O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2017

(*DECEMBER*)

Odisha Judicial Academy, Cuttack, Odisha

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

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2. Order VI Rule 17 of CPC

Mohinder Kumar Mehra vs Roop Rani Mehra

A.K. Sikri & Ashok Bhushan ,JJ.

In the Supreme Court of India.

Date of Judgment -11.12.2017

Issue

In the matter of an application for amendment under Order VI Rule 17 CPC after commencement of trial.

Relevant Extract

This appeal has been filed against the judgment of Delhi High Court dated 02.08.2017 by which judgment, the Writ Petition filed by the appellant challenging the order of Additional District Judge dismissing the application of the plaintiff under Order VI Rule 17 of the Civil Procedure Code (hereinafter referred to as "C.P.C.") has been dismissed. Facts in brief necessary to be noted for deciding the appeal are:- The appellant and respondent No.5 are sons of respondent No.1. Respondent Nos. 2, 3 and 4 are wife, son and daughter of another brother of appellant. The appellant's father Late Shri O.P.Mehra alongwith his wife and three minor sons came to Delhi from Lahore after Partition. Shri O.P. Mehra died in 1951. The respondent No.1 and her sons were held entitled to compensation under Order of Settlement Commissioner, New Delhi dated 14.08.1956. The respondent No. 1 was declared as highest bidder in a public auction for a House No. D-4, Lajpat Nagar, area measuring 300 sq. yds. which amount was adjusted from the claim to which the respondent No.1 and her sons were held entitled.

Another property was also allotted in the name of respondent No.1 of area measuring 200 sq. yds. at G-11, Nizamuddin, New Delhi. The property G-11, Nizamuddin was sold by respondent No.1 in the year 2000. On 04.11.2009, the appellant filed a Suit No. 2082 of 2009 against the respondents seeking partition of the suit property described in Appendix A. In Appendix A, only property mentioned was Plot No.D-4, Lajpat Nagar, Part-II, New Delhi.

Written statement was filed by the respondent and on 17.05.2010, issues were framed by the Court. 10.08.2010 was fixed for recording the evidence of the plaintiff. The plaintiff prayed for time for producing

evidence. On 17.01.2011, plaintiff filed an application under Order VI Rule 17 praying for amendment of the plaint. By the application plaintiff sought to add certain pleadings and a prayer claiming share in the sale proceeds received by defendant No.1 from sale of the property of Nizamuddin. Application filed by the plaintiff was objected by the defendants by filing a reply. It was pleaded that several opportunities were given to the plaintiff to lead evidence and last opportunity was given on 08.12.2010 to file his evidence by 28.01.2011. It was further pleaded that in the sale document of Nizamuddin property, plaintiff himself was a witness. The relief which is sought to be amended is barred by time and is altogether a separate cause of action. Plaintiff filed a rejoinder in which it was stated that plaintiff came to know that plaintiff had undivided share in the property at Nizamuddin only in November, 2010. He further stated that he informed all the facts to his earlier counsel but in the plaint the mention of Nizamuddin property was not made by earlier counsel and while preparing for evidence in the suit, the fact was noticed by the plaintiff only in November, 2010 and hence application for amendment has been filed. The Court passed on order on 26.07.2011 granting the plaintiff four week's time as a last opportunity to file the examination-in-chief of his witnesses subject to payment of Rs.5,000/-, with regard to I.A. No.1001 of 2011, it was stated "Needless to say in Case I.A. No.1001/2011 is allowed, appropriate orders for evidence of the plaintiff would be made." Parties led evidence and suit was fixed for final disposal. On 14.02.2014, an order was passed directing that amendment application shall be considered at the time of final hearing of the suit. Plaintiff filed an application for amendment of issues, which was rejected by the High Court on 09.02.2015. The plaintiff filed a FAO (OS) No.196 of 2015, in which Division Bench of the High Court by order dated 28.04.2015 directed the learned Single Judge to decide the amendment application I.A. No. 1001 of 2011. In the meantime on account of pecuniary jurisdiction of the case, the suit was transferred to the Court of Additional District Judge, Saket. The Additional District Judge took up the amendment application and vide order dated 24.10.2016 rejected the amendment application. The trial court took the view that the suit for recovery of money of his share could have been filed by plaintiff within three years from the date of sale. The trial court held that the amendment sought is barred by time, hence the application was rejected.

A Writ Petition under Article 227 was filed by the plaintiff in the High Court challenging the order dated 24.10.2016, which has been dismissed by the High Court by the impugned judgment, against which this appeal has been filed.

Learned counsel for the appellant in support of the appeal contends that the application filed by the plaintiff for amendment under Order VI Rule 17 was not barred by time. Relying on Article 110 of the Limitation Act, 1963, learned counsel submits that the limitation for enforcing a right to share in a joint family property is twelve years, hence the claim was not barred by time. The High Court on one hand refrained itself from saying anything on the issue of limitation on Article 110 of the Limitation Act and on the other hand has given an approval to the view of the learned Additional District Judge that suit is barred by time. The High Court has failed to appreciate that parties have already led evidence relating to proposed amendment which fact was recorded by the High Court on 14.02.2014 and only a formal order of allowing amendment was required, which would not have caused any prejudice to the defendant. The High Court on technical grounds has rejected the amendment application whereas it is well settled that amendment applications are to be liberally considered and unless any prejudice is shown to be caused to the defendant, the applications are allowed.

Learned counsel for the respondent refuting the submission of the appellant contends that amendment application filed by the appellant could not have been allowed in view of Proviso to Order VI Rule 17 C.P.C. It is submitted that trial in the suit has already commenced and plaintiff failed to show that in spite of due diligence, he could not raise the matter earlier, hence the trial court has rightly rejected the amendment application. It is further stated that claim was barred by time. The amendment sought to be made related to claim for recovery of money for which limitation is only three years, as has been rightly held by the trial court. There is no substance in the case of the plaintiff that due to mistake of earlier counsel, the Nizamuddin property could not be included in the plaint. Plaintiff himself has verified the plaint and cannot be allowed to take any such plea. The Proviso to Order VI Rule 17 does not permit any such amendment as now prayed by plaintiff. It is submitted that there was no due diligence at all on the part of the appellant-plaintiff so as to enable the Court to allow the amendment exercising the power reserved to the Court under Proviso. The appellant in his repllication has stated that Lajpat Nagar property was the one and the only joint family property. By allowing the amendment, the very nature of the suit shall be changed, causing great prejudice to

respondent No.1. Learned counsel for the respondents have also raised submissions regarding the merits of the claim of the plaintiff.

We have considered the submissions of the learned counsel for the parties and have perused the records.

By Amendment Act 46 of 1999 with a view to shortage litigation and speed of the trial of the civil suits, Rule 17 of Order VI was omitted, which provision was restored by Amendment Act22 of 2002 with a rider in the shape of the proviso limiting the power of amendment to a considerable extent. The object of newly inserted Rule 17 is to control filing of application for amending the pleading subsequent to commencement of trial. Not permitting amendment subsequent to commencement of the trial is with the object that when evidence is led on pleadings in a case, no new case be allowed to set up by amendments. The proviso, however, contains an exception by reserving right of the Court to grant amendment even after commencement of the trial, when it is shown that in spite of diligence, the said pleas could not be taken earlier. The object for adding proviso is to curtail delay and expedite adjudication of the cases. This Court in Salem Advocate Bar Association, T.N. Vs. Union of India, (2005) 6 SCC 344 has noted the object of Rule 17 in Para 26 which is to the following effect:

"26. Order 6 Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the pro- vision."

The judgment on which much reliance has been placed by learned counsel for the appellant is Rajesh Kumar Aggarwal & Ors. Vs. K.K. Modi & Ors. (2006) 4 SCC 385. This Court had occasion to consider and interpret Order VI Rule 17 in Paragraphs 15 and 16, in which following has been held:-

"15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for de- termining the real question in

controversy be- tween the parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in contro- versy between the parties."

Although Order VI Rule 17 permits amendment in the pleadings "at any stage of the proceedings", but a limitation has been engrafted by means of Proviso to the fact that no application for amendment shall be allowed after the trial is commenced. Reserving the Court's jurisdiction to order for permitting the party to amend pleading on being satisfied that in spite of due diligence the parties could not have raised the matter before the commencement of trial. In a suit when trial commences? Order XVIII of the C.P.C. deal with "Hearing of the Suit and Examination of Witnesses". Issues are framed under Order XIV. At the first hearing of the suit, the Court after reading the plaint and written statement and after examination under Rule 1 of Order XIV is to frame issues. Order XV deals with "Disposal of the Suit at the first hearing", when it appears that the parties are not in issue of any question of law or a fact. After issues are framed and case is fixed for hearing and the party having right to begin is to produce his evidence, the trial of suit commences. This Court in Vidyabai & Ors. Vs. Padmalatha & Anr., (2009) 2 SCC 409 held that filing of an affidavit in lieu of examination-in-chief of the witnesses amounts to commencement of proceedings. In Paragraph 11 of the judgment, following has been held:-

"11. From the order passed by the learned trial Judge, it is evident that the respon- dents had not been able to fulfil the said precondition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the pro- ceeding. Filing of an affidavit in lieu of ex- amination-in-chief of the witness, in our opinion, would amount to "commencement of pro- ceeding"."

Coming to the facts of the present case, it is clear from the record that issues were framed on 17.05.2010 and case was fixed for recording of evidence of plaintiff on 10.08.2010. Plaintiff did not produce the evidence and took adjournment and in the meantime filed an application under Order VI Rule 16 or 17 on 17.01.2010.

By same order dated 14.02.2014, the Court directed amendment application be taken at the time of final hearing. As noticed above, when plaintiff sought for framing additional issues which application was rejected, the matter was taken before the Division Bench and the Division Bench ultimately has directed the learned Single Judge to consider the amendment application. Subsequently, the amendment application was rejected on 24.10.2016.

Taking into overall consideration of the facts of the present case and specially the fact that evidence by the parties was led after the filing of the amendment application, we are of the view that justice could have been served in allowing the amendment application. We thus allow the appeal and set aside the order of the High Court as well as the order of the Additional District Judge. The amendment application I.A. No. 1001 of 2011 stand allowed. Both the parties have led their evidences and case has already been fixed for hearing, however, to avoid any prejudice to the parties, justice will be served in giving a limited opportunity to the parties to lead additional evidence, if they so desire.

We thus direct that the parties may file this order before the trial court within two weeks from today, on receipt of the order, the trial court shall consider on framing of additional issue, if necessary and shall thereafter grant opportunity to the parties to lead additional evidence, if any. The entire exercise shall be completed within three months and thereafter suit be decided finally. The parties shall bear their own costs. We make it clear that we have not expressed any opinion on merits of the case including on the question of applicability of Article 110 of the Limitation Act and all the issues shall be decided on the basis of materials on record without being influenced by any observation made by us.

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3. Order VI Rule 17

Raj Kumar Bhatia vs. Subhash Chander Bhatia

Dipak Misra, CJI., A. M. Khanwilkar, Dr D .Y .Chandrachud, JJ.

In the Supreme Court of India

Date of Judgment -15.12.2017

Issue

In the matter of amendment of written statement after a period of 13 years from the date of knowledge.

The present appeal arises from a judgment of the High Court of Delhi dated 5 October 2016 by which an order of the Trial Court allowing an application filed by the appellant for amendment of the written statement was set aside.

On 11 October 2002, Sharda Rani Bhatia instituted a suit for the recovery of possession, arrears of damages and mesne profits against the appellant. The property in dispute is situated on the first floor at 1/6 Ramesh Nagar, New Delhi. The case of the original plaintiff is that Desh Raj Bhatia acquired the leasehold rights on 13 February 1962. On his death, his children are stated to have relinquished their rights and interest in favour of their mother, Lajwanti Bhatia. She executed a will bequeathing the property to her son Ratan Lal Bhatia who is stated to have become the exclusive owner of the property on her death. The original plaintiff, Sharda Rani Bhatia is the widow of Ratan Lal Bhatia. The appellant is the son of Ratan Lal Bhatia. Ratan Lal Bhatia died intestate. On his death, a registered deed of relinquishment was executed in favour of Sharda Rani Bhatia by the appellant and the respondent, the sons of Ratan Lal Bhatia and by Shakti Bhatia in favour of their mother. The original plaintiff is stated to have permitted the appellant and the respondent to reside along with her in the property. The suit was filed by Sharda Rani Bhatia for recovery of possession from the appellant and for consequential relief. The original plaintiff is stated to have executed a deed of gift in favour of the respondent in 2003 after which he was impleaded as co-plaintiff. The original plaintiff died in 2005 and the suit is being pursued by the respondent.

The appellant filed his written statement in the suit on 22 February 2003. According to the appellant, the respondent had exercised undue influence in obtaining the deed of relinquishment. According to him, parties had lived together jointly even after the alleged relinquishment. The appellant claims that an oral understanding was arrived at by which he was to occupy the first and second floors together with the terrace whereas the respondent was to occupy the ground floor exclusively and their mother

was to live on the ground floor or, with any of her sons, as she desired. Accordingly, it has been alleged that the family arrangement was acted upon and the appellant is in occupation of the first and second floors together with the terrace while the respondent is in possession of the ground floor.

Issues were framed on 14 August 2003. The respondent moved an application under Order 6 Rule 17 of the Code of Civil Procedure for amendment of the plaint on 7 February 2013, which was allowed on 21 September 2013. The appellant filed a written statement to the amended plaint. The appellant filed an application for amendment of the written statement in March 2016, which was opposed by the respondent. The Trial Court allowed the application by an order dated 11 April 2016.

The respondent filed an application under Order 47 Rule 1 of CPC seeking review of the order dated 11 April 2016. On 3 June 2016, the respondent filed a writ petition under Article 227 of the Constitution. The petition was allowed by the impugned order dated 5 October 2016.

By the proposed amendment, the appellant inter alia sought to introduce the following averments in the written statement:

"22. That as a matter of fact the property in question is the ancestral, joint Hindu Family Property as initially in view of the pleadings as well the same was purchased by Desh Raj Bhatia, grandfather of the plaintiff No. 2 and the defendant. After the death of Desh Raj Bhatia, who died intestate, the suit property was inherited by all the legal heirs namely Smt. Rajwanti Bhatia (widow), Sunita Rani Bhatia (Daughter), Walaityi Ram Bhatia (Son), Om Prakash Bhatia(Son), Tilak Raj Bhatia (Son), Ratan Lal Bhatia (son), Smt Sita Virmani (daughter), Smt Shakuntala Bhatia (daughter), Jagdish Lal Bhatia (son). All the said legal heirs have relinquished their rights in favour of their widow mother Smt. Lajwanti Bhatia. Thereafter, Smt Lajwati Bhatia before her expiry, have executed a Will in favour of Ratan Lal Bhatia, who is the father of the plaintiff No. 2 and the defendant and after death of Smt. Lajwanti Bhatia, the suit property was inherited by Ratan Lal Bhatia..

24. That it is an admitted position that on the death of Ratan Lal Bhatia, he was survived by his widow Shara Rani Bhatia, plaintiff No. 2, Subhash Chander Bhatia, defendant Raj Kumar Bhatia and one daughter namely Smt. Shakti Rani Bhatia and one daughter namely Smt Sakshi Rani

Bhatia and the plaintiff No. 2, defendant and their sister was also having their two children. It is undisputed position that Ratan Lal Bhatia died intestate and the assets as well as the properties left behind by him stands inherited equally in the name of his legal heir and thus the properties left behind by Ratan Lal Bhatia become the coparcenary property for the rights of the grand children of Ratan Lal Bhatia. It is submitted that the grand children of Ratan Lal Bhatia have derived their coparcenary rights in the properties left behind by Ratan Lal Bhatia. Meaning thereby in case of plaintiff No. 2, although he derived 1/4th share in the suit property but legally his own son and daughter being coparcener then his share shall be terms as 1/12th each and likewise the share of defendant which he derived as 1/4 th on the death of his father shall also be deemed as 1/12th each with his two sons and the share of Sharda Rani Bhatia which she derived as 1/4th is also to be legally deemed as 1/12th each alongwith her sons and daughter.

The High Court has held that the amendment sought in the written statement was not bona fide and was not necessary for determining the real question in controversy between the parties. The suit was instituted in 2001 and the written statement was filed in 2003. The High Court held that based on facts which were known to the appellant in 2003, a belated attempt was made thirteen years later in 2016 to amend the written statement to introduce an averment on the existence of coparcenary / hindu undivided property. On merits, the High Court held that it is a settled principle that after the enactment of the Hindu Succession Act1956, property which devolves on an individual from a paternal ancestor does not become HUF property but the inheritance is in the nature of self-acquired property unless an HUF exists at the time of the devolution. This view was based on the judgments of this Court in Commissioner of Wealth-tax, Kanpur v Chander Sen1 and Yudhishter v Ashok Kumar2 . In the view of the High Court, the averments sought to be introduced by the appellant do not lead to a conclusion of the existence of coparcenary property. While accepting that in the course of considering an application for amendment, its merits or demerits should not be evaluated, the High Court nevertheless held that the amendment in the present case was untenable on merits.

On behalf of the appellant, it has been urged that necessary averments about the ancestral nature of the property are contained in the original written statement. Hence, it was urged that the averments which were sought to be elaborated in the amended written statement had their genesis in the original written statement. Based on this premise, it was

urged that the amendment was (1986) 3 SCC 567 (1987) 1 SCC 204 correctly allowed by the Trial Court. The High Court, it was urged, ought not to have interfered under Article 227 of the Constitution with an order of the Trial Court allowing the amendment. Moreover, it was urged that at the stage of allowing an amendment, the court is not justified in considering the merits of the case which is sought to be pleaded. The High Court, it was submitted, had declined to allow the amendment after reviewing the merits of the defence raised, which was impermissible. The appellant also urged that the respondent had already filed an application for review of the order passed by the Trial Court on 11 April 2016, allowing the amendment in spite of which, a petition was filed under Article 227.

On the other hand, it was urged on behalf of the respondent that the written statement as originally filed was based on a challenge to the deed of relinquishment executed by the appellant in favour of his mother Sharda Rani Bhatia. The appellant also sought to plead an oral arrangement to the effect that his possession of the suit property would not be disturbed. This, it was urged, amounted to an admission that the property was the self-acquired property of Ratan Lal Bhatia and the appellant cannot be permitted to withdraw the admission by amending the written statement. Moreover, it was urged that issues were framed on 14 August 2003. The respondent had filed its evidence on affidavit and the trial had already commenced prior to the filing of the application for amendment of the written statement. In the absence of due diligence on the part of the appellant, the amendment could not have been allowed. The amendment, it was submitted, changes the fundamental nature of the defence and is aimed at delaying the disposal of the suit.

In the original written statement, the appellant had set up the plea that the property in dispute was in the nature of joint family property and that even after the alleged deed of relinquishment, parties were living together as members of a joint hindu family. The written statement inter alia contains the following averments :

"10…The property is the joint family property. The sister of the respondent is married and well settled at her matrimonial home… The defendant, plaintiff and the said S C Bhatia were jointly occupying the said property as being the undivided joint family property. That even after execution of the alleged relinquishment dee the abovesaid parties were living as joint family and the suit property being the undivided joint family… That

all family members were using ground floor, first floor and second floor jointly as undivided joint family property."

In paragraph 12 of the written statement, the appellant has set up an oral family arrangement, thus :

"12…That acting upon the oral family arrangement, an amount of Rs. 6, 00, 000/- was taken out of the common fund of the Joint Hindu Undivided Family. The said amount has been handed over to Dr R C Bhatia and Shri Shakti Bhatia both residents of Modi Nagar, U P on interest. The said two persons are regularly paying interest to the plaintiff."

In "the reply on merits", the appellant has averred that :

"2… The defendant is in possession of the first floor, second floor and terrace of the said property as owner as per the oral family settlement of the undivided Joint Hindu Property… That all other assets movable as well as immovable including the factory in the name and style of Rattan Industries situated at 18 DLF Industrial Modi Nagar, are still in joint possession and ownership and no division on metes and bounds has taken place. Though the "said property" has been divided by mets and bound as per the oral family armament. The plaintiff has made the present averment at the behest of her younger son Shri S C Bhatia with an ill intention and motive to deprive the defendant of his lawful occupation. That as per the said oral family arrangements, an amount of Rs. 6 lacs from joint funds has been handed over on interest to Dr R C Bhatia and Smt Shakti Bhatia, son in law and daughter of the plaintiff. That R C Bhatia and Smt Shakti Bhatia have been regularly paying interest to the plaintiff on the said amount."

This being the position, the case which was sought to be set up in the proposed amendment was an elaboration of what was stated in the written statement. The High Court has in the exercise of its jurisdiction under Article 227of the Constitution entered upon the merits of the case which was sought to be set up by the appellant in the amendment. This is impermissible. Whether an amendment should be allowed is not dependent on whether the case which is proposed to be set up will eventually succeed at the trial. In enquiring into merits, the High Court transgressed the limitations on its jurisdiction under Article 227. In Sadhna Lodh v National Insurance Company, this Court has held that the (2003) 3

SCC 524 supervisory jurisdiction conferred on the High Court under Article 227is confined only to see whether an inferior court or tribunal has proceeded within the parameters of its jurisdiction. In the exercise of its jurisdiction under Article 227, the High Court does not act as an appellate court or tribunal and it is not open to it to review or reassess the evidence upon which the inferior court or tribunal has passed an order. The Trial Court had in the considered exercise of its jurisdiction allowed the amendment of the written statement under Order 6 Rule 17 of the CPC. There was no reason for the High Court to interfere under Article 227.

Allowing the amendment would not amount to the withdrawal of an admission contained in the written statement (as submitted by the respondent) since the amendment sought to elaborate upon an existing defence. It would also be necessary to note that it was on 21 September 2013 that an amendment of the plaint was allowed by the Trial Court, following which the appellant had filed a written statement to the amended plaint incorporating its defence. The amendment would cause no prejudice to the Plaintiff.

In the view which we have taken, it has not become necessary to consider the alternative submission of the appellant namely, that recourse taken to the jurisdiction under Article 227by the respondent after filing an application for review before the Trial Court was misconceived. Since the matter has been argued on merits, we have dealt with the rival submissions.

Hence, on a conspectus of the facts and having due regard to the nature of the jurisdiction under Article 227 which the High Court purported to exercise, we have come to the conclusion that the impugned judgment and order is unsustainable. We accordingly allow the appeal and set aside the judgment of the High Court. The order passed by the Trial Court allowing the amendment of the written statement is accordingly affirmed.

There shall in the circumstances be no order as to costs.

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4. Section 370 & 392 of Cr.P.C.

State of Orissa Vs. Banabihari Behera

D. Dash, J.

In the High Court of Orissa , Cuttack

Date of Judgement- 07.12.2017

Issue

In the matter of differences of opinion re: confirmation of death sentence –ultimately matter referred s to another Bench.

The appellant-Banabihari Behera @ Haria faced the trial in the Court of Additional Sessions Judge, Jajpur in C.T. Case No. 315 of 2013 standing charged for commission of offence under section 302 IPC. The trial court has found the appellant guilty of murder under section 302 IPC. Having thus for been convicted for the offence of causing murder of the sixteen years daughter of the informant who was then a student of Ist Year of Intermediate in Science, the appellant has been sentenced to death. In view of the infliction of the capital punishment upon the appellant, for its confirmation, reference has been made under section 366(1) of the Code of Criminal Procedure, 1973 (for short, the Code').

The appellant being aggrieved by the said order of conviction and the order of sentence has also filed an appeal from inside the jail.

The reference as well as the appeal had been heard by the Hon'ble Judges constituting the Division Bench. The Bench delivered two judgments on 19.11.2015. While two Hon'ble Judges are of the unanimous opinion that the finding of guilt recorded by the trial court is based on just and proper appreciation of evidence on record keeping in view the settled position of law warranting no interference and accordingly have held that the conviction of the appellant has to be maintained, the difference of opinion arises as to the sentence to be awarded. The Hon'ble Judge presiding the Bench when observed that the case falls within the category of 'rarest of rare' cases as it is a case of brutal murder of a young adolescent damsel aged about sixteen years by infliction of twelve numbers of injuries on her person by means of a sharp cutting weapon and thus the death sentence is only adequate one; the other Hon'ble Judge however has differed on this aspect of sentence that the appellant has to be visited with.

The Hon'ble Judge having said that mitigating circumstances, particularly the young age of the appellant without any criminal track record and in the absence of any such material that he is a menace to the society and as such remaining with the continuous threat from the society and the possibility of his being reformed and rehabilitated not ruled out has opined that imposition of sentence of death is not called for and it is a case where sentence of imprisonment for life be awarded, further taking note of the fact that when the motive behind the crime has neither been so pin pointedly projected nor established. This is how, the matter has thus been laid before me as provided under section 370 read with section 392 of the Code.

The facts having been comprehensively given in the judgment of the Hon'ble Judge presiding the Bench, I would only refer to such facts as are necessary for disposal of the matter in hand which has been laid before me.

Suffice it to say that the appellant-accused Banabihari Behera also called as Haria in the locality and the deceased belong to the same village and particularly their houses are not far apart. The appellant was then working as the driver in a truck and earning his livelihood when deceased was prosecuting her studies as a student of Ist Year of Intermediate in Science.

(a) On 26.04.2013 at about 7.30 a.m. the deceased who was the only daughter of the informant (P.W. 2) and aged about 16 years had been to attend the call of nature with her mother, P.W. 3 to the nearby canal running little away on the back side of their house. The appellant, a co-villager of the informant who had then concealed his presence near the bushes, suddenly came out and started dragging the deceased towards the ridge, holding her hands. The mother of the deceased i.e. P.W. 3 though tried to resist the attempt of the appellant and rescue the deceased, it was all in vain. So she rushed to the house and informed her family members to appropriately respond forthwith. The father of the deceased (P.W. 2) and others thereafter rushing near the spot, saw the appellant dealing successive blows by means of a 'Kata' (a type of small dagger, a billhook) on the deceased who was lying in a naked condition. Seeing the arrival of P.W. 2 and others, the appellant fled away from the spot carrying the weapon. P.W. 2 and others through chased him returned empty handed. The father

of the deceased suspected that the murder was committed in execution of a prior plan hatched by the appellant and the members of his family particularly i.e., his elder brothers Hrusikesh Behera, Babaji Behera and sister-in-laws, namely Lipi Behera and Tiki Behera who playing their respective role therein. It was also suspected that the deceased had been subjected to sexual assault soon before her death caused by the appellant by infliction of fatal injuries all over the body.

(b) Father of the deceased, P.W. 2 on that day around 9 a.m. presented a written report to the Inspector-in-Charge of Tomka Police Station.

(c) On receipt of the written report, Inspector-in-Charge of Tomka Police Station (P.W. 17), registered Tomka P.S. Case No. 28 of 2013 under section 302/376 read with section 34 of the Indian Penal Code not only against the appellant but also against his family members namely Hrusikesh Behera, Babaji Behera, Lipi Behera land Tiki Behera.

He (P.W. 17) then directed Parao Tudi (P.W. 19), S.I. of Police, Tomka Police Station to investigate into the case. During course of investigation, the witnesses were examined the Investigating Officer visited the spot and prepared spot map (Ext. 12). He also seized blood stained earth, sample earth, aluminum 'lota', a pair of slipper of Paragaon make, head hair, ear rings of the deceased lying at the spot under seizure list (Ext. 2/1). Inquest over the dead body was conducted at the spot on 26.04.2013 during noon hours in presence of the witnesses vide inquest report (Ext. 4). The dead body was then sent to C.H.C., Danagadi for post mortem examination and after that the wearing apparels of the deceased were seized under seizure list, Ext. 5.

P.W. 14 Dr. Ramesh Kumar Sahoo, Medical Officer, Danagadi C.H.C. conducted post mortem examination over the dead body of the deceased on 26.04.2013 and submitted the post mortem report vide Ext. 6. His evidence in consonance with the report is that he had noticed most importantly one chop wound on the neck completely transecting the spinal cord and vertebra at 6-7 level size of the size of 20 x 15 x 10 cm, transecting the great vessels of the neck besides two other chopped wounds on face,

incised wound on deltoid muscle, incised wounds on right fore-arm on back side, left fore-arm cutting bones of radiua and ulna.

The appellant was arrested on 28.04.2013 at 5.00 a.m. at village Tomka and was taken to the Police Station. The appellant while in police custody is said to have confessed his guilt in the presence of the witnesses and further stating to have concealed the 'Kata' near bushes has accordingly, led the police party to the place of concealment in giving recovery of the 'Kata' which was seized under seizure list (Ext. 11). After receipt of the post mortem examination report, on 30.04.2013, that 'Kata' being sent to the doctor (P.W. 14) for his opinion to connect its user with the injuries found on the person of the deceased, the opinion vide Ext. 8, has been in the affirmative that the injuries sustained by the deceased are possible by that 'Kata'. On 02.05.2013 the material objects were sent to S.F.S.L., Rasulgarh, Bhubaneswar following due procedure and on completion of investigation finally the appellant alone was charge sheeted.

(d) The prosecution in order to prove its case has examined in total twenty one witnesses besides proving the supporting documents marked as Exts. 1 to 18 and seventeen material objects, M.O. I to XVII, when two witnesses have been examined from the side of the defence.

Both the Hon'ble Judges are of the view that the finding of guilt against the appellant as has been returned by the trial court is in order, having unanimously arrived at the conclusion that the appellant is liable to be convicted for commission of offence under section 302 IPC.

In view of the fact that the Hon'ble Judges are divided in their opinion in the matter of award of sentence upon the appellant whose conviction has been found to be in order, the matter has been laid before me in terms of the provision of section 370 and 392 of the Code centering round the question of sentence. Both the Hon'ble Judges have relied on a numbers of cases decided by the Apex Court in the matter of infliction of death sentence in support of their respective view point.

Now, therefore, I shall proceed to the sentencing.

Mr. D.P. Das, learned Advocate/Amicus Curiae submitted that the sentence passed by the trial court ought to be set aside and the learned trial

judge in awarding the death sentence has failed to keep in view those aggravating as well as mitigating circumstances which have bearing on the question of sentence, especially in the case of imposition of death penalty. He submitted that the learned trial judge has pronounced the sentence in a routine manner for which it is vitiated. Criticizing the sentence, he placed reliance of Banchan Singh v. State of Punjab; AIR 1980 SC 898 and submitted that the trial court has committed error by not properly appreciating the said authoritative pronouncement in as much as the position that the court in Banchan Singh (supra) has categorically held that the extreme penalty can be inflicted only in gravest cases of extreme culpability and that in making the choice of sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also have not been properly viewed and appreciated.

Mr. Das further contended that in the present case, the decision in Banchan Singh was completely disregarded and the trial court, while sentencing the accused, only placed emphasis on the brutal and heinous nature of the crime and the mitigating factors including the possibility of reform and rehabilitation of the appellant were ruled out on the basis of the nature of the crime and not on its own merits.

Mr. Das further submitted that the trial court failed to pay due regard to the mitigating factors; that the court has committed the mistake of rejecting the mitigating factors by reasoning that it may not be sufficient for awarding life sentence; and that the courts have not considered all the mitigating factors cumulatively in order to arrive at the conclusion whether the case fell within the category of 'rarest of rare' cases. According to him, the young age is a mitigating factor which has been taken note of by the Apex court in several cases. He urged that the crime when is not premeditated, the same stands as the mitigating factor and that has to be given its due place for being taken into account. He further submitted that when the criminal antecedents of the appellant are lacking, the prosecution has not been able to say that the appellant deserves imposition of lesser sentence. He also submitted that considerable weightage must be given to the concept of reformation and rehabilitation. According to him, the present case easily passes all the laid down tests so as to stand as a fit one for commutation of the death sentence to life imprisonment. According to him, the young age as the mitigating factor has to be taken note of along

with the presence of mother and other family members of the appellant standing as his dependants with there is absence of any continuing threat to the collective. It is submitted that testing the present case in the touch stone of the principles propounded in the decisions of the Apex Court, the case does not fall within the 'rarest of the rare' cases category and therefore the norm is for awarding life sentence and not the death penalty which is exception.

Learned counsel for the State submitted that the trial judge has appositely sentenced the appellant to death after drawing up the balance sheet of the mitigating and aggravating circumstances and striking a just balance and has rightly found that here is a case where the sentence of death is adequate. He also submitted that the mitigating circumstances are required to be considered in the light of the offence and not alone on the back drop of age and family back ground.

Let me proceed to analyze the aforesaid aspects. In the case of Bachan Singh vs. State of Punjab; AIR 1980 SC 898 the Apex court has held that:-

"164.....(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence".

"202.....'Aggravating circumstances. - A court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed-

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

"203. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other".

xx xx xx

"206.....'Mitigating circumstances.-In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct."

"207. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence."

"209..... It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

In the case of Machhi Singh v. State of Punjab; AIR 1983 SC 957, it has been held that:-

"32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection."

The court next has adverted to the aspects of the feeling of the community and its desire for self-preservation and opined that the

community may well withdraw the protection by sanctioning the death penalty. What has been ruled in this regard is worth reproducing:-

"32.....But the community will not do so in every case. It may do so "in the rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty."

It is apt to state here that in Machhi Singh case, stress was laid on certain aspects, namely, the manner of commission of the murder, the motive for commission of the murder, antisocial or socially abhorrent nature of the crime, magnitude of the crime and personality of the victim of murder. After so enumerating, the propositions that emerged from Bachan Singh, were culled out which are of as follows:-

"The following propositions emerge from Banchan Singh case.

'(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

It has been further opined in Machhi Singh's case that to apply the said guidelines, the following questions are required to be answered:

"(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

In the said case, the Court upheld the extreme penalty of death in respect of three accused persons.

The Apex Court in the case of Haresh Mohandas Rajput v. State of Maharashtra ,(2011) 12 SCC 5, while dealing with the situation where the death sentence is warranted, referred to the guidelines laid down in Banchan Singh and the principles culled out in Machhi Singh and opined as follows:-

"19. In Machhi Singh v. State of Punjab, this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in Banchan Singh to cases where the "collective conscience" of the community is so shocked that it will expect the holders of the judicial power centre to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, such a penalty can be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between the aggravating the mitigating circumstances."

The Court then ruled that:-

"20. The rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment

provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organized criminal activities, death sentence should be awarded."

In a case of murder of a young girl of about 18 years in Dhananjoy Chatterjee vs. State of West Bengal; (1994) 2 SCC 220, the Court took note of the fact that the accused was a married man of 27 years of age, the principles stated in Bachan Singh's case and further took note of the rise of violent crimes against women in recent years and, thereafter, on consideration of the aggravating factors and mitigating circumstances, opined that:

"15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

The Court then took note of the fact that the deceased was a school-going girl and it was the sacred duty of the appellant, being a security guard, to ensure the safety of the inhabitants of the flats in the apartment but to gratify his lust, he had raped and murdered the girl in retaliation which made the crime more heinous. It was also considered that on many occasions the victim had been teased by Dhananjoy on her way back from her school and the latest was three days before and that Dhananjoy's all these actions being complained of, the employer was arranging for his transfer and thus there was a motive and sense of revenge in his mind. Appreciating the manner in which the barbaric crime was committed on a

helpless and defenceless school-going girl of 18 years, the Court came to hold that the case fell in the category of rarest of the rare cases and, accordingly, affirmed the capital punishment imposed by the High Court.

In fact in case of 'Rameshbhai Chandubhai Rathod vs. State of Gujrat; (2009) 5 SCC 740 which was a case of rape and/or murder of girl of tender age, a student of IV Standard in the school by the appellant employed as a watchman in the Apartment who was married having wife and children, their Lordships agreed for the conviction to sustain. The difference of opinion arose on the question of sentence; when the Hon'ble Judge, presiding the Bench confirmed the death sentence, the other Hon'ble Judge held that life sentence be given. The appeal in view of difference of opinion on the imposition of sentence had been referred to a three Judges Bench. The decision as reported in (2011) 2 SCC 764 has been that the case was not in the category of 'rarest of rare' cases. Accordingly, the death sentence being commuted to life, it was however directed that the life sentence must extend to the full life of the appellant but subject to any remission or commutation at the instance of the Government for good and sufficient reason.

In Laxman Naik v. State of Orissa, 1994 SCC (Cri) 656, the judgment begins as under:-

"1. The present case before us reveals a sordid story which took place sometime in the afternoon of February 17, 1990, in which the alleged sexual assault followed by brutal and merciless murder by the dastardly and monstrous act of abhorrent nature is said to have been committed by the appellant herein who is none else but an agnate and paternal uncle of the deceased victim Nitma, a girl of the tender age of 7 years who fell a prey to his lust which sends shocking waves not only to the judicial conscience but to everyone having slightest sense of human values and particularly to the blood relations and the society at large".

In Laxman Naik case, the High Court had dismissed the appellant's appeal and confirmed the death sentence awarded to him. While discussing as regards the justifiability of the sentence, the Court referred to the decision in Bachan Singh's case and opined that there were absolutely no mitigating circumstances and, on the contrary, the facts of the case

disclosed only aggravating circumstances against the appellant. Proceeding further, the Court held thus:

"The hard facts of the present case are that the appellant Laxman is the uncle of the deceased and almost occupied the status and position that of a guardian. Consequently the victim who was aged about 7 years must have reposed complete confidence in the appellant and while reposing such faith and confidence in the appellant must have believed in his bona fides and it was on account of such a faith and belief that she acted upon the command of the appellant in accompanying him under the impression that she was being taken to her village unmindful of the preplanned unholy designs of the appellant. The victim was a totally helpless child there being no one to protect her in the desert where she was taken by the appellant misusing her confidence to fulfill his lust. It appears that the appellant had preplanned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act."

After so stating, the Court, while affirming the death sentence, opined that:

"28 .....The victim of the age of Nitma could not have even ever resisted the act with which she was subjected to. The appellant seems to have acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, the appellant with a view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such a calculated, cold-blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare cases attracting no punishment other than the capital punishment and consequently we confirm the sentence of death imposed upon the appellant for the offence under Section 302 of the Penal Code."

In case of Kamta Tiwari vs. State of M.P. (1996) 6 SCC 250, the appellant was convicted for the offence punishable under Section 363, 376, 302 and 201 IPC and sentenced to death by the learned trial Judge and the

same was affirmed by the High Court. In appeal, the two-Judge Bench referred to the propositions culled out in Machhi Singh and expressed thus:

"8. Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances-but found aggravating circumstances aplenty. The evidence on record clearly establishes that the appellant was close to the family of Parmeshwar and the deceased and her siblings used to call him "Tiwari Uncle". Obviously her closeness with the appellant encouraged her to go to his shop, which was near the salon where she had gone for a haircut with her father and brother, and ask for some biscuits. The appellant readily responded to the request by taking her to the nearby grocery shop of Budhsen and handing over a packet of biscuits apparently as a prelude to his sinister design which unfolded in her kidnapping, brutal rape and gruesome murder as the numerous injuries on her person testify; and the finale was the dumping of her dead body in a well. When an innocent helpless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes."

In Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2012) 4 SCC 37, the appellant was awarded sentence of death by the learned trial Judge which was confirmed by the High Court, for he was found guilty of the offences punishable under Section 376(2)(f), 377 and 302 IPC. In the said case, the prosecution had proven that the appellant had lured a three-year old minor girl child on the pretext of buying her biscuits and then raped her and eventually, being apprehensive of being identified, killed her. In that context, while dismissing the appeal, the Court ruled thus:-

"37. When the Court draws a balance sheet of the aggravating and mitigating circumstances, for the purpose of determining whether the extreme sentence of death should be imposed upon the accused or not, the

scale of justice only tilts against the accused as there is nothing but aggravating circumstances evident from the record of the Court. In fact, one has to really struggle to find out if there were any mitigating circumstances favouring the accused.

38. Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of "trust-belief" and "confidence", in which capacity he took the child from the house of P.W. 2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness'. The accused left the deceased in a badly injured condition in the open fields without even clothes. This reflects the most unfortunate and abusive facet of human conduct, for which the accused has to blame no one else than his own self."

In the recent case of Mukesh vs. State (NCT) of Delhi); (2017) 6 SCC 1, the Apex Court taking note of the proven factual matrix of the horrendous incident found in the case, the brutal, barbaric and diabolic nature of the crime. The Court held:-

"364. It is necessary to state here that in the instant case, the brutal, barbaric and diabolic nature of the crime is evincible from the acts committed by the accused persons viz. the assault on the informant, P.W. 1 with iron rod and tearing off his clothes; assaulting the informant and the deceased with hands, kicks and iron rod and robbing them of their personal belongings like debit cards, ring, informant's shoes, etc; attacking the deceased by forcibly disrobing her and committing violent sexual assault by all the appellants; their brutish behavior in having anal sex with the deceased and forcing her to perform oral sex; injuries on the body of the deceased by way of bite marks (10 in number); and insertion of rod in her private parts that, inter alia, caused perforation of her intestine which caused sepsis and, ultimately, led to her death. The medical history of the prosecutrix (as proved in the record in Ext. PW-50/A and Ext. PW-50) demonstrates that the entire intestine of the prosecutrix was perforated and splayed open due to the repeated insertion of the rod and hands; and the appellants had pulled out the internal organs of the prosecutrix in the most savage and inhuman manner that caused grave injuries which ultimately annihilated her life. As has been established, the prosecutrix sustained various bite marks which were observed on her face, lips, jaws, near ear, on the right and left breast,

left upper arm, right lower limb, right inner groin, right lower thigh, left thigh lateral, left lower anterior and genitals. These acts itself demonstrate the mental perversion and inconceivable brutality as caused by the appellants. As further proven, they threw the informant and the deceased victim on the road in a cold winter night. After throwing the informant and the deceased victim, the convicts tried to run the bus over them so that there would be no evidence against them. They made all possible efforts in destroying the evidence by, inter alia, washing the bus and burning the clothes of the deceased and after performing the gruesome act, they divided the loot among themselves.

365. As we have narrated the incident that has been corroborated by the medical evidence, oral testimony and the dying declarations, it is absolutely obvious that the accused persons had found an object for enjoyment in her and, as is evident, they were obsessed with the singular purpose sans any feeling to ravish her as they liked, treat her as they felt and, if we allow ourselves to say, the gross sadistic and beastly instinctual pleasures came to the forefront when they, after ravishing her, thought it to be just a matter of routine to throw her along with her friend out of the bus and crush them. The casual manner with which she was treated and the devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience which knows not what to do. It is manifest that the wanton lust, the servility to absolutely unchained carnal desire and slavery to the loathsome bestiality of passion ruled the mindset of the appellants to commit a crime which can summon with immediacy a "tsunami" of shock in the mind of the collective and destroy the civilised marrows of the milieu in entirety."

Having said so, the Court arrived at singular conclusion that the mitigating circumstances highlighted which pertain to the strata to which they belong, the aged parents, marital status and the young children and the suffering they would go through and the calamities they would face in case of affirmation of sentence, their conduct while they are in custody and the reformative path they have chosen and their transformation and the possibility of reformation being taken together do not outweigh the

aggravating circumstances. In that view of the matter, the death penalty has been confirmed being found to be the only adequate.

Mr. D.P. Das, learned Advocate/Amicus Curiae for the appellant argued that keeping in view the ratio laid down in the aforesaid decisions by going through the facts and circumstances of the case, it cannot be said that the case is falling within the category 'rarest of rare' cases as by balancing the aggravating and mitigating circumstances upon consideration of the totality of the case, the case in hand cannot be taken to be one where imposition of life imprisonment would be wholly inadequate and thus would not meet the ends of justice. He while concluding submitted that the imposition of death penalty here would be extremely harsh and totally unwarranted in as much as the case at hand does not fall in the category of the 'rarest of rare' cases.

Learned counsel for the State argues that on the totality of the facts and circumstances of the case, in this incident of brutal murder of a young girl of sixteen years old who was then a student of Ist Year of Intermediate Science and with the mitigating circumstance such as the young age of the appellant who is having his mother and other family members; absence of criminal track record, the scope of reformation and rehabilitation being viewed cumulatively, do not outweigh the aggravating circumstance.

Keeping in view the authoritative pronouncements, and the rival submission, coming to examine the facts and circumstances relevant for the purpose, it appears to be a case that the appellant was infatuated and thereby obsessed with the physical charm of the deceased and was under the extreme emotional and psychological disturbance due to passiveness of the deceased towards his infatuation.

Given anxious consideration to the evidence let in during trial especially as regards the trailer to the main picture i.e. the incident of infliction of injuries on the deceased, it plainly strikes to mind as if some matters concerning the relationship between the two are not being placed by the witnesses for the reasons known to them or thinking for a moment that in so far as the trial is concerned, those are of no relevance. The extreme fascination of the appellant towards the deceased and the failure

on his part to win over her heart appears to have been the cause of frustration and that again being expressed in the last meet closing the chapter for ever is seen to have led the appellant to be greatly disturbed emotionally and psychologically to a degree beyond the range of human thermo stat. The evidence would go to show that the appellant had not started the assault no sooner he appeared. He first of all dragged her and that he ventured to do in presence of mother of victim (P.W. 3). Then however, there is lack of evidence on the score as to what it transpired between the appellant and the deceased after the mother of the deceased (P.W. 3) left the spot. The possibility of altercation or tussle between them in the fact situation of the case is not altogether ruled out. The appellant has used "Kata', the sharp cutting weapon of small size in inflicting the blows, but has not attempted in any way to harm the chastity of the deceased which is fortified from the report of the doctor who has not noticed any injury on the genitals or breasts of the deceased. The clothing's of the deceased were intact as has been noticed during inquest at the spot. The initial allegation that the deceased was ravished prior to the infliction of the blows on her person leading to her death, in course of investigation has been found to have not derived any support from any such material and thus has proven untrue. The appellant, a bachelor was by avocation a driver of the truck, having the members of the family needing his support and he has no such criminal track record to his credit. The crime as committed does not appear to be premeditated which is again a mitigating factor.

The appellant is an able bodied young man of 35 years old as has been observed by the trial court. It has not been shown by the prosecution that the appellant is menace to the society, as such there remains continuous threat from the side of the society. The prosecution has not

submitted any material to show that the possibility of reform of the appellant stands totally ruled out and that he cannot be reformed and rehabilitated at any time in future. At the same time, no adverse report is forthcoming from the jail authority and placed by the prosecution as regards the conduct of the appellant during all these period spent by him in jail.

The appellant's conduct in course of investigation has not been in the light of destroying the evidence or avoiding the process of law and rather, it is seen that since his arrest, he fully co-operated with the investigation.

True it is that the manner in which the incident has taken place and the way the appellant has committed the offence, the age of the victim and her helplessness at that point of time when seen with the number of injuries inflicted upon her, visualizing for a moment their force and impact from the detail narration of those injuries, go to show the brutality of the crime committed which however is not the sole criteria for judging the case to be within the category of "rarest of rare" cases; it has to be one of extreme brutality and exceptional depravity so as to avoid the criticism that the death penalty has been taken as the norm and not the exception.

In the above way, cautiously and anxiously weighing the aggravating and mitigating circumstances, I am led to record my opinion that the aggravating circumstances as projected are not ought weighing the mitigating circumstances. Consequent upon the above, I conclude that the case in hand does not fall within the category of "rarest of rare" cases so as to say that only adequate penalty for the offence committed by the appellant is death and therefore, be hanged by the neck until he be dead.

For all the aforesaid, in my considered opinion, the sentence of death awarded to the appellant be commuted to imprisonment for life.

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5. Section 374 of Cr. p. c

Pradeep Bachhar Vs. The State of Chhattisgarh

Kurian Joseph & Amitava Roy, JJ.

In the Supreme Court of India

Date of Judgement- 11.12.2017

Issue

In the matter of conviction and sentence passed under Section 20 (b)(ii) (c) of NDPS Act 1985 –Challenged.

Leave granted.

The Appellant is convicted Under Section 20(b)(ii)(C) of The Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, "the NDPS Act") and sentenced to undergo rigorous imprisonment for 15 years and a fine of Rs. 1,50,000/- with a default sentence of three years.

The Sigh Court reduced the sentence from 15 years to 12 years. The fine of Rs. 1,50,000/- was retained, but the default sentence was reduced to two years.

When the matter came up before this Court, on 09.10.2017, notice was issued on the quantum of sentence.

A similar situation came up for consideration before this Court in Shahejadkhan Mahebubkhan Pathan v. State of Gujarat, reported in (2013) 1 SCC 570, whereby having regard to the financial and other social conditions of the convicted person, this Court reduced the substantial sentence to 10 years and the default sentence to six months. The relevant considerations are available at paragraphs 15 and 16 of the Judgment, which read as follows:

"15. It is clear that Clause (b) of Sub-Section 1 of Section 30 of the Code authorises the court to award imprisonment in default of fine up to one-fourth of the term of imprisonment which the court is competent to inflict as punishment for the offence. However, considering the circumstances placed before us on behalf of the Appellant-Accused viz. they are very poor and have to maintain their family, it was their first offence and if they fail to pay the amount of fine as per the order of the Additional Sessions Judge, they have to remain in jail for a period of 3 years in addition to the period of substantive

sentence because of their inability to pay the fine, we are of the view that serious prejudice will be caused not only to them but also to their family members who are innocent. We are, therefore, of the view that ends of justice would be met if we order that in default of payment of fine of Rs. 1.5 lakhs, the Appellants shall undergo RI for 6 months instead of 3 years as ordered by the Additional Sessions Judge and confirmed by the High Court.

16. For the reasons stated above, both the appeals are partly allowed. The conviction recorded is confirmed and sentence imposed upon the Appellants to undergo RI for 15 years is modified to 10 years. The order of payment of fine of Rs. 1.5 lakhs each is also upheld but the order that in default of payment of fine, the Appellants shall undergo RI for 3 years is reduced to RI for 6 months. Since the Appellants have already served nearly 12 years in jail, we are of the view that as per the modified period of sentence in respect of default in payment of fine, there is no need for them to continue in prison. The Appellants shall be set at liberty forthwith unless they are required in any other offence. It is further made clear that for any reasons, if the Appellants have not completed the modified period of sentence, they will be released after the period indicated hereinabove is over."

Having heard the learned senior Counsel appearing for the Appellant and the learned Counsel appearing for the State, on facts, we do not find any reason to take a different view. Accordingly, the appeal is allowed. The substantial sentence of the Appellant is reduced to 10 years and the sentence in default on payment of fine is reduced to six months.

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6. Section 374 of Cr. p. c

Asharfi Vs. State of Uttar Pradesh

Ranjan Gogoi and R. Banumathi, JJ.

In the Supreme Court of India

Date of Judgment- 08.12.2017

Issue

In the matter of conviction and sentence passed under Sections 323 376(2)(g) and 450 of IPC ,1860 and Section 3 (2)(v) of SC and ST(Prevention of Atrocities) , Act 1989.

This appeal arises out of the judgment of the Allahabad High Court in Criminal Appeal No. 8270 of 2007 dated 29.01.2013 in and by which the High Court affirmed the conviction and sentence of the Appellant awarded by the trial court. The trial court vide its judgment dated 30.11.2007 convicted the Appellant for the offences Under Sections 450, 376(2)(g), 323 Indian Penal Code and Under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 [for short 'the SC/ST Prevention of Atrocities Act]. For conviction Under Section 376(2)(g) Indian Penal Code, the Appellant was sentenced to undergo rigorous imprisonment for ten years with fine of Rs. 8,000/- with default Clause and for conviction Under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act, the Appellant was sentenced to undergo life imprisonment with fine of Rs. 10,000/- with default clause. The Appellant was also imposed sentence of imprisonment for other offences under Indian Penal Code.

Case of the prosecution is that on the intervening night of 8/9.12.1995, Appellant Asharfi and one Udai Bhan are alleged to have forcibly opened the door and entered inside the house of PW-3-Phoola Devi and PW-4-Brij Lal and said to have committed rape on PW-3 Phoola Devi. PW-4-Brij Lal was kept away on the point of pistol. On raising alarm, neighbours (PW-1-Rassu and PW-2-Baghraj) came there and on seeing them, the Accused persons ran away threatening the witnesses. Based on the complaint lodged by the complainant Brij Lal, FIR was registered in Case Crime No. 76 of 1996 Under Sections 376/452/323/506 Indian Penal Code and Under Section 3(1)12 SC/ST Act against Appellant and one Udai Bhan. After completion of investigation, chargesheet was filed against the

Appellant and the said Udai Bhan for the abovesaid offences. As noted above, the Appellant and Udai Bhan were convicted for various offences by the trial court. In the appeal preferred by the Appellant before the High Court, the High Court affirmed the conviction of the Appellant and the said Udai Bhan.

We have heard the learned amicus curiae appearing for the Appellant. None appeared on behalf of the Respondent. We have carefully perused the impugned judgment and materials on record.

So far as the conviction Under Section 376(2)(g) Indian Penal Code is concerned, based upon the evidence of PW-3-Phoola Devi and PW-4 Brij Lal and the medical evidence, both the courts below recorded concurrent findings that the charge of rape has been proved. We are not inclined to interfere with the same and also the sentence of ten years of imprisonment imposed upon him. We also find no perversity with respect to the conviction and sentence of the Appellant with respect to other offences under Indian Penal Code.

In respect of the offence Under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act, the Appellant had been sentenced to life imprisonment. The gravamen of Section 3(2)(v) of SC/ST Prevention of Atrocities Act is that any offence, envisaged under Indian Penal Code punishable with imprisonment for a term of ten years or more, against a person belonging Scheduled Caste/Scheduled Tribe, should have been committed on the ground that "such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member". Prior to the Amendment Act 1 of 2016, the words used in Section 3(2)(v) of the SC/ST Prevention of Atrocities Act are "..... on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe".

Section 3(2)(v) of the SC/ST Prevention of Atrocities Act has now been amended by virtue of Amendment Act 1 of 2016. By way of this amendment, the words "..... on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe" have been substituted with the words "..... knowing that such person is a member of a Scheduled Caste or Scheduled Tribe". Therefore, if subsequent to 26.01.2016 (i.e. the day on which the amendment came into effect), an offence under Indian Penal

Code which is punishable with imprisonment for a term of ten years or more, is committed upon a victim who belongs to SC/ST community and the Accused person has knowledge that such victim belongs to SC/ST community, then the charge of Section 3(2)(v) of SC/ST Prevention of Atrocities Act is attracted. Thus, after the amendment, mere knowledge of the Accused that the person upon whom the offence is committed belongs to SC/ST community suffices to bring home the charge Under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act.

In the present case, unamended Section 3(2)(v) of the SC/ST Prevention of Atrocities Act is applicable as the occurrence was on the night of 8/9.12.1995. From the unamended provisions of Section 3(2) (v) of the SC/ST Prevention of Atrocities Act, it is clear that the statute laid stress on the intention of the Accused in committing such offence in order to belittle the person as he/she belongs to Scheduled Caste or Scheduled Tribe community.

The evidence and materials on record do not show that the Appellant had committed rape on the victim on the ground that she belonged to Scheduled Caste. Section 3(2)(v) of the SC/ST Prevention of Atrocities Act can be pressed into service only if it is proved that the rape has been committed on the ground that PW-3 Phoola Devi belonged to Scheduled Caste community. In the absence of evidence proving intention of the Appellant in committing the offence upon PW-3-Phoola Devi only because she belongs to Scheduled Caste community, the conviction of the Appellant Under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act cannot be sustained.

In the result, the conviction of the Appellant Under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and the sentence of life imprisonment imposed upon him are set aside and the appeal is partly allowed.

So far as the conviction of the Appellant Under Section 376(2)(g) Indian Penal Code and other offences and sentence of imprisonment imposed upon him are confirmed. As the Appellant had already undergone more than ten years, the Appellant is ordered to be released forthwith unless he is required in any other case.

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7. Section 374 of Cr. p. c.

Joseph vs State Rep. By Inspector Of Police

Ranjan Gogoi & R. Banumathi ,JJ

In the Supreme Court of India .

Date of Judgment-14.12.2017

Issue

In the matter of conviction and sentence passed under Section 302 read with Section 149 of IPC , Sections 341, 324, 148, 147, 323 read with Section 149 I.P.C and Section 326 of IPC –Challenged.

Relevant Extract

These appeals arise out of the judgment dated 10.02.2011 passed by Madras High Court at Madurai Bench dismissing Criminal Appeal No.519 of 2002 thereby affirming the conviction of the appellants under Section 302 read with Section 149 IPC, Sections 341, 324, 148, 147, 323 read with Section 149 IPC and Section 326 IPC and also the sentence of imprisonment imposed upon each of them.

Briefly stated case of prosecution is that on 12.01.1994, PW2-Anthony Mududhagam, deceased Luis John Kennedy and Raja came to attend funeral of one Jesu (PW2's cousin). While they were standing near Sahayam's (A3) house at about 3.05 p.m., Jesu Adimai (A1)(since dead), Selvaraj (A2) and Sahayam (A3) armed with country made bombs in their hands, Selvam (A4) and Antony Innasi (A5) armed with sickles, Charles (A6), Jerone (A7), Edwinson (A8), Raj (A9) and Elizabethan (A10) with sticks and Joseph (A11) came there and confronted the deceased Kennedy, PW2 and Suresh (PW1) [who just came there to see his father PW2]. Joseph (A11) instigated all the accused to attack on them. Selvam (A4) attacked PW1 with sickle on the left shoulder. Jesu Adimai (A1) threw one country bomb which hit the forehead of the deceased and the deceased fell down. Selvaraj (A2) threw the bomb which hit the right leg of Raja. Sahayam (A3) also threw a bomb which has fallen on the ground. Antony Innasi (A5) attacked PW2 on his left shoulder. Accused Nos.6 to 10 attacked Raja and PW2 indiscriminately causing injuries to them. On seeing the by-standers coming towards the spot, the accused ran away from the scene. Thereafter Johnson (PW-3) hired a tempo and took the injured to Nagercoil Kottar Government Hospital. On the way to hospital, Kennedy succumbed to injuries.

Based on the statement of Raja (Ex.P-16), FIR (Ex.P-9) was registered in Crime No.23/94 under Sections

147, 148, 326, 307 and 302 IPC as well as under the Indian Explosives Act. PW9-Krishnan Nair, Inspector in Charge had taken up the initial investigation and prepared rough sketch (Ex.P-10) of the place of occurrence and seized articles viz., blood stained earth (M.O.6) and sample earth (M.O.7) from the scene of crime and conducted the inquest (Ex.P11). PW6-Dr. Kutralingam conducted autopsy on the body of the deceased and noted "lacerated injury with burnt out black skin margins over the head both ocular areas; both eyes found to be missing; Face and forehead was seen seriously disfigured." PW6-Dr. Kutralingam opined that "the death was due to head injuries and the same could have been caused by explosion of bomb" and issued post-mortem certificate (Ex.P-6). On 15.01.1994, PW12-Ganesan- Inspector of Police, took up further investigation and arrested the accused Nos. 2 to 10 on 25.01.1994 at about 04:45 a.m. Confession statement (Ex.P3) recorded from Selvam (A4) which led to recovery of sickle with wooden handle (M.O.2) and sickle with iron handle (M.O.3). On completion of investigation and submission of final report on 08.11.1995, all the accused were remanded to judicial custody.

To bring home the guilt of the accused, prosecution has examined witnesses (PWs 1 to 12) and marked nineteen exhibits (Ex.P-1 to Ex.P-19) and seven material objects (M.O.1 to M.O.7). The accused were questioned under Section 313 Cr. P.C. about the incriminating evidence and circumstances and the accused denied all of them. Upon consideration of evidence adduced by the prosecution, the trial court held that the prosecution has proved the existence of common object of the unlawful assembly and that the accused acted in furtherance of the common object and convicted all the eleven accused under Section 302 IPC with the aid of constructive liability under Section 149 IPC and sentenced all of them to undergo life imprisonment. The accused were also convicted for various other offences and were sentenced to undergo various imprisonment. Being aggrieved by the verdict of conviction and sentence imposed upon them, the accused preferred appeal before the High Court which came to be dismissed by the High Court by the impugned judgment.

Taking us through the evidence and the impugned judgment, learned counsel for the appellants submitted that the prosecution has failed to prove the common object of the unlawful assembly to cause the death of deceased Kennedy that the accused acted in furtherance of the common object. It was contended that the appellants should not have been convicted for causing murder of Kennedy with the aid of Section 149 IPC. The learned counsel emphasized that the prosecution has failed to prove existence of common object of the unlawful assembly and that the appellants knew that

death of Kennedy was likely to be caused by the unlawful assembly and therefore, the conviction of the appellants under Section 302IPC with the aid of Section 149 IPC cannot be sustained.

Per contra, learned counsel appearing for the State submitted that from the evidence adduced by the prosecution and the attending circumstances of the case, prosecution has clearly proved the existence of common object and the courts below rightly convicted the accused under Section 302 IPC with the aid of Section 149 IPC.

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

The question falling for consideration is whether the prosecution succeeded in proving the existence of common object amongst the accused persons and whether the accused persons acted in prosecution of the common object and that the accused persons knew that the death was likely to be committed, to convict the accused under Section 302 IPC with the aid of Section 149 IPC.

Before we consider the testimony of the witnesses, let us consider the requirements for invoking the vicarious liability under Section 149 IPC. Section 149 IPC consists of two parts:

The first part of the section means that there exists common object and that the offence has been committed in prosecution of the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member.

The second part of the section means that even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section149, if it can be shown that the offence was such as the members knew was likely to be committed.

What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was the one which the members knew to be likely to be committed. Once the court finds that the ingredients of Section 149 IPC are fulfilled, every person who at the time of committing that offence was a member of the assembly has to be held guilty of that offence. After such a finding, it would not be open to

the court to see as to who actually did the offensive act nor would it be open to the court to require the prosecution to prove which of the members did which of the above two ingredients. Before recording the conviction under Section 149 IPC, the essential ingredients of Section 141 IPC must be established.

Whether the members of the unlawful assembly really had the common object to cause the murder of the deceased has to be decided in the facts and circumstances of each case, nature of weapons used by such members, the manner and sequence of attack made by those members on the deceased and the circumstances under which the occurrence took place. It is an inference to be deduced from the facts and circumstances of each case (vide Lalji and Ors. v. State of U.P. (1989) 1 SCC 437; Ranbir Yadav v. State of Bihar (1995) 4 SCC 392; Rachamreddy Chenna Reddy and Ors. v. State of A.P. (1999) 3 SCC 97).

PW-1-Suresh and deceased Kennedy are the sons of PW-2 Anthony Muduthagam. There is a family dispute between PW-2's family and Jesu Adimai (A1) in respect of laying the fishing net in the sea. On 12.01.1994, at about 03.00 p.m., PW-2-Anthony Muduthagam, deceased Kennedy and injured person Raja went to attend the funeral of PW-2's cousin Jesu. While they were talking to one another, on the exhortation of Joseph (A11), the accused party attacked the complainant party. The occurrence started on the eastern side of the church and in front of the house of Sahayam (A3).

There are only about 350 houses in Perumanal village and most of them are fishermen. In the village, there were two factions who assembled to attend the funeral of Jesu. There was no common object among the accused as only Joseph (A11) had enmity with PW- 2's family. Jesu Adimai (A1), Selvaraj (A2) and Sahayam (A3) were armed with bombs; Selvam (A4) and Antony Innasi (A5) were armed with sickles; and A6 to A10 were armed with sticks. On the exhortation of Joseph (A11), Jesu Adimai (A1) hurled the bomb which hit the forehead of deceased Kennedy and he fell down. Selvam (A2) threw the country bomb which hit the right ankle of Raja causing injuries to him. The bomb hurled by Sahayam (A3) fell on the ground and exploded. The deceased died of head injuries, fracture of frontal neck and both eyes found missing. PW-6-Dr. Kutralingam opined that the injuries on the deceased could have been caused by hurling of bombs. The fact that accused Nos. 1 to 3 carrying the bombs, gives indication that they had the common intention to cause the death of the complainant party. Selvam (A4) attacked PW-1-Suresh with aruval on the left shoulder and Antony Innasi (A5) attacked PW-2-Anthony Muduthagam

on the left shoulder and accused Nos. 6 to 10 attacked the complainant party with sticks. There is no evidence to prove that the accused Nos. 1 to 11 had any common object to commit the murder of Kennedy which activated all of them to join in furtherance of the common object.

As noted earlier, first part of Section 149 IPC states about the commission of an offence in prosecution of the common object of the assembly whereas the second part takes within its fold knowledge of likelihood of the commission of that offence in prosecution of the common object. In the facts and circumstances of the case, we are of the view that the prosecution has not proved the existence of the common object amongst the accused and that all of them acted infurtherance of the common object to invoke the first part of Section 149 IPC.

Let us consider whether the act of the accused falls under the second part of Section 149IPC. As members of the unlawful assembly, whether the accused knew that the offence of murder is likely to be committed. It is a matter of evidence that Sahayam's house is situated next to the house of Jesu, for whose funeral, the two factions have assembled. Accused Nos. 4 to 10 may not have had the knowledge that Jesu Adimai (A1), Selvaraj (A2) and Sahayam (A3) were armed with bombs and that the murder of Kennedy was likely to be committed. On the exhortation of Joseph (A11), the accused seem to have individually reacted. There is no definite finding of the High Court that the common object of the assembly was to commit the murder or that the accused persons had knowledge that the offence of murder was likely to be committed and hence, the conviction of the accused Nos. 4 to 10 under Section 302 IPC with the aid of Section 149 IPC cannot be sustained.

It is now well established that this Court does not, by special leave convert itself into an appellate court to appreciate evidence for third time. As has been consistently held by this Court in Ramaniklal Gokaldas and Others v. State of Gujarat (1976) 1 SCC 6 and Ramanbhai Naranbhai Patel and others v. State of Gujarat (2000) 1 SCC 358 and other cases, unless some serious infirmity or perversity is shown, this Court normally refrains from reappreciating the matter on appeal by special leave. In the case at hand, hurling of bombs is attributed only to accused Nos. 1 to 3. Had the other accused intended to kill Kennedy and the witnesses, they would have inflicted injuries on the vital organs or used the surest weapon of committing murder and not mere sickles/sticks. Conviction of accused Nos. 4 to 10 under Section 302 IPC with the aid of Section 149 IPC, in our view, suffers from serious infirmity and liable to be set aside.

Insofar as the conviction of the Sahayam (A3), an attempt was made that he cannot be convicted under Section 302 IPC as Selvaraj (A2) and Sahayam (A3) were acquitted under Section 27(2) and Section 27(3) of the Arms Act, 1959. As rightly contended by the learned counsel for the State, the sole reason for acquittal under Section 27(2) and Section 27(3) of the Arms Act is non-obtaining of prior sanction from District Magistrate to prosecute the accused under the Arms Act. Hence, the acquittal of the accused Nos. 2 and 3 under Section 27(2) and Section 27(3) of the Arms Act is of no avail to accused No. 3.

Joseph A11: On behalf of Joseph (A11), it was submitted that there is nothing on record to show the involvement of Joseph in the occurrence and no overt act is attributed to him and hence, no liability could be fastened upon him. PWs 1 to 3 have consistently stated that Joseph (A11) asked them to "...hack and hurl bomb...". The words uttered by accused Joseph is the starting point for all the troubles and all the accused acted only on such instigation of accused Joseph (A11). In his evidence, Johnson (PW3) had stated "that there had been dispute between the families of Jesu Adimai (A1) and Joseph (A11) and the family of Anthony Muduthagam (PW2) with regard to fishing at sea". Though no overt act is attributed to the accused Joseph, the words uttered by him "...hack, throw bomb and kill..." clearly shows that only on the exhortation of the accused Joseph, other accused acted and attacked the complainant party. Joseph (A11) was convicted under Section 302 IPC read with Section 149IPC even though he was charged under Section 302 IPC read with Section 109 IPC (fourth charge). Though the conviction of the accused Joseph under Section 302 IPC read with Section 149 IPC cannot be sustained, the same is modified as conviction under Section 302IPC read with Section 109 IPC.

As discussed above, on the exhortation of Joseph (A11), Jesu Adimai (A1) hurled the bomb which hit the forehead of deceased Kennedy. Selvam (A2) hurled the bomb which hit the right ankle of Raja. Bomb hurled by Sahayam (A3) fell on the floor and exploded. The bomb hurled by Selvaraj (A2) and Sahayam (A3), though, had not hit the deceased, the fact remains that they carried the bomb which clearly indicates that Sahayam (A3) was sharing the intention with Jesu Adimai (A1) and Selvaraj (A2) in committing the murder. Conviction of Sahayam (A3) under Section 302 IPC read with Section 149 IPC is modified as conviction under Section 302 IPC read with Section 34 IPC.

Conviction of accused Nos. 4 to 10 under Section 302 IPC with the aid of Section 149 IPC suffers from serious infirmity and the same cannot

be sustained. Since the prosecution has not succeeded in establishing and proving that there was an unlawful assembly with a common object to commit the offence, conviction of the accused Nos. 3 to 5 (under Section 148 IPC) and accused Nos. 6 to 11 (under Section 147 IPC) are set aside.

Considering the individual acts of the appellants, Selvam (A4) and Antony Innasi (A5) attacked PW1 and PW2 on their left shoulders respectively with sickles, conviction of Antony Innasi (A5) is modified as conviction under Section 324 IPC and the sentence of rigorous imprisonment of one year is maintained. Conviction of Selvam (A4) under Section 324 is affirmed and the sentence of imprisonment of one year imposed upon him is affirmed. Considering the acts of accused Nos.6 to 10 that they attacked Raja and PW-2 with sticks, conviction of accused Nos.6 to 10 under Section 323 read with Section 149 is modified as conviction under Section 323 IPC maintaining their sentence of imprisonment of six months.

Conviction of Sahayam (A3) and Joseph (A11) under Section 302 IPC read with Section 149 IPC is modified as Section 302 IPC read with Section 34 IPC and under Section 302 IPC read with Section 109 IPC respectively and the sentence of life imprisonment awarded to each of them is confirmed. Criminal Appeal No.413 of 2012 preferred by Joseph (A11) is dismissed. Sahayam (A3) and Joseph (A11) are directed to surrender to serve their remaining sentence.

Conviction of accused Nos. 4 to 10 [Selvam (A4), Antony Innasi (A5), Charles (A6), Jerone (A7), Edwinson (A8), Raj (A9) and Elizabethan (A10)] under Section 302 IPC read with Section 149 IPC is set aside and they are acquitted of the same. So far as conviction of Accused Nos. 4 to 10 for other offences and the sentence imposed upon each of them, the same is modified as indicated above and accordingly, appeals are partly allowed. Accused Nos. 4 to 10 have already undergone the sentence for more than six years, they need not surrender. Their bail bonds stand discharged.

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8. Section 374 of Cr. p. c

Mr. Abdul Basar Mulla Alias Khokan and others vs. State Of Orissa.

Dr. D.P. Choudhury, J.

In the High Court of Orissa, Cuttack

Date of Judgment- 13.12.2017

Issue

In the matter of conviction and sentence passed for the offence under Section 395 IPC read with section 397 of IPC read with Section 14 of the Foreigners' Act-Challenged.

Relevant Extract

The appellants in the captioned appeal challenges the order of conviction and sentence passed by the learned Addl. Sessions Judge, F.T.C.-II, Balasore for the offence under section 395 of I.P.C. read with section 397 of I.P.C. read with section 14 of the Foreigners' Act in S.T. Case No. 106/245 of 2009/2007.

FACTS

The factual matrix leading to the case of the prosecution is that on 21.5.2007 while the informant Raj Kishore Mohapatra was proceeding with his sister to the railway station, near Jyoti Hospital they found that wooden logs have been lying on the road to obstruct their way to go. When the driver of the car stopped the vehicle, the present appellants along with co-accused persons came near the car and assaulted the informant, his family members and removed cash, gold ornaments and three mobile telephones. Likewise they stopped an ambulance vehicle and also removed the valuables from the inmates of the ambulance vehicle. Then two motorcyclists came. The appellants and others stopped them and also forcibly removed cash and gold ornaments from their possession. A passenger bus came. The appellants and others came there, but the driver of bus speeded up vehicle and fled away. Thereafter the appellants and co-accused decamped the spot. Due to assault the informant and other inmates sustained injuries on their person. Thereafter the informant lodged the F.I.R. During course of investigation the police visited the spot and examined the witnesses. In further investigation police conducted T.I. parade of the appellants and co-accused persons. The police also seized the stolen materials from the appellants and others. On police requisition the informant and other injured persons were examined by the doctors. Since prima facie case is made out, charge sheet was filed after completion of investigation.

The plea of the appellants as revealed from the statement recorded under section 313 of Cr.P.C. and the suggestion given during cross-examination to the prosecution witnesses, is squarely denial to the occurrence and he plead innocence.

The prosecution in order to prove the charge examined 18 witnesses whereas the defence examined none. The trial court after analyzing the evidence of prosecution witnesses has come to the conclusion that the appellants and co-accused persons have committed the aforesaid offences and as such convicted them thereunder. After hearing on the question of sentence, learned trial court sentenced the appellants to undergo R.I. for 14 years and to pay fine of Rs.2,000/- each and in default to undergo further R.I. for one year for the offence under section 395 of I.P.C. read with section 397 of I.P.C. and further sentenced to undergo further R.I. for five years and to pay fine of Rs.1,000/- each and in default to undergo R.I. for six months for the offence under section 14 of Foreigners' Act. Both the sentences are directed to run concurrently.

SUBMISSIONS:

Learned counsel for the appellants submitted that P.Ws. 2, 13 and 16 identified the appellants during T.I. parade, but their evidence is clear to show that the appellants have been shown at the Police Station to the witnesses before the T.I. parade was held. So, their evidence has no evidentiary value to base conviction against the appellants. According to him, the P.Ws. have stated that the appellants were covered with black clothes leaving the eyes to be kept open, for which the T.I. parade held identifying the appellants should be held unreliable.

Learned counsel for the appellants further submitted that after seizure of the stolen properties the stolen properties were not got identified by the owners to prove the same to be the stolen properties. Similarly, the injuries found on the person of the inmates do not tally to the place of injuries as stated by the injured persons. Besides, learned counsel for the appellants submitted that since 1.6.2007 the appellants are inside custody, alternatively lenient view may be taken to reduce sentence already undergone.

Learned Additional Government Advocate submitted that the learned trial court has examined the materials on record meticulously and rightly convicted the appellants under relevant provision of law. He submitted that the evidence of the doctor clearly shows that the inmates of the vehicles have sustained injuries on their persons due to assault by the appellants and co- accused. According to him, the trial court has well

discussed the evidence and rounded up the links to the circumstances duly proved and found the chain of circumstance against the appellants have been completed to prove their complicity with the commission of offence. He supported the judgment of conviction and sentence passed against the appellant and prayed to dismiss the appeal.

DISCUSSION:

Before going to the facts of the case the law in the matter should be discussed. It is trite in law that the appellate court has got duty to re-appreciate the evidence of the P.Ws. to come to a conclusion whether the view of the trial court is correct and legal. It is also well settled in law that the court should separate grain from the chaff and the evidence should be weighed, but not to be counted.

It is revealed from the evidence of P.W.1 that while he and his family members were coming from Nilgiri in an Ambassador car to Jyoti Hospital, they found that the road was blocked. According to him six to seven persons came and assaulted them by means of Katari. Thereafter they removed the mobile phone and due to assault they sustained injuries on their persons. There is no proper cross-examination in this regard. From the evidence of P.W.1 it is clear that in the occurrence night there was a dacoity committed. P.W.2 who is the driver of the car corroborated the evidence of P.W.1 stated that six persons assaulted them by means of Bhujali causing injuries on their persons and then removed all the valuables from them. He has lodged the F.I.R. vide Ext.1. Thus, in cross-examination there is nothing revealed to overturn his evidence. The evidence of P.Ws.3 and 4 also corroborate the evidence of P.W.1 as to commission of dacoity. P.W.5 was also coming in Ambulance bearing No.OR-01-3516. His evidence is also relevant about the dacoity committed by six to seven persons in their vehicle while they came to same spot. He testified about removal of cash, gold ornaments by these culprits. Denying suggestion of defence he stated to have stated such fact before the police. Similar is the statement of P.W.6, who was also an inmate of the ambulance corroborates the evidence of P.W.5 about removal of valuables after assaulting the inmates by the culprits. P.W.10 who is also the inmate of the car corroborating the statement of P.Ws.1 to 3 stated that when the vehicle in which she was travelling was rubbed by six to seven unknown persons. P.W.14 who is also an inmate of the Ambassador car corroborates the evidence of P.Ws.1 to 3 about removal of the valuables from them by six to seven culprits after assaulting them. On the other hand she has corroborated the evidence of P.Ws.1 to 3. P.W.12 who was also coming on a bike corroborating the evidence of P.Ws. 1 to 6 stated that they also stopped near the spot due to obstruction of road. According to him, when

he stopped, some docaoits came and assaulted him and out of fear he and his friend gave cash, mobile hand set and other valuables. P.W.13 who was accompanying P.W.12 also corroborating the evidence of P.W.12 stated about the dacoity committed by six to seven persons.

From the aforesaid analysis it appears that on the occurrence night six to seven culprits committed dacoity on the National highway by removing valuables from the above witnesses after causing hurt to them.

Now the question arises as to who were the culprits. The prosecution has tried to prove through circumstantial evidence about involvement of the present appellants and other co-accused persons. The prosecution has more relied on the T.I. parade to base conviction against the appellants. So far as T.I. parade is concerned the law on the subject is no more res integra. It is reported in 1970(2) S.C.C. 128; Budhsen and another v. State of U.P., where Their Lordships observed at paragraph-7 as follows:-

"7. Now, facts which establish the identity of an accused person are relevant under Section 9 of the Indian Evidence Act. As a general rule, the substantive evidence of a witness is a statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exceptions to this general rule, when, for example, the court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bona fides of the prosecution witnesses and also to furnish evidence to corroborate their testimony in court. Identification proceedings in their legal effect amount simply to this: that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive

evidence. These parades are essentially governed by Section 162, Cr. P.C. It is for this reason that the identification parades in this case seem to have been held under the supervision of a Magistrate.

Keeping in view the purpose of identification parades the Magistrates holding them are expected to take all possible precautions to eliminate any suspicion of unfairness and to reduce the chance of testimonial error. They must, therefore, take intelligent interest in the proceedings, bearing in mind two considerations : (i) that the life and liberty of an accused may depend on their vigilance and caution and (ii) that justice should be done in the identification. Those proceedings should not make it impossible for the identifiers who, after all, have, as a rule, only fleeting glimpses of the person they are supposed to identify. Generally speaking, the Magistrate must make a note of every objection raised by an accused at the time of identification and the steps taken by them to ensure fairness to the accused, so that the court which is to judge the value of the identification evidence may take them into consideration in the appreciation of that evidence. The power to identify, it may be kept in view, varies according to the power of observation and memory of the person identifying and each case depends on its own facts, but there are two factors which seems to be of basic importance in the evaluation of identification. The persons required to identify an accused should have bad no opportunity of seeing him after the commission of the crime and before identification and secondly that no mistakes are made by them or the mistakes made are negligible. The identification to be of value should also be held without much delay. The number of persons mixed up with the accused should be reasonably large and their bearing and general appearance not glaringly dissimilar. The evidence as to identification deserves, therefore, to be subjected to a close and careful scrutiny by the Court....."

With due respect to the aforesaid decision it is clear that the evidentiary value of the T.I. parade is undoubtedly great. Before accepting such evidence Court is to assess if procedure holding T.I. parade has been followed by Magistrate properly or not so as to ensure fair trial.

It is revealed from the evidence of P.W.8 that he has conducted T.I. parade inside the jail. According to him, he called the identifying witnesses one after another to identify the suspects. Also it appears that the suspects were mixed with similar dressed and similar age group of ten persons. He testified that witness Satya Prakash Pati correctly identified Pausa Khan, Asadul Mulla, Arif Khan and Sk. Jahir. Witness Sanjaya Kumar Mohanty identified appellant Sk. Jahir. Witness Baji Soud did correctly identified suspects Pausa Khan and Abdul Basar Mulla. Similarly witness Raj Kishore

Mohapatra correctly identified Arif Khan and Pausa Khan. The witnesses have stated before him that they have seen these appellants while being assaulted by them and some of the suspects were unmasked. He proved T.I. parade report vide Ext.3/1. In paragraph-9 he admitted that the identifying witnesses have not stated about mode of assault by the suspects, but the suspects after being identified objected before him about the manner of holding T.I. parade. It appears from the evidence of P.W.8 that after following proper procedure he has conducted the T.I. parade vide EXt.3/1 and there is nothing to disbelieve his testimony.

P.W.2 admitted that he has identified appellants Arif Khan and Pausa Khan corroborating the evidence of P.W.8. Of course he admitted not to have stated before the Magistrate the reason of assault as he was not asked. Such discrepancy is minor one, but the fact remains that he has identified those two appellants during T.I. parade. Not only this, but also it is revealed from his evidence that due to assault he has sustained injuries on his person.

P.W.13 stated that he has participated in the T.I. parade and identified appellants Arif Khan, Sk. Jahir, Pausa Khan and Abdul Basar. There is nothing to disbelieve his evidence.

Similarly, P.W.16 also revealed that he has participated in the T.I. parade and identified correctly appellant Sk. Jahir. There is nothing in the cross-examination to shake his evidence in this regard.

It also appears from the evidence of P.Ws.2, 13 and 16 that the appellants assaulted them and removed the materials. Although he was cross-examined in detail, but so far their identification during T.I. parade under the circumstances corroborating the evidence of P.W.8 cannot be brushed aside. Hence the T.I. parade being vital evidence and same being proved against the appellants is a major circumstance to prove their involvement.

On perusal of the evidence of P.Ws. 2, 3, 4, 5, 6, 10, 12, 13, 14 and 15 it transpires that they have also identified the appellants in court. It may not be out of place to mention that according to the case of the prosecution, dacoity was committed on one spot and at the same time with the inmates of the car, Ambulance van and motorcyclist. Moreover, their evidence is clear to show that on the head light of these vehicles they could see the face of the appellants. As stated earlier, P.Ws.2,3 and 16 had already identified the appellants during T.I. parade. The question of identification in T.I. parade during investigation is relevant undersection 9 of the Evidence Act.

The confirmation of the previous T.I. parade during trial is a strong circumstance against the appellants. With regard to the identification of the appellants in court, there is already decision of the Hon'ble Apex Court reported in (2003) 5 SCC 746; Malkhansingh and others v. State of M.P., where Their Lordships observed hereunder:-

"7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad vs. Delhi Administration : AIR 1958 SC 350; Vaikuntam Chandrappa and others vs. State of Andhra Pradesh: AIR 1960 SC 1340 ; Budhsen and another vs. State of U.P. : AIR 1970 SC 1321 and Rameshwar Singh vs. State of Jammu and Kashmir : (1971) 2 SCC 715)."

With due regard to the aforesaid decision of the Hon'ble Apex Court, the identification in the court at the first instance may be a weak piece of

evidence in nature, but due to the fact that three prosecution witnesses already identified them during T.I. parade held inside the jail and fact that there was already head light of the vehicles were on, the identification of the appellants by the said prosecution witnesses cannot be thrown out from the zone of consideration and the same becomes a relevant circumstance against the appellants.

The evidence of P.Ws.2,3,4 and 5 disclose that the appellants were assaulting them and it is revealed from their evidence that they sustained injuries on different parts of their bodies. P.W.7, who is the doctor also issued injury reports vide EXts.7, 8, 9, 10, 2/1 and 11. Thus, it is revealed that these appellants voluntarily caused hurt to the inmates of the car, Ambulance van and the motorcyclists .

A further perusal of the evidence, it appears that these appellants removed the mobile phone of P.W.1, cash and mobile hand set from P.W.2, Nokia mobile set and cash of Rs.1200/- from P.W.3, money from P.W.5, money from P.W.6, cash and gold chain, Palla, I. Pod from P.W.10, cash from P.W.12, cash of Rs.5100/-, A.T.M. and PAN card, Driving License, L.G. model mobile phone from P.W.13, I. Pod from P.W.14, cash of Rs.200/- with purse from P.W.15 and cash, mobile hand set from his brother. There were cross-examination to these witnesses, but nothing has been elicited from their evidence to shake their testimony.

It is revealed from the evidence of P.W.18, that one Nokia model hand set was seized from appellant Abdul Basar Mulla, one Samsung mobile hand set was seized from accused Asadul Mulla, one I. Pod from appellant Sk. Jahir, one gold chain from accused Arif Khan, one piece of gold Palla was seized from appellant Pausa Khan and a gold Pall was seized from appellant Arif Khan. The seizure also has been witnessed by P.Ws.10 and 17. Learned trial court also vividly discussed about recovery of the stolen properties from the possession of the appellants. Thus, there is consistent evidence to prove that the stolen properties were recovered from the possession of these appellants. So, it is another circumstance against the appellants.

In view of the discussions made hereinabove, it appears that not only direct evidence is available against the appellants, but also there are circumstantial evidence as noted above to chain them to find out the complicity of the appellants with commission of the offence. Learned trial court has vividly discussed about these evidence. As such, the appreciation of evidence by the learned trial court is fully endorsed so as to prove the evidence under section 395 of I.P.C. read with section 397 of I.P.C.

So far as section 14 of the Foreigner's Act is concerned, no charge sheet was submitted against the present appellants, but only charge has been framed against the present appellants for committing such offence. The evidence of P.W.18 who is the I.O. in this case could not show what action has been taken to array appellants as a Bangaladeshi National. It is only available from his evidence that after arresting the accused he has intimated the fact of his Nationality to Indian Embassy through the Superintendent of Police, Balasore, but no such letter was produced by him. Apart from this, P.W.17 in cross-examination admitted that only appellants confessed that they belong to village Amridi, P.S. Bhanga, Dist. Faridpur, Bangaladesh. But at paragraph- 15 of the cross-examination he admitted that he has not submitted charge sheet against the present appellants under Foreigner's Act. Since the confession before the police is not admissible and no material is available to show that as foreigner they have entered the Indian Territory, rightly he has not submitted charge sheet against the appellants under Foreigner's Act. On the other hand the judgment of the learned trial court is silent as to the material available which prompted the trial court to convict them under section 14 of the Foreigner's Act. Hence, the question of convicting the appellants under section 14 of the Foreigner's Act is not proved by the prosecution beyond all reasonable doubt. The conviction and sentence against the present appellants under section 14 of the Foreigner's Act is also not proved.

In view of the aforesaid analysis, this Court is of the view that the conviction and sentence passed by the learned trial court against the appellants for the offence under section 395 of I.P.C. read with section 397 of I.P.C. is proved, but due to want of material the offence under section 14 of the Foreigners' Act remained disproved.

In the result, the conviction and sentence against the appellants under section 395 I.P.C. read with section 397 I.P.C. is hereby confirmed, but the conviction and sentence under section14 of the Foreigners' Act against the appellants is not agreed with. Thus, this Court acquitted the appellants for the offence under section 14 of the Foreigners' Act. Hence, the JCRLA is partly allowed.

The L.C.R. be returned forthwith.

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9.Section 482 of Cr. P. C

Kumar Raghavendra Singh vs Union of India And Ors

J. P. Das, J

In the High Court of Orissa, Cuttack.

Date of Judgment :13.12.2017

Issue

***In the matter of quashing the criminal proceeding against the petitioner pending for the offences punishable under section 13 (2) read with section 13(i)(e) of the PC Act* ,1988.**

This is an application under Section 482 of the Criminal Procedure Code with a prayer to quash the criminal proceeding against the petitioner vide T.R. Case No.01 of 2013 on the file of learned Special Judge, Special Court, Bhubaneswar which was originally pending before the learned Special Judge, Vigilance, Bhubaneswar vide T.R. Case No.22 of 2011, arising out of Cuttack Vigilance P.S. Case No.02 of 1996 charge sheeted for the offences punishable under Section 13(2) read with Section 13(i)(e) of the Prevention of Corruption Act, 1988.

With the allegations of accumulation of assets beyond known source of income by the petitioner who was working as the Planning Officer in the Office of the Principal Chief Conservator of Forest, Bhubaneswar an enquiry was conducted and pursuant thereto his house and office were searched by the Vigilance Department on 22.12.1995. Finding incriminating materials, the F.I.R. was registered against the petitioner on 08.01.1996 with the allegations that during the period from 01.05.1982 to 29.12.1995, he committed criminal misconduct acquiring disproportionate assets to a tune of Rs.14,38,435/- which, he could not account for satisfactorily. After completion of investigation, sanction order was obtained from the Ministry of Environment and Forest, Government of India, since the petitioner was an I.F.S. Officer and the charge sheet was submitted on 31.12.2010. The learned Special Judge, Vigilance, Bhubaneswar took cognizance of the offences by order dated 27.04.2012. Thereafter, the petitioner filed Writ Petition (Criminal) No. 674 of 2011 before this Court with a prayer to quash the proceeding on the grounds of malafide investigation, invalid sanction and the delay in the prosecution. The matter was considered and some interim orders were passed directing the vigilance department to produce certain documents and by order dated 21.02.2016, the petitioner was permitted to convert the writ petition to criminal application under Section 482 of the Criminal Procedure Code and

consequently the present application was renumbered and placed for consideration.

The petitioner has assailed the order of cognizance mainly on the grounds as follows:

(i) the investigation was unfair and misdirected since the income of the petitioner from agriculture was not taken into consideration. The income of the wife and financial assistance received from the family members of the petitioner were also not taken into consideration even though those were shown by the petitioner in his income tax returns;

(ii) the valuation of the properties was inflated reducing the expenditure undertaken by the petitioner, which if considered properly would show the assets of the petitioner to be much less than his known source of income;

(iii) the properties and assets of the petitioner acquired prior to the check period were wrongly calculated while assessing the assets of the petitioner;

(iv) the sanction order obtained against the petitioner was invalid for the reasons that although the sanctioning authority asked the State Government and the Investigating Agency to re-consider the submissions made on behalf of the petitioner, those were not considered and the sanction order was obtained in a mechanical fashion and

(v) there has been a delay of more than twenty years in the meantime which has seriously prejudiced the petitioner having spent all these years with mental agony and apprehension.

The learned counsel for the petitioner while submitting the aforesaid points, placed different materials on record with the contention that the pleas as taken by the petitioner regarding his source of income were placed before the Investigating Agency but those were not properly considered and valuations have been assessed with imaginary calculations. It was strenuously contended that the petitioner has shown all his income in his income tax returns and in statements of assets submitted to his employer but all those were not taken into consideration by the Investigating Agency. It was mostly stressed upon that despite repeated correspondences from the Government of India to the State Government and communicated to the Investigating Agency to consider the submissions of the petitioner with regard to the sanction order, those were not considered by the Investigating Agency and hence, the sanction order was not valid and

proper. Lastly, it was submitted that there is inordinate delay in the proceeding of this case.

Per contra, it was submitted by learned counsel appearing for the State, Vigilance, that the contentions as to the details of income of the petitioner from other sources and the allegation that those were not properly considered by the Investigating Agency are the materials, which may be considered at the time of trial, but it is not permissible to be thrashed out at the time of taking cognizance. It was further submitted that the materials as found in course of investigation made out a prima-facie case against the petitioner for the alleged offences and hence the order of cognizance passed by the learned trial court cannot be quashed in exercise of the power under Section 482 of the Criminal Procedure Code. As regards the delay in the proceeding, it was submitted on behalf of the State, Vigilance, that the investigation of the case was completed in the year 2002 but the sanction was obtained in the year 2010 only for the dilatory tactics adopted by the petitioner by making repeated representations to the Government of India as well as to the State Government and in the process the sanction order was delayed and after obtaining the same in the year 2010 the charge sheet was immediately submitted. It was further submitted that even after filing of the charge sheet and taking of cognizance, the matter has been delayed due to the application filed by the petitioner before this Court and hence, the delay in the proceeding cannot be attributed to the prosecuting agency so as to consider any benefit in favour of the petitioner. Thus, it was submitted that the petitioner does not have any merit in his contentions so as to get the relief as has been prayed for.

A number of citations have been placed on behalf of both the sides in support of their respective contentions.

It was submitted by the learned counsel for the petitioner that the cognizance in a case can be quashed, if it is found out that the investigation is perfunctory and no prima-facie case is made out against the petitioner. As against this, it was submitted on behalf of the State, Vigilance that the material particulars to make out a case in favour of the petitioner have been submitted in the charge-sheet and the discrepancies, as alleged can be gone into only in course of trial but not at the time of taking cognizance of the offence.

The position of law is undisputed that at the time of taking cognizance, the court is simply to see as to whether the allegations as

brought out on record without being controverted make out a prima-facie case against the accused. At the time of taking cognizance, the possible defence to be taken by the accused or the materials to controvert the allegations against the accused are not permissible to be scanned through. In the case at hand, the detailed calculation sheets have been prepared showing that the petitioner was in possession of the assets disproportionate to his known source of income. Some materials were placed by the learned counsel for the petitioner submitting that the incomes of the petitioner were not properly calculated and imaginary valuations have been placed and those, if considered in proper perspective, shall make out no case against the petitioner. It was also submitted that the documents as relied upon by the petitioner were very much before the Investigating Agency and are on record, which need to be considered for granting the relief in favour of the petitioner. Suffice it to say that the court is not required to go into the details of the materials either in favour of the prosecution or in favour of the accused at the time of taking cognizance, if simply on the face of the record, the allegations, as made, make out a prima-facie offence. Here, in order to consider the submissions made on behalf of the petitioner, this Court has to enter into a detailed calculation of the income of the petitioner from other sources, the expenditures claimed to have been incurred and the assessment of valuation of the properties, which is neither feasible nor permissible at this stage.

As regards the validity of the sanction order, it was submitted on behalf of the State that once a sanction is granted, it cannot be reviewed or recalled. It was submitted by the learned counsel for the petitioner that as per the settled position of law the granting of sanction being an administrative act can be reviewed and recalled. Be that as it may, in this case sanction order has not been recalled, but simply some correspondences were made between the Central Government and the State Government regarding consideration of the representations of the petitioner made before them. In this regard, it was submitted and placed on behalf of the State, Vigilance, that being asked for by the Government of Odisha in G.A. Department, replies have been furnished and all those correspondences being subsequent to the completion of investigation, it was intimated that all the objections raised by the petitioner had been taken into consideration during the investigation. That part, it is not the

case of the petitioner that there was no sanction or the sanction order was invalid on some legal grounds so as to quash the order of cognizance. Of course, it was submitted on behalf of the State, Vigilance that the prosecution against the petitioner being under the order of the Special Court Act, no sanction is necessary whereas it was submitted by the learned counsel for the petitioner that the relevant provision having come into effect much after the completion of the investigation in this case, the contentions raised on behalf of the state, Vigilance is not tenable. However, I do not want to delve into that question in view of my aforesaid observation that there existed a sanction order against the petitioner which was not recalled by the concerned authority.

Now, coming to the question of delay, it is the own case of the petitioner that he made several representations to the Central Government as well as to the State Government between the period of 2004 to 2010 and in the process there was delay in obtaining the sanction order. Thereafter the cognizance was taken in the year 2012 and thereafter, the petitioner has also assailed the prosecution before this Court in different forums. Thus, the delay in the proceeding of the present case cannot be attributed solely to the prosecution, for quashing of cognizance.

It needs no mention that a case wherein corruption against a public servant, moreso like the petitioner holding a high ranking Office has been made, cannot be thrown out merely on the ground of delay.

In view of the aforesaid discussions and findings, I am of the considered opinion that the contentions as raised on behalf of the petitioner cannot be gone into at the time of taking cognizance and the petitioner if so advised can raise those at the time of framing of charge which would be considered according to law by the learned trial court. Since the matter has been delayed, the learned trial court would do well to complete the trial as expeditiously as possible and the petitioner shall co-operate for the purpose.

Accordingly, this application is dismissed being devoid of any merit and disposed of accordingly.

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10. Section 37 (1) of OCH & PFL Act

Rasananda Samal vs Commissioner Consolidation,Orissa,Cuttack and others .

Biswanath Rath, J.

In the High Court of Orissa,Cuttack

Date of Judgment-01. 12. 2017

Issue

In the matter of order passed by the Commissioner, Consolidation and Settlement, Cuttack under section 37 (1) of the OCH & PFL Act – Challenged in writ petition.

This writ petition involves challenge to the order of the Commissioner, Consolidation & Settlement, Cuttack passed in R.C. No.395 of 2004 thereby dismissing the claim of the petitioner involving an application under Section 37(1) of the O.C.H. & P.F.L. Act.

Short background involved in the case is that the land under dispute in the nature of homestead was recorded in the name of Mayadhar Mishra and others in Khata No.295, Plot No.916, Ac.0.130 decimals and the plot was claimed to be under possession of Hadibandhu Behera in Sikim Khata No.19 in 1930 record of rights. Hadibandhu Behera died prior to 1939 leaving behind his widow, namely, Nila and daughter Sukhi. Nila, out of Ac.0.130 decimals alienated Ac.0.30 decimals in favour of Rasananda Behera, the father of the opposite party nos.2 and 3 by Registered Sale Deed No.4801 dated 17.11.1939 and balance Ac.0.100 decimals in favour of her daughter Sukhi by Registered Sale Deed No.4802 dated 27.11.1939.Said Rasananda Behera sold Ac.0.015 decimals out of Ac.0.030 decimals of land by Registered Sale Deed No.5385 dated 27.11.1943 in favour of Sukhi Dei and, thus, after the purchase Sukhi became the owner of Ac.0.115 decimals in Plot No.916. It is further stated that Sukhi Dei was remaining as owner in possession of Ac.0.115 decimals of land and the father of opposite party nos.2 and 3 was the owner of Ac.0.015 decimals of land. Vide notification dated 21.6.1961, Government of Orissa acquired Ac.0.010 decimals of land from the ownership of Sukhi Dei for government purpose and Sukhi Dei has also been paid with due compensation. Thus, at this stage, Sukhi Dei continued to be the owner of Ac.0.105 decimals of land from which she alienated Ac.0. Ac.0.095 decimals of land in favour of the petitioner by Registered Sale Deed No.1300 dated 25.2.1963 with due delivery of

possession of the land in favour of the petitioner. After alienation of the land, Ac.0.090 decimals of land in favour of the petitioner, Sakhi Dei remained owner of Ac.0.015 decimals of land and it is at this point of time, opposite party nos.2 and 3 purchased Ac.0.025 decimals of land from Sukhi Dei by way of Registered Sale Deed No.6818 dated 3.12.1980 but without considering the land remained in existence of the vendor of the petitioner so also the vender of the opposite party nos.2 and 3. It is at this point of time, consolidation operation started in the area where the Consolidation Authority recorded Ac.0.080 decimals of land as against the petitioner alleged to have been lesser than the land sold to the petitioner by Registered Sale Deed No.1300 dated 25.2.1963 and final record of rights are also published accordingly as appearing in the year 1992. Petitioner having come to know the recording of lesser land involving the petitioner, petitioner preferred R.C. No.395 of 2004 challenging the illegalities made in hal consolidation record and thereby prayed for due correction in the consolidation record of right. The revision was dismissed by final order vide Annexure-4 holding against the petitioner.

Learned counsel for the petitioner assailing the impugned order contended that despite of a clear picture available, particularly, with regard to Sukhi Dei alienating Ac.0.090 decimals of land in favour of the petitioner by way of Registered Sale Deed dated 25.2.1963 and Registered Sale Deed in favour of opposite party nos.2 and 3 of a higher extent of land and there being a sale of higher extent of land in favour of opposite party nos.2 and 3 without entitlement of the vendor, the Revisional authority failed in appreciating this aspect of the matter and thereby arrived at the wrong and illegal impugned order. Learned counsel for the petitioner contended that unless the impugned order is interfered with the petitioner will suffer great prejudice for no fault of him.

To the contrary, Sri U.K. Mohanty, learned counsel appearing for the opposite party nos.2 and 3 referring to the contentions of opposite party nos.2 and 3, as narrated in the counter affidavit, contended that the claim of sale in favour of the petitioner by Sukhi Dei to the extent of Ac.0.090 decimals of land by virtue of Registered Sale Deed dated 25.2.1963 and giving delivery of its possession to the petitioner of the while land are all false for non filing of the sale deed by the petitioner nor filing of a certified

copy thereof to establish his case in the writ petition. Learned counsel for the opposite party nos. 2 and 3 claimed that the petitioner has no sustainable claim. The opposite party nos.2 and 3 also alleged involvement of malafide intention and stage managed sale deed obtained fraudulently in the guise of a will, which also was the bone of contention at the instance of Sukhi Bewa in T.S.No.69 of 1981. But unfortunately, the suit was dismissed for default on account of death of Sukhi Bewa. Referring to the plaint narrations, the counsel appearing for the opposite party nos.2 and 3 attempted to justify the claim on behalf of the opposite party nos.2 and 3. Denying the allegation in the writ petition, learned counsel appearing for the opposite party nos.2 and 3 prayed for dismissal of the writ petition.

Sri Birkam Senapati, learned Additional government Advocate supporting the stand of opposite party nos.2 and 3 and taking this Court to the observations of the learned authority below vide impugned order submitted that there is no infirmity in the impugned order.

Considering the rival contentions of the parties, this Court finds there is no dispute that even after acquisition of land by the State Government belonging to Sukhi Dei, Sukhi Dei still remains owner of Ac.0.105 decimals of land. There also appears a sale deed in favour of thepetitioner establishing the sale of Ac.0.090 decimals of land in favour of the petitioner by virtue of a sale deed dated 25.2.1963. There is also no denial to the fact that at the same time there also exists a sale deed dated 3.11.1980 in favour of opposite party nos.2 and 3 establishing sale of Ac.0.025 decimals of land to the father of the opposite party nos.2 and 3. Thus, here the question remains to be decided until and unless the sale deed standing in favour of the petitioner is not nullified by any court of law in spite of the vendor of the opposite party nos.2 and 3 had a sale deed with the opposite party nos.2 and 3 to the extent of Ac.0.025 decimals of land, no right of opposite party nos.2 and 3 can accrue in respect of Ac.0.025 decimals as their vendor did not have such land with her as on the date of that sale deed. Taking into consideration of the facts involving sale transaction between the petitioner and opposite party nos.1 and 2 and on perusal of the discussions on the case of the parties involving impugned order at Annexure-4, this Court finds the authority below has taken into account the above facts in deciding the claim of the petitioner. When the

authority below taking into consideration the rival contentions parties and materials available in their support, came to observe that in 1930 settlement Plot No.916, Ac.0.13 decimals under Malik Khata No.295 was recorded n favour of Mayadhar Mishra, Jagnyeswar Mishra and Trilochan Mishra as stitiban status with note of sikim possession of Hadibandhu Mishra. After the death of Hadibandhu Mishra, his wife Nila Bewa alienated the sikim right for an area of Ac.0.03 decimals of land out of Sabik Plot No.916, Ac.0.13 decimals out of Sabik Plot No.916, Ac.0.13 decimals to Rasananda Behera, the deceased father of the opposite party nos.2 and 3. Similarly, on the same day, Nila Bewa alienated her sikim right over rest of the area Ac.0.10 decimals out of Sabik Plot No.916, Ac.0.13 decimals to her own daughter Sakhi Dei through Registered Sale Deed dated 17.11.1939 where after Rasananda Behera further alienated Ac.0.015 decimals out of his purchased sikim area Ac.0.030 decimals of land to Sakhi Dei. Thus, Sakhi Dei became the owner of total land Ac.0.115 decimals. Accepting the claim of opposite party nos.2 and 3 that Sakhi Dei alienated Ac.0.025 decimals to Rasananda Behera through Registered Sale Deed dated 3.12.1980, petitioner became the sikim right purchaser of Ac.0.09 decimals. Records further also revealed that from the purchased land of the petitioner adjoins to the canal of the Irrigation Department. The Irrigation Department acquired Ac.0.010 decimals of land for canal purpose. So the petitioner remained with balance Ac.0.080 decimals of land as against his purchased sikim area Ac.0.090 decimals of land. It is fur the detailed discussions and the above observations of the lower authority and taking into consideration the claim of the petitioner that the petitioner had purchased all total Ac.0.090 decimals of land and for fact revelation that Irrigation Department has acquired land from the portion of the petitioner's land, this Court finds there no illegality in the sale of Sakhi Dei to an extent of Ac.0.025 decimals in favour of opposite party nos.2 and 3.

As a result, this Court finds there remains no wrong recording in the settlement record of right so far as the petitioner is concerned. For the above, this Court finds there is no infirmity in the impugned order leaving any scope for this Court to interfere in the same. The writ petition thus failed. However, there is no order as to cost.

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11. Section 166 of MV Act

Navjyot Singh and Ors. Vs. D.T.C. and Ors.

Kurian Joseph and Amitava Roy, JJ.

In the Supreme Court Of India

Date of Judgment- 07.12.2017

Issue

In the matter of admissibility of future prospects in case of self employed persons.

Leave granted.

The main question arising for consideration in these appeals is with regard to the application for future prospects. The other question is on the computation of income.

The Constitution Bench, in a recent judgment dated 31.10.2017 in National Insurance Co. Limited v. Pranav Sethi and Ors. (SLP (C) No. 25590 of 2014 & Batch), has held that even in the case of self-employed persons, addition of income by way of future prospects is permissible. In the instant case, the deceased was aged 42 years and hence, as per the guidelines, it is not in dispute that enhancement shall be at the rate of 25%.

There is a vast difference between the findings of the Tribunal and the High Court with regard to computation of income. The Tribunal, on the basis of Income Tax Returns filed after the death and the evidence tendered by the colleagues, calculated the income at Rs. 1,46,618/- per month. However, the High Court, having regard to the Income Tax Returns, entered a finding that the monthly income was only Rs. 59,250/-.

Having heard the learned Counsel appearing on both sides and having gone through the materials available on record, we are of the view that a reasonable increase in the income is required in the instant case. Of course, the Appellants are entitled to 25% enhancement by way of future prospects. On a rough and ready estimate, we are of the view that it will be just, fair, proper and reasonable to fix the compensation at Rs. 75,00,000/- (Rupees Seventy Five Lakhs). The same shall carry interest at the rate of 9% from the date of application. The amount already paid shall be duly adjusted. The Respondents are directed to deposit the amount due as per this judgment within a period of three months from today. In view of the above, the appeals are disposed of.

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12. Section 166 of MV Act

Halappa Vs. Malik Sab

Dipak Misra, C.J.I., A.M. Khanwilkar & Dr. D.Y. Chandrachud, JJ.

In the Supreme Court of India

Date of Judgment- 15.12.2017

Issue

In the matter of awarding compensation in a case of 100 % disability.

The High Court of Karnataka by a judgment dated 12 July 2011 reversed a decision of the Motor Accident Claims Tribunal awarding compensation to the Appellant in the amount of Rs. 8,66,000/- with interest @ 7% per annum. While reversing the award of compensation, the High Court has come to the conclusion that the Appellant was sitting on the mudguard of a tractor and this was not a risk insured by the insurer. Upon this finding, the High Court allowed the appeal of the insurer and rejected the appeal filed by the Appellant for enhancement of compensation.

The accident took place on 24 September 2005. The Appellant was 28 years old at the time of the accident. The case of the Appellant is that on 24 September 2005 he was visiting Sirigere to attend an event. A demonstration of tractors was being held at 11.30 A.M. by Sonalika tractors. The Appellant, who is an agriculturist, claimed that when he approached the tractor, the driver was unable to bring it to a halt as a result of which it turned turtle and collided with the Appellant resulting in his sustaining grievous injuries. A first information report was registered at the Bharamasagara Police Station under Case Crime 147 of 2005 and a charge-sheet was filed against the driver for offences punishable Under Sections 279 and 338 of the Penal Code.

The Appellant claimed compensation in the amount of Rs. 25,00,000/-. The Appellant was examined as PW 1 in support of his claim. PW 2 Dr Jayaprakash was examined to prove the nature of the injuries sustained by the Appellant. The evidence indicated that immediately after the accident the Appellant was taken for treatment to the community health centre, Sirigere where he was administered first aid. He was thereafter shifted to Bapuji Hospital, Davangere from where he was referred to the M S Ramayya Hospital, Bangalore for further treatment. The

medical records showed that the Appellant had suffered paraplegia with a compression fracture. The Appellant has been permanently immobilized, is wheel-chair bound, and requires artificial support for bladder and bowel evacuation. The lower portion of his body has been paralyzed. Dr Jayaprakash, PW 2, deposed in evidence that the disability of the Appellant is one hundred per cent since both his lower limbs have been paralyzed resulting in a loss of bladder and bowel control.

Before the Tribunal the defence of the insurer was that the Appellant was riding on the mudguard of the tractor, this having been stated in the FIR. According to the insurer, the policy of insurance did not cover the risk of anyone other than the driver of the tractor. The Tribunal rejected the defence of the insurer and relied upon the testimony of the Appellant which was found to have been corroborated by the evidence of PW 3, an eye-witness to the incident. On the aspect of compensation the Tribunal noted that the Appellant belongs to a family of agriculturists which has a land holding of 5 acres and 25 gunthas. The Appellant was married. The Tribunal did not accept the plea of the Appellant that his monthly income was Rs. 10,000/-, in the absence of cogent proof. The Tribunal assumed the income of the Appellant to be Rs. 3,000/- per month. The age of the Appellant at the time of the accident being 28 years, the Tribunal applied a multiplier of 16 and computed the compensation on account of the loss of future earning capacity at Rs. 5,76,000/-. An additional amount of Rs. 50,000/- was awarded towards loss of amenities and Rs. 30,000/- for future medical expenses. An amount of Rs. 2,10,000/- was awarded towards medical expenses, pain and suffering. Consequently, a total compensation of Rs. 8,66,000/- was awarded together with interest at 7% per annum from the date of the claim petition until realization. The driver, owner and insurer have been held to be jointly and severally liable.

The Appellant filed an appeal for enhancement of compensation. The insurer had also filed an appeal questioning its liability. The High Court has allowed the appeal of the insurer and dismissed the appeal filed by the Appellant. The High Court held that in the first information report which was registered on the date of the accident on the basis of the statement of the Appellant, it was stated that the Appellant was sitting on the mud-guard next to the driver of the tractor. Subsequently on 30 September 2005 another statement was recorded by the police in which the Appellant

stated that the accident had taken place as a result of the rash and negligent act of the tractor driver, due to which the tractor had turned turtle and fallen over the Appellant. In the view of the High Court, the police had attempted to protect the liability of the owner and had recorded a further statement to support the plea that the Appellant was a third party and that the tractor had fallen upon him. The High Court has also doubted as to how the police could have recorded the statement of the Appellant on 30 September 2005 when he was shifted to M S Ramayya Hospital in Bangalore.

Learned Counsel appearing on behalf of the Appellant submits that the High Court has manifestly erred in reversing the considered judgment of the Tribunal. The Appellant urged that the finding of fact recorded by the Tribunal on the basis of substantive evidence could not have been reversed purely on the basis of the FIR. Moreover, it was urged that the insurer had not produced any ocular evidence to displace what was stated by the Appellant in the course of his deposition and which was supported by PW 3 who had witnesses the accident.

On the other hand, the learned Counsel appearing on behalf of the insurer has supported the judgment of the High Court and urged that the finding that the Appellant was injured while riding on the mud-guard of the tractor is correct. Consequently it was urged that the insurance policy which was issued to the owner did not cover the risk arising from a third party riding on the tractor and there was hence a breach of the insurance policy.

The judgment of the Tribunal indicates that the defence of the insurer based on the first information report, the complaint Exh. P1 and the supplementary statement of the Appellant at Exh. P2 was duly evaluated. The Tribunal, however, observed thus:

...the Respondent No. 3 and RW. 1 submitted that the Petitioner has invited the alleged unfortunate accident but except the FIR and complaint Ex. P. 1 the Respondent No. 3 has not produced any documents to show that at the time of accident the Petitioner was travelling as a passenger by sitting on the engine of the tractor in question. During the course of cross-examination RW. 1 has admitted that the Respondent No. 3 has maintained

a separate file in respect of accident in question and he has also admitted that the Respondent No. 3 has not produced the investigator's report of this case. Admittedly the Respondent No. 3 has not examined any independent eye witness to the accident to prove that on the relevant date and time of the accident the Petitioner was travelling as a passenger by sitting on the engine of the tractor. If really the Petitioner has sustained grievous injuries by falling down from the engine of said tractor the Respondent No. 3 insurer could have produced the separate file maintained by it in respect of the accident in question and it could have also produced investigator's report in respect of the said accident but admittedly the Respondent No. 3 has not produced the said separate file and investigator's report in respect of the accident in question for the reasons best known to it. On the other hand as already stated above it is clear from the statement of Petitioner on oath and eye witness and from the supplementary statement of Petitioner at Ex. P. 2 and police statement of witnesses at Ex. P. 3 and Charge Sheet at Ex. P. 6 it is clear that due to rash and negligent driving of said tractor by Respondent No. 1 the said tractor turtle down and fell over the Petitioner who was about to board the tractor and as a result of which the Petitioner has sustained grievous injuries. Moreover as already stated above the Investigating Officer concern after detail investigation has filed the Charge Sheet against the Respondent No. 1 for the offences punishable Under Section 279 and 338 Indian Penal Code...

The High Court has proceeded to reverse the finding of the Tribunal purely on the basis that the FIR which was lodged on the complaint of the Appellant contained a version which was at variance with the evidence which emerged before the Tribunal. The Tribunal had noted the admission of RW1 in the course of his cross-examination that the insurer had maintained a separate file in respect of the accident. The insurer did not produce either the file or the report of the investigator in the case. Moreover, no independent witness was produced by the insurer to displace the version of the incident as deposed to by the Appellant and by PW 3. The cogent analysis of the evidence by the Tribunal has been displaced by the High Court without considering material aspects of the evidence on the record. The High Court was not justified in holding that the Tribunal had arrived at a finding of fact without applying its mind to the documents produced by the claimant or that it had casually entered a finding of fact.

On the contrary, we find that the reversal of the finding by the High Court was without considering the material aspects of the evidence which justifiably weighed with the Tribunal. We are, therefore, of the view that the finding of the High Court is manifestly erroneous and that the finding of fact by the Tribunal was correct.

That leaves the Court to determine the quantum of compensation. The medical evidence on the record shows that the lower limbs of the Appellant have been paralyzed resulting in a loss of bladder and bowel control. The medical evidence establishes that the disability of the Appellant is one hundred per cent. The medical records have been scrutinized by the Tribunal. The Appellant suffers from traumatic paraplegia and was hospitalized for 42 days. The Appellant was 28 years of age when the accident took place on 24 September 2005. In our view, the monthly income of the Appellant, having regard to the facts and circumstances of the case should be taken at Rs. 4,000/-. After allowing for future prospects and making a deduction for present expenses, the compensation payable to the Appellant shall stand enhanced by an amount of Rs. 1,50,000/- from Rs. 5,75,000/- to Rs. 7,75,000/-. The amount for future medical expenses which has been fixed at Rs. 30,000/- should be enhanced to Rs. 1,20,000/- having regard to the serious nature of the disability. In other words, the compensation of Rs. 8,66,000/- awarded by the Tribunal shall be enhanced by an additional amount of Rs. 2,70,000/-. The Appellant shall be entitled to interest @7% p.a. from the date of the claim petition until realization. The insurer shall deposit the compensation or, as the case may be, the balance payable in terms of this judgment within a period of 12 weeks from today before the Tribunal which shall be released to the Appellant upon due verification.

The appeals are allowed in the above terms with no order as to costs.

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13. Section 138 of NI Act

B. Sunitha Vs. The State of Telengana and Ors.

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

In the Supreme Court of India

Date of Judgment - 05.12.2017

Issue

In the matter of dispute regarding the term "legally enforceable debt" in order to attract section 138 of NI Act.

Relevant Extract

This appeal has been preferred against the order dated 14th October, 2015 of the High Court of Judicature at Hyderabad in CRLP No. 3526 of 2015, thereby, the High Court declined to quash the proceedings initiated against the Appellant Under Section 138 of the Negotiable Instruments Act, 1881('the Act').

The proceedings were initiated by the Respondent who is an advocate in whose favour the Appellant executed a cheque allegedly towards his fee. The same was dishonoured. The stand of the Appellant is that Section 138 of the Act is not attracted as there was no legally enforceable debt. The Appellant having already paid a sum of Rs. 10 lakhs towards fee, the cheque was taken from the Appellant by way of abuse of position and the transaction was void Under Section 23 of the Indian Contract Act, 1872 ('Contract Act'). Claim for fee based on percentage of the decretal amount was unethical. It was submitted that the Appellant, as a client, being in fiduciary relationship, burden to prove that the fee was reasonable and had been voluntarily agreed to be paid was on the Advocate. The Advocate by using his professional position could not be allowed to exploit a client by taking signatures on a cheque and no presumption of enforceable debt arises, specially when no account maintained in regular course of business was furnished.

Reference may be briefly made to the facts on record. The Appellant's husband died in a motor accident on 30th July, 1998. She along with her children and parents of the deceased filed a claim before the Motor Accident Claims Tribunal (MACT) through the Respondent as an advocate. The MACT awarded compensation. The Appellant paid a sum of Rs. 10 lakhs towards fee on various dates. However, the Respondent forced the Appellant to sign another cheque of Rs. 3 lakh on 25th October, 2014 despite her stating that she was unable to pay more fee as she had no funds in her account. The Respondent sent e-mail dated

2nd November, 2014 claiming his fee to be 16% of the amount received by the Appellant.

Complaint dated 11th December, 2014 was filed before the Court Under Section 138 of the Act stating inter alia that the cheque which was issued in discharge of liability having been returned unpaid for want of funds, the Appellant committed the offence for which she was liable to be punished. The Appellant was summoned by the Court against which she approached the High Court stating that there was no legally enforceable debt as fee claimed was exorbitant and against law. The claim was in violation of Advocates Fee Rules and Ethics as fee could not be demanded on percentage of amount awarded as compensation to the Appellant. Her signatures were taken when she was under distress.

The petition was contested by the Respondent by submitting that the Appellant having agreed to pay the professional fee and having availed his professional services, she could not contest the claim for fee. It was submitted that the Respondent had engaged services of other senior advocates and paid huge amount for their services at various courts including the Supreme Court.

The Appellant, in support of her prayer for quashing, inter alia, argued before the High Court that the fee claimed by the Respondent was against the A.P. Advocates' Fee Rules, 2010 of Subordinate Courts. It was also submitted that the claim of the Respondent was against ethics and public policy and hit by Section 23 of the Contract Act.

The High Court held that Advocates' Fee Rules are only for guidance and there was no bar to fee being claimed beyond what is fixed under the Rules. The claim of the Respondent was that the amount included his fee for engaging an advocate in the High Court and the Supreme Court. Thus, the High Court dismissed the quashing petition.

We have heard learned Counsel for the parties and perused the record.

The main contention raised on behalf of the Appellant is that charging percentage of decretal amount by an advocate is hit by Section 23 of the Contract Act being against professional ethics and public policy, the cheque issued by the Appellant could not be treated as being in discharge of any liability by the Appellant. No presumption arose in favour of the Respondent that the cheque represented legally enforceable debt. In any case, such presumption stood rebutted by settled

law that claim towards Advocate's fee based on percentage of result of litigation was illegal. Signing of the cheque was by way of exploitation of fiduciary relationship of Advocate and the client.

In support of his submission that charging of exorbitant fee and calculating the sum with reference to the result of the litigation was against public policy, reliance has been placed on judgments of this Court in In the matter of Mr. G., a Senior Advocate of the Supreme Court (1955) 1 SCR 490 at 494, R.D. Saxena v. Balram Prasad Sharma : (2000) 7 SCC 264, para 41, V.C. Rangadurai v. D. Gopalan : (1979) 1 SCC 308.

Learned Counsel for Respondent No. 2-complainant supports the impugned order. He submitted that the cheque of the Appellant having dishonored, statutory presumption was available in his favour and no ground was made out for quashing. There was no legal bar to the claim of the complainant towards his professional fees. Learned Counsel for the complainant did not dispute that a sum of Rs. 10 lakhs has already been received towards fee. There was no written agreement about the quantum of fee nor any account was maintained. He also did not dispute the e-mail dated 2nd November, 2014 wherein basis of the claim of fee is 16% of the decretal amount received by the Appellant.

The first question which needs consideration is whether fee can be determined with reference to percentage of the decretal amount. Second question is whether the determination of fee can be unilateral[1] and if the client disputes the quantum of fee whether the burden to prove the contract of fee will be on the advocate or the client. Third question is whether the professional ethics require Regulation of exploitation in the matter of fee.

One of the issues was dealt with by a single Bench judgment of the Madras High Court in C. Manohar v. B.R. Poornima (2004) Crl.L.J. 443. R. Banumathi, J (as her Lordship then was) held that no presumption could arise merely by issuance of a cheque that amount stipulated in the cheque was payable towards fee. In absence of independent proof, issuance of cheque could not furnish cause of action Under Section 138 of the Act in the context of an advocate or client. The observations relevant in the context are as follows:

The case in hand is an example of the present day trend of the legal profession. Legal profession is essentially service oriental. Ancestor of today's lawyers was no more than a spokesperson, who rendered his services to the needy members of the society, by putting forth their case

before the authorities. Their services were rendered without regard to remuneration received or to be received. With the growth of litigation, legal profession became a full time occupation. The trend of the legal profession has changed... profession has almost became a trade. There is no more service orientation.

The relationship between the lawyer and the client is one of trust and confidence. The client engages a lawyer for personal reasons and is at liberty to leave him for the same reasons. Considering the relationship between the lawyer and the client and the present day trend in the profession, it has to be carefully seen whether the complainant has proved that the amount due of Rs. 43,600/- is being payable towards him.

To attract the penal provisions Under Section 138 N.I. Act, a cheque must have been drawn by the Accused on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge in whole or in part, of any debt or other liability due. That means, the cheque must have been issued in discharge of debt or other liability wholly or in part. The cheque given for any other reasons not for the satisfaction of any debt or other liability, even if it is returned unpaid-, will not meet with penal consequences.

Case of the complainant is that on behalf of the Accused, he has filed claim petitions in M.C.O.P. Nos. 2339 of 1992 and 246 of 1993. Two civil cases were also filed. There is nothing to show that the complainant/Advocate himself has paid the stamp duty and bore the legal fees. The complainant has not produced any agreement showing as to what was the arrangement between him and the Accused, as to how much is the fee payable and whether the Accused agreed for payment of stamp duty by her counsel itself. In the absence of any agreement, Ex. P-1 cheque cannot be said to have been issued for the purpose of discharge of any substantial debt or liability. Urging the Court to raise the presumption Under Section 139 N.I. Act, the learned Counsel for the Appellant has relied upon M/s. Modi Cements Ltd. v. Kuchil Kumar Nandi: (1998) 3 SCC 249] wherein the Supreme Court has held that once the cheque is issued by the drawer a presumption Under Section 139 N.I. Act must follow and merely because the drawer issues a notice to the drawee (Payee) or to the Bank for stoppage of the payment it will not preclude an action Under Section 138 of the Act by the drawee (Payee) or the holder of a cheque in due course. Of course, Under Section 139 N.I. Act, there is a presumption that unless the contrary is proved, the holder of the cheque

received the cheque for the discharge in whole or in part of any debt or other liability. But even in Section 139 N.I. Act, the legal presumption is created only for the cheque so received for the discharge in whole or in part of any debt or other liability. In the case on hand, the complainant being a practising advocate, has not proved the debt amount payable towards him by the Accused, who has engaged him as his lawyer to conduct the case. The finding of the trial Court that there is no debt or legally enforceable liability' does not suffer from any infirmity warranting interference.

The Bombay High Court in Re: KL Gauba : AIR 1954 Bom 478 held that fees conditional on the success of a case and which gives the lawyer an interest in the subject matter tends to undermine the status of the profession. The same has always been condemned as unworthy of the legal profession. If an advocate has interest in success of litigation, he may tend to depart from ethics.

In in the matter of Mr. G.: A Senior Advocate of the Supreme Court : (1955) 1 SCR 490, this Court held that the claim of an advocate based on a share in the subject matter is a professional misconduct.

In VC Rangadurai v. D. Gopalan : (1979) 1 SCC 308, para 31, it was observed that relation between a lawyer and his client is highly fiduciary in nature. The advocate is in the position of trust.

Rule 20 of Part VI, Chapter II, Section II of the Standard of Professional Conduct and Etiquette reads as follows:

An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof.

Thus, mere issuance of cheque by the client may not debar him from contesting the liability. If liability is disputed, the advocate has to independently prove the contract. Claim based on percentage of subject matter in litigation cannot be the basis of a complaint Under Section 138 of the Act.

In view of the above, the claim of the Respondent advocate being against public policy and being an act of professional misconduct, proceedings in the complaint filed by him have to be held to be abuse of the process of law and have to be quashed.

It was observed that recurring strikes by the bar had contributed to the piling up of arrears jeopardizing the consumers of justice and has thus led to weakening the system of administration of justice[5]. While considering the mounting cost of litigation, it was observed that fee charged by some senior advocates are astronomical in character. The corporate sector is willing to retain talent at a high cost. It develops into a culture and it permeates down below[6]. Role of the legal profession in strengthening the administration of justice must be in consonance with the mandate of Article 39A to ensure equal opportunity for access to justice. The legal profession must make its services available to the needy by developing its public sector. It was observed that like public hospitals for medical services, the public sector should have a role in providing legal services for those who cannot afford fee[7]. Maintenance of irreducible minimum standards of the profession is a must for ensuring accountability of the legal profession[8]. The methodology was required to be devised as a part of social audit of the profession wherein consumers of justice were required to be given role[9].

Referring to the lawyers' fee as barrier to access to justice, it was observed that it was the duty of the Parliament to prescribe fee for services rendered by members of the legal profession. First step should be taken to prescribe floor and ceiling in fees[10].

The appeal stands disposed of accordingly.

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