O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2016

(*DECEMBER*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY
MONTHLY REVIEW OF CASES ON CIVIL, CRIMINAL & OTHER LAWS, 2016 (December)
I N D E X

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2. Section 482 of Cr. P. C.

Rama Chandra Behera Versus State of Orissa and another

S.K. SAHOO, J.

In the High Court of Orissa, Cuttack

Date of Hearing & Judgment: 05.12.2016

Issue

Quashing of the Proceeding under Sections 409, 420, 167, 218 read with Section 120 –B of IPC due to delay.

Relevant Extract

The main contentions raised by the learned counsel for the petitioner Mr. Karunakar Jena is that the criminal proceeding has been initiated in the year 1990 and in the meantime twenty six years have passed and the delay in disposal of the criminal case is in no way attributable to the petitioner and whatever delay has occasioned, it was due to the lackadaisical attitude of the investigating agency in submitting the charge sheet at a belated stage and then for non-supply of police papers by the Court . It is further contended that in the meantime, the petitioner has been superannuated/retired from his service and the petitioner faced a departmental proceeding and he has been found not guilty by the appellate authority. It is further contended that no useful purpose would be served in allowing the criminal proceeding to continue against the petitioner.

The petitioner Rama Chandra Behera has filed this application under section 482 of the Cr.P.C. for quashing the criminal proceeding in G.R. Case No. 567 of 1991 in which he has been charge sheeted under sections 409, 420, 167, 218 read with section 120-B of the Indian Penal Code pending in the Court of learned S.D.J.M., Bhubaneswar. The said case arises out of Capital P.S. Case No. 114 of 1991.

Considering the submissions made by the learned counsels for the respective parties and the citations placed by the learned counsels for both the sides, it is very clear that the delay which has occasioned by action or inaction in the prosecution is one of the main features which are to be taken note of by the Court. A deliberate attempt to delay the trial in order to hamper the accused is

weighed heavily against the prosecution inasmuch as such delay violates the constitutional rights to speedy trial of the accused. The Court while deciding the case has to see whether there is unreasonable and unexplained delay which has resulted in causing serious prejudice to the accused. There is no dispute that there cannot be any straight jacket formula in a particular case to quash the criminal proceeding if the trial is not concluded within a particular time limit. The nature and gravity of the accusation, the qualitative and quantitative materials collected during course of investigation, the conduct of the accused in causing the delay are also to be considered by the Court. Coming to the case in hand, I find that not only it took about eight months for the Officer in charge of Capital Police Station to register the F.I.R. but for best reason known to the investigating agency, even though the case records indicates that the charge sheet was made ready by 27.12.1994 but it was withheld from the Court and submitted only on 23.10.1998 and thereafter, till this case was filed in this Court, the case was adjourned by the learned Magistrate from time to time since 07.10.1999 onwards for supply of police papers. It is regrettable that when few hours would have been sufficient to prepare Xerox copies of the police papers and then supply it to the accused, the same could not be done even after passage of more than ten years. One after the other Magistrates mechanically and without application of mind went on putting their signatures in the order sheet in adjourning the case from time to time for supply of police papers even without asking the registry to prepare it at an earliest. It was also the joint responsibility and duty of the prosecutor to point out the inordinate delay caused to the notice of the Court to pass appropriate order in that respect. It is for the laches of both that the petitioner against whom serious charges of public nature have been brought could not be proceeded with. More than twenty six years have passed in the meantime since the date of presentation of the F.I.R. The petitioner has not only retired from his service but the Board of Directors, the appellate authority has given a clean chit to the petitioner while rehearing the appeal against the punishment imposed on him in the disciplinary proceeding as per the direction

of this Court in O.J.C. No. 5415 of 1995 dated 16.03.2009. There is no gainsaying that exoneration in the departmental proceeding ipso facto would not result in the quashing of the criminal prosecution but in view of long lapse of time passed since the presentation of the F.I.R. and non-supply of copies of police statements and other relevant documents and uncertainty of the memory of 141 charge sheeted witnesses, assuming that they are still available to prove the accusations, it would not be fair and just to allow the case to proceed against the petitioner.

In view of exceptional circumstances in this case in favour of the petitioner, I am of the considered view that the petitioner has been deprived of his constitutional right of speedy trial guaranteed under Article 21 of the Constitution of India. The fact that he is in no way responsible for the inordinate delay caused in the proceeding and has suffered serious prejudice, in order to prevent miscarriage of justice and in the interest of justice, invoking my inherent power under section 482 of Cr.P.C., I am of the view that the proceeding against the petitioner in connection with Capital P.S. Case No.114 of 1991 which corresponds to G.R. Case No.567 of 1991 pending in the Court of learned S.D.J.M., Bhubaneswar should be quashed. Accordingly, the CRLMC application is allowed and the criminal proceeding in G.R. Case No.567 of 1991 pending in the Court of learned S.D.J.M., Bhubaneswar stands quashed.

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3. Section 306 of IPC

Gurcharan Singh versus State Of Punjab

DIPAK MISRA & AMITAVA ROY , JJ.

In the Supreme Court of India

Date of Judgment – 02. 12. 2016

Issue

Conviction endorsed but sentence scaled down – appeal to overturn the concurrent determination of charge –discussed.

Relevant Extract

The fascicule of facts, indispensable to comprehend the backdrop of the prosecution, has its origin in the inexplicable abandonment of the deceased Surjit Kaur and her two daughters namely; Geet Pahul and Preet Pahul by Dr. Jaspal Singh, their husband and father respectively, about two years prior to the tragic end of his three family members as above. The prosecution version is that Dr. Jaspal Singh, who was initially in the Government service, had relinquished the same and started a coal factory at Muktsar. He suffered loss in the business and consequently failed to repay the loan availed by him in this regard from the bank. As he and his brother Gurcharan Singh (appellant herein) and others succeeded to the property left by their predecessors, he started medical practice in private.

Be that as it may, before leaving his family, he addressed a communication to the concerned bank expressing his inability to repay the loan inspite of his best efforts as he was not possessed of any property in his name. Dr. Jaspal Singh was thereafter not to be traced. Following this turn of events, according to the prosecution, his wife Surjit Kaur and his daughters shifted from Jalalabad where they used to stay to Abohar and started residing in a rented house of one Hansraj (PW3). According to them, they had no source of income and further, they were also deprived of their share in the property and other entitlements, otherwise supposed to devolve on Dr. Jaspal Singh. They were also not provided with any maintenance by the family members of her husband – Jaspal Singh and instead were ill-treated, harassed and intimidated.

While the matter rested at that, on 3.10.2000 at about 10.30 p.m., Hansraj, the landlord of the deceased Surjit Kaur, being suspicious about prolonged and unusual lack of response by his tenants, though the television in their room was on, informed the brother of the deceased Surjit Kaur. Thereafter they broke open the door of the room and found all three lying dead. The police was informed and FIR was lodged.

In course of the inquisition, the Investigating Officer collected a suicide note in the handwriting of Surjit Kaur and also subscribed to by her daughter Preet Bahul. The suicide note implicated the appellant, his wife Ajit Kaur and the convicted co-accused Sukhvinder Singh @ Goldy as being responsible for their wretched condition, driving them in the ultimate to take the extreme step. A note book containing some letters, written by deceased Geet Pahul was also recovered. On the completion of the investigation, which included, amongst others the collection of the post-mortem report which confirmed death due to consumption of aluminium phosphide, a pesticide, charge-sheet was submitted against the three persons named hereinabove along with Satnam Kaur under Section 306/34 IPC.

In assailment is the judgement and order dated 17.12.2014 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. S- 566-SB of 2004, affirming the conviction of the appellant and co-accused Sukhvinder Singh under Section 306 of the Indian Penal Code (hereinafter to be referred to as "IPC"), as entered by the Trial Court. While by the decision impugned, the conviction has been endorsed, the substantive sentence of six years of rigorous imprisonment awarded by the Trial Court to each of the accused persons has been scaled down to one of five years of the same description. The instant appeal seeks to overturn the concurrent determinations on the charge by the courts.

Though, in the teeth of the sequential findings of guilt of the courts below, normally, reappraisal of the evidence is otherwise uncalled for, we are impelled to embark upon that exercise, having regard to the rival assertions in the unique

facts and circumstances of the case. This is more so, as in controversion of the allegation of wilful and deliberate deprivation of the deceased Surjit Kaur and her daughters of their share in the family property, as laid by the prosecution, evidence has surfaced to the contrary, being conceded by her brothers in the course of their testimony at the trial.

The evidence on record, to start with, in our estimate, does not substantiate the imputation that Surjit and her daughters had been deprived wholly of their shares in the joint family property as the heirs of Dr. Jaspal Singh. Admittedly, there is no proof of any threat being extended by the appellant or anyone of the in-laws of Surjit so as to reduce them to destitutes in a petrified state. The disappearance of Dr. Jaspal Singh, the husband of Surjit, father of Preet and Geet though unfortunate, the event had occurred about two years prior to the incident. Neither the appellant nor the in-laws of Surjit did have any role in this regard. The absence of any complaint or civil litigation also permits an inference against the denial of the share in the family property to Surjit and her daughters or of any ill-treatment, torture, oppression meted out to them. There is thus neither any proximate nor remote acts of omission or commission on the part of the appellant and his family members that can be irrefutably construed to be a direct or indirect cause or factor compelling Surjit and her daughters to take the extreme step of self-elimination.

Section 113A of the Indian Evidence Act, 1872 permits a presumption as to the abetment of suicide by a married woman by her husband or any relative of his, if it is proved that she had committed the act within a period of seven years from the date of her marriage and that her husband or such relative of his had subjected her to cruelty. The explanation to this Section exposits "cruelty" to have the same meaning as attributed to this expression in Section 498A IPC.

Though for the purposes of the case in hand, the first limb of the explanation is otherwise germane, proof of the willful conduct actuating the woman to commit suicide or to cause grave injury or danger to life, limb or

health, whether mental of physical, is the sine qua non for entering a finding of cruelty against the person charged.

That the intention of the legislature is that in order to convict a person under Section 306 IPC, there has to be a clear mens rea to commit an offence and that there ought to be an active or direct act leading the deceased to commit suicide, being left with no option, had been propounded by this Court.

The assessment of the evidence on record as above, in our considered opinion, does not demonstrate with unqualified clarity and conviction, any role of the appellant or the other implicated in-laws of the deceased Surjit Kaur, as contemplated by the above provisions so as to return an unassailable finding of their culpability under Section 306 IPC. The materials on record, to reiterate, do not suggest even remotely any act of cruelty, oppression, harassment or inducement so as to persistently provoke or compel the deceased to resort to self-extinction being left with no other alternative. No such continuous and proximate conduct of the appellant or his family members with the required provocative culpability or lethal instigative content is discernible to even infer that the deceased Surjit Kaur and her daughters had been pushed to such a distressed state, physical or mental that they elected to liquidate themselves as if to seek a practical alleviation from their unbearable earthly miseries.

In the wake up of the above determination, we are, thus, of the unhesitant opinion that the ingredients of the offence of Section 306 IPC have remained unproved and thus the appellant deserves to be acquitted. The findings to the contrary recorded by the courts below cannot be sustained on the touchstone of the law adumbrated by this Court as well as the facts involved. The appeal is thus allowed. The appellant would be set at liberty from custody, if his detention is not required in connection with any other case.

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4. Sections 302 & 307 of IPC
Gurpal Singh versus State Of Punjab
DIPAK MISRA & AMITAVA ROY , JJ.
In the Supreme Court of India
Date of Judgment -02.12.2016
Issue
Conviction under Sections 302 and 307 challenged when co-accused is acquitted.

Relevant Extract

The incident witnessing the death of Jatinder Singh and the injuries sustained by Lakhwinder has the genesis in a trifle. On a statement rendered with regard thereto by Gurdial Singh(PW1), the First Information Report was registered against the appellant and his son Harpartap. It was alleged that over a lingering land dispute between the informant and the appellant, who are brothers, on 06.07.2002, while Jugraj, the son of the informant was in his fields, the appellant had hurled abuses to him. Jugraj having felt humiliated and anguished, on returning home, complained about the same to his father Gurdial, the informant. The houses of the brothers were adjacent to each other. When the appellant returned home from his fields, the informant went to the terrace of the roof of his house and summoned the former to that of his. The appellant and his son Harpartap responded to the call whereafter informant enquired of Gurpal as to why he had abused his son. This enraged the appellant and while arrogantly proclaiming that he was not only justified to do so but that he would continue to conduct himself as done, rushed downstairs of his house and brought his DBBL gun. His son Harpartap, the acquitted co-accused was also with him. It is alleged by the prosecution that on the exhortation of Harpartap, the appellant opened fire, which hit the informant on the side of his head. Meanwhile drawn by the commotion, Paramjit Kaur, the wife of the informant, Jatinder Singh and Lakhwinder Singh, friends of Jugraj rushed to the terrace. On seeing them, the appellant fired from his gun towards them, which hit Paramjit and Jatinder on their abdomen and Lakhwinder on his mouth and head. On hue and cry being raised, the appellant and the accused fled the scene.

The injured were rushed to the Guru Nanak Dev Hospital, Amritsar where they were treated. However, Jatinder succumbed to the injuries sustained. After completing the investigation, charge-sheet was laid against both the accused persons under Sections 302 and 307 IPC.

The accused persons denied the charge and, therefore were tried. The prosecution examined several witnesses including the informant, the injured and the doctor who had performed the post-mortem examination and had attended the injuries of others involved. The accused persons were examined under Section 313 Cr.P.C. and on the completion of the trial, the Trial Court convicted the appellant under Sections 302, 307 IPC but acquitted the co-accused Harpartap. To reiterate, the High Court has affirmed the conviction and the sentence recorded by the Trial Court.

The subject matter of scrutiny is the judgment and order dated 01.10.2008 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 378-DB of 2004 concurring with the verdict of the Trial Court in convicting the appellant for the offence under Sections 302 and 307 IPC while acquitting the co-accused Harpartap Singh, his son. Following his conviction, the appellant had been awarded sentence of life imprisonment and fine of Rs.5,000/- with default sentence under Section 302 IPC and five years rigorous imprisonment and fine of Rs.2,000/- with default sentence under Section 307 IPC. Both the sentences have been ordered to run concurrently. The High Court has concurred with the sentence as well.

We have examined the evidence pertaining to the incident as available on records. The eye-witnesses including the informant have offered a consistent, coherent and convincing narration thereof which does not admit of any doubt of their trustworthiness. The plea of their family relationship to discredit them does not commend for acceptance in the attendant facts and circumstances. Noticeably, in course of the investigation, amongst others, the 12 bore DBBL gun

loaded with two live cartridges used for the offence had been recovered from the appellant. The site plan prepared by the investigating officer also pins the place of occurrence as deposed by the witnesses. Further four cartridge shells have also been recovered from the said spot.

The medical evidence reveals injuries on the deceased and the injured compatible with the weapon used. The charges levelled against the appellant thus have been proved beyond doubt. The co-accused Harpartap has been acquitted in view of absence of any incriminating evidence against him. His acquittal, having regard to the state of evidence has no bearing on the inculpatory involvement of the appellant so much so, that his conviction in isolation is sustainable.

However, in the singular facts of the case and noticing in particular, the progression of events culminating in the tragic incident, we are inclined to reduce the sentence awarded to him. Incidentally, the occurrence is of the year 2004 and meanwhile twelve years have elapsed. Further, having regard to the root cause of the incident and the events that sequentially unfolded thereafter, we are of the comprehension that the appellant was overpowered by an uncontrollable fit of anger so much so that he was deprived of his power of self-control and being drawn in a web of action reflexes, fired at the deceased and the injured, who were within his sight. The facts do not commend to conclude that the appellant had the intention of eliminating any one of those fired at, though he had the knowledge of the likely fatal consequences thereof. Be that as it may, on an overall consideration of the fact situation and also the time lag in between, we are of the view that the conviction of the appellant ought to be moderated to one under Section 304 Part 1 IPC and 307 IPC. Further, considering the facts of the case in particular, according to us, it would meet the ends of justice, if the sentence for the offences is reduced to the period already undergone. We order accordingly.

Ex-consequenti, the appeal is partly allowed. The conviction of the appellant is converted to one under Section 304 Part 1 and 307 IPC and the sentence is reduced to the period already undergone. In this view of the matter, as a corollary, the appellant is hereby ordered to be set at liberty forthwith, if he is not required to be detained in connection with any other case.

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5. Section 376(1) of IPC

Raja @ Dolagobinda Dash Versus State of Orissa

C.R. DASH, J.

In the High Court of Orissa , Cuttack.

Date of Judgment : 21.12.2016

Issue

Appeal against conviction and sentencing.

Relevant Extract

The gist of the prosecution case, as found from the record, is as follows :- The victim (P.W.1), who is major, woke up early at about 4.00 A.M. on 20.04.2013 and went outside to urinate. At that time, her mother (P.W.9) had already woken up and she had already switched on the electric light illuminating the house. The victim (P.W.1) did not return home for about 10-20 minutes. The victim's mother (P.W.9) searched for her and also informed about the fact of victim's missing, to her husband (P.W.4) immediately. P.W.4 and P.W.9 (both the parents) along with their youngest son and youngest daughter (both not examined) searched for the victim in the nearby places, but in vain. The victim's father (P.W.4) thereafter gave information about missing of the victim to his sonin- law Siba Charan Das (P.W.2), who has married his (P.W.4's) middle daughter Banita (P.W.3). Both P.Ws.2 and 3 then reached in the house of the victim immediately. All of them started searching for the victim at different places. When they were going towards Mayfair Hotel, Bhubaneswar, they found the Appellant (accused) coming out of a sub-lane, and the Appellant ran away seeing all of them. After a while, they saw the victim (P.W.1) coming from the same sub-lane. On being confronted, the victim (P.W.1) said that the Appellant called her to show a material and then forcibly brought her to a latrine at a distance of about ten minutes walk from their house, and inside the latrine the Appellant asked her to remove her panty. She refused. Then the Appellant forcibly removed her panty, squeezed her breasts and inserted his penis into her anus repeatedly. The Appellant also threatened her to keep quiet and further threatened her not to disclose the matter before anybody, or else he would kill her. After hearing about the incident, all the family members of the victim, i.e. P.Ws.1, 2, 3, 4 and 9 while were returning to their house, they found the mother of the Appellant plucking flowers in front of her house. They all complained before her (mother of the Appellant) about the indecent act of the Appellant. She (mother of the Appellant) called them inside her house and confronted the matter to the Appellant (her son). The Appellant denied to have committed any such act. Thereafter the local gentries came to know about the incident, out of whom P.Ws.5, 6, 8 and 10 are important. They told the victim's family not to report the matter to the Police, as they are

taking up the matter for an amicable settlement. Thereafter, in the house of the Appellant, a meeting was held; the Appellant (accused) initially refused about any such incident, but subsequently he admitted his guilt. The matter was reduced into writing in presence of the Appellant and all the gentries present in the meeting. Days passed by, but no action was taken by the local gentries. P.W.4 (father of the victim) then went and met one of the local gentries, with whom the written 'Ekrarnama' was there; he (the gentleman) said that, they cannot do anything in the matter and he (P.W.4) should report the matter to the Police. However, giving some other reasons regarding the health condition of the victim, the delay of lodging the F.I.R. on 26.04.2013 has been explained.

On registration of the case, the Investigating Officer (P.W.17) took up the investigation; she got the victim girl examined by the Medical Officer (P.W.14), whom P.W.13, a lady Constable along with others had escorted to the hospital; she (P.W.17) seized the wearing apparels of the victim girl, her vaginal swab collected by the Medical Officer and other incriminating articles. She also got the Appellant examined by the Medical Officer (P.W.16) and P.W.12, the lady Constable along with others was directed to escort the Appellant for his medical examination. She requisitioned the services of the Scientific Officer (P.W.15), who visited the spot latrine and submitted his report. She also seized the wearing apparels and materials like semen and sample pubic hair of the Appellant on production by the escorting Constable. On completion of investigation, the I.O. filed charge-sheet under Section 376 (1), I.P.C. against the accused-Appellant.

The Appellant was convicted under Section 376 (1), I.P.C. (Criminal Law Amendment Act, 2013) and he was sentenced to suffer R.I. for seven years and to pay fine of Rs.5,000/- (five thousand), in default, to suffer further period of R.I. for three months. Hence this Appeal.

The finding of guilt against the appellant was returned by the learned Court below on the basis of the evidence of P.W.1 and corroborative evidence of P.Ws. 2, 3, 4, 9 and 11. P.W.1 is the victim. It is not a matter of dispute that she is major. She (P.W.1) ipse dixit has testified that she is aged about 28 years. Victim's mother (P.W.9) and her father (P.W.4) have testified that the victim suffers from epilepsy, whereas P.W.11, who is a tenant in the house of P.W.4, has testified that the victim lady is an epilepsy patient, her IQ is low and she is in the habit of repeating words. The Medical Officer (P.W.14), who had examined the victim girl on police requisition, has testified that the general mental condition of the patient (victim) is subnormal and there is history of epilepsy and the victim was responding the questions very slowly. In her cross-examination she has further testified that the victim lady was not lunatic, but her IQ was subnormal. She has further testified that the victim lady was capable of understanding the questions

and was responding the same very lately. According to her, no medical papers were produced before her by the parents of the victim as supportive documents to show her treatment for epilepsy.

In this case, the trial court having failed to record about the demeanour of the victim (P.W.1) while recording her evidence, has failed grossly in view of such mental state of the victim, as testified by the aforesaid witnesses. Had the trial court recorded the demeanour of the victim, it could have thrown much light on the veracity of the evidence of the witnesses. The Medical Officer (P.W.14) and P.W.11 (who is a tenant in the house of the victim) have testified that the victim has low IQ. No step has been taken by the Investigating Officer to get the victim further examined medically to find out her mental age. It is found from the evidence of P.W.1 that, she has been cross-examined by the Additional Public Prosecutor, as she did not support the prosecution case on some aspects. The evidence of such a witness, against whom there are materials to show that her IQ is low and there are further materials to show that she was under the control of her family members for quite sometime before her first statement was recorded, cannot be made the sole basis of conviction unless there are corroboration in material particulars.

Coming to the spot of occurrence of the case, it is a latrine belonging to a person not known either to the victim or the appellant. It is situated at a distance of about 5-10 minutes' walk from the house of the victim. It is situated outside the house. According to the prosecution witnesses, the door of the latrine was damaged and the appellant took the victim inside the latrine to do the act, as alleged against him. P.W.2, who is the brother-in-law of the victim, being the husband of her younger sister, is stated to have seen the appellant coming out of the latrine. P.W.3, in paragraph-3 of her evidence, has also testified that she saw the spot latrine after coming to know about the incident from the victim. P.W.3 has testified that the victim led her and her mother (P.W.9) to the spot latrine, the door of which was damaged to some extent. In paragraph-12 of her evidence, P.W.3 has given the description of the latrine, i.e. about its length and breadth, etc. P.W.4, in his evidence, has testified that he had not gone to the spot latrine. P.W.9, in paragraph-3 of her evidence has testified that the latrine was in a deteriorated condition. She, in paragraph-11 of her evidence has testified that, she (P.W.9) along with her daughter (P.W.3) and the victim (P.W.1) had gone to the spot latrine.

Very designedly the I.O. (P.W.17) has not testified anything about the nature of the door of the latrine. In paragraph-9 of her cross-examination, the I.O. has testified that she has not mentioned about the nature of the roof of the spot latrine and that she has not mentioned about the nature of wall of the spot latrine

and regarding the nature of the door of the latrine. According to the I.O. (P.W.17), the spot latrine was located to the backside of the house, which was under occupation of one Ranjan Mohanta, being intervened by a narrow lane. The spot latrine is located close to the house under occupation of Ranjan Mohanta at a distance of about 5 to 7 feet towards the backside of his house. Again she has testified that, a damaged house and cowshed are located near the vicinity of the spot latrine. P.W.7 – Sita Mohanta is the wife of Ranjan Mohanta. She however did not support the prosecution case. But, it is her specific assertion in the cross-examination that the entrance door of the spot latrine has never been damaged by any person at any point of time, and immediately after every use, the door of the latrine is used to be locked instantly. The Scientific Officer (P.W.15), who had visited the spot latrine on police requisition, has also testified nothing about the door condition of the spot latrine. All the discrepancies so far as the spot is concerned, make the spot itself doubtful, especially in view of the positive assertion by P.W.7 to the effect that the latrine used to be locked instantly after every use. The damaged house or the cowshed in the vicinity of the latrine, which were in open condition, might be the spot, but such inference cannot be drawn when the prosecution's assertion is specific to the effect that the incident took place inside the latrine. But the evidence however shows that the use of the latrine for commission of the offence, as alleged, could not have been possible, as it was in locked condition and there is nothing on record to show that the door of the latrine was in damage condition to enable a person to open the same.

Now, let me find out the corroborative evidence of P.Ws. 2, 3, 4, 9 and 11, as adduced in the case. P.W.4 is the father of the victim and P.W.9 is the mother of the victim. The occurrence happened at about 4.00 A.M. in the early morning. When P.W.9 did not find the victim (her daughter) returning home from outside where she had gone to ease, she (P.W.9), her husband (P.W.4), youngest son and youngest daughter (both not examined) started searching for the victim. They searched her for about 10 minutes and at about 4.10 A.M. P.W.4 conveyed the matter to P.W.2 (his son-in-law) over telephone. P.Ws.2 and 3 reached immediately within ten minutes and thereafter all of them continued the search. According to P.W.2, in paragraph-2 of his evidence, he saw the accused coming out of the latrine with intent to flee, and thereafter the victim came out of that latrine. In paragraph-3, he has testified that the victim narrated before her mother (P.W.9) that the appellant ravished her (victim) from front side as well as from backside. P.W.3, who was along with P.Ws.2, 4 and 9, in paragraph-2 of her evidence has testified that, *"after covering a distance of about 20 meters we found that the appellant was running away from a narrow lane and we found the victim coming out of the same lane."* P.W.4, in paragraph-7 of his evidence, has testified

that, he saw the appellant from a distance of 200 meters when there was still darkness at that time and it was drizzling. He has not stated anything as to whether the accused was running away or he walk passed them. He has however stated nothing about the spot latrine. P.W.9, in paragraph-1 of her evidence has stated that, on their way they found the appellant coming away from a narrow lane. In paragraph-2, she has testified that the accused-appellant then passed by their side and after 1-2 minutes the victim passed through that lane. All the witnesses have state different things as to how they spotted the accused-appellant. According to P.Ws.3 and 4, it was still darkness at that time, as the weather was cloudy and it was drizzling. P.W.2 saw the appellant coming out of the latrine to flee, followed by the victim. P.W.3 saw the appellant running away from a narrow lane. P.W.4, though he was with P.Ws.2, 3 and 9, has testified to have seen the appellant from a distance of 200 meters. He has however not stated that the accused-appellant was running away or walking away. P.W.9 has testified that she saw the appellant coming away from a narrow lane and he walk passed by their side. There is no cohesion in the evidence of these four witnesses regarding the demeanour of the appellant to draw any adverse inference. One witness is improving the story on another. The discrepancies strike at the very root of the prosecution case that, all the four witnesses saw the appellant running away from a lane and thereafter they saw the victim coming out of the same lane. It becomes doubtful as to whether P.Ws.2, 3, 4 and 9 were searching together for the victim and as to whether they at all saw the appellant.

So far as the occurrence is concerned, the victim herself is stated to have raised cry while the appellant dragged her by holding her hand. Nobody has heard any such cry, though P.W.9 was already awaken by that time and the lanes and by-lanes passes through different house as per the description of the witnesses regarding the area. So far as the act and time is concerned, the victim has alleged that the appellant forced her to remove her panty; when she refused, he himself forcibly removed her panty. He squeezed her breasts and thereafter inserted his penis into her anus. According to the victim, the floor of the latrine was wet and all these sexual acts happened in standing position. The witnesses namely P.Ws.2, 3 and 9 have tried to improve the story by saying that the victim told before them that the appellant ravished her from the front side as well as from the backside. According to the victim, they remained inside the latrine for about 5 to 10 minutes. The I.O. (P.W.17) has testified that the victim has not stated before her regarding the pain she experienced after the appellant inserted his penis into her anus. Though delay in lodging of the F.I.R. is not detrimental in such a case, but in the case at hand the incident was made known the public in the area within minutes after the occurrence, but the F.I.R. was lodged after six

days of the occurrence, awaiting compromise. There is improvement by P.Ws.2, 3 and 9 so far as allegation of rape on the victim from the front side is concerned. So far as the allegation of sodomy is concerned, P.W.1 is corroborated by P.W.11, who is a tenant in the house of P.W.4. The victim, who is having a subnormal mental condition, was there in the hands of her family members for quite a sometime before the matter was disclosed to P.W.11 at about 7.30 P.M. In the meantime many things had already happened, a meeting had already held and the matter was made known to public, i.e. the neighbours and the gentries of the locality. A girl of such a mental state like P.W.1 is prone to be tutored and I am convinced to return such a finding in view of improvements made by P.Ws.2, 3 and 9 so far as allegation of vaginal rape is concerned, though the victim is silent about that. Sodomy is also not possible in a standing position, as the anus is neither capacious nor lubricated like vagina to allow entry of the penis easily. But the victim being a lady of subnormal mental condition, must be telling some truth like a child, and the allegation of sodomy in the context of the case appears to be a tutored come out. The appellant must have dealt with the victim indecently, which she has narrated before P.Ws.2, 3, 4 and 9 and they have tried to improve upon the things for the reasons best known to them.

Taking into consideration all the aforesaid aspects in close circumspection, I am of the considered view that, neither vaginal nor anal sexual act has been committed by the appellant on the victim. But, so far as the allegation of the victim regarding squeezing of her breasts, etc. by the appellant are concerned, a clear case under Section 354, I.P.C. is made out against the appellant. Accordingly, the conviction of the appellant is modified to one under Section 354, I.P.C. The appellant was arrested on 26.04.2013 and by now he has suffered imprisonment for about three years and eight months. Accordingly, the appellant is sentenced to suffer the period of imprisonment he has already undergone, towards punishment for offence under Section 354, I.P.C. Taking into consideration the age of the appellant and the circumstances under which the alleged act came to be committed and especially the financial state of the appellant, I do not thing it proper to levy any amount of fine as punishment. In the result, the Criminal Appeal is allowed in part. The appellant be set at liberty forthwith, if his detention is not required in connection with any other case.

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6. Section 498 A /302 of IPC &
Section 4 of Dowry Prohibition Act, 1961
Niranjan Rout versus State of Orissa
I. MAHANTY & BISWAJIT MOHANTY , JJ.
In the High Court of Orissa , Cuttack.
Date of Judgment: 19.12.2016
Issue
Appeal against order of conviction and sentence.

Relevant Extract

Prosecution story in brief is that the appellant was married to the deceased-daughter of P.W.7 in or around in 1998 in the month of July in Mahabinayak temple of Chandikhol. At the time of marriage, the parents of deceased which includes P.W.7 had given cash of Rs.5,400/- to the appellant and his father and had promised to pay another Rs.1,000/-. On account of inability to pay the balance amount, the appellant and his parents used to abuse and assault the deceased. On 13.5.1999, the deceased-wife died in her matrimonial house. The Gramarakhi of the locality (P.W.6) lodged a written report on the next morning about the death of the deceased at Jenapur Police Out Post, basing upon which, an unnatural death case was registered and the matter was enquired into. In course of investigation, inquest report was prepared, post-mortem examination was held and some witnesses were examined. Subsequently, after receipt of the post-mortem report disclosing the death as homicidal, a coginzable case was registered under Section 302 IPC and on completion of investigation, charge sheet was filed against the appellant and his father. It is important to note here that during pendency of the Sessions Trial, the father of the appellant died in the month of December, 2001. Accordingly vide order dated 7.2.2002, the learned trial court noted that the case against the father of the appellant stood abated.

The present Criminal Appeal is directed against the judgement dated 27.6.2003 pronounced by the learned Addl. Sessions Judge, Jajpur in Sessions Trial No.592/54 of 2000 arising out of G.R. Case No.936 of 1999 from the file of learned S.D.J.M., Jajpur convicting the appellant under Sections 498 A/302 of I.P.C. and under Section 4 of the D.P. Act, 1961. Vide impugned judgment, for the offence under Section 498 A IPC, the appellant has been sentenced to underego R.I. for 2 years and to pay a fine of Rs.2,000/- and in default of payment of fine to undergo further R.I. for 2 months and for the offence under Section 302 IPC, the appellant has been sentenced to undergo life imprisonment and to pay a fine of Rs.5,000/-, in default of payment whereof to further undergo R.I. for 5 months. No separate sentence has been awarded for the offence under Section 4 of the

D.P. Act, 1961. However, the learned trial court has directed that both the above noted substantive sentences are to run concurrently.

In order to appreciate the contention of both the parties, we have to scan the evidence. P.W.1 and P.W.5 are the doctors, who have conducted the autopsy over the dead body of Jhumani Dei, the wife of the appellant. Both have opined that death was caused mainly by strangulation or throttling leading to asphyxia and was homicidal in nature. Despite cross-examination, the evidence of P.W.1 and P.W.5 remain un-demolished. Thus, there is no doubt that the deceased died a homicidal death.

The three I.Os have mainly stated about the course of investigation and they proved F.I.R. under Ext.2, the dead body challan under Ext.4, spot map under Ext.8 and inquest report under Ext.3. P.W.10 stated about examining P.W.4. P.W.10 in his cross-examination denied the suggestion that the investigation was perfunctory. Scanning of evidence shows that P.W.7 remains the material witness on behalf of the prosecution and as indicated earlier the entire case is based on circumstanicial evidence. There exists no evidence from the prosecution side to show that the appellant and deceased were last seen together inside the matrimonial house some time prior to the alleged occurrence and admittedly the informant- P.W.6 found the dead body lying on the outer verendah of the house of the appellant. So, provision of Section 106 of the Evidence Act, 1972 has no application to this case. No doubt, P.W.7 has spoken of cruelty in the form of abuse and assault on the deceased on account of non-payment of balance amount, however, it would be too much to infer that the same can be treated as a motive to murder the deceased in absence of anything more. In such background, merely because of false statement made by the appellant in his statement under Section 313 Cr.P.C. it may not be proper to convict the appellant under Section 302 IPC as many links in the circumstances are missing. In *Sharad Birdhichand Sarda v. State of Maharashtra* (supra), it has been made clear by the Hon'ble Supreme Court that following conditions must be fulfilled before a case against an accused can be said to be fully established on circumstancial evidence:

"(1) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established,

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

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

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

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

From a scanning of evidence, it is clear that most of the links are missing here to complete the chain of evidence. With regard to Section 498 A read with Section 4 of the D.P. Act, a scanning of evidence of P.W.7, however, show that there exists enough material to convict the appellant under Section 498 A IPC and Section 4 of the D.P. Act.

In such background, let us now examine the contention of Mr. Pradhan, learned counsel for the appellant. In the light of scanning of evidence made above, it is clear that so far as conviction under Section 302 IPC is concerned, most of the link in the chain of evidence remains unproved.

For all these aforesaid reasons, we set aside the conviction of the appellant under Section 302 IPC. Since there exists evidence with regard to cruelty by the appellant and with regard to un-lawful demand of property as would appear from evidence of P.W.7, we leave the conviction of the appellant under Section 498 A IPC read with Section 4 of D.P. Act untouched. However, with regard to the sentence for committing the offence under Section 498 A IPC, in the facts and circumstances of the case, we modify the sentence with regard to payment of fine by directing the appellant instead to pay a fine of Rs.200/- and in default to undergo further R.I. for 5 days. With regard to the offence under Section 4 D.P. Act, 1961, since no separate sentence has been awarded by the learned trial court, we also do not propose to award a separate sentence as the appellant has suffered long incarceration. Accordingly, the appeal is partly allowed and disposed of.

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7. Sections 465,468,471 & 420 of IPC

Pratap Keshari Patnaik Versus State of Orissa

S.K. SAHOO , J.

In the High Court of Orissa, Cuttack

Date of Hearing and Judgment: 15.12.2016

Issue

Judgment and order of conviction under sections 468 and 420 of IPC – Challenged.

Relevant Extract

The prosecution case as per the First Information Report submitted by Govinda Chandra Patra, Branch Manager, State Bank of India, Vani Vihar Branch, Bhubaneswar before the Inspector in charge, Saheednagar Police Station, Bhubaneswar on 08.04.1985 is that the cheque bearing no.0118887 dated 23.11.1994 of Rs.50,000/- (rupees fifty thousand) drawn on Indian Overseas Bank, Saheednagar Branch in favour of the Registrar, Utkal University, Bhubaneswar was deposited by the University at the Branch for credit into the Account No.II of the University. The cheque was presented to Indian Overseas Bank, Saheednagar for clearing through the Bhubaneswar Main Branch. It is the further prosecution case as per the First Information Report that on receipt of the credit advice on 15.01.1985, the petitioner who was working as Clerk -cum-Typist of Vani Vihar Branch and was handling the transactions credited Rs.50,000/- (rupees fifty thousand) i.e., proceeds of the cheque in question in the four accounts instead of the Utkal University account and thereby misappropriated the amount fraudulently by preparing fake vouchers. As per the First Information Report, the concerned four accounts are:

(i) Saving Bank Account No. C-864 in the name of Sri P.K. Patnaik and Smt. Pranati Patnaik of Rs.19,600/- (rupees nineteen thousand six hundred);

(ii) Demand Loan Account No.21/85 of Smt. Ramsundari Puhan of Rs.19,000/- (rupees nineteen thousand);

(iii) Current Account No.3/136 of Sri Saroj Kumar Mohany for an amount of Rs.6400/- (rupees six thousand four hundred);

(iv) Current Account No.3/191 of Sri Susanta Kumar Paikray of Rs.5000/- (rupees five thousand).

On the basis of such First Information Report, the Inspector in charge, Saheednagar Police Station registered Saheednagar P.S. Case No.140 of 1985 under sections 420, 409 and 468 of the Indian Penal Code and directed P.W.8 Narayan Bisi, Sub-Inspector of Police, Saheednagar Police Station to take up investigation of the case. During course of investigation, the investigating officer examined the witnesses, visited the spot, seized the relevant documents in

presence of the witnesses. He arrested the petitioner and forwarded him to Court on 11.04.1985. Subsequently P.W.6 K.S. Kawar, Sub-Inspector of Police, Saheednagar Police Station took up charge of investigation of the case. The specimen signatures and handwritings of the petitioner were taken and sent to S.F.S.L., Rasulgarh and on completion of investigation, charge sheet was submitted on 24.11.1987 against the petitioner under sections 468, 471 and 420 of the Indian Penal Code.

The petitioner preferred an appeal in the Court of Session which was heard by the learned 2nd Additional Sessions Judge, Bhubaneswar in Criminal Appeal No.25/3 of 1997/93 and the learned Appellate Court vide impugned judgment and order dated 06.04.1998 acquitted the petitioner of charges under sections 465 and 471 of the Indian Penal Code, however upheld the conviction and sentence awarded by the learned Trial Court under sections 468 and 420 of the Indian Penal Code.

The learned Trial Court in the impugned judgment has been pleased to hold that the witnesses P.Ws. 1, 3 and 6 are consistent in their evidence that an amount of Rs.50,000/- (rupees fifty thousand) was deposited in four different accounts by four vouchers marked as Exts.4 to 4/3 on 15.01.1985. It is further held that on verification of the documents and the evidence of P.Ws. 1, 2, 3 and 4 shows that the petitioner credited the amount dishonestly and swindled the money instead of crediting the same to the account of the Registrar, Utkal University to whom the cheque was concerned. It was further held by the learned Trial Court that the proper verification of the exhibited documents along with the opinion of the expert Ext.14 and the consistent nature of evidence go to show that the petitioner prepared forged documents, those are vouchers and transfer scroll and other documents for the purpose of a cheating the Bank and used the vouchers as genuine which he had reason to believe that those are forged and thereby dishonestly induced the Bank to deliver the amount of Rs.50,000/- (rupees fifty thousand) to him.

The learned Appellate Court has committed error of record in holding that no charge under section 471 of the Indian Penal Code has been framed and

therefore set aside the order of conviction under Section 471 of the Indian Penal Code. Such charge has been framed by the Trial Court. Be that as it may, since there is no challenge to such acquittal, on assessment of the evidence on record and on perusal of the impugned judgment, I find no infirmity and illegality in the order of conviction of the petitioner under sections 468 and 420 of the Indian Penal Code.

It appears that after arrest, the petitioner was produced in Court on 11.04.1985 and he was remanded to jail custody and thereafter he was released on bail by the virtue of the order passed by the learned Sessions Judge. There is no dispute that in the meantime more than thirty one years have already passed since the date of lodging of the F.I.R. and in view of the passage of time and the mental agony suffered by the petitioner due to protracted trial and the settled position of law that Article 21 of the Constitution of India would bring within its sweep, not only expeditious trial but disposal of appeals and revisions, at this juncture, in the ends of justice it would not be proper to send the petitioner to custody again to serve the remaining sentence and therefore, while affirming the impugned judgment and order of conviction under sections 468 and 420 of the Indian Penal Code, the substantive sentence of imprisonment is reduced to the period already undergone by the petitioner and the fine amount is enhanced to Rs.20,000/- (rupees twenty thousand) in total, which shall be deposited by the petitioner before the learned Trial Court within a period of thirty days from today failing which the petitioner shall undergo simple imprisonment for one month.

With the aforesaid modification in the sentence, the criminal revision petition stands dismissed.

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8. Article 226 of the Constitution of India

State of Orissa and Others. Versus Ambica Prasad Ratha.

SANJU PANDA & SUJIT NARAYAN PRASAD ,JJ.

In the High Court of Orissa, Cuttack.

Date of hearing & Judgment : 09.12.2016

Issue

Appeal against the rejection of order issued by the O.A.T.

Relevant Extract

The brief facts of the case is that a Departmental Proceeding was initiated against the private opposite party, namely, Ambika Prasad Ratna vide order dtd.24.1.2005 and when proceeding was not completed by 6.12.2005, he has filed an original application being O.A. No.544 of 2006 praying therein to quash the Departmental Proceeding The O.A.T. has passed an order on 12.5.2006 directing the State to conclude the Departmental Proceeding within a period of three months from the date of communication of the order, failing which the proceeding shall stand dropped. The State has taken all sincere efforts to conclude the Departmental Proceeding but for one reason or other, the proceeding could not be concluded, however, the enquiry report was submitted on 29.8.2006, in place of 23.8.2006, the time limit granted by the Tribunal, as such the petitioner – State has made an application for extension of time vide M.P.425 of 2006, arising out of O.A. No. 544 of 2006 but the same was rejected vide order dtd.27.4.2007 against which this writ petition has been filed. The private opposite party has also filed another original application being O.A. No.1126 of 2006 praying therein to direct the opposite parties to reinstate him in service in consequence of the nonest Departmental Proceeding after the time frame of three months as has been directed by the Tribunal vide order dtd.12.5.2006 passed in O.A. No.544 of 2006.

The State of Odisha being aggrieved with the order passed in a miscellaneous petition being M.P. No.5125 of 2006 (O.A. No.544 of 2006) is before this court whereby and where under the extension of time sought for by the petitioner for concluding the Departmental Proceeding has been rejected.

We have heard learned counsels for the parties and perused the documents available on record. The State has challenged the order passed by the Tribunal whereby and where under the extension of time sought for by way of filing M.P. No.425 of 2006 arising out of O.A. No.544 of 2006 has been rejected on the

ground that the Tribunal has got no power to extend the time the reason being that the Tribunal after passing the order will become functus officio, but we are not in agreement with the reason given by the Tribunal in this regard since the law is well settled after the pronouncement of Judgment by the Hon'ble Apex court in the case of L. Chandra Kumar (supra) wherein it has been held that the Tribunal has got same power as has been conferred to the High Courts under Article 226 of the Constitution of India and even the Tribunal can look into the virus of the provision, when issue has already been decided, as such it is not right in saying that the Tribunal after passing an order has become functus officio, rather in exercise of power under Article 226 of the Constitution of India, the Tribunal has got power to entertain the applications in the ends of justice as per the ratio decided by the Hon'ble Apex Court in the case of L. Chandra Kumar (supra). The fact which is not in dispute in this case is that a Departmental Proceeding was initiated against the private opposite party for the charge of misappropriation of huge Government money to the tune of Rs.28 lakhs and for that a Departmental Proceeding was initiated on 24.01.2005, when the Departmental Proceeding was not concluded for a period of one year, the private opposite party filed an original application being O.A. No.544 of 2006 which was disposed of vide order dtd.12.05.2006 directing the State to conclude the Departmental Proceeding within period of three months from the date of receipt of copy of the order, failing which the proceeding shall stand dropped. The opposite party - State has proceeded with the Departmental Proceeding but could not be able to conclude the Departmental
Proceeding within the period of three moths as directed by the Tribunal, i.e. by 23rd August 2006, rather the enquiry of report of the proceeding was submitted on 29th August 2006, i.e. after delay of six days from 23rd August, 2006.

We have already stated at the outset that the Departmental Proceeding should not be quashed on the ground of delay, subject to certain condition, i.e. if there is inordinate delay a proceeding can be quashed if the delay is not attributable to the employee, but if the delay is not inordinate, the proceeding should not be quashed on the technicality, this is on the principle that if any charge has been leveled against the delinquent employee, then it has to be enquired into to come to the truth. In this regard reference may be made to the judgment of Hon'ble Apex Court in the case of B. C. Chaturvedi Vrs. Union of India and Others, reported in (1995) 6 SCC 749 wherein at paragraph 11 their Lordships have been pleased to hold as follows:-

"11. The next question is whether the delay in initiating disciplinary proceeding is an unfair procedure depriving the livelihood of a public servant

offending Article 14 or 21 of the Constitution. Each case depends upon its own facts. In a case of the type on hand, it is difficult to have evidence of disproportionate pecuniary resources or assets or property. The public servant, during his tenure, may not be known to be in possession of disproportionate assets or pecuniary resources. He may hold either himself or through somebody on his behalf, property or pecuniary resources. To connect the officer with the resources or assets is a tardy journey, as the Government has to do a lot to collect necessary material in this regard. In normal circumstances, an investigation would be undertaken by the police under the Code of Criminal Procedure, 1973 to collect and collate the entire evidence establishing the essential links between the public servant and the property or pecuniary resources. Snap of any link may prove fatal to the whole exercise. Care and dexterity are necessary. Delay thereby necessarily entails. Therefore, delay by itself is not fatal in these type of cases. It is seen that the CBI had investigated and recommended that the evidence was not strong enough for successful prosecution of the appellant under Section 5(1)(e) of the Act. It had, however, recommended to take disciplinary action. No doubt, much time elapsed in taking necessary decisions at different levels. So, the delay by itself cannot be regarded to have violated Article 14 or 21 of the Constitution."

We have considered the fact of this case and found that a Departmental Proceeding was initiated against the private opposite party for misappropriation of Government money to the tune of Rs.28 lakhs, initiated on 21.4.2005, although the same was not concluded by the month of December, 2005 which led the private opposite party to prefer an original application before the Tribunal being O.A. No.544 of 2006 and the Tribunal fixed the time limit for three months for conclusion of the Departmental Proceeding, failing which the proceeding shall stand dropped. The State although has not challenged that order, but tried to conclude the Departmental Proceeding as per the direction passed by the Tribunal, but it could not have been concluded within the period stipulated, although the enquiry was concluded by 29th August, 2006 which was to be concluded by 23rd August 2006, the enquiry report was submitted on 29.8.2006 and as such there was delay of only six days. The State filed miscellaneous petition of extension of time, after lapse of about three months, but the same was rejected on two grounds, one that the application has been filed after completion

of period of three months and second that the Tribunal has got no power to extend the time since the moment the order has been signed, the Tribunal has become functous officio. We have appreciated the arguments advanced on behalf of the parties and are of the considered view that the Tribunal ought to have extended the time taking into consideration the reason mentioned in the application, but the Tribunal has not bothered to go with the reasons mentioned in the miscellaneous petition and rejected the same on the pretext that it has got no jurisdiction to extend the time, but as per the law laid down in the case of L. Chandra Kumar (supra) the reasons mentioned by the Tribunal in this regard is not sustainable in the eye of law and accordingly we quashed the order dtd.24.07.2007 by which the extension application has been rejected by the Tribunal.

We have passed this order taking into consideration the nature of allegation leveled against the private opposite party which is misappropriation of public money and as such the Departmental Proceeding should not be quashed merely on the ground of technicality, that too in absence of any inordinate delay in this regard. In view thereof the writ petition stand allowed. We have been told that the State has already served a second show cause notice which the private opposite party has accepted and submitted its reply before the authorities but no final decision has been taken and as such we hereby direct the authorities to take final decision in accordance with law within reasonable period, preferably within six weeks from the date of receipt of copy of this order. Accordingly the writ petition stands allowed in terms of the observations and directions made herein above.

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Orissa Forest Development Corporation Services Rules ,1986

9. Clauses (i) &(vi) of 121 & Rule 125 of the Rules, 1986

Articles 226 &227 of the Constitution of India

Patitapaban Pala versus Orissa Forest Development Corporation Ltd & another

DR. B. R. SARANGI , J.

In the High Court of Orissa , Cuttack.

Date of Judgment -03.12.2016

Issue

Calling upon to issue a rule nisi –against the rejection order of the Appellate authority without any reason.

Relevant Extract

The factual matrix of the case is that after retirement on VRS the petitioner received a letter/notice dated 20.07.2007 (Annexure-1) issued by opposite party no.2 calling upon him to show cause as to why the amount found to be recoverable on review of the internal audit paras shall not be recovered from his VRS dues. The deduction sought to be made, as shown in Annexure-1, relates to shortages in sawn firewood out turn after sawing of timbers in Cuttack Saw Mill of the opposite party corporation during the year 1991-92, 1996-97, 1997-98 and 1998-99 to the tune of Rs.2,62,703.61. On receipt of such notice dated 20.07.2007, the petitioner submitted his reply on 28.07.2007 (Annexure-2) pointing out that as a matter of fact monthly basis reports were used to be submitted on the actual production of sawn sizes, sawn firewood, etc., but never any shrinkage or shortage was pointed out by any higher authority. The petitioner explained each of the internal audit report paras to show that the proposed recovery after so many years was unjustified and without any substance and claimed that he may be exonerated from deduction of any amount from his VRS dues.

On submission of reply by the petitioner, opposite party no.1 called for further clarification on the audit objections from opposite party no.2. On 17.12.2007, opposite party no.2, on verification of materials pertaining to the shortages, vide Annexure-3 suggested to drop the main allegations of shortages relating to item nos.4, 5 and 6 contained in Annexure-1. After submission clarifications and suggestions of opposite party no.2 in Annexure-3, a triangular committee deliberated over the matter in its meeting dated 31.01.2008 and vide its minutes (Annexure-4) recommended for recovery/deduction of total amount of Rs.1,41,557.00 from the petitioner on the basis of the letter/notice under Annexure-1. As per the recommendation of the triangular committee, an amount of Rs.1,41,557.00 was deducted from VRS dues of the petitioner. Thereby, from VRS dues of Rs.2,69,900.00 after deducting the aforesaid amount of Rs.1,41,557.00, the balance amount of Rs.1,28,343.00 has been paid. On receipt of

the said amount, the petitioner preferred appeal on 19.05.2008 before opposite party no.1 for re-consideration of the matter. But, the same was rejected by opposite party no.1 vide his letter dated 19.07.2008 (Annexure-7). Hence, this writ application.

The petitioner, who was working as sectional supervisor under the Orissa Forest Development Corporation Limited and after rendering 35 years of service took retirement on exercising option under the VRS Scheme on 28.02.2007, has filed this writ application seeking for following reliefs:

"*In the facts and circumstances of the case it is prayed that this Hon'ble Court be kind enough to issue a rule nisi calling upon the O.Ps. to show cause as to why the deduction of Rs.1,41,557/- from the V.R.S. dues of the petitioner as per Annexure-5, and the recommendations of the triangular committee for such deduction as per Annexure-4 shall not be quashed and why the O.Ps. shall not be directed to release the said deducted amount to the petitioner forthwith. And if the O.Ps. show no cause or show insufficient cause this Hon'ble Court be kind enough to make the rule absolute and pass such other order/orders as may be deemed fit and proper.*"

Having heard learned counsel for the parties and after going through the records, the matter is being disposed of finally at the stage of admission with their consent.

On perusal of the provisions contained in Orissa Forest Development Corporation Service Rules, 1986, it is seen that Rule 121 deals with "penalty" and clause (iv) of Rule 121 deals with recovery from pay, which has been categorized as "minor penalty". For imposition of "minor penalty", procedure has been envisaged under Rule-125 of Rules, 1986. For better appreciation Rule 125 is quoted below:

"Rule 125 – Procedure for imposing minor penalty.

1. No order imposing any of the minor penalties specified in Clauses (i) to (vi) of Rule-121 shall be imposed except after

(a) The employee/workman is informed in writing of the proposal to take action against him and of the allegation on which it is proposed to be taken and given an opportunity to make any representation he may wish to make within a time limit as may be specified:

b) Such representation, if any, is taken into consideration by the disciplinary authority.

2. The record of proceedings in such cases shall include:-

i) a copy of the intimation to the employee/workman of the proposal to take action against him;

ii) a copy of the statement of allegation communicated to him;

iii) his representation, if any, and
iv) the orders on the case together with the reasons thereof.
NOTE: 1. No oral enquiry is necessary where the punishment proposed is a minor one.

Where two or more employees/workman are concerned in any case, the authority empowered to impose the penalty on all such employees/workmen may make an order directing that the disciplinary action against all of them may be taken in any common proceeding."

Keeping in view the above mentioned provisions contained in Rules, 1986 the case has been dealt with on the basis of the facts available on record. It is the admitted fact that the petitioner was working under the opposite party-Orissa Forest Development Corporation Limited as sectional supervisor and he availed V.R.S. by exercising his option on 28.02.2007. Opposite party-authority considered his application and before V.R.S. was granted show-cause notice under Annexure-1 was issued, to which the petitioner gave his reply vide Annexure-2. After consideration of the same, the order impugned has been passed by the triangular committee showing that a sum of Rs.1,41,557/- is due to recover from the V.R.S. amount. In view of the undertaking given by the petitioner in Annexure-E, the amount in question has been deducted from his V.R.S. dues and the balance dues have been paid, which has been accepted by the petitioner without any protest. The petitioner, thereafter, filed appeal and the appellate authority under Annexure-7 dated 19.07.2008 by a cryptic order rejected the claim of the petitioner without assigning any reason.

Franz Schubert said- "*Reason is nothing but analysis of belief*."

In *Black's Law Dictionary*, reason has been defined as a- *"faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from propositions."*

It means the faculty of rational thought rather than some abstract relationship between propositions and by this faculty, it is meant the capacity to make correct inferences from propositions, to size up facts for what they are and what they imply, and to identify the best means to some end, and, in general, to distinguish what we should believe from what we merely do believe. In *Union of India v. Mohan Lal Capoor*, AIR 1974 SC 87 it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a

rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice. Similar view has also been taken in *Uma Charan v. State of Madhya Pradesh*, AIR 1981 SC 1915. Reasons being a necessary concomitant to passing an order, the appellate authority can thus discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference to those given by the original authority.

On perusal of the impugned order in Annexure-7, the appellate authority appears to have passed a cryptic order simply stating appeal is rejected, without assigning any reason. Consequentially, the order dated 19.07.2008 in Annexure-7 passed by the appellate authority is hereby quashed and the matter is remitted back to the said authority to consider the appeal of the petitioner afresh and dispose of the same in accordance with law by passing a reasoned and speaking order after affording opportunity of hearing to the parties concerned as expeditiously as possible. The writ petition is allowed to the extent indicated above.

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10. Rule 15 of Orissa Civil service (CCA) Rules 1962
Rule 72(2)of Orissa Service Code & Rule 4 of the Government Rules 1959
State of Odisha Versus Smt. Indurekha Dash and Others.
SANJU PANDA & SUJIT NARAYAN PRASAD ,JJ.
In the High Court of Orissa ,Cuttack.
Date of hearing and Judgment : 20.12.2016
Issue
Maintainability of punishment quashed –challenged.
Relevant Extract

The brief fact of the case is that the applicant before the Tribunal, the opposite party herein, while working as Lecturer in Economics in Rajendra (Auto) College, Bolangir fell ill for which she remained on leave from 11.09.2000, as she did not recover from illness, she extended her leave from 21.9.2000 to 22.1.2001 and submitted her application to the Principal of the College, the leave was refused, she again applied for extension from 22.11.2000 and thereafter from time to time till 30.10.2006. The Principal, Rajendra (Auto) College, Bolangir vide his letters dtd.26.9.2005 and15.9.2006 recalled the applicant to resume duty. While on leave the applicant was transferred from Rajendra (Auto) College, Bolangir to Rourkela College vide office order No.33422, dtd.21.8.2004 by the respondent no.1 and in pursuance to the said order of transfer, the applicant joined in Rajendra (Auto) College, Bolangir on 31.10.2006 and was relieved on the same day to join in her new place of posting at Rourkela Government College and accordingly joined on 14.11.2006. The Principal informed the Government and the Director, Higher Education vide his letter No.1537 dtd.14.11.2006 and the applicant continued to discharge her duties, a departmental proceeding under Rule 15 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 (herein after referred to as 'the Rules, 1962') was initiated against her, she was asked to give reply in pursuance to the memorandum of charge which pertains to unauthorized absence, i.e. violation of Rules 72(2) of the Orissa Service Code and disobedience of orders, i.e. Rule 4 of Orissa Government Servant's Conduct Rules, 1959.

The applicant submitted her written statement of defence denying the charges, but the Director, Higher Education, who had been appointed as the Inquiring Officer to enquire into the charges had submitted enquiry report after hearing the applicant who had participated in the enquiry, but according to the applicant she had not been provided with reasonable opportunity to defend herself, but however, the enquiry was concluded and communicated to the applicant with a direction to make representation, if any, on the finding of the

inquiring officer, the applicant submitted her representation on 24.9.2011 stating that the proceeding is not maintainable under the provision of the Rules 1962 since she has retired from Government service w.e.f. 31.08.2011, but without considering this aspect of the matter second show cause notice was issued to her treating 11.9.2000 as the deemed date of resignation and proposed for removal from service w.e.f. 11.9.2000, i.e. the date from which the applicant has remained unauthorized absent and accordingly passed the order of removal with retrospective effect from 11.9.2000. According to the applicant the order of removal is absolutely illegal and without any basis on the ground that the date when the order has been passed, i.e. on 25.2.2013 passing the order of removal from service with retrospective effect from 11.09.2000 is not permissible since there is no provision in the Service Code or Service Jurisprudence to put an employee under dismissal or removal with retrospective effect and further on the ground that the applicant has already been superannuated from service, w.e.f. 31.08.2011 and as such the date when she has retired from service the relationship of master and servant ends hence the proceeding initiated under the provision of Rules 1962 will not be maintainable, but without appreciating this aspect of the matter the proceeding continued under the provision of Rules, 1962 and the order of removal has been passed, that too with retrospective effect which is without any jurisdiction and without any authority of law.

The case of petitioner – State is that the departmental proceeding was initiated against the applicant – opposite party herein while she was in service and as such there is no bar to continue with the proceeding, which will be treated as proceeding under Rule 7 of the Orissa Civil Service Pension Rules, 1992 (hereinafter referred to as 'the Rules, 1992), since the applicant remained absent for a period of more than 5 years, the proviso under Rule 72 of Orissa Service Code has been rightly invoked and the order of removal is in accordance with the statutory rules, thus there is no scope to interfere with the order of removal passed by the authority.

This application has been filed by the State of Odisha assailing the order dtd.15.11.2014 passed in Original Application No.1502 of 2013 whereby and where under the order of punishment has been held to be not maintainable and accordingly quashed with a direction to the respondent authorities to settle the claim of the applicant as due and admissible to her within a stipulated period reserving liberty to the State – respondent to take appropriate action against the applicant in accordance with Rule / Law, if so advised.

There is no dispute with respect to the settled proposition that a departmental proceeding if initiated in course of the service of a delinquent employee will be deemed to have been continued under the provision of Pension Rules and in the State, pension rule is applicable, known as Orissa Civil Services (Pension) Rule, 1992.

In the light of these statutory provisions we have appreciated the facts of this case and the undisputed fact as we have narrated hereinabove, and for the risk of repetition it is once again been stated that a departmental proceeding was initiated against the applicant for imposing punishment under the provision of Rule 15 of the Rules, 1962 while the applicant was in service and during its pendency she had retired from service w.e.f. 31.8.2011. The disciplinary authority had imposed punishment of removal from service with retrospective effect, i.e. from 11.9.2000 treating the applicant removed from service in view of the provision of Rule 72 of the Orissa Service Code, the same was challenged before the learned Tribunal.

According to us the learned Tribunal after taking into consideration the factual aspects and the legal proposition, has passed the order quashing the order of punishment being not maintainable with a direction to the authorities to settle the claim of the applicant as due and admissible to her within a stipulated period, however, with a liberty to the State-respondent to take appropriate action against the applicant in accordance with Rule / Law. According to our considered view, since the learned Tribunal has granted liberty to the State – respondent to take action against the applicant in accordance with law, as such the disciplinary authority is in no way being prejudiced after liberty having been granted by the Tribunal. Taking into consideration this aspect of the matter, according to our considered view there is no error in the order passed by the Tribunal. Accordingly we declined to interfere with the same. Hence the writ petition is dismissed.

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11. Rule 31(1)& 25A &55 of the Mineral concession Rules 1960
Section 30 of the Mines and Minerals (Development &Regulation) Act 1957
State of Odisha Versus Government of India & another
VINEET SARAN, C.J. & DR. B.R. SARANGI ,J.
In the High Court of Orissa ,Cuttack.
Date of Judgment -19.12.2016.

Issue

Order of the Revisional authority under Mines and Minerals (Development &Regulation) Act 1957 –Challenged.

Relevant Extract

Dharam Chand Jain, husband of opp. party no.2- Smt. Sobha Jain, had on 15.06.1970 applied for grant of mining lease for iron and manganese ores over an area of 1277.50 acres in Sidhamath Reserve Forest of Keonjhar district. On 05.06.1984, an order for granting mining lease over an area of 637 acres was issued in favour of the applicant- Dharam Chand Jain for a period of twenty years subject to the mining lease deed being executed within a period of six months of the order or within such further period as the State Government may allow, as provided under Rule 31(1) of the Mineral Concession Rules, 1960. Without going into further details, we may mention on 12.05.1989, the applicant himself gave a proposal to reduce the grant area to 70.39 acres. While the matter remained pending, on 25.03.1995, the Collector, Keonjhar demarcated an area of 72.70 acres to be granted for lease in favour of the applicant, instead of 70.30 acres, and recommended to allow execution of the mining lease deed, subject to approval under the Forest (Conservation) Act, 1980 and the Mineral Rules, 1960. Then on 30.05.1995, the power of attorney of the applicant submitted a draft mining plan. In response thereto, on 20.06.1995, notice under Rule 26(3) of the M.C. Rules, 1960 was issued to the applicant to comply with the deficiency latest by 30.07.1995. Then on 06.05.1997, Avin Jain, the power of attorney holder of the allottee-Dharam Chand Jain was requested to take all possible steps to obtain the approval of the Government of India within three months. On 26.09.1997, the allottee-Dharam Chand Jain was given reminder, as a last chance, to obtain prior approval of the Central Government under Section 2 of the Forest (Conservation) Act, 1980, failing which action to revoke the grant order dated 05.06.1984 would be initiated.

In the meanwhile, on 09.12.1995, the applicant- Dharam Chand Jain had expired, but the power of attorney continued to negotiate and correspond with the authority even after the death of the applicant. It was only on 25.06.2009, which was after 14 years of the death of Dharam Chand Jain and 12 years after the communication dated 26.09.1997, that the power of attorney of the applicant

intimated the State Government about processing of the application for prior approval of the Central Government and also about the death of the allottee Dharam Chand Jain on 09.12.1995. In the meantime, it was on 12.09.2006 that a probate was granted in favour of opp. party no.2-Smt. Sobha Jain-widow of late Dharam Chand Jain. Then a power of attorney is said to have been issued on 19.10.2006 by opp. party no.2 in favour her son Avin Jain. The said Avin Jain as power of attorney of opp. party no.2 requested for further time for completing the formalities and certain communications were also received by him from the Ministry of Forest & Environment, Government of Odisha. On 22.01.2010, the Addl. Secretary, Department of Steel & Mines, Government of Odisha, wrote to the Conservator of Forests that, after the demise of the grantee on 09.12.1995, there was no substitution in favour of any legal heir, as nobody had applied for the same, and that the grant of mining lease which was ordered on 05.06.1984 was not executed till that date, as the grantee had not furnished the statutory clearances as were required under the provisions of law. However, the Ministry of Forest & Environment, Government of Odisha, continued with the process and completed the formalities during pendency of this writ petition. On 13.01.2012, a notice was issued to the power of attorney holder of legal heir of the grantee by the Mines Department to show cause as to why the grant order be not revoked for non-execution of the mining lease deed within the stipulated period of six months, as provided under Rule 31(1) of the Minor Mineral Concession Rules, 1960.

The Deputy Director of Mines, Keonjhar then wrote to the Director of Mines, Odisha on 03.04.2012 that the grantee had obtained certain clearances for execution of the mining lease and that the Government may be moved to recommend the case of the grantee to the Chief Conservator of Forests for final disposal of diversion proposal and for allowing extension of time for execution of the mining lease deed. Pursuant thereto on 09.04.2012, the Director of Mines forwarded the case of the applicant to the Addl. Secretary, Government of Odisha, Department of Steel & Mines. The matter was thereafter taken up by the State Government for consideration of grant of mining lease in pursuance of the order for granting lease dated 05.06.1984 in favour of Dharam Chand Jain. Vide order dated 20.07.2012, the State Government revoked the grant order dated 05.05.1984 and thereby refused to grant lease in favour of opp. party no.2. Challenging the said order, opp. party no.2 filed a revision under Section 30 of the Mines and Minerals (Development and Regulation) Act, 1957, which has been allowed by the Central Government vide order dated 08.06.2015. Challenging the same, this writ petition has been filed by the State Government.

We have carefully considered the submission of learned counsel for the parties and perused the record. It is not disputed that the grant of mining lease, passed on 05.06.1984, was in favour of the applicant-Dharam Chand Jain. It is also not disputed that the grantee-Dharam Chand Jain expired on 09.12.1995. Though it is contended that intimation of the death of the grantee-Dharam Chand Jain was given to the State Government immediately after his death, but there is no document to support the said contention. The first document on record regarding intimation of death of the grantee-Dharam Chand Jain is one dated 25.06.2009. It is also not disputed that after the death of grantee-Dharam Chand Jain, on 09.12.1995, the power of attorney of Dharam Chand Jain continued to correspond with the State Government with regard to grant of mining lease.

Rule 25-A of the Mineral Concession Rules, 1960 reads as follows;

"25A. Status of the grant on the death of applicant for mining lease:-

(1) Where an applicant for a grant or renewal of mining lease dies before the order granting him a mining lease or its renewal is passed, the application for the grant or renewal of a mining lease shall be deemed to have been made by his legal representative.

(2) In the case of an applicant in respect of whom an order granting or renewing a mining lease is passed, but who dies before the deed referred to in sub-rule (1) of rule 31 is executed, the order shall be deemed to have been passed in the name of the legal representative of the deceased."

The aforementioned rules, as it appears, deals with the status of the grantee on the date of application for mining lease. In addition to the above, it is made clear that a mining lease is a State largesse over which no individual can have monopoly. There ought to be transparency and equal opportunity in distribution of State largesse with the paramount objective being to further community and State interest. Within the last 25 years, ever since issuance of the grant order, competition has increased and there is increased need of raw material for the manufacturing facilities that have been established within the State. Idling of State largesse is not in public interest. Neither the grantee nor his legal representative has done anything to indicate sincerity on his part. It would be in public interest to notify the granted area so that opportunity is accorded to all interested for grant of mining lease.

In view of the reasons described above, the State Government, considering the materials on record, came to a conclusion that there was no merit in the case of legal heir of the grantee for grant of additional time for fulfillment of statutory compliance, as the period of lease had already expired. Consequentially, it revoked the grant of mining lease for iron and manganese ore over an area of

637.00 acres in Sidhamath reserve forest of Keonjhar district in favour of original grantee, namely, D.C. Jain pursuant to proceeding dated 05.06.1984.

Section 30 of the Mines and Minerals (Development and Regulation) Act, 1957 reads as follows: "*30. Power of revision of Central Government.:- The Central Government may, of its own motion or on application made within the prescribed time by an aggrieved party, revise any order made by a State Government or other authority in exercise of the powers conferred on it by or under this Act with respect to any mineral other than a minor mineral."* Similarly, Rule 55 of the Mineral Concession Rules, 1960 reads as follows:

"55. Orders on revision application : -

(1) On receipt of an application for revision under rule 54, copies thereof shall be sent to the State Government or other authority and to all the impleaded parties calling upon them to make such comments as they may like to make within three months from the date of issue of the communication, and the State Government or other authority and the impleaded parties, while furnishing comments to the Central Government shall simultaneously endorse a copy of the comments to the other parties.

(2) Comments received from any party under sub-rule (1) shall be sent to the other parties for making such further comments as they may like to make within one month from the date of issue of the communication and the parties making further comments shall send them to all the other parties.

(3) The revision application, the communications containing comments and counter-comments referred to in sub-rule (1) and (2) shall constitute the records of the case.

(4) After considering the records referred to in sub-rule (3), the Central Government may confirm, modify or set aside the order or pass such other order in relation thereto as the Central Government may deem just and proper.

(5) Pending the final disposal of an application for revision, the Central Government may, for sufficient cause, stay the execution of the order against which any revision application has been made."

A combined reading of aforesaid provisions would indicate that statute empowers to prefer revision against the order passed by the State Government before the Central Government. Invoking such power, wife of the original grantee preferred revision against the order passed by the State Government dated 20.07.2012. The power of "revision" is limited to the act of examining again in order to remove any defect or grant relief against the irregular or improper exercise or non-exercise of jurisdiction by the subordinate authority or the lower Court, as the case may be. In *Sri Raja Lakshmi Dyeing Works v. Rangaswamy* (1980) 4 SCC 259, the apex Court held:

"Ordinarily, revisional jurisdiction is analogous to a power of superintendence and may sometimes be exercised ever without it being invoked by a party. The conferment of revisional jurisdiction is generally for the purpose of keeping tribunals subordinate to revisional tribunal within the bounds of their authority to make them act according to well defined principles of justice. Therefore, it follows that in a revision the revising authority is not bound to examine the facts for itself but is entitled to give its decision on points of law alone. As such, in a revision the person seeking revision has more restricted rights.

Applying the above well settled principle to the present context, we find that the revisional authority has not dealt with the detailed reasons given by the State Government with regard to undue delay in execution of lease after the order of grant was issued on 05.06.1984. The period of 12 years from 1997 to 2009 dealt with by the State Government has been cursorily considered by the revisional authority and brushed aside by merely stating that "*the revisionist in his RA has indicated the circumstances which caused the delay and he has been able to establish that the delay cannot be attributed to any omission or lapse on the part of the revisionist*". Nowhere, the revisional authority has considered as to what was stated in the rejoinder affidavit filed before it, which could establish that the delay could not be attributed to the revisionist (opp. Party no.2 herein). Even otherwise, an explanation given before the revisional authority in the rejoinder affidavit could not be considered by the revisional authority until the said explanation was on record before the State Government. As such, the finding that the delay could not be attributed to opp. party no.2 or the grantee cannot be justified in law. It has also been stated by the revisional authority that the revisionist (opp. party no.2 herein) had "*actively pursued their endeavour*", which is also without any basis, as there is no factual foundation to substantiate the same. In view of the aforesaid, we are of the opinion that the order dated 08.06.2015 passed by the revisional authority cannot be justified in law and the order of the State Government dated 20.07.2012 is a well reasoned order. The revisional authority, having limited jurisdiction, in exercise of such power, could not have interfered with the order so passed by the State Government. Certainly, the revisional authority is not discharging the jurisdiction of an appellate authority and we are of the opinion that within the limited compass of its jurisdiction, in the facts of this case, it ought not to have interfered with the order dated 20.07.2012 passed by the State Government. The writ petition is accordingly allowed by quashing the order dated 08.06.2015 passed by the revisional authority. There shall be no order as to cost.

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12. Section 5 (e) of the Aircraft Act 1934 & Rule 8(a) of the Aircraft Rules, 1957

Union of India Versus Rajasthan High Court & Ors.

T.S. THAKUR , CJI , DR. D.Y. CHANDRACHUD & L. NAGESWARA RAO ,JJ.

In the Supreme Court of India.

Date of Judgment -14.12.2016

Issue

Persons exempted from pre-embarkation security checks-discussed.

Relevant Extract

A Division Bench of the Rajasthan High Court by its judgment dated 13 May 2005 issued a direction to the Union Government and to its Secretaries in the Ministries of Civil Aviation and Home Affairs "to include the Chief Justices and the judges of the High Court in the list of persons exempted from pre-embarkation security checks" at airports and to amend a circular dated 1 May 2002[1] of the Bureau of Civil Aviation Security (BCAS).

This exercise was directed to be completed within thirty days. The High Court has directed that certain suggestions formulated by it for laying down a 'National Security Policy' should be considered by the Union government. The Union of India moved this Court under Article 136 of the Constitution. Leave has been granted on 20 January 2006, and the judgment of the High Court was stayed.

The case before the High Court arose from a report that was published in the daily edition of the Rajasthan Patrika on 10 February 2000, of a breach of security which took place at Sanganer Airport, Jaipur. On 8 February 2000, a person who was to board a flight to Mumbai was detained by airport security staff for carrying a revolver with six live cartridges. He possessed an arms license which had expired. After the passenger was apprehended he was sent to Sanganer police station where the revolver and live cartridges were seized and a First Information Report under the Arms Act was lodged.

The passenger left the police station and after dodging the duty officer, boarded the aircraft destined for Mumbai. He was prosecuted for a violation of Sections 21 and 13 of the Arms Act and was eventually convicted by the Civil Judge and Judicial Magistrate of the first class at Sanganer and sentenced to a fine of rupees one thousand. The accused paid the fine and, as the Additional

Superintendent of Police, Immigration states before this Court, the revolver and live cartridges were released.

So much for security.

The Rajasthan High Court took suo moto cognizance of the news report and a public interest petition was registered. During the course of the hearing, the Division Bench directed the Chief Security Officer of the airport, the Secretary to the Home Department and the Director General of Police to show cause how a security lapse had occurred.

In pursuance of the provisions contained in Section 5(e) of the Aircraft Act, 1934 and Rule 8(a) of the Aircraft Rules, 1957, the Union government has made provisions for security screening in Chapter IV of the National Civil Aviation Security Programme (NCASP). Para 2 deals with pre- embarkation security checks and divides them broadly into three categories :

i) Manual search of hand baggage;

ii) Screening of hand baggage through an X-ray baggage inspection system; and

iii) Frisking of passengers Paragraph 4.24 contains exemptions and is in the following terms :

"4.2.1 Certain categories of VIPs/persons are exempted from frisking and searching, screening of their hand baggage if carried by themselves. The details of the List of such persons have been separately circulated to all concerned."

The Union government is in appeal.

The High Court has evidently transgressed the 'wise and self-imposed' restraints (as they are described) on the power of judicial review by entertaining the writ petition and issuing these directions. The cause for invoking its jurisdiction suo moto was a news report in regard to a breach of security at Sanganer airport. Matters of security ought to be determined by authorities of the government vested with the duty and obligation to do so. Gathering of intelligence information, formulation of policies of security, deciding on steps to be taken to meet threats originating both internally and externally are matters on which courts singularly lack expertise.

The breach of security at Sanganer airport undoubtedly was an issue of serious concern and would have been carefully investigated both in terms of prosecuting the offender and by revisiting the reasons for and implications of a security lapse of this nature. This exercise was for the authorities to carry out. It was not for the Court in the exercise of its power of judicial review to suggest a policy which it considered fit. The formulation of suggestions by the High Court for framing a National Security Policy travelled far beyond the legitimate domain of judicial review.

Formulation of such a policy is based on information and inputs which are not available to the court. The court is not an expert in such matters. Judicial review is concerned with the legality of executive action and the court can interfere only where there is a breach of law or a violation of the Constitution.

A suo moto exercise of the nature embarked upon by the High Court encroaches upon the domain of the executive. In a democracy based on the rule of law, government is accountable to the legislature and, through it, to the people. The powers under Article 226 are wide - wide enough to reach out to injustice wherever it may originate. These powers have been construed liberally and have been applied expansively where human rights have been violated. But, the notion of injustice is relatable to justice under the law. Justice should not be made to depend upon the individual perception of a decision maker on where a balance or solution should lie. Judges are expected to apply standards which are objective and well defined by law and founded upon constitutional principle. When they do so, judges walk the path on a road well-travelled.

When judicial creativity leads judges to roads less travelled, in search of justice, they have yet to remain firmly rooted in law and the Constitution. The distinction between what lies within and what lies outside the power of judicial review is necessary to preserve the sanctity of judicial power. Judicial power is respected and adhered to in a system based on the rule of law precisely for its nuanced and restrained exercise.

If these restraints are not maintained the court as an institution would invite a justifiable criticism of encroaching upon a terrain on which it singularly lacks expertise and which is entrusted for governance to the legislative and executive arms of government. Judgments are enforced, above all, because of the belief which society and arms of governance of a democratic society hold in the sanctity of the judicial process.

This sanctity is based on institutional prestige. Institutional authority is established over long years, by a steadfast commitment to a calibrated exercise of judicial power. Fear of consequences is one reason why citizens obey the law as well as judicial decisions. But there are far stronger reasons why they do so and the foundation for that must be carefully preserved. That is the rationale for the principle that judicial review is confined to cases where there is a breach of law or of the Constitution. The judgment of the Rajasthan High Court is an example of a matter where the court should not have entered.

By the time that the Rajasthan High Court dealt with the case, the list of exemptions had been modified to include Chief Justices of High Courts in the list of persons exempted from pre-embarkation security. Even assuming that the intervention of the High Court in such a matter could have been invoked in the first place (though we believe it should not have been) the matter should have rested there.

The cause for which the suo moto writ petition was registered was left behind and the episode which led to the invocation of the jurisdiction found no place in the ultimate directions. The direction to include judges of the High Court was unrelated to the very basis on which the jurisdiction under Article 226 was invoked. But that apart, there is a more fundamental reason why the case should not have been entertained and directions of this nature ought not to have been issued. Matters of security are not issues of prestige.

They are not matters of 'status'. The Union government has adopted the position that the issue as to whether pre-embarkation security exemptions should be granted does not depend only on the warrant of precedence. Among the factors which are borne in mind is that the person who is exempted from pre-embarkation security checks must, according to the government, be secured by such a level of government security on a 24x7 basis, which would virtually preclude the possibility of any prohibited or dangerous items being introduced on board an aircraft through his or her baggage.

The security perception of the Union government is that no exemption can be granted to a dignitary if he/she is not under effective government security coverage on a 24x7 basis. Heads of foreign missions in India are exempted from pre-embarkation security checks on a reciprocal basis. We are not called upon to decide upon the legality or justification for the inclusion of the name of any particular individual in the list of exempted persons in these proceedings. What we have said above is to emphasise that the view of the Union government is

based on a considered assessment of security perceptions and ought not to have been interfered with in the manner that the High Court did in the exercise of its jurisdiction under Article 226.

We accordingly allow the Appeal and set aside the impugned judgment and order of the High Court dated 13 May 2005. The writ petition before the High Court shall accordingly stand dismissed. There shall be no orders as to costs. T.P.(C) No. 75 of 2012

This transfer petition has been instituted by the Commissioner of Security (Civil Aviation), BCAS. The transfer petition has arisen in the context of an order dated 12 May 2011, passed by a Division Bench of the Allahabad High Court. The order of the High Court has been passed in a Special Appeal arising from a judgment and order of a learned Single Judge dated 11 April 2007 in writ petition 1949/S/S/2000. It appears that the proceedings before the learned Single Judge arose out of a disciplinary proceeding.

The record of the transfer petition indicates that the High Court in the course of the Special Appeal has made certain observations while issuing a notice to the Director General of the Bureau of Civil Aviation Security. Since the High Court has made these observations in a matter which is unrelated to the issue involved in the Special Appeal, we draw the attention of the High Court to the principles enunciated above while disposing of the Civil Appeal filed by the Union government against the judgment of the Rajasthan High Court. A copy of the above judgment shall be placed on the record of the Special Appeal filed before the High Court. In the event that the Special Appeal still remain on the file of the High Court, the High Court shall proceed to hear and dispose of the Special Appeal accordingly.

We clarify that we have made no observations on the merits of Special Appeal. The transfer petition is disposed of.

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13. Guardian and Wards Act

Harshita Bhasin Versus State of West Bengal & Ors.

T.S. THAKUR , CJI , DR. D.Y. CHANDRACHUD & L. NAGESWARA RAO ,JJ.

In the Supreme Court of India.

Date of Judgment -14.12.2016

Issue

Refusal of interim custody order- challenged.

Relevant Extract

The basis of the present application is set out in paragraphs 9, 10 and 11 which reads as follows: "That the minor children to comply with the present visitation arrangement leave their home at Noida at 3:30 am to reach the airport in time to catch a flight to reach Kolkata on time for the visitation. The minor children further return to Delhi after the visitation between 10:30 pm and 1:00 am on Monday morning and have to wake up for school by 6:15 am on the same day. On one occasion the flight of the minor children had to be diverted to Lucknow and the children only reached Delhi by 3:14 am. The present arrangement is not conducive for the minor children keeping in mind their tender age and their mental and physical well-being.

That the present Applicant/Respondent No.5 fears that the strenuous and constant travelling from Delhi to Kolkata and back on a regular basis shall have a negative impact on their physical health along with the mental psyche of the children and may even in the future begin to affect the academics, extra-curricular activities, sports and attendance of the children. That the present Applicant/Respondent No.5 humbly submits that the present visitation arrangement is no longer in the best interest and welfare of the children.

That it is due to these reasons that the present Applicant/Respondent No.5 is seeking modification of the order dated 09.04.2014 passed by this Hon'ble Court only to the limited extent of changing the venue of the visits from Kolkata to Delhi. After due consideration the present Applicant/Respondent No.5 humbly states that he is even willing to bear the Petitioner's cost of travel to Delhi to meet the minor children every fortnightly Sunday so as to let the petitioner interact with them. It is further submitted that the Petitioner has relatives and family members who live in Delhi and shall not be adversely affected in anyway by travelling to Delhi to meet with the minor children and comply with the fortnightly visitation arrangement".

The applicant, Mukul Bhasin, was impleaded as the fifth respondent to a petition under Article 136 of the Constitution which was disposed of by this

Court on 9 April 2014. The first respondent to the application was the petitioner in the Special Leave Petition. The applicant and the first respondent were married on 11 July 2007. They have two children - Ranvir, who was born on 24 July 2008 and Hridaan, born on 16 November 2011. The children are now eight and five years old. There is a matrimonial dispute and parties have been living separately since July 2013.

The applicant instituted a petition under the Guardian and Wards Act, 1890 (Petition 754 of 2013) before the Civil Judge (Senior Division), Gautam Budh Nagar, UP, for dissolution of marriage and for custody of the children. The respondent instituted a habeas corpus petition before the Calcutta High Court to which the applicant filed an affidavit-in- opposition. The learned counsel appearing on behalf of the applicant submits that it is extremely stressful for the children to travel to Kolkata every fortnight on a Sunday since they have to leave their home at NOIDA at 3.30 am in order to take a flight to meet their mother at 10 am. Moreover, it has been submitted that the children return back to New Delhi late at night and have to attend school on Monday morning.

The applicant has expressed his readiness and willingness to bear the cost of travel of the respondent to Delhi where, it has been submitted, the children can meet her during the hours fixed by the High Court. Having regard to the fact that prima facie it appears tiring and stressful for the two young children who are eight and five years of age to travel to Kolkata in the manner agreed, we had requested learned counsel for the parties to discuss the matter and indicate to the Court whether an agreement can be broadly arrived at to facilitate the convenience of the young children while at the same time protecting the legitimate concerns of their mother.

Ms. Meenakshi Arora, learned senior counsel appearing on behalf of the respondent has fairly stated before the Court that while the respondent would be willing to abide by any reasonable arrangement which would obviate inconvenience to her children, this Court may require the petitioner to provide for the airfare both for the respondent and her mother to travel to New Delhi and the petitioner may be directed to make arrangements to facilitate their stay in a room in a hotel in New Delhi for two nights.

During the course of the hearing we had indicated a viable arrangement by which instead of being required to travel to Kolkata every fortnight, the children

shall travel once in a month to Kolkata while the respondent will meet the children in New Delhi once in a month. Both the learned counsel have fairly agreed to the suggestion. In view of the above position, we issue the following directions:- Pending the hearing and final disposal of the guardianship proceedings, the respondent shall be entitled to visitation rights and to meet her two minor children, Ranvir and Hridaan in the following manner : The applicant father shall travel with the children to Kolkata, on a Sunday, in the first fortnight of every month so as to enable the respondent mother to meet the children in the manner indicated in the order of the High Court dated 8 October 2013; The respondent shall in the second fortnight of every month be entitled to visitation rights at New Delhi in the manner indicated in the order of the High Court dated 8 October 2013. To facilitate disbursement of the travel and hotel expenses of the respondent and her mother, the applicant shall by means of an electronic transfer of funds deposit a sum of rupees forty thousand per month into a nominated bank account of the respondent by the seventh day of every month.

The respondent shall make her own arrangements for travel to and fro from New Delhi and for stay. The respondent shall fetch the children from the chambers of Ms Udita Seth, Advocate (Chamber No.20A, R.K. Garg Block, Supreme Court, Bhagwan Das Road, New Delhi) and return the children to the father at the same place. The period of visitation shall be as prescribed in the order of the High Court dated 8 October 2013.

The order of the High Court dated 8 October 2013 shall in the circumstances stand modified by consent to the above extent. The Interlocutory Application is accordingly disposed of.

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