

REVIEW OF CASE LAWS ON C.P.C, 2013 (A)

I N D E X

SL.NO	CASE	SUBJECT / ISSUE	PAGE
1.	Ayaaubkhan Noorkhan Pathan v. State of maharashtra and ors.,(AIR 2013 SC 58)	C.P.C., O.18, R 4.	1
2.	Smt. Urmilla devi & ors. V. Debts Recovery Appellate Tribunal,Allahabad & Ors. AIR 2013 Allaha. 11,	C.P.C., O.1 ,R. 10	1-2
3.	Valiji Shamji Chheda & ors. V. Bhuderbhai Bajidas Patel & ors. AIR 2013 Bom. 1	C.P.C.,O.36 ,R. 1	2
4.	State of Gujarat and anr. v. Gujarat Revenue Tribunal Bar Association and Anr. AIR 2013 SC 107,	C.P.C.,sec-3	2-3
5.	Ratangiri Gas and Power Pvt. Ltd. v. RDS Projects Ltd. and ors, AIR 2013 SC 200	C.P.C., O.23, R. 1	3
6.	Banka Bihari Mohapatra V. Gitagobinda Patra and others, 2013 (1) CLR 126	C.P.C., O 6, R 2	3-4
7.	Rajan Purohit & Ors. v. Rajasthan University of Health Science & ors., 2013 (1) CLR (SC) 134	C.P.C., Sec. 11	4
8.	Satya Narayanan v. State Rep. by Inspector of Police,(2013) 54 OCR (SC) 218	Circumstantial Evidence	4-5
9.	State of Maharashtra & Ors. etc.etc. V. Saeed Sohail Sheikh Etc. Etc. (2013) 54 OCR (SC) 244	Sec.167 & 309	5-7
10.	Fatima Begum vs Usman Mohammad 115 (2013) CLT 42	C.P.C.,O 7, R 11	7-8
11.	Smt.Rita Rani Mishra And Three ... vs Sachidananda Badhei And Six ors. 115 (2013) CLT 81	O 1, R 10	8
12.	Kumari Rojallin Nayak v. State of Orissa & ors.,AIR 2013 Ori 1,	Const. Arts. 21,226	8-9

REVIEW OF DECIDED CASES ON CIVIL PROCEDURE CODE (2013-JAN.)

1. O.18,R 4.

Ayaaubkhan Noorkhan Pathan v. State of maharashtra and ors. AIR 2013 SUPREME COURT 58

DR.B.S.CHAUHAN AND JAGDISH SINGH KHEHAR, JJ.

ISSUE 1

Not only should the opportunity of cross examination be made available , but it should be effective cross- examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity ,it cannot be held that the matter has been decided in accordance with law, as cross- examination is an integral part and parcel of the principles of natural justice.

O.19 R 3

ISSUE 2

Affidavit - Not evidence

Affidavits are not included within the purview of the definition of “evidence” in S.3 of the Evidence Act, and the same can be used as “evidence” only if ,for sufficient reasons ,the court passes an order under o. 19 of the Code of Civil Procedure,1908.Thus ,the filing of an affidavit of one’s own statement, in one’s own favour ,cannot be regarded as sufficient evidence for any Court or Tribunal ,on the basis of which it can come to a conclusion as regards a particular fact – situation. However , in a case where the deponent is available for cross – examination , and opportunity is available for cross – examination him, the same can be replied upon .Such view ,stands fully affirmed particularly ,in view of the amended provision of O.18 ,Rules 4 and 5,CPC.

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2.O.1 R.10

Issue

Necessary party

Smt. Urmilla devi & ors. V. Debts Recovery Appellate Tribunal, Allahabad & Ors.(AIR 2013 Allha. 11)

DILIP GUPTA, J.

Transfer Application before DRT filed by creditor bank – During pendency of application, properties of borrower firm auctioned in proceeding for recovery of sales tax

dues –Auction purchaser aware of Transfer Application as he was party in objections filed by Bank before Commissioner under Zamindari Abolition Rules -Bank had impleaded borrower firm and its partners –Subsequent purchasers of property from auction purchaser , not necessary party in Transfer Application.

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3. O.36 ,R. 1

Issue

Valiji Shamji Chheda & ors. V. Bhuderbhai Bajidas Patel & ors. (AIR 2013 Bom 1)

S.J. KATHAWALLA , J.

Interim relief

To maintain status quo as of date in regard to suit property – Suit by partner of partnership firm regarding property of firm – Plaintiff making out prima facie case - Balance of Convenience also in their favour – Defendants directed to maintained status quo as of date in regard to suit property **Kalawati Kotal alias Chamrani v. Shokilal and others. (AIR 2013 Chh. 12)**

ABHAY MANOHAR SAPER, J. S.96 Issue Jurisdiction of Appellant Court –Issue of res judicata was not raised by parties – No issue of res judicata framed by Trial Court –Appellate Court Suo moto invoking and applying principles of res judicata -Not proper – Unless issue of res judicata raised by parties ,Court has no jurisdiction to answer issue of res judicata.

4. Sec-3

State of Gujarat and anr. v. Gujarat Revenue Tribunal Bar Association and Anr. AIR 2013 SC 107

DR.B.S.CHAUHAN AND FAKKIR MAHAMED IBRAHIM KALIFULA, JJ

ISSUE 1

Court tribunal –Distinction –Tribunals are created to reduce burden of courts – Perform quasi judicial function –And can exercise only certain powers under civil and criminal Procedure Codes –Fact that tribunal is headed by judicial officer does not make it Court.

ISSUE 2**sec-3**

Court and tribunal –Tribunal whether Court – Test to determine is whether High Court exercises revisional jurisdiction over orders of tribunal.

ISSUE 3**Ss.100 ,115**

Appellate and revisional jurisdictions –Distinction – Appellate jurisdiction gives right to aggrieved party to complain to higher forum –Where as revisional jurisdictions casts responsibility on higher forum to keep subordinate forum within limits of law.

5. O.23, R. 1

Ratangiri Gas and Power Pvt. Ltd. v. RDS Projects Ltd. and ors. AIR 2013 SC 200

T.S. THAKAR AND Mrs GYAN SUDHA MISRA, JJ.

ISSUE

Withdrawl of petition – Tenability of Second petition for same relief - Petition challenging rejection of petitioners bid and cancellation of entire tender process – Petition withdrawn – Permission to file fresh petition obtained if petitioner is excluded from competing in fresh tender process – Permission so granted permits petitioner only to seek redress against its exclusion from fresh tender process – Not to re-agitate issue regarding annulment of tender process – Second petition filed seeking relief against petitioner’s exclusion from fresh tender notice and also relief against rejection of its earlier bid and cancellation of bid process – Not maintainable as regards latter relief.

6. O 6, R 2

Banka Bihari Mohapatra V. Gitagobinda Patra and others.2013 (1) CLR 126

B.N.MAHAPATRA,J.

ISSUE

Pleadings –What it should contain –“Material Facts” –What constitute.

Order VI, Rule 2, CPC postulates that every pleading shall contain, and contain only, the statement in concise form of the material facts on which a party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

“Material facts” are primary or basic facts which must be pleaded by the plaintiff or defendant in support of the case set up by him either to prove his cause of action or defence.

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7. S. 11

Rajan Purohit & Ors. v. Rajasthan University of Health Science & Ors. 2013 (1) CLR (SC) 134

A.K.PATTANAYAK V.SWATANTER KUMAR ,JJ .

Civil Appeal no.8142 of 2011 with Civil Appeal no.8143 of 2011, Civil Appeal no.8144 of 2011, Civil Appeal no.6210 of 2012,(Arising out of SLP (C) No.24967 of 2011 and Civil Appeal no.6211 of 2012(Arising out of SLP (C) No.25353 of 2011.(D.O.J-30/08/2012)

ISSUE

Res judicata –Order of single Judge of High Court attaining finality –Issue now raised not before the single Judge –Principle of Res judicata not attracted.

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8. Circumstantial Evidence

Satya Narayanan v. State Rep. by Inspector of Police (2013) 54 OCR (SC) 218

P.Sathasivam and Ranjan Gogoi , JJ.

ISSUE

Guidelines for appreciation restated

In **Hanumant vs. State of Madhya Pradesh, 1952 SCR 1091** the nature, character and essential proof required in a criminal case that rests on circumstantial evidence alone has been laid down. This case has been uniformly followed and applied by this Court in a large number of later decisions up to this date.

In **Sharad BirdhiChand Sarda vs State Of Maharashtra ,(1984 SCC (4) 116)** , a bench of three Judges of this Court , after analyzing various aspects, laid down certain cardinal principles for conviction on the basis of Circumstantial evidence. This Court laid down the following conditions must be fulfilled before a case against an accused can be said to be fully established :

“153...(1)the circumstances from which the conclusion of guilty is to be drawn should be fully established.....

(2) the facts so established should be consistent only with the hypothesis of the guilty of the accused , that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”

ISSUE

Criminal Trial – Hostile Witness – Evidence of – Need not be rejected in toto – Replied upon to the extent supported by prosecution.

Criminal Trial - Circumstantial Evidence – Motive - In a case based on Circumstantial evidence, motive assumes importance.

In the case of circumstantial evidence, motive also assumes significance for the reason that the absence of motive in the case of circumstantial evidence, would put the court on its guard and cause it to scrutinize each piece of evidence closely in order to ensure that suspicion, omission or conjecture do not take the place of proof. In the case on hand, the prosecution has demonstrated that initially, the deceased entered the Ashram in order to assist the devotees and subsequently became one of the Trustees of the Trust and slowly developed grudge with the appellants. PWs 35 and 36, sister and brother of the deceased Leelavathi deposed that since then she became a Trustee, there was a dispute with regard to the Management of the said Trust.

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9. Section 167 and 309

State of Maharashtra & Ors. etc.etc. V. Saeed Sohail Sheikh Etc. Etc. (2013) 54 OCR (SC) 244

T.S. THAKUR AND FAKKIR MOHAMED IBRAHIM KALIFULLA ,JJ.

ISSUE

Transfer of prisoners – Permissible only with the permission of the Court warranting remand to custody.

Reference may also be, at this stage made, to Section 309 of the Code which, inter alia, empowers the court after taking cognizance of an offence or commencement of the trial to remand the accused in custody in cases where the court finds it necessary to postpone the commencement of trial

or inquiry. The rationale underlying both these provisions is that the continued detention of the prisoner in jail during the trial or inquiry is legal and valid only under the authority of the Court/Magistrate before whom the accused is produced or before whom he is being tried. An undertrial remains in custody by reasons of such order of remand passed by the concerned court and such remand is by a warrant addressed to the authority who is to hold him in custody. The remand orders are invariably addressed to the Superintendents of jails where the undertrials are detained till their production before the court on the date fixed for that purpose. The prison where the undertrial is detained is thus a prison identified by the competent court either in terms of Section 167 or Section 309 of the Code. It is axiomatic that transfer of the prisoner from any such place of detention would be permissible only with the permission of the court under whose warrant the undertrial has been remanded to custody.

ISSUE

Administration of justice – Judicial propriety - Judicial enquiry – Natural Justice –Principles stated

That leaves us with the only other aspect namely whether the High Court was justified in directing the Government to hold an inquiry against those responsible for using excessive force and for dereliction of duty by the medical officer. As noticed earlier by us the said direction has been issued entirely on the basis of the report submitted by the Sessions Judge. That report besides being preliminary is flawed in many respects including the fact that the same does not comply with the basic requirement of a fair opportunity of hearing being given to those likely to be affected. It is true that the statements of some of the jail officials have also been recorded in the course of the inquiry but that is not enough. Those indicted in the report were entitled to an opportunity to cross-examine those who alleged misconduct against them. Not only that the Sessions Judge has not named the officers responsible for the alleged use of excessive force which was essential for any follow up or further action in the matter. The Sessions Judge has observed:

“I am avoiding naming the officers of the jail against whom allegations of use of force are made as I am expected to give findings only on the aforesaid five points and as officers who took part in the action, officers who gave orders of or the officers who did not oppose the action cannot be segregated.”

So, also the report clearly states the officials concerned have not been allowed to examine any witness although a request was made by them to do so. Such being the position, some of the

observations made by the High Court that give an impression as though the misdemeanor of the jail officers had been proved, do not appear to be justified. It was at any rate not for the High Court to record a final and authoritative finding that the force used by the jail authorities was excessive or that it was used for any extraneous purpose. It was a matter that could be determined only after a proper inquiry was conducted and an opportunity afforded to those who were accused of using such excessive force or abusing the power vested in them. Consequential directions issued by the High Court in directing the State Government to initiate disciplinary inquiry against all the officers involved in the incident were, therefore, premature. We say so because the question whether any disciplinary inquiry needs to be instituted against the jail officials would depend upon the outcome of a proper investigation into the incident and not a preliminary enquiry in which the Investigating Officer, apart from statements of the respondents, makes use of information discreetly collected from the jail inmates. The report of the Sessions Judge could in the circumstances provide no more than a prima facie basis for the Government to consider whether any further investigation into the incident was required to be conducted either for disciplinary action or for launching prosecution of those found guilty. Beyond that the preliminary report could not in view of what we have said above serve any other purpose.

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10. O 7, R 11

Fatima Begum vs Usman Mohammad. 115 (2013) CLT 42

B.N.Mahapatra,J.

ISSUE

Whether question of law not raised before the lower Court in the petition filed u/order 7 ,r 11 CPC canbe raised in a revision petition? –Point of law which goes to the root of the case can be raised at any time –Even if a point of law was not raised in the court below – that does not preclude the parties to raise the same before the Appellate Court or revision Court for the first time.

So far as question No.(v) (Whether the question of law which has not been raised before the Lower Court in the petition filed under Order 7, Rule 11, CPC can be raised before the High Court in a revision petition?), is concerned, the law is no more res-integra that a point of law which goes to the root of the case can be raised at any time. Therefore, even if a point of law was not raised in the Court below that does not preclude the parties to raise the same before the Appellate Court or revision Court for the first time. (See Sk. Jamaitullah and others vs. Sk. Jayakatullah and others, 1996 (1) OLR 98).

In view of the above settled principles of law, the learned Civil Judge (Sr. Division), Berhampur is not justified to hold that the suit is not barred by law and the suit discloses the cause of action. Therefore, the suit filed by plaintiff-opposite party No.1 is hit by Order 7, Rule 11 (a) and (d) of CPC and the petition filed under Order 7, Rule 11, CPC deserves to be allowed. Hence, the impugned order dated 23.04.2011 (Annexure-5) passed by the Civil Judge (Sr. Division), Berhampur is set aside.

In the result, the Civil Revision Petition is allowed. No order as to costs.

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11. O 1, R 10

Smt.Rita Rani Mishra And Three ... vs Sachidananda Badhei And Six ors. 115 (2013) CLT 81

C.R. Dash, J.

ISSUE

Title (eviction) suit – Impleadment as Defendants –Petition allowed with direction to Plaintiff to take necessary steps for necessary steps for adding the present Petitioners as Defendants –Petition allowed with direction to Plaintiff to take necessary steps for adding the present Petitioners as Defendants
Written Statement filed was refused to be accepted –Writ petition –Irrespective of the nomenclature or the provisions , under which a person has to take the character on the ground of which he has been impleaded in their independent or personal capacity – They have been impleaded only on the ground that they are left out legal representatives of deceased Defendant No. 1 –They can not depart from the pleadings filed by the deceased Defendant & they cannot claim a right to file a contrary pleading on the basis of individual & independence title – No interference.(2012 (II) OLR 739),(AIR 1995 SC 1653).

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12. CONSTITUTION OF INDIA .ARTS.21,226

Kumari Rojallin Nayak v. State of Orissa & ors. AIR 2013 ORISSA 1

V.GOPAL GOWDA, C.J. AND S.K.MISHRA,JJ.

ISSUE

CUSTODIAL DEATH

Compensation – Death of jail inmate due to self strangulation –Duty of jail authorities to ensure safety and security of inmates of jail –only when there is negligence on their part such incident could take place -Though incident was termed as suicide foul play could not be ruled out –Thus ,death being custodial death ,authorities would be responsible for same – Authorities being employees of State, State would be vicariously liable to pay compensation to legal heir of deceased.

It is duty of the jail authorities to ensure safety and security of the inmates of the jail. Only when there is negligence on their part, such an incident could take place. Though the authorities have termed the incident as a suicide ,foul play cannot be ruled out. Therefore, this court comes to the conclusion that it is a case of custodial death and the authorities are responsible for the same. The authorities being the employees of the State of Orissa, the State is vicariously liable for the death of the aforesaid deceased Ganeswar Nayak.

Keeping in view the aforesaid proposition of law, this court comes to the conclusion that on the fact of the case ,death of the deceased Ganeswar Nayak is a custodial death and the jail authorities are responsible for the same. As such , the State is liable to pay compensation to the petitioner. Keeping in view in entirety of the facts , we assess compensation of Rs 3,00,000/-.

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