. EQBAL, JJ.

Issue

Penology—Sentencing—Considerations that way in determining proportionate sentence—Not only rights of victim but also that of society at large have to be kept in view.

Brief facts:

(a) On 11.08.2001, in the morning, when Mullo Bai, sister of Fida Hussain-the complainant, was passing through the field of Mohabbatdin - co- accused, at that time, Mohabbatdin abused her and told her not to pass through his field. On this, Mullo Bai assured him that she will not pass through his field in future. On the same day, in the evening, at about 7.00 p.m., when Fida Hussain, along with Ahmed Hussain, Gulabuddin and Guddu, was going to the shop of one Nawab, on their way near the hand pump, Najab Khan and Mohabbatdin having spade in their hands and Gani Khan holding a danda (stick) in his hand along with Munnawar Ali came at the spot and surrounded Fida Hussain. Fida Hussain tried to escape but could not succeed and Mohabbatdin attacked him with the spade due to which he sustained injury below his left shoulder and left arm. In order to save him, the other persons, viz., Guddu and Gulabuddin, who were accompanying Fida Hussain, intervened. After beating Fida Hussain, the accused persons fled away from the spot. Thereafter, Fida Hussain went to the Radhogarh Police Station and an FIR was lodged which was registered as Crime No. 248 of 2001.

(b) During the course of investigation, on 22.08.2011, Najab Khan was arrested and Gani Khan and Munnawar Ali were arrested on 10.09.2001. The police also got recovered the weapons (spades and stick) used in the commission of the aforesaid act.

(c) After the investigation, a charge-sheet was filed against the respondents herein under Sections 307, 341, 326 read with 34 IPC and the case was committed to the

Court of the First Additional Sessions Judge-I, Guna (MP) which was numbered as Sessions Trial No. 311 of 2001. Further, besides the accused persons/respondents herein, Mohabbatdin was also charged under Sections 341 and 307 of IPC but vide order dated 11.10.2002, passed by the High Court in Revision No. 378 of 2002, it was directed to stay the proceedings against him and to continue the trial against rest of the persons i.e., the respondents herein.

(d) During the trial, on a compromise between the accused persons and Fida Hussain-the complainant, the accused persons were acquitted under Section 341 of IPC.

(e) By order dated 08.02.2006, the Additional Sessions Judge, convicted the respondents herein for the offence punishable under Section 326 read with Section 34 of IPC and sentenced them to undergo rigorous imprisonment (RI) for three years along with a fine of Rs.500/- each, in default, to further undergo RI for 3 months.

(f) Against the said order, the respondents moved an appeal being Criminal Appeal No. 150 of 2006 before the High Court. The High Court, by impugned judgment dated 13.12.2011, partly allowed the appeal by maintaining the conviction of the respondents herein and reduced their sentence to the period already undergone.

(g) Aggrieved by the said order, the State has filed this appeal by way of special leave.

In view of the above, we reiterate that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The Courts must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment.

Though it is stated that both the parties have amicably settled, in view of the fact that the offence charged under Section 326 is non compoundable and also in the light of serious nature of the injuries and no challenge as to conviction, we are of the

view that the High Court is not justified in reducing the sentence to the period already undergone.

Accordingly, we set aside the order of the High Court and restore the sentence imposed on the respondents herein. Consequently, the appeal filed by the State is allowed and the respondents-accused (A-1 to A-3) are directed to surrender within a period of four weeks from today, failing which, the trial Judge is directed to take appropriate steps for sending them to prison to undergo the remaining period of sentence.

Appeal allowed.

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8. Secs.365 &376

Deepak Gulati V. State of Haryana. 2013 (II) OLR -684

Dr. B.S. CHAUHAN & DIPAK MISRA, JJ.

Issue

Conviction under- Appeal before High Court dismissed—Appeal before Apex Court- there exist in the statements of the witnesses material contradictions, improvements and embellishments.

FIR in the present case has been registered by father of the prosecutrix—Prosecutrix has never raised any grievance before any person at any stage—whether prosecutrix consent had been obtained on the false promise of marriage? Consent may be express or implied, coerced or misguided, obtained willingly or through deceit—Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil of each side—An accused can be convicted for rape only if the Court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives—There must be adequate evidence to show that at the relevant time, i.e. at the initial stage itself, the accused had no intention whatsoever of keeping his promise to marry the victim---Appellant entitled to the benefit of doubt.

There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at any early stage a false promise of marriage by the accused; and whether the consent

involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim—Effect of, stated. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore a rape victim is placed on a higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamount to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks.

Facts and circumstances giving rise to this appeal are that:

A. The appellant and Geeta, prosecutrix, 19 years of age, student of 10+2 in Government Girls Senior Secondary School, Karnal, had known each other for some time. Appellant had been meeting her in front of her school in an attempt to develop intimate relations with her. On 10.5.1995, the appellant induced her to go with him to Kurukshetra, to get married and she agreed. En route Kurukshetra from Karnal, the appellant took her to Karna lake (Karnal), and had sexual intercourse with her against her wishes, behind bushes. Thereafter, the appellant took her to Kurukshetra, stayed with his relatives for 3-4 days and committed rape upon her.

B. The prosecutrix was thrown out after 4 days by the appellant. She then went to one of the hostels in Kurukshetra University, and stayed there for a few days. The warden of the hostel became suspicious and thus, questioned the prosecutrix. The prosecutrix thus narrated the incident to the warden, who informed her father. Meanwhile, the prosecutrix left the hostel and went to a temple, where she once again met the appellant. Here, the appellant convinced her to accompany him to Ambala to get married. When they reached the bus stand, they found her father present there alongwith the police. The appellant was apprehended.

C. Baldev Raj Soni, father of the prosecutrix, had lodged a complaint on 16.5.1995 under Sections 365 and 366 IPC, which was later converted to one under Sections 365 and 376 IPC.

D. The prosecutrix was medically examined on 17.5.1995. Her statement was recorded by the Magistrate under Section 164 of the Code of Criminal Procedure,

1973 (hereinafter referred to as the `Cr.P.C.') on 20.5.1995. After completing the investigation, a chargesheet was filed against the appellant, and in view of the material on record, charges under Sections 365 and 376 IPC were framed against him by the Sessions Court, vide order dated 3.5.1996.

E. The prosecution examined 13 witnesses in support of its case and in view thereof, the Sessions Court convicted the appellant under Sections 365/376 IPC, vide judgment and order dated 13.11.1998 and awarded him the sentence for the said charges as has been referred to hereinabove.

F. Aggrieved, the appellant preferred Criminal Appeal No. 960- SB of 1998 (D & M) in the High Court of Punjab and Haryana at Chandigarh, which stood dismissed by the impugned judgment and order dated 18.11.1998.

To conclude, the prosecutrix had left her home voluntarily, of her own free will to get married to the appellant. She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the appellant. According to the version of events provided by her, the prosecutrix had called the appellant on a number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long time, and when he finally arrived she went with him to the Karna lake where they indulged in sexual intercourse. She did not raise any objection at this stage and made no complaints to any one. Thereafter, she also went to Kurukshetra with the appellant, where she lived with his relatives. Here to, the prosecutrix voluntarily became intimate with the appellant. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the appellant at the Birla Mandir. Thereafter, she even proceeded with the appellant to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married in court at Ambala. However, here they were apprehended by the police. If the prosecutrix was in fact going to Ambala to marry the appellant, as stands fully established from the evidence on record, we fail to understand on what basis the allegation of "false promise of marriage" has been raised by the prosecutrix. We also fail to comprehend the circumstances in which a charge of deceit/rape can be leveled against the appellant, in light of the afore-mentioned fact situation. In view of the above, we are of the considered opinion that the appellant, who has already served more than 3 years sentence, is entitled to the benefit of doubt. Therefore, the appeal succeeds and is allowed. His conviction and sentences awarded by the courts below are set aside. The appellant is on bail. His bail bonds stand discharged.

Appeal Allowed.

9. Sec.376 (2)(f) & 302

Sujit Biswas V.State of Assam. 2013 (II) OLR -744

Dr. B.S. CHAUHAN &DIPAK MISRA, JJ.

Issue

Conviction under and confirmed by High Court—Appeal before apex Court-Circumstance not put to the appellant while he was being examined under Sec.313 Cr.P.C.by the trial Court, cannot be taken into consideration—It cannot be held that the circumstances clearly point towards the guilt of the appellant, and in light of such a fact situation, the burden lies not only on the accused to prove his innocence but also upon the prosecution, to prove its case beyond all reasonable doubt—In a case of circumstantial evidence the stated burden of proof on the prosecution is much greater—impugned judgments set aside.

Facts and circumstances giving rise to this appeal are that:

A. On 17.10.2007 at about 7.00 P.M., Sultana Begum Khatoon (PW.8), aged 12 years, was enjoying the celebrations of the festival of Durga Pooja along with her sister Sima Khatoon, aged 3 years, at the Nepali Mandir, Guwahati. The appellant was alleged to have been standing behind them at such time. After a short while, Sultana Begum Khatoon (PW.8) noticed that her sister Sima Khatoon was missing and she also happened to notice that the appellant had disappeared as well. Sultana Begum Khatoon (PW.8) thus began to look for her sister, and when she could not find her in the nearby areas, she went back to her house and informed her brother Gulzar Ali (PW.3) and her parents etc. of the said incident.

B. Apin Dulal (PW.1) and Gulzar Ali (PW.3) therefore began to search for Sima Khatoon, and while doing so, they came across the appellant and asked him whether he had seen Sima Khatoon. The appellant allegedly demanded a sum of Rs.20/- to pay for his evening food, in lieu of showing them the place where Sima Khatoon could be found. Apin Dulal (PW.1) agreed to pay him the said amount and thus, the appellant pointed to a place by the side of a municipal canal. Apin Dulal (PW.1) and Gulzar Ali (PW.3) thus began to approach the said place, and at such time, the appellant ran away and boarded a bus. Apin Dulal (PW.1) chased him and managed to catch hold of him, forcing him to get off the bus. Apin Dulal (PW.1) and Gulzar Ali (PW.3) thereafter succeeded in locating the girl, who they found gasping, wrapped in a jute-sack (gunny bag). The mouth of the bag had been closed. Sima Khatoon was alive, but in a critical condition. She was then taken by her brother Gulzar Ali (PW.3) to the house. The appellant was also taken there. Sima Khatoon was taken to a Nursing Home, and then to the Guwahati Medical College where she breathed her last at about 1.30 A.M. i.e., in the intervening night of 17/18.10.2007.

C. Father of the deceased Sima Khatoon approached the Paltan Bazar police station, where a report was endorsed only in the General Diary. After the death of Sima Khatoon, her father also lodged an FIR at the said police station on 18.10.2007. The appellant was taken to the police station by the relatives of Sima Khatoon, and he had thus been arrested on 17.10.2007 itself.
D. The post-mortem examination of the dead body of Sima Khatoon was conducted by Dr. Pradeep Thakuria, who found various injuries on her body, including an injury to her vagina. However, the doctor has stated that the vaginal smears taken had tested negative for spermatozoa.

E. The blood stained jute-sack in which the Sima Khatoon had been found, the blood stained underwear of the appellant, as well as the apparel i.e., frock of Sima Khatoon were taken into custody. It was noted that she was not wearing any undergarment at the said time. All the seized material objects were sent to the Forensic Science Laboratory, and the report received thereafter, revealed that the blood group of the blood found on the underwear of the appellant, was the same as the blood group of the victim, Sima Khatoon.

F. After the conclusion of the investigation, a charge sheet was filed against the appellant under Sections 376(2) (f) and 302 IPC. As the appellant denied all charges, criminal trial commenced.
Criminal Trial

Suspicion, however grave it may be, cannot take the place of proof—Court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof—Court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.

Suspicion, however grave it may be, cannot take the place of Proof, and there is a large difference between something that `may be' proved, and something that `will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between `may be' and `must be' is quite large, and divides vague conjectures from sure conclusions. The large distance between `may be' true and `must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance

between `may be' true and `must be' true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record.

Criminal Trial—Whether the abscondance of an accused can be taken as a circumstance against him?- The mere abscondance of an accused do not lead to a firm conclusion of his guilty mind—An innocent man may also abscond in order to evade arrest as in light of such a situation, such an action may be part of the natural conduct of the accused—Abscondance is in fact relevant evidence, but its evidentiary value depends upon the surrounding circumstances, and hence, the same must only be taken as a minor item in evidence for sustaining conviction.

Section-313- Criminal trial—Purpose of examining the accused person under the section is to meet the requirement of the principles of natural justice---In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete- No matter how weak the evidence of the prosecution may be, it is the duty of the Court to examine the accused and to seek his explanation as regards the incriminating material that has surfaced against him--- The circumstances which are not put to the accused in his examination under Sec.313 Cr.P.C. cannot be used against him and must be excluded from consideration.

The present case is required to be examined in light of the aforesaid settled legal propositions. The instant is one of circumstantial evidence, and only two circumstances have appeared against the appellant, namely,
I. That he had been able to point out the place where Sima Khatoon was lying, after his demand for Rs.20/- had been accepted; and
II. That subsequently, he had left the said place and boarded a bus immediately. The aforesaid circumstances in isolation, point out conclusively, that the appellant has in fact committed the said offence. Furthermore, the most material piece of evidence which could have been used against the appellant was that the blood stains found on his underwear matched the blood group of Sima Khatoon. However, the said circumstance was not put to the appellant while he was being examined under Section 313 Cr.P.C. by the trial court, and in view thereof, the same cannot be taken into consideration. Hence, even by a stretch of the imagination, it cannot be held that the aforementioned circumstances clearly point towards the guilt of the appellant, and in light of such a fact situation, the burden lies not only on the

accused to prove his innocence, but also upon the prosecution, to prove its case beyond all reasonable doubt. In a case of circumstantial evidence, the aforementioned burden of proof on the prosecution is much greater. In view of the above, the appeal succeeds and is allowed. The judgments and orders passed by the courts below impugned before us are set aside. The appellant has been in jail for the last six years, he must be released forthwith, unless wanted in some other case. Before parting with the case, we feel that it is our duty to appreciate the services rendered by Shri Ratnakar Dash, learned senior counsel, who acted as amicus curiae.

Appeal Allowed

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10. Sec.354

State Of M.P. V. Najab Khan & Ors. AIR 2013 SC 2997

P. SATHASIVAM & M.Y. EQBAL, JJ.

Issue

Penology—Sentencing—Considerations that way in determining proportionate sentence—Not only rights of victim but also that of society at large have to be kept in view.

Brief facts:

(a) On 11.08.2001, in the morning, when Mullo Bai, sister of Fida Hussain-the complainant, was passing through the field of Mohabbatdin - co- accused, at that time, Mohabbatdin abused her and told her not to pass through his field. On this, Mullo Bai assured him that she will not pass through his field in future. On the same day, in the evening, at about 7.00 p.m., when Fida Hussain, along with Ahmed Hussain, Gulabuddin and Guddu, was going to the shop of one Nawab, on their way near the hand pump, Najab Khan and Mohabbatdin having spade in their hands and Gani Khan holding a danda (stick) in his hand along with Munnawar Ali came at the spot and surrounded Fida Hussain. Fida Hussain tried to escape but could not succeed and Mohabbatdin attacked him with the spade due to which he sustained injury below his left shoulder and left arm. In order to save him, the other persons, viz., Guddu and Gulabuddin, who were accompanying Fida Hussain, intervened. After beating Fida Hussain, the accused persons fled away from the spot. Thereafter, Fida Hussain went to the Radhogarh Police Station and an FIR was lodged which was registered as Crime No. 248 of 2001.

(b) During the course of investigation, on 22.08.2011, Najab Khan was arrested and Gani Khan and Munnawar Ali were arrested on 10.09.2001. The police also got

recovered the weapons (spades and stick) used in the commission of the aforesaid act.

(c) After the investigation, a charge-sheet was filed against the respondents herein under Sections 307, 341, 326 read with 34 IPC and the case was committed to the Court of the First Additional Sessions Judge-I, Guna (MP) which was numbered as Sessions Trial No. 311 of 2001. Further, besides the accused persons/respondents herein, Mohabbatdin was also charged under Sections 341 and 307 of IPC but vide order dated 11.10.2002, passed by the High Court in Revision No. 378 of 2002, it was directed to stay the proceedings against him and to continue the trial against rest of the persons i.e., the respondents herein.

(d) During the trial, on a compromise between the accused persons and Fida Hussain-the complainant, the accused persons were acquitted under Section 341 of IPC.

(e) By order dated 08.02.2006, the Additional Sessions Judge, convicted the respondents herein for the offence punishable under Section 326 read with Section 34 of IPC and sentenced them to undergo rigorous imprisonment (RI) for three years along with a fine of Rs.500/- each, in default, to further undergo RI for 3 months.

(f) Against the said order, the respondents moved an appeal being Criminal Appeal No. 150 of 2006 before the High Court. The High Court, by impugned judgment dated 13.12.2011, partly allowed the appeal by maintaining the conviction of the respondents herein and reduced their sentence to the period already undergone.

(g) Aggrieved by the said order, the State has filed this appeal by way of special leave.

In view of the above, we reiterate that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The

Courts must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment.

Though it is stated that both the parties have amicably settled, in view of the fact that the offence charged under Section 326 is non compoundable and also in the light of serious nature of the injuries and no challenge as to conviction, we are of the view that the High Court is not justified in reducing the sentence to the period already undergone.

Accordingly, we set aside the order of the High Court and restore the sentence imposed on the respondents herein. Consequently, the appeal filed by the State is allowed and the respondents-accused (A-1 to A-3) are directed to surrender within a period of four weeks from today, failing which, the trial Judge is directed to take appropriate steps for sending them to prison to undergo the remaining period of sentence.

Appeal allowed.

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11. Sentence

Shyam Narain V. The State of NCT of Delhi . 2013 (II) OLR -732

DR. B. S. CHAUHAN & DIPAK MISRA ,JJ.

Issue

Sentencing for any offence has a social goal-Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed—Detail stated.

The horrid episode as unfurled by prosecution is that on 29.10.2003, about 6.30 p.m., an eight year old child, daughter of one Binda Saha, was taken by the appellant to Lal Bahadur Shastri Hospital and from there, being referred, she was admitted in GTB Hospital, Shahdara, at 1.30 a.m. on 30.10.2003. The young girl, as recorded in MLC Ext.PW-10/D, had stated that she had fallen down in the toilet about 2.00 p.m. on 29.10.2003 as a consequence of which she had sustained the injuries. The treating doctor, Dr. Anju Yadav, was not convinced with what was being narrated to her. As the factual narration would reflect, the duty constable informed the local police station, i.e., P.S. Kalyanpuri, about the admission of the young girl (hereinafter whom we shall refer to as 'M') and her condition, as recorded in the MLC. The child remained in the hospital for six days and thereafter she was discharged. The anxious mother, unable to digest the story that was told to her by

the daughter, asked her to muster courage and tell the truth to her. The young 'M' gained confidence and, eventually, on 10.11.2003, broke down before her mother and told her how the appellant had brutally raped her and threatened her that if she disclosed the said fact to anyone, her life as well as the lives of her parents would be in danger. The disturbed father proceeded to the police station and informed what was told by his daughter and, accordingly, an FIR was registered. After the criminal law was set in motion, the investigating agency arrested the accused and, eventually, the accused-appellant was sent up for trial. The accused pleaded innocence and claimed to be tried.

Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

The wanton lust, vicious appetite, depravity of senses, mortgage of mind to the inferior endowments of nature, the servility to the loathsome beast of passion and absolutely unchained carnal desire have driven the appellant to commit a crime which can bring in a 'tsunami' of shock in the mind of the collective, send a chill in the spine of the society, destroy the civilized stems of the milieu and comatose the marrows of sensitive polity. It is brutal rape of an eight year old girl. The sensitive learned trial Judge, after recording conviction under Section 376(2) (f) of the Indian Penal Code (for short "IPC"), had taken note of the brutality meted out to the child and sentenced him to undergo rigorous imprisonment for life and to pay a fine of Rs.5000/- failing which to undergo rigorous imprisonment for six months. The Division Bench of the Delhi High Court has equally reflected its anguish over the crime by describing it as "pervaded with brutality" and "trauma which the young child would face all her life" and has concurred with the sentence of imprisonment and the fine.

The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

Keeping in view the aforesaid enunciation of law, the obtaining factual matrix, the brutality reflected in the commission of crime, the response expected from the courts by the society and the rampant uninhibited exposure of the bestial nature of pervert minds, we are required to address whether the rigorous punishment for life imposed on the appellant is excessive or deserves to be modified. The learned counsel for the appellant would submit that the appellant has four children and if the sentence is maintained, not only his life but also the life of his children would be ruined. The other ground that is urged is the background of impecuniousity. In essence, leniency is sought on the base of aforesaid mitigating factors. It is seemly to note that the legislature, while prescribing a minimum sentence for a term which shall not be less than ten years, has also provided that the sentence may be extended upto life. The legislature, in its wisdom, has left it to the discretion of the Court. Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilized society. The age old wise saying “child is a gift of the providence” enters into the realm of absurdity. The young girl, with efflux of time, would grow with traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an

exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court. The mitigating factors put forth by the learned counsel for the appellant are meant to invite mercy but we are disposed to think that the factual matrix cannot allow the rainbow of mercy to magistrate. Our judicial discretion impels us to maintain the sentence of rigorous imprisonment for life and, hence, we sustain the judgment of conviction and the order of sentence passed by the High Court.

Ex consequent, the appeal, being sans merit, stands dismissed.

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CIVIL PROCEDURE CODE.

12. Section 80 (1)&(2) , Order- VII,Rule-11

Govt. Of kerala & ors. V. Sudhir kumar sharma & ors. 2013 (II)CLR (SC)-666

ANIL R. DAVE & DIPAK MISRA ,JJ.

Issue

Suit filed against State seeking compensation for wrongful detention- Notice under Section 80 not issued—Application filed under Section 80(2) seeking leave of the Court to file the suit without serving a notice under Section 80(1), CPC.

The facts giving rise to the present litigation, in a nutshell, are as under: Respondent No. 1 has filed a civil suit, being OS No. 11286 of 1998 in the Court of the Additional City Civil Judge at Mayo Hall in Bangalore. According to respondent no.1, he had been wrongfully detained by the State Authorities and therefore, in the said suit he has prayed that he should be awarded Rs.55, 00,000/- as damages with interest thereon at the rate of 18%. As the suit has been filed against the State, he was supposed to give a notice under Section 80 of the Civil Procedure Code, 1908 (hereinafter referred to as 'the CPC') but he had not given the statutory notice under Section 80 of the CPC in accordance with law. In fact, the notice was issued by him on 24th October, 1998 whereas the suit had been filed on 28th October, 1998. At the time of filing the suit, he had not even received acknowledgment from the authority to whom he had issued the notice. He had not even affixed requisite court fee stamp to the plaint when the plaint was filed in the Court. Respondent No. 1 being conscious of the defects in the suit filed by him, had also filed two interlocutory applications along with the plaint on the date on which the plaint had been filed. An I.A. No. I was filed under the provisions of Section 80(2) of the CPC seeking leave of the court to file the suit without serving a notice under Section 80(1) of the CPC and an I.A. No. II was filed under Section 151 of the CPC praying for extension of time for payment of the court fee.

On 29th October, 1998, the I.A. No. II had been granted by the court, whereby respondent no. 1 was granted time up to 28th November, 1998 for paying the court fee stamp and the same was paid by him on 28th November, 1998 and therefore, summons had been issued on 28th November, 1998. Thereafter, hearing had been adjourned from time to time.

In the said suit, I.A. Nos. III & IV were filed on behalf of the present appellants under Order VII Rule 11 of the CPC praying for rejection of the plaint. The said applications filed by the appellants had been heard by the Trial Court and

ultimately, by an order dated 3rd September, 2001, the said applications praying for rejection of the plaint had been rejected.

Being aggrieved by the Order dated 3rd September, 2001, whereby the applications praying for rejection of the plaint had been rejected, the appellants had filed Civil Revision Petition No. 5189 of 2001, which was also rejected by the High Court by an order dated 20th January, 2005 and the said order has been challenged by the appellants in this appeal.

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13. Order- 3, Rules-1 & 2

Sobhagini Tripathy V. Subhashini Tripathy & Others. 2013 (II) OLR -732

Dr. A.K.Rath, J.

Issue

Appearance by recognized agent or by pleader—Whether power of attorney holder of a party is entitled to appear as a witness on behalf of the said party ? If the power of attorney holder has done some acts pursuant 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—He also cannot depose for the principal in respect of the matter which only the principal can have personal knowledge and in respect of which the principal is entitled to be cross-examined.

To appreciate the rival contentions made at the bar, it is necessary to quote Rules 1 and 2 of Order III of the Code of Civil Procedure (for the sake of brevity "CPC")

Order-III

"1. **Appearance, 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, whereon other agents is expressly authorized to make and do such appearances, applications and acts."

6. An identical question came up for consideration before the Hon'ble Supreme in the case of **Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd. and others**, AIR 2005 SC 439. Interpreting Rules 1 and 2 of Order III, CPC, their Lordships in paragraph 13 of the report 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."

On a conspectus of the said judgment, it is evident that if the power of attorney holder has done some acts pursuant 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. He also cannot depose for the principal in respect of the matter which only the principal can have personal knowledge and in respect of which the principal is entitled to be cross examined.

I have given my anxious consideration to the rival contentions of the parties and carefully perused the impugned order. In view of the authoritative pronouncement of the Hon'ble apex Court in the case of **Janki Vashdeo Bhojwani** (supra), the order dated 4.12.2008 passed by the learned Civil Judge (Sr. Division), Bolangir is not sustainable in the eye of law and the same is liable to be quashed.

Accordingly, the order dated 4.12.2008 passed by the learned Civil Judge (Sr. Division), Bolangir is quashed. The writ petition is allowed. There shall be no order as to costs.

Petition Allowed.

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14. Order -7 ,Rule- 10

Bhanwar Lal & Anr. vs. Rajasthan Board of Muslim Wakf & Ors. 2013 (II)CLR (SC)-676

K.S. RADHAKRISHNAN & A.K. SIKRI, JJ.

Issue

Jurisdiction of Civil Court.

Facts: Suit filed by respondent Board of Muslim Wakf claiming that the subject property was Wakf property---Respondents filed the civil suit in year 1980 for possession of said property as well as for rendition of accounts against the petitioners claiming it to be a wakf property---On coming to know, after filing of the suit, the one trustee had sold the property to the petitioners vide sale deed dated 28.2.1983,respondent amended the plaint by adding the relief of declaration to the effect that the said sale deed was invalid—When the matter was ready for final hearing, on 2.12.2000, respondents filed application under Section 85 of the Act alleging that the suit in question could not be tried by the Civil Court as the jurisdiction of the Civil Court was barred—Prayer was made that the plaint filed by them may be returned to be presented before the Tribunal constituted under the Act, which alone had the jurisdiction to try the suit—Their application was allowed by the Trial Court—Revision petition—High Court dismissed the revision petition and concurred with the view of the District Judge- Whether since the suit was filed much before the Act came into force, it is the Civil Court where the suit was filed will continue to have the jurisdiction over the issue—Held, Yes.

Interestingly, as per the Respondents themselves there is no dispute that the property in question is a wakf property. It is argued by the learned Counsel for the Respondents that even before the trial court, the appellant had accepted that the disputed property is wakf property (Though issues framed suggest otherwise). This is so recorded in para 3 of the orders passed by the trial court while deciding the application of the respondent for returning of the plaint.

The suit is for cancellation of sale deed, rent and for possession as well as rendition of accounts and for removal of trustees. However, pleading in the suit are not filed before us and, therefore, exact nature of relief claimed as well as averments made in the plaint or written statements are not known to us. We are making these remarks for the reason that some of the reliefs claimed in the suit appeared to be falling within the exclusive jurisdiction of the Tribunal whereas for other reliefs civil suit would be competent. Going by the ratio of Ramesh Gobind Ram (supra), suit for possession and rent is to be tried by the civil court. However, suit pertaining to removal of trustees and rendition of accounts would fall within the domain of the Tribunal. In so far as relief of cancellation of sale deed is concerned this is to be tried

by the civil court for the reason that it is not covered by Section 6 or 7 of the Act whereby any jurisdiction is conferred upon the Tribunal to decided such an issue. Moreover, relief of possession, which can be given by the civil court, depends upon the question as to whether the sale deed is valid or not. Thus, the issue of sale deed and possession and inextricably mixed with each other. We have made these observations to clarify the legal position. In so far as present case is concerned, since the suit was filed much before the Act came into force, going by the dicta laid down in Sardar Khan case, it is the civil court where the suit was filed will continue to have the jurisdiction over the issue and civil court would be competent to decide the same.

We, thus, allow the appeal and set aside the impugned judgment of the High Court thereby dismissing the application filed by the respondent under Order 7 Rule 10 of the C.P.C. with the direction to the civil court to decide the suit. No costs.

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15. Order -7 , Rule-10

Dr. Jagmittar Sain Bhagat V. Dir. Health Services, Haryana & Ors. AIR 2013 SC 3060

Dr. B.S. CHAUHAN & S.A. BOBDE ,JJ.

Issue

Jurisdiction—Issue of –Goes to root of matter- Can be raised at any stage—Doctrine of waiver does not apply.

The facts and circumstances giving rise to this appeal are that: A. The appellant joined Health Department, of the respondent State, as Medical Officer on 5.6.1953 and took voluntary retirement on 28.10.1985. During the period of service, he stood transferred to another district but he retained the government accommodation, i.e. Bungalow No. B-8 from 11.5.1980 to 8.7.1981. Appellant claimed that he had not been paid all his retiral benefits, and penal rent for the said period had also been deducted from his dues of retiral benefits without giving any show cause notice to him.

B. Appellant made various representations, however, he was not granted any relief by the State authorities.

C. Aggrieved, the appellant preferred a complaint before the District Consumer Disputes Redressal Forum, Faridabad (hereinafter referred to as the `District Forum') on 5.1.1995 and the said Forum vide order dated 24.3.2000 dismissed the complaint on merits observing that his outstanding dues i.e. pension, gratuity and provident fund etc. had correctly been calculated and paid to the appellant by the State authorities.

D. The appellant approached the appellate authority, i.e., the State Commission. The State Commission dismissed the appeal vide order dated 31.1.2007 observing that though the complaint was not maintainable as the District Forum did not have jurisdiction to entertain the complaint of the appellant as he was not a "consumer" and the dispute between the parties could not be redressed by the said Forum, but in view of the fact that the opposite party (State) neither raised the issue of jurisdiction before the District Forum nor preferred any appeal, order of the District Forum on the jurisdictional issue attained finality. However, there was no merit in the appeal.

E. Aggrieved, the appellant filed Revision Petition No. 1156 of 2007 before the Commission. The said revision stood dismissed vide order dated 1.4.2008 and the review filed by the appellant has also been dismissed vide order dated 26.11.2009.

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E. Aggrieved, the appellant filed Revision Petition No. 1156 of 2007 before the Commission. The said revision stood dismissed vide order dated 1.4.2008 and the review filed by the appellant has also been dismissed vide order dated 26.11.2009.

Indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court, and if the Court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the roots of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a Court or Tribunal becomes irrelevant and unenforceable/ inexecutable once the forum is found to have no jurisdiction. Similarly, if a Court/Tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation. The Court cannot derive jurisdiction apart from the Statute. In such eventuality the doctrine of waiver also does not apply.

In view of the above, it is evident that by no stretch of imagination a government servant can raise any dispute regarding his service conditions or for payment of gratuity or GPF or any of his retiral benefits before any of the Forum under the Act. The government servant does not fall under the definition of a "consumer" as defined under Section 2(1)(d)(ii) of the Act. Such government servant is entitled to claim his retiral benefits strictly in accordance with his service conditions and regulations or statutory rules framed for that purpose. The appropriate forum, for redressal of any his grievance, may be the State Administrative Tribunal, if any, or Civil Court but certainly not a Forum under the Act. In view of the above, we hold that the government servant cannot approach any of the Forum under the Act for any of the retiral benefits.

Mr. Hooda has made a statement that all the dues for which the appellant had been entitled to had already been paid and the penal rent has also been dispensed with and the State is not going to charge any penal rent. If the State has already charged the penal rent, it will be refunded to the appellant within a period of two months. In view thereof, we do not want to pass any further order. In view of the above, the appeal stands disposed of. Before parting with the case, we record our appreciation for the assistance rendered by Shri Prateesh Kapur, learned Amicus Curiae. He is entitled for full fees as per the Rules.

16. Order 9 Rule-13

Badani Parida V. Smt.Mahanga Parida & others. 2013(II) CLR-748

R.B.DASH,J

Issue

Application to set aside ex part decree rejected—It is not open to the defendant to have the question reagitated in the appeal form itself and such a right is not given by Sec.105 of the CPC.

Facts:- For setting aside the ex parte Decree. Application filed on the grounds that due to his Advocate's misdemeanor & his illness he had sufficient cause for having not appeared before the Court. But application was rejected. Appeal preferred challenging the ex parte decree. Held, it is not open to the defendant to have the question reagitated the same grounds in the appeal, such a right is not given by Section 105 of the CPC. While the very engagement of lawyer is not on record the question of Lawyer's fault does not arise.

It is the case of the appellant that he had made an application under Order 9 Rule 13 C.P.C. for setting aside the ex parte decree which was registered as CMAPL No.89 of 2003 but the same was dismissed by the leaned lower court. The case record of the CMAPL is not available with the L.C.R. It is quite probable that the appellant had taken the ground of his Advocate's misdemeanor along with the plea of his illness to justify that he had sufficient cause for having not appeared before the trial court when the suit was called on for hearing. If that be so, then the appellant cannot re-agitate the same ground here in an appeal under Order 41,Rule 1 read with Section 96 of C.P.C. This Review is supported by the decision of a Bench of the Madras High Court in Asethu v. Kesavayya (AIR 1920 Mad962) referred to in Munassar Bin v.Fatima Begum,reported in AIR 1975 Andhra Pradesh 366 wherein it has been held that where an application to set aside the ex parte decree has been rejected under Order 9, Rule 13, it is not open to the defendant to have the question reagigated in the appeal from the decree itself and such a right is not given by Section 105 of the C.P.C. The Bombay High Court in M/s. Mangilal Rungta, Calcutta v.Manganese Ore (India) Ltd., Nagpur, reported in AIR 1978 Bombay 87 has also given concurrence to the same view.

Learned counsel for the appellant has relied on two decisions of Hon'ble Supreme Court (1) Rafiq and another v.Munshilal and another (AIR 1981 Supreme Court 1400) and (2) Goswami Krishna Murarilal Sharma v.Dhan Prakash and others (1981)4 Supreme court Cases 574) in support of his contention that for the fault of his Advocate, the appellant should not be allowed to suffer. In both the cases it was not in dispute that the parties concerned had engaged their respective counsel. But in the case at hand, the appellant has not shown that one Sri

K.K.Swain, Advocate was engaged as his lawyer to participate in the suit on behalf of the appellant. While the very engagement of the lawyer is not on record, the question of lawyer's fault does not arise. In the result, the First Appeal being devoid of any merit is dismissed with cost.

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17.Order - 14 , Rule – 5

Bal gopal maheshwari & ors. V. Sanjeev kumar gupta. 2013 (II)CLR (SC)-644.

SUDHANSU JYOTI MUKHOPADHAYA & KURIAN JOSEPH ,JJ.

Issue

Eviction Suit – Striking off defence for failure to deposit admitted rent – Discretionary power.

Fact- Appellants filed suit for eviction of respondent-tenant from the suit premises, shop on the ground of arrears of rent and default---In spite of receipt of notice, respondent did not choose to file written statement within the specified period---After long delay, the respondent filed his written objection against which the appellant—plaintiffs filed an application for striking off the defence on the ground that the respondent failed to deposit the rent, damages due and cost of the suit—Civil Judge allowed the application of appellant-plaintiff and struck off the defence of respondent-In revision, District Judge affirmed the order passed by the Trial Court-Respondent filed a petition under Article 227 of the Constitution—High Court allowed the writ petition and held that as the Court has got jurisdiction and discretion to accept the written statement even after expiry of 90 days from the date of service of summon on heavy cost, the same principle may apply to cases under Order 15 Rule 5,CPC—High Court held that the respondent—defendant shall pay Rs.10,000/- as costs---Power to strike off the defence was exercised by the lower Courts after going through the facts of the case—Whether it was open to the High Court to alter such finding of facts and to accept the written statement without any ground—Held, No.

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18. Order -21,Rule 83 & 90

Manju swarup (d) through lrs. V. Bhupenshwar prasad (d) through lrs. & ors. 2013 (II)CLR (SC)-737

ANIL R. DAVE & A.K. SIKRI,JJ.

Issue

Execution proceedings---Auction of property of judgment debtor—Stay granted by this Court vacated.

Facts: In pursuance of a suit, which had been filed in 1955, the final decree was passed and property of appellant—judgment debtor had been attached on 21.12.1962-Exeuction case filed for recovery of the decretal amount by the decree holder—Auction notice was published on 16.4.1964—Appellant, judgment debtor filed an application for postponement of sale, as it was possible for the judgment debtor to raise the decretal amount and pay the same to the decree-holder—Amount was not deposited by the judgment debtor within the specified time- Application filed by judgment debtor, for extension of time, was rejected—Attached property was auctioned on 29.10.1995 and property was sold for Rs.13,700/- Judgment debtor filed an application under Order XXI, Rule,90 of the Code alleging that irregularities were committed in the conduct of auction—Application was allowed by the executing Court on the ground that the sale price was inadequate—Appeal filed against the order was allowed—Section appeal-High Court gave an opportunity to appellant/judgment debtor to pay the entire decretal amount within two months—As the appellant failed to deposit the amount, Execution of Second Appeal was dismissed—Whether any further opportunity can be granted to the appellant—Held, No.

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19. Order- 23,Rule -1

Kailash paliwal v. Subhash chandra agrawal .air 2013 sc 2923

T.S.THAKUR ,SUDHANSU JYOTI MUKHOPADHAYA ,JJ.

Issue

Withdrawal of suit—Permission—Suit for possession based on tenancy—Dismissed on finding that relationship of landlord and tenant was not established—Matter remanded to try suit as suit based on title---Plaintiff seeking to withdrawl suit and file fresh suit based on title –Defendant not objecting—Permission for withdrawal with liberty to file fresh suit granted.

Learned counsel for the appellant submitted that the High Court was in error in directing that the defendant-respondent was entitled to set up a plea based on adverse possession or that the plaintiff's title could be disputed by the defendant-

respondent on the basis of the oral sale set up by him. Be that as it may, the plaintiff-appellant would, according to the learned counsel, prefer to file a fresh suit on the basis of title to the property by withdrawing the suit out of which the present appeal arises. He submitted that since the High Court had recorded a specific finding that the relationship of landlord and tenant had not been established by the plaintiff, the only option left for the plaintiff was to sue for possession based on the title of the property. That option, according to the learned counsel, could be exercised by way of filing a fresh suit instead of the suit for possession based on tenancy being converted into a suit for possession based on title.

Learned counsel for the defendant-respondent had no objection to the withdrawal of the suit by the plaintiff-appellant, provided he is granted liberty to raise all such pleas as are open to him in law and on facts.

In the circumstances, therefore, we allow this appeal, set aside the judgment and orders passed by the Courts below, permit the plaintiff-appellant to withdraw the suit filed by him and file a fresh suit based on title to the property. We reserve liberty to the defendant-respondent to raise all such defences as may be open to him in law and on facts.

Parties are directed to bear their own costs.

Appeal Allowed.

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20. Order -39, Rule-1

Lakshmi alias Bhagyalakshmi and Anr. V. E.Jayaram (D) by Lr. AIR 2013 SC 2939

SURINDER SINGH NIJJAR & M.Y. EQBAL, JJ.

Issue

Interim injunction granted against defendant—Reversal of on ground that plaintiff having filed suit for injunction without reserving right to sue for relief of specific performance plaintiff is not entitled to injunction—Improper.

The plaintiffs who are the present appellants filed a suit for permanent injunction restraining the defendant-respondents from interfering with their peaceful possession and enjoyment of the suit property. The plaintiff-appellants case was that Plaintiff No.1 is the absolute owner of the suit property consisting of a building which was purchased from Defendant No.1 on a consideration of Rs.6,000/- However, sale deed could not be registered as the registration was suspended by the Government and the defendant-respondents could not get clearance from the Urban Land Ceiling Authority. The plaintiff-appellant's further case was that although the sale deed was not registered, the entire sale consideration was paid to Defendant

No.1 by the plaintiff who was put in possession of the suit property. It was pleaded by the plaintiffs that Plaintiff No.1 leased out the suit property in favour of Defendant No.2 who is residing in the same suit property for the last 17 years. Plaintiff-appellants further case was that they approached the Bangalore Mahanagara Palike for change of kattas and, on enquiry, they learnt that Defendant No.1 with an intention to grab the property concocted a gift deed in favour of Defendant No.2, who is his wife and on that basis moved an application for change of kattas. Immediately, the plaintiffs caused a legal notice dated 09.09.2002 asking him to execute a sale deed in favour of Plaintiff No.1. The plaintiffs also caused a legal notice on Municipal authorities not to change the kattas in favour of Defendant No.2 as Defendant No.1 has no right whatsoever to gift the suit property. The plaintiffs alleged that defendants along with their henchmen came to the suit property and threatened the plaintiff-appellants of dire consequences if they do not vacate the property within three days. On account of repeated threats from the side of defendants, the plaintiffs were compelled to file a suit for permanent injunction restraining the defendants from interfering with their peaceful possession and enjoyment of the suit property. A separate application under Order 39 Rule 1 and 2 CPC seeking an ad-interim relief restraining the defendants from interfering with their peaceful possession and enjoyment was filed.

The defendant-respondents filed a written statement and denied the averments made in the plaint. The defendants denied the purchase of the suit property by the plaintiff-appellants from Defendant-Respondent No.1. The defendants pleaded about their family settlement whereby the suit property was allotted to the defendants who put construction and let out the same to Plaintiff No.2. According to the defendants, Plaintiff No.1 is a stranger. In a nutshell the case of the defendants is that Defendant No.1 is the owner of the property and Plaintiff No.2 is a tenant under him and that she was paying rent per month.

We have heard learned counsel appearing for the parties. In our considered opinion, the learned single judge has completely misconstrued the provisions of Order 39 Rule 1 and 2 CPC and has committed serious error in deciding the scope of Section 53A of Transfer of Property Act, 1882 and Order 2 Rule 2 of CPC. As noticed above the Civil Judge while granting ad-interim injunction very categorically observed in the order that respective rights of the parties shall be decided at the time of final disposal of the suit. The very fact that Plaintiff No.2 is in possession of the property as a tenant under Plaintiff No.1 and possession of Plaintiff No.2 was not denied, the interim protection was given to Plaintiff No.2 against the threatened action of the defendants to evict her without following the due process of

law. In our considered opinion, the order passed by the learned single judge cannot be sustained in law.

For the aforesaid reasons, we allow this appeal and set aside the order passed by the High Court in the aforesaid appeal arising out of the order of injunction.

However, before parting with the order we are of the view that since the suit is pending for a long time the trial court shall hear and dispose of the suit within a period of four months from the date of receipt of copy of this order. It goes without saying that the trial court shall not be influenced by any of the observation made in the order passed by the appellate court as also by this court and the suit shall be decided on its own merits.

Appeal Allowed.

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21. Order- 41, Rule-31

Smt. Ashabati Gupta (dead), after her, her L.Rs. Smt. Mithilesh Gupta and others. V.Ram Pratap Agarwal .2013 (II) OLR -621

M. M. DAS, J.

Issue

Points for determination—Lower appellate Court reversed the finding rendered by the trial Court—Reliance placed on certified copies of the order sheet in the proceeding under Regulation II of 1956 filed before the trial Court and admitted into evidence being public documents—It cannot be said that extraneous matter has been considered for coming to the conclusion—No scope for interference in second appeal.

Decision of the Board of Revenue has no precedent value for a Civil Court.

Coming to the first substantial question of law, on which this Second Appeal has been admitted, it appears that while answering issue No. IV, the learned trial court, believing the oral sale by Joseph Toppo in favour of Shyamlal Gupta, who is the husband of the defendant No.1 and father of the defendants 2 to 7 in 1954 – 55, held that there was no restriction in the year 1954 – 55 for sale of immovable property by a Scheduled Tribe person in favour of a non-Scheduled Tribe. The above finding of the learned trial court was based on a judgment of the Board of Revenue reported in Vol.56 (1983) CLT (B.R.D) 25, ***Collector, Bolangir v. Arnapurna Kuanr and others***. (The said decision of the Board of Revenue has no precedence value for a civil court). Finding thus, the learned trial court concluded that the father of the

defendant No.7 had acquired a valid title to the suit land in the year 1954 – 55 by oral sale from Joesph Christia @ Joseph Toppo.

The learned lower appellate court, on discussing the evidence adduced by the appellants, has disbelieved the story oforal sale. Relying upon the administration of the Orissa State Orders, 1948 and the provisions of the Orissa Merge State Laws (Act), 1950, the learned lower appellate court has come to the conclusion that the oral sale in favour of the predecessor of the defendants, even if believed, was an illegal sale, being without prior permission of the Sub Divisional Magistrate, as per the provisions of the aforesaid administration of Orissa State Orders, 1948 as well as Orissa Merge State Laws Act, 1950.

This Court finds the approach of the learned lower appellate court to be correct and as a matter of fact, the learned lower appellate court has not taken into consideration any extraneous matters for coming to the above conclusion. Reliance placed by the learned lower appellate court on the orders passed in the proceeding under Regulation – II of 1956 cannot be stated to be erroneous, in view of the fact that the certified copies of the order sheet of the said proceeding was filed before the learned trial court and admitted into evidence being public documents.

This Court, therefore, finds that the learned lower appellate court has not considered any extraneous material while deciding the appeal by relying upon the orders passed in the proceeding under Regulation – II of 1956 while holding that the respondent – plaintiff has acquired valid title over the disputed property.

With regard to the second substantial question of law enumerated above, it is seen that, when the learned lower appellate court has come to a correct finding that the plaintiff acquired title under the registered sale deed executed by Dulari Toppo on 11.05.1987 after permission was granted on 14.12.1985 by the competent authority under Regulation – II of 1956, the above second substantial question no more remains to be answered. Further, as it is found that Dulari was a recorded tenant, from whom the plaintiff purchased the suit land under a valid sale, question of estoppel under Section 116 of the Evidence Act operating against the plaintiff does not arise any more. 12

In view of the aforesaid finding, this Court finds no merit in this Second Appeal, which is accordingly dismissed, but in the circumstances, there shall be no orders as to cost.

Appeal dismissed.

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INDIAN CONSTITUTION

22. Article- 20 (1)

Babaji Charan Sahu v. State of Orissa (2013)56 OCR ---560

B.K.PATEL, J.

Issue

What is prohibited under Article 20 (1) of the Constitution of India is only conviction under an ex post facto law and not the trial thereof.

On the basis of the F.I.R lodged by Sub-Inspector of Police,Chauliaganj Police Station Containing allegations against the petitioners made by the victim girl child, aged about 10 years, Mahila P.S.Case NO.185 of 2012 was registered against the petitioners for commission of offence under Section 323,345 and 337 read with Section 34 of the I.P.C. and Section 8 of the Act. On completion of investigation, charge-sheet against the petitioners was submitted under Section 323,354 and 377 read with Section 34 of the I.P.C and Section 6 of the Act.

Petitioners filed application under Section 227 of the Cr.P.C. Contending that materials on record do not raise strong suspicious constituting a prima facie case for framing charge under Section 377 of the I.P.C and Section 6 of the Act. By the impugned order, learned Special Judge-cum-Sessions Judge, Cuttack, while allowing the application with regard to the prayer for discharging the petitioners of the allegations under Section 377 of the I.P.C., held that materials on record, more particularly the allegations made by victim girl and her medical examination report, justify framing of charge under Section 6 of the Act.

In assailing the impugned order learned counsel for the petitioner, firstly, Submitted that the Act came into force o n 14.11.2012 and the F.I.R in the case was registered on 24.11.2012. It is contended that materials on record do not contain allegation of commission of any offence under the Act in between 14.11.2012 and 24.11.2012. It is argued that petitioners cannot be proceeded for an act which did not constitute an offence under a penal provision which was not in existence when such act was committed.

It appears from the F.I.R that on 24.11.2012 being directed by the I.I.C chaluliaganj P.S., the informant went to petitioner's house where the victim made allegations of commission of offences by the petitioners since the date of her engagement as a maid servant in their house prior to two years. Undoubtedly, in view of provisions under Article 20(1) of the constitution of India, no person can be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence. What is prohibited under Article 20(1)

of the Constitution of India is only conviction under an ex post facto law and not trial thereof. In the present case, the petitioners assail framing if charge only. Therefore, on the face of it, first contention is not tenable; Moreover, the victim herself in her statement recorded by the investigation officer on 24.11.2012 has made allegations of commission of offence under the Act by the petitioners by way of squeezing her breast and inserting their fingers, in the present tense. In the formal F.I.R., day and time of 'Occurrence or Officer' has been entered as "Since 2 years to till date". It such circumstances, there is nothing on record to support the contention of the learned counsel for the petitioners that allegations made in the case related to acts committed by the petitioners only prior to 14.11.2012 when the Act was not in force.

There is so merit in the contention that there is no martial to frame charge for commission of offence under Section 6 of the Act. In view of the above, there is no merit in the CRL.REV. Accordingly, the CRL.REV is dismissed.

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23. Art.32

Arun Kumar Agrawal V. Union of India & Others. AIR 2013 SC 3127

K. S. RADHAKRISHNAN & DIPAK MISRA, JJ.

Issue

Interference by Court –Only if decision is in violation of statue or perverse or taken with improper motives –Economics decision carry an element of risk –Only because decision proves to be said to be wrong –It cannot be said to be taken mala fide.

Petitioner, through this Public Interest Litigation, has challenged the approval granted by the Government of India dated 24.1.2012 for the acquisition of majority stake in Cairn India Limited (CIL) for US $8.48 billion and also for a direction to the Oil and Natural Gas Corporation of India (ONGC) to exercise its right of pre-emption over sale of shares of CIL on the same terms without causing any loss or profit to the Cairn Energy, and also for a direction to CBI to investigate the reasons for ONGC, a Government of India Undertaking, in not exercising their legal rights under the Right of First Refusal (RoFR) and giving clearance to the CAIRN – Vedanta Deal on the basis of the existing right to share the royalty and cess on pro-rata basis and also for the consequential reliefs.

We notice that the ONGC and the Government of India have considered various commercial and technical aspects flowing from the PSC and also its advantages that ONGC would derive if the Cairn and Vedanta deal was approved. This Court sitting in the jurisdiction cannot sit in judgment over the commercial or

business decision taken by parties to the agreement, after evaluating and assessing its monetary and financial implications, unless the decision is in clear violation of any statutory provisions or perverse or for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve complex economical factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions; ultimately it may turn out to be a correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately proved to be a wrong, that itself is not a ground to hold that the decision was mala fide or done with ulterior motives.

Matters relating to economic issues, have always an element of trial and error, so long as a trial and error are bona fide and with best intentions, such decisions cannot be questioned as arbitrary, capricious or illegal. This Court in State of M.P. and others v. Nandlal Jaiswal and others (1986) 4 SCC 566 referring to the Judgment of Frankfurter J. in Morey vs. Dond 354 US 457 held that "we must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call "trial and error method" and, therefore, its validity cannot be tested on any rigid "a priori" considerations or on the application of any straight jacket formula." In Metropolis Theatre Co. v. State of Chicago 57 L Ed 730 the Supreme Court of the United States held as follows:

"The problem of government are practical ones and may justify, if they do not require, rough accommodation, illogical, if may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void."

In Life Insurance Corporation of India v. Escorts Ltd. and others (1986) 1 SCC 264 this Court held

"that the Court will not debate academic matters or concern itself with intricacies or trade and commerce. The Court held that when the State or its instrumentalities of the State ventures into corporate world and purchases the shares of the company, it assumes to itself the ordinary role of shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholders and there is no reason why the State as a shareholder should be expected to state its reasons when

it seeks to change the management by a resolution of the company, like any other shareholder."

In Liberty Oil Mills and others v. Union of India and others (1984) 3 SCC 465, this Court held that expertise in public and political, national and international economy is necessary, when one may engages in the making or in the criticism of an import policy. Obviously, courts do not possess the expertise and are consequently, incompetent to pass judgments on the appropriateness or the adequacy of a particular import policy.

In Villianur Iyarkkai Padukappu Maiyam v. Union of India (2009) 7 SCC 561, this Court held as follows:

"It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts."

In Bajaj Hindustan Limited v. Sir Shadi Lal Enterprises Limited And Another (2011) 1 SCC 640, this Court held "that economic and fiscal regulatory measures are a field where Judges should encroach upon very wearily as Judges are not expert in those matters".

This Court in Bhavesh D. Parish and Others v. Union of India and Another (2005) 5 SCC 471, took the view that, in the context of the changed economic scenario, the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years. The process of rationalisation of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all.

In Centre for Public Interest Litigation and Another v. Union of India and Others (2000) 8 SCC 606, this Court held as follows:

"20. It is clear from the above observations of this Court that it will be very difficult for the courts to visualize the various factors like commercial/technical aspects of the contract, prevailing market conditions, both national and international and immediate needs of the country etc. which will have to be taken note of while accepting the bid offer. In such a case, unless the court is satisfied that the allegations leveled are unassailable and there could be no doubt as to the unreasonableness, mala fide, collateral consideration alleged, it will not be possible for the courts to come to the conclusion that such a contract can be prima facie or otherwise held to be vitiated so as to call for an independent investigation, as prayed for by the appellants……."

The question that is germane for consideration in this case is whether this Court can grant reliefs merely placing reliance on the CAG's report. The CAG's report is always subject to parliamentary debates and it is possible that PAC can accept the ministry's objection to the CAG report or reject the report of the CAG. The CAG, indisputably is an independent constitutional functionary, however, it is for the Parliament to decide whether after receiving the report i.e. PAC to make its comments on the CAG's report.

We may, however, point out that since the report is from a constitutional functionary, it commands respect and cannot be brushed aside as such, but it is equally important to examine the comments what respective ministries have to offer on the CAG's report. The ministry can always point out, if there is any mistake in the CAG's report or the CAG has inappropriately appreciated the various issues. For instance, we cannot as such accept the CAG report in the instance case.

Article 2.6 of PSC permits extension of the exploration period for three years from the end of the seven year period prescribed in Article 2.2. The period extended in pursuance to Article 2.6 expired on 14.5.2005. The CAG, it is seen, has assumed that any exploration carried out beyond the period was beyond the provision of PSC. Article 2.6 specifically contemplates extension of the exploration phase pursuant to the terms of the PSC. The last part of Article 2.6 to Article 2.9, however, permits further extension of the exploration period for a period of 30 months, therefore, it is factually and legally incorrect to suggest that any exploration carried out beyond 14.5.2005 was beyond the provision of PSC. CAG views on that aspect cannot be accepted.

In such circumstances, we find no merits in the writ petition which was filed without appreciating or understanding the scope of the decision or the making process concerning economic and commercial matters which gives liberty to States and its instrumentalities to take appropriate decision after weighing advantages and disadvantages of the same and this Court sitting in this jurisdiction, as already indicated, is not justified in interfering with those decisions, especially when there is nothing to show that those decisions are contrary to law or actuated to mala fide or irrelevant considerations. The writ petition, therefore, lacks merits. Hence, the same is dismissed.

Appeal Dismissed.

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24. Art.311

Jai Bhagwan V. Commr. Of Police & Ors. AIR 2013 SC 2908

T.S. THAKUR &GYAN SUDHA MISRA, JJ.

Issue

Disciplinary proceedings—Punishment—Judicial interference—Quantum and nature of punishment to be awarded- Within discretion of disciplinary authority—Appellate authority or Courts would interfere only when punishment is outrageously disproportionate to gravity of misconduct.

What is the appropriate quantum of punishment to be awarded to a delinquent is a matter that primarily rest in the discretion of the disciplinary authority. An authority sitting in appeal over any such order of punishment is by all means entitled to examine the issue regarding the quantum of punishment as much as it is entitled to examine whether the charges have been satisfactorily proved. But when any such order is challenged before a Service Tribunal or the High Court the exercise of discretion by the competent Authority in determining and awarding punishment is generally respected except where the same is found to be so outrageously disproportionate to the gravity of the misconduct that the Court considers it be arbitrary in that it is wholly unreasonable. The superior Courts and the Tribunal invoke the doctrine of proportionality which has been gradually accepted as one of the facets of judicial review. A punishment that is so excessive or disproportionate to the offence as to shock the conscience of the Court is seen as unacceptable even when Courts are slow and generally reluctant to interfere with the quantum of punishment. The law on the subject is well settled by a series of decisions rendered by this Court. We remain content with reference to only some of them.

"the doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision even as to sentence is an in defiance of logic, then the quantum of sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review".

In the totality of these circumstances, we are of the view that while dismissal from service of the appellant is a harsh punishment the order for dismissal could be substituted by an order of reduction to the rank of a constable with the direction that while the appellant shall have the benefit of continuity of service he shall not be entitled to any arrears of pay or other financial benefits for the period between the date of dismissal and the date of his reinstatement against the lower post of constable. We are conscious of the fact that this Court could in the ordinary course remit the matter back to the disciplinary authority for passing a fresh order of punishment considered proper but we are deliberately avoiding that course. We are doing so because the order of dismissal of the appellant was passed in the year 2001. A remand at this distant point of time is likely to lead to further delay and litigation on the subject which is not in the interest of either party. We have, therefore, upon an anxious thought as to the quantum of punishment that is appropriate taken the un-usual but by no means impermissible course of reducing the punishment to the extent indicated above.

These appeals are accordingly allowed in the above terms; with a further direction that the respondents shall do the needful expeditiously but not later than three months from the date of this order. No costs.

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HINDU LAW

25. Section—6

Pratibha Rani Tripathy & another v.Binod Bihari Tripathy & others. 2013(II) CLR—740

M.M.DAS, J

Issue-

Suit instituted prior to amendment, disposed of after amendment—Amended provisions will operate in the suit. Partition-Partition of joint family ancestral property—Section-6 as well as the Amended Section 23 of the Act—Father, mother, sons & daughters have equal share.

This appeal has been preferred against the judgment and decree passed in T.S. NO.7535 of 2002-03 by the Learned Additional District Judge (FTC), Bolangir.

Defendants 1 and 2, in their written statement, raised a technical issue of maintainability of the suit on the ground of non-joinder of necessary parties as well as limitation. They further pleaded that there is no cause of action to bring the suit, although they admitted the relationship between the parties as stated above. It was subsequently stated by them that 'A' schedule property is the self acquired and exclusive property of the defendant No.1. Therefore, the plaintiffs have no share in it. So far as 'B' schedule property is concerned, the pleadings of the plaintiffs were traversed to asserting that defendant No.2 was made the nominee of late Durga Charan Tripathy and the defendant No.2, being a nominee under the two policies, is entitled to get the entire assured amount under Section 39 of the insurance Act. They further asserted that the defendants 1 and 2 were treated by the plaintiff No.1 with love and affection. However, after the death of the husband of plaintiff No.1, she voluntarily left them along with plaintiff No.2.

The moot question, therefore, arises as to whether after amendment of the Hindu Succession Act in the year, 2005 the Court below should have held that the defendants Nos. 5 and 6 have equal share with their brother late Durga Charan Tripathy in Schedule 'C' Property along with their mother defendant No.2 Section 6 of the Hindu Succession Act as it stands after the amendment in 2005 is as follows:

Devolution of interest in coparcenary property-(1) On and from the commencement of the Hindu Succession (Amendment) Act,205, in a Joint Hindu family governed by the Mitakshara law, the daughter of coparcener shall,-

(a) By birth become a coparcener in her own right in the same manner as the son;

(b) Have the same rights in the coparcenary property as she would have had it she had been a son;

(c) Be subject to the same liabilities in respect of the said coparcenary property as that of a son,

And any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this Sub-section shall affect of invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

Any property to which a female Hindu becomes entitled by virtue of Sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for time being in force in, as property capable of being disposed of by her by testamentary disposition.

Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and –

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the predeceased son or a predeceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such predeceased son or of such predeceased daughter, and

(c) the share of the predeceased child of a predeceased son of a predeceased daughter, as such child would have got had her or she been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or a predeceased daughter, as the case may be.

Explanation.—For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

After the commencement of the Hindu Succession (Amendment) Act, 2005, no Court shall recognize any right to proceed against a son, grandson or great grandson for the recovery of any debt due from his father, grandfather or great-grand-father solely on the ground of the pious obligation under the Hindu Law, of such son, grandson or great-grandson to discharge any such debt.

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect-

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be ;or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation—For the purposes of clause (a), the expression "Son", "grandson" or "Great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who born or adopted

prio0r to the commencement of the Hindu Succession (Amendment) Act,2005.

Nothing contained in this section shall apply to partition, which has been effected before the 20th day of December, 2004.

Explanation--- For the purposes of this section "Partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a Court".

Thus, by the date, the suit was disposed of i.e. in the year 2007, the amendment has come into force. Hence, the amended provisions of Section 6 of the Hindu Succession Act with regard to right of the daughter will operate in the instant case as there has been no partition effected prior to 20.12.2004 as per Sub-section(5) of the said section. Thus, the learned Trial Court, while determining the share of the parties over the joint family property described in Scheduled 'A' should have considered the amendment brought into the Hindu Succession Act by the commencement of the Hindu Succession (Amendment) Act 2005. Applying the aforesaid provision of Section 6 as well as the amendment to Section 23 of the Act, it would be seen that late Durga Charan Tripathy along with defendant Nos.1 and 2 and defendant Nos.5 and 6 would have been entitled to equal share in Schedule 'A' property and therefore, each of them would have got 1/5th share. 1/5th Share of late Durga Charan Tripathy is succeeded by the plaintiffs as well as defendant No.2. Therefore, the plaintiff Nos. 1 and 2 will have 1/15th share each and defendant No.2 will have 1/15th + 1/15th 4/15 Share share. Defendant Nos.1,5, and 6 will have 1/5th share each.

In the result, this appeal is disposed of with the aforesaid modification of the impugned judgment and decree, but in the circumstances, parties shall bear their respective costs of this appeal.

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26. Sec .13 (1) (iii)

kollam chandra sekhar vs. kollam padma latha. 2013 (II)CLR (SC)-725

G.S. SINGHVI &V. GOPALA GOWDA, JJ.

Issue

Dissolution of marriage—Unsoundness of mind or mental disorder---Section 13(1)(iii) of the Act does not make a mere existence of a mental disorder of any degree sufficient in law to justify dissolution of marriage—Court cannot grant dissolution of marriage on the basis of a spouse's illness.

Facts: Marriage between appellant—husband and respondent-wife was solemnized on 31.5.1995- At the time of marriage, appellant—husband was working as Senior Resident in All India Institute of Medical Sciences—Respondent-wife, also a Doctor joined the appellant in New Delhi and secured employment in the said Institute---Respondent gave birth to a female child on 7.7.1997. Subsequently, both appellant and respondent resigned from their jobs and joined at Hyderabad—Appellant filed a petition for divorce alleging that the respondent—wife was suffering from schizophrenia and she had suicidal tendencies etc.-Respondent-wife filed petition for restitution of conjugal rights—Trial Judge held that appellant was entitled to a decree of divorce—Trial Court relied on the certified copoy of report from Institute of Mental Health which showed that the respondent was suffering from schizophrenia—On appeal, High Court held that there was no positive evidence to show that the respondent-wife had suffered schizophrenia and even in the case she suffered from schizophrenia, it could not be said that she was suffering from such a serious of disease that it would attract Section13(1)(iii) of the Act for grant of decree for dissolution of marriage between the parties—Whether the respondent was suffering from a serious mental disorder or incurable unsoundness of mind—Held, No-Whether the High Court was justified in dismissing appellant's divorce petition and granting restitution of conjugal rights to respondent—Held, Yes.

"What is the disease and what one should know?

*A psychotic lacks insight, has the whole of his personality distorted by illness, and constructs a false environment out of his subjective experiences.

*It is customary to define 'delusion' more or less in the following way. A delusion is a false unshakeable belief, which is out of keeping with the patient's social and cultural background. German psychiatrists tend to stress the morbid origin of the delusion, and quite rightly so. A delusion is the product of internal morbid processes and this is what makes it unamenable to external influences.

*Apophanous experiences which occur in acute schizophrenia and form the basis of delusions of persecution, but these delusions are also the result of auditory hallucinations, bodily hallucinations and experiences of passivity. Delusions of persecution can take many forms. In delusions of reference, the patient feels that people are talking about him, slandering him or spying on him. It may be difficult to be certain if the patient has delusions of self-reference or if he has self-reference hallucinosis. Ideas of delusions or reference are not confined to schizophrenia, but can occur in depressive illness and psychogenic reactions.

Causes

The causes of schizophrenia are still under debate. A chemical imbalance in the brain seems to play a role, but the reason for the imbalance remains unclear.

One is a bit more likely to become schizophrenic if he has a family member with the illness. Stress does not cause schizophrenia, but can make the symptoms worse.

Risks

Without medication and therapy, most paranoid schizophrenics are unable to function in the real world. If they fall victim to severe hallucinations and delusions, they can be a danger to themselves and those around them.

What is schizophrenia?

Schizophrenia is a chronic, disabling mental illness characterized by:

*Psychotic symptoms
*Disordered thinking
*Emotional blunting

How does schizophrenia develop?

Schizophrenia generally develops in late adolescence or early adulthood, most often:

*In the late teens or early twenties in men
*In the twenties to early thirties in women

What are the symptoms of schizophrenia?

Although schizophrenia is chronic, symptoms may improve at times (periods of remission) and worsen at other times (acute episodes, or period
of relapse). Initial symptoms appear gradually and can include:

*Feeling tense
*Difficulty in concentrating
*Difficulty in sleeping
*Social withdrawal

What are psychotic symptoms?

*Psychotic symptoms include:
*Hallucinations: hearing voices or seeing things.
*Delusions: bizarre beliefs with no basis in reality (for example delusions of persecution or delusions of grandeur). These symptoms occur during acute or psychotic phases of the illness, but may improve during periods of remission. A patient may experience:
*A single psychotic episode during the course of the illness
*Multiple psychotic episodes over a lifetime…"

It is thus clear that the respondent, even if she did suffer from schizophrenia, is in a much better health condition at present. Therefore, this Court cannot grant the dissolution of marriage on the basis of one spouse's illness. The appellant has not proved the fact of mental disorder of the respondent with reference to the allegation made against her that she has been suffering from schizophrenia by producing

positive and substantive evidence on record and on the other hand, it has been proved that the respondent is in much better health condition and does not show signs of schizophrenia as per the most recent medical report from NIMHANS, as deposed by PW- 4 in his evidence before the trial court.

For the aforesaid reasons, we are of the firm view that the findings and reasons recorded in setting aside the judgment and decree of the trial court is neither erroneous nor does it suffer from error in law which warrants our interference and calls for setting aside the impugned judgment and decree of the first appellate court. Therefore, this Court cannot interfere with the impugned judgment of the High Court as the same is well-reasoned and based on cogent reasoning of facts and evidence on record and accordingly, we answer point no.4 in favour of the respondent.

Under Hindu law, marriage is an institution, a meeting of two hearts and minds and is something that cannot be taken lightly. In the Vedic period, the sacredness of the marriage tie was repeatedly declared; the family ideal was decidedly high and it was often realized. In Vedic Index I it is stated that "The high value placed on the marriage is shown by the long and striking hymn". In Rig Veda, X, 85; "Be, thou, mother of heroic children, devoted to the Gods, Be, thou, Queen in thy father-in-law's household. May all the Gods unite the hearts of us "two into one" as stated in Justice Ranganath Misra's 'Mayne's Treatise on Hindu Law and Usage'8. Marriage is highly revered in India and we are a Nation that prides itself on the strong foundation of our marriages, come hell or high water, rain or sunshine. Life is made up of good times and bad, and the bad times can bring with it terrible illnesses and extreme hardships. The partners in a marriage must weather these storms and embrace the sunshine with equanimity. Any person may have bad health, this is not their fault and most times, it is not within their control, as in the present case, the respondent was unwell and was taking treatment for the same. The illness had its fair share of problems. Can this be a reason for the appellant to abandon her and seek dissolution of marriage after the child is born out of their union? Since the child is now a grown up girl, her welfare must be the prime consideration for both the parties. In view of the foregoing reasons, we are of the opinion that the two parties in this case must reconcile and if the appellant so feels that the respondent is still suffering, then she must be given the right treatment. The respondent must stick to her treatment plan and make the best attempts to get better. It is not in the best interest of either the respondent or her daughter who is said to be of adolescent age for grant of a decree of dissolution of marriage as prayed for by the appellant. Hence, the appeal is liable to be dismissed.

Accordingly, we dismiss the appeal and uphold the judgment of the High Court in not granting a decree of divorce and allowing the petition for restitution of conjugal rights. Therefore, we grant a decree for restitution of conjugal rights under Section 9 of the Act in favour of the respondent.

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NEGOTIABLE INSTRUMENT ACT

27. Sec.138

Ramesh Chandra Nayak V. M/s Shivam Finance through their Power of Attorney. (2013)56 OCR ---539

Dr.B.R.SARANGI, J.

Issue

Copy of the legal notice sent to the accused after dishonor of cheque and documents showing issuance and service of notice on the accused not filed by the complainant along with the complaint petition—Bald statement regarding service of notice in the complainant petition not sufficient---Held, proceeding instituted against the petitioner stands quashed.

The fact as revealed from the complaint petition, it is found that the complainant-opposite party being a Commercial Financial Firm advances loan on hire purchase of vehicles. The petitioner availed a loan for purchase of a two wheeler from the complainant on hire purchase after executing an agreement to pay the value of the motor cycle in twenty four monthly installments. It is alleged that the petitioner having failed to comply with the terms of the agreement and failed to pay the demand, the complaint has been filed. It is further alleged that the petitioner came to the office of the complainant on 17.11.2003 and issued a cheque bearing No. 842021 for Rs.22,750/- towards full and final payment of the demand and when the said cheque was produced in S.B.I., Commercial Brach, Bargarh for collection, the Chief Manager intimated the complainant that the cheque has been dishonored stating the reasons in the report "not arranged for" on 11.12.2003. The complainant thereafter called upon the petitioner through their Advocates to pay the cheque amount within fifteen days, but the petitioner failed to comply the notice and hence the complaint petition has been filed, which is registered as I.C.C. Case No. 11 of 2004, pending before the learned S.D.J.M., Bargarh.

In view of the law laid down by the Hon'ble apex Court and considering the factual position available in the complaint petition and taking into account that the petitioner has already paid the installment dues and he is being harassed by the complainant, I am of the opinion that in order to prevent to abuse of the process of Court and in the interest of justice, this is a fit case where this Court in exercise its jurisdiction under Section 482, Cr.P.C. should quash the proceeding initiated against the petitioner under Section 138 of the N.I. Act. Accordingly, the proceeding so initiated under Section 138 of the N.I. Act in ICC Case No. 11 of 2004 pending in the court of learned S.D.J.M., Bargarh is quashed. The CRLMC is allowed.

MOTOR VEHICLE ACT.

28. Insurance

National insurance co.ltd. V. Balkar ram & ors. 2013 (II) CLR (SC)-623

GYAN SUDHA MISRA & KURIAN JOSEPH, JJ.

Issue

Cheque issued by insured towards issuance of policy dishonored before date of accident—Intimation of dishonor given after date of accident---Whether Appellant—Insurance Company is liable to pay compensation to the claimants/Respondents---Held, Yes.

This appeal has been preferred by way of special leave against the judgment and order passed by the High Court of Punjab and Haryana in F.A.O. No. 2941 of 2004 dated 28.09.2004 wherein the appeal filed by the Appellant-insurance company was dismissed holding therein that the intimation by the Appellant-Insurance Company regarding dishonour of the cheque towards the issuance of policy was communicated to the policyholder after the accident. Hence, it was liable to pay the compensation to the claimants/ Respondents and it could not recover the same from the owner. To clarify the position, it may be stated that the vehicle which was insured with the appellant met with an accident and a compensation of Rs.1, 24,035/- was ordered to be paid to the respondents-claimants along with interest and the owner as also the insurance company were jointly and severally held liable by the Motor Accidents Claims Tribunal ('Tribunal' for short)to pay the amount of compensation to the claimants. The Appellant/Insurance Company assailed the award passed by the Tribunal essentially on the ground that the cover note for the policy of insurance was issued on 7.04.2000 for which a cheque was submitted by the owner. However, the cheque was dishonoured by the bank on 17.04.2000. Subsequently, the vehicle which was insured with the appellant insurance company met with an accident on 19.04.2000. The appellant-insurance company, therefore, contended that as the policy of insurance could not be held to be a valid document in

view of the fact that the cheque towards the policy had been dishonored even before the accident had taken place, the insurance company was not liable to indemnify the claimants by paying the amount which fell into its share as per the Tribunal's award and it is the owner which is liable to pay the entire amount of compensation to the respondents/ claimants. However, we compliment Ms. Kiran Suri, learned counsel for the appellant for cutting short the controversy by fairly pointing out the ratio of the judgment (2012) 5 SCC 234 titled United India Insurance Co. Ltd. Vs. Laxmamma & Ors. Wherein it has been held that the insurance company is liable to satisfy the award if the intimation regarding the dishonour of the cheque and cancellation of policy is communicated to the policy-holder after the date of the accident. Thus, the defence of the insurance company that the policy of insurance was not valid since the cheque had been dishonoured prior to the accident would not exonerate them from making the payment of compensation. In this matter, admittedly the accident had taken place on 19.04.2000 and the cheque although had been dishonoured prior to the accident on 17.04.2000, the intimation to the policy-holder had been given by the insurance company on 26.04.2000, in view of which the insurance company cannot be allowed to contend that the policy-holder was not holding a valid policy of insurance in regard to the vehicle which met with an accident. Admittedly, the policyholder had already issued another cheque substituting the cheque which had earlier been dishonored.

In that view of the matter and following the ratio of the judgment referred to hereinbefore, this appeal has no substance and accordingly it is dismissed. No order as to costs.

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INSURANCE

29.Sec .33A,36 &125A

Resurgence India V. Election Commission of India & Anr. 2013 (II) CLR (SC)-698

P. SATHASIVAM, RANJANA PRAKASHDESAI & RANJAN GOGOI, JJ.

Issue

Right to information---Filing of affidavit with blank space—Duty of Returning Officer---If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected.

Facts:- Writ petition has been filed to issue specific directions to Election Commission to make it compulsory for the Returning Officers to ensure that the affidavits filed by the contestants are complete in all respects and to reject the

affidavits having blank particulars---Election Commission vide order dated 28.6.2002 had issued certain directions to the candidates to furnish full and complete information in the of an affidavit with regard to matters specified by this Court in Union of India vs. Association for Democratic and Another (2002(4) SCALE 297)—It was also directed that non-furnishing of the affidavit by any candidate or furnishing of any wrong or incomplete information or suppression in rejection of nomination paper---In people's Union for Civil Liberties (PUCL) and Another vs. Union of India & Anr.(2003(3) SCALE 263), though this Court reaffirmed the decision of Association for Democratic Reforms but also held that the direction to reject the nomination papers for furnishing wrong information or concealing material information cannot be justified—Petitioner organization made a representation to the Election Commission regarding large number of non-disclosures in affidavits filed by contestants and poor level of scrutiny by the Returning Officers—Election Commission of India expressed its inability in rejecting the nomination papers of candidates in view of judgment in People's Union for Civil Liberties(supra)--- Whether filing of affidavit with blank particulars will render the affidavit nugatory—Held, Yes.

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