O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2014

(*DECEMBER*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY
MONTHLY REVIEW OF CASES ON
CIVIL, CRIMINAL & OTHER LAWS, 2014 (DECEMBER)

I N D E X

8.	*Renuka Majhi and others Vs. State of Orissa and others.* ***W.P.(C) No.10712 of 2009*** **, In the High Court Of Orissa : Cuttack.**	***Article 226 &227 Constitution of India.***	***19-20***
	(ii) Contempt of Courts Act, 1971		
9.	*Dhabala Prasad Pradhan Vs. Ramesh Chandra Panda.* **MANU/OR/0551/2014.**	**Sec.15 read with Sec.12Contempt of Courts Act, 1971.Sec. 2 Cr.P.C.**	***21-22***

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2. Sec. 8(1) (3), 11(6), Arbitration and Conciliation Act, 1996. &Sec.11, C.P.C

Anil S/O Jagannath Rana & Ors Vs. Rajendra S/O Radhakishan Rana & others. ***CIVIL APPEAL NO. 11604 /2014 , SUPREME COURT OF INDIA.***

Anil R. Dave & Kurian Joseph , JJ.

Date of Judgment - 18.12.2014

Issue

Invoke the Jurisdiction

Appellants are defendant nos. 1, 2, 3 in Special Suit No. 211 of 2009 on the file of Civil Judge Senior Division at Aurangabad, Maharashtra. The suit is filed by a partnership firm, viz., M/s. Rana Sahebram Mannulal and three others. The dispute mainly pertains to the partnership business.

The defendants/appellants had filed an application under Section 9A of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC"), as applicable to the State of Maharashtra, to dismiss the suit for want of jurisdiction since the partnership deed contained a provision for arbitration and hence the disputes were liable to be resolved in terms of the Act. In other words, application filed by defendants, in essence, was to be treated as an application under Section 8(1) of the Act. The same was opposed by the plaintiff. The trial court upheld the objection and held that it was within the jurisdiction of the court to try the dispute and, therefore, it was not required under law to refer the same to arbitration. The suit proceeded. The parties have examined all their witnesses. While so, the respondents herein approached the Chief Justice of the High Court of Judicature at Bombay in Arbitration Application No. 12/2013 under Section 11(6) of the Act seeking appointment of an arbitrator as per the terms of the partnership deed. At paragraph-4 of the application, it is stated as follows:

" The applicants further states and submits that, as per clause 6 of the Partnership deed dated 13.12.2008 marked and annexed as Exhibit-B, it was decided between the partners that if any dispute shall arise between them in respect of the conduct of the business of partnership or in respect of the interpretation, operation or enforcement of any of the terms and conditions of the deed in respect of any other matter, cause or thing whatsoever, the same shall be referred to the arbitration of the person appointed by the partners whose decision shall be final and binding on all parties and legal representatives."

In the suit instituted by the firm and some of the respondents, the order passed by the civil court that it was well within its jurisdiction to try the suit, despite the objection regarding the existence of a clause for arbitration, has become final. Thereafter, Section 11(6) jurisdiction of the Chief Justice cannot be invoked by either party. The principle of res judicata will also be attracted in such a case. In Satyadhyan Ghosal and others Vs. Deorajin Debi (Smt.) and another, this principle was discussed in detail and it has been settled as follows. To quote:

"The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as

between past litigation and future litigation. When a matter – whether on a question of fact or a question of law – has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. …"

In Hope Plantations Ltd. v. Taluk Land Board, Peermade and another, it was held that the general principle underlying the doctrine of res judicata is ultimately based on considerations of public policy. One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice. The principles as discussed above on res judicata have been consistently followed by this Court. And the recent judgments in that regard are in Dr. Subramanian Swamy v. State of Tamil Nadu and others and in Surjit Singh and others v. Gurwant Kaur and others. Thus, once the judicial authority takes a decision not to refer the parties to arbitration, and the said decision having become final, thereafter Section 11(6) route before the Chief Justice is not available to either party. With great respect, the designated Judge has gone wholly wrong in passing the order under Section 11 of the Act when the civil court is in seisin of the dispute and where arbitration has already been declined by the said court. The impugned order is hence set aside. The appeal is allowed with costs of Rs.25,000/-.

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3. Sections 227, 228, 238, 239, Cr.P.C.

State Tr. Insp. of Police Vs. A. Arun Kumar. ***MANU/SC/1174/2014***

Dipak Misra & Uday Umesh Lalit, JJ.

Date of Judgment -17.12.2014

Issue

Framing of Charges and exercise of jurisdictions.

On 08.02.2007 RC-1/E/2007-CBI/EOW/CHENNAI was registered under sections 120B read with section 420, 467, 468, 471 IPC and 477-A IPC and section 13 (2) read with section 13(1)(d) of The Prevention of Corruption Act, 1988 (POC Act for short) and section 32 of the Customs Act, 1962 on the allegations that accused nos. 1-3 named therein had entered into a criminal conspiracy with accused no.4 who was Appraiser of Customs, Inland Container Depot (ICD), Irugur, Coimbatore and with accused no.5, Inspector of Customs, Inland Container Depot, Irugur, Coimbatore during 2004-2005 and in pursuance of said conspiracy had filed false and fabricated documents to claim duty draw back to the tune of Rs.2.14 crores (approximately) from ICD, Irugur. It was alleged that said accused nos.1-3 had filed certain Shipping Bills and that the export documents were assessed by accused no.4 i.e. respondent no.1 and after such assessment the goods were examined by accused no.5 i.e. respondent No.2. After completion of the customs formalities the goods were stuffed in containers which were sealed and transported to Cochin for consignment to Dubai. It was alleged that accused no.1 produced different sets of forged shipping bills by adding a digit before the total quantity of shipment thereby inflating the value of shipment and fraudulently claimed duty draw back. These forged shipping bills were endorsed by the respondents. A chart was relied upon to show how the total quantity and the present market value differed by addition of a digit. The chart was as follows:

Name of the Firm	Total Qty. in Kg (Net Weight as declared in transference copy of Shipping Bill (presented to Cochin Customs)	Total Qty. (Net Weight as declared in GR Form Shipping Bill) presented to RBI for matching for foreign Exchange Realisation	Present Market Value declared in transference Shipping Bill (Indian Rupee)	Present Market Value declared in GR Form Shipping Bill (Indian Rupee)
[1]	[2]	[3]	[4]	[5]
M/s J.S. Babu, Inc.	79257	479257	17492880	117492880
M/s Samy Metal Industries	27176	187176	4850990	44850990
M/s Ayyappan Industries	38836	258836	8586055	63586055
Total			30929925	225929925

A regular case was registered on the allegations as aforesaid and investigation was conducted by CBI which later filed charge sheet against said five accused on 28.04.2008. The respondents preferred application under section 239 of Cr.P.C. seeking discharge. The special court after having considered the matter, came to the conclusion that a case for framing charges against the respondents under section 468, 471 and 201 IPC and under section 15 of the POC Act and under sections 132 and 136 of the Customs Act was made out. The special court thus dismissed the application by its order dated 19.12.2008. The respondents being aggrieved preferred revision under section 397 read with 401 of Cr.P.C. before the High Court. During the pendency of said revision the special court framed following charges against the accused:

Charge No.	Accused	Offences under section/s
I	A-1 to A-5	120-B r/w 511 IPC, 468, 471 and 201 IPC/Section 15 of the prevention of Corruption Act, 1988 and section 132 and 136 of the Custom Act.
II	A-1 to A-2	468 IPC
III	A-1 to A-2	468 r/w 471 IPC
IV	A-1 to A-3	511 r/w 420 IPC
V	A-1 to A-2	201 IPC
VI	A-4 to A-5	201 IPC
VII	A-1 to A-3	132 of the customs Act
VIII	A-4 to A-5	136 of the customs Act
IX	A-4 to A-5	15 of the Prevention of Corruption Act, 198

The present appeal challenges the correctness of the view taken by the High Court. By way of an additional affidavit, the appellant placed on record, copies of relevant Shipping Bills and the corresponding Exchange Control declaration forms. We have heard Ms. Vibha Dutt Makhija, learned senior counsel appearing for the appellant who invited our attention to documents on record to bring home the point about discrepancy in the total quantity of shipment and the value of shipment in two sets of documents. It was submitted that the High Court was not right and justified in observing that there was no material on record at all. Mr. B.A. Khan and Mr. Ratnakar Dash, learned senior counsel appearing for Respondent Nos.1 and 2, respectively supported the view taken by the High Court. It was submitted by the learned counsel that there never existed two sets of shipping bills, that none of the witnesses deposed against the respondents that no duty draw back had been claimed at all and that the High Court was right in concluding that there was no material against the respondents. Relying on Ganga Kumar Srivastava v. State of Bihar,(2005) 6 SCC 211 it was submitted that no case for interference by this Court was made out.

It is clear that at the initial stage, if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the

evidence which the prosecution proposes to adduce prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.

On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

(iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

In our considered view, the material on record discloses grave suspicion against the respondents and the Special Court was right in framing charges against the respondents. We must also observe that the High Court was not justified in stating that Section 15 of the POC Act could not be invoked in the present case. Since the duty draw back was not actually availed, the prosecution had rightly alleged that there was an attempt to commit offence under the relevant clauses of Section 13(1) of the POC Act. It is not the requirement of law that in order to charge an accused under Section 15 of the POC Act he must also be charged either under Section 13(1)(c) of 13(1)(d) of the POC Act. The assessment of the High Court in that behalf is not correct. In our view the instant case calls for interference by this Court. We, therefore, set aside the judgment and order passed by the High Court and restore the order of the Special Court. The respondents thus continue to stand charged and must consequently face the trial. However, it must be recorded that this Court has considered the matter only from the stand point whether the respondents be discharged or not and we shall not be taken to have expressed any opinion on merits. The matter shall and must be dealt with purely on merits by the concerned court. We allow this appeal in the aforesaid terms.

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4. Sec.235, Cr.P.C.

Vijay Pal Singh & Ors. Vs. State Of Uttarkhand. ***MANU/SC/1172/2014.***

Kurian Joseph & Abhay Manohar Sapre ,JJ.

Date of Judgment -16.12.2014

Issue

Opportunity to appellants for submissions on sentencing.

In the instant case, the prosecution has not made any attempt to explain the ante-mortem injuries which conclusively point to the cause of death as asphyxia caused by strangulation. Yet, no serious attempt, it is disturbing to note, was done to connect the murder to its author(s). No doubt, nothing prevents this Court from putting the appellants on notice as to why the punishment should not be appropriately enhanced but why we reluctantly decline to do so, we shall explain in the later part of the judgment. In two of the early decisions of this Court, after the introduction of Section 304B of IPC, the ingredients of the offence and the interplay of Section 304B of IPC with Sections 498A, 302, 306 of IPC have also been discussed.

Though in the instant case the accused were charged by the Sessions Court under Section 302 of IPC, it is seen that the trial court has not made any serious attempt to make an

inquiry in that regard. If there is evidence available on homicide in a case of dowry death, it is the duty of the investigating officer to investigate the case under Section 302 of IPC and the prosecution to proceed in that regard and the court to approach the case in that perspective. Merely because the victim is a married woman suffering an unnatural death within seven years of marriage and there is evidence that she was subjected to cruelty or harassment on account of demand for dowry, the prosecution and the court cannot close its eyes on the culpable homicide and refrain from punishing its author, if there is evidence in that regard, direct or circumstantial.

In State of Punjab v. Iqbal Singh and others, (1991) 3 SCC 1 , the Court in paragraph-8 stated that:

"The legislative intent is clear to curb the menace of dowry deaths, etc., with a firm hand. We must keep in mind this legislative intent. It must be remembered that since crimes are generally committed in the privacy of residential homes and in secrecy, independent and direct evidence is not easy to get. That is why the legislature has by introducing Sections 113-A and 113-B in the Evidence Act tried to strengthen the prosecution hands by permitting a presumption to be raised if certain foundational facts are established and the unfortunate event has taken place within seven years of marriage. This period of seven years is considered to be the turbulent one after which the legislature assumes that the couple would have settled down in life. If a married women is subjected to cruelty or harassment by her husband or his family members Section 498-A, IPC would be attracted. If such cruelty or harassment was inflicted by the husband or his relative for, or in connection with, any demand for dowry immediately preceding death by burns and bodily injury or in abnormal circumstances within seven years of marriage, such husband or relative is deemed to have caused her death and is liable to be punished under Section 304-B, IPC. When the question at issue is whether a person is guilty of dowry death of a woman and the evidence discloses that immediately before her death she was subjected by such person to cruelty and/or harassment for, or in connection with, any demand for dowry, Section 113-B, Evidence Act provides that the court shall presume that such person had caused the dowry death. Of course if there is proof of the person having intentionally caused her death that would attract Section 302, IPC. Then we have a situation where the husband or his relative by his willful conduct creates a situation which he knows will drive the woman to commit suicide and she actually does so, the case would squarely fall within the ambit of Section 306, IPC. In such a case the conduct of the person would tantamount to inciting or provoking or virtually pushing the woman into a desperate situation of no return which would compel her to put an end to her miseries by committing suicide."

Now, the question as to why the High Court, having entered a conclusion that it is a case of murder at the hands of the appellants, yet chose to convict them only under Section 304B of IPC.

As we have already indicated, it could have been a case for the High Court or for that matter this Court for issuing notice for enhancement of punishment to those against whom there is evidence to connect them with the murder. The incident being of 1991, the prosecution having not chosen to link all the circumstances in a chain with no missing links to reach the irresistible and conclusive finding on involvement of the accused, the High Court would have thought it more prudent to convict the accused only under Section 304B of IPC. No doubt, in such a case, the High Court should not have entered a categoric finding on murder since once the court enters such a finding, the punishment can only be under Section 302 of IPC. Having regard to the circumstances which we have referred to above, we are of the view that though this case could have been dealt with under Section 302 of IPC, at this distance of time and in view of the lack of evidence on the chain of circumstances, it will not be proper for this Court to proceed under Section 302 of IPC for enhancement of punishment. There are no such problems as far as the presumption under Section 113B of the Indian Evidence Act, 1872 is concerned. Once the ingredients of Section 304B of IPC are established, the presumption is that the death has been caused by the husband or his relatives, who caused the cruelty or harassment. That presumption can safely be drawn in the instant case, as we have already discussed above, as all the ingredients under Section 304B of IPC have been proved beyond doubt in the present case particularly since there is no direct evidence on the part of the appellants to rebut the same. Yet with all that, we have to address a further question as to the involvement of the younger brother of husband-Rakesh Singh and brother-in-law of husband-Gyan Chandra. Though, under Section 304B of IPC, a presumption has to be drawn against those relatives who have harassed the deceased in connection with the demand for dowry, there must be evidence, which is not rebutted to connect the husband and each relative in that regard. We also see no substance in the submission that merely because the appellant had been acquitted under Section 302 IPC the presumption under Section 113-B of the Evidence Act stands automatically rebutted. The death having taken place within seven years of the marriage and there being sufficient evidence of demand of dowry, the presumption under Section 113-B of the Evidence Act gets invoked. There is no evidence in rebuttal.

Now, the last question as to whether the case should be remitted back to the High Court for the purpose of Section 235 of Cr.PC, we are of the view that in the present case, it is not necessary. The conviction is under Section 304B IPC. The mandatory minimum punishment is

seven years. Of course, there is no such minimum punishment under Section 498A of IPC or Section 201 of IPC. Since the sentence in respect of offence under Section 498A of IPC for two years rigorous imprisonment and one year under Section 201 of IPC are to run concurrently, no prejudice whatsoever is caused to the two appellants. Therefore, this is not a fit case for following the procedure under Section 235 of Cr.PC by this Court or for remand in that regard to the High Court. The conviction and sentence against the third and fourth accused/appellants, Rakesh Singh and Gyan Chandra, respectively, are set aside. The conviction and sentence as against first and second appellants, Vijay Pal Singh and Narendra Singh, respectively, under Section 304B of IPC read with Section 34 of IPC, Section 498A of IPC and Section 201of IPC are upheld. Their bail bonds are cancelled. They shall immediately surrender/they shall be taken to custody, to serve the remaining sentence. The appeal is thus partly allowed as above.

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5. Sec.439, Cr.P.C.

Neeru Yadav Vs. State of U.P and another. ***Criminal Appeal No. 2587 of 2014, In the Supreme Court of India.***

Dipak misra & Uday Umesh Lalit , JJ.

Date of Judgment-16.12.2014

Issue

The legal substantiality and defensibility of the order on bail.

Considering the submission made by the learned counsel for the applicant as well as learned A.G.A, this Court is of the view that the applicant has made out a case for grant of bail on the ground of parity.

The pivotal issue that emanates for consideration is whether the impugned order passed by the High Court deserves legitimate acceptation and put in the compartment of a legal, sustainable order so that this Court should not interfere with the same in exercise of jurisdiction under Article 136 of the Constitution of India. In this context, a fruitful reference be made to the pronouncement in *Ram Govind Upadhyay* Vs. *Sudarshan Singh*, (2002) 3 SCC 598 wherein this Court has observed that grant of bail though discretionary in nature, yet such exercise cannot be arbitrary, capricious and injudicious, for the heinous nature of the crime warrants more caution and there is greater change of rejection of bail, though, however dependant on the factual matrix of the matter.

(*i*) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(*ii*) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(*iii*) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.

(*iv*) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

In this context, we may profitably refer to the dictum in *Prasanta Kumar Sarkar* v. *Ashis Chatterjee*, (2010) 14 SCC 496, wherein it has been held that normally this Court does not interfere with the order passed by the High Court when a bail application is allowed or declined, but the High Court has a duty to exercise its discretion cautiously and strictly. Regard being had to the basic principles laid down by this Court from time to time, the Court enumerated number of considerations and some of the considerations which are relevant for the present purpose are; whether there is likelihood of the offence being repeated and whether there is danger of justice being thwarted by grant of bail.

In the case at hand, two aspects have been highlighted before us. One, the criminal antecedents of the 2nd respondent and second, the non-applicability of the principles of parity on the foundation that the accusations against the accused Ashok and 2nd respondent are different. First, we shall dwell upon the criminal antecedents. The appellant, the real victim, being the wife of the deceased, has annexed a chart relating to the criminal history of the accused. The State has filed a counter affidavit. We think it apt to refer to the cases which find place in the counter affidavit filed by the state. Be it clarified though it has been filed as a counter affidavit, it is not in impugnation of the prayer sought in the petition. On the contrary, it is supportive of the stand put forth in the petition. It has been asseverated that the respondent no. 2 is a history-sheeter and number of cases have been lodged against him.

Coming to the case at hand, it is found that when a stand was taken that the 2nd respondent was a history sheeter, it was imperative on the part of the High Court to scrutinize every aspect and not capriciously record that the 2ndrespondent is entitled to be admitted to bail on the ground of parity. The issue that is presented before us is whether this Court can annul the order passed by the High Court and curtail the liberty of the 2nd respondent. We are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bed rock of constitutional right and accentuated further on human rights principle. It is basically a natural

right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilized society. It is a cardinal value on which the civilization rests. It cannot be allowed to be paralysed and immobilized. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. The society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from the member, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the Court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law.

It can be stated with absolute certitude that it was not a case of parity and, therefore, the impugned order clearly exposes the non-application of mind. That apart, as a matter of fact it has been brought on record that the 2nd respondent has been charge sheeted in respect of number of other heinous offences. The High Court has failed to take note of the same. Therefore, the order has to pave the path of extinction, for its approval by this court would tantamount to travesty of justice, and accordingly we set it aside.

Consequently, the appeal is allowed and the order passed by the High Court admitting the respondent no. 2 on bail is set aside. The respondent no. 2 is commanded to surrender to custody forthwith failing which it shall be the duty of the Investigating Agency to take him into custody immediately. We may hasten to clarify that what we have stated here is only to be read and understood for the purpose of annulling the order of grant of bail and they would have no bearing on the trial. The learned trial Judge shall proceed with the trial as per the evidence brought on record.

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6. Sec. 482, Cr.P.C.

Dinesh Diptimay@ Gudu Vs. State Of Orissa & Others. ***CRLMC No.403 of 2007, In the High Court Of Orissa : Cuttack***

Amitava Roy, C.J.

Date of Judgment-05.12.2014

Issue

Annul the Order.

The recorded facts disclose that on 13.12.2005 an FIR was lodged with the Khunta P.S. by opp. party no.2 herein alleging that on 7.12.2005 his son Shri Abhijit Behera on being called by the petitioner accompanied him in a scooty/motorcycle. At about 12.45 A.M. in the night while the informant was sleeping, Dillip Kumar Nayak the father of the petitioner and others informed him that his son (Abhijit) had fallen down from the scooty, whereafter he along with Dillip Nayak and his companions went in search of Abhijit and eventually found the scooty parked at Brundagadi Chhak. As the informant could not locate his son nearby, he continued with the search and in the next morning got the information that he (Abhijit) had been admitted in Khunta P.H.C. in seriously injured condition. The informant thereafter rushed to the hospital and on medical advice the victim was shifted to Baripada and eventually to Kalinga Hospital, Bhubaneswar. According to the prosecution, after four days, Abhijit having regained his consciousness the FIR was lodged. On the FIR, Khuta P.S. Case No.101 of 2005 under Sections 307/363/34 IPC was registered and on the conclusion of the investigation, charge sheet was laid against the petitioner and one Dillip Kumar Nayak under Section 279/337 IPC. Being informed of the report in the final form, as above, the informant (O.P.2) filed an application in the court of the learned S.D.J.M., Udala, reiterating the statements made in the FIR and adding further that the injured had identified opp. party nos.3 and 4 to be the accused persons and had also indicated the place where he was thrown in the drain near the roadside of Titia Chhak. It was averred as well that the accused persons were influential inhabitants of the locality and that the I.O. neither examined him nor other witnesses in order to favour the persons involved. The informant (O.P.2) prayed for an order for reinvestigation of the case. It is worthwhile to mention that in the said application, the informant had sated that about 1.30 A.M. in the night i.e. on 7/8.12.2005 while the search was on, he found opp. party nos. 3 and 4 near Naloya Chhak and that on his return after informing the Khunta P.S. over telephone, he had found that the petitioner sleeping in his

house. According to the informant, when the petitioner was asked about his son he did not reply. Noticeably, corresponding to Khunta P.S. Case No.101 of 2005, G.R. Case No.339 of 2005 had been registered.

Learned trial court by order dated 18.11.2006 recorded receipt of this application under Section 173, Cr.P.C. of the informant. On 23.12.2006, the learned trial court on a consideration of the application filed under Section 173 of the Code filed by the informant, the FIR, statements recorded by the police under Section 161 Cr.P.C. of Abhijit Behera and other papers relatable to the investigation held the view that there was prima facie evidence to take cognizance of the offences under Sections 307/363/34 IPC instead of those under Sections 279/337 IPC. By order of the even date i.e. 23.12.2006, the informant was directed to furnish the detailed address of Tutu Sahu and Nalini Naik (O.P. Nos.3 and 4) including their age by 16.1.2007 and also to produce the injury report of the victim by collecting the same from D.H.H., Baripada and Kalinga Hospital, Bhubaneswar. By order dated 16.1.2007, C.S.I. was directed to handover the case record to the Bench Clerk of the concerned court to issue summons to the accused persons for their appearance fixing 16.3.2007.

According to the police, it was a case of accident of the scooty as testified by the witnesses and the attendant circumstances in course whereof Abhijit Behera the son of informant fell down and received injury. The charge sheet did not involve in any way opp. party nos.3 and 4 in the incident. These opp. parties, however, were clearly implicated by the informant in his protest petition while asserting that it was a case under Sections 307/363/34 IPC. It can thus reasonably be concluded that the learned trial court vide order dated 23.12.2006 took cognizance of the offences under Sections 307/363/34 IPC in place of those under Sections 279/337 IPC by taking note of the contents of the protest petition filed by the informant. To reiterate thereby, the learned trial court also directed the informant to furnish the particulars of opp. party nos.3 and 4 along with their age together with the injury report pertaining to the victim. Thus, it cannot be held that the learned trial court in taking cognizance under Sections 307/363/34 IPC against the petitioner, opp. party no.3 and opp. party no.4 had limited its scrutiny to the materials pertaining to police investigation only, culminating in the submission of the charge sheet filed under Sections 279/337 IPC.

It is thus apparent from the preponderant judicial view adumbrated as above that even on the submission of a report by the police under Section 173(2) of the Code stating that no case had been made out against the accused, it is competent for the Magistrate to disagree with the said conclusion on a scrutiny of the materials collected in course of the investigation and either take cognizance of the offence alleged or direct further investigation under Section 156(3) of the Code. It is also amply clear that if such a course is adopted, the Magistrate is not bound to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of the offences under Section 190(1)(a) though it is open for him to do so.

However, if the protest petition is construed to be an original complaint and reliance is placed thereon by the Magistrate, he has to essentially follow the procedure as set out in Chapter XV of the Code enfolding Sections 200 to 203. In such an eventuality, therefore, the cognizance of the offence would be construed to be under Section 190(1)(a) of the Code for which the procedure enjoined under Chapter XV has to be unsparingly observed. In the case in hand, on a scrutiny of the materials on record as a whole, this Court is left with the impression that the learned trial court while taking cognizance of the offence under Sections 307/363/34 IPC against the petitioner and opp. party nos.3 and 4 had traversed beyond the materials collected in course of the investigation by the police and had consciously relied upon the statements made in the protest petition by way of additional materials without, however, adhering to the procedure prescribed under Chapter XV of the Code. This, in comprehension of the Court, is not permissible in view of the law laid down by the Hon'ble Apex Court as adverted to herein above.

In the above factual and legal premise, this Court is thus inclined to sustain the challenge laid to order dated 23.12.2006 taking cognizance of the offences under Sections 307/363/34 IPC against the petitioner and opp. party nos.3 and 4 and steps consequential thereto in G.R. Case No.339 of 2005. The order dated 23.12.2006 is thus set aside. The petition is allowed.

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Constitution of India

7. Article 226 Constitution of India &
Sec.7, Indian Contract Act

M/s. Chandaneswar Enterprises Ltd. Vs. Industrial Promotion & Investment Corporation of Orissa Ltd. ***W.P(C) No.17035 of 2007, In the High Court of Orissa: Cuttack.***

Amitava Roy, C.J. & A.K. Rath, J.

Date of Judgment-22.12.2014

Issue

The legality and propriety of the letter issued by the opposite party, whereby and where under the Earnest Money Deposit was forfeited.

By this writ petition under Article 226 of the Constitution of India, the petitioner calls in question the legality and propriety of the letter dated 24/25.1.2006 issued by the opposite party, vide Annexure-11, whereby and whereunder the Earnest Money Deposit (hereinafter referred to as "the E.M.D") amounting to Rs.1.00 lakh was forfeited. An ancillary prayer has also been made to refund the said E.M.D.

Bereft of unnecessary details, the short facts of the case of the petitioner is that the opposite party issued a sale notice in the month of January, 2005 in the local daily "the Samaj" inviting offers from the intending parties for sale of the assets including the land, building and machineries of the defaulting unit M/s. Eastland Impex Ltd., Barbaria in the district of Balasore in exercise of its power under Section 29 of the State Financial Corporation Act, 1951 (in short, "the Act"). The last date of the offer was fixed to 28.1.2005 at 5 P.M. The petitioner submitted its offer along with E.M.D of Rs.1.00 lakh on 22.1.2005. The price offered by the petitioner was Rs.100.00 lakhs. The petitioner being the highest bidder was called upon for negotiation by the Default Advisory and Disposal Committee (hereinafter referred to as "the DADC") of opposite party on 29.1.2005. After discussion, the petitioner submitted the modified offer on 29.1.2005, vide Annexure-3. On 22.2.2005, the petitioner sent a letter to get the modified offer approved by the Board of the opposite party. The opposite party in its letter dated 15.4.2005, vide Annexure-5, agreed to accept the modified offer, but imposed certain terms and conditions for such acceptance. Thereafter, the petitioner sent a letter dated 7.5.2005 to the opposite party to waive certain conditions, vide Annexure- 6. But then, by letter dated 6.7.2005, vide Annexure-7, the opposite party intimated the petitioner that since the offer made by the petitioner was not acceptable, the offer of the opposite party to sell the fixed assets of the said unit was cancelled.

The E.M.D was forfeited due to non-acceptance of terms and conditions of sale notice by the petitioner.

The sole point that arises for our consideration is as to whether the opposite party was justified in forfeiting the E.M.D. of Rs.1.00 lakh of the petitioner. The E.M.D was forfeited due to non-acceptance of terms and conditions of sale notice by the petitioner.

Section 7 of the Indian Contract Act, 1872 provides that in order to convert a proposal into a promise, the acceptance must be absolute, unqualified and without conditions. The offer and acceptance must correspond. The acceptance must match with the terms of the offer. When there

is a variation between the offer and acceptance even in respect of any material term, acceptance cannot be said to be absolute. It does not result in the formation of a contract. An acceptance does not convert a proposal into a promise, if it is qualified by conditions. Bearing in mind the aforesaid principles of law, we have given our anxious consideration to the issue involved. The sale notice, vide Annexure-1, stipulates that "if the offer is accepted by the Corporation and the offerer (s) does not come forward to accept the same, the amount deposited with the offer shall be forfeited. The amount deposited with the offer will be refunded without any interest in case the offer is not accepted by the Corporation."

We find that final offer made by the petitioner, vide Annexure-4, was not accepted in toto. The balance down amount of Rs.75.00 lakhs, which was offered by the petitioner to be paid in five annual instalments, was accepted by the opposite party with a condition that the deferred sale consideration of Rs.75.00 lakhs shall be treated as term loan and carry interest at the rate of 14% per annum (computed at quarterly rest) with a rebate of at the rate of 3% for timely payment. In the letter dated 7.5.2005, vide Annexure-6, the petitioner had categorically stated to modify and confirm the same, but then it was rejected by the opposite party, vide Annexure-7. The acceptance did not match with the terms of the offer. Thus the offer made by the petitioner was not accepted by the opposite party. Since the offer was not accepted by the opposite party, the question of forfeiture of E.M.D does not arise at all.

In the wake of the aforesaid, the letter dated 24/25.1.2006, vide Annexure-11, forfeiting the E.M.D. of the petitioner is quashed. The opposite party is directed to refund the said amount within a period of thirty days to the petitioner. The writ petition is allowed.

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8. Article 226 &227 Constitution of India.

Renuka Majhi and others Vs. State of Orissa and others. ***W.P. (C) No.10712 of 2009, In the High Court Of Orissa : Cuttack***

Amitava Roy, C.J. & A.K. Rath, J.

Date of Judgment-22.12.2014

Issue

Extra-ordinary and equitable jurisdiction.

The factual matrix of the case is as follows:-

Lochan Majhi is the father of the petitioners. By tampering the school admission register, he obtained a fake Scheduled Tribe Certificate and took unfair advantage of the same in securing employment in the Office of the Executive Engineer, Lower Suktel Dam Division, Bolangir. While the matter stood thus, show cause notice was issued by the opposite party no.3 enclosing therein a copy of the report of the Inspector of Police, Vigilance Cell, Bolangir to him and the petitioners. Thereafter, Lochan Mahi and the petitioners filed their show cause. In a detailed order dated 30.9.2006, the Committee came to hold that Lochan Majhi had tampered the

school register by changing the surname, name of the village, name of the father and caste. The Committee further held that the persons do not belong to Gond (Scheduled Tribe) and directed the Tahasildar, Kantabanjhi, opposite party no.9 to cancel the caste certificate issued to Lochan Majhi and the petitioners. A further direction was issued by the Committee to lodge the F.I.R. and to take appropriate action for removal of services of Lochan Majhi and petitioner no.1. Lochan Majhi challenged the order dated 30.6.2009 of the Committee before this Court in W.P.(C) No.10649 of 2009. A Division Bench of this Court in a well discussed judgment dated 30.4.2010 dismissed the writ petition. Thereafter, he filed Special Leave Petition No.17515 of 2010 before the apex Court. The same was also dismissed.

So far as petitioners 1 and 2 are concerned, they have completed their studies. Thereafter, they have been appointed in service. Let us see if their services can be protected by invoking the principle enunciated by the apex Court. Admittedly, the father of the petitioners by tampering school admission register obtained a fake scheduled caste certificate and took unfair advantage of the same in securing an employment in a Government office. The direction of the Committee to cancel the caste certificate has been upheld by the apex Court. The petitioner nos.1 and 2 have also entered into the Government service on the basis of the said certificate. Thus, they are disentitled from continuing in service. Since there is some confusion concerning the eligibility to the benefits flowing from Scheduled Caste or Scheduled Tribe status such as issuance of relevant certificates to persons claiming to be 'Koshtis' or 'Halba Koshtis' under the broadband of 'Halbas', protection of employment had been given to the petitioners therein with the rider that those persons will be adjusted in the general category and thereby rendering them ineligible to the further benefits.

The apex Court held that equity, sympathy and generosity have no place where the original appointment rests on a false caste certificate. A person who enters the service by producing a false caste certificate and obtains appointment to the post meant for a Scheduled Caste or Scheduled Tribe or OBC as the case may be, deprives a genuine candidate falling in either of the said categories of appointment to that post, and does not deserve any sympathy or indulgence of the Court.

The extraordinary and equitable jurisdiction of this Court under Article 226 cannot be exercised in favour of the persons who have approached this Court with a pair of unclean hands. Those persons, who have entered services through backdoor, must vacate the same through back door. The ratio of the judgment, *in Regional Manager, Central Bank of India (2008) 13 SCC 170,* applies with full force to the facts and circumstances of the present case and, accordingly, we dismiss the writ petition.

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9. Sec.15 read with Sec.12 Contempt of Courts Act, 1971.
Sec. 2 Cr.P.C.
Dhabala Prasad Pradhan Vs. Ramesh Chandra Panda. ***MANU/OR/0551/2014***
Dr. B.R. Sarangi, J.
Date of Judgment-04.12.2014
Issue

Role of Public persecutors and initiation of contempt proceeding.

The short facts of the case in hand is that the petitioner had purchased a piece of land comprising of an area of Ac.0.22 out of Plot No.1708 in mouza-Gopalpur in the district of Cuttack pertaining to Khata No. 285 through registered sale deed dated 08.02.2013/ 11.02.2013. In order to meet the expenses for treatment of his ischemic heart disease or cardiac ailments, the petitioner wanted to sale the land and get the consideration money. The intending purchaser disclosed that there is no chance of registration of the sale deed since the name of the petitioner does not find place in the Record of Rights. Therefore, the petitioner filed W.P.(C) No. 9997 of 2014 before this Court. While entertaining such application, this Court passed an interim order on 6.8.2014 directing that on presentation of sale deed along with the Record of Rights pertaining to the said land proposed to be sold along with any other documents indicating the petitioner's title over the land, the registering authority shall proceed to consider registration in accordance with law forthwith, but the opposite party refused to register the sale deed only on the ground that the name of the transferor is not reflected in the Record of Rights in respect of the land proposed to be alienated. Pursuant to the notice, opposite party no.4 in the writ petition (present contemnor herein) filed counter affidavit stating that the registering authority is not the authority to decide the title of the property of the vendee or vendor who are approaching for registration of the sale deeds.

Taking into consideration the proposition of law laid down by the apex Court and examining the contentions raised by the opposite party, it appears that there is deliberate and willful violation of the Court's order. Therefore, the opposite party is to be prosecuted under the provisions of the Contempt of Courts Act. But considering the unqualified apology tendered by him and also the undertaking furnished by him that he would not repeat the same in future, this Court does not want to award any punishment for violation of the Court's order dated 21.10.2014 while deprecating the conduct of the petitioner. Let us now consider the contention that the State Counsel should not represent a Government employee in a contempt proceeding, in this connection , it is necessary to know the meaning of "Public Prosecutor". "Public Prosecutor" has been defined under sub-Section (u) of Section 2 of the Code of Criminal Procedure as under: "Public Prosecutor" means any person appointed under Section 24 and includes any person acting under the directions of a Public Prosecutor." The principles of law is -

(i) It is open to the State to nominate its Advocates to appear for its officials in contempt proceedings.

(ii) The State is entitled to authorize a Law Officer to appear in cases where the contempt consists of disobedience of an order of the Court by an Officer or employee of the State.

(iii) Where the conduct of the concerned official is contumacious the Court can direct him to pay costs personally."

Keeping in view the law laid down by the apex Court, the Chief Secretary of the State of Orissa issued a letter on 6.121.2000 laying down the guidelines to defend officers/ employees of the State Government in contempt proceeding. If the terms of engagement of the Additional Government Advocate indicates that they have been appointed as Public Prosecutor, they cannot appear in a contempt proceeding for or on behalf of the contemnor, who may be a Government Servant for his willful and deliberate violation of the Court's order and the State exchequer will not be burdened for the errant act of the officer, who has got scanty regards to the orders passed by this Court, all expenses have to be borne by the contemnor himself and he should defend the case on his own.

In view of the aforesaid facts and circumstances, while dropping the proceeding initiated against the petitioner pursuant to the unqualified apology tendered by opposite party-contemnor, this Court directs the Chief Secretary, Odisha to intimate all concerned that Government exchequer will not be burdened to bear the expenses to defend the errant officers in contempt proceedings by the State Counsel where violation of the order is willful and deliberate. With the aforesaid observation and direction, the contempt proceeding is dropped.

Cases Referred-

1. In Haryana State Adhyapak Sangh and others, v. State of Haryana and others, AIR 1990 SC 968
2. Agra and others, Vs. Rohtas Singh and others, AIR 1998 SC 685

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