O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2015

(*JANUARY*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY
MONTHLY REVIEW OF CASES ON
CIVIL, CRIMINAL & OTHER LAWS, 2015 (JANUARY)

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2. Sec.100

Laxmidevamma Vs. Ranganath. ***MANU/SC/0055/2015***

V. Gopala Gowda & R. Banumathi, JJ.

Date of Judgment- 20.01.2015

Issue

Concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse.

Relevant Extract

This appeal arises out of the judgment dated 27.9.2012 passed by the High Court of Karnataka in R.S.A. No. 297/2007, wherein the High Court allowed the appeal in part, modifying the concurrent judgment and decree passed by the courts below and holding that the Appellants-Plaintiff's are entitled to compensation for the space earmarked for road as and when the competent authority acquires the same.

We have carefully considered the rival contentions and perused the judgments of the courts below as well as the High Court and the materials on record. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that Plaintiff's have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation of evidence. While so, the High Court proceeded to observe that the first Plaintiff has earmarked the 'A' schedule property for road and that she could not have full fledged right and on that premise proceeded to hold that declaration to Plaintiff's right cannot be granted. In exercise of jurisdiction Under Section 100 Code of Civil Procedure, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings

recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained.

In the result, the appeal is allowed, impugned judgment in R.S.A. No. 297/2007 dated 27.9.2012 passed by the High Court of Karnataka is set aside and the judgment passed by the Addl. Civil Judge (Jr. Divn.), Chikmagalur as confirmed by the lower appellate court is restored. Parties are left to bear their own costs. Hon'ble Mrs. Justice R. Banumathi pronounced the judgment of the Bench comprising Hon'ble Mr. Justice V. Gopala Gowda and Hon'ble Mrs. Justice R. Banumathi. The appeal is allowed in terms of the Signed Reportable Judgment.

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3. Sec. 100 , Civil Procedure Code
Sec. 50 , Evidence Act

Sanatan Das and Ors. Vs. Ahalya Dei and Ors. ***MANU*/OR/0019/2015**
Amitava Roy, C.J. & Dr. Akshaya Kumar Rath, J.
Date of Judgment- 28.01.2015
Issue
Second Appeal
Relevancy of opinion by conduct.

Relevant Extract

On the basis of inter se pleadings of the parties, the learned trial court struck seven issues, out of which, issue Nos. 3 and 4 are vital for deciding the lis, which are as follows:-

Issue No. 3.

Is Sanatan Das adopted son of Binod Das and if so, whether it is valid or not?

Issue No. 4.

Are plaintiff, Ahalya and defendant No. 1, Padma the daughters of Rambha? The trial court, after marshalling on facts and scrutiny of evidence on record, concluded that defendant No. 23 is not the adopted son of Binod and plaintiff and defendant No. 1 are the daughters of Rambha. Aggrieved by and dissatisfied with the judgment and decree passed by the trial court, defendant No. 23 and defendant Nos. 7 to 9 filed F.A. No. 267 of 1988 before this Court. The learned Single Judge confirmed the finding of the learned trial court to the effect that plaintiff and defendant No. 1 are daughters of Rambha and are entitled to succeed to the properties of Bholanath and Jema, but reversed the

finding of the trial court in respect of issue No. 3 holding inter alia that Sanatana is the adopted son of Binod. Still aggrieved, defendant Nos. 23 and 7 to 9 filed this Letters Patent Appeal. We have heard Mr. G. Mukharjee, learned counsel for the appellants and Mr. G.D. Kar, learned counsel for the respondents. In course of hearing, Mr. G.D. Kar, learned counsel for the respondents submitted that he does not challenge the finding of the learned Single Judge in respect of Issue No. 3. Thus, the only issue, which survives for our consideration, is as to whether plaintiff and defendant No. 1 are the daughters of Rambha.

Learned Single Judge relied on evidence of P.W.1, P.W.4 and D.W.10 to come to a conclusion that plaintiff and defendant No. 1 are the daughters of Rambha. According to Mr. Mukharjee, the evidence of D.W.10 falls short of requirement of Section 50 of the Evidence Act. Section 50 of the Evidence Act is quoted hereunder:-

"50. Opinion on relationship, when relevant. - When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact". The scope of Section 50 of the Evidence Act has been succinctly stated by the Supreme Court in Dolgobinda Paricha Vrs. Nimai Charan Misra and others, MANU/SC/0188/1959 : AIR 1959 SC 914. Interpreting Section 50 of the Evidence Act, the Supreme Court held:-

"On a plain reading of the section it is quite clear that it deals with relevancy of a particular fact. It states in effect that when the Court has to form an opinion as to the relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. The two illustrations appended to the section clearly bring out the true scope and effect of the section. It appears to us that the essential requirements of the section are - (1) there must be a case where the court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of

relationship; in the other words, the person must fulfill the condition laid down in the latter part of the section. If the person fulfils that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one things on a particular question. Now, the "belief' or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion. What the section says is that such conduct or outward behaviour as evidence of the opinion held is relevant & may, therefore, be proved. We are of the view that the true scope and effect of section 50 of the Evidence Act has been correctly and succinctly put in the following observations made in Chandu Lal Agarwala v. Khalilar Rahman, MANU/WB/0037/1942 : ILR (1942) 2 Cal 299 at p.309 (AIR 1943 Cal 76 at p.80)

"It is only 'opinion as expressed by conduct' which is made relevant. This is how the conduct comes in. The offered item of evidence is 'the conduct', but what is made admissible in evidence is 'the opinion', the opinion as expressed by such conduct. The offered item of evidence thus only moves the Court to an intermediate decision: its immediate effect is only to move the Court to see if this conduct establishes any 'opinion' of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer 'the opinion', the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the 'opinion'. When the conduct is of such a tenor the Court only gets to a relevant piece of evidence, namely, 'the opinion of a person'. It still remains for the Court to weigh such evidence and come to its own opinion as to the 'factum probandum'- as to the relationship in question." We also accept as correct the view that S. 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship: 'Lakshmi Reddi v. Venkata Reddi, MANU/PR/0061/1937 : AIR 1937 PC 201."

It was further held:-

"7.....If we remember that the offered item of evidence under Section 50 is conduct in the sense explained is conduct in the sense explained above, then there is no difficulty in holding that such conduct or outward behaviour must be proved in the manner laid down in Section 60; if the conduct relates to something which can be seen, it must be proved by the

person who saw it; if it is something which can be heard, then it must be proved by the person who heard it; and so on. The conduct must be of the person who fulfils the essential conditions of Section 50, and it must be proved in the manner laid down in the provisions relating to proof. It appears to us that that portion of Section 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of Section 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, maybe proved either by the testimony of the person himself whose opinion is evidence under Section 50 or by some other person acquainted with such facts , the testimony is in each case direct within the meaning of Section 60. This, in our opinion, is the true inter-relation between Section 50 and Section 60 of the Evidence Act."

It is settled principle of law that a judgment in rem like judgments passed in probate, insolvency, matrimonial or guardianship or other similar proceedings, is admissible in all cases whether such judgments are inter partes or not. It is further held that judgment in rem like judgment passed in probate is admissible in all cases where such judgments are inter partes or not. In view of the same, the learned Single Judge is right in relying on the judgment in probate case and admission of defendant Nos. 6 and 24 in probate case. The observation in the probate proceeding regarding relationship is admissible under Section 13 of the Evidence Act. Except bald denial made by defendant No. 23 in the written statement and evidence, there is no contrary material. The learned trial court as well as the learned Single Judge on a threadbare analysis of the pleadings of the parties and evidence on record came to hold that plaintiff and defendant No. 1 are the daughters of Rambha. We affirm the finding of the learned Single Judge in respect of Issue No. 4.

The learned Single Judge has decided the rights of the parties and issued directions so far as respective shares of the parties. We see no reason to differ with the same and concur with the said view. On taking a holistic view of the matter, we are on ad idem that the appeal, sans any merit, is liable to be dismissed. Accordingly, the appeal is dismissed. No Costs.

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4. Order 1 Rule 10

Kuldeep Kumar Dubey Vs. Ramesh Chandra Goyal. **MANU/SC/0051/2015**

T.S. Thakur & A.K. Goel, JJ.

Date of Judgment- 21.01.2015

Issue

The question for consideration is whether the suit filed by the father of the Appellants in respect of property owned by Appellants Nos. 1 and 2 could be held to be not maintainable even when the Appellants were added as Plaintiffs as heirs of their father who died during pendency of the suit and whether description of the Appellants who are owners as heirs instead of owners in their own right will be a case of mere "error, defect or irregularity" not affecting the merits or jurisdiction of the Court which did not affect the maintainability of the suit.

Relevant Extract

Raj Kumar was owner of the suit property who died on 4th February, 1994. Shiv Kumar Dubey, brother of Raj Kumar filed the suit for eviction of the respondent-tenant in his capacity as heir of Raj Kumar on the ground of non payment of rent on 24th April, 1995. During pendency of the suit, Shiv Kumar Dubey died on 11th August, 1996 and the appellants Kuldeep Kumar and Pradeep Kumar sons of Shiv Kumar Dubey and Smt. Dayawati widow of Shiv Kumar Dubey were substituted as plaintiffs being his heirs. The suit was contested by the tenant (who has also died during pendency of the proceedings in this Court and who has been substituted by his legal heirs) by filing a written statement admitting that Raj Kumar was the owner and Shiv Kumar was his brother and heir apart from other heirs. It was stated that rent was deposited in Court. Sister of Raj Kumar, an heir of Raj Kumar, was also a necessary party. It may be mentioned that Raj Kumar had executed Will in favour of appellants Kuldeep Kumar and Pradeep Kumar but the said appellants were shown in cause title only as heirs of Shiv Kumar and not as owners. No objection was, however, raised by the tenant on that account. The trial Court framed the following issues :

"1. Whether the plaintiff is the landlord of the defendant?

2. Whether the defendant has defaulted in payment of rent and has not made the payment of rent from 01.06.1993 and the computed amount of Rs.830, of water tax?

3. Whether the disputed shop is on rent of Rs.75/- per month including house tax and water tax?

4. Whether the suit is bad for the non-joinder of necessary parties?

5. Whether defendant is entitled to get the benefit of section 20(4) Uttar Pradesh Rent Act?
6. Whether the eviction notice dated 22.07.1995 is against law?"

Issue Nos. 1 and 4 were decided in favour of the plaintiffs and against the defendant. It was observed that the defendant had not mentioned the name of any other heir of Raj Kumar in the written statement. Issue Nos. 2 and 5 were also decided against the defendant. It was held that the defendant had defaulted in payment of rent from 1st June, 1993 and was not entitled to benefit under Section 20(4) of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. Under Issue No.3, the rate of rent was held to be Rs.75/-per month, excluding the house tax and the water tax. Under Issue No.6 it was held that the tenancy was validly terminated. Accordingly, the trial Court passed a decree for eviction and for payment of rent on 8th December, 1998.

We have heard learned counsel for the parties. Learned counsel for the appellants submitted that it is undisputed that appellants Nos.1 and 2 are the sole owners of the property in question. It is not disputed that they were substituted as plaintiffs on the death of Shiv Kumar before the trial Court itself. It is also not disputed that they could maintain the suit for eviction. Thus on admitted facts, only defect pointed out is of formal nature in description without, in any manner, affecting the merits or the jurisdiction of the Court. Such irregularity could have been corrected by the Court under Order 1 Rule 10 and can be corrected even at this stage unless the defendant is in any manner prejudiced. No principle or authority has been brought to our notice which could affect the maintainability of the suit merely on account of wrong description which did not in any manner cause prejudice to the defendant, particularly when no such objection is shown to have been raised before the trial Court.

In our view, the District Judge is, thus, not justified in reversing the decree of the trial Court on such a technicality which did not in any manner affect the merits of the case. Section 99 of the Code of Civil Procedure, 1908 provides as under : "99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction:

No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder [or non-joinder] of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court: [Provided that nothing in this section shall apply to non-joinder of a necessary party.]

Thus, the High Court also erred in upholding the order of the District Judge. Accordingly, we allow this appeal, set aside the impugned orders of the High Court and the District Judge and restore the order of the trial Court dated 8th December, 1998 in JSCC No.5 of 1995 passed by the Civil Judge, (J.D.), Hasanpur, Moradabad. No costs.

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5. Order 41 Rule 22 & 31

Shasidhar Vs. Ashwini Uma Mathad. **MANU/SC/0025/2015**

Fakkir Mohamed Ibrahim Kalifulla & Abhay Manohar Sapre, JJ.

Date of Judgment- 13.01.2015

Issue

Partition - Separate possession - Disposal of appeal - Validity thereof - Section 96 and Order XLI Rule 31 of Civil Procedure Code, 1908 - Trial Court held that Plaintiffs were entitled for partition and separate possession of their share in suit properties - Division Bench of High Court disposed of Defendants' appeal and cross objections and modified decree of Trial Court to detriment of Defendants.

One Basavantayya Revanayya Mathad was married to Shantakka Mathad (Defendant No. 2). Out of this wedlock, three children were born-one son Shashidhar (Defendant No. 1) and two daughters-Rajeshwari (Died in 2003) and-Gayatri (Died in 2004)-Defendant No. 3. Shashidhar was married to Uma and out of this wedlock, three daughters were born-Ashwini (Plaintiff No. 1), Nivedita (Plaintiff No. 2) and Puja who was given in adoption to Uma's sister. Shashidhar divorced to Uma and remarried to Manjula (Defendant No. 4). Out of this second marriage, two daughters were born-Aishwarya (Defendant No. 5) and Vaishnavi (Defendant No. 6). Basavantayya had extensive properties. On 21.07.1991, Basavantayya died leaving behind him

the aforementioned members of his family. On his death and also on the death of his one unmarried daughter Rajeshwari, disputes arose between his legal representatives regarding their respective shares in the properties and also regarding ownership of some members of his family in relation to certain properties standing in the name of members of his family. The disputes unfortunately could not be settled amicably which led to filing of civil suit by the daughters of Defendant No. 1 from his first wife-Uma (deceased) against the other members of the family, i.e., their father, step-mother and step-sisters for determination of their respective shares, partition by meets and bounds and separate possession in the suit properties held and possessed by the members of the family of late Basavantayya. The Defendants contested the civil suit by denying the Plaintiffs' claim. The trial Court framed issues. Parties adduced evidence.

By judgment and decree dated 10.02.2010, the trial Court partly decreed the Plaintiffs' suit and accordingly passed preliminary decree in relation to the suit properties. It was held that Plaintiffs are entitled for partition and separate possession of their 1/6th share each in some properties specified in the decree whereas 1/10th share each in other suit properties as specified in the decree. Dissatisfied with the preliminary decree, the Defendants filed first appeal being R.F.A. No. 3052 of 2010 and the Plaintiffs filed cross objections being R.F.A. CROB No. 103 of 2011 Under Order XLI Rule 22 of the Code of Civil Procedure, 1908 (in short "the Code"). This is how the entire preliminary decree became the subject-matter of first appeal filed by the Defendants. By impugned judgment and order dated 06.12.2012, the Division Bench of the High Court disposed of the appeal and cross objections and modified the judgment and decree of the trial court to the detriment of

the Defendants. It is against this judgment and order, the Defendants have filed this appeal by way of special leave.

How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 Code of Civil Procedure deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the Appellant is entitled.

The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings.

In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned

judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law.

In our considered opinion, the High Court did not deal with any of the submissions urged by the Appellants and/or Respondents nor it took note of the grounds taken by the Appellants in grounds of appeal nor took note of cross objections filed by Plaintiffs Under Order XLI Rule 22 of the Code and nor made any attempt to appreciate the evidence adduced by the parties in the light of the settled legal principles and decided case laws applicable to the issues arising in the case with a view to find out as to whether the judgment of the trial Court can be sustained or not and if so, how, and if not, why? We may consider it apposite to state being a well settled principle of law that in a suit filed by a co-sharerer, coparcener, co-owner or joint owner, as the case may be, for partition and separate possession of his/her share qua others, it is necessary for the Court to examine, in the first instance, the nature and character of the properties in suit such as who was the original owner of the suit properties, how and by which source he/she acquired such properties, whether it was his/her self-acquired property or ancestral property, or joint property or coparcenery property in his/her hand and, if so, who are/were the coparceners or joint owners with him/her as the case may be. Secondly, how the devolution of his/her interest in the property took place consequent upon his/her death on surviving members of the family and in what proportion, whether he/she died intestate or left behind any testamentary succession in favour of any family member or outsider to inherit his/her share in properties and if so, its effect. Thirdly whether the properties in suit are capable of being partitioned effectively and if so, in what manner? Lastly, whether all properties are included in the suit and all co-sharerers, coparceners, co-owners or joint-owners, as the case may be, are made parties to the suit? These issues, being material for proper disposal of the partition suit, have to be answered by the Court on the basis of family tree, inter se relations of family members, evidence adduced and the principles of law applicable to the case.

Being the first appellate Court, it was, therefore, the duty of the High Court to decide the first appeal keeping in view the scope and powers conferred on it Under Section 96 read with Order XLI Rule 31 of the Code

mentioned above. It was unfortunately not done, thereby, causing prejudice to the Appellants whose valuable right to prosecute the first appeal on facts and law was adversely affected which, in turn, deprived them of a hearing in the appeal in accordance with law.

It is for these reasons, we are unable to uphold the impugned judgment of the High Court. The appeal thus succeeds and is, accordingly, allowed. The impugned judgment is set aside and the case is remanded to the High Court for deciding the first appeal and cross-objections afresh, keeping in view the principle of law laid down by this Court as mentioned above. However, we make it clear that we have not applied our mind to the merits of the issues involved in the case and hence, the High Court would decide the appeal strictly in accordance with law on merits uninfluenced by any of our observations, which we have refrained from making on merits. Needless to observe, the High Court will do so after affording an opportunity of hearing to all the parties. Since the case is quite old, we request the High Court to expedite its hearing and dispose of the case preferably within six months.

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6. Order 37, Rule 4

Mahesh Kumar Joshi Vs. Madan Singh Negi. **MANU/SC/0033/2015**

T.S. Thakur & A.K. Goel, JJ.

Date of Judgment- 15.01.2015

Issue

Civil - Ex parte decree - Setting aside - Denial thereto - Order XXXVII Rule 4 of Civil Procedure Code, 1908 - Present appeal filed against order holding that Courts below held that suit was for recovery on account of dishonour of cheques and was not in respect of transaction of property - Whether Courts below were justified in declining prayer of Appellant-Defendant to set aside ex-parte decree and to grant leave to appeal to defend summary suit - Held, debatable issue did arise for consideration and it would be fair and just to give Appellant opportunity to contest suit subject to Appellant depositing entire amount claimed in suit but without interest or costs - Setting aside of ex-parte decree under Order XXXVII Rule 4 of Code could not be allowed in routine and special circumstances were required to be established - However, expression "special circumstances" had to be construed

having regard to individual fact situations - It would be in interests of justice that ex-parte decree was set aside but interest of Respondent-Plaintiff was safeguarded by deposit of amount in question by Appellant as condition precedent for setting aside decree – Appeal allowed.

The question raised for consideration is whether the courts below are justified in declining the prayer of the appellant to set aside the ex-parte decree and to grant leave to appeal to defend the summary suit.

The respondent-plaintiff filed suit under Order XXXVII of the Code of Civil Procedure (for short "the Code") on 4 th November, 2009 seeking a decree for Rs.3 lacs with costs and interest alleging that the appellant-defendant gave two cheques for Rs.3 lacs towards purchase price of Plot No.71-A, measuring 233 sq. yard situated in Ram Park Extension Colony, being Khasra No.196(Main), village Loni, District Ghaziabad, Uttar Pradesh which were dishonoured inspite of plaintiff having executed the requisite documents and handed over peaceful vacant possession of the plot in question. Though the summons were duly served on the wife of the appellant on 19th December, 2009, the appellant failed to enter appearance within ten days on which the trial Court passed the ex-parte decree on 24th February, 2010.

The appellant sought setting aside of the said decree by filling the application dated 25th March, 2010 under Order XXXVII Rule 4 of the Code. He submitted that the power of attorney dated 10th October, 2004 in favour of the plaintiff by Smt. Asha Negi, the alleged owner of the plot in question, did not specify the plot number and the appellant found no such plot in existence in the records of the Ghaziabad Development Authority. Instead of Plot No.71-A, the number of the plot was 71 which did not belong to Asha Negi but to someone else. Thus, the appellant did not get possession of the plot and the cheques in question could not be taken to be in discharge of any liability. The transaction was without any lawful consideration and was void.

The application was contested by the respondent and the trial Court vide Order dated 12 th January, 2012 dismissed the application which order has been affirmed by the High Court. Dealing with the objection of the appellant, the Courts below held that the suit was for recovery on account of

dishonour of cheques and was not in respect of the transaction of property. Presumption under Section 118 of the Negotiable Instruments Act was available. The appellant had failed to enter appearance without any justification in spite of service, there was no ground to set aside the ex parte decree.

After due consideration, we are of the view that a debatable issue does arise for consideration and it will be fair and just to give the appellant an opportunity to contest the suit subject to the appellant depositing the entire amount claimed in the suit but without interest or costs, i.e. Rs.3 lacs. In pursuance of interim order dated 8 th March, 2013, the appellant claims to have deposited 50% of the decretal amount before the trial Court. On depositing the rest of the amount to make up the deficit of Rs.3 lacs within six weeks from today, the decree will stand set aside and the appellant will be entitled to leave to defend. The deposit will abide by further order of the trial Court. We are conscious of the fact that setting aside of ex- parte decree under Order XXXVII Rule 4 of the Code cannot be allowed in routine and special circumstances are required to be established. However, the expression "special circumstances" has to be construed having regard to the individual fact situations. The Court has to balance the equities and while safeguarding the interest of the plaintiff, appropriate conditions can be laid down if the defendant makes out a debatable case which may prime facie show injustice if the ex-parte decree was not set aside. As already observed, in the present case, it will be in the interests of justice that the ex-parte decree is set aside but the interest of the plaintiff is safeguarded by the deposit of the amount in question by the defendant as a condition precedent for setting aside the decree.

Accordingly, the appeal is allowed in the above terms. It is made clear that we have not expressed any final opinion on merits and the trial Court will be free to take decision in the matter without being bound by the observations made in this order which are only for deciding this appeal.

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7. Sec. 313

Pathubha Govindji Rathod Vs. State of Gujarat. **MANU/SC/0062/2015**

Dipak Misra & Prafulla C. Pant, JJ.

Date of Judgment- 21.01.2015

Issue

This appeal is directed against judgment and order dated 30.6.2014 passed by High Court of Gujarat whereby the said Court has partly allowed the criminal appeals arisen out of Sessions Case No. 85 of 2003 and the cross Sessions Case No. 53 of 2004, which were decided by two separate orders of the same date, i.e., 5.10.2007 by Additional Sessions Judge/Fast Track Court, Junagarh.

Relevant Extract

Prosecution story, in brief, is that complainant Satish Jotva (PW-42) used to live with his family in Village Arena. On 2.9.2003 his uncle Bhurabhai Jivabhai (PW-46) was going to his field on a bicycle. At about 10.30 a.m., he was intercepted by Pathubha Govindji Rathod (appellant no. 1) near bus stand. Accused/appellant no.1 picked up a quarrel with Bhurabha Jivabhai as to why he supported Natha Nagabhai (one of the deceased) in Gram Panchayat Election with whom the accused/appellant no.1 was not having cordial relations. Meanwhile Natha Nagabhai came there and joined Bhurabhai Jivabhai in the quarrel. This led heated exchange of words between both the sides, and crowd gathered there. Accused/Appellant no.1 was joined by his other supporters (co-accused), who were armed with deadly weapons like swords, knives and sticks. Out of the accused persons, accused Pathubha Govindji was armed with revolver, and accused Bhavubhai Gagubhai, Bhuraji Gaguji, Kirit Jesing and Punjaji Muluji were armed with swords. Accused Mala Gaguji was armed with knife. Rest of the accused Gaguji Manji, Gomubha Halarwadi, Navalsinh Motisinh, Kanubha Jesangji, Dhiru Jesing, Kiritsinh Punjajai, Veraji Punjaji, Jayubha, Samatsinh, Sidharajsinh Manji, Bharat Manji, Kanu Bhai Devu bhai and accused/appellant no.2 Hemubha Govindji were armed with sticks. On hearing the noise, complainant Satish Jiva Jotva (PW-42) and his another uncle Bhimshi Jiva (PW-47), father of the complainant Hamir Nagabhai (another deceased), Malde Nagabhai (PW-43), Bhurabhai Jivabhai (PW-46), Punjabhai Bhimshibhai (PW-44), Jagmal Jivabhai (PW-45) and some other villagers also gathered there. When the quarrel further aggravated between

the two sides, accused/appellant no.1 Pathubha Govindji exhorted his supporters to kill Natha Nagabhai and teach lesson to other supporters. Thereafter, accused/appellant no.1 Pathubha Govindji himself took out revolver from his pocket and fired at him. Natha Nagabhai suffered bullet injuries on the stomach and fell down. In the incident, Bhimshibhai who was attacked with sword suffered injury on his head. Bhavubhai Gagubhai assaulted Punja Bhimshi with sword in his hand, and he also suffered injury on his head. Punjaji gave blow to Bharat Jiva on his head, Gomubha Halarwala gave blow on the head of Jagmal Jiva. Accused/appellant no.2 Hemubha Govindji inflicted injury with sword on the head of Hamir Nagabhai. Accused Malde Nagabhai Jotva assaulted with stick to some other persons. Several persons suffered injuries in the incident on both sides. According to prosecution, after the incident complainant took his uncle Natha Nagabhai on his motor cycle to Mangrol Government Hospital, and other injured persons were also taken on rickshaw to said Hospital for medical treatment. Out of the injured Natha Nagabhai, Bhimshi Jivabhai, Hamir Nagabhai, Bhura Jivabhai, Malde Nagabhai, Punjabhai Bhimshibhai, Jagmal Jivabhai were shifted to Junagarh Hospital for further treatment. In the incident Natha Nagabhai and Hamir Nagabhai succumbed to the injuries and died.

The present appeal has been filed before us by way of Special Leave Petition, by two of the above convicts, namely, Pathubha Govindji Rathod and Hemubha Govindji Rathod.

The only point pressed and argued before us in this appeal is that the courts below have erred in law in not accepting the plea of private defence taken by appellant no.1. It is argued that the accused/appellant no.1 was assaulted with a knife and suffered the injury on the vital part, as such he has a right of private defence to save his person. It is further contended that charge relating to causing death of Natha Bhai with a fire arm, even if proved, is covered by Exception 2 of Section 300 IPC.

We have considered the submissions of the learned counsel for the appellants. Exception 2 to Section 300 IPC reads as under: -

"Exception 2.-Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence."

It is not disputed in the present case that there are cross versions of the incident, and cross complaints were lodged with the police. It is also not disputed that in both the cases police submitted charge sheets against both set of accused. It is also evident from the record that both Sessions Case No 85 of 2003 and Sessions Case No. 53 of 2004 resulted in conviction on conclusion of trial by Additional Sessions Judge, Junagarh. Considering the number of persons involved in the incident it can be safely said that it is a case of free fight between two groups of people. It is settled principle of law that in the cases of free fights accused are to be fastened with individual liability taking into consideration the specific role assigned to each one of them, and normally right of private defence is not available in such cases unless circumstances in a given case warrant so.

A person faced with injury with a deadly weapon to his life cannot be expected to weigh in balance the precise force needed to avoid danger. Referring to case of Bhanwar Singh v. State of M.P., this Court, in State of Rajasthan v. Manoj Kumar, has observed as under: - "15.3. In Bhanwar Singh v. State of M.P.,it has been ruled to the effect that for a plea of right of private defence to succeed in totality, it must be proved that there existed a right to private defence in favour of the accused, and that this right extended to causing death; and if the court were to reject the said plea, there are two possible ways in which this may be done i.e. on one hand, it may be held that there existed a right to private defence of the body, however, more harm than necessary was caused or, alternatively, this right did not extend to causing death and in such a situation it would result in the application of Section 300 Exception 2 IPC."

No doubt normally the right of private defence is not available to either of the parties in incidents of group fighting, but that is not a rule without

exception. In the case at hand, we have a special circumstance where the injured person (appellant no. 1) who was given 2cm x 2cm x 1.5cm deep knife blow on his back (scapular region) has retorted by using licensed firearm, and killed one of his rivals in the same incident. Accused/appellant Pathubha Govindji has taken plea of private defence right from beginning of the trial. From the judgment of the trial court also, it is clear that the plea of private defence was taken by the appellant no.1. Considering the facts and circumstances of the present case and evidence on record, it is evident that accused/appellant no.1 Pathubha Govindji Rathod who suffered knife injury in the incident has caused death of one of the deceased by firing several shots thereby exceeding right of private defence. Injuries suffered by both the sides are on record. In the above circumstances, from the evidence, as discussed above, we are inclined to accept the argument that it is a case of culpable homicide not amounting to murder covered under Exception 2 of Section 300 of IPC. Therefore, after weighing the submissions of learned counsel for the parties and going through the papers on record, we are of the opinion that appeal of the accused/appellant no. 1 deserves to be allowed partly. Accordingly, the appeal is partly allowed and the conviction and sentence recorded against accused/appellant no.1 under Section 302 IPC read with Section 149 IPC is set aside. Instead he (accused/appellant no.1 Pathubha Govindji Rathod) is convicted under Section 304 Part-I IPC and sentenced to imprisonment for a period of ten years and directed to pay fine of Rs.5000/- , in default of payment of fine he shall undergo simple imprisonment for a further period of six months. He is reported to have undergone nine years and six months of imprisonment. He shall serve out unserved part of the sentence. The conviction and sentence recorded against accused/appellant no. 2 Hemubha Govindji Rathod under Section 304 Part I read with Section 149 IPC, does not require any interference. The appeal stands disposed of.

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8. Art. 14 & 16

Union of India Vs. Bitali Rout. **MANU/OR/0010/2015**

Amitava Roy, C.J. & Dr. Akshaya Kumar Rath, J.

Date of Judgment: 15.01.2015

Issue

Right to Equality –Equality of opportunity matters of public Employment.

Relevant Extract

The husband of the opposite party No. 1 and the father of the opposite party No. 2 while working as CPC Gangman in the Railways died on 12.11.1978. After opposite party No. 2 attained majority, opposite party No. 1 made a representation to the petitioners on 5.12.1993 seeking employment on compassionate ground in favour of her son. Since the representation filed by her was not heeded to, they approached the Tribunal in O.A. No. 353 of 2004. By order dated 16.6.2004, the learned Tribunal disposed of the said application directing the petitioners, who are respondents therein, to consider the grievance of the applicant and pass necessary order. Thereafter, the matter was considered by the petitioners and by order dated 26.10.2006, the request for providing employment on compassionate ground had been rejected on the ground that there was no representation prior to 2004 and that the application for compassionate appointment had been submitted beyond 20 years of the death of the ex-employee. Thereafter, the opposite parties laid another application being O.A No. 875 of 2006 to quash the order of rejection dated 26.10.2006 with further prayer to provide employment to the opposite party No. 2. The Tribunal by order dated 16.5.2008; vide Annexure-3, allowed the said application. Pursuant to issuance of notice, a counter affidavit has been filed by the petitioners reiterating the grounds taken in the order of rejection.

The petitioners call in question the legality and propriety of the order dated 16.5.2008 passed by the learned Central Administrative Tribunal, Cuttack Bench, Cuttack (hereinafter referred to as "the Tribunal") in Original Application No. 875 of 2006, whereby and where under the application filed by the opposite parties seeking compassionate appointment has been allowed. The only question which arises for our consideration is as to whether a

direction for compassionate appointment can be given to any member of the family after lapse of 28 years of the death of the employee.

In Umesh Kumar Nagpal v. State of Haryana, MANU/SC/0701/1994 : (1994) 4 SCC 138, the Apex Court held that the whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. Mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The appointment on compassionate ground to the dependant of the deceased employee is well known. In SAIL v. Madhusudan Das, MANU/SC/8196/2008 : (2008) 15 SCC 560, the apex Court held that Articles 14 and 16 of the Constitution of India mandate that all eligible candidates should be considered for appointment in the posts which have fallen vacant. Appointment on compassionate ground offered to a dependant of a deceased employee is an exception to the said rule. It is a concession, not a right.

In Bhawani Prasad Sonkar v. Union of India and others, MANU/SC/0242/2011 : (2011) 4 SCC 209, the apex Court directed that the following factors have to be borne in mind while considering the claim for employment on compassionate grounds.

"(i) Compassionate employment cannot be made in the absence of rules or regulations issued by the Government or a public authority. The request is to be considered strictly in accordance with the governing scheme, and no discretion as such is left with any authority to make compassionate appointment dehors the scheme.

(ii) An application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time.

(iii) An appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the breadwinner while in service. Therefore, compassionate employment cannot be granted as a matter of course by way of largesse irrespective of the

financial condition of the deceased/incapacitated employee's family at the time of his death or incapacity, as the case may be.
(iv) Compassionate employment is permissible only to one of the dependants of the deceased/incapacitated employee viz. parents, spouse, son or daughter and not to all relatives, and such appointments should be only to the lowest category that is class III and IV posts."

On the anvil of the decisions cited supra, the matter is required to be examined. We find that the father of the opposite party No. 2 died on 12.11.1978. After lapse of 26 years, the opposite parties approached the learned Tribunal in OA No. 353 of 2004 wherein a direction was issued by the learned Tribunal to the petitioners to consider their case. After considering the case in its proper perspective, the representation of the petitioners was rejected. Thereafter, the opposite parties 2 and 3 approached the Tribunal in OA No. 875 of 2006 wherein a direction was issued to consider the case of the opposite party No. 2 for compassionate appointment.

Appointment on compassionate ground can not be claimed as a matter of right, nor an applicant becomes entitled automatically for appointment. The same depends on a host of factors enumerated in Bhawani Prasad Sonkar (supra). In the meantime 35 years have elapsed. The family of the opposite parties 2 and 3 would tide over the financial crisis. The learned Tribunal has brushed aside the same and has mechanically allowed the application. In the wake of the aforesaid, the order dated 16.5.2008 passed by the learned Tribunal in Original Application No. 875 of 2006 is hereby quashed. The writ petition is accordingly allowed.

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9. Art. 141, Constitution of India

Sec. 127 ***Maharashtra Regional Town Planning Act, 1966***

*Godrej & Boyce Manufacturing Co. Ltd. Vs. State of Maharashtra***. MANU/SC/0058/2015**

V. Gopala Gowda & R. Banumathi, JJ.

Date of Judgment: 21.01.2015

Issue

Land Acquisition - Development plan - Modification therein - Validity thereof – Section 127 of Maharashtra Regional Town Planning Act, 1966 - Appellant, whose land were reserved in Development Plan for acquisition, questioned through present appeal, correctness of 1st Respondent-State Government's notification

proposing modification in Development Plan deleting reservation of land in question from Railway reservation and adding reservation for Development Plan Road - Whether High Court rightly held that action of State Government was only proposed modification and therefore, petition could not be entertained - Held, impugned notification was bad in law and liable to quashed - High Court had not examined impugned notification from view point of Section 127 of Act - Land which was reserved for another purpose had lapsed and it enured to benefit of Appellant - Therefore, it was not open for State Government to issue impugned notification proposing to modify Development Plan from deleting for purpose of Railways and adding to Development Plan for formation of Development Plan Road after lapse of decade and expiry of six months notice served upon State Government - Order passed by High Court as well as impugned notification issued by State Government were vitiated in law and hence, set aside - Appeal allowed.

Relevant Extract

The brief facts of the case are as under:

In the year 1991, Appellant's land in question were reserved under the Sanctioned Development Plan of Greater Mumbai for acquisition of Respondent No. 2 herein-Union of India, Ministry of Railways for laying down additional Railway tracks between "Thane and Kurla". No steps were taken by the concerned authorities despite passing of 10 years period as contemplated Under Section 127 of the MRTP Act to acquire the reserved land of the Appellant. The Appellant has issued the purchase notice under the said Section on 04.09.2002 to the Respondent No. 2- Ministry of Railways stating that if, the Ministry of Railways is in need of the land in question, the same may be acquired by them, and if the same is not required, a clarification to that effect may be issued.

After issuance of the said notice, the period of 6 months as prescribed Under Section 127 of the MRTP Act, was expired on 3.3.2003, thus, the reservation of the land in question was deemed to be released. Having got no reply from Respondent No. 2, the Appellant again wrote a letter dated 2.10.2004 to Respondent No. 1 for de-reservation of the land if the same is not required by them. On 1.11.2004, the Respondent No. 2-Ministry of Railways informed the Urban Development Department of State that there was no proposal for acquisition of reserved land for railway development works in the Railways in the near future. The Appellant, on 5.1.2005, wrote to the Urban Development Department of the State Government requesting for suitable steps in view of clarification letter dated 1.11.2004 issued by Respondent No. 2 and requested it for expediting the process of deleting the reservation of the land in question. The Urban Development Department of

the State Government has issued the notification on 24.5.2006 Under Section 37(1) of the MRTP Act, proposing the modification to the Development Plan by deleting "Railway reservation" and adding "Reservation for DP Road". The land which was reserved earlier in the Development Plan for railway line, the period of 10 years and 6 months after issuing notice was lapsed, now proposed to be reserved for Development Plan Road. The same was followed by another notification issued by the State Government Under Section 37(1) of the MRTP Act dated 5.8.2008 for modification of the land deleting from the Railway reservation and reserving the same for Development Plan Road. Being aggrieved by the said notification dated 5.8.2008 proposing the modification of reservation of the land in question from the Railway line to Development Plan Road, the Appellant approached the High Court by filing Writ Petition No. 2274 of 2011 challenging the correctness of the said notification by placing strong reliance upon Section 127 of the MRTP Act, contending that the proposed modification by the Urban Development Department is impermissible in law as the State Government has no power to do so.

Having heard the learned senior Counsel on behalf of both the parties and with reference to the abovesaid rival factual and legal contentions, we have carefully examined the same keeping in view the undisputed facts involved in this case. It is an undisputed fact that the Respondent No. 1 has reserved the land in question for the Development Plan under the provisions of Section 127 of the MRTP Act for the acquisition of the land in favour of Ministry of Railways for laying additional railway track between "Thane and Kurla". It would be apposite to extract Section 127 of the MRTP Act for better appreciation of the claim of the parties, which deals with lapsing of reservation:

127. Lapsing of reservations-If any land reserved, allotted or designated for any purpose specified in any plan under this Act is not acquired by agreement within ten years from the date on which a final Regional plan, or final Development plan comes into force or if proceedings for the acquisition of such land under this Act or under the Land Acquisition Act, 1894, are not commenced within such period, the owner or any person interested in the land may serve notice on the Planning Authority, Development Authority or as the case may be, Appropriate Authority to that effect; and if within six

months from the date of the service of such notice, the land is not acquired or no steps as aforesaid are commenced for its acquisition, the reservation, allotment or designation shall be deemed to have lapsed, and thereupon the land shall be deemed to be released from such reservation, allotment or designation and shall become available to the owner for the purpose of development as otherwise, permissible in the case of adjacent land under the relevant plan.

In our view, the observations contained in para 133 of Girnar Traders (3) unequivocally support the majority judgment in Girnar Traders (2). As a sequel to the above discussion, we hold that the majority judgment in Girnar Traders (2) lays down correct law and does not require reconsideration by a larger Bench...

Therefore, we have to hold that the impugned notification is bad in law and liable to quashed. The High Court has not examined the impugned notification from the view point of Section 127 of the MRTP Act and interpretation of the above said provision made in the case of Girnar Traders (2) (supra), therefore, giving liberty to the Appellant by the High Court to file objections to the proposed notification is futile exercise on the part of the Appellant for the reason that the State Government, once the purpose the land was reserved has not been utilized for that purpose and a valid statutory right is acquired by the land owner/interested person after expiry of 10 years from the date of reservation made in the Development Plan and 6 months notice period is also expired, the State Government has not commenced the proceedings to acquire the land by following the procedure as provided Under Sections 4 and 6 of the repealed Land Acquisition Act, 1894. Therefore, the land which was reserved for the above purpose is lapsed and it enures to the benefit of the Appellant herein. Therefore, it is not open for the State Government to issue the impugned notification proposing to modify the Development Plan from deleting for the purpose of Railways and adding to the Development Plan for the formation of Development Plan Road after

lapse of 10 years and expiry of 6 months notice served upon the State Government.

In view of above, the order passed by the High Court as well as the impugned notification issued by the State Government are vitiated in law and liable to be set aside and quashed and we order accordingly. The appeal is allowed. The impugned order is set aside and consequently Rule issued. The impugned notification dated 5.8.2008 is also quashed as the period of 10 years from the date of reservation in the Development Plan and 6 months notice served by the Appellant on the Respondent No. 1 is also over, the reservation of the land is lapsed. No costs.

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10. Art.227
Debesh Das Vs. State of Orissa. **MANU/OR/0007/2015**
I. Mahanty & B.N. Mahapatra, JJ.
Date of Judgment: 06.01.2015
Issue
Power of superintendence
Relevant Extract

Shorn of unnecessary details, suffice it is to note herein that each of the petitioners filed OGLS cases before the Tahasildar (Sadar), Sambalpur-Opposite Party No. 4 seeking settlement of land in their names on which, they claim to be in occupation/possession as sublessees under the private opposite parties 5 and 6. The said OGLS applications were rejected on 31.07.2002 under Annexure-1 and the appeals preferred by the petitioners before the Sub-Collector, Sambalpur were also dismissed vide order dated 21.04.2003 under Annexure-2. Thereafter the petitioners preferred revision before the Collector, Sambalpur and the said revisions were also dismissed on 26.02.2004 under Annexure-3. Challenging the concurring orders passed by the Tahasildar (sadar), Sambalpur; Sub-Collector, Sambalpur (appellate authority) and Collector, Sambalpur (Revisional authority), the present applications came to be filed. The brief case of the petitioners is that the petitioners were sub-lessees under the predecessors of Opposite Parties 5 and 6 prior to the cut-off date i.e. 09.01.1991 and raised a claim on the basis of

Section 3(4) of the Orissa Government Land Settlement (Amendment) Act, 1990.

In MANU/SC/0066/1983 : AIR 1984 SC 38 Mohd. Yunus v. Mohd. Mustaqim, it has been held:

"A mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Article 227. The supervisory jurisdiction conferred on the High court under Article 227 of the Constitution is limited to seeing that an inferior Court or Tribunal functions within the limits of its authority and not to correct an error apparent on the face of the record, much less an error of law. In this case there was, in our opinion, no error of law much less an error apparent on the face of the record, there was no failure on the part of the learned Subordinate Judge to exercise jurisdiction nor did he act in disregard of principle of natural justice. Nor was the procedure adopted by him not in consonance with the procedure established by law. In exercising the supervisory power under Article 227, the High Court does not act as an Appellate Court or Tribunal. It will not review or re-weigh the evidence upon which the determination of the inferior court or tribunal purports to be based or to correct errors of law in the decisions."

The Supreme Court in MANU/SC/0504/1975 : AIR 1975 SC 1297 Babhutmal Raichand Oswal v. Laxmibai R. Tarte, the power of superintendence of the High Court is limited to see that the subordinate Courts or Tribunals function within the limits of their authorities. It cannot correct some errors of fact by examining the evidence and re-appreciating it.

Learned Senior Counsel for the private opposite parties 5 and 6 essentially submits that the present case, in essence, seeks the interference of this Court in the writ jurisdiction by re-appreciating the facts of the case. After having heard the learned counsel for the respective parties and on perusing the impugned orders as well as the citation referred hereinabove, we queried the learned counsel for the petitioners as to whether any evidence is on record to substantiate the fact that the petitioners were sub-lessees. Learned counsel for the petitioners fairly admits that no documentary

evidence in support of the claim of the petitioners as 'sub-lessee' is available. Apart from the same, admittedly, no oral evidence has also been led to substantiate their case of being sub-lessees. Considering the submissions made, we are of the considered view that this Court has to limit its exercise of authority within the limits of its jurisdiction that is "power of superintendence" and three forums below, i.e. the Tahasildar, Sub-Collector as well as the Collector having exercise the jurisdiction over the matter, we find no error of law to permit any interference with the same. Accordingly, we find no merit in this batch of writ applications and the same stands dismissed. Interim orders dated 7.3.2006 passed in all the writ applications stand vacated.

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11. Art.309

*Odisha Public Service Commission Vs. Priyambada Das***.**

MANU/OR/0016/2015

P. Mohanty & Biswajit Mohanty, JJ.

Date of Judgment : 16.01.2015

Issue

***Natural Justice – Recruitment and condition of service*.**

Relevant Extract

This writ application has been filed by the petitioner-Odisha Public Service Commission, for short, "the OPSC" with a prayer to quash the order dated 26.8.2014 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack.

Upon hearing the parties and on perusing the documents including L.C.R., the following issues arise for consideration in this case.

"1. Whether selected candidates of the Preliminary Examination were required to be made parties before the learned Tribunal?

2. Whether in view of office order dated 28.9.2013, a Single Member Bench has/had authority to hear a matter relating to recruitment when vide said office order, the Hon'ble Chairman has clearly categorized, the same as a Division Bench matter? In other words whether the learned Single Member has exceeded his jurisdiction in entertaining a matter outside his province?

3. Whether a person, who failed in the preliminary Examination and who never objected to the said results and who never objected to model answers published inviting observations/comments, who never objected to procedure of evaluation, can file an Original Application after three months of the declaration of the result in the background of principles of waiver and acquiescence?
4. Whether the learned Tribunal has passed a proper order on merits directing evaluation on pro rata basis?"

Thus one thing is clear that on one ground or another, opposite party No. 1 has averred that the result of the Preliminary Examination conducted by the petitioner has been vitiated and accordingly, she prayed for setting aside the result of preliminary examination. As indicated earlier about 5823 candidates succeeded in the preliminary examination. As per Rule 12(1) of 1991 Rules read with Clause-II of Schedule-II of 1991 Rules, it is clear that the candidates qualifying the Preliminary Examination shall only be called by the Commission to appear in the Main Examination. Thus, the candidates, who qualified in the Preliminary Examination got the right to appear in the Main Examination. In such background, it is needless to say that the selected 5823 successful candidates have a right to appear in the main examination as per 1991 Rules, which is a rule made under Proviso to Article 309 of the Constitution of India. Since the select list containing roll Nos. of 5823 successful candidates has been set aside by the learned Tribunal, it clearly offends their right to sit in the Main Examination. As per the law laid down by a 4-Judge Bench of the Hon'ble Supreme Court in the decision in Udit Narayan Singh Malpaharia's case , it is clear that persons, who are going to be directly affected or against whom relief is sought are necessary parties and they should be named in the petition. It has also been made clear that the parties in whose favour an order or notification has been issued and when the same order or notification is challenged, the said parties are necessary parties. To the same effect is the judgment of the Hon'ble Supreme Court in H.C. Kulwant Singh's case (supra). Even as per the decision in the case of Prashant Ramesh Chakkarwar's case, where results of the Civil Services Main Examination was under challenge, the Hon'ble Supreme Court has held that nonimpletion of candidates selected in the Civil Service Main Examination

was fatal. It may be noted here that even though a candidate selected in the Main Examination has no right to be appointed at that stage, but has a right to appear in the interview. In All India SC & ST Employees' Association's case ,the Hon'ble Supreme Court has made it clear that the candidates, whose ames are there in the provisional selection even have interest/right in protecting and defending that select list. A reading of decision rendered in Sadananda Halo's case makes it clear that the Hon'ble Supreme Court was not satisfied with the course of action taken by the High Court in inviting the objections from the selected candidates, who were never bothered to be made parties. In this context the decision cited by Dr. Mohapatra in B. Prabhakar Rao's case (supra) is factually distinguishable. In that case Ordinance was challenged and no relief was claimed against the individuals. So far as the decision in Rajesh Kumar's case (supra) cited by Dr. Mohapatra is concerned, the same is also factually distinguishable. Though the court therein took note of non impletion of parties, no finding was recorded on its impact on account of the nature of direction given by the Hon'ble Court at Paragraph 19(4) of the judgment.

Even otherwise as per Section 22 of the Administrative Tribunals Act, 1985, the learned Tribunal while disposing of a case or adjudicating a matter has to be guided by principles of natural justice. One facet of such principle is that no body should be condemned unheard. Here selected candidates, 5823 in number, have been condemned unheard by setting aside their selection in their absence. For all these reasons, we come to a conclusion that the selected candidates are necessary parties and the learned Tribunal has gone wrong in disposing of the matter without insisting on their presence in tune with the principles of natural justice. As held in Prabodh Verma's case (supra), the learned Tribunal ought not to have proceeded without insisting on impletion of the selected candidates as respondents and/or at least some of them being made parties in a representative capacity and had the opposite party No. 1 refused to do so, it would have dismissed the Original Application for non-joinder of necessary parties.

Coming to the Issue No. 2 relating to hearing of a matter by a learned single Member Bench; as has been indicated earlier as per Notification dated

28.9.2013, the Hon'ble Chairman in tune with the requirement of Section 5(6) of the Administrative Tribunals Act, 1985 has made it clear that matter relating to the recruitment is a Division Bench matter. Secondly, in the impugned order itself while discussing Issue No. iii, the learned Single Member Bench has observed that the matter involves a point of law and in such background in tune with the judgment of the Hon'ble Supreme Court in Dr. Mahabalaram's case (supra), the matter should not have been disposed of by a learned Single Member Bench and should have gone before a Division Bench. With regard to the decision cited by Dr. Mohapatra, learned counsel for opposite party No. 1 in Indermani Kirtipal's case (supra) it may be noted here that the said case is factually distinguishable. In the present case successful candidates were not made parties before the learned Tribunal. Mr. Das, learned counsel for opposite party Nos. 12 to 22 in his submission made it clear that had they been made parties they would have surely raised these issues and would have drawn the attention of the learned Tribunal to the decision in Dr. Mahabal Ram's case (supra). Further, there is no reference to Dr. Mahabala Ram's case, a 3-Judge Bench decision Indermani Kirtipal's case (supra). Thirdly, from the facts of the said judgment, it is not clear as to whether like in the present case where Hon'ble Chairman has assigned the recruitment matter to a Division Bench, whether in the said case there was any such Notification for taking up promotion matter by a Division Bench. Further as has been submitted by Mr. Das had his clients been made parties, he would have raised that issue before the learned Tribunal. Simply because the petitioners had not raised the issue would not go against his clients as the rights of opposite party Nos. 12 to 22 to protect and defend the select list from which their right to sit in the Main Examination flowed have been taken away behind their back. Section 5(6) of the Administrative Tribunals Act, 1985

provides that a Single Bench can only take up such matters, which have been assigned to it by the Hon'ble Chairman. Here as indicated earlier, the matter relating to recruitment was never assigned to the single Member Bench by the Hon'ble Chairman. For all these reasons we have no hesitation to hold that the order passed by the learned Single Member Bench is wholly without jurisdiction. The decisions cited by opposite party No. 1 reported in 2000 (2) Karnataka Law Journal 341, MANU/AP/0303/2001 : 2001 (3) ALT 88, MANU/TN/0879/2003 : (2003) 3 LLJ 203 are factually distinguishable. In (2003) 3 LLJ since there was only one Member, i.e., a Vice Chairman for the entire Tribunal, the High Court observed that the matter can be heard by the said learned Single Member Bench though the matters should have gone before a Division Bench because as per settled principles of law, the Tribunal is the Court of first instance and on the ground of doctrine of necessity. Here, it is nobody's case that on the date of disposal the Odisha Administrative Tribunal was functioning with one Member only. In MANU/AP/0303/2001 : 2001 (3) ALT 88 parties directly approached the High Court and accordingly High Court directed to approach the Tribunal first. In 2000 (2) KLJ 341, there is no reference to Dr. Mohabala Ram's case. Further, here the point relating to hearing by Division Bench has been raised by successful candidates, who were deliberately not made parties before the Tribunal. Moreover, here clear cut notification to refer the matter to a Division Bench is there. For all these reasons, we hold that the learned Single Member had no jurisdiction to hear and dispose of the Original Application and by doing so, he exceeded his jurisdiction.

In view of our findings above, we do not think it proper to discuss the other issues framed by us and those issues are left open. Accordingly, without expressing any opinion on the merits of the case, we set aside the order dated

26.8.2014 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack and remit the matter to the learned Tribunal with a request to dispose of O.A. No. 2146(C) of 2014 in accordance with law as expeditiously as possible preferably within a period of three months keeping in mind the observations made by us above. Further, in order to avoid multiplicity of litigation, we direct that till disposal of O.A. No. 2146(C) of 2014, no evaluation should be made of OCS (Main) Examination papers. In order to expedite the matter, we further direct the petitioner-OPSC to supply a sizeable number of names and addresses of successful candidates of Preliminary Examination to opposite party No. 1, if a request is made to that effect, whereupon opposite party No. 1 would be at liberty to implead them in a representative capacity as respondents before the learned Tribunal. Before saying omega, we expect that the State Government and the petitioner should make all endeavours to conduct Odisha Civil Services Combined Competitive Recruitment Examination regularly every year keeping in mind mandatory provision of "1991 Rules" in the background of submission of the learned Advocate General relating to existence of large number of vacancies. A copy of the judgment be sent to the Chief Secretary, Government of Odisha for his information and immediate necessary action. The writ application is accordingly allowed with the above noted observations. No costs. LCR be sent back forthwith.

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12. Sec.11A
Article 226 & 227 Constitution of India
K.V.S. Ram Vs. Bangalore Metropolitan Transport Corpn.
MANU/SC/0037/2015
V. Gopala Gowda & R. Banumathi, JJ.
Date of Judgment : 14.01.2015

Issue

Labour and Industrial - Termination - Confirmation thereof - Present appeal filed against order of High Court dismissing appeal filed by Appellant-Workman, thereby, confirming termination of Appellant - Whether High Court erroneously held that long delay of twelve years in holding enquiry was not fatal to case - Held, similarly placed workmen were ordered to be reinstated with lesser punishment of stoppage of few increments - While so, there was no reason as to why for similar misconduct Appellant should have been imposed harsh punishment of dismissal from service - When Labour Court exercised its discretion keeping in view facts of case and cases of similarly situated workmen, High Court ought not to have interfered with exercise of discretion by Labour Court - Award passed by Labour Court did not suffer from any such flaws - Impugned order set aside - Appeal allowed.

Relevant Extract

Brief facts which led to the filing of this appeal are as under:- The Appellant was appointed on the post of Driver in the Bangalore Metropolitan Transport Corporation on 3.9.1985 and was working on the same post since then. The Appellant was served with article of charge dated 3.9.1990 alleging that he had secured appointment by producing a false transfer certificate. An enquiry was initiated on 15.7.1992 and the Appellant submitted his explanation to the aforesaid charges. The Enquiry Officer submitted his report on 13.3.2002 holding the Appellant guilty for his misconduct. After affording opportunity to the Appellant to show cause against the proposed punishment, the disciplinary authority passed the order imposing punishment of dismissal from service vide order dated 1.10.2004.

Aggrieved by the order of dismissal, the Appellant raised an industrial dispute bearing I.D. No. 39/2005 before the III Additional Labour Court, Bangalore. The Labour Court vide award dated 14.2.2007 directed the management of the corporation to reinstate the Appellant in his original post with continuity of service but without back wages. The Labour Court modified the punishment directing withholding of four annual increments with cumulative effect. In the Labour Court, Appellant has produced notarized

copies of orders passed by the Respondent-Corporation in respect of other workmen, who have committed similar misconduct but were awarded lesser punishments. Referring to Exs. W.5 to W.11 which are the notarized copies of the orders passed in respect of other workmen who have committed similar misconduct, Labour Court held that those workmen were reinstated in service with minor punishment of withholding of few annual increments, whereas the Appellant was imposed grave punishment of dismissal from service and thus was discriminated. Referring to another judgment of the High Court in W.P. No. 17316/2005 (L/K) dated 8.8.2005, Labour Court observed that when similarly situated workmen were imposed lesser punishment and the Appellant cannot be discriminated by imposing punishment of dismissal from service and the Labour Court in exercise of its discretion Under Section 11A set aside the punishment imposed on the Appellant and directed reinstatement of the Appellant without backwages.

Being aggrieved, Respondent-corporation filed a writ petition before the High Court. Vide order dated 31.1.2008, learned Single Judge of the High Court allowed the writ petition holding that the punishment of dismissal from service was proportionate to the proved misconduct against the Appellant. Aggrieved by the same, the Appellant- workman preferred appeal before the Division Bench challenging the legality and correctness of the said order. The Division Bench dismissed the appeal filed by the Appellant on the ground that the charges levelled against the Appellant are serious in nature and that the punishment of dismissal from service imposed by the disciplinary authority was just and proper. In this appeal, the Appellant assails the correctness of the above judgment.

We have carefully considered the rival contentions and perused the impugned judgment and other materials on record. The Appellant joined the services of the corporation in the year 1985. In the year 1990, charges were framed against the Appellant alleging that he had secured appointment by producing a false certificate and enquiry was initiated in the year 1992 and the Enquiry Officer submitted his report only in the year 2002, nearly twelve years after framing of charges. Even though the Enquiry Officer submitted his report on 13.3.2002, order of dismissal from service was passed only on

1.10.2004. Enquiry report was thus submitted after a lapse of twelve years and there was a delay of twelve years in conducting and completing the enquiry. As pointed out by the Labour Court, there was no plausible explanation for such inordinate delay in completing the enquiry. The Appellant continued in service from 1990 to 2004. Having allowed the Appellant-workman to work for fourteen years, by the time punishment of dismissal from service was imposed on the Appellant, the Appellant had reached the age of forty five years. As observed by the Labour Court, the Appellant having crossed forty five years, he could not have sought for alternative employment. Further, as seen from Exs. W.5 to W.11, similarly placed workmen were ordered to be reinstated with lesser punishment of stoppage of few increments. While so, there is no reason as to why for the similar misconduct the Appellant should be imposed harsh punishment of dismissal from service. It is settled proposition of law that while considering the management's decision to dismiss or terminate the services of a workman, the Labour Court can interfere with the decision of the management only when it is satisfied that the punishment imposed by the management is highly disproportionate to the degree of guilt of the workman concerned. Considering the delay in completing the enquiry and the age of the Appellant and the fact that similarly situated workmen were reinstated with lesser punishment, the Labour Court ordered reinstatement, in exercise of its discretion Under Section 11A of the Industrial Disputes Act.

In our considered view, in exercise of its power of superintendence Under Article 227 of the Constitution of India, the High Court can interfere with the order of the Tribunal, only, when there has been a patent perversity in the orders of tribunal and courts subordinate to it or where there has been gross and manifest failure of justice or the basic principles of natural justice

have been flouted. In our view, when the Labour Court has exercised its discretion keeping in view the facts of the case and the cases of similarly situated workmen, the High Court ought not to have interfered with the exercise of discretion by the Labour Court.

We find the judgment and award of the labour court well reasoned and based on facts and evidence on record. The High Court has erred in its exercise of power Under Article 227 of the Constitution of India to annul the findings of the labour court in its award as it is well settled law that the High Court cannot exercise its power Under Article 227 of the Constitution as an appellate court or re-appreciate evidence and record its findings on the contentious points. Only if there is a serious error of law or the findings recorded suffer from error apparent on record, can the High Court quash the order of a lower court. The Labour Court in the present case has satisfactorily exercised its original jurisdiction and properly appreciated the facts and legal evidence on record and given a well reasoned order and answered the points of dispute in favour of the Appellant. The High Court had no reason to interfere with the same as the award of the Labour Court was based on sound and cogent reasoning, which has served the ends of justice.

Before concluding, we consider it necessary to observe that while exercising jurisdiction Under Articles 226 and/or 227 of the Constitution in matters like the present one, the High Courts are duty-bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality

between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that:

> 10...The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State.

Once the Labour Court has exercised the discretion judicially, the High Court can interfere with the award, only if it is satisfied that the award of the Labour Court is vitiated by any fundamental flaws. We do not find that the award passed by the Labour Court suffers from any such flaws. While interfering with the award of the Labour Court, the High Court did not keep in view the parameters laid down by this Court for exercise of jurisdiction by the High Court Under Articles 226 and/or 227 of the Constitution of India and the impugned judgment cannot be sustained.

In the result, the appeal is allowed and the impugned judgment passed by the High Court is set aside and the award passed by the Labour Court is restored. In the facts and circumstances of the case, we make no order as to costs.

Hon'ble Mrs. Justice R. Banumathi pronounced the judgment of the Bench comprising Hon'ble Mr. Justice v. Gopala Gowda and Hon'ble Mrs. Justice R. Banumathi. Delay condoned. Leave granted. The appeal is allowed in terms of the signed order.

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13. Sec. 372

Vijaya Ukarda Athor (Athawale) Vs. State of Maharashtra.
MANU/SC/0036/2015
V. Gopala Gowda & R. Banumathi, JJ.
Date of Judgment : 14.01.2015

Issue

Service - Compassionate appointment - Consideration thereof - Denial thereto Present appeal filed against order of High Court dismissing petition and also review application thereby declining to issue direction to consider case of Appellant for compassionate appointment - Whether impugned order suffered from any infirmity warranting interference - Held, Appellant was daughter through first wife whereas 3rd Respondent was son through second wife - Questions related to effect of Government Resolution, non consideration of Appellant's plea, eligibility of 3rd Respondent, effect of subsequent policy taken by State Government, remained untouched - Instead of present Court examining such questions, matter was to be remitted back to High Court for considering these questions in light of facts and circumstances of case.

Relevant Extract

The issue relates to the compassionate appointment between the rival claimants. Late Ukarda Athor (Athwale), who was working as a clerk in Municipal Corporation, Amravati, had two wives namely Shantabai Ukarda Athor and Kuntabai Ukarda Athor. He died on 18.06.1997. The Appellant-Vijaya Ukarda Athor (Athawale), is daughter of Late Ukarda Pundlikrao Athor (Athawale) through the first wife, 3rd Respondent is the son of Late Ukarda Athor through the second wife. Smt. Shantabai Ukarda Athor, mother of the Appellant, filed a Regular Civil Suit No. 40 of 2001 in the Court of Civil Judge (Junior Division), Anjanagaon-Surji, Dist. Amravati, seeking for a declaration being the legal heirs of deceased Ukarda Athor, they have the right in the property, pension and funds of deceased Ukarda Athor and the said suit was decreed by the judgment dated 15.01.2005. In the Succession Case No. 6/1998 Dated 24.09.2007 filed Under Section 372 of the Indian Succession Act, 1925, the Civil Judge (J.D.), Distt. Amravati, interalia, ordered that the mother of the Appellant would be entitled for the benefit of the pension of the deceased. In the succession case, it was further ordered that the Appellant and her mother would be entitled to 1/4th share each of total amount of GPF and other funds of Ukarda Athor. On 25.5.2009, Respondent No. 3 moved an application seeking compassionate appointment. On 19.4.2012, the Appellant

filed an objection application, raising objection for consideration of job application filed by Respondent No. 3 and requesting the authorities not to give him the compassionate appointment. The Municipal Corporation vide order dated 18.09.2012 appointed Respondent No. 3-Sagar Ukarda thereby declaring the Appellant ineligible for the compassionate appointment as she has already got married.

Aggrieved by the order of non-grant of appointment, Appellant herein filed a Writ Petition No. 1341 of 2013 before the High Court of Bombay. Vide order dated 18.03.2013, the High Court dismissed the aforesaid writ petition holding that on the date of appointment, the Appellant was a married daughter and the policy decision was taken by the State Government on 26.2.2013 for grant of compassionate appointment to married daughter and before the said date the Appellant was not eligible for any appointment. The Appellant filed a review application before the High Court which was also dismissed vide order dated 22.11.2013. In these appeals, the Appellant assails the above orders.

We have carefully considered the rival contentions and perused the impugned order and other materials on record. The fact that the Appellant is the daughter through the first wife-Shantabai Athor and Respondent No. 3 is the son through the second wife-Kuntabai Athor of Late Ukarda Athor are not in dispute. Ukarda Athor died on 18.06.1997. According to the Appellant, her mother submitted an application dated 29.12.1997 stating that her daughter Vijaya Athor-appellant who is aged seventeen years and then a minor studying in 10th standard, should be given compassionate appointment when she attains majority. According to the Appellant after she attained majority she has submitted another application on 19.03.1998, seeking compassionate appointment; but for quite sometime, the same was not considered by the authorities. The Appellant was married in the year 2009. The contention of the Appellant is that her application for compassionate appointment was kept pending by the authorities without any justifiable reason. But according to the Respondent No. 2-Corporation, giving employment in government service on compassionate ground was then governed by "Government Resolution, General Administration Department, No. Comp. 1093/2335/M. No. 90/93/Eight, dated 26 October, 1994". As per the said Resolution only the unmarried daughter of the deceased would be eligible for the appointment as

per Rules. Reliance is placed on Clause (3)(a) of Government Resolution which reads as under:

(3) (a). Husband/wife, son or unmarried daughter of the deceased/prematurely retired government employee OR son/unmarried daughter lawfully adopted, before death/premature retirement, shall be deemed to be the relatives eligible to be appointed as per rules. Except them, no other relative shall get the benefit under this scheme.

The State Government has taken a Policy Decision on 26.02.2013 and held that the married daughters are also entitled for compassionate appointment subject to certain conditions.

In our considered view, the questions viz.: (i) the effect of "Government Resolution, General Administration Department, No. Comp. 1093/2335/M. No. 90/93/Eight, dated 26.10.1994 and effect of Clause (3)(a); (ii) the plea that the Appellant submitted application on 29.12.1997 and 19.03.1998, that the same was not considered by the authorities for quite sometime; (iii) at the time when the applications for compassionate appointment was considered in 2012 whether 3rd Respondent was eligible to be considered; (iv) the effect of subsequent policy decision dated 26.02.2013 taken by the State Government as per which the married daughter is also eligible to get compassionate appointment; and (v) such other relevant questions which are to be examined. In our considered view, instead of this Court examining the above questions, the matter is to be remitted back to the High Court for considering the above questions in the light of the facts and circumstances of the case.

In the result, the impugned Orders of the High Court in Writ Petition No. 1341 of 2013 dated 18.03.2013 and Review Application No. 511 of 2013 dated 22.11.2013 are set aside and the appeals are allowed and the matter is remitted back to the High Court for consideration of the matter afresh. The High Court shall give sufficient opportunity to the Appellant and the Respondents and consider the matter afresh expeditiously and in accordance with law. Hon'ble Mrs. Justice R. Banumathi pronounced the judgment of the Bench comprising Hon'ble Mr. Justice V. Gopala Gowda and Hon'ble Mrs. Justice R. Banumathi. Delay condoned. Leave granted. The appeals are allowed in terms of the signed order.

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14. Rule 12(3) (b) JJ (CPC)

Darga Ram @ Gunga Vs. State Of Rajasthan. **In the Supreme Court of India Criminal Appellate Jurisdiction Criminal Appeal No. 513 of 2008**

T.S. Thakur &R. Banumathi , JJ.

Date of Judgment- 08.01.2015

Issue

Conviction affirmed but set aside the sentences - considering his juvenility.

Relevant Extract

The appellant was tried and convicted for offences punishable under Sections 376 and 302 IPC. For the offence of rape punishable under Section 376, he was sentenced to undergo imprisonment for a period of 10 years besides a fine of Rs.1000/- and default sentence of one month with rigorous imprisonment. Similarly, for the offence of murder punishable under Section 302 IPC, he was sentenced to undergo life imprisonment besides a fine of Rs.3,000/- and default sentence of three months' rigorous imprisonment. Both the sentences were directed to run concurrently. Criminal Appeal No.604 of 2004 filed by him was heard and dismissed by a Division Bench of the High Court of Judicature for Rajasthan at Jodhpur. The present appeal assails the impugned judgment and order.

A first Information Report was registered at Police Station Rani in the State of Rajasthan on 11th April, 1998, inter alia, stating that the complainant on 9th April, 1998 had organised a "Jaagran" (night long prayer meet) near a well belonging to one Magga Ram. The complainant and other relatives, in all around 50 persons assembled for the "Jaagran" that continued till late night. This included his seven year old daughter-Kamala who went to sleep along with other children close to the place where the "Jaagran" was held. When he returned to his house he noticed that Kamala was missing. Assuming that she may have gone away with one of the relatives, a search was made at their houses but Kamala remained untraceable. The search was then extended to neighbouring areas where the dead body of Kamala was discovered by Magga Ram (PW-5) and Pura Ram. On receipt of this information he and Naina Ram (PW-2) went to the place and found that baby Kamala had been raped and

killed by crushing her head with a stone. The dead body of Kamala was, according to the report, lying on the spot.

A case under Sections 302 and 376 of the IPC was registered on the basis of the above information and investigation started which led to the arrest of the appellant and eventually a charge sheet against him before the jurisdictional magistrate who committed the case to Additional Sessions Judge, (Fast Track), Bali.

The medical opinion given by the duly constituted Board comprising Professors of Anatomy, Radiodiagnosis and Forensic Medicine has determined his age to be "about" 33 years on the date of the examination. The Board has not been able to give the exact age of the appellant on medical examination no matter advances made in that field. That being so in terms of Rule 12 (3) (b) the appellant may even be entitled to benefit of fixing his age on the lower side within a margin of one year in case the Court considers it necessary to do so in the facts and circumstances of the case. The need for any such statutory concession may not however arise because even if the estimated age as determined by the Medical Board is taken as the correct/true age of the appellant he was just about 17 years and 2 months old on the date of the occurrence and thus a juvenile within the meaning of that expression as used in the Act aforementioned. Having said that we cannot help observing that we have not felt very comfortable with the Medical Board estimating the age of the appellant in a range of 30 to 36 years as on the date of the medical examination. The general rule about age determination is that the age as determined can vary plus minus two years but the Board has in the case at hand spread over a period of six years and taken a mean to fix the age of the appellant at 33 years. We are not sure whether that is the correct way of estimating the age of the appellant. What reassures us about the estimate of

age is the fact that the same is determined by a Medical Board comprising Professors of Anatomy, Radiodiagnosis and Forensic Medicine whose opinion must get the respect it deserves. That apart even if the age of the appellant was determined by the upper extremity limit i.e. 36 years the same would have been subject to variation of plus minus 2 years meaning thereby that he could as well be 34 years on the date of the examination. Taking his age as 34 years on the date of the examination he would have been 18 years, 2 months and 7 days on the date of the occurrence but such an estimate would be only an estimate and the appellant may be entitled to additional benefit of one year in terms of lowering his age by one year in terms of Rule 12 (3)(b) (supra) which would then bring him to be 17 years and 2 months old, therefore, a juvenile.

In the totality of the circumstances, we have persuaded ourselves to go by the age estimate given by the Medical Board and to declare the appellant to be a juvenile as on the date of the occurrence no matter the offence committed by him is heinous and but for the protection available to him under the Act the appellant may have deserved the severest punishment permissible under law. The fact that the appellant has been in jail for nearly 14 years is the only cold comfort for us to let out of jail one who has been found guilty of rape and murder of an innocent young child.

In the result, this appeal succeeds but only in part and to the extent that while the conviction of the appellant for offences under Section 302 and 376 of IPC is affirmed the sentence awarded to him shall stand set aside with a direction that the appellant shall be set free from prison unless required in connection with any other case.

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