O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2017

(*APRIL*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY
MONTHLY REVIEW OF CASES ON CIVIL, CRIMINAL & OTHER LAWS, 2017 (April)
I N D E X

C. Other laws				
(i) **Hindu Marriage Act, 1955**				
10.	*Kalyan Dey Chowdhury Vs. Rita Dey Chowdhury Nee Nandy.* ***In the Supreme Court of India***	***Section 25(2) of Hindu Marriage Act***	***Date of Judgment - 19.04.2017***	***57-60***
(ii) Orissa District and Subordinate Courts Ministerial Services (Method of Recruitment and Conditions of Service) Rules, 1969 & the Orissa District and Subordinate Courts (Special Scheme) (Method of Recruitment and Conditions of Service) Rules, 2001				
11.	*Pruthiraj Jena vs. The District and Sessions Judge, Bhadrak and Ors.* ***In the High Court of Orissa , Cuttack***	**Orissa District and Subordinate Courts Ministerial Services (Method of Recruitment and Conditions of Service) Rules, 1969 & the Orissa District and Subordinate Courts (Special Scheme) (Method of Recruitment and Conditions of Service) Rules, 2001**	***Date of Judgment - 27.04.2017***	***61-66***
(iii) Negotiable Instrument Act, 1881				
12.	*Ashok Kumar Das Vs. State of Orissa and Ors.* ***In the High Court of Orissa , Cuttack***	***Sections138,139 of NI Act***	***Date of Judgment - 10.04.2017***	***67-71***
(iv) Orissa Saw Mills and Saw Pits (Control) Act, 1991				
13.	*Ramesh Chandra Sabat and another Versus State of Orissa and others .* ***In the High Court of Orissa, Cuttack***	***Section 14 & 17 of the Orissa Saw Mills and Saw Pits (Control) Act, 1991***	***Date of Judgment - 17.04.2017***	***72-74***

****

2. Section 100 of CPC

Dagadabai(Dead) by L.Rs. Versus Abbas @ Gulab Rustum Pinjari .

R.K. Agrawal & Abhay Manohar Sapre, JJ.

In the Supreme Court of India.

Date of Judgment -18.04.2017

Issue

Questions involving substantial question of law within the meaning of Section 100 of the Code of Civil Procedure Code , 1908 can be formulated by the High Court.

This appeal is filed by the legal representatives of the plaintiff against the final judgment and order dated 25.04.2007 passed by the High Court of Judicature of Bombay, Bench at Aurangabad in Second Appeal No.333 of 1990 whereby the Single Judge of the High Court while exercising jurisdiction under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") reversed the concurrent findings of fact arrived at by the two Courts below and dismissed the suit of the plaintiff-appellant herein.

We need not burden the order by setting out the facts in detail except to the extent necessary to appreciate the short controversy involved in the appeal.

The appellants are the legal representatives of the original plaintiff whereas the respondent is the defendant.

The dispute in this appeal relates to an agricultural land bearing G.No. 505 (old Sy. No 71) admeasuring 5 Hectare 28 R. situated at village Vardi, Taluka Chopda, District Jalgao (MH) (hereinafter referred to as, "the suit land".

One Rustum s/o Nathu Pinjari - a Muslim by religion was the owner of the suit land. He died intestate leaving behind his only daughter- Dagadabai, w/o Shaikhlal Pinjari. She, as an heir, accordingly inherited the suit land exclusively on the death of her father- Rustum.

Dagadabai then filed a Civil Suit, out of which this appeal arises, against the respondent claiming therein a decree for possession in relation to the suit land. The plaintiff alleged that she is the owner of the suit land whereas the defendant is in unlawful possession of the suit land without any right, title and interest therein and, therefore, he is to be dispossessed from the suit land. The plaintiff, therefore, as mentioned above sought a decree for possession on the strength of her title against the respondent.

The respondent filed his written statement. He denied the appellant's claim. In the first place, claiming himself to be the adopted son of Late Rustum, the respondent contended that he became the owner of the suit land by inheritance as an adopted son of Rustum. In the second place, he denied the

ownership of the plaintiff in the suit land and set up a plea of adverse possession to claim his ownership over the suit land. The respondent contended that he has been in long and continuous possession of the suit land for more than 12 years prior to the date of filing of the suit on the basis of mutation entries made in the revenue record in relation to the suit land. It was alleged that he acquired title over the suit land on the strength of his continuous possession which, according to him, was adverse. It is essentially on these two defenses, the respondent denied the plaintiff's case and defended his possession over the suit land.

The Trial Court framed issues and the parties adduced evidence. The Trial Court, by judgment/decree dated 29.08.1983 in Civil Suit No. 108 of 1981 decreed the appellant's suit. It was held that the appellant (plaintiff) is the owner of the suit land; defendant failed to prove his adoption; there is no concept of adoption in Muslims and hence there could be no valid adoption of the respondent by Rustam and nor such adoption is recognized in Mohammadan Law; the defendant has failed to prove his title over the suit land on the basis of his alleged possession over the suit land; the defendant is, therefore, in illegal and unauthorized possession of the suit land for want of any right, title and interest and hence liable to be dispossessed from the suit land.

Felt aggrieved, the defendant filed first appeal before the Additional District Judge, Amalner. Vide order dated 18.09.1990 in Civil Appeal No.43 of 1989. The first appellate Court affirmed the judgment and decree of the Trial Court and dismissed the appeal.

Felt aggrieved, the defendant carried the matter in Second Appeal before the High Court. The High Court admitted the appeal on the following substantial question of law: “Whether in the facts and circumstances of the present case, the defendant(appellant herein) perfected his title to the suit land on account of adverse possession and the alternative plea ought to have been allowed by the Courts below, particularly, when there were disputes regarding the mutation proceedings after the death of Rustum Pinjari and the intention of the defendant to get his name mutated was writ large to show his hostile attitude.”

By impugned order, the learned Single Judge of the High Court allowed the appeal and while setting aside the judgment/decree of the two courts below dismissed the suit giving rise to filing of this appeal by special leave by the plaintiff before this Court. The leave was granted.

Heard Mr. Anshuman Animesh, learned counsel for the appellants and Mr. Nishant Ramakantrao Katneshwarkar, learned counsel for the respondent.

Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal and while setting aside of the impugned order restore that of the Trial Court and the first Appellate Court.

In our considered opinion, the High Court erred in admitting the second appeal in the first instance and then further erred in allowing it by answering the question framed in defendant's favour. This we say for more than one reason as detailed below.

First, when the Trial Court and the First Appellate Court concurrently decreed the plaintiff's suit by recording all the findings of facts against the defendant enumerated above, then, in our opinion, such findings of facts were binding on the High Court.

It is also for additional reasons that the findings were neither against the pleadings nor evidence and nor against any provisions of law. They were also not perverse on facts to the extent that no average judicial person could ever record. In this view of the matter, we are of the opinion that the second appeal did not involve any question of law much less substantial question of law within the meaning of Section 100 of the Code to enable the High Court to admit the appeal on any such question much less answer it in favour of the defendant.

Second, the question which was formulated by the High Court did not involve any question of law much less substantial question of law within the meaning of Section 100 of the Code requiring interference in the first Appellate Court's judgment.

Third, the plea of adverse possession being essentially a plea based on facts, it was required to be proved by the party raising it on the basis of proper pleadings and evidence. The burden to prove such plea was, therefore, on the defendant who had raised it. It was, therefore, necessary for him to have discharged the burden that laid on him in accordance with law.

When both the Courts below held and, in our view, rightly that the defendant has failed to prove the plea of adverse possession in relation to the suit land then such concurrent findings of fact was unimpeachable and binding on the High Court.

Fourth, the High Court erred fundamentally in observing in Para 7 that, "it was not necessary for him (defendant) to first admit the ownership of the plaintiff before raising such a plea".

In our considered opinion, these observations of the High Court are against the law of adverse possession. It is a settled principle of law of adverse possession that the person, who claims title over the property on the strength of adverse possession and thereby wants the Court to divest the true owner of his ownership rights over such property, is required to prove his case only against the true owner of the property. It is equally well-settled that such person must

necessarily first admit the ownership of the true owner over the property to the knowledge of the true owner and secondly, the true owner has to be made a party to the suit to enable the Court to decide the plea of adverse possession between the two rival claimants.

It is only thereafter and subject to proving other material conditions with the aid of adequate evidence on the issue of actual, peaceful, and uninterrupted continuous possession of the person over the suit property for more than 12 years to the exclusion of true owner with the element of hostility in asserting the rights of ownership to the knowledge of the true owner, a case of adverse possession can be held to be made out which, in turn, results in depriving the true owner of his ownership rights in the property and vests ownership rights of the property in the person who claims it.

In this case, we find that the defendant did not admit the plaintiff's ownership over the suit land and, therefore, the issue of adverse possession, in our opinion, could not have been tried successfully at the instance of the defendant as against the plaintiff. That apart, the defendant having claimed the ownership over the suit land by inheritance as an adopted son of Rustum and having failed to prove this ground, he was not entitled to claim the title by adverse possession against the plaintiff.

In the light of this settled legal position, the plea taken by the defendant about the adoption for proving his ownership over the suit land as an heir of Rustum was rightly held against him.

Fifth, the defendant having failed to prove that he was the adopted son of Rustum, had no option but to suffer the decree of dispossession from the suit land. It is a settled principle of Mohammadan Law that Mohammadan Law does not recognize adoption (**see-Section 347 of Mulla Principles of Mahomedan Law, 20th Edition page 430**).

It is for the aforementioned reasons, the impugned judgment is held legally unsustainable and hence deserves to be set aside.

The appeal thus succeeds and is accordingly allowed. Impugned judgment is set aside and that of the Trial Court and the first Appellate Court is restored.

****

3. Section 319 of Cr. P.C

Brijendra Singh and Ors. Vs. State of Rajasthan

A.K. Sikri & Ashok Bhushan , JJ.

In the Supreme Court Of India

Date of Judgment- 27.04.2017

Issue

Quality of evidence required to be considered by the court while issuing summons to the additional accused persons (through named in the FIR but not included in the charge sheet) under section 319 of the code, 1973 to face trial along with other accused persons.

Relevant Extract

The Appellants herein, three in number, have been summoned by the Court of Special Judge, SC/ST Act, which is in seisin of the trial in respect of FIR No. 53 of 2000, wherein charges for offences Under Sections 147, 148, 149, 323, 448, 302/149 of Indian Penal Code (Indian Penal Code) as well as Under Sections 3 and 3(2)(V) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (SC/ST Act) have been framed. The Appellants were not arraigned as Accused in the chargesheet. The charges were framed against those who were Accused in the chargesheet and prosecution evidence is being recorded. The Appellants are summoned as additional Accused persons Under Section 319 of Code of Criminal Procedure, 1973 (Cr.P.C.) to face the trial along with other Accused persons. The trial court has passed the Order dated 06.10.2015 on an application filed by the complainant Harkesh Meena Under Section 319 of Code of Criminal Procedure. This order was challenged by the Appellants before the High Court. However, the High Court has dismissed the revision petition preferred by the Appellants on 11.01.2016.

Factual details pertaining to the FIR and registration of case against other persons as well as filing of the application by the complainant Under Section 319 of Code of Criminal Procedure and the orders therein are as under:

On the basis of a written complaint, FIR No. 53 of 2000 was registered at 10:30 pm on 29.04.2000 Under Sections 147, 148, 149, 323, 448, 302/149 Indian Penal Code as well as Under Sections 3 and 3(2) (V) of SC/ST Act. In this complaint, the complainant had stated that at about 3:00 pm on 29.04.2000 when he was at his Khejra well, making his cattle drink water, certain persons including Appellants who belong to his village came there armed with axe, lathi sabbal (iron rod) and knives in their hands, with intention to kill the complainant. On seeing them, the complainant ran from that place and came to his uncle's (Nathu) house and cried loudly. His uncle was sleeping in front of the house and Lakhpat was sleeping under Neem tree. As soon as he came into the thatch, Pratap Singh inflicted lathi blow on him from behind which hit on his back. The complainant ran into the house of Bharatlal. Brijendra Singh inflicted sabbal at the head of his uncle Nathu who was sleeping at that time and Pratap hit his uncle with axe above the ear. Thereafter, all these Accused persons started inflicting lathi sticks. Lakhpat tried to run in order to rescue himself. These persons gave beating to him as well, with lathi sticks. When the complainant's elder brother went to rescue them, these Accused persons gave lathi sticks blow to him as well. In the meantime, their wives, wives of their sons had also come. Rishi, son of Ramu Brahmin of Talabka and Bhanu, nephew of Jagdish Singh of Jaipur were also along with them. Because of the beating by the Accused persons, complainant's uncle Nathu died on the spot. Thereafter, Accused persons fled away. The incident was witnessed by a number of villagers. In the FIR, the Appellants were also named as Accused persons.

FIR was registered and the matter was investigated by the Investigating Officer (IO). During the investigation, the Appellants were also interrogated. They had stated that they are residing at Jaipur and at the time of incident, they were in Jaipur. Thus, plea of alibi was taken by these persons. Appellant No. 1 and 2 are in police service and at relevant time they were posted at Jaipur. Appellant No. 2 Jagdish has lost his leg while on traffic police duty. Appellant No. 3 Bhanu is the Appellant's sister's son and claimed that he was also at Jaipur. The police after

investigation and considering the evidence with regard to the alibi of the Appellants Brijendra, Jagdish (who lost his leg while discharging traffic police duty) and Bhanu, did not find any sufficient and reliable evidence against the Appellants and, therefore, did not file any challan against them and kept the investigation pending Under Section 178(3) Code of Criminal Procedure. When the trial court by its Order dated 06.09.2000, without any challan being submitted by the police, directed cognizance of the matter, the Appellants filed the S.B. Criminal Revision No. 505/2000 before the High Court and the High Court vide its Order dated 16.04.2009 allowed the Revision and set aside the Order dated 06.09.2000 of the trial court. The High Court, however, made it clear that the said Order dated 16.04.2009 shall be without prejudice to the powers of the Sessions Court to add any person in the array of Accused Under Section 319 Code of Criminal Procedure.

During the period when S.B. Criminal Revision No. 505 of 2000 was pending before the High Court, the police came to the conclusion that the Appellants were not involved in the incident. The police after investigation, prepared the Final Report of closure of the case against the Appellants which was approved by the SP. In this manner, after completing the investigation, the police filed the Challan only against other Accused persons, namely, Bhanwar Singh, Pratap Singh and Shambhu Singh.

Though, at the time of filing of the Challan, the police kept investigation pending, subsequently it came to the conclusion that the Appellants were not involved and the final report of closure of the case against the Appellants was filed. The trial court framed charges against the aforesaid three Accused persons and the trial proceeded, though it has been delayed abnormally as more than 15 years have been passed. Be that as it may, the prosecution examined 23 witnesses including PW-1 Bharat Lal, PW-2 Kamla, PW-3 Lakhpat, PW-4 Harkesh and PW-5 Amritlal sometime in the year 2009. On 26.03.2014 i.e. after five years of examination of the aforesaid witnesses, complainant filed application Under

Section 319 of Code of Criminal Procedure. It is this application which has been allowed by the Special Judge and the said order has been affirmed by the High Court.

Mr. Jain, learned senior Counsel, submitted that it is on the basis of various documents and statements of various persons, recorded during investigation, the Investigating Officer was convinced that these three Appellants were in Jaipur at the time of the incident and, therefore, could not have been present at the place of incident, i.e. Karauli, which is at a distance of 176 kms. approximately, from Jaipur. Submission of Mr. Jain was that merely on the basis of the statement of the complainant, which was there before the Investigating Officer as well at the time of investigation, the Special Judge could not have allowed the application Under Section 319 Code of Criminal Procedure as no further or new material was produced before the Court which could indicate the involvement of the Appellants. Learned Counsel submitted that for exercising the powers Under Section 319 Code of Criminal Procedure, which was discretionary and extraordinary in nature, the trial court should have convinced itself that there is strong and cogent evidence indicating that the Appellants may be guilty of committing the offence. This condition, according to him, was not satisfied. He further submitted that the High Court also did not examine the matter from the aforesaid perspective and merely went by the fact that the witnesses have deposed about the involvement of the Appellants in their deposition before the Court.

Learned Counsel for the Respondents, on the other hand, argued that the trial court has rightly exercised its power on the basis of depositions of the witnesses before it, which were in the form of 'evidence' to the effect that the Appellants may have committed the offence in question. It was argued that provisions of Section 319 Code of Criminal Procedure were not meant for this purpose only and the exercise of power by the trial court cannot be treated as unwarranted. It was so observed by the High Court also while dismissing the

revision petition and observing that no illegality or perversity was found in the orders of the trial court.

It also goes without saying that Section 319 Code of Criminal Procedure, which is an enabling provision empowering the Court to take appropriate steps for proceeding against any person, not being an accused, can be exercised at any time after the charge-sheet is filed and before the pronouncement of the judgment, except during the stage of Section 207/208 Code of Criminal Procedure, the committal etc., which is only a pre-trial stage intended to put the process into motion.

The moot question, however, is the degree of satisfaction that is required for invoking the powers Under Section 319 Code of Criminal Procedure and the related question is as to in what situations this power should be exercised in respect of a person named in the FIR but not charge-sheeted.

In order to answer the question, some of the principles enunciated by the Constitution Bench in the case of **Hardeep Singh Vrs.State of Punjab reportrd in (2014)3 SCC 92** case may be recapitulated:

Power Under Section 319 Code of Criminal Procedure can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an Accused and face the trial in the ongoing case, once the trial court finds that there is some 'evidence' against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The 'evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power Under Section 319 Code of Criminal Procedure. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court Under Section 319 Code

of Criminal Procedure and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

When we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the Appellants. The Appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO found that these Appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 kms. The complainant and others who supported the version in the FIR regarding alleged presence of the Appellants at the place of incident had also made statements Under Section 161 Code of Criminal Procedure to the same effect. Notwithstanding the same, the police investigation revealed that the statements of these persons regarding the presence of the Appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that Appellants plea of alibi was correct.

This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so-called verbal/ocular version. Thus, the 'evidence' recorded during trial was nothing more than the statements which was already there Under Section 161 Code of

Criminal Procedure recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether 'much stronger evidence than mere possibility of their (i.e. Appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the Appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the Appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny.

As a consequence, this appeal is allowed setting aside the order of summoning the Appellants Under Section 319 Code of Criminal Procedure.

****

4. Section 372 read with Section 378 (4) of Cr. P. C

Roopendra Singh Vs. State of Tripura and Ors.

A.K. Goel & U.U. Lalit , JJ.

In the Supreme Court of India

Date of Judgment - 11.04.2017

Issue

Whether the widow of the deceased comes within the ambit of victim and can maintain an appeal without obtaining leave against the judgment and order of acquittal in a murder case specially when leave to appeal has been refused to the state.

Relevant Extract

This appeal was filed Under Section 372 of Code of Criminal Procedure, 1973 ('Cr.P.C.' for short)by the wife of the deceased,Respondent No.2 challenging the order of acquittal by filing Criminal Appeal no:23 of 2011 in the Gauhati high Court,Agartala Bench. When the appeal was listed for admission, an objection was taken that unless "leave" was granted Under Section 378(4) of Code of Criminal Procedure, the appeal could not be admitted. At this juncture, a petition Under Section 482 of Code of Criminal Procedure was filed by Respondent No. 2 for treating said criminal appeal Under Section 372 read with Section 378 Code of Criminal Procedure.

The matter was contested. The High Court by its judgment and order dated 06.06.2012 concluded that there was an unfettered right conferred upon the victim by Section 372 Code of Criminal Procedure and that no leave was required for the victim to file such appeal. Consequently, the High Court observed that there was no necessity for converting the appeal to one Under Section 372 read with 378 Code of Criminal Procedure. The following observations are noteworthy:

The proviso to Section 372 has created a right to appeal unfettered of any leave or sanction and it shall automatically lie to the forum where an appeal ordinarily lies against the order of conviction of such court if the said appeal against the judgment and order of acquittal is filed by the victim as defined in Section 2(wa) of Code of Criminal Procedure.

For the reasons as stated above, this Court is of the view that even though the right to appeal for the victim has been created by the proviso to Section 372 of Code of Criminal Procedure, the said proviso itself is a comprehensive provision, not fettered by any leave or sanction as required for the categories of appeals as depicted in Section 378(1), 378(2) and 378(4) of Code of Criminal Procedure. No leave is required for the victim to

file an appeal as against the order of acquittal under the proviso to Section 372 of Code of Criminal Procedure.

The correctness of the decision of the High Court is questioned by the Appellant-accused.

In the meantime a decision was rendered by this Court on 06.10.2015 in Satya Pal Singh v. State of Madhya Pradesh MANU/SC/1119/2015MANU/SC/1119/2015 : 2015 (15) SCC 613. Paras 14, 15, 17 and 18 of the decision are as under:

"14. Thus, from a reading of the above said legal position laid down by this Court in the cases referred to supra, it is abundantly clear that the proviso to Section 372 Code of Criminal Procedure must be read along with its main enactment i.e. Section 372 itself and together with Sub-section (3) of Section 378 Code of Criminal Procedure otherwise the substantive provision of Section 372 Code of Criminal Procedure will be rendered nugatory, as it clearly states that no appeal shall lie from any judgment or order of a criminal court except as provided by Code of Criminal Procedure.

15. Thus, to conclude on the legal issue:

whether the Appellant herein, being the father of the deceased, has statutory right to prefer an appeal to the High Court against the order of acquittal under the proviso to Section 372 Code of Criminal Procedure without obtaining the leave of the High Court as required under Sub-section (3) of Section 378 Code of Criminal Procedure?

This Court is of the view that the right of questioning the correctness of the judgment and order of acquittal by preferring an appeal to the High Court is conferred upon the victim including the legal heir and others, as defined Under Section 2(wa) Code of Criminal Procedure, under the proviso to Section 372, but only after obtaining the leave of the High Court as required under Sub-section (3) of Section 378 Code of Criminal Procedure. The High Court of M.P. has failed to deal with this important legal aspect of the matter while passing the impugned judgment and order.

17. Hence, the impugned judgment and order of the High Court is not sustainable in law and the same is liable to be set aside by this Court and the case is required to be remanded to the High Court to consider for grant of leave to file an appeal by the Appellant as required under Sub-section (3) of Section 378 Code of Criminal Procedure and thereafter proceed in the matter.

18. For the reasons stated supra, this appeal is allowed by setting aside the impugned judgment and order of the High Court. The case is remanded to the High Court to hear the Appellant with regard to grant of leave to file an appeal as the Appellant is legal heir of the victim as defined Under Section 2(wa) Code of Criminal Procedure and dispose of the appeal in accordance with law in the light of observations made in this order as expeditiously as possible.

The decision in Satya Pal Singh shows that reliance was placed on a Full Bench decision of High Court of Delhi in Ram Phal v. State and Ors. MANU/DE/1687/2015MANU/DE/1687/2015 : 2015 221 DLT 1, according to which the right to prefer an appeal conferred upon a victim by virtue of proviso to Section 372 Code of Criminal Procedure is an independent statutory right and there is no need for the victim to seek leave of the High Court. Said decision of the Full Bench of the High Court of Delhi was not found to be legally correct by this Court in Satya Pal Singh.

Though the learned Amicus Curie has suggested that these matters be referred to larger Bench to reconsider the decision of this Court in Satya Pal Singh, we do not think that such course ought to be adopted in the present matter. The special leave petition has been pending in this Court for last 5 years. In any case, in the present matter the victim had preferred an application to treat the appeal initially filed Under Section 372 to be one Under Section 372 read with Section 378 Code of Criminal Procedure. Though the High Court observed that no such leave was necessary, the matter now assumes different complexion in the light of the decision in Satya Pal Singh. However, since there was already an application on behalf of the victim to treat the appeal Under Section 372 read with Section 378 Code of Criminal Procedure, in our considered view the leave ought to be granted, which we presently do. The pending appeal shall now be considered on merits by the High Court. This appeal, thus, stands disposed of.

Section 372 Code of Criminal Procedure has conferred upon a victim a substantive and independent right to maintain an appeal against acquittal. The widow of the deceased in the present matter comes within the definition of "victim" as incorporated in Section 2(wa). Merely because leave to appeal was not granted to the State to prefer an appeal against acquittal, the appeal preferred by the victim Informant ought not to have been rejected by the High Court summarily. We, therefore, set aside the order dated 28.06.2012 passed by the High Court rejecting Criminal Appeal preferred by the Appellant and remit the matter to the High Court for fresh consideration. It will be open to the High Court to consider the matter for grant of leave to appeal to the Appellant in the light of paragraphs 17 and 18 of the decision of this Court in Satya Pal Singh. These appeals are thus allowed in the aforesaid terms.

****

5. Sections 120-B/406/417/418/420/422/323/506/294/34 of IPC
Bikash Ch. Tulsiyan and others Versus State of Orissa and another
S.K. Sahoo ,J.

In the High Court of Orissa, Cuttack

Date of Hearing and Judgment: 24.04.2017

Issue

Cognizance of offences 120-B/406/417/418/420/422/323/506/294/34 of the Indian Penal Code and issuance of process against accused persons is challenged.

Relevant Extract

This is an application under section 482 of Cr. P. C. filed by the petitioners challenging the impugned order dated 22.12.2006 passed by the learned S.D.J.M., Angul in C.T. Case No.403 of 2005 in taking cognizance of offences under sections 120-B/406/417/418/420/422/323/506/294/34 of the Indian Penal Code and issuance of process against them.

It appears that initially the opposite party no.2 Sri Surendra Kumar Baliar filed a complaint petition in the Court of learned S.D.J.M., Angul which was registered as C.T. Case No.403 of 2005 against the petitioners. The said complaint petition was sent to the Inspector in charge of Angul Police Station for registration of the first information report and for investigation, on the basis of which Angul P.S. Case No.110 of 2005 was registered on 28.04.2005 under sections 120-B/ 406/417/418/420/422/323/506/294/34 of the Indian Penal Code.

After completion of investigation, final report was submitted in the case on 07.01.2006 indicating the case to be false which was received and placed before the learned S.D.J.M., Angul on 13.01.2006 and accordingly, the learned S.D.J.M., Angul issued notice to the complainant for filing a protest petition, if any. On the basis of such notice, the opposite party no.2 filed a protest petition on 03.04.2006. The learned S.D.J.M., Angul treated the protest petition as complaint petition, recorded the initial statement of the complainant-opposite party no.2 under section 200 of Cr.P.C. and conducted inquiry under section 202 of Cr.P.C.

During course of such inquiry, six witnesses were examined where after on perusal of the complaint petition, initial statement of the complainant–opposite party no.2 and the evidence recorded under section 202 of Cr.P.C., the learned S.D.J.M., Angul was of the prima facie view that the ingredients of offences under sections 120B/ 406/ 417/ 418/ 420/ 422/ 323/ 506/ 294/ 34 of the Indian Penal Code are made out against the petitioners and accordingly took cognizance of such offences and issued process against the petitioners which is impugned in this application under section 482 of Cr.P.C..

Mr. Jayadeep Pal, learned counsel appearing for the petitioners contended that there is absolutely no material on record against the petitioners nos.3, 4 and 5 who are ladies and they have been falsely entangled in the case merely because they are related to petitioners nos. 1 and 2. It is contended that even accepting the entire allegations as per the complaint petition and the evidence on record, the ingredients of offences under sections 120-B/ 406/417/418/420/422 of the Indian Penal Code are not attracted and therefore, the impugned order should be quashed invoking the inherent power under section 482 of Cr.P.C.

Mr. S.K. Bhanjadeo, learned counsel for the complainant–opposite party no.2 on the other hand placed the complaint petition as well as evidence and submitted that the accused persons had intention to cheat the complainant–opposite party no.2 and therefore, in spite of their assurance to refund the amount taken on credit basis, they only refunded a part of it and therefore, no illegality has been committed by the learned Magistrate in passing the impugned order.

Mr. C.R. Swain, learned Addl. Standing Counsel supported the impugned order. Law is well settled that in order to establish a charge under section 420 of the Indian Penal Code, it is to be proved that the accused had fraudulent or dishonest intention at the time of making promise or representation. In the case in hand, merely because the accused persons refunded a part of the credit amount to the complainant and could not refund the rest, it cannot be inferred

that they had fraudulent or dishonest intention at the time of taking money on credit basis.

The powers under section 482 of Cr.P.C. are to be exercised sparingly and with a great deal of circumspection. On scrutiny of materials available on record, it indicates that there is nothing against the petitioners nos. 3, 4 and 5 who are the ladies and allegations have been leveled in an omnibus manner. Without specific accusation in respect of any of the offences, I am of the view that the order of taking cognizance and issuance of process against the petitioners nos. 3, 4 and 5 are not sustainable in the eye of law and therefore, the same is hereby set aside.

Similarly, so far as the offences under Similarly, so far as the offences under sections 120-B/406/417/418 /420/422 of the Indian Penal Code are concerned, the ingredients of cheating and criminal breach of trust are conspicuously absent from the allegations leveled against the petitioners nos. 1 and 2 and in such circumstances, it would not be in the interest of justice if the criminal proceedings are allowed to stand in respect of such offences and therefore, the order of taking cognizance of such offences also stands quashed. So far as the offences under sections 323/506/294/34 of the Indian Penal Code are concerned, on a plain reading of the complaint petition as well as evidence on record, the ingredients of such offences are apparent as against petitioners nos. 1 and 2 and therefore, no illegality has been committed by the learned S.D.J.M., Angul in taking cognizance of such offences and issuance of process against those two petitioners.

Accordingly, the 482 Cr.P.C. application is allowed in part. The order of taking cognizance and issuance of process as against petitioners nos. 3, 4 and 5 stands quashed. So far as the taking cognizance of offences under sections 120-B/ 406/417/418/420/422 of the Indian Penal Code also stands quashed. The order of taking cognizance of offences under sections 323/506/294/34 of the Indian Penal Code and issuance of process against the petitioners nos. 1 and 2 stands confirmed. With the aforesaid observation, the CRLMC application disposed of.

****

6. Section 302/34 of IPC

Gajendra Bhoi vs. State of Orissa

Sanju Panda and S.N. Prasad, JJ.

In the High Court of Orissa , Cuttack

Date of Judgment - 07.04.2017

Issue

Conviction for murder –Common intention Sentenced to life imprisonment –challenged.

Relevant Extract

This Criminal Appeal is directed against the judgment dated 20.11.2000 passed by the learned Addl. Sessions Judge, Sonepur in Sessions Case No. 16/10 of 2000 in convicting the appellant for commission of offence under Section 302 of the Indian Penal Code and sentencing him to undergo Imprisonment for life.

The prosecution case, in brief is that on 23.04.1997 at about 5.00 P.M. the present appellant-Gajendra Bhoi along with one Chakadola Gura came to the liquor Bhati namely "Gatarkela country liquor distillery and sales shop" wherein the deceased-Kasinath Prasad was working as Manager and Ramavatar Prasad (P.W. 4) as the gadidar, and they asked P.W. 4 to give them liquor free of cost. P.W. 4 when denied to give them liquor free of cost, they became angry and picked up a quarrel with him. However, one Santosh Sandh who was then working in a nearby sugarcane field intervened and was able to persuade the present appellant and his accomplice to leave the place. Shortly after this incident the present appellant again came to the bhati being accompanied by Chakadola and quarreled with P.W. 4, the gadidar and also assaulted P.W. 4, however they were again persuaded by Santosh Sandh and one Ganesh to leave the place. At that time Kasinath the deceased was not present in the bhati having gone to Sonepur for some work. While going away from the bhati, the present appellant had threatened P.W. 4 to see him. Some time thereafter the deceased Kasinath Prasad, the Manager of the bhati returned from Sonepur and sat on a chair in front of the bhati house. At about 7.30 P.M. on that day while the deceased was sitting on the chair, the present appellant and his four accomplices, namely Subal, Beda, Chakadola and Trilochan came to the bhati and of them Subal gave a 100 rupee note to P.W. 4 and asked him to give liquor. P.W. 4

received the money and went inside the bhati to bring liquor. Beda Jena and Subal while followed P.W. 4, the present appellant and his friend Chakadola stood near the deceased Kasinath Prasad who was then sitting on a chair. While P.W. 4 was bringing liquor, he heard the deceased Manager, Kasinath Prasad shouting as "CHURA MARDIA, CHURA MARDIA". Kartik Bagarty (P.W. 3) a cook under the deceased Kasinath and Akrura Guru (P.W. 1) a labourer who were present inside the bhati at that time, they also heard the deceased shouting "CHURA MARDIA CHURA MARDIA". All of them came out immediately and found the deceased Manager was lying in a pool of blood in front of the main gate of the bhati house, who died soon.

Immediately after such occurrence, P.W. 4 straightway headed to Sonepur P.S. where he reported that in the evening at 7.30 P.M., while he was in the bhati he heard the deceased Manager shouting "CHURA MARDIA CHURA MARDIA" and when he came out, the deceased was lying dead in front of the main gate of the bhati house. Shortly after such oral report, which was reduced to writing by the O.I.C., the O.I.C. reached the spot and investigated into the matter. He noticed a stab wound on the left side neck of the deceased, besides one abrasion near the left axial. The body of the deceased was sent to district headquarters hospital, Sonepur for autopsy. Akrura Guru (P.W. 1), Kartika Bagarty (P.W. 3) and Ramavatar Prasad (P.W. 4) told the Investigating Officer (P.W. 5) that the present appellant-Gajendra along with his four accomplices were seen running away from the place of assault shouting after the stabbing of the deceased. All the four accomplices were arrested, while the present appellant remained absconded. After completion of investigation, charge-sheet was submitted finding sufficient evidence against the appellant to have committed offence under Sections 302/34 I.P.C. As the present appellant was absconded, the case record was split up against him and the trial in respect of other accused persons were concluded. In the instant case, the present appellant on being arrested and taken to custody, the split up case was taken up.

The appellant's defence plea was one of complete denial.

In order to bring home the charge, during trial the prosecution examined as many as 5 witnesses and exhibited 7 documents. On the other hand, the defence had neither examined any witness nor exhibited any documents. The prosecution also proved five Material Objects from M.O.I. to M.O.V.

The learned Addl. Sessions Judge after threadbare discussion of the materials available on record found that it was the present appellant who had killed the deceased with a knife while the deceased was sitting outside near the door of the bhati. He has also given the finding that all the accomplices of appellant had gone to the bhati at a time, but none of them had done overt act nor had participated in assaulting the deceased. Accordingly, he acquitted all the four accomplices from the offence of murder stating that they had not shared their common intention with the present appellant in killing the deceased. Therefore, the Trial Court convicted the present appellant for commission of the offence punishable under section 302 IPC and sentenced him to undergo imprisonment for life.

Mr. Dhal, learned counsel for the appellant submits that When none of the witness have seen that who was the real assaultant among the five accused persons, he should not have convicted the present appellant under Section 302 IPC, when other accused persons have already been acquitted by his predecessor. As such the impugned judgment is liable to be set aside and the appellant is entitled for acquittal.

Learned Additional Government strongly contended that there are corroborative evidences of P.W. 1, 3 and 4 that the appellant had given the stabbing in the neck of the deceased manager with a knife. According to him, the Doctor (P.W. 2), who conducted the autopsy also corroborated with the evidence of the witnesses about one Stabbing injury on the body of the deceased, which is sufficient to cause death of a person. The sentence imposed on the appellant has

been properly assessed by the Trial Court and as such, the same calls for no interference by this Court.

Perused the L.C.R. and went through the evidence on record carefully.

It appears that the prosecution has basically founded its case on the basis of the statements of the eye witnesses, i.e. P.Ws. 1, 3 and 4, so also the statements of the P.W. 2, the Doctor, who conducted the post mortem examination.

On close scrutiny of the evidences of the witnesses , it is evident that blow of knife in the neck of the deceased has been corroborated by P.W. 1, 3 and 4. According to the evidence of P.W. 4, no one was there along with the deceased at the time of occurrence since all the accomplices had been inside to the bhati along with him to bring liquor. Due to the previous quarrel on that date, the appellant had come prepared. The evidence of the doctor who conducted autopsy over the dead body is consistent with the evidence of the witnesses so far as stabbing in the neck of the deceased is concerned. According to the Doctor, there were only two injuries on the body of the deceased out of which, one was stabbing injury made by sharp pointed cutting weapon by which there were massive haemorrhage to the left internal carotid artery and the same was sufficient to cause the death of the deceased. The other one is abrasion which might have been caused due to rubbing against a hard and rough surface.

Taking all these things into account, there cannot be any doubt that the present appellant is the author of the crime. In such background, there is no force in the arguments advanced by the learned counsel for the appellant to interfere with the impugned order. Thus, this Court is not inclined to interfere with the impugned judgment of conviction and sentence. The Criminal Appeal stands dismissed accordingly.

****

7. Section 302/149 of IPC

Sudha Renukaiah and Ors. Vs. State of A.P.

A.K. Sikri & Ashok Bhushan ,JJ.

In the Supreme Court of India

Date of Judgment - 13.04.2017

Issue

Conviction for murder/ Common object ,Sentenced to life Imprisonment with fine - Challenged.

Relevant Extract

These appeals have been filed against judgment dated 09.07.2013 of High Court of Andhra Pradesh, allowing the Criminal Appeal No. 340 of 2009 and Criminal Revision Case No. 643 of 2008. Criminal Appeal was filed by the State of A.P. and Criminal Revision was filed by Somarowthu Laxmi Samrajyam, wife of Siva Sankara Rao deceased. The High Court vide its judgment has set aside the order of the Trial Court acquitting the Accused and has convicted the Accused Under Section 302 read with Section 149 Indian Penal Code. The Accused aggrieved by the judgment of High Court, convicting them have come up in these appeals.

The prosecution case briefly stated is:

All the Accused and the de facto complainants are permanent residents of Vellaluru village. Two factions, one of the Accused party and another of complainant party had been attacking each other and several criminal cases had been registered against both the factions. One Satyanarana, belonging to the complainant party was killed on 07.02.2003, for which a case in Crime No. 08 of 2003 of Ponnur Rural Police Station was registered for the offences punishable Under Sections 147, 148 and 302 read with 149 Indian Penal Code. While so, another case in Cr. No. 35 of 2003 of Ponnur Town Police Station, was registered for the offences punishable Under Sections 147, 148 and 302 read with 149 Indian Penal Code against Somarowthu Tirupathirao(hereinafter referred as deceased No. 1), Somarowthu Siva Sankara Rao (hereinafter referred as deceased No. 2) and others who were alleged to have killed one Sooda China Veeraiah and in connection with the said case, the above named two deceased and others were arrested and remanded to judicial custody. The Court gave conditional bail to them to the effect that they should remain at Bapatla only and shall report daily before the Bapatla Police Station, and shall also appear before the Ponnur Court once in a week. In connection with the above case, on 10.10.2013 the deceased No. 1 and No. 2, along with PWs. 1 to 6 and PW. 9, went to Ponnur on three two-wheelers to attend the Court and after attending the Court, they were returning

back in the evening and on receipt of the said information, all the Accused except A. 2, A. 4 to A. 6, A. 11, A. 13 and A. 18 conspired together and as A. 18 was having a lorry bearing No. ADM 8373, all of them collected deadly weapons like axes, knives, rods and sticks, went in the lorry of A. 18 and dashed the two wheeler in which both the deceased and PW. 5 were travelling. Both the deceased fell down from two wheeler. Thereafter, the Accused attacked them indiscriminately and killed them and also inflicted injuries on PW. 5 and they all ran away from the scene of offence in the same lorry along with the weapons. Deceased No. 1 died on the spot and other injured were shifted to the Hospital. The others, who were following the two wheeler of the deceased witnessed the incident and reported the matter to police and shifted the second deceased to Ponnur Hospital, where the Doctor declared him dead and other injured (P.W. 5) was referred to Government Hospital, Guntur. On intimation, the police went and recorded the statement of PW. 1. PW. 20 the Head Constable, Bapatla Town P.S., handed over the file to PW. 21 who registered a case in Crime No. 57 of 2013 for the offences punishable Under Sections 147, 148, 307, 302 read with 149 Indian Penal Code. After completion of investigation, PW. 23 laid the charge sheet.

PW. 23, Investigating Officer(hereinafter referred to as 'IO') took up the investigation on 10.10.2003 itself. After visiting Govt. Hospital, Guntur, IO found Venkaiahnaidu unconscious. He could not record the statement of PW. 5. PW. 5 on 14.10.2003 was shifted to Hi-tech Hospital, Guntur where he regained consciousness after 20 days. IO recorded the statement of PW. 5 on 04.11.2010 at Hi-tech Hospital. The IO also visited the place of incident, seized various articles, prepared the sketch map and also got the spot photographs. After conducting the investigation, IO submitted the charge sheet against 19 accused, out of which A. 18 had already died on 14.12.2003. All the Accused were put on trial. Prosecution before the Trial Court examined PW. 1 to PW. 23, marked exhibit P. 1 to P. 25 and also marked M.O. 1 to 16. PW. 1 to PW. 6 and PW. 9 are the eye-witnesses of the incident. PW. 7 and PW. 8 are the wives of first and second deceased, who after knowing about the incident rushed to the scene of offence. PW. 10 was examined to show that on the date of incident, she had seen the Accused making preparation in a lorry in front of his house. PW. 16 is a doctor who treated the injured at Govt. Hospital, Guntur. Doctors who conducted the postmortem of two dead bodies were also examined, as PW. 17 and PW. 18. P.W. 23 is Investigating Officer who conducted the investigation. The Accused did not lead any evidence. During pendency of the trial A. 1, A. 9, A. 11 and A. 18 having died, trial abated against such accused.

The Trial Court vide its judgment dated 24.12.2007 acquitted the accused. Trial Court after referring to evidence of eye-witnesses came to the conclusion that there were contradictions and omissions. The Trial Court observed that medical evidence does not support any injury by battle axe. After referring to the injuries of P.W. 5 and medical evidence, Trial Court observed that it is not possible to hold that injuries were caused with sharp edge weapon like hunting sickle. Trial Court held that Accused are entitled to benefit of doubt and acquittal. Aggrieved by the judgment of Trial Court, State filed an appeal being Criminal Appeal No. 340 of 2009. Somarowthu Laxmi Samarajaya wife of Siva Sanakara Rao deceased, filed Criminal Revision No. 643 of 2008. Both Criminal Appeal and Criminal Revision were heard together and have been allowed by the High Court. A. 1 to A. 3, A. 5 to A. 7 and A. 11 were found guilty Under Section 302 read with 149 Indian Penal Code and they have been convicted and sentenced to undergo life imprisonment and to pay a fine of Rs. 500/- each. Acquittal of A. 12 to A. 9 have been affirmed. These appeals have been filed by A. 2, A. 3, A. 5, A. 6, A. 7 and A. 11 (A-1, being dead).

Learned Counsel for the Appellants in support of the appeal contended that the order of acquittal by the Trial Court was based on appreciation of evidence on record which order of acquittal required no interference by the High Court. It is contended that even if two views are possible, the order of Trial Court acquitting the Accused need no interference by Appellate Court. The medical evidence which was led by the prosecution did not support the ocular evidence led by so called eye-witnesses. Hence, the Trial Court rightly disbelieved the prosecution case. The High Court wrongly put the burden on the Accused to prove that deceased and eye-witnesses were not required to attend the Court whereas burden lies on the prosecution to prove that the deceased and all the eye-witnesses were required to attend the Ponnur Court from where they claimed to be returning. There being long standing enmity between the Accused and complainant party, the Accused have been roped in. When Doctors came before the Court for recording their evidence, the weapons which were seized were not shown to them, so as to form an opinion whether injuries on the deceased and injured witness could have been caused by such weapons, which prejudicially affect the prosecution case.

Learned Counsel for the State refuting the submissions of learned Counsel for the Appellants contends that the High Court has rightly reversed the order of acquittal. It is contended that eye-witnesses account given by the eye-witnesses was worthy of reliance and Trial Court on account of insufficient reasons discarded such evidence. The injured PW. 5, Venkaiahanaidu, eye-witness had

fully proved the incident and specifically proved the roles of Accused which evidence ought not to have been discarded by the Trial Court. It is submitted that the High Court has correctly re-appreciated the evidence and has given cogent reasons for finding the evidence trustworthy and believable. The account of injuries as proved by eye-witnesses was fully corroborated with the medical evidence. The evidence of eye-witnesses who were accompanying the deceased Nos. 1 and 2 could not have been discarded as interested witnesses whereas they were family members who were accompanying the deceased on the motor-cycle and others on two-wheeler which eye-witnesses could prove the incident. The judgment of conviction by the High Court is based on correct appreciation of evidence and the Accused having been found guilty, the appeals deserve to be dismissed.

As noted above, PW. 1 to PW. 6 and PW. 9 are all eye-witnesses of the incident. PW. 5, Venkaiahanaidu is an injured witness who was travelling on the Hero Honda motor-cycle driven by Tirupati Rao, his father (deceased No. 1). The Trial Court after commenting on the evidence of the eye-witnesses had proceeded to discard the evidence by giving some reasons. We have carefully looked into the order of the Trial Court as well as depositions of eye-witnesses and adverted to the reasons given by the Trial Court for not believing the evidence. We shall refer to the reasons given by the Trial Court for discarding eye-witnesses one by one. We first take up the deposition of the injured witness-PW. 5 and the reasons given by the Trial Court to discard his evidence.

As noted above, PW. 5, aged about 12 & 1/2 years on the day of incident was sitting on Hero Honda motor bike driven by his father, Tirupati Rao, deceased No. 1, Siva Sankara Rao deceased No. 2, was also sitting on the same motor bike. PW. 5, Venkaiahanaidu in his eye-witness account has deposed that he, his father and Siva Sankara Rao were on Hero Honda motor bike returning to Baptala, PW. 1- Sivarama Krishnaiah, PW. 3, Murali Krishna, were coming on scooter whereas Veerahaviah, PW. 4, Venkatalakshmi Narasimha, PW. 2 and PW. 9, Venkateswara Rao were coming on TVS moped. They left for about 3 or 3.40 p.m. and at about 4 p.m. when they reached the scene of offence, Tirupati Rao, his father observed that a lorry driven by Accused A-3 was coming from opposite direction, his father turned the vehicle to go back. At that time the lorry hit their motorcycle, they all fell down. All the Accused were in the lorry with knives and axes. His father and Siva Sankara Rao were attacked by the Accused with axes and knives. A-19 beat PW. 5 on his right temporal bone with knife whereas Botchu Vasu - A-11 beat with stick on his right side. He stated that he lost consciousness which he regained at Hitech Hospital, Guntur. It has come on

evidence that immediately after occurrence both Shiva Shankar Rao and Venkaiah Naidu were taken to Government Hospital, Ponnur. Shiva Shankar Rao died between 5.30 to 6 p.m. at Government Hospital, Ponnur and Venkaiahanaidu, PW. 5 was shifted to Government Hospital, Guntur where he was examined at 6.15 p.m. by Dr. Vinayvardhan, PW. 16, who in his evidence has clearly proved that on 10.10.2003 at 6.15 p.m. he examined injured Venkaiahanaidu accompanied by Murali Krishna, PW. 3 and injuries were found in his body. PW. 23, IO had taken the investigation in the evening on 10.10.2003 itself and recorded statement of PWs. 1, 2, 3, 4, 6 and 9 on the same day. He also on the same day came to know that injured, PW. 5 was shifted to Government Hospital, Guntur where he went and found PW. 5 unconscious, hence, statement of PW. 5 could not be recorded on that day.

Now, let us come to the judgment of the Trial Court and advert to the reasons given by the Trial Court for discarding the evidence of injured eye-witness. In paragraph 15 of the judgment, Trial Court has observed that PW. 23 in his statement has stated that when he went to Government Hospital, Ponnur, PW. 5 was absent and he was shifted to Government Hospital, Guntur as his condition was critical. The Trial Court has observed that unfortunately "the Doctor at Government Hospital, Ponnur was not examined and there is no record to show that PW. 5 was also taken to the Government Hospital, Ponnur along with the second deceased". The above observation that no Doctor from Government Hospital, Ponnour was examined nor there is any record to show that PW. 5 was taken to Government Hospital, Ponnur has no significance since Venkaiahanaidu, PW. 5 was shifted to Government Hospital, Guntur where he was examined at 6.15 p.m. on the same day which was proved by the Doctor. PW. 16. PW. 1 and PW. 3, both had stated that after the incident both the injured Siva Sankara Rao and Venkaiahanaidu were taken to the Government Hospital, Ponnur and after 5.30 p.m. Siva Sankara Rao died and Venkaiahanaidu was asked to be taken to Government Hospital, Guntur. Non-examination of Doctor to prove that injured PW. 5 was first taken to Government Hospital, Ponnur was inconsequential and immaterial, when there is no dispute that injured was admitted in the Government Hospital, Guntur and was examined by the Doctor at 6.15 p.m. on the same day. In paragraph 16 Trial Court has referred to evidence of PW. 16, Doctor who examined PW. 5 on 10.10.2003 at 6.15 p.m. The evidence of Doctor, PW. 16 extracted by the Trial Court in paragraph 16 of the judgment that PW. 16 who was working as CMO in the Government Hospital, Guntur has stated that on 10.10.2003 at 6.15 p.m. he examined Venkaiahanaidu, PW. 5 accompanied by Murali Krishna, PW. 3, the Doctor was also noted that PW. 5 was

injured and said to be beaten with Veta Kodavali (hunting sickle). The following injuries were noticed by the Doctor:

1. Diffused swelling 10 x 10 cm on right occipital partial region with one centimeter laceration-bleeding.

2. Graze abrasion on left hand and fore arm 10 x 5 cm size red in colour.

X-Ray skull reveals no bone injury X-ray left hand with wrist reveals fracture noted in the lower end of radius. Ward opinion with I.P. No. 49385 head injury patient absconded on 14.10.2003.

I am of opinion basing on the X-ray and ward opinion the injury No. 2 is grievous in nature; No. 1 is simple in nature might have been caused due to blunt and rough objects and aged about 1 to 6 hours prior to my examination. Ex. P13 is the wound certificate issued by me.

The Trial Court held that it is not possible to hold that the nature of injuries could be caused with sharp edged weapon like hunting sickle. This was one of the reasons for discarding the evidence of PW. 5.

When, PW. 5 himself has stated that he was attacked by knife and stick the injuries which were noticed by the Doctor were caused by knife and stick, since there is no inconsistency between the ocular evidence of PW. 5 and medical evidence of PW. 16, the reason given by the Trial Court for discarding the evidence of PW. 5 is incorrect.

The Trial Court further has observed that PW. 23 had not taken any endorsement from the Doctor to the effect that PW. 5 was in fact in unconscious state of mind, when he visited Hospital on 10.10.2003 and found PW. 5 unconscious. The Trial Court further observed that since PW. 5 was unconscious for considerable period and regained consciousness nearly after more than 20 days, it was expected that the investigation agency to secure the presence of the Doctor while examining this witness. The Trial Court made the following observation in paragraph 17:

Even according to prosecution, PW. 5 was unconscious for considerable period and regained consciousness nearly after more than 20 days. Naturally, we will expect the investigation agency to secure the presence of the doctor while examining this witness. In the above circumstances, any amount of doubt is created about the examination of this witness. Even at the sake of repetition it must be pointed out that the absence of evidence from the doctor PW. 16 that PW. 5 was brought to the hospital in unconscious state, the whole theory must be

disbelieved. Which again will eliminate the evidence of PW. 5. Now we got the evidence of PW. 1, 2, 4, 5 and 9.

The Trial Court has drawn adverse inference against the evidence of PW. 5 on the ground that no evidence was given by the Doctor, PW. 16 about the unconscious state of PW. 5, hence, the whole theory must be disbelieved. PW. 5 has stated that after being attacked on the scene of occurrence he became unconscious and regained consciousness only at Hitech Hospital, Guntur.

PW. 23, IO in his statement has clearly stated that he went after recording the evidence of PW. 1, 2, 3, 4, 6 and 9 to the Government Hospital, Guntur and found the injured Venkaiahanaidu, PW. 5 in unconscious state, hence, could not record his statement. Following was stated by IO in his statement:

I visited GGH Guntur and found the injured S. Venkaiah Naidu (P.W. 5) in unconscious state; Hence, I could not record his statement.

PW. 5 appeared in the Court and in examination-in-chief question was put to him that whether he was unconscious at the time when he was admitted in Government Hospital, Guntur and when he regained his consciousness. PW. 5, both in examination-in-chief and cross-examination stated that he regained consciousness after 20 days and next day of regaining consciousness his statement was recorded.

Doctor, PW. 16, who appeared before the Court and recorded his evidence was not even put any question as to whether when Venkaiahanaidu was admitted in Government Hospital, Guntur he was conscious or unconscious. The observation of the Trial Court that there being no evidence that PW. 5 was unconscious and in the absence of evidence that PW. 5 was brought to the Hospital in unconscious state, the whole theory is to be disbelieved, is wholly incorrect and perverse appreciation of evidence. There being evidence of PW. 5 and PW. 23 that he was unconscious when he was admitted in Government Hospital, Guntur and there is no contrary evidence on the record, the view of the Trial Court that whole theory must be disbelieved is perverse and has rightly been reversed by the High Court.

It is also relevant to notice that observation has been made by the Trial Court that IO, PW. 23 ought to have been taken endorsement from the Doctor that PW. 5 was in unconscious state of mind on 10.10.2003, although there is evidence that he was unconscious on 10.10.2003 when he was admitted in the Hospital, the mere fact that certificate was not obtained by IO from the Doctor is inconsequential. Furthermore, it is well settled that even if IO has committed any

error and has been negligent in carrying out any investigation or in the investigation there is some omission and defect, it is the legal obligation on the part of the Court to examine the prosecution evidence de hors such lapses. In C. Muniappan and Ors. v. State of Tamil Nadu MANU/SC/0655/2010MANU/SC/0655/2010 : (2010) 9 SCC 567, following has been laid down in paragraph 55:

Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth.

The High Court has specifically considered the evidence of PW. 5 in paragraphs 27 and 28 of the judgment. The High Court has rightly observed that the fact of sustaining injuries by this witness has not been denied or disputed nor it was suggested to him that he sustained those injuries at a different place in a different manner in the hands of some other assailants. The High Court observed that some lapses on behalf of the investigation in examining the Doctor of the Government Hospital, Guntur or at Hitech Hospital cannot be taken as sole basis so as to doubt the case of the prosecution. When PW. 5 was unconscious, the delay in examination cannot be said to be fatal to the case of the prosecution. The High Court, thus, has correctly appreciated and relied on the evidence of PW. 5 which we find fully in accordance with law.

The injured witness PW. 5 having given specific role of the persons who caused injuries to deceased Nos. 1 and 2 which stands corroborated with the medical evidence, ignoring the evidence of PW. 5 an injured witness on the grounds as noted above by the Trial Court is clearly unsustainable and the High Court rightly after considering all aspects of the matter has relied on the evidence of PW. 5 for holding the Accused guilty.

We now come to the reasons given by the Trial Court for discarding evidence of other eye-witnesses. With regard to PW. 1, Trial Court says that he has admitted that in Ex. P1, the names of A12 to A19 were not mentioned although he stated that he gave the names of the Accused when Police examined him. The Trial Court observed that so called conspiracy and participation of A12 to A19 is clouded with doubt. Even if, A12 to A19 have been acquitted, their acquittal does not lead the Trial Court to discard the prosecution case as given in Ex. P1 and supported by PW. 1 in his oral evidence. We are, thus, of the view that

there is no reason to discard the evidence of PW. 1 who was an eye-witness. PW. 21 is Sub-Inspector of Police who stated that he received phone call at about 5 p.m. on 10.10.2003 about the offence. He immediately rushed to the scene of offence and learnt that two injured persons were shifted to Ponnur Government Hospital and he also noticed there a Hero Honda Passion. After posting guard at the scene of offence, SI proceeded to Government Hospital, Ponnur where he came to know that Head Constable 690 (PW. 20) had already recorded the statement from the complainant. The statement of PW. 1 was recorded at 6 p.m. as was stated by PW. 23, IO in his deposition. The information of offence having been received by Police within one hour and statements of witnesses were recorded by 6 p.m. in the presence of PW. 1 at the Hospital corroborates the prosecution case of occurrence at 4 p.m. and shifting of injured to the Hospital immediately. The injured Siva Sankara Rao had died at Ponnur Hospital between 5.30 to 6 p.m., inquest report of which was also prepared immediately. We are, thus, of the view that the Trial Court without any valid reason has discarded the evidence of PW. 1 and the High Court did not commit an error on placing reliance on PW. 1 who made statement and gave detail of entire incident in his statement and details of the Accused and manner of carrying out the assault on both the deceased and injured witness.

With regard to PW. 2, the Trial Court states that when PW. 21, Sub-Inspector went on the scene of offence, he did not find PW. 2 present on the scene whereas PW. 1 has informed that while taking the second deceased and PW. 5 to Government Hospital, Ponnur, PW. 2 was asked to present near the dead body of first deceased. The statement of PW. 2 being recorded at Government Hospital, Ponnur his presence at Ponnour Hospital cannot be discarded. We are of the view that only due to the reason that he was not found at the place of occurrence when PW. 21 visited the spot does not lead to the conclusion that his eye-witness account be discarded.

The Trial Court has observed that prosecution did not try to establish the fact that on 10.10.2003, i.e., on the date of incident these witnesses and the deceased were required to be present before the Ponnur Court. The Trial Court further stated that presence of some witnesses at Ponnur Court was not necessary particularly Kalyani, PW. 6 daughter of the first deceased. It has come in the evidence that all the persons who were returning from Ponnur Court, presence of few of them was not necessary at Ponnur Court. It has come in the evidence that second deceased and some other who were returning on 10.10.2003 were under the conditional bail and were to appear before the Court once in a week. The mere fact that some other persons were not required to be

present in the Court also went along with those who were to go to the Court is neither unnatural nor uncommon. In the Accused accompanying by the other members of the family while going to the Ponnur Court nothing is abnormal on the basis of which any adverse inference can be drawn by the Trial Court.

One of the submissions raised by the learned Counsel for the Appellants is that Doctor who appeared before the Court was not shown the weapon to give his opinion as to whether injuries could have caused with such weapon or not. Learned Counsel for the Appellants relied on the case in Kartarey and Ors. v. State of U.P. 1976 AIR SC 76 : (MANU/SC/0138/1975MANU/SC/0138/1975 : 1976 (1) SCC 172 para 26), wherein in paragraph 25 following has been stated:

It is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may, sometimes, cause aberration in the course of justice....

In the present case Dr. N. Subba Rao, PW. 17 appeared before the Court who had conducted the postmortem of Tirupati Rao. Doctor in his statement has stated that the injuries could be caused with battle axes and knives. PW. 18 has conducted the postmortem of Siva Sankara Rao. PW. 18 has stated that "injuries noted in my postmortem can be caused by axes, battle axes and knives". The eye-witnesses in their eye-witness account have stated that Accused used axe, knives and sticks while attacking on deceased Nos. 1 and 2. The injuries noted in the postmortem of deceased Nos. 1 and 2 are injuries which can be caused by axe, knives and sticks. Thus, there was no inconsistency with medical evidence and the ocular evidence. The death of both deceased Nos. 1 and 2 was homicidal in nature. A perusal of the statements of the PW. 17 and 18, Doctors who conducted the postmortem as well as PW. 16 who gave evidence on injuries of PW. 5, indicates that they were not shown the weapons by which injuries were caused. It is useful to refer to the external injuries noted by PW. 17 on the dead body of Tirupati Rao. In the statement of PW. 17, he stated as follows:

On 11-10-2003 at about 3-1 p.m., I conducted postmortem on the dead body of a male body by name Somarouthu Tirupathirao, first deceased. The external appearance regormortis passed of External injuries:

1. Cut injury of 11x2x1 cm., in oblique direction over the left ear lobule extending towards temporal region and downwards towards neck.

2. Cut injury 12x4 cm., bone deep on left parity occipital region. Deep dissection shows linear fracture of left parietal bone.

3. Cut injury of 5x2 cm., scale deep on left front parietal region.

4. Cut injury of 10x5 cm., skin deep on left thigh:

5. Cut injury of 20x2 cm., x2.5 cm., from dorsum of right forearm to the dorsum of hand. Deep dissection shows both radius and ulna fractured.

6. Cut injury 8x5 cm., skin deep over upper 1/3rd of upper arm.

7. Cut injury of 8 cm., x 3x3 4 cm., encircling left shoulder deep dissection shows displacement head of humorous posterior.

8. Cut injury of 7 cm., x 2 x 2 cm., on the back of left shoulder region.

9. A crushed injury on left leg 22 x 10 cm. bone deep. Deep dissection shows both tibia and fibula fractured.

10. A cut injury of 8 cm. x 3 cm., bone deep in the middle of right thigh. Deep dissection shows of right femur fracture at middle.

11. Cut injury of 10x2 cm., skin deep on left inter scapular area on left of back of chest.

12. Cut injury of 10x2 cm., skin deep on back of chest below injury No. 11.

13. Cut injury of 10x2 cm., skin deep on right side of back of chest.

14. Stab injury of 6x2 cm., on right lumbar region and deep dissection shows a lacerated injury of 2x1 cm., over right kidney on superior lateral region.

15. An abrasion injury 4 cm., size on back of right thigh.

Looking to the injuries as noticed by PW. 17, it is clear that the cut injuries as noticed above could be by axe and knife as well as by battle axe as opined by the Doctor. The fact that weapon was not shown to the Doctor nor in the cross-examination attention of the Doctor was invited towards the weapon, is not of much consequence in the facts of the present case where there was clear medical evidence that injuries could be caused by knife, axe and battle axe. It is not the contention before us that the injuries as noted by the Doctors in the postmortem of deceased Nos. 1 and 2 could not have been caused by knives and axes. The submission has also been raised that it was put to the Doctor that injuries by battle axe could be half moon, Doctor himself admitted in his report that he has

not reported depth of the injury, middle of the injury nor margins of the injuries have been noted. He has not described any injury as the half moon. Doctor himself has admitted that he has not described the shapes of the injuries, depth and middle of the injuries. The above medical evidence does not lead to the conclusion that injuries as noticed by the Doctors could not have been caused by axe, knives and battle axe. The eye-witnesses, PW. 1, 2, 3 and 5 have clearly mentioned about the weapons used by the Accused which eye-witnesses accounts are in accordance with medical evidence. Thus, mere non-showing of the weapons to the Doctors at the time of their depositions in the Court is inconsequential and in no manner weakens the prosecution case. Some discrepancies referred by the Trial Court in the statements of eye-witnesses were inconsequential. The eye-witnesses after lapse of time cannot give picture perfect report of the injuries caused by each Accused and the minor inconsistencies were inconsequential.

Learned Counsel for the Appellants has also placed reliance on the judgment of this Court in Eknath Ganpat Aher and Ors. v. State of Maharashtra and Ors. MANU/SC/0340/2010MANU/SC/0340/2010 : (2010) 6 SCC 519. In support of the case it is mentioned that in the case of group rivalries and enmities, there is a general tendency to rope in as many persons as possible as having participated in the assault. There cannot be any dispute to the above proposition laid down in paragraph 26 of the judgment which is quoted below:

26. It is an accepted proposition that in the case of group rivalries and enmities, there is a general tendency to rope in as many persons as possible as having participated in the assault. In such situations, the courts are called upon to be very cautious and sift the evidence with care. Where after a close scrutiny of the evidence, a reasonable doubt arises in the mind of the court with regard to the participation of any of those who have been roped in, the court would be obliged to give the benefit of doubt to them.

However, when there are eye-witnesses including injured witness who fully support the prosecution case and proved the roles of different accused, prosecution case cannot be negated only on the ground that it was a case of group rivalry. Group rivalry is double edged sword.

In State of U.P. v. Anil Singh MANU/SC/0503/1988MANU/SC/0503/1988 : (1988) (Supp). SCC 686, this Court has held that although when two views are reasonably possible, one indicating conviction and other acquittal, this Court will not interfere with the order of acquittal but Court shall never hesitate to interfere if the acquittal is perverse in the sense that no reasonable person would have

come to that conclusion, or if the acquittal is manifestly illegal or grossly unjust. In paragraph 14 of the judgment following has been stated:

14. The scope of appeals Under Article 136 of the Constitution is undisputedly very much limited. This Court does not exercise its overriding powers Under Article 136 to reweigh the evidence. The court does not disturb the concurrent finding of facts reached upon proper appreciation. Even if two views are reasonably possible, one indicating conviction and other acquittal, this Court will not interfere with the order of acquittal (See: State of U.P. v. Jashoda Nandan Gupta; State of A.P. v. P. Anjaneyulu.) But this Court will not hesitate to interfere if the acquittal is perverse in the sense that no reasonable person would have come to that conclusion, or if the acquittal is manifestly illegal or grossly unjust.

Present is a case where the High Court exercised its appellate power Under Section 386 Code of Criminal Procedure In exercise of Appellate power Under Section 386 Code of Criminal Procedure the High Court has full power to reverse an order of acquittal and if the Accused are found guilty they can be sentenced according to law.

Present is a case where reasoning of the Trial Court in discarding the evidence of injured witness and other eye-witnesses have been found perverse. The High Court, thus, in our opinion did not commit any error in reversing the order of acquittal and convicted the accused. From the eye-witnesses account, as noticed above and for the reasons given by the High Court in its judgment, we are of the view that High Court is correct in setting aside the order of acquittal and convicting the accused. There is no merit in these appeals. Both the appeals are dismissed.

****

8. Section 306 of IPC

Pawan Kumar Vs. State of H.P.

Dipak Misra , A.M. Khanwilkar & Mohan M. Shantanagoudar ,JJ.

In the Supreme Court of India

Date of Judgment : 28.04.2017

Issue

Conviction for abetment of suicide -Sentenced to seven years rigorous imprisonment and fine by the High Court – Challenged.

Relevant Extract

The present appeal, by special leave, depicts the sorrowful story of a young girl, in the middle of her teens, falling in love with the accused-Appellant and driven by the highest degree of youthful fixation, elopes with him, definitely in complete trust, and after the Accused is booked for the offences punishable Under Sections 363, 366 and 376 of the Indian Penal Code (IPC), she stands behind him like a colossus determined to support which consequently leads to his acquittal. In all possibility, she might have realized that the Accused should not be punished, for she was also equally at fault. Be that as it may, as per the prosecution version, he was extended the benefit of acquittal.

The sad story gets into a new and different beginning. The Accused feels that he has been prosecuted due to the prosecutrix and gets obsessed with idea of threatening the girl and that continues and eventually eve-teasing becomes a matter of routine. Here, as the exposition of the prosecution uncurtains, a situation is created by the Accused which becomes insufferable, where the young girl feels unassured and realizes that she could no more live in peace. The feeling gets embedded and the helpless situation compels her to think that the life is not worth living. Resultantly, she pours kerosene on her body and puts herself ablaze but death does not visit instantly and that is how she was taken to a nearby hospital, where in due course of investigation, her dying declaration is recorded, but she ultimately succumbs to her injuries and the "prana" leaves the body and she becomes a "body"-a dead one.

The question that is required to be answered is whether the Accused can be convicted Under Section 306 Indian Penal Code. The case of the prosecution as projected is that deceased was the daughter of the informant, PW-1, Sukh Dev, and after acquittal in the case Under Sections 363, 366 and 376 Indian Penal Code, the accused-Appellant used to threaten the girl that he would kidnap her, and had been constantly teasing her. It is the case of the prosecution that on 18.07.2008 at 9.00 p.m., Appellant came to the house of informant and threatened him that he would forcibly take her. As the narration further unfolds

on 19.07.2008 about 10.00 a.m. when the informant alongwith his wife was working outside in the field, the deceased poured kerosene oil on her and set herself ablaze which was extinguished by the father, and immediately Pradhan of Gram Panchayat was informed. The injured girl was taken to the private hospital at Daulatpur where she was referred to Chandigarh for further medical treatment but the informant could not take her to Chandigarh due to paucity of money and in the evening Pradhan of the village visited the house of the informant and the deceased gave one written document to the Pradhan stating that the accused-Appellant was responsible for her condition whereafter police was informed and statement of the informant was recorded and the victim was medically examined. On 24.07.2008, the dying declaration of the girl was recorded by the Head Constable in the presence of Medical Officer and after the victim expired the post-mortem was conducted and an FIR was registered. After the criminal law was set in motion, the investigating agency after completing the investigation laid the charge sheet before the competent court which, in turn, committed the case to the Court of Session.

The Accused abjured his guilt and pleaded false implication. The prosecution in order to establish the charge examined 14 witnesses. The defence shoes not to examine any witness. The learned Sessions Judge, after hearing the arguments, posed the following question:

Whether the prosecution has successfully proved the liability of Accused Under Section 306 of Indian Penal Code beyond the scope of all reasonable doubts?

and answered the question in the negative and consequently acquitted the accused-Appellant vide judgment and order dated 16th July, 2010.

Being aggrieved by the aforesaid judgment, the State preferred the appeal before the High Court. The Division Bench of the High Court, after reappreciating the evidence, reversed the judgment of acquittal rendered by the trial court and convicted the accused-Appellant Under Section 306 Indian Penal Code and sentenced him to suffer rigorous imprisonment for seven years and to pay fine of Rs. 10,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of one year.

We have heard Mr. Sanchar Anand, learned Counsel for the Appellant and Mr. D.K. Thakur, learned Additional Advocate General for the Respondent-State.

It is submitted by Mr. Anand, learned Counsel for the Appellant that the judgment rendered by the learned trial Judge is absolutely flawless since he has

analysed the evidence in great detail and appreciated them in correct perspective. It is his further submission that the trial court scrutinizing the medical evidence and the burn injuries sustained by the victim has appositely discarded the dying declaration, Ex. PW-10/A. It is further put forth that when cogent reasons have been ascribed by the trial court for not placing reliance upon the dying declaration and the testimony of the prosecution witnesses, the High Court, in such a fact situation, should have been well advised not to interfere with the judgment of acquittal. It is also canvassed by him that when the appreciation of evidence by the trial court is not perverse and the view expressed by it is a plausible one, the High Court should not have interfered with the judgment of acquittal.

Mr. D.K. Thakur, learned Additional Advocate General appearing for the Respondent-State, in support of the impugned judgment, would contend that the High Court has reappreciated the evidence and on such reappraisal has found the conclusion pertaining to medical condition of the victim is wholly incorrect and accordingly opined that the acquittal recorded by the learned trial Judge is unsupportable and, therefore, this Court should give the stamp of approval to the same.

First we shall deal with the nature of jurisdiction the High Court exercises when it reverses a judgment of acquittal to that of conviction in exercise of appellate jurisdiction.

Keeping in view the principles laid down in the aforesaid authorities, we shall scan the approach of the learned trial Judge and scrutinize the correctness of deliberation of the High Court and adjudge he ultimate reversal of the judgment of the trial court.

On a careful examination and close study of the judgment of the trial court, it is perceivable that the learned trial Judge, after enumerating the facts, has analysed the evidence and come to the conclusion that the prosecution has failed to prove the culpability of the Accused Under Section 306 Indian Penal Code. He has disbelieved the evidence of PW-1, Sukh Dev, the father of the deceased, on the principal ground that though after acquittal of the Accused in the criminal case instituted for offence Under Sections 363/364/376 Indian Penal Code, teased his daughter, yet he only made an oral complaint to the Gram Panchayat and did not file a written complaint before it. That apart, the learned trial Judge has noted that though PW-1 had stated in the FIR that the Accused had threatened to forcibly take away his daughter, he had not so stated in his deposition. The dying declaration, that is, Ex. PW-10/A, has not been given

credence to on the ground that the victim was not in a position to speak and had sustained 80% burn injuries and further as her both hands were burnt, she could not have written what has been alleged to have written by her in the said document. On that ground, the learned trial Judge arrived at the conclusion that it would not be safe to rely on the said dying declaration. Be it noted, Ex. PW-10/A was written by the deceased on 24.07.2008. He has also disbelieved the testimony of the material witnesses on the same ground.

As is evincible, the learned trial Judge has also not found Ex. PW-10/A, which had been recorded on 24.07.2008 by the investigating officer, PW-13, as reliable as the victim was under treatment and the medical officer PW-10, Dr. Sanjay, who had deposed that he had appended his endorsement in PW-10/B, but not issued any certificate that the victim was mentally fit to give her statement. Leaned trial Judge has observed that barring the aforesaid evidence, there is no other evidence on record to connect the Accused with the crime. It is worthy to note that he has referred to the post-mortem report which recorded that the victim had suffered burn injuries and finally arrived at the conclusion that there is no specific evidence to record a conviction against the accused.

The High Court, as is noticeable, has taken note of the fact that PW-1 has testified that the Accused had earlier faced trial for the offences Under Sections 363, 366 and 376 Indian Penal Code and remained in jail for eleven months and, therefore, he threatened the victim that he would again kidnap her. That apart, PW-1, Sukh Dev, father of the deceased, had also deposed that the Accused used to tease her daughter by gestures and his daughter used to narrate these facts to him and his wife. He had also stated that that he had made an oral complaint to the President of the Gram Panchayat, Bathra who, in his turn, had admonished the Accused and told him to mend his ways. The High Court further took note of the fact that PW-1 has vividly described the burn injuries sustained by his daughter and the reason for the same.

PW-2, Jai Singh, as his evidence would show, which has also been taken note of by the High Court, is the Pradhan of the village. He has testified about the conduct of the Accused and how he had asked him to understand the situation. He has also deposed about the victim being taken to the hospital and the nature of treatment administered to him. The High Court has also dealt with the evidence of PW-3, Dr. Kulbhushan Sood, who had issued MLC, Ex. PW-3/B and admitted that the victim had suffered 80% burn injuries and opined that the same is sufficient to affect the mental capability of the patient. The High Court has also analysed the evidence of PW-9, Sawarna Devi, mother of the deceased, who has deposed about the whole incident. PW-10, Dr. Sanjay, on whom the High

Court has placed heavy reliance, was posted as Senior Resident in the Department of Surgery in RPGMC, Tanda. The police had orally requested him to accompany them as the statement of the victim was to be recorded and 24.07.2008 and he went to the ward where the victim was and the statement of the injured was recorded by the police, Ex. PW-10/A, in his presence. The High Court has also appreciated the fact that in the cross-examination, treating doctor had admitted that he had not issued any certificate that the victim was mentally fit to make a statement. It is pertinent to mention that the said witness has denied the suggestion that the victim was not fit to make statement and Ex. PW-10/A was not her statement.

After analyzing the evidence, the High Court has found that the trial court has acquitted the Accused on the ground that the deceased was not fit to write Ex. PW-10/A and PW-10, Dr. Sanjay, had not issued the certificate that the deceased was in a fit mental condition to give the statement on 24.07.2008. The High Court has observed that it had perused Ex. PW-10/A wherefrom it was reflectible that the victim had written that the Accused would be responsible for her death. The analysis of the High Court is as follows:

It is evident from the handwriting that Shalu was in tremendous pain and agony when she was writing that Accused would be responsible for her death. This was written on 19.7.2008. It is also written in Ext. PW-2/A by the Pradhan that Shalu had received burn injuries and she told him that Accused used to tease her. Thus she has taken this extreme step. It has come in the statement of PW-1 Sukh Dev and his wife (PW-9) Sawarna Devi that the Accused used to tease their daughter even after his acquittal in criminal case. They had informed this fact to the Pradhan of Gram Panchayat, PW-2 Jai Singh. Jai Singh (PW-2) has also admitted that complaint was lodged with him and he has told the Accused to mend his way.

And again:

> PW-13 SI Surjeet Singh has recorded the statement of deceased vide Ext. PW-10/A on 24.7.2008. PW-10 Dr. Sanjay has deposed that the police had recorded the statement of Shalu in his presence. He attested the same vide endorsement Ext. PW-10/B. Police has written the same version in Ext. PW-10/A, which was told by Sahlu. Statement Ext. PW-10/A would constitute a dying declaration Under Section 32 of the Evidence Act. Merely that the Doctor has not issued certificate that Shalu was fit to make statement would not in any way affect the dying declaration made by deceased on 24.07.2008, that too in the presence of

PW-10 Dr. Sanjay. It is duly proved by the prosecution that the Accused alone was responsible for abetting suicide committed by the deceased. She received 80-85% superficial ante-mortem burns. She might have received 80-85% burns but still she had sufficient strength to write Ext. PW-2/A.

The High Court has relied on the decision in Gulzari Lal v. State of Haryana MANU/SC/0110/2016MANU/SC/0110/2016 : (2016) 4 SCC 583, and come to hold that a valid dying declaration may be made without obtaining a certificate fitness of the declarant by medical officer.

It is demonstrable that the trial court has acquitted the Accused by disregarding the version of parents of the deceased and other witnesses and treating the dying declaration as invalid and the High Court, on the contrary, has placed reliance on the testimony of the parents of the deceased, and the evidence of the village Pradhan and also given credence to the dying declaration.

As is seen, the non-reliance on the dying declaration by the learned trial Judge is founded on the reason that the deceased was not in a position to speak and there was no medical certificate appended as regards her fitness. That apart, the learned trial Judge has regarded the dying declaration as unacceptable and unreliable on the base that the deceased had sustained 80% burn injuries. The High Court has found the said approach to be absolutely erroneous.

The hub of the matter is whether the dying declaration Ex. Pw-10/A is to be treated as reliable or not. To appreciate the validity of the dying declaration, we have requisitioned the original record and had perused the same. On a careful scrutiny of the same, we find that the Head Constable had written what the deceased had spoken and thereafter the deceased had written that the Accused alone was responsible for her death. The dying declaration, as has been recorded by the Head Constable, eloquently states about the constant teasing of the victim by the accused. PW-10, Dr. Sanjay, has stood firm in his testimony that the victim was in a fit condition to speak. Despite the roving cross-examination he has not paved the path of tergiversation. The trial court, as mentioned earlier, has disregarded the testimony of PW-10 on the ground that there is no certificate of fitness.

In this context, reference to the Constitution Bench decision in Laxman v. State of Maharashtra MANU/SC/0707/2002MANU/SC/0707/2002 : (2002) 6 SCC 710 would be absolutely seemly. In the said case, the larger Bench, while stating the law relating to the dying declaration, has succinctly held:

3. ... A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a Rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

Tested on the anvil of the aforesaid authorities, we find that there is no reason to disregard the dying declaration. The Head Constable has recorded it as narrated by the deceased and the deceased has also written few words about the accused. The same has been recorded in presence of the doctor, PW-10, who had appended his signature. A certificate of fitness is not the requirement of law. The trial court has been swayed away by the burn injuries. It is worthy to note that there cannot be an absolute Rule that a person who has suffered 80% burn injuries cannot give a dying declaration.

In Vijay Pal v. State (Government of NCT of Delhi) MANU/SC/0230/2015MANU/SC/0230/2015 : (2015) 4 SCC 749, the Court repelled the submission with regard to dying declaration made by the deceased who had sustained 100% burn injuries stating that:

22. Thus, the law is quite clear that if the dying declaration is absolutely credible and nothing is brought on record that the deceased was in such a condition, he or she could not have made a dying declaration to a witness, there is no justification to discard the same. In the instant case, PW 1 had immediately rushed to the house of the deceased and she had told

him that her husband had poured kerosene on her. The plea taken by the Appellant that he has been falsely implicated because his money was deposited with the in-laws and they were not inclined to return, does not also really breathe the truth, for there is even no suggestion to that effect.

23. It is contended by the learned Counsel for the Appellant that when the deceased sustained 100% burn injuries, she could not have made any statement to her brother. In this regard, we may profitably refer to the decision in Mafabhai Nagarbhai Raval v. State of Gujarat MANU/SC/0425/1992MANU/SC/0425/1992 : (1992) 4 SCC 69 wherein it has been held that a person suffering 99% burn injuries could be deemed capable enough for the purpose of making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance.

Quite apart from the above, her dying declaration has received support from the other witnesses. In view of the corroborative evidence, we are of the considered opinion that the High Court has correctly relied upon this aspect and has reversed the finding of the trial court.

As far as reliability of evidence of PW-1 and PW-9, the parents of the victim are concerned, the reasons for not treating their version as reliable is based on the fact that they had not reported the incident in writing to the Gram Panchayat. On a perusal of the evidence in entirety, we find that the High Court has appropriately dislodged the analysis made by the trial court. The evidence has to be appreciated regard being had to various circumstances. It is to be noted that the Accused has been acquitted in the earlier offence and he has become a constant nuisance for the victim. In such a situation, the poor parents had no other option but to make a complaint to the Gram Panchayat. To hold that their evidence is reproachable as the complaint was not given in writing manifestation of perverse approach. On a perusal of the evidence in entirety, we find that the testimonies of the parents are absolutely unimpeachable and deserve credence.

The next aspect which is required to be addressed is whether Section 306 Indian Penal Code gets attracted. Submission of the learned Counsel for the Appellant is that even assuming the allegation is accepted to have been proved, it would not come within the ambit and scope of Section 306 Indian Penal Code as there is no abetment.

Section 306 Indian Penal Code reads as under:

Section 306. Abetment of suicide.--If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

The word 'abetment' has not been explained in Section 306 Indian Penal Code. In this context, the definition of abetment as provided Under Section 107 Indian Penal Code is pertinent. Section 306 Indian Penal Code seeks to punish those who abet the commission of suicide of other. Whether the person has abetted the commission of suicide of another or not is to be gathered from facts and circumstances of each case and to be found out by continuous conduct of the accused, involving his mental element. Such a requirement can be perceived from the reading of Section 107 Indian Penal Code. Section 107 Indian Penal Code reads as under:

Section 107. Abetment of a thing.--A person abets the doing of a thing, who--

First. -- Instigates any person to do that thing; or Secondly. --Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly. -- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.--A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration-- A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.--Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act.

"Abetment", thus, means certain amount of active suggestion or support to do the act.

Analysing the concept of "abetment" as found in Section 107 Indian Penal Code, a two-Judge Bench in Chitresh Kumar Chopra v. State (Government of NCT of Delhi) MANU/SC/1453/2009MANU/SC/1453/2009 : (2009) 16 SCC 605 has held:

13. As per the section, a person can be said to have abetted in doing a thing, if he, firstly, instigates any person to do that thing; or secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing. Explanation to Section 107 states that any wilful misrepresentation or wilful concealment of material fact which he is bound to disclose, may also come within the contours of "abetment". It is manifest that under all the three situations, direct involvement of the person or persons concerned in the commission of offence of suicide is essential to bring home the offence Under Section 306 Indian Penal Code.

xxxxx

15. As per Clause Firstly in the said section, a person can be said to have abetted in doing of a thing, who "instigates" any person to do that thing. The word "instigate" is not defined in Indian Penal Code. The meaning of the said word was considered by this Court in Ramesh Kumar v. State of Chhattisgarh MANU/SC/0654/2001MANU/SC/0654/2001 : (2001) 9 SCC 618.

In the said authority, the learned Judges have referred to the pronouncement in Ramesh Kumar v. State of Chhattisgarh.

The word "instigate" literally means to goad, urge forward, provoke, incite or encourage to do an act. A person is said to instigate another person when he actively suggests or stimulates him to an act by any means or language, direct or indirect, whether it takes the form of express solicitation or of hints, insinuation or encouragement. Instigation may be in (express) words or may be by (implied) conduct.

At this juncture, we think it appropriate to reproduce two paragraphs from Chitresh Kumar Chopra (supra). They are:

16. Speaking for the three-Judge Bench in Ramesh Kumar case (supra), R.C. Lahoti, J. (as His Lordship then was) said that instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of "instigation", though it is not necessary that actual words must be used to that effect or what constitutes "instigation" must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. Where the Accused had, by his acts or omission or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, in which case, an "instigation" may have to be inferred. A word uttered in a fit of anger or emotion without intending the consequences to actually follow, cannot be said to be instigation.

xxxxx

19. As observed in Ramesh Kumar (supra), where the Accused by his acts or by a continued course of conduct creates such circumstances that the deceased was left with no other option except to commit suicide, an "instigation" may be inferred. In other words, in order to prove that the Accused abetted commission of suicide by a person, it has to be established that:

(i) the Accused kept on irritating or annoying the deceased by words, deeds or wilful omission or conduct which may even be a wilful silence until the deceased reacted or pushed or forced the deceased by his deeds, words or wilful omission or conduct to make the deceased move forward more quickly in a forward direction; and

(ii) that the Accused had the intention to provoke, urge or encourage the deceased to commit suicide while acting in the manner noted above. Undoubtedly, presence of mens rea is the necessary concomitant of instigation.

This Court again observed:

20. ... The question as to what is the cause of a suicide has no easy answers because suicidal ideation and behaviours in human beings are complex and multifaceted. Different individuals in the same situation react and behave differently because of the personal meaning they add to each event, thus accounting for individual vulnerability to suicide. Each individual's suicidability pattern depends on his inner subjective experience of mental pain, fear and loss of self-respect. Each of these factors are crucial and exacerbating contributor to an individual's

vulnerability to end his own life, which may either be an attempt for self-protection or an escapism from intolerable self.

Keeping in view the aforesaid legal position, we are required to address whether there has been abetment in committing suicide. Be it clearly stated that mere allegation of harassment without any positive action in proximity to the time of occurrence on the part of the Accused that led a person to commit suicide, a conviction in terms of Section 307 Indian Penal Code is not sustainable. A casual remark that is likely to cause harassment in ordinary course of things will not come within the purview of instigation. A mere reprimand or a word in a fit of anger will not earn the status of abetment. There has to be positive action that creates a situation for the victim to put an end to life.

In the instant case, the Accused had by his acts and by his continuous course of conduct created such a situation as a consequence of which the deceased was left with no other option except to commit suicide. The active acts of the Accused have led the deceased to put an end to her life. That apart, we do not find any material on record which compels the Court to conclude that the victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestic life quite common to the society to which the victim belonged. On the other hand, the Accused has played active role in tarnishing the self-esteem and self-respect of the victim which drove the victim girl to commit suicide. The cruelty meted out to her has, in fact, induced her to extinguish her life-spark.

As is demonstrable, the High Court has not reversed the judgment of acquittal solely on the basis of dying declaration. It has placed reliance on the evidence of the parents and also other witnesses. It has also treated the version of the Pradhan of the Gram Panchayat as credible. All these witnesses have deposed that the Accused after his acquittal engaged himself in threatening and teasing the girl. He did not allow her to live in peace.

The harassment caused to her had become intolerable and unbearable. The father had deposed that the girl had told him on number of occasions and he had complained to the Pradhan. All these amount to active part played by the accused. It is not a situation where a person is insulted on being asked to pay back a loan. It is not a situation where someone feels humiliated on a singular act. It is a different situation altogether. The young girl living in a village was threatened and teased constantly. She could not bear it any longer. There is evidence that the parents belong to the poor strata of the society. As the materials on record would reflect, the father could not afford her treatment when

case of his daughter was referred to the hospital at Chandigarh. The impecuniosity of the family is manifest. It is clearly evident from the materials brought on record that the conduct of the Accused was absolutely proactive.

Eve-teasing, as has been stated in Deputy Inspector General of Police and Anr. v. S. Samuthiram MANU/SC/1029/2012MANU/SC/1029/2012 : (2013) 1 SCC 598, has become a pernicious, horrid and disgusting practice. The Court therein has referred to the Indian Journal of Criminology and Criminalistics (January-June 1995 Edn.) which has categorized eve-teasing into five heads, viz. (1) verbal eve-teasing; (2) physical eve-teasing; (3) psychological harassment; (4) sexual harassment; and (5) harassment through some objects. The present case eminently projects a case of psychological harassment. We are at pains to state that in a civilized society eve-teasing is causing harassment to women in educational institutions, public places, parks, railways stations and other public places which only go to show that requisite sense of respect for women has not been socially cultivated. A woman has her own space as a man has. She enjoys as much equality Under Article 14 of the Constitution as a man does. The right to live with dignity as guaranteed Under Article 21 of the Constitution cannot be violated by indulging in obnoxious act of eve-teasing. It affects the fundamental concept of gender sensitivity and justice and the rights of a woman Under Article 14 of the Constitution. That apart it creates an incurable dent in the right of a woman which she has Under Article 15 of the Constitution. One is compelled to think and constrained to deliberate why the women in this country cannot be allowed to live in peace and lead a life that is empowered with a dignity and freedom. It has to be kept in mind that she has a right to life and entitled to love according to her choice. She has an individual choice which has been legally recognized. It has to be socially respected. No one can compel a woman to love. She has the absolute right to reject.

In a civilized society male chauvinism has no room. The Constitution of India confers the affirmative rights on women and the said rights are perceptible from Article 15 of the Constitution. When the right is conferred under the Constitution, it has to be understood that there is no condescension. A man should not put his ego or, for that matter, masculinity on a pedestal and abandon the concept of civility. Egoism must succumb to law. Equality has to be regarded as the summum bonum of the constitutional principle in this context. The instant case portrays the deplorable depravity of the Appellant that has led to a heart breaking situation for a young girl who has been compelled to put an end to her life. Therefore, the High Court has absolutely correctly reversed the judgment of acquittal and imposed the sentence. It has appositely exercised the jurisdiction and we concur with the same. Consequently, the appeal, being devoid of any merit, stands dismissed.

****

9. Section 306 of IPC

State of Rajasthan Vs. Ramanand

A.K. Goel & U.U. Lalit ,JJ.

In the Supreme Court of India

Date of Judgment - 11.04.2017

Issue

Acquittal of the charge of murder but Conviction for abetment of suicide –Sentenced to 5 years rigorous imprisonment by High Court - Challenged.

The Respondent was convicted by the Trial Court Under Sections 302 and 201 Indian Penal Code for having committed murder of his wife Anita and daughter Ekta and was sentenced to undergo life imprisonment for the offence Under Section 302 and 3 years RI for that Under Section 201 Indian Penal Code in Sessions Case No. 62 of 2000. In DB Criminal Appeal No. 20 of 2002 preferred by the Respondent, the High Court of Judicature for Rajasthan at Jaipur by its judgment and order dated 07.03.2006 acquitted him of the charges Under Sections 302 and 201 Indian Penal Code but convicted him Under Section 306 Indian Penal Code and sentenced him to undergo 5 years RI, which judgment is under challenge in this appeal by Special Leave.

On 21.09.2000 at about 9:11 p.m. a report Ext. D-1 was lodged by the Respondent to the following effect:

To
The S.H.O.
P.S. Patan

Sir,

Most respectfully I submit that my wife burnt to death this evening on 5.30 p.m. I was at my shop and my brother was also there. My mother and younger brother's wife had gone to our house in Bihar. My wife was half mad. She was burnt to death. When the smoke arose in the house and sounds of the crying came out of the house, the neighbour came running to my shop and informed me. I went to the house, went up the stairs and pushed the door open. I saw my wife and daughter were burnt to death. The above report is produced. My marriage took place some 10 years ago on 21.09.2000.

Sd/-
Yours
Ramanand Agrawal
S/o. Shri Vishashwar Dayal
R.S. Dabla

The aforesaid report was registered in the Case Diary and appropriate steps Under Section 174 Code of Criminal Procedure were taken by PW14 Tulsi Ram who at the relevant time was Incharge of Police Station Patan. On the next day at about 6:15 a.m. a written report Ext. P-2 was received from PW2 Rakesh Agrawal, brother of deceased Anita that his sister and niece were burnt to death; that his sister was being harassed for dowry and that the Respondent and his family members were responsible for the deaths of his sister and niece.

The report Ext. P-2 was received by PW15 ASI Rajendra Singh, pursuant to which crime was registered and investigation was undertaken. Inquest Reports Exts. P-6 and P-7 were prepared regarding the bodies of Anita and Ekta and they were sent for autopsy. Photographs of the bodies Exts. P-14 to P-19 were also taken and site plan Ext. P-21 at the place of occurrence was also prepared. The post-mortem on the bodies was conducted by a Board consisting of three doctors. As regards Anita, the report Ext. P-13 had following relevant observations:

Fairly built & nourished, P.M. lividity present on back of body. R.M. present all over the body. Partially burnt clothes are present on body. No smell like kerosene like substance. The whole body has burns (Post mortem in nature) except back of trunk and hips. Burns limited upto skin only. Hair of head & pubic area are partially burnt and axillary hair are totally burnt. Face is swollen. Tongue is protruded-swollen. Eyes are partially open conjunctive having petechial hemorrhage. Both hands are clinched. Bloody froth is coming out of both nostrils and mouth."

"In the opinion of the medical board the cause of death is Asphyxia due to strangulation (throttling)

- Burns are post-mortem in nature as there is no blister formation, no line of redness and no signs of inflammation."

The report Ext. P-12 regarding Ekta made following observations:

Fairly built & nourished, P.M. lividity present on back of Body, R.M. present all over body. Partially burnt clothes are present on body. No smell like kerosene, like substance. The whole body has burns (P.M. in nature) except back of trunk and hips. Burns limited upto skin only. Hair of head burnt partially. Face is swollen. Tongue is protruded-swollen. Eyes are partially open. Conjuctive having petechial hemorrhage. Both hands are clinched. Bloody froth is coming out of both nostrils and mouth.

"In the opinion of the Medical Board the cause of death is Asphyxia due to strangulation (throttling). Burns are post mortem in nature, as there is no blister formation, notice of redness and no sign of inflammation.

After completion of investigation, charge-sheet was filed against six persons including the present Respondent. The charges were framed against the Respondent, his mother Narangi Devi and brother Vinod Kumar for the offences Under Sections 498A, 302/34, 201 Indian Penal Code while his other brothers Mukesh Kumar, Moolchand and Mahesh Kumar were charged for the offences Under Section 201/511 Indian Penal Code. They were tried in the court of Additional Sessions Judge, Neemka Thana, in Sessions Case No. 62 of 2000. The prosecution examined fifteen witnesses. PWs 1, 2, 3, 4 and 5, namely, father, brother, mother, cousin and brother-in-law respectively of deceased Anita did not support the case of prosecution as regards demands of dowry or harassment. PW7, Nandlal, neighbour also turned hostile but in cross-examination stated that when the cries were heard coming from the house, he was amongst the persons who had gone to the house and opened the door. According to him the door was bolted from inside. PW10 Dr. Surendra Kumar Meena, one of the members of the Board which conducted post-mortem proved report Exts. P-12 and P-13 and stated that the cause of death was asphyxia because of strangulation and that Anita and Ekta were done to death first and thereafter their bodies were sought to be set on fire. PW12 Mahesh Sharma, photographer proved photos Exts. P-14 to P-19. PW14 Sub-Inspector Tulsi Ram in answer to queries in the cross-examination stated, "Before the registration of First Information Report, Ramanand had given me an application. This application is attached with the case diary. Aforesaid application was made Under Section 174 of Code of Criminal Procedure, which is Ext. D-1". Similarly PW15, Sub-Inspector Rajendra Singh in his cross-examination stated; "Before going to spot report Ext. D-1 had already been received. The report was submitted before S.H.O."

After considering the material on record including the medical evidence, the trial court found that both Anita and Ekta were killed by strangulation and that the case was of culpable homicide. As regards the involvement of the Accused in the crime in question, it was observed that there was nothing on record to suggest the involvement of Accused Nos. 2 to 6. Further, all the relations of deceased Anita having turned hostile and not supported the case of prosecution as regards demands of dowry, no offence Under Section 498A was found to be have been established. The trial court further observed that motive for the crime was also not established and in any case the death of Anita had occurred 10 years after the marriage. While acquitting rest of the accused, the

trial court convicted the Respondent Under Sections 302 and 201 Indian Penal Code and sentenced him to suffer life imprisonment Under Section 302 Indian Penal Code and to suffer three years imprisonment Under Section 201 Indian Penal Code.

The Respondent, being aggrieved filed DB Criminal Appeal No. 20 of 2002 in the High Court which found that charge Under Section 302 Indian Penal Code was not established against the Respondent. However, it was of the view that the circumstances on record clearly showed that the Respondent was guilty of the offence Under Section 306. Thus, while acquitting the Respondent of the charges Under Sections 302 and 201 Indian Penal Code it convicted him Under Section 306 Indian Penal Code. The Respondent having remained in custody for more than five years and four months, the sentence was reduced by the High Court to the period already undergone.

This appeal, at the instance of State of Rajasthan challenges the correctness of the decision of the High Court. Relying on the decision of this Court in Sumer Singh v. Surajbhan Singh MANU/SC/0465/2014MANU/SC/0465/2014 : (2014) 7 SCC 323 Mr. Sushil Kumar Jain, learned Senior Advocate appearing for the Respondent contended that he was entitled to submit that the Respondent ought to be acquitted of all the charges.

The medical evidence on record is very clear and precise that deaths were as a result of strangulation. Having gone through the post-mortem report, the testimony of PW10 Dr. Surendra Kumar Meena and the photographs Exts. P14 to P19, it is very clear that the deaths of Anita and Ekta were not as a result of burn injuries. They died of strangulation and their bodies were sought to be set afire in order to create an impression as if they had died of burn injuries. The finding by the trial court was therefore completely correct. It is impossible to assume how Anita could have strangulated herself and then attempted to set herself afire. The view taken by the High Court is, therefore, wholly unjustified. Consequently there could not have been conviction of the Respondent Under Section 306 Indian Penal Code.

The question then arises whether the Respondent was guilty of the offence Under Section 302 Indian Penal Code read with Section 201 Indian Penal Code. The fact that the deaths are as a result of culpable homicide is beyond any doubt but the question is whether the Respondent could be said to be author of the crime. The entire case of the prosecution on this count rests purely on circumstantial evidence. It is true that the deaths have occurred in a room occupied by the Respondent along with wife, Anita and daughter Ekta. But no

witness has been examined to suggest that the Respondent was at or around his residence at the relevant time. The marriage was more than 10 years old and as such no statutory presumption on any count could be drawn, more particularly, when none of the prosecution witnesses had supported the case of prosecution as regards demands of dowry and harassment. Apart from strangulation marks nothing was found in the post-mortem report regarding any other bodily injury. The absence of any evidence as regards dowry or related harassment also nullifies the element of presence of any motive on part of the Respondent. None of the prosecution witnesses alleged anything against the Respondent nor are there any other supporting circumstances such as discovery of any relevant fact.

We are, therefore, left with the only material, namely Ext. D-1 which was the reporting made by the Respondent. It undoubtedly shows that the Respondent himself had opened the door and found the bodies of Anita and Ekta lying with injuries. In the face of Ext. D-1 it is not possible to accept the assertion that the door was locked from inside and was pushed open by PW7 and others. Locking of door from inside would have been consistent with the theory of suicide but that theory stood demolished as a result of medical evidence. We are, therefore, persuaded to accept what emerges from Ext. D-1 that the Respondent himself had opened the door and found the bodies having burnt.

Relying on Section 162 Code of Criminal Procedure Mr. Jain, learned senior Advocate submitted that Ext. D-1 could not be relied upon and read against the Respondent. The terms of Section 162 are quite clear and govern cases where statements are made to a police officer "in the course of an investigation" under Chapter XII of Code of Criminal Procedure Statement Ext. D-1 was neither given in the course of an investigation, nor could it be termed as a confession. Further, the cross-examination of PWs 14 and 15 would show that the Respondent stood by and relied upon that statement. We do not see any difficulty why statement Ext. D-1 could not be read in evidence.

However, that by itself does not establish beyond any doubt that it was the Respondent alone who was responsible for having caused the deaths of Anita and Ekta. Even if the circumstance emerging from Ext. D-1 is taken to be against the Respondent, that by itself without any connecting material on record, is not sufficient to bring home the case against the Respondent.

Mr. Jain, learned Senior Advocate is right in his submission that in a case where the prosecution is coming up against the acquittal of the Accused and is praying for conviction on a graver charge, the Accused is entitled to plead for acquittal.

While considering similar plea for acquittal, though this Court negated the plea on facts, the legal position was summed up by this Court in Chandrakant Patil v. State MANU/SC/0081/1998MANU/SC/0081/1998 : (1998) 3 SCC 38 as under:

7. Powers of the Supreme Court in appeals filed Under Article 136 of the Constitution are not restricted by the appellate provisions enumerated under the Code of Criminal Procedure or any other statute. When exercising appellate jurisdiction, the Supreme Court has power to pass any order. The aforesaid legal position has been recognized by a Constitution Bench of this Court in Durga Shankar Mehta v. Raghuraj Singh MANU/SC/0099/1954MANU/SC/0099/1954 : AIR 1954 SC 520 and later followed in a series of decisions (vide Arunachalam v. P.S.R. Sadhanantham MANU/SC/0073/1979MANU/SC/0073/1979 : (1979) 2 SCC 297, Delhi Judicial Service Assn. v. State of Gujarat MANU/SC/0478/1991MANU/SC/0478/1991 : (1991) 4 SCC 406).

....

9. It is now well nigh settled that Supreme Court's powers Under Article 142 of the Constitution are vastly broad-based. That power in its exercise is circumscribed only by two conditions, first is, that it can be exercised only when Supreme Court otherwise exercises its jurisdiction and the other is that the order which Supreme Court passes must be necessary for doing complete justice in the cause or matter pending before it.....

In view of medical evidence on record, the deaths could never be termed as a case of suicide and consequently the conviction of the Respondent Under Section 306 was wholly unjustified. At the same time there is nothing on record to conclusively establish that the Respondent was the author of the crime. The circumstances on record do not Rule out every other hypothesis except the guilt of the accused. However strong the suspicion be, in our view, the Respondent is entitled to benefit of doubt and cannot be convicted Under Section 302 Indian Penal Code.

Thus, while rejecting this appeal, we acquit the Respondent of the charge Under Section 306 Indian Penal Code. The appeal is disposed of in these terms.

****

10. Section 25(2) of Hindu Marriage Act

Kalyan Dey Chowdhury Vs. Rita Dey Chowdhury Nee Nandy.

R. Banumathi & Mohan M. Shantanagoudar, JJ.

In the Supreme Court of India

Date of Judgment - 19.04.2017

Issue

Power of the court to vary , modify or discharge the order of permanent alimony/permanent maintenance considering the change in the circumstances of the parties.

Relevant Extract

Leave granted. Challenge in this appeal is to the order dated 15.09.2016 passed by the High Court at Calcutta in RVW No. 85 of 2016 in C.O. No. 4228 of 2012, reviewing an order dated 02.02.2015 passed earlier in an application filed Under Section 25(2) of the Hindu Marriage Act, 1955, thereby enhancing the amount of maintenance from Rs. 16,000/- per month to Rs. 23,000/- per month.

Parties are entangled in several rounds of litigation. Background facts in a nutshell are as follows: The marriage of the Appellant and the Respondent was solemnized on 10.08.1995 as per Hindu rites and customs at the Appellant's residence at Kalna. A male child was born on 04.10.1996 at Chandannagore who is now a major pursuing his college education. After the birth of child, it is alleged that the Respondent continued in her parent's house. The Appellant-husband requested the Respondent to return to the matrimonial home at Kalna alongwith the child. It is alleged that instead of acceding to the request of the Appellant-husband and returning back to the matrimonial home, the Respondent-wife insisted that the Appellant-husband shifts to her father's place at Chandannagore.

The Appellant-husband filed a divorce petition being Matrimonial Suit No. 71 of 2007 which was renumbered as Suit No. 193 of 2010 Under Section 13(1)(ia) of the Hindu Marriage Act for dissolution of marriage. In the said divorce petition, the Respondent-wife filed an application for permanent alimony

Under Section 25 of the Act. By an order dated 19.05.2006, passed by the Additional District Judge, 1st Court, Hooghly in Matrimonial Suit No. 533 of 2003, enhanced the amount of maintenance to Rs. 8,000/- per month in F.A. No. 193 of 2008.

On 10.10.2010, the Respondent filed an amendment application before the Court being Misc. Case No. 2 of 2010 in Matrimonial Suit No. 533 of 2003 Under Section 25(2) of the Act praying for enhancement of maintenance amounting to Rs. 10,000/- per month for herself and Rs. 6,000/- for her minor son. Vide order dated 10.10.2012, the said application was allowed and maintenance at the rate of Rs. 6000/- each was ordered for the Respondent and her minor son.

Aggrieved by this order, Respondent-wife preferred a revision petition Under Article 227 of the Constitution of India before the High Court being C.O. No. 4228 of 2012. During its pendency, the Matrimonial Suit No. 193 of 2010 was decreed and the marriage between the parties came to be dissolved by the order of the Additional District Judge, 1st Fast Track Court, Serampore on 30.11.2012. Post-divorce, the Appellant herein re-married and has a male child born out of the second wedlock.

By an order dated 02.02.2015, the High Court disposed of the above revision petition by directing the Appellant-husband to pay a sum of Rs. 16,000/- towards the maintenance of the Respondent-wife as well as her minor son. Aggrieved by this order, the Respondent-wife preferred a Special Leave Petition (C) No. 12968 of 2015 which was disposed of as withdrawn with liberty to approach the High Court by way of review. Pursuant to the above order, Respondent-wife filed a review application being RVW No. 85 of 2016 arising out of CO No. 4228 of 2012. Upon hearing both the parties, by order dated 15.09.2016, the learned Single Judge of the High Court modified the order under review and enhanced the amount of maintenance from Rs. 16,000/- to Rs. 23,000/- which is the subject matter of challenge in this appeal.

Learned Counsel for the Appellant Mr. Pijush K. Roy submitted that in exercise of review jurisdiction, the High Court ought not to have enhanced the maintenance amount from Rs. 16,000/- to Rs. 23,000/-. It was further submitted that the Appellant-husband is posted at Malda Medical College, Malda, West Bengal and gets a net salary of Rs. 87,500/- per month and while so, the Appellant would find it difficult to pay enhanced maintenance amount of Rs. 23,000/- per month to the Respondent-wife. It is also submitted that the Respondent is a qualified beautician and Montessori teacher and earns Rs. 30,000/- per month and the son has also attained eighteen years of age and hence the enhanced maintenance amount of Rs. 23,000/- per month is on the higher side and prayed for restoring the original order of Rs. 16,000/- per month.

Per contra, learned Counsel for the Respondent-wife Ms. Supriya Juneja submitted that the High Court on perusal of the pay slip and the expenditure of Appellant-husband has arrived at the right conclusion of granting Rs. 23,000/- as maintenance to the Respondent. The learned Counsel has also further submitted that even though the son has attained majority and since the son is aged only eighteen years and is presently studying in a college and for meeting the expenses of higher education and other requirements, enhanced maintenance amount of Rs. 23,000/- per month is a reasonable one and the impugned order warrants no interference.

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

Section 25 of the Hindu Marriage Act, 1955 confers power upon the court to grant a permanent alimony to either spouse who claims the same by making an application. Sub-section (2) of Section 25 of Hindu Marriage Act confers ample power on the court to vary, modify or discharge any order for permanent alimony or permanent maintenance that may have been made in any proceeding under the Act under the provisions contained in Sub-section (1) of Section 25. In exercising the power Under Section 25 (2), the court would have regard to the

"change in the circumstances of the parties". There must be some change in the circumstances of either party which may have to be taken into account when an application is made under Sub-section (2) of Section 25 for variation, modification or rescission of the order as the court may deem just.

The review petition under Order XLVII Rule 1 Code of Civil Procedure came to be filed by the Respondent-wife pursuant to the liberty granted by this Court when the earlier order dated 02.02.2015 awarding a maintenance of Rs. 16,000/- to the Respondent-wife as well as to her minor son was under challenge before this Court. As pointed out by the High Court, in February 2015, the Appellant-husband was getting a net salary of Rs. 63,842/- after deduction of Rs. 24,000/- on account of GPF and Rs. 12,000/- towards income-tax. In February, 2016, the net salary of the Appellant is stated to be Rs. 95,527/-. Following Dr. Kulbhushan Kumar v. Raj Kumari and Anr. MANU/SC/0349/1970MANU/SC/0349/1970 : (1970) 3 SCC 129, in this case, it was held that 25% of the husband's net salary would be just and proper to be awarded as maintenance to the Respondent-wife. The amount of permanent alimony awarded to the wife must be befitting the status of the parties and the capacity of the spouse to pay maintenance. Maintenance is always dependant on the factual situation of the case and the court would be justified in moulding the claim for maintenance passed on various factors. Since in February, 2016, the net salary of the husband was Rs. 95,000/- per month, the High Court was justified in enhancing the maintenance amount. However, since the Appellant has also got married second time and has a child from the second marriage, in the interest of justice, we think it proper to reduce the amount of maintenance of Rs. 23,000/- to Rs. 20,000/- per month as maintenance to the Respondent-wife and son.

In the result, the maintenance amount of Rs. 23,000/- awarded to the Respondent-wife is reduced to Rs. 20,000/- per month and the impugned judgment is modified and this appeal is partly allowed. The maintenance of Rs. 20,000/- per month is payable to the Respondent-wife on or before 10th of every succeeding English calendar month. No costs.

****

Orissa District and Subordinate Courts Ministerial Services (Method of Recruitment and Conditions of Service) Rules, 1969 & the Orissa District and Subordinate Courts (Special Scheme) (Method of Recruitment and Conditions of Service) Rules, 2001

11. Pruthiraj Jena vs. The District and Sessions Judge, Bhadrak and Ors.
B.K. Nayak & Dr. Durga Prasanna Choudhury, JJ.

In the High Court of Orissa , Cuttack

Date of Judgment - 27.04.2017

Issue

In the matter regularisation of service of the petitioner from the date of initial appointment.

Relevant Extract

The factual matrix leading to filing of the writ petition is that in pursuance of the advertisement dated 17.11.2009 (Annexure-1) made by opposite party No. 1 to fill up the post of Steno (Grade-III), the petitioner applied for the same and after due selection, he was appointed on 26.03.2010 in accordance with the provision of the erstwhile Orissa District and Subordinate Courts Ministerial Services (Method of Recruitment and Conditions of Service) Rules, 1969 (hereinafter called "Rules, 1969"). On the other hand, he was issued with the appointment letter temporarily on Ad hoc basis and posted in the Court of the Additional Civil Judge (Junior Division)-cum-J.M.F.C., Basudevpur. Thereafter, the Ad hoc appointment of the petitioner was renewed from year to year but could not be regularized under the impression that his appointment was made under the Orissa District and Subordinate Courts (Special Scheme) (Method of Recruitment and Conditions of Service) Rules, 2001 (hereinafter called "the Rules, 2001") although he was appointed against the regular post under Rules, 1969. Instead of regularizing the service of the petitioner, the opposite party No. 1 made fresh advertisement on 09.05.2012 for the post of Junior Stenographer (Grade-III) which was challenged by the petitioner in W.P.(C) No. 1354 of 2013 and this Court disposed of that writ petition on 18.01.2013 directing opposite party No. 1 to dispose of the representation filed by the petitioner in the light of the decision of this Court in the case of Geetanjali Pattnaik and others V. District

Judge, Balasore and another (W.P.(C) Nos. 9690, 9691 and 9692 of 2009), if the ratio of the said cases applies to the case of the petitioner.

In pursuance of the aforesaid decision of this Court, the petitioner made representation on 22.01.2013 and the learned District Judge, Bhadrak-opposite party No. 1, passed order on 08.04.2013 (Annexure-7) regularizing the service of the petitioner w.e.f. 10.04.2013. The grievance of the petitioner is that his regularization should have been made from the date of his initial appointment because in similar matter in the case of Satya Kumar Das v. District Judge, Balasore-Bhadrak and another (W.P.(C) No. 22244 of 2010), this Court disposed of the said writ petition on 24.01.2012 with following observation:-

"It would be just and proper for this Court to observe that regularization of the services of the petitioner in the post must go back to the original date of his appointment. Therefore, the stand taken in the statement of counter is wholly untenable in law. The petitioner succeeds. Rule is issued. The affected portion in the appointment order that the regularization is given with effect from 15.03.2010 (Annexure-10) is hereby quashed only insofar as regularization of the services of the petitioner in the post in question. Direction is given to the District Judge to give effect to regularization from the date of appointment of the petitioner and the same shall be applied extending the consequential benefits for which he is legally entitled to.

The writ petition is allowed in the above term."

Be it is stated that when this Court has already taken the view that the regularization of the service should be made from the initial appointment, the order passed by opposite party No. 1 is illegal and improper and the service of the petitioner should have been regularized from the date of his initial appointment i.e., 26.03.2010 but not from 10.04.2013. So, the writ petition is filed to quash the order dated 08.04.2013 vide Annexure-7 passed by opposite party No. 1 and further prays to direct the opposite party No. 1 to pass fresh

order regularizing the service of the petitioner from the date of his initial appointment, i.e., 26.03.2010.

Per contra, counter affidavit has been filed by the opposite parties refuting the allegations made in the writ petition. It is the case of the opposite parties that the original advertisement was made by the learned District Judge, Balasore under undivided judgeship for 08 posts of Junior Stenographer mentioning in Annexure-1 in the writ petition and only one post was advertised for the candidate of SEBC Men category. The petitioner was placed at SL. No. 9 of the merit list. In the merit list, SL. Nos. 1 to 5, 7 and 8 were SEBC candidates. Since there are 07 SEBC candidates above the present petitioner in the merit list and there was only one post of SEBC male category and there was no regular vacancy for the petitioner to be appointed as Junior Stenographer as per the ORV Act and Rules, the petitioner was appointed on Ad hoc basis vide Annexure-B/2 and his appointment was renewed from time to time because of the promotion given to the Junior Stenographer to the post of Senior Stenographer created for the Fast Track Court temporarily and the posting in the Fast Track Court was tenure based. It is stated in the counter affidavit that in the case of Geetanjali Pattnaik and others (supra), the services of the petitioners, in those cases, were regularized but there was no order in that case to regularize the service of the petitioner from the date of initial appointment. When the posting of the petitioner was not against the regular vacancy and it was on Ad hoc basis, the question of regularization of service from the date of his initial appointment does not arise. Hence, it is stated that the order of opposite party No. 1 is correct and proper and the petitioner has no merit to succeed in this case.

SUBMISSIONS

Mr. S.S. Das, learned Senior Advocate for the petitioner submits that the petitioner being recruited against the regular vacancy and there being no provision for filling up the post on Ad hoc basis, the opposite party No. 1 has committed error by issuing the appointment letter to the petitioner against Ad

hoc post. On the other hand, the advertisement being made against the regular vacancy and there being Rule 6(5) of the Rules, 1969 showing the post on temporary basis and there is clear provision in the Rules for appointing the employee at first on probation for two years, the appointment of the petitioner on Ad hoc basis is totally contrary to the provisions of the Rules, 1969. He further submits that the impression of the opposite parties to fill up the post under the erstwhile Rules, 2001 on Ad hoc basis is misconceived and contrary to law.

Mr. Tripathy, learned Additional Government Advocate submits that the opposite parties have mentioned in their counter affidavit that the present petitioner although applied in pursuance of the advertisement made in 2009 for the post of Steno (Grade-III) but his position remained at SL. No. 9 in the merit list under the SEBC category to which the petitioner belongs to. According to him, there are other SEBC candidates above petitioner and there was only one male SEBC post. Since the petitioner was in the lower rank, he could not be given appointment against the regular post. But due to necessity of Senior Stenographer in the Fast Track Court under the FTC Scheme, the Junior Stenographer (Grade-III) was promoted to the post of Senior Stenographer and against that vacancy the present petitioner was given appointment on Ad hoc basis. He further submits that when there was no regular vacancy for the petitioner, the petitioner was only appointed on Ad hoc basis just to manage the vacancy occurred due to promotion of Junior Stenographer to Senior Stenographer.

Learned Additional Government Advocate further submits that since the Fast Track Court under the FTC Scheme is a tenure based Court, the appointment of Senior Stenographer to such Court was co-terminus. Apprehending about reversion of Senior Stenographer at any time to the original post, the appointment of the petitioner is renewed in each year on Ad hoc basis. He further submits that in view of the direction of this Court in W.P.(C) No. 1354 of 2013, the opposite party No. 1 has considered the case of the petitioner in the light of the case of Geetanjali Pattanik and others (supra) and accordingly the impugned order of regularization has been issued. Since there was no substantive vacancy available in 2010, original appointment of the petitioner was regularized from the date of the order i.e., 10.04.2013 and at no other circumstances, the petitioner could be regularized w.e.f. 26.03.2010.

POINT FOR DETERMINATION

(i) The main point for consideration in this case is whether the service of the petitioner is to be regularized from the date of his original appointment.

DISCUSSION

It is not in dispute that the petitioner was selected in the recruitment to the post of Steno (Grade-III) against the advertisement dated 17.11.2009 vide Annexure-1. It is admitted fact that the petitioner was issued appointment letter on 26.03.2010 as Stenographer (Grade-III) temporarily on Ad hoc basis with the Scale of Pay of Rs. 5,200-20,200/- & Grade Pay of Rs. 2,400/- being posted in the Court of Additional Civil Judge (Junior Division)-cum-JMFC, Basudevpur. It is also admitted fact that the petitioner's appointment was renewed from time to time in each year.

On going through the judgment of Geetanjali Pattnaik and others (supra), it appears that the petitioners in those cases being the candidates for the post of Junior Stenographer (Grade-III) were selected in pursuance of advertisement dated 28.06.2002 and given the Ad hoc appointment contrary to the provisions of the Rules, 1969 but not under Rules, 2001. In those cases, the same plea had been taken by the petitioners. Their Lordships observed in the following manner:-

"So, when the petitioners were selected in the recruitment held under the 1969 Rules and were appointed and posted, as aforesaid, continued to be employed since 2003 in case of the petitioners in W.P.(C) Nos. 9690 and 9692 of 2009 and 2005 in case of petitioner in W.P.(C) No. 9691 of 2009 without any interruption and their services are otherwise required by the institutions and they would better serve the organization than fresh recruits by virtue of the experience gained in the meantime, we see no justification as to why the benefit of regularization should be denied to them on the pretext of the Special Scheme."

Challenging the said order again, the petitioner, Satya Kumar Das, in those cases filed the writ petition and in that writ petition, necessary order was passed at paragraph-5 in the following manner:-

"5. It would be just and proper for this Court to observe that regularization of the service of the petitioner in the post must go back to the original date of his appointment. Therefore, the stand taken in the statement of counter is wholly

untenable in law. The petition succeeds. Rule is issued. The affected portion in the appointment order that the regularization is given with effect from 15.03.2010 (Annexure-10) is hereby quashed only insofar as regularization of the services of the petitioner in the post in question. Direction is given to the District Judge to give effect to regularization from the date of appointment of the petitioner and the same shall be applied extending the consequential benefits for which he is legally entitled to.

The writ petition is allowed in the above terms. This order shall be complied swith within a period of eight weeks from the date of its receipt."

The opposite party No. 1 has issued the letter of appointment against a regular vacancy of regular Court i.e., Additional Civil Judge (Junior Division)-cum-JMFC, Basudevpur. The case of the petitioner is clearly covered by the decision of Geetanjali Pattnaik and others (Supra) and also by the decision of Satya Kumar Das vide W.P.(C) No. 22244 of 2010. The opposite party has failed to satisfy the ground for appointment of the petitioner on Ad hoc basis but not on regular basis.

In terms of the above discussion, we are of the view that the petitioner was appointed against the regular vacancy in pursuance of the advertisement made in 2009 and as per Rule, 6(5) of Rules, 1969, he should be appointed temporarily on probation for a period of two years instead of Ad hoc basis. Further, we are of the considered opinion that the case of the present petitioner being similar to the case of the petitioners namely Satya Kumar Das and Geetanjali Pattnaik, the petitioner's service should be regularized from the date of his initial appointment i.e., 26.03.2010 but not from 10.04.2013. The issue No. (i) is answered accordingly.

CONCLUSION

In W.P.(C) No. 1354 of 2013, this Court had directed to dispose of the representation of the present petitioner in the light of ratio in the case of Geetanjali Pattnaik and others (supra) and the same order has been compiled by the opposite party No. 1 in regularizing the service of the present petitioner w.e.f. 10.04.2013 but not from the date of his original appointment. Since, we are of the view that the petitioner should be regularized from the date of his original appointment, Annexure-7 must be quashed and the Court do so. We, therefore, direct the opposite party No. 1 to issue fresh order of regularization of service of the petitioner with effect from the date of his original appointment i.e., 26.03.2010 with all consequential service benefits accrued to him.

The writ petition is disposed of accordingly.

****

12. Sections 38,139 of NI Act

Ashok Kumar Das Vs. State of Orissa and Ors.

S.K. Sahoo, J.

In the High Court of Orissa , Cuttack

Date of Judgment -10.04.2017

Issue

Whether the Court while taking cognizance of offence under section 138 of the Negotiable Instrument Act ,1881 has to consider regarding the existence of a legally enforceable debt or liability.

Relevant Extract

This is an application under section 482 of Cr.P.C. filed by the petitioner Ashok Kumar Das with a prayer to hold the impugned order dated 24.06.2005 passed by the learned S.D.J.M., Nayagarh in I.C.C. Case No. 80 of 2005 in taking cognizance of offence under section 138 of the Negotiable Instruments Act, 1881 (hereafter 'N.I. Act') as bad and illegal and to quash the complaint case proceeding.

It appears that after the complaint petition was filed, learned Magistrate recorded the initial statement of the complainant on 18.06.2005 and on 24.06.2005 after perusing the statement of the complainant and the documents, took cognizance of the offence under section 138 of the Negotiable Instrument Act and issued process against the petitioner.

The complaint petition reveals that the complainant was a wholesale dealer of consumer durable items having a showroom at Kacheri Bazar, Main Road, Nayagarh and the petitioner was a retailer of such items and there was business transaction between the parties since 1996 till 2002 and the petitioner was taking consumer durable items and paying at the prescribed rates in cash and credit bills in dealer price. It is stated that during such business transaction, there was outstanding dues against the petitioner for an amount of Rs. 3,55,536/- (rupees three lakhs fifty five thousand fine hundred thirty six) as per the Credit Bill Memo No. 3548 dated 11.01.2002 and Rs. 2,77,050.00 lakhs

(rupees two lakhs seventy seven thousand fifty) as per the Credit Bill Memo No. 3553 dated 27.01.2002.

It is the further case of the complainant that despite several approach, the petitioner did not clear up the arrear dues and he took several adjournments to clear up the arrear dues of the consumer items but neglected to clear up the same. The opp. party-complainant issued a pleader's notice to the petitioner on 11.04.2005 by registered post which was acknowledged by the petitioner on 13.04.2005 and then on 23.04.2005 the petitioner through his advocate sent reply to the pleader's notice of the complainant wherein though it was admitted that there was business transaction between the parties since 1996 till 2002 but the petitioner disputed regarding the outstanding dues to the tune of Rs. 6,32,586/- (rupees six lakhs thirty two thousand five hundred eighty six) of the complainant against him. It is the further case of the complainant that the petitioner came to his show room at Nayagarh and requested him not to take any legal action and asked him to give one week time to clear up the arrear outstanding dues and ultimately the petitioner handed over a post dated cheque dated 28.04.2005 bearing No. 360177 for an amount of Rs. 6,00,000/- (rupees six lakhs) of State Bank of India, Manjhiakhanda Branch of District Nayagarh for discharge of his liability. The cheque was presented by the complainant in his account at UCO Bank, Nayagarh on 29.04.2005 for encashment but intimation was received from the bank that the account of the petitioner was closed. After receipt of the intimation on 18.05.2005 from UCO Bank, Nayagarh, the complainant sent a pleader's notice in writing on 25.05.2005 making a demand of Rs. 6,00,000/- (rupees six lakhs) to be paid within fifteen days of the receipt of the notice. The said notice which was sent by the registered post was acknowledged by the petitioner on 26.05.2005. Since the petitioner didn't pay the amount within the stipulated period of 15 days, the complaint petition was filed.

The sole ground taken by the learned counsel for the petitioner while challenging the complaint case proceeding is that since there was no business transaction between the parties since 2002 and the alleged debt was barred by limitation at the time of issuance of cheque, therefore, there was no legally enforceable debt or other liability against the petitioner under the explanation to section 138 of the N.I. Act and as such the complaint petition was not maintainable.

The question that crops up for consideration in this case is whether a cheque which was drawn by the accused on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge in whole or in part, of any debt or other liability cannot be made the foundation of a complaint case proceeding under section 138 of the N.I. Act on the ground that debt was barred by limitation.

The learned counsel for the petitioner in support of his contention placed a decision of the Hon'ble Andhra Pradesh High Court in case of Girdhari Lal Rathi-Vrs.-P.T.V. Ramanujachari & another reported in MANU/AP/0092/1997MANU/AP/0092/1997 : 1997(2) Crimes 658 wherein while dealing with an appeal against acquittal of the charge under section 138 of the Negotiable Instrument Act, it was held that in case a cheque is issued for a time barred debt and it is dishonoured, the accused cannot be convicted under section 138 of the Negotiable Instrument Act.

In case of Rangappa-Vrs.-Sri Mohan reported in MANU/SC/0376/2010MANU/SC/0376/2010 : (2010) 11 Supreme Court Cases 441, it is held as follows:-

"14. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation.

xxxxx xxxxx xxxxx xxxxx xxxxx xxxx

Therefore, if the accused is able to raise a probable defence which creates about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

In case of S. Natarajan-Vrs.-Sama Dharman reported in MANU/SC/0698/2014MANU/SC/0698/2014 : 2015 (2) Recent Criminal Reports (Criminal) 854 wherein, the Hon'ble Supreme Court held as follows:-

"9. In our opinion, therefore, the High Court could not have quashed the proceedings on the ground that at the time of issuance of cheque, the debt had become time barred and therefore, the complaint was not maintainable. The High Court, therefore, fell into a grave error in quashing the proceedings."

In this case, prima facie material is available on record to show that the cheque was issued by the petitioner for part payment of outstanding debt against him. In view of the business transaction between the parties, the credit bills, the continuous negotiation between the parties for clearance of the dues, the letter correspondence between the parties, it can be said that in the year 2005, when the cheque in question was issued by the petitioner and when the cheque was presented by the complainant for encashment, there was legally enforceable debt or other liability and since the account of the petitioner was closed, the cheque was dishonored.

Therefore in the context of the case, at this stage of the proceeding, it cannot be said that the cheque drawn by the petitioner was in respect of a debt or liability, which was not legally enforceable and therefore, even if it is dishonoured, the petitioner cannot be prosecuted for an offence under section

138 of the N.I. Act. The petitioner can rebut the presumption under section 139 of the N.I. Act at the time of trial by establishing his case by way of preponderance of probabilities and thereby creating doubt about the existence of a legally enforceable debt or liability. If such a plea is taken, it is expected that the same shall be duly considered by the learned Trial Court in accordance with law.

At the stage of taking cognizance of offence, the Magistrate is required to see a prima facie case for commission of the offence in question. On perusal of the complaint petition, the initial statement of the complainant supported by documents, the learned Magistrate has found prima facie material for commission of offence under Section 138 of the N.I. Act. Therefore, I am not inclined to invoke my inherent power under section 482 Cr.P.C. to quash the impugned order and the complaint case proceeding.

Accordingly, the CRLMC application being devoid of merit stands dismissed.

****

13. Section 14 & 17 of the Orissa Saw Mills and Saw Pits (Control) Act, 1991

Ramesh Chandra Sabat and another Versus State of Orissa and others .

S.K. Sahoo , J.

In the High Court of Orissa, Cuttack

Date of Judgment -17.04.2017

Issue

Whether 'any other person' who are not coming under any of the categories as per section 17(1) of 1991 Act ,can submit a report directly to the court for taking cognizance of the offence.

Relevant Extract

The petitioners Ramesh Chandra Sabat and Jivan Chandra Pattanaik have filed this application under section 482 of Cr.P.C. challenging the impugned order dated 04.12.2004 passed by the learned J.M.F.C., Aska in 2(b) C.C. Case No.11 of 2004 in taking cognizance of offence under section 14 of the Orissa Saw Mills and Saw Pits (Control) Act, 1991 (hereafter for short '1991 Act').

The sole contention raised by the learned counsel for the petitioners is that in the present case, the offence was detected on 21.01.2004 and the Forester of Sherogodo Section prepared the prosecution report on 20.05.2004 and then it was placed before the Forest Range Officer, Aska, Ganjam who forwarded the report on 10.06.2004 to the Conservator of Forests who in turn forwarded it to the learned J.M.F.C., Aska on 20.11.2004. According to the learned counsel for the petitioners, both the provisions i.e. sub-section (1) and sub-section (2) of section 17 of the 1991 Act have not been followed in the case and therefore, the prosecution report has no sanctity in the eye of law and the learned J.M.F.C., Aska should not have taken cognizance of offence under section 14 of the 1991 Act on the basis of such prosecution report.

In view of sub-section (1) of section 17 of 1991 Act, a Court as enumerated under section 18 of the said Act can take cognizance of any offence punishable under 1991 Act only on the report in writing of the facts constituting of such offence of the following persons:-

(i) Licensing Officer;
(ii) Any person duly authorized by the State Government;
(iii) Any person authorized by the Licensing Officer.

As per section 2(e) of 1991 Act, "Licensing Officer" means licensing officer appointed under section 3. As per the section 3 of the 1991 Act, any officer not below the rank of the Divisional Forest Officer can be appointed as a Licensing Officer by the State Government by notification.

The other persons, who are not coming under any of the above categories as per section 17(1) of 1991 Act, cannot submit a report to the Court directly for taking cognizance of offence. Such persons have to make a complaint in writing alleging the commission of an offence under 1991 Act either to the Licensing Officer or to the person authorized under sub-section (1) of section 17. Thereafter, the procedure as laid down under sub-section (2) of section 17 has to be followed. The Licensing Officer or the authorized person shall conduct an enquiry and if he finds sufficient reason to believe that an offence has been so committed, he shall make a report to the Court within thirty days from the date of receipt of the complaint. A patently regulatory imposition in the matter of lodging of a report for such offence is discernible assuredly to obviate frivolous and wanton complaints by all and sundry. Therefore, in every circumstance, the report of the Licensing Officer or that of the person duly authorized either by the State Government or the Licensing Officer is necessary for a Court to take cognizance of any offence punishable under 1991 Act.

The learned counsel for the State, Mr. Swain placed the letter dated 23.03.2017 of the D.F.O., Ghumsur South Division wherein it is indicated that the State Government or Licensing Officer has not authorized anybody under section 17 of the 1991 Act but the D.F.O., Ghumusur South Division has authorized the Forest Range Officer, Deputy Range Officer, Forester and field staff of Ghumusur South Division to participate in the protection of forests and to curb the timber smuggling activities and to conduct raids on illegal saw mill premises etc.

The Forester in this case shas submitted the prosecution report to the Forest Range Officer who in turn has forwarded it to the Conservator of Forests on 10.06.2004. The prosecution report prepared by the Forester which was forwarded to the Court of learned J.M.F.C., Aska by the Conservator of Forests cannot be said to be a report in writing by the Licensing Officer or by the any person duly authorized by the State Government or the Licensing Officer in that behalf in consonance with sub-section (1) of section 17 of 1991 Act. The Conservator of Forests has not conducted any enquiry after receipt of the report of the Forester to ascertain as to whether there are sufficient reason to believe that an offence under 1991 Act has been committed or not and that to within

thirty days from the date of receipt of the prosecution report. It appears that much after the stipulated period of thirty days, only on 20.11.2004 the Conservator of Forests has simply forwarded the prosecution report to the Court of learned J.M.F.C., Aska, Ganjam.

In absence of any enquiry as contemplated under sub-section (2) of section 17 of the 1991 Act and in absence of any finding by the Licensing Officer that there is sufficient reason to believe that an offence has been committed under the 1991 Act, when the prosecution report prepared by the Forester was forwarded to the Court by the Conservator of Forests five months after its receipt from the Forest Range Officer, I am of the view that the prosecution report which has been submitted in this case is not in consonance with the provision under section 17 of the 1991 Act. Therefore, the learned J.M.F.C., Aska has committed illegality in accepting such prosecution report and taking cognizance of the offence basing on such report. When there is a specific bar for taking cognizance, the Court should have been more careful while accepting such prosecution report and should not have mechanically taken cognizance of the offence under section 14 of the 1991 Act.

Accordingly, the CRLMC application is allowed and the impugned order is quashed.

****