O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2017

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Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY
MONTHLY REVIEW OF CASES ON CIVIL, CRIMINAL & OTHER LAWS, 2017 (February)
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2. Section 115 of CPC
Bithika Mazumdar and ANR. Vs. Sagar Pal and Ors.
A.K. SIKRI & R.K. AGRAWAL, JJ.

In the Supreme Court of India.
Date of Judgment-01.02.2017
Issue
Limitation as per CPC whether can be applied - Discussed.

The appellants herein are the legal heirs of one Gautam Mazumdar (hereinafter referred to as the 'deceased') who died on 06.05.2007 in a road accident allegedly due to rash and negligent driving of goods carriage vehicle, when, according to the appellants, the said goods carriage vehicle bearing No. W.B.41/8002 plying on G.T. Road towards Durgapur to Asansol came from behind with high speed without headlights and ran over Gautam Mazumdar, a pedestrian, and fled away from the place of accident rather than helping the injured. The victim died on the spot due to the said accident.

The vehicle was insured by respondent No. 3-New India Assurance Company Limited. The appellants herein (who are the widow and minor daughter of the deceased) filed the claim for compensation because of the demise of Gautam Mazumdar in the said accident before the Motor Accidents Claims Tribunal, City Civil Court, Calcutta (hereinafter referred to as 'MACT'). MACT went ahead with the trial and recorded the evidence of the parties.

However, ultimately vide its orders dated 18.06.2009, MACT held that Kolkata Court did not have territorial jurisdiction to entertain the same and returned the said petition filed by the appellants for presentation thereof, in the Court of law competent to decide the said claim. The appellants filed review petition against that order which was also dismissed vide orders dated 10.04.2013.

Challenging this order, the appellants filed petition under Article 227 of the Constitution in the High Court of Calcutta which has been dismissed by the High Court on the ground of delays and laches stating that though MACT had dismissed the review petition of the appellants vide orders dated 10.04.2013, revisional application challenging that order was filed only on 03.03.2015 after

a delay of almost 2 years. Challenging that order, the present special leave petition is filed in which we have granted leave as aforesaid.

It is an admitted position in law that no limitation is prescribed for filing application under Article 227 of the Constitution. Of course, the petitioner who files such a petition is supposed to file the same without unreasonable delay and if there is a delay that should be duly and satisfactorily explained. In the facts of the present case, we find that the High Court has dismissed the said petition by observing that though there is no statutory period of limitation prescribed, such a petition should be filed within a period of limitation as prescribed for applications under Sections 115 of the Code of Civil Procedure. This approach of the High Court cannot be countenanced. As mentioned above, in the absence of any limitation period, if the petition is filed with some delay but at the same time, the petitioner gives satisfactory explanation thereof, the petition should be entertained on merits.

In the present case, we find that sufficient reasons were given by the appellants in the petition filed under Article 227. Moreover, the High Court should have also kept in mind that Gautam Mazumdar, who was the only earning member, died in the said accident and appellants are the widow and minor daughter of the deceased. In a case like this, the High Court should have considered the revisional application on merits rather than dismissing the same on the ground of delay.

In the aforesaid circumstances, the order of the High Court does not stand judicial scrutiny and, therefore, is liable to be set aside. At this stage, learned counsel appearing for the appellants has submitted that Gautam Mazumdar had died in the accident on 06.05.2007, i.e., more than 9 1/2 years ago and the appellants have still not been given any compensation. In these circumstances, his prayer is that since the entire evidence is available in respect of the earnings of the deceased and also that there is no dispute about the fact that he was 40 years of age at the time of the accident, this Court itself can fix the compensation on the basis of the aforesaid material which is placed on record. Learned counsel for the respondents also is agreeable for fixing the compensation by this Court in the aforesaid peculiar and unprecedented circumstances.

We find that the deceased was an employee and his employer, Ashok K. Shaw had appeared in the witness box as PW-2 before the MACT. He had deposed that the deceased was employed with him and was getting a salary of Rs.5,000/- per month. In this manner, the annual income of the deceased comes to Rs.60,000/-. We may assume that 1/3 of this income the deceased was spending on himself and the balance thereof, he was contributing to his family, i.e., the appellants herein. In this way, after adjusting 1/3 of the income, the annual contribution for the appellants herein would be Rs.40,000/-. Keeping in view the age of the deceased as 40 years, for awarding compensation, multiplier of 15 shall be applicable and after applying the same, the compensation is worked out at Rs.6 lakhs. We grant another sum of Rs.2 lakhs for loss of consortium to the appellants. In this manner, a total compensation of Rs.8 lakhs is fixed.

The appellants shall also be entitled to interest thereupon from the date of filing of the petition before MACT at the rate of 9 per cent per annum. However, from the aforesaid period, a period of two years shall be excluded which is to be attributed to the appellants in preferring the revision application before the High Court. The appellants shall also be entitled to cost of these proceedings which we quantify at Rs.50,000/-. The aforesaid amount shall be paid within a period of eight weeks from today. The appeal stands disposed of.

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3. Order 1 Rule 8 of CPC

Artatrana Behera And Others vs Purna Behera And Others .

Dr. A. K. Rath , J.

In the High Court of Orissa: Cuttack

Date of Judgment -03.01.2017

Issue

Defect in ascribing the name of the father of the defendant when could be pointed out by the office - if it will be treated irregular –Discussed.

Relevant Extract

The petitioners as plaintiffs instituted T.S No.88 of 2000 in the court of the learned Civil Judge (Junior Division), Puri seeking following reliefs; "(a) let a decree be passed declaring the communal land of the plaintiffs villagers and their right of pasteruring the land be confirmed and let it further be declared that the so-called order passed in W.L. Case No.83/93 is illegal invalid, fraudulent, collusive and acts of without jurisdiction which is not binding against the plaintiffs villagers in the suit property. (b) Let a decree of permanent injunction be passed prohibiting the defendants from making the permanent construction or changing the nature and character in any manner.

xxx xxx xxx"

The plaintiffs filed an application under Order 1 Rule 8 CPC for publication of the notice. In the draft notice, the defendant no.1 has been described as Purna Behera son of Ganesh Behera. The same has been approved by the court. Accordingly, notice was published in the daily 'Sambad' on 5.7.2015. Pursuant to the publication of notice, fourty three persons entered appearance and filed a petition to be impleaded as defendants. The defendants 1 and 2 have also filed written statement. While the matter stood thus, defendants filed an objection stating therein that the name of the father of defendant no.1 has been wrongly described in the notice and, as such, the notice is defective one. It is stated that defendant no.1 is the son of Banchha Behera but in the notice, his father's name has been wrongly mentioned as Ganesh Behera. Learned trial court came to hold that the plaintiffs have mentioned the name of defendant no.1 Purna Behera as son of Ganesh Behera though in the plaint he has been described as Purna Behera son of Banchha Behera. The defect has not been pointed out by the office while preparing the

draft notice. The defect in the description of the defendant hits the root of the matter with regard to identity of the party. The notice is defective. Accordingly, the plaintiffs have been directed to file draft notice under Order 1 Rule 8 CPC in correct format.

By this application under Article 227 of the Constitution, challenge is made to the order dated 21.8.2015 passed by the learned Civil Judge (Junior Division), Puri in T.S No.88 of 2000, whereby and whereunder the learned trial court directed the plaintiffs to file draft notice under Order 1 Rule 8 CPC in correct format so as to make paper publication.

In the case of Harihar Jena and others v. Bhagabat Jena and others, AIR 1987 Orissa 270 and Jogiram Mohapatra and others v. Sibaram Pradhan and others, 2005 (I) OLR 612. In Harihar Jena case , the notice did not indicate the name of the plaintiff, the name of the suit and the relief claimed. This Court held that the notice under the provision must disclose the nature of the suit as well as reliefs claimed therein in order to enable the persons interested to get themselves impleaded as parties to the suit either to support the case or oppose it. The notice must state about why the suit has been filed and what is the relief claimed therein and it must also state as to who are the persons who have been selected to represent the cause. It was further held that it is the responsibility of the Court under Order 1 Rule 8 CPC to give proper notice and when it becomes defective, the trial of the suit becomes vitiated.

In Jogiram Mohapatra case 2005 (I) OLR 612, this Court held that the provisions contained under Order 1 Rule 8 of the Civil Procedure Code are mandatory and not merely directory. The same are essential pre-conditions for trial of a representative suit. The notice must disclose the nature of the suit as well as relief claimed therein in order to enable the persons interested to get them impleaded as parties to the suit either to support the case or to defend the case. Further the notice must mention the names of the persons who have been permitted to represent them so that the persons interested may have an opportunity of knowing who have been selected to represent them.

Reverting to the facts of the case at hand and keeping in view the aforesaid principles, this Court finds that Purna Behera is the defendant no.1 in

the suit. He has been described as son of Ganesh Behera. Defendants 1(A) and 1(B) are sons and defendant no.2 is the widow of defendant no.1. They have been correctly described in the notice. It is not the case of the opposite parties that the notice did not disclose the nature of the suit as well as the relief claimed therein, the names of the plaintiffs and others who have been permitted to represent the villagers Katakapada or the subject- matter of the suit and the disputed property. Pursuant to the notice, fourty three persons entered appearance and filed an application for impleadment. Further, defendants 1 and 2 have also filed the written statement. Thus the description of the father's name of one of the defendants does not make the notice defective.

On taking a holistic view of the matter, this Court is of the opinion that the notice is not defective one. There is valid publication of draft notice in the daily newspaper. Accordingly, the order dated 21.8.2015 passed by the learned Civil Judge (Junior Division), Puri in T.S No.88 of 2000 is quashed. The petition is allowed.

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4. Order 2 Rule 7 and Order XLI Rule 27 of CPC
Jayantilal Chimanlal Patel Vs. Vadilal Purushottamdas Patel
Dipak Misra ,J., A.M. Khanwilkar & Mohan M. Shantanagoudar ,JJ.

In the Supreme Court of India .
Date of Judgment -21.02.2017.
Issue
Dismissal of Civil Revision –Challenged.
Relevant Extract

The appellant-landlord instituted HRP Suit No.686 of 1992, seeking permanent injunction against the original tenant, the predecessor-in- interest of the respondents herein, restraining them from constructing any permanent structure on the tenanted premises and further from subletting the same or transfer it in any manner. The learned trial Judge vide judgment and decree dated 12th March, 1999, partially decreed the suit restraining the respondents from subletting or transferring the suit premises.

Being grieved by the aforesaid judgment, the appellant preferred Civil Appeal No.79 of 1999. It is necessary to state here that the appellant also initiated an action for eviction forming the subject matter of HRP Suit No.1804 of 1998 before the Small Causes Court, Ahmedabad, on the ground that the respondent-original tenant had erected permanent structure on the premises without the consent of the landlord. It is apt to note here that the same is one of the grounds as find mention under Section 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, (for short, 'the 1947 Act') which is applicable in the State of Gujarat.

The learned trial Judge dismissed the suit being hit by the principle of Order 2 Rule 2 of the Code of Civil Procedure, as well as on merits.

The said judgment and decree was assailed in Civil Appeal No.61 of 2004. The appeal arising out of the first suit and the appeal arising out of the second suit were taken up together and were dismissed by the common judgment dated 24th March, 2006.

The dissatisfaction of the non-success compelled the appellant to file two civil revision applications, namely, Civil Revision Application Nos.172 and

173 of 2006. The High Court by the common order dated 1st April, 2014, dismissed both the civil revision applications.

To appreciate the submissions raised at the Bar, we have carefully perused the common order passed by the High Court in both the civil revision applications. As we find that the High Court has adverted at length to the facet of Order 2 Rule 2. On a scrutiny of the entire judgment, we do not find that there is any mention that the plaint in the earlier suit was proved.

In this context, learned counsel for the respondent has drawn our attention to the Constitution Bench decision in Gurbux Singh vs. Bhooralal , AIR 1964 SC 1810 . In the said case, this Court while considering the issue of Order II Rule 2 has opined thus:-

"6. .....As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. It is common ground that the pleadings in CS 28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under Order 2 Rule 2 of the Civil Procedure Code.

The learned trial Judge, however, without these pleadings being on the record inferred what the cause of action should have been from the reference to the previous suit contained in the plaint as a matter of deduction. At the stage of the appeal the learned District Judge noticed this lacuna in the appellant's case and pointed out, in our opinion, rightly that without the plaint in the previous suit being on the record, a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code was not maintainable.

. .....This apart, we consider that learned Counsel's argument must be rejected for a more basic reason. Just as in the case of a plea of res judicata which cannot be established in the absence on the record of the judgment and decree which is pleaded as estoppel, we consider that a plea under Order 2 Rule 2 of the Civil Procedure Code cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar.

As the plea is basically founded on the identity of the cause of action in the two suits the defence which raises the bar has necessarily to establish the cause of action in the previous suit. The cause of action would be the facts which the plaintiff had then alleged to support the right to the relief that he claimed. Without placing before the Court the plaint in which those facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed."

[Emphasis supplied]

From the aforesaid statement of law, it is clearly discernible that filing of the plaint of earlier suit and proving it as per law is imperative to sustain the plea of Order 2 Rule 2 CPC. Unless that is done, the stand would not be entertainable.

Though Mr. Tanmay Agarwal, learned counsel for the respondents has made enormous effort to distinguish the decision in Gurbux Singh vs. Bhooralal , AIR 1964 SC 1810 , in our considered opinion, the same is not distinguishable. It is mandatory that to sustain a plea under Order 2 Rule 2 of the Code of Civil Procedure, the defendant is obliged under law to prove the plaint and the proof has to be as per the law of evidence. We have no hesitation in saying that the ratio in Gurbux Singh (supra) has been properly appreciated by the Full Bench of the High Court of Patna in Jichhu Ram and others vs. Pearey Pasi and another , AIR 1967 Patna 423.

In view of the aforesaid, we are not able to sustain the conclusion arrived at by the High Court on the basis that the suit instituted by the plaintiff-appellant was hit by Order 2 Rule 2 CPC. However, the controversy does not end there. The trial court and the appellate court have adverted to the merits of the case, that is, whether the tenant had constructed any permanent structure without the consent of the landlord. It is manifest that the High Court has not adverted to the same.

In view of the aforesaid, we are inclined to remit the matter to the High Court for proper appreciation of the material on record and to deal with the contentions raised by the appellants therein in accordance with law within the

parameters of the revisional jurisdiction. We may hasten to clarify that if the High Court from the original records finds that the plaint had been brought on record and proved as per law, it would be bound to advert to the plea of Order 2 Rule 2 within the parameters of the said principle.

Be it noted, if the plaint has not been brought on record and proved, prayer for amendment shall not be entertained to bring the plaint on record by way of additional evidence by taking recourse to Order XLI Rule 27 of the Code of Civil Procedure. In that event, the High Court shall proceed only to deal with the merits of the case, that is, whether the plaintiff has made out a case under Section 13(b) of the 1947 Act.

We may hasten to add that as far as the revision arising out of refusal of the order of injunction is concerned, it does not deserve to be dwelt upon by the High Court as we do not see there is any justification to do so. The conclusion on that score by the High Court is justified. Therefore, the civil appeal arising out of Civil Revision Application No.172 of 2016, stands dismissed. What is required to be deliberated by the High Court is whether the grounds urged for eviction have been established by the landlord or not. That is the subject matter of Civil Revision Application No.173 of 2006. The same alone shall be dealt with.

In view of the aforesaid, the appeal relating to eviction is allowed and the judgment of the High Court in that regard is set aside and the matter is remitted to the High Court for reconsideration on merits. There shall be no order as to costs. As we are remitting the matter, we request the High Court to dispose of the civil revision application within six months.

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5. Order 26 Rule 9 of CPC

Nayana Manjari Sahoo vs Rajakishore Sahoo And Another

Dr. A. K. Rath, J

In the High Court of Orissa: Cuttack

Date of Judgment -15.02.2017.

Issue

Appointment of Administration Commissioner when can be rejected-Discuss.

Relevant Extract

The petitioner as plaintiff instituted C.S. No.20 of 2016 in the court of the learned Addl. Civil Judge (Junior Division), Narasinghpur for permanent injunction impleading the opposite parties as defendants. The case of the plaintiff is that she is the owner of an area of Ac.0.125 dec. appertaining to Khata No.574/376, Plot No.1865/2948 of Mouza-Paikapadapatna in the district of Cuttack. The defendant no.1 is the adjacent owner of the suit land towards the northern side. The suit land is bounded by pillars. Taking advantage of the absence of the plaintiff, defendant no.1 removed the boundary pillars and stacked the materials to build a house. The plaintiff applied for demarcation of the suit land in Misc. Case No.12 of 2016 before the Tahasildar, Narasinghpur. The defendant no.1 did not allow the amin to measure the land. Defendant no.1 continued the construction work forcibly and unauthorisedly encroaching upon the suit land.

Pursuant to issuance of summons, defendants entered appearance and filed a written statement denying the assertions made in the plaint. The specific case of the defendants is that they have not encroached upon any portion of the suit land. While the matter stood thus, the plaintiff filed an application under Order 26 Rule 9 CPC to depute an amin commissioner for identification and demarcation of the suit land. It is stated that she made an application to the Tahasildar, Narasinghpur to depute an amin to demarcate

the suit land. The defendants did not cooperate for which the amin was unable to identify the land. The defendants filed an objection to the same. Learned trial court came to hold that no evidence has been adduced by the parties. Appointment of commission can be considered after closure of evidence, when the court finds it difficult to pass effective decree on the existing evidence. Held so, learned trial court rejected the application.

This petition challenges the order dated 2.9.2016 passed by the learned Addl. Civil Judge (Junior Division), Narasinghpur in I.A No.06 of 2016 arising out of C.S. No.20 of 2016 whereby the learned trial court rejected the application of the plaintiff under Order 26 Rule 9 CPC holding, inter alia, that the appointment of commission can only be considered after closure of evidence.

On a reading of Order 26 Rule 9 C.P.C., it is manifest that the stage of appointment of Survey Knowing Commissioner has not been prescribed. When the legislature in its wisdom has not prescribed the stage of appointment of Survey Knowing Commissioner, the power of the Court to appoint the Survey Knowing Commissioner can not be cabined, cribbed or confined.

On an interpretation of the said Rule, in Bhabesh Kumar Das v. Mohan Das Agrawal, 2015 (II) CLR 603, this Court held as under:

"In the case of Prasanta Kumar Jena vs. Choudhury Purna Ch. Das Adhikari, 99 (2005) CLT 720, the learned Single Judge of this Court held that an application under Order 26 Rule 9 C.P.C. can be considered only after closure of the evidence when the court finds difficult to pass an effective decree on the existing evidence. Relying on the said decision, learned Single Judge of this Court set aside the order of appointment of Survey Knowing Commissioner for measurement and demarcation of the land passed by the learned trial court.

The same was challenged before this Court in the case of Ram Prasad Mishra Vrs. Dinabandhu Patri and another. The Bench speaking through Mr. V. Gopala Gowda, C.J.(as he then was) held that the learned Single Judge has interfered with the order passed by the learned trial court in appointing the Survey Knowing Commissioner ignoring the decision of this Court in the case of Mahendranath Parida Vrs. Purnananda Pardia and others, AIR 1988 ORISSA 248. Thus, the decision in the case of Prasanta Kumar Jena vs. Choudhury Purna Ch. Das Adhikari, 99 (2005) CLT 720 has been impliedly overruled by the Division Bench of this Court.

In Mahendranath Parida Vrs. Purnananda Pardia and others, AIR 1988 ORISSA 248 , this Court held that when the controversy is as to identification, location or measurement of the land or premise or object, local investigation should be done at an early stage so that the parties can be aware of the report of the Commissioner and can go to trial prepared.

In Ramakant Naik and others vs. Bhanja Dalabehera, 2015 AIR CC 1724 (ORI), this Court held that issuance of a Commission for local investigation is the discretion of the Court. While considering the prayer for appointment of Commission, the Court must apply its mind to the facts and circumstances of the case and pass order. No straight jacket formula can be laid down. Before issuance of Commission, the Court must be satisfied that there is prima facie case in favour of the applicant.

In view of the authoritative pronouncement of this Court in the case of Bhabesh Kumar Das v. Mohan Das Agrawal, 2015 (II) CLR 603 , the order dated 2.9.2016 passed by the learned Addl. Civil Judge (Junior Division), Narasinghpur in I.A No.06 of 2016 arsing out of C.S. No.20 of 2016 is quashed. The learned trial court shall decide the application for appointment of commission on merit.

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6. Order 41 rule 27 of CPC

Shri Dhananjaya Rohidas vs State Of Odisha And Another

Dr. A. K. Rath, J.

In the High Court of Orissa: Cuttack

Date of judgment: 27.02.2017

Issue

Rejection of the application for admitting certain documents are additional evidence –Challenged.

Relevant Extract

The petitioner as plaintiff instituted C.S. No. 77 of 2009 in the court of learned Civil Judge (Senior Division), Jharsuguda for declaration of right, title and interest and confirmation of possession impleading the opposite parties as defendants. The suit was dismissed. He filed R.F.A. No. 09 of 2013 in the court of learned District Judge, Jharsuguda. In the appeal, an application under Order 41 Rule 27 CPC has been filed to admit certain documents as additional evidence. The same has been rejected.

This petition challenges the order dated 09.02.2017 passed by the learned District Judge, Jharsuguda in R.F.A. No. 09 of 2013. By the said order, the lower appellate court rejected the application of the petitioner under Order 41 Rule 27 CPC for admitting certain documents as additional evidence.

The question does arise as to whether the appellate court can consider the application for additional evidence at any stage of the appeal ?

The subject-matter of dispute is no more res integra. This Court in Sankar Pradhan v. Premananda Pradhan (dead) and others, 2015 (II) CLR 583 held thus:

The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands some inherent lacuna or defect becomes apparent."

In view of the authoritative pronouncement of this Court in the case of Sankar Pradhan (supra), the order dated 09.02.2017 passed by the learned District Judge, Jharsuguda in R.F.A. No. 09 of 2013 is quashed. The learned lower appellate court shall consider the application for additional evidence at the time of hearing of the appeal. Since the appeal is of the year 2013, the learned appellate court shall dispose of the same within a period of three months.

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Indian Penal Code

7. Sections 302 ,307 and 324 of IPC

P. Eknath Vs. Y. Amaranatha Reddy @ Babu & ANR

Pinaki Chandra Ghose & R.F. Nariman , JJ.

In the Supreme Court of India

Date of Judgment -09.02.2017.

Issue

Setting aside the conviction and sentence –Challenged.

Relevant Extract

Pinaki Chandra Ghose, J.

The relevant facts which are necessary for the purpose of deciding this appeal are narrated hereunder:

According to the case of the prosecution, on 18.09.2005, at about 10.00 p.m., the accused went to the house of P. Venkatramana (the deceased No.2) along with a sickle. While the deceased No.2 and the accused were talking and when the others had retired for the night, at about 1.30 a.m., the accused took out the sickle and attacked the deceased No.2 and hacked him indiscriminately. When P.W. 2 wife of deceased No.2 tried to intervene, he attacked her too and caused severe bleeding injuries.

On the information furnished by P.W.3, police came to the scene of offence and recorded the statement of P.W.1 and Crime No. 115 of 2005 under Sections 302 and 307 IPC was registered. P.W.23 held inquest over the dead body of the deceased No.1 and got the scene of offence photographed and sent the deceased No.2 and P.W.2 to the hospital for treatment. While undergoing treatment, deceased No.2 died in the hospital and an inquest was held on his dead body. The body was also sent for postmortem examination.

On 15.10.2005, P.W. 23 arrested the accused and recorded his confessional statement in the presence of P.Ws 11 and 12 and seized the sickle used in the commission of offence at his instance. The accused also showed the place where he burned his blood stained shirt.

This appeal, filed by the appellant/Complainant is directed against the judgment and order dated 17.08.2012 passed by the Division Bench of the High

Court of Andhra Pradesh at Hyderabad, whereby the High Court allowed the appeal filed by the accused (Respondent No.1 herein) and set aside the conviction and sentence imposed by the trial Court for the offences punishable under Sections 302, 307 and 324 IPC and acquitted him of the charges.

This case pertains to double murder of the deceased Pasupuleti Lohita, aged 12 years and the deceased Pasupuleti Venkatramana, aged 50 years and double life attempts on Pasupuleti Chandrakala and Pasupuleti Eknath, all residents of Prasanth Nagar, Madanapalle, and theft in the dwelling house by the sole accused Yerraballi Amaranatha Reddy @ Babu Reddy- Respondent No.1 herein. the prosecution examined P.Ws 1 to 23. The trial Court, after taking into consideration the evidence adduced, both oral and documentary, held that the prosecution has been able to establish the guilt of the accused beyond reasonable doubt, and convicted the appellant for offences punishable under Sections 302, 307 and 324 IPC and sentenced him to undergo imprisonment for life and to also to pay a fine of Rs. 5,000 with default stipulation.

Being aggrieved, the accused preferred an appeal before the High Court and the said Court, after hearing the parties, allowed the appeal and set aside the conviction and sentence imposed by the trial Court for the offences punishable under Sections 302, 307 and 324 IPC and acquitted him.

After hearing the contentions of the parties and carefully perusing the records of the case and after going through the judgments of both the trial Court as well as the High Court, it appears to us that except motive, the High Court has not given any other plausible reasons for setting aside the well reasoned order of the Trial Court.

Further, after going through the evidence which has been placed before us, there is no reason to disbelieve the evidence of PWs 1 and 2 who are injured eye witnesses. The High Court has not even taken into account the evidence of PWs 20, 21 and 22 who just after the incident came to the spot in question.

After taking into consideration and summing it up together, it appears to us that the High Court did not take into account all these facts which were

brought before us had been placed before the High Court at the time of hearing of the appeal.

We have been able to find out from the material available on record that the accused had the requisite motive for committing the offence and the weapon used i.e. sickle can be convincingly linked to the injuries caused on the deceased. The FSL report, credibility of witnesses, foot prints of the offender, narration of incident by the circumstantial witness, identification of the accused/weapon, presence of light in the murder scene, all leads to the guilt of the accused.

In our opinion, the High Court has failed to appreciate such evidence which was brought before the Court and further the facts which ought to have been taken into consideration at the time of the matter to be decided by the High Court and without giving any reasons, set aside the well reasoned order of the Trial Court.

Therefore, the order passed by the High Court is perverse and not sustainable in the eyes of law and we set aside the order passed by it affirming the order passed by the trial Court.

Accordingly, the appeal is allowed.

We direct the concerned Police Authorities to take custody of the respondent forthwith to serve out the remainder of sentence imposed by the Trial Court.

R.F. Nariman, J. (Concurring)

A concurring judgment is usually written because a Judge feels that he can reach the same conclusion, but by a different process of reasoning. In the present case, the reason I have penned this concurrence is because the impugned judgment of the Division Bench of the Andhra Pradesh High Court, dated 17th August, 2012, has been characterized by my learned brother as "perverse". "Perverse" is not a happy expression, particularly when used for a judgment of a superior court of record. I am constrained to observe this

because in the facts of the present case, there has been a heinous double murder, as has been pointed out by my learned brother.

And, despite an extremely well-considered judgment by the trial court, dated 31st July, 2008, the High Court has acquitted the respondent-accused before us. I entirely agree that this judgment is "perverse", and wish to give my own reasons as to why it is so.

In appeal to a Division Bench of the High Court, the accused was acquitted of the offence under Section 302 as well as the offence under Section 307.

The reasoning of the High Court in acquitting the accused of this heinous double murder and the heinous attempt at another double murder leaves much to be desired. In its reasoning, the High Court judgment begins with the evidence of PW-13 and PW-14. It must not be forgotten that PW-13 is the doctor who conducted the autopsy over the dead body of deceased no.1, who was the murdered daughter in the present case. PW-14, on the other hand, conducted the autopsy over the dead body of deceased no. 2, who was the father and the head of the family.

After setting out the evidence of PW-13 and PW-14, the High Court examined only the evidence of PW-14, and stated that despite the fact that the doctor opined that the deceased would have appeared to have died of shock and hemorrhage due to multiple injuries caused to the vital organs, and despite stating the above injuries could be caused by a sharp edged weapon like a sickle, in his cross-examination he admitted that the injuries are "lacerated" injuries.

The trial court has correctly appreciated this evidence, and stated that what was really meant was that the injuries were caused by a sharp object. However, the High Court came to the conclusion, based on Medical Jurisprudence on Toxicology by Dr. K.S. Reddy, that "lacerated" injuries could only be caused with a blunt object. The High Court then went on to state that in his re-examination the doctor stated that "lacerated" injuries could be caused if the reverse side of a sickle is used, which is blunt.

On this evidence, the High Court concluded that injuries found on deceased no. 2 are not possible with a sharp edged weapon like a sickle. It also went on to conclude that given the number of injuries, it is also possible that it could have been done with two distinct weapons. Both the aforesaid reasons are perverse. There was no gainsaying that the blunt edged side of a sickle could possibly have been used. Be that as it may, the theoretical possibility that the injuries could have been caused with two distinct weapons is purely in the nature of surmise.

But this does not end the matter. What is seriously wrong with the judgment under appeal is that it conveniently forgets the entire testimony of PW-13. In so far as PW-13's testimony is concerned, there is no doubt whatsoever that all 9 injuries caused on deceased no. 1, who was the daughter, were incised injuries and that they were all caused with a sharp edged weapon being a sickle. The High Court judgment conveniently forgets about PW-13, and then lumps PW-13 and PW-14 together to arrive at the astounding conclusion that the injuries sustained by deceased nos.1 and 2 are not possible with a sickle and that further, more than one weapon might have been used.

The High Court then goes on to discuss whether the accused could be said to have carried the sickle along with him at all. It arrives at the conclusion that the accused carrying the sickle along with him is itself doubtful. This is done without at all adverting to the fact that the sickle was recovered under a pile of stones only because the accused led the police to the hiding place of the sickle. Further, it also ignored the FSL report which made it clear that there was human blood found on the said sickle.

And this omission becomes even more egregious in that the High Court, in passing, while narrating the facts, has itself observed: "On 15.10.2005, PW.23 arrested the accused at Neerugattuvaripalle and recorded his confessional statement in the presence of PWs.11 and 12 and seized the sickle used in the commission of offence from the heap of stones at Ammacheruvemitta and the accused also shown the place where he has burnt his blood stained shirt."

With regard to the scene of the offence, in so far as the dead body of the female child was concerned, the High Court refers only to the inquest report Exh.P7 to conclude that since the evidence of PW-1 and PW-2 state that the body of the girl child was on the staircase, and the inquest report states that it was found in the middle of the bedroom of the children, there is contradictory evidence with regard to the finding of the dead body of deceased no. 1. Here again, the High Court falls into grievous error in completely ignoring the evidence of PW-3, 4, 5, and 6, all of whom consistently record that the dead body of the girl child was found only on the staircase. Further, in the rough sketch that was drawn by the Investigating Officer and exhibited as Exh.P-16, it is also made clear that the dead body of the deceased female child was found only on the staircase.

Also, with regard to the amount of light that was there in the house in order that the injured eye-witnesses could be said to have successfully identified the accused, the High Court refers only to the evidence of PW-22, S.I. of the Police, to state that "a zero watt bulb was burning in the bedroom". From this it concludes that "only a zero watt bulb was burning in the house" whereas both the eye-witnesses stated that there was power supply and illumination of lights. Here again, the High Court falls into grievous error in completely ignoring the consistent testimony of PWs-20, 21, and 23, all of whom state that there was more than sufficient light in the house at the time of the incident. Further, it is clear that both deceased no.2 and the accused were sitting and talking till the incident occurred, and this they obviously did with the lights on in the house.

In the result, it must be declared that the Division Bench judgment of the Andhra Pradesh High Court cannot but be characterized as perverse on all counts, and must therefore be set aside.

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8. Section 302 read with Section 34 of IPC
Arjun And Anr. Etc. Etc vs State Of Chhattisgarh
Dipak Misra & R. Banumathi ,JJ.

In the Supreme Court of India
Date of Judgment -14.02.2017

Issue

Conviction and sentences of life imprisonment by the trial Court – Challenged .

Relevant Extract

Briefly stated case of the prosecution is that on 19.11.2006 at about 9:45 a.m., deceased Ayodhya Prasad @ Rahasu had gone to his field alongwith Bajrang Manjhi (PW-1), Borri Verma (PW-2), Gilli Raout (PW-7) and Makunda Raout (PW-8) to cut tree with the help of the above persons which was on his land in village Ghatmadwa. At that time, the appellants-accused came to the field and they stopped the deceased and his labourers from cutting the tree. Deceased Ayodhya Prasad @ Rahasu told the appellants that he was the owner of the tree, therefore, he was cutting the tree which resulted in quarrel between the parties. The appellants assaulted the deceased with katta, gandasa and stone. The deceased fell down and sustained injuries on his head and his brain matter came out. He was taken to Bilaspur for treatment but he died on the way to the hospital.

Shivprasad (PW-6), brother of the deceased lodged the complaint in Police Outpost Gidhouri. Based on the complaint, FIR (Ex.P-16) was registered in Police Station Bilaigarh. PW-10, the Investigating Officer reached the place of occurrence and took up the investigation. After the inquest, the body was sent for autopsy. The post-mortem was conducted by Dr. Harnath Verma (PW-12) who gave the Post Mortem Report (Ex.P-26). Dr. Verma opined that the death of the deceased was due to excessive haemorrhage and injury to the head.

PW-10, the Investigating Officer arrested the appellants from the Gidhouri Bus Stand and recorded their statements under Section 27 of the Evidence Act. Disclosure statement of the appellants led to the discovery of iron katta (cutting object), gandasa and stone weighing 12.5 kg which were seized from Lalaram @ Bhagat, Arjun and Padumlal respectively. Sando baniyan and full-pant of appellant Lalaram @ Bhagat were also seized. Seized

articles were sent to Forensic Science Laboratory, Raipur for chemical examination vide Ex.P-23. After completion of the investigation, chargesheet was filed against the appellants in the Court of Judicial Magistrate, First Class Balodabazar, who, in turn, committed the case to the Court of Session, Raipur, from where it was received on transfer by Second Additional Sessions Judge, Balodabazar, District Raipur, who conducted the trial.

These appeals arise out of the judgment and order dated 30.08.2013 passed by the High Court of Chhattisgarh in Criminal Appeal Nos.111 of 2008 and 100 of 2008 whereby the High Court affirmed the conviction and sentence of life imprisonment imposed by the trial Court on the appellants.

Having considered the evidence of the witnesses and the defence plea and the material placed before it, the trial court held that the appellants acted with common intention to commit the murder of deceased Ayodhya Prasad and found that the prosecution has proved the guilt of the accused beyond reasonable doubt and convicted the appellants under Section 302 IPC or 302/34 IPC and sentenced each of them to undergo imprisonment for life and imposed fine of Rs.20,000/- and in default of payment of fine to undergo rigorous imprisonment for two years. Aggrieved by the verdict of conviction, the accused-appellants Arjun and Lalaram together filed an appeal and accused Padumlal filed a separate appeal before the High Court. The High Court after hearing the counsel for the parties affirmed the conviction of the appellants and sentence imposed by the trial court. Aggrieved by the conviction and sentence imposed on them, the appellants are before us in these appeals by way of special leave.

We have heard learned counsel for the parties at length and perused the impugned judgment and the materials placed on record.

Shivprasad PW-6 is the real brother of the deceased. PW-6 has deposed in his evidence that on 19.11.2006 at about 8:45 a.m., his brother Ayodhya Prasad @ Rahasu had gone to the field for cutting of trees alongwith four labourers who are eye witnesses i.e. PWs 1, 2, 7 and 8 and at that time A1-Lalaram, A2-Padumlal and A3-Arjun came there with katta and gandasa and surrounded the deceased quarrelled with him and prevented him from cutting

the tree. The accused told the deceased that they are the owners of the land and questioned him as to why he was cutting the tree. When the deceased replied that he was the owner of the tree and he had the right to cut the tree, there was wordy altercation between the accused and the deceased and the accused attacked him with the weapons they had, namely, katta, gandasa and a stone. The deceased sustained injuries on his head, neck, back and abdomen and fell down on the field. He further deposed that he witnessed the incident from near the shop and the distance between the shop and the place of occurrence is 15 to 20 feet and due to fear, he did not go near.

Shivprasad (PW-6) is the brother of the deceased, his relationship with the deceased does not affect the credibility of the witness. Only because PW-6 is related to the deceased that may not by itself be a ground to discard his evidence. Where the prosecution case rests upon the evidence of a related witness, it is well-settled that the court shall scrutinize the evidence with care as a rule of prudence and not as a rule of law. The fact of the witness being related to the victim or deceased does not by itself discredit the evidence.

We find no reason to discard the evidence of PW-6 for the sole reason that he is related to the deceased and that he is an interested witness.

All the four eye witnesses have corroborated that the accused Padum and Lalaram were present. Further, according to PW-8 Makunda Raout, accused Padum and Lalaram were present and immediately on fleeing away from the spot, PW-8 Makunda Raout after some distance turned back and saw that there were three accused persons standing surrounding the deceased. The presence of two accused in the beginning and later on joining of the third accused Arjun is what falls from the evidence of PW-8. Evidence of PW-8, thus, corroborates the evidence of PW-6 as to the presence of three accused.

Though the eye witnesses PWs 1, 2, 7 and 8 were treated as hostile by the prosecution, their testimony insofar as the place of occurrence and presence of accused in the place of the incident and their questioning as to the cutting of the trees and two accused surrounding the deceased with weapons is not disputed. The trial court as well as the High Court rightly relied upon the evidence of PWs 1, 2, 7 and 8 to the above said extent of corroborating the

evidence of PW-6 Shivprasad. Merely because the witnesses have turned hostile in part their evidence cannot be rejected in toto. The evidence of such witnesses cannot be treated as effaced altogether but the same can be accepted to the extent that their version is found to be dependable and the court shall examine more cautiously to find out as to what extent he has supported the case of the prosecution.

The contention of the accused is that the eye witnesses PWs 1, 2, 7 and 8 have not mentioned the name of appellant Arjun. Appellant Arjun could have not been convicted, does not merit acceptance. In his evidence, PW-8 Makunda Raout stated that when they started cutting trees, accused Padum and Lala came there and surrounded Ayodhya Prasad and started questioning. After that PW-8 and other eye witnesses ran away from the spot. PW-8 further stated that after some distance, he turned back and saw three persons surrounding the deceased. The evidence of PW-8 establishes the presence of two accused in the beginning and that Arjun joined two other accused and the presence of appellant Arjun spoken by PW-6 is corroborated by the evidence of PW-8. That apart, recovery of gandasa from appellant Arjun is an incriminating circumstance/evidence against the appellant Arjun and concurrent findings recorded by the courts below that appellant Arjun was also responsible for the homicidal death of Ayodhya is based on evidence.

The point falling for consideration is whether the conviction of the appellants under Section 302 IPC is sustainable. As discussed earlier, the evidence clearly establishes that while Ayodhya Prasad and other witnesses were cutting the trees, there was exchange of words which resulted in altercation and during the said altercation, the appellants attacked the deceased. Thus, the incident occurred due to a sudden fight which, in our view, falls under exception (4) of Section 300 IPC.

The accused, as per the version of PW-6 and eye witness account of other witnesses, had weapons in their hands, but the sequence of events that have been narrated by the witnesses only show that the weapons were used during altercation in a sudden fight and there was no pre-meditation. Injuries as reflected in the post-mortem report also suggest that appellants have not taken “undue advantage” or acted in a cruel manner. Therefore, in the fact

situation, exception (4) under Section 300 IPC is attracted. The incident took place in a sudden fight as such the appellants are entitled to the benefit under Section 300 exception (4) IPC.

When and if there is intent and knowledge, then the same would be a case of Section 304 Part I IPC and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 Part II IPC. Injuries/incised wound caused on the head i.e. right parietal region and right temporal region and also occipital region, the injuries indicate that the appellants had intention and knowledge to cause the injuries and thus it would be a case falling under Section 304 Part I IPC. The conviction of the appellants under Section 302 read with Section 34 IPC is modified under Section 304 Part I IPC. As per the Jail Custody Certificates on record, the appellants have served 9 years 3 months and 13 days as on 2nd March, 2016, which means as on date the appellants have served 9 years 11 months. Taking into account the facts and circumstances in which the offence has been committed, for the modified conviction under Section 304 Part I IPC, the sentence is modified to that of the period already undergone.

In the result, conviction of the appellants under Section 302 IPC read with Section 34 IPC is modified as conviction under Section 304 Part I IPC and the sentence is reduced to the period already undergone and these appeals are partly allowed accordingly. The appellants are ordered to be released forthwith unless required in any other case. Fee of the learned Amicus is fixed as per Rules.

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9. Section 302 & Section 304 read with Section 34 of IPC
Suresh Singhal vs State(Delhi Administration)
S.A. Bobde & L. Nageswara Rao , JJ.

In the Supreme Court of India.
Date of Judgment -02.01.2017.
Issue
Conviction and Sentence , when modified –Discussed.
Relevant Extract

The appellant was prosecuted for the incident that occurred on the 04.03.1991 at about 5.15 pm. The deceased-Shyam Sunder and Kishan Lal, both brothers, were killed in the incident at the office of Lala Harkishan Dass located at Rajendra Park, Nangloi. The statement of Lala Harkishan Dass was recorded. He had arranged a meeting for settling a dispute that had arisen between the appellant and the deceased. The appellant had apparently agreed to sell a property through a property dealer, namely the deceased-Shyam Sunder. The purchasers were the Gurdaspur Party. Apparently there was some misunderstanding between the parties and eventually a meeting was arranged at the office of Lala Harkishan Dass.

The deceased-Shyam Sunder and his two brothers Hans Raj and Kishan Lal were already at the office of Lala Harkishan Dass. The appellant-Suresh Singhal and his father Pritpal Singhal accompanied by another man (Roshan Lal) reached the office at about 5.00 pm. As soon as they entered the office, there was an altercation between the appellant and the deceased. The appellant took out his revolver and shot Shyam Sunder. Thereafter, the appellant and his father Pritpal Singhal who had come to the office in a car, left the car behind and fled the place in the car of another visitor.

In the incident Shyam Sunder and Kishan Lal were killed.

The Sessions Court convicted the appellant for the murder of Shyam Sunder under Sections 302 and 304 read with Section 34 of Indian Penal Code (hereinafter referred to as 'IPC') for the murder of Kishan Lal. His co-appeallant-Pritpal Singhal who died on 28.03.2007, during the pendency of the suit was also convicted under Section 307 read with Section 34 of IPC for

attempting the murder of Hans Raj. The third accused Roshan Lal was acquitted.

WITNESSES TO THE SHOOTING

The actual shooting was claimed to have been witnessed by Lala Harkishan Dass (PW-2), Hans Raj (PW-3) and Raj Kumar (PW-4). Lala Harkishan Dass (PW-2) was declared hostile. Hans Raj (PW-3) is the injured eye-witness, and the brother of the deceased-Shyam Sunder.

Two distinct versions about the actual shooting have arisen from the deposition of the witnesses. One version is that there was no scuffle before which the appellant fired at the deceased. The other is that there was a scuffle in which the appellant was attempted to be strangulated.

NO SCUFFLE

The first version is mainly deposed to by Hans Raj (PW-3). Hans Raj is the brother of the deceased. He went to the office of Lala Harkishan Dass where the parties had decided to meet to resolve the dispute. He deposed that the moment the deceased entered the room, the appellant asked his brother-the deceased, to tell him what had happened yesterday. The deceased got up and responded to it by asking the appellant whether he had come to settle the dispute or to quarrel. The appellant said that there won't be any quarrel but something different would happen. This witness said that "he then took out a revolver from his coat pocket and fired at my brother-Shyam Sunder." This is all that the witness stated about the actual shooting. Thereafter this witness stated that he tried to catch hold of the appellant but the appellant exhorted his father to finish all the brothers. Thereafter, Pritpal Singhal took out a revolver from his pocket and both the appellant as well as Pritpal Singhal started firing at him and his brother-Kishan Lal. In the firing he was injured and received one bullet in his stomach. This version significantly does not speak of any scuffle preceding the shooting. In the cross-examination later on, he specifically stated in the cross-examination that there was no scuffle in which the deceased tried to strangulate the appellant. This witness thus clearly stated that the appellant shot the deceased as soon as he rose.

This appeal is directed against the judgment dated 01.09.2010 of the Delhi High Court in Criminal Appeal No.232 of 1997 filed by the appellant-Suresh Singhal against his conviction and the sentence awarded to him. The appeal filed by the State seeking death penalty for the appellant and against the acquittal of Roshal Lal was dismissed by the High Court in Criminal Appeal No.226 of 1997.

The other version deposed by Subhash Chand Mahajan (PW-23) and Sarover Kumar (PW-27) is that there was a scuffle between the three brothers i.e. deceased-Shyam Sunder, Kishan Lal and Hans Raj on one hand, and the appellant-Suresh Singhal on the other hand. The deceased tried to strangulate the appellant as they fell during the struggle, and thereafter pulled out his gun and shot the deceased. He then exhorted his father to shoot the others.

Subhash Chand Mahajan (PW-23) stated in his cross examination that he saw the appellant on the floor being strangulated. The witness stated that there was a scuffle and thereafter a shot fired.

The stark difference between the two versions is that of the scuffle preceding the incident of the shooting. Whether there was a scuffle or not determines the tenability of the main submission advanced by Mr. Sushil Kumar, the learned senior counsel, that the appellant acted in the exercise of his right of private defence and shot the deceased. It may be noted that, both the Sessions Court and the High Court have found that there was a sudden fight in the course of which a common intention developed between the appellant and his father to cause the death of the deceased-Shyam Sunder and Kishan Lal.

Having closely examined the evidence, we are of the view that in fact a scuffle did take place. In this scuffle, Shyam Sunder alone, or along with his two brothers tried to strangulate the appellant-Suresh Singhal. The appellant reached for his revolver, upon which the deceased released him and turned around to run away. At this point the appellant shot at him, either still lying down or having got up. This probablizes and explains the fact that it was not a close shot and that the bullet entered the body below the right shoulder of the deceased at the back and travelled upwards.

NOT A CLOSE SHOT

The shot in question was obviously not a close shot. There was no blackening, tattooing or charring around the bullet entry wound. In fact, the doctors specifically stated that the shot was fired from a distant range. It is well known that the shooting from close quarters chars or blackens the body.

With regard to the evidence that the appellant was being assaulted and in fact attempted to be strangulated, it needs to be considered whether the appellant shot the deceased in the exercise of his right of private defence. Such a right is clearly available when there is a reasonable apprehension of receiving the injury.

Having regard to the above, we are of the view that the appellant reasonably apprehended a danger to his life when the deceased and his brothers started strangulating him after pushing him to the floor. As observed by this Court a mere reasonable apprehension is enough to put the right of self-defence into operation and it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the appellant apprehended that such an offence is contemplated and is likely to be committed if the right of private defence is not exercised.

We have no doubt that the appellant exceeded the power given to him by law in order to defend himself but we are of the view that the exercise of the right was in good faith, in his own defence and without premeditation. In this regard, it would be apposite to reproduce the observation of Sessions Court which is as follows:-

“Since I feel that the prosecution witnesses are hiding something at the introduction stage of the story, I will not impute a prior concert or intention to the accused. I have no doubt that tempers got fayed at the spot itself and whatever happened was not a result of prior meeting of minds amongst the accused persons.”

The homicide in the present case thus does not amount to murder in the view of Exception 2 to Section 300 of IPC[2]. We agree with the observations of

the Sessions Court and the High Court that the homicide was not the result of premeditation but rather, as the evidence suggests, the shooting took place in a sudden fight in the heat of passion. It is not possible to accept the argument of the prosecution that the appellant took undue advantage of the situation and used the gun even though the deceased- Shyam Sunder and his brothers were unarmed. Given the murderous assault on the appellant and the possibility of being attacked again, may be with arms or may be with the help of the other persons, it is not possible to attribute undue advantage to have been taken by the appellant. In such a situation it would be unrealistic to expect the appellant to calmly assess who would have the upper hand before exercising his right of private defence.

In the circumstances of the case and the findings of the Sessions Court and the High Court, we find that the homicide falls within Exception 4 to Section 300 of IPC[3] and does not amount to murder.

The strong possibility is that there was a scuffle in which the appellant was pinned to the floor and attempted to be strangulated by the deceased. The appellant may have pulled out his gun and upon seeing the gun, the deceased may have released the appellant and started running upon which the appellant fired the shot which hit him from the back side. This also explains the trajectory of the shot in which the bullet entered the body below the right shoulder, and travelled upwards without exiting.

In these circumstances, we are of the view that Suresh Singhal is undoubtedly guilty of causing death to Shyam Sunder with the intention of causing death or of causing such bodily injury as is likely to cause death and therefore guilty of the offence under Section 304 of the IPC. We are informed that the appellant has already undergone a sentence of 13 ½ years as on date. We thus sentence him to the period already undergone.

KISHAN LAL'S DEATH

The appellant has also been convicted under Section 302 IPC for the murder of Kishan Lal. Hans Raj (PW-3) deposed that the appellant fired at his brother, and when he (PW-3) and his brothers-Raj Kumar and Kishan Lal, tried to catch hold of the appellant, the appellant told his father to finish all the brothers. He then stated that Pritpal Singhal took out a revolver from his

pocket and both the appellant and his father started firing at him and his brother-Kishan Lal. He stated that he received two bullets on his stomach, and one bullet grazed him over the neck portion in the front. When he started running out, he was hit by another bullet on the back of his right shoulder.

When he and Kishan Lal started running out, he heard Pritpal Singhal tell Roshan Lal to go outside, get the gun from the vehicle and that the fourth brother should not be spared.

It may be remembered that this witness survived the shooting with two bullets still lodged in his body. The office in which the firing took place was a small area. Yet this witness does not specify that the appellant shot him. He generally states that appellant and his father started firing at him and his brothers. Thus, it is difficult to say with certainty that the shots which hit Kishan Lal were fired by Suresh Singhal.

In these circumstances all that can be said is that a shot from the appellant may have hit Kishan Lal or may not have hit Kishan Lal. This benefit of doubt in law must go to the appellant. For the reasons stated above specifically that Hans Raj (PW-3) did not specify that the appellant shot him. There is a serious doubt whether it can be held as having been proved beyond reasonable doubt that the appellant attempted to murder Hans Raj for which he has been convicted.

It is not possible for us to approve the observation of the High Court that because Suresh Singhal and Pritpal Singhal were armed "it is only the appellant and/or his father late Pritpal Singhal who could be responsible for the firing resulting in the murder of late Kishan Lal and the deceased-Shyam Sunder. We have already held that the appellant killed the deceased in the exercise of the right of private defence. Pritpal Singhal may or may not have acted out of the desire to protect Suresh. He did not share the same intention as that of Suresh. It is not possible to attribute common intention to kill the three brothers to both the appellant and his father.

Hence, we allow this appeal partly and modify the impugned judgment and order passed by the High Court to the extent that the conviction of the appellant – Suresh Singhal under section 302 IPC for murder of Kishan Lal is set aside and his conviction under section 304 IPC is maintained. Since the appellant has already undergone a sentence of 13 ½ years as on date, we sentence him under section 304 IPC to the period already undergone. The appellant is in jail. He be released forthwith from the custody, if not required in any other case.

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10. Section 307 and Section 448 of IPC
Section 235(2) and Section 377(1) of Cr.P.C
Ravada Sasikala Vs. State of Andhra Pradesh & ANR.
Dipak Misra & R. Banumathi ,JJ.

In the Supreme Court of India
Date of Judgment -27.02.2017.

Issue

Imposing of sentences by the Learned Single Judge .Whether proportional to the Crime Investigation –Discussed.

Relevant Extract

As the factual matrix gets unfolded from the judgment of the learned trial Judge, the appellant after completion of her intermediate course had accompanied her brother to Amalapuram of East Godavari District where he was working as an Assistant Professor in B.V.C. Engineering College, Vodalacheruvu and stayed with him about a week prior to the occurrence. Thereafter, she along with her brother went to his native place Sompuram. At that time, the elder brother of the accused proposed a marriage alliance between the accused and the appellant for which her family expressed unwillingness.

The reason for expressing the unwillingness is not borne out on record but the said aspect, needless to say, is absolutely irrelevant. What matters to be stated is that the proposal for marriage was not accepted. It is evincible from the material brought on record that the morning of 24.05.2003 became the darkest and blackest one in her life as the appellant having a head bath had put a towel on her head to dry, the accused trespassed into her house and poured a bottle of acid over her head. It has been established beyond a trace of doubt by the ocular testimony and the medical evidence that some part of her body was disfigured and the disfiguration is due to the acid attack.

The necessary facts. On the basis of the statement of the injured, an FIR under Sections 448 and 307 of the Indian Penal Code (IPC) was registered at police station Vallampudi. The injuries sustained by the victim-informant required long treatment and eventually after recording the statements of the witnesses, collecting various materials from the spot and taking other aspects into consideration of the crime, the investigating agency filed the charge sheet for the offences that were originally registered under the FIR before the

competent court which, in turn, committed the matter to the Court of Session, Vizianagaram. The accused abjured his guilt and expressed his desire to face the trial.

The prosecution, in order to establish the charges against the accused, examined 12 witnesses and got marked Ex. P1 to P14 besides bringing 11 material objects on record. The defence chose not to examine any witness. It may be noted that on behalf of the defence, one document Ex. D-1, was marked.

The learned Assistant Sessions Judge, Vizianagaram did not find the accused guilty under Section 307 IPC but held him guilty under Section 326 and 448 IPC. At the time of hearing of the sentence under Section 235(2) of the Code of Criminal Procedure (CrPC), the convict pleaded for mercy on the foundation of his support to the old parents, the economic status, social strata to which he belongs and certain other factors. The learned trial judge, upon hearing him, sentenced him to suffer rigorous imprisonment for one year and directed to pay a fine of Rs. 5,000/- with a default clause under Section 326 IPC and sentenced him to pay a fine of Rs. 1000/- for the offence under Section 448 IPC with a default clause.

The State preferred Criminal Appeal No. 1731 of 2007 under Section 377(1) CrPC before the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh for enhancement of sentence. Being grieved by the judgment of conviction and order of sentence, the accused-respondent had preferred Criminal Appeal No. 15 of 2006 before the Sessions Judge, Vizianagaram which was later on transferred to the High Court and registered as Transferred Criminal Appeal No. 1052 of 2013.

Both the appeals were heard together by the learned Single Judge who concurred with the view taken by the learned trial judge as regards the conviction. While dealing with the quantum of sentence, the learned Judge opined thus:- "However, the sentence of imprisonment imposed by the trial Court for the offence under Section 326 I.P.C. is modified to the period which the accused has already undergone, while maintaining the sentence of fine for both the offences."

At the outset, we must note that the State has not assailed the said judgment. The appellant, after obtaining permission of this Court, filed the special leave petition which we entertained for the simon pure reason it has been asserted that the period of custody suffered by the accused is 30 days. It is apt to note here that the accused-respondent has not challenged the conviction and, therefore, it has to be assumed that apart from accepting the judgment of conviction, he must have celebrated the delight and jubilation of liberty inasmuch as despite the sustenance of the judgment of conviction, he was not required to suffer any further imprisonment.

The centripodal question, indubitably a disquieting one, whether the High Court has kept itself alive to the precedents pertaining to sentencing or has been guided by some kind of unfathomable and incomprehensible sense of individual mercy absolutely ignoring the plight and the pain of the victim; a young girl who had sustained an acid attack, a horrendous assault on the physical autonomy of an individual that gets more accentuated when the victim is a young woman. Not for nothing, it has been stated stains of acid has roots forever.

We have noted earlier that the conviction under Section 326 IPC stands established. The singular issue is the appropriateness of the quantum of sentence. Almost 27 years back in Sham Sunder v. Puran and another[2], the accused-appellant therein was convicted under Section 304 Part I IPC and while imposing the sentence, the appellate court reduced the sentence to the term of imprisonment already undergone, i.e., six months. However, it enhanced the fine. This Court ruled that sentence awarded was inadequate. Proceeding further, it opined that:- "No particular reason has been given by the High Court for awarding such sentence.

The court in fixing the punishment for any particular crime should take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of the offence. The sentence imposed by the High Court appears to be so grossly and entirely inadequate as to involve a failure of justice. We are of opinion that to meet the ends of justice, the sentence has to be enhanced." After so stating the Court

enhanced the sentence to one of rigorous imprisonment for a period of five years.

In State of Madhya Pradesh v. Najab Khan and others , the High Court of Madhya Pradesh, while maintaining the conviction under Section 326 IPC read with Section 34 IPC, had reduced the sentence to the period already undergone, i.e., 14 days. The two-Judge Bench referred to the authorities in Shailesh Jasvantbhai v. State of Gujarat , Ahmed Hussain Vali Mohammed Saiyed v. State of Gujarat , Jameel v. State of Uttar Pradesh and Guru Basavaraj v. State of Karnataka and held thus:- "In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix.

The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

The courts must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment." In the said case, the Court ultimately set aside the sentence imposed by the High Court and restored that of the trial Judge, whereby he had convicted the accused to suffer rigorous imprisonment for three years.

In Sumer Singh v. Surajbhan Singh & others , while elaborating on the duty of the Court while imposing sentence for an offence, it has been ruled that it is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an

obligation to the society which has reposed faith in the court of law to curtail the evil.

While imposing the sentence it is the court's accountability to remind itself about its role and the reverence for the rule of law. It must evince the rationalised judicial discretion and not an individual perception or a moral propensity. The Court further held that if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined and law does not tolerate it; society does not withstand it; and sanctity of conscience abhors it. It was observed that the old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule.

The conception of mercy has its own space but it cannot occupy the whole accommodation. While dealing with grant of further compensation in lieu of sentence, the Court ruled:- "We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society."

Recently, in Raj Bala v. State of Haryana and others , on reduction of sentence by the High Court to the period already undergone, the Court ruled thus:-

"Despite authorities existing and governing the field, it has come to the notice of this Court that sometimes the court of first instance as well as the appellate court which includes the High Court, either on individual notion or misplaced sympathy or personal perception seems to have been carried away by passion of mercy, being totally oblivious of lawful obligation to the collective as mandated by law and forgetting the oft quoted saying of Justice Benjamin N. Cardozo, "Justice, though due to the accused, is due to the accuser too" and follow an extremely liberal sentencing policy which has neither legal permissibility nor social acceptability."

And again:- "A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked."

In view of what we have stated, the approach of the High Court shocks us and we have no hesitation in saying so. When there is medical evidence that there was an acid attack on the young girl and the circumstances having brought home by cogent evidence and the conviction is given the stamp of approval, there was no justification to reduce the sentence to the period already undergone.

We are at a loss to understand whether the learned Judge has been guided by some unknown notion of mercy or remaining oblivious of the precedents relating to sentence or for that matter, not careful about the expectation of the collective from the court, for the society at large eagerly waits for justice to be done in accordance with law, has reduced the sentence.

When a substantive sentence of thirty days is imposed, in the crime of present nature, that is, acid attack on a young girl, the sense of justice, if we allow ourselves to say so, is not only ostracized, but also is unceremoniously sent to "Vanaprastha". It is wholly impermissible.

In view of our analysis, we are compelled to set aside the sentence imposed by the High Court and restore that of the trial court. In addition to the aforesaid, we are disposed to address on victim compensation. We are of the considered opinion that the appellant is entitled to compensation that is awardable to a victim under the Cr.P.C. In Laxmi v. Union of India and others , this Court observed thus:- "12. Section 357-A came to be inserted in the Code

of Criminal Procedure, 1973 by Act 5 of 2009 w.e.f. 31-12-2009. Inter alia, this section provides for preparation of a scheme for providing funds for the purpose of compensation to the victim or his dependants who have suffered loss or injury as a result of the crime and who require rehabilitation.

13. We are informed that pursuant to this provision, 17 States and 7 Union Territories have prepared "Victim Compensation Scheme" (for short "the Scheme"). As regards the victims of acid attacks, the compensation mentioned in the Scheme framed by these States and Union Territories is un-uniform. While the State of Bihar has provided for compensation of Rs 25,000 in such Scheme, the State of Rajasthan has provided for Rs 2 lakhs of compensation. In our view, the compensation provided in the Scheme by most of the States/Union Territories is inadequate. It cannot be overlooked that acid attack victims need to undergo a series of plastic surgeries and other corrective treatments. Having regard to this problem, the learned Solicitor General suggested to us that the compensation by the States/Union Territories for acid attack victims must be enhanced to at least Rs 3 lakhs as the aftercare and rehabilitation cost. The suggestion of the learned Solicitor General is very fair." The Court further directed that the acid attack victims shall be paid compensation of at least Rs 3 lakhs by the State Government/Union Territory concerned as the aftercare and rehabilitation cost. Of this amount, a sum of Rs. 1 lakh was directed to be paid to such victim within 15 days of occurrence of such incident (or being brought to the notice of the State Government/Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of Rs.2 lakhs was directed to be paid as expeditiously as possible and positively within two months thereafter and compliance thereof was directed to be ensured by the Chief Secretaries of the States and the Administrators of the Union Territories.

Regard being had to the aforesaid decisions, we direct the accused-respondent No. 2 to pay a compensation of Rs.50,000/- and the State to pay a compensation of Rs.3 lakhs. If the accused does not pay the compensation amount within six months, he shall suffer further rigorous imprisonment of six months, in addition to what has been imposed by the trial court. The State shall deposit the amount before the trial court within three months and the learned trial Judge on proper identification of the victim, shall disburse it in her favour. The criminal appeals are allowed to the extent indicated above

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11. Article 226 and 227 of the Constitution of India
Saroj Kumar Mohanty vs State Of Orissa And Others
S.N. Prasad & Kumari Sanju Panda, JJ.

In the High Court of Orissa: Cuttack.
Date of hearing and Judgment : 16.02.2017

Issue

Regularization of Adhoc service when continuing by an interim order but denied by the Tribunal –Discussed.

Relevant Extract

The ground taken by the petitioner in assailing the order of the Orissa Administrative Tribunal is that he has been appointed although on adhoc basis but continued in the said post from 26.8.86 to 8.3.1989 against the substantive post in the office of the Electrical Inspector, Angul, he was terminated w.e.f. 8.3.1989 but the appropriate authority after taking into consideration of the workload in the office again appointed him as Junior Clerk-cum-Typist which was extended from 12.11.1989 and according to the petitioner, since then he is continuing in the said post and now at this moment he is aged about 56 years and as such prayer has been made to direct the authority to consider his case sympathetically for taking in the permanent establishment otherwise it will be very harsh not only for him rather for his entire family members, the reason being that he was being allowed to continue in service since the year 1989 and since then he is rendering service in the post for almost 28 years without any complaint from any quarter.

This writ petition under Articles 226 and 227 of the Constitution has been filed for assailing the order passed in O.A.No.296 of 1989 whereby and where under the Orissa Administrative Tribunal, Cuttack Bench has rejected the claim of the petitioner for his regularization to the post of junior clerk with an observation that if there will be any further recruitment to the post of Junior Clerks in the districts in question within June,2001 and if the applicants are still continuing in service on the basis of the interim orders, they be given only one chance of applying for appearing at the said recruitment test/examination after allowing age relaxation to the extent necessary, provided he is within the prescribed age limit at the time of initial ad hoc appointment.

Upon hearing the learned counsel for the parties and having perused the documents available on record, we are of the conscious view that the Tribunal has not committed any error in passing the order which is impugned in this writ petition but simultaneously we have taken into consideration the fact that for one reason or the other the petitioner has been allowed to continue in service since 1989 and he has put unblemished service of continuing 28 years since the date of his engagement and he at the moment is 56 years of age.

We have perused the order sheets of this Court wherein this Court has specifically directed the opposite party-State vide order dated 25.4.2001 to take instruction as to when there is likelihood of holding a recruitment test as per the rules against three existing vacancies but no such affidavit has been filed to that effect although counter affidavit dated 7.8.2001 has been filed stating therein that from the date of his engagement the petitioner is continuing in service against regular post.

We, without interfering with the order impugned but taking into consideration the fact that the petitioner has been allowed to continue on the post for last 28 years and now he is aged about 56 years and further the State Government is also admitting in the counter affidavit that due to workload in the office he was allowed to continue to use his vast experience and as such purely in special circumstance, thought it proper to give liberty to the petitioner to make appropriate representation before the concerned competent authority, who is competent to take decision on the issue, raising his entire grievance within four weeks from the date of receipt of this order and in that situation the concerned competent authority shall take decision in accordance with law within eight weeks thereafter. With the observations made herein above, the writ petition is disposed of.

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12. ***Articles 311 (2) & Article 226 and 227 of the Constitution of India***
Section 81(b) Central Civil Service (classification, control and appeal) Rules 1965
Article 80 & 81(b) of the KVS Education Code
Kendriya Vidyalaya Sangathan vs Shri Ananta Chandra Das And Others
Kumari Sanju Panda & Sujit Narayan Prasad ,JJ.

In the High Court of Orissa: Cuttack.
Date of Judgment : 17.02.2017
Issue
Setting aside of order of dismissal by Central Administrative Tribunal-Challenged.
Relevant Extract

The brief fact of the case is that the opposite party no.1 was working as work-experienced teacher in Kendriya Vidyalaya Sangathana, after putting 18 years of service as a teacher at various places, was lastly posted at Kendriya Vidyalaya, Charbatia, while posted there, was removed from service on the allegation that he misbehaved a minor girl-student of about 11 to 12 years of age.

The case of the opposite party no.1 is that the order of dismissal has been passed without following the provisions as contemplated under Article 311(2) of the Constitution of India as also without initiating a regular departmental proceeding as per the Discipline and Appeal Rules governing the field, hence the order of dismissal is an arbitrary exercise of the authorities concern, hence according to him the order of dismissal is not fit to be sustainable in the eye of law.

While, on the other hand, the case of the Kendriya Vidyalaya Sangathana and its functionaries is that on the basis of allegation that the opposite party no.1 misbehaved a minor girl student aged about 11 to 12 years, on complaint having been received, a preliminary enquiry was directed to be conducted by the Asst. Commissioner of the Kendriya Vidyalaya Sangathana, who constituted a fact finding committee and the committee after recording the evidence of various girl students including the lady teachers working in the school, has found the allegation to be true and as such the matter has been referred before the Commissioner, being the competent

disciplinary authority, who has taken recourse of the provision of Section 81(b) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (herein after referred to as the Rules, 1965) since according to him it is not expedient to hold regular inquiry on account of embarrassment to student or their guardians or for other practical difficulties, after recording reasons in writing, the Commissioner, in exercise of power conferred under Article 80 and 81(b) of the Kendriya Vidyalaya Sangathana Education Code, has passed the order of dismissal and as such in such circumstances it cannot be said that the order of dismissal is illegal and arbitrary exercise of power.

It has been submitted that the Commissioner has got power under the provision of Article 81(b) of the Kendriya Vidyalaya Sangathana Education Code to dismiss an employee if in his opinion it is not expedient to hold regular departmental proceeding and to that effect he can pass an order of dismissal after getting prima facie report on the basis of preliminary inquiry by the Asst. Commissioner, Kendriya Vidyalaya Sangathana and invoking the said jurisdiction he has rightly passed the order of dismissal taking into consideration the nature of allegation upon a working teacher.

The Kendriya Vidyalaya Sangathana and its functionaries, being aggrieved with the order dtd.19th September, 2016 passed in Original Application No.1019 of 2012 by the Central Administrative Tribunal, Cuttack Bench, Cuttack are before this court by way of this writ petition whereby and where under the order dtd.09.03.2012 and 04.10.2012, the orders of dismissal of the opposite party no.1, has been quashed and set aside and the matter has been remitted back to the disciplinary authority to reconsider the matter de novo, after giving the applicant an opportunity of being heard.

We have heard the learned counsels for the parties at length and perused the written notes of submission filed on behalf of opposite party.

We, after going through the factual aspects, have found that the questions arose for consideration are:-

(i) whether the dismissal of opposite party no.1 is vitiated by error of law and whether he is entitled to full-fledged enquiry and opportunity to cross-examine the girl students who have given the statement against him; and

(ii) whether the Central Administrative Tribunal was right in allowing the original application under the impugned order dtd.19th September, 2016.

Indisputably, the provision of Rules, 1965 of the Government of India is applicable to the employees of the Kendriya Vidyalaya Sangathana. The Kendriya Vidyalaya Sangathana has also constituted its own Education Code. The provision under Article 80 and 81(b) of the Kendriya Vidyalaya Sangathana Education Code is as under:-

"Article 80 - Extension of the application of Central Civil Services (Classification, Control and Appeal) Rules, 1965:

(a) All employees of Kendriya Vidyalayas, Regional Offices and the Headquarters of the Sangathan shall be subject to the disciplinary control of the Sangathan and the Central Civil Services (Classification, Control and Appeal) Rules, 1965, as amended from time to time, will apply mutatis mutandis to all Members of the staff of the Sangathan except when otherwise decided. (In the above Rules, for the words "Government Servant", whether they occur, the words "Employee of Kendriya Vidyalaya Kendriya Vidyalaya Sangathan" shall be substituted.

Article 81(B) - Termination of services of an employee found guilty of immoral behavior towards students:

Whether the „Commissioner‟ is satisfied after such a summary enquiry as „he‟ deems proper and practicable in the circumstances of the case that any member of the Kendriya Vidyalaya is prima facie guilty of moral turpitude involving sexual offence or exhibition of immoral sexual behavior towards any student, he can terminate the services of that employee by giving him one month‟s or three months pay and allowances accordingly as the guilty employee is temporary or permanent in the service of the Sangathan. In such cases, procedure prescribed for holding enquiry for imposing major penalty in accordance with CCS (CCA) Rules, 1965 as applicable to the employees of the Kendriya Vidyalaya Sangathan, shall be dispensed with, provided that the „Commissioner‟ is of the opinion that it is not expedient to hold regular enquiry on account of embarrassment to student or his guardians or such other practical difficulties. The „Commissioner‟ shall record in writing the reasons under which it is not reasonably practicable to hold such enquiry and

he shall keep the Chairman of the Sangathan informed of the circumstances leading to such termination of services."

It is evident from the Constitutional provision as contained under Article 311 that the order of dismissal or removal can only be passed after providing adequate and sufficient opportunity of being heard to the delinquent employee subject to some exception, one of such exception is that the order of dismissal or removal can be passed without holding any enquiry, but by reflecting reasons to be recorded in writing to show that the enquiry is not reasonably practicable.

The provision to Article 311(2)(b) is attracted when the authority is satisfied from the materials placed before him that it is not reasonably practicable to hold a departmental inquiry. The authority empowered to dismiss etc. must record his reason in writing for denying the opportunity under Clause 2 before making the order of dismissal etc. and the reasons recorded must ex facie show that it was not reasonably practicable to hold a disciplinary enquiry. To emphasize, the provision of Rule 14 of Rules, 1965 is parameteria to Article 311 of the Constitution of India while the provision of Article 80 and 81(b) of the Kendriya Vidyalaya Sangathana Education Code the parameteria to Art.311(2)(b) of the Constitution of India.

On the subject, we thought it proper to have a discussion regarding the propositions laid down by the Hon‟ble Apex Court and the relevant is the judgment pronounced by Hon‟ble Apex Court in the case of Union of India v. Tulsiram Patel, AIR 1985 SC 1416, wherein at paragraphs 130 and 133, their Lordships have been pleased to hold as follows :

"130. The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or

perform: capable of being put into practice, done or accomplished: feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner: to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry. x x x"

"133. The second condition necessary for the valid application of clause (b) of the second proviso is that the disciplinary authority should record in writing its reason for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Article 311(2). This is a Constitutional obligation and if such reason is not recorded in writing, the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional."

The judgment rendered in the case of Jaswant Singh v. State of Punjab, (1991) 1 SCC 362 wherein their Lordships at paragraph 5 have been pleased to hold as follows:-

"The decision to dispense with the departmental enquiry cannot be rested solely on the ipse dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a court of law. it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer."

In the case of Avinash Nagra Vrs. Navodaya Vidyalaya Samiti and Others, reported in (1997) 2 SCC 534 in the similar nature of allegation, the Hon‟ble Apex Court while dealing with the subject, has been pleased to hold that the decision taken by the Director not to conduct any enquiry exposing the student and modesty of the girls and to terminate the services of the appellant by giving one month‟s salary and allowance in lieu of notice as he is a temporary

employee under probation, their Lordships have taken view that the conduct of the appellant is unbecoming of a teacher much less a loco parentis, and therefore, dispensing with regular enquiry under the rules and denial of cross-examination are legal and not vitiated by violation of principle of natural justice.

Hon'ble Apex court in the case of Director, Navodaya Vidyalaya Samiti and Others Vrs. Babban Prasad Yadav and Another, reported in (2004) 13 SCC 568, after putting reliance upon the judgment rendered in the case of Avinash Nagra‟s case (supra) has been pleased to observe that in deviating from holding regular enquiry in a case of sexual harassment against the girl student, no illegality can be said to be committed.

In the case of Commissioner, Kendriya Vidyalaya Sangathan and Others Vrs. Rathin Pal (S.L.P.(C) No.4627 of 2008, decided on 16th August, 2010) their Lordships of the Hon‟ble Apex Court after taking into consideration the judgment rendered in the case of Avinash Nagra (supra) has been pleased to approve the decision taken by the competent authority by invoking the provision of Article 81(b) of the Kendriya Vidyalaya Sangathan Education Code dispensing with holding regular departmental enquiry before passing order of punishment in a case of sexual harassment towards the girl student.

The statutory provision provides that the Commissioner is to act upon on the basis of the preliminary enquiry report, if he has to invoke the jurisdiction conferred to him under Article 81(b) of the Kendriya Vidyalaya Sangathana Education Code, we have found from the record that the preliminary enquiry report has been submitted before it, the statement of various girl students have been recorded including the lady teachers and it is not to be disbelieved that the girl student will tell lie for false implication of the teacher who is imparting teaching to the students without any rhyme and reason, that too, a girl aged about 11 to 12 years.

The Commissioner, after going through the report submitted by the Committee constituted under the order of Asst. Commissioner of the Kendriya Vidyalaya Sangathana, has exercised the power conferred to him under Article 81(b) of the Kendriya Vidyalaya Sangathan Education Code by recording its

reason that it is not practicable to hold regular enquiry in order not to embarrass the student who is a girl having the age of 11 to 12 years and the guardians subjecting them to examination and cross-examination and thereby deviated from holding regular departmental proceeding and accordingly imposed the punishment after issuing show cause notice to him to explain the reason as to why he will not be dismissed from service.

We have also found from the record that the delinquent employee has submitted his detail reply in terms of the show cause given by the Commissioner and the Commissioner, after taking into consideration the reply having not found to be satisfactory and accepting the statement of the girl students including the lady teachers, has dismissed him from service.

The provisions of the Kendriya Vidyalaya Sangathana Education Coder as contained in Article 81(b) which provides that where the commissioner is satisfied after such a summary enquiry as he deems proper and practicable in the circumstances of the case that any member of the Kendriya Vidyalaya is prima facie guilt of moral turpitude involving sexual offence or exhibition of immoral sexual behaviour towards any student, he can terminate the service of employee by giving him one months‟ or three months pay and allowances, accordingly as the guilty employee is temporary or permanent in the service of the Sangathan.

We have found from the record that on complaint being received from the father of the victim girl student a complaint redressal committee was constituted by the Asst. Commissioner, Kendriya Vidyalaya Sangathana, who have called upon the girl students including the lady teachers, who have deposed regarding the truthiness of the allegation leveled against opposite party no.1 and accordingly the Commissioner has proceeded with the matter, by deviating from the initiation of regular departmental proceeding by recording specific reasons thereof, hence according to us, the reasons stipulated in the order of dismissal cannot be said to be erroneous in the facts and circumstances of the instant case.

According to our conscious view, the Commissioner has not exceeded his jurisdiction, rather he has passed order in consonance with the power

conferred upon him under Article 81(b) of the Kendriya Vidyalaya Sangathan Education Code and in terms thereof he has given specific reasons for deviating with the established procedure for imposing major penalties.

Moreover, the Commissioner before imposing the punishment of dismissal, has issued a show cause notice upon opposite party no.1 which has been replied in detail and after going through the response the order of dismissal has been passed and as such it is not a case that the petitioner has not been heard, the only question is that the initiation of regular departmental proceeding and as to whether this case is coming under the exception as to cover under the provision of Article 81(b) of the Kendriya Vidyalaya Sangathana Education Code which we have already discussed in detail in preceding paragraphs and answered it, hence the argument advanced on behalf of opposite party no.1 basis upon which the order of dismissal has been found to be incorrect by the Tribunal is not seems to be sustainable.

We have also seen in the order passed by the Tribunal, in which it has been observed that;

"The girls cannot be exposed during enquiry, but certainly that principle cannot be applied in so far as collecting evidence in presence of the parents of the members of teaching and nonteaching staff of the school".

But we are not in agreement with this observation, reason being that either before the parents or the members of teaching and non-teaching staff of the school, the girl student having such a tender age will be put to embarrassment in course of collecting evidence, which is admittedly through examination and cross- examination of the victim girl student, allowing this it will certainly create embarrassment to victim girl students who have been subjected to harassment, that too by her own teacher.

The opposite party no.1 has submitted a written note of submission wherein, apart from the factual aspects, reliance has been placed upon various judgments of Hon‟ble Apex Court. In the cases of Narinder Mohan Arya Vrs. United India Insurance Company Ltd, reported in (2006) I SCC (L&S) 840 and Moni Shankar Vrs. Union of India & Another, reported in (2008) I SCC (L&S) 819, proposition has been laid down regarding the power of judicial review for the purpose of re-appreciating the evidence in order to take contrary view from the view of the disciplinary authority.

There is no dispute about the settled proposition of law as reflected in the Judgments referred in preceding paragraphs, but it is also settled that no

judgment is of its universal application, rather the same is to be seen on the facts and circumstances of each and every case, the power of judicial review is vested upon the Court of Law for the purpose of judicially scrutinize the finding given by the disciplinary authority, but here in the instant case completely different situation is there since the question fell before this court regarding power of judicial review of an order of dismissal which has been passed against a teacher of an allegation of moral turpitude towards a girl student of about 11 to 12 years of age, the girl student, while deposing before the committee constituted for summary enquiry, has deposed regarding truthiness of the allegations and in that situation it would not be advisable for this Court to scrutinize the evidence given by the teen aged girl for the purpose of exercising the power of judicial review by assuming the power of disciplinary authority or enquiry committee.

Furthermore, it is not a trial of criminal case where the evidence, without any reasonable doubt is to be taken into consideration, rather it is a case of disciplinary enquiry where the preponderance of probability is required to be seen and from the facts and circumstances of the case, we have stated herein above that why a girl student aged about 11 to 12 years of age will depose against her teacher without any rhyme and reason, moreover, the opposite party no.1 himself has admitted in the memorandum of appeal that the occurrence might have been committed by him once or twice but it is not intentional, in that view of the matter there is no question of re-appreciating the evidence for the purpose of judicial review of the order of dismissal, hence these judgments are not applicable in the facts and circumstances of the instant case.

We, after having appreciated the factual aspect and dealing it with the proposition laid down by the Hon‟ble Apex Court in the cases of Union of India Vrs. Tulsiram Patel (supra), Jaswant Singh Vrs. State of Punjab (supra), Avinash Nagra Vrs. Navodaya Vidyalaya Samiti and Others (supra), Director, Navodaya Vidyalaya Samiti and Others Vrs. Babban Prasad Yadav and Another (supra) and Commissioner, Kendriya Vidyalaya Sangathan and Others Vrs. Rathin Pal (supra), are of the considered view that the competent disciplinary authority has not committed error in exercising power conferred upon him under Article 81(b) of the Kendriya Vidyalaya Sangathana Education Code taking into consideration the nature of allegation and the teen age of the girl student who is studying in class-VII. Accordingly, in our considered view the order passed by the Tribunal is not sustainable in the eye of law, hence the same is set aside, in the result the order of dismissal is restored. The writ petition stands allowed.

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13. Section 24(C) ,24(B) of Orissa Education Act
Boilochan Rout Vs State of Orissa & Others
D. Dash, J.

In the High Court of Orissa, Cuttack
Date of judgment: 10.02.2017
Issue
Order passed under Section 24(C) of Orissa Education Act ,1969 by the State Educational Tribunal –Challenged.

Relevant Extract

The appellant's case is that his initial appointment was in the second post of lecturer in Political Science by the governing body of the college on 21.02.1995. Pursuant to the same, the appellant joined therein on 28.02.1995. It is stated that prior to the same, respondent no. 4 had been appointed in the first post of lecturer in Political Science on 07.01.1994 when he was working as Sikhya Karmi (Annexure-3). It is next alleged that subsequently while continuing as such, he was selected and engaged as Sikhya Sahayak by order dated 03.07.2007 (Annexure-5). He resigned from the 1st post of Lecturer in Political Science. On 06.07.2007 by addressing a letter of resignation to the Secretary of the College (Annexure-4) on getting employment as Sikshya Sahayak in Rajnagar Block, he asked for its acceptance by the governing body. The resignation being accepted, the post of lecturer in Political Science fell vacant and this appellant claims to have been elevated to the said post by the governing body by issuance of order dated 07.07.2007. It is next stated that the college in question has been notified to receive the block grant as per order of the GIA Order, 2008 by notification dated 25.11.2013 (Annexure-A). However, the governing body still recommended the name of the respondent no. 4 against the first post of lecturer in Political Science which is attacked as illegal as by then the respondent no.4 had already joined as the Sikshya Sahayak pursuant to his due and proper selection as such and undertaking the employment thereof 18.07.2007. Therefore, the appellant's case is that the service of respondent no.4 ought not to have been placed for approval and the recommendation to that effect by the governing body is nonest.

The appellant as the petitioner has filed the above noted case under section 24(B) of the Act before the learned Tribunal questioning the

recommendation of the respondent no.4 (opposite party no.4 before the learned Tribunal) for approval of his service in the first post of lecturer in Political Science in Nalinikanta Mahavidyalaya, Chandibaunsamula, Rajnagar in the district of Kendrapara as illegal. The appellant as a contender of the same has further advanced the prayer that his name be recommended for the purpose and he be granted with all other consequential benefits attached thereto. The prayers have been rejected by the learned Tribunal.

The respondent nos. 1 and 2 in the counter have come out to state that as per the resolution of the governing body the appellant started his service career as lecturer in Political Science with effect from 20.11.1998. It is further stated that the service of respondent no.4 as Sikshya Karmi was terminated on 09.12.1992 and therefore he was no more the Sikhya Karmi after 09.12.1992 and has been continuing to work as lecturer in Political Science w.e.f. 13.01.1994. The resignation of respondent no.4 and elevation of the appellant are doubtful. It is again submitted that the joining of respondent no. 4 against the post of Sikshya Sahayak is not substantiated.

The governing body of the college arraigned as respondent no. 3 has supported the case of respondent no. 4 that he was duly appointed in the first post of lecturer in Political Science and had joined as such on 13.01.1994, duly ratified by governing body by resolution dated 08.08.1994. It is stated that since then he has uninterruptedly rendered the service as such. So the recommendation for approval of his service is asserted to have been rightly made. It is stated that the appellant was not having the qualification of being appointed as lecturer in Political Science nor he has acquired the same later. The respondent no. 4 asserted himself to be the contender in the first post of lecturer in Political Science and to have been continuing all along being duly appointed. It is also stated that he has neither resigned from the service in the college nor had joined as Sikshya Sahayak as pleaded by the appellant.

On the above rival case, the learned Tribunal formulated the following points for consideration:-

(i) Whether the recommendation for approval of appointment of respondent no. 4 against the 1st post of Lecturer in Political Science in the college in question is liable to be set aside?
(ii) Whether the appellant is entitled for recommendation of his name for approval of his appointment and consequential release of Grant-in- Aid?

It is submitted that although the submission advanced before this Court on behalf of the appellant concerns with the appointment and eligibility of the respondent no. 4 to receive Grant-in-Aid yet no case has been made out in so far as the eligibility of the appellant to receive the Grant-in-Aid under said G.I.A. Order, 2008 is concerned. So, on this lone ground, the claim according to him, does not stand. It is next contended that when as required under Clause – 13(2)(a) of the G.I.A Order, 2008, the appellant is not eligible to receive the Grant-in-Aid as also when his appointment is void abinitio on that ground, his claim falls flat being without foundation.

The rival claim remain that when appellant claims to have been elevated in the first post of Lecturer in Political Science after the resignation of respondent no. 4; continuance in the service of said post is asserted by respondent no. 4 notwithstanding his appointment as Sikhya Sahayak and joining therein which are not denied; and at the same time it is said that he was taking the classes regularly without receiving any salary as Sikhya Sahayak. Before the Tribunal with some materials, the appellant has also called in question the very appointment of respondent no. 4 to be void. I am unable to accept the submission that when the appellant has raised the question of the appointment of respondent no. 4 as void abinitio placing some materials that it is based on manipulated records and by way of fraudulent activity which is coming to be unearthed later and going stand against the entitlement of appellant and consequential thereto, if it is accepted, when the appellant is likely to get the benefit in that event provided he succeeds to establish his case, the question as raised has to be answered and cannot be sidelined without being addressed in accordance with law.

It is to note here that learned Tribunal in its finding has not touched that aspect and instead it has recorded that the resignation of respondent no. 4 on

06.07.2007 and his appointment as Sikhaya Sahayak are doubtful which is said to be contrary to the materials available on record. This approach appears to be erroneous and the learned Tribunal was under legal obligation to decide if the respondent no. 4 had at all been appointed as Sikhya Sahayak and had joined and accordingly to note the impact of the same in his service as Lecturer in the 1st post in Political Science in the college.

This is because of the settled position of law that an act of fraud is to be viewed seriously and more particularly when a case is projected on that foundation, the Court in order to decide the lis has to rule out that possibility as otherwise the Court's order would give a seal of approval to that fraud. Thus the submission of the learned counsel for the appellant is acceptable on this score that the records of the college have been manipulated in so far as the appointment of respondent no. 4 is concerned and although he has been said to have been appointed, it has not been the outcome of a selection having been taken place in accordance with law. Therefore, when para -13 of Orissa Non- Government Colleges, Junior Colleges and Higher Secondary Schools Grant-in-Aid order, 2008; particularly Rule -13 (2)(a) speaks of a valid and lawful appointment, the case of the respondent no. 4 has to pass through the said test. So, on the above ground, the claim of respondent no. 4 has no foundation and the recommendation of the governing body to that effect is not legally tenable.

Point having been raised, even accepting for a moment that the appointment of respondent no. 5 was valid and lawful, the documents reveal that respondent no. 4 was appointed as Sikhya Sahayak and he had joined in Radhakanta Jew Nodal U.P. School on 18.07.2007. It is further stated that since he remained absent from that very day onwards, he has not been paid his remuneration. Admittedly, this fact was not informed to the College on the next day that he was no more interested to work as Sikhya Sahayak and though joined is not working. Now, it is stated that he resigned there as Sikhya Sahayak also and instead would work in the first post of Lecturer as before nor he has asked for withdrawal of his resignation. I am unable to find as to how these facts are doubtful. The day he joined as Sikhaya Sahayak i.e. on 18.07.2007, it goes without saying that he ceased to be a Lecturer in Political Science in the college. The college then being not within the Grant-in-Aid fold,

the respondent no. 4 cannot avoid this position by saying that acceptance of his letter of resignation being made on the very day of its tendering, it is not permissible, in view of rule -32 of the Orissa Education (Establishment of Recognition and Management of Private Junior Colleges / Higher Secondary Schools) Rule 1991. The ratio of the decision in case of OBCC Ltd (supra) is of no help to the respondent no. 4 where the court was seized with a question of termination of service merely in view of absence without departmental proceeding. Therefore, in view of the aforesaid discussion, the appointment of respondent no. 4 is not valid and lawful and recommendation made by the governing body for giving approval to his service as such falls flat on the ground having no legal backing.

Now coming to the appointment of appellant, as in the second post of Lecturer in Political Science, the objections stand at the outset that such a post was not admissible. Admittedly, the stand has not been taken by the governing body so far as the number of persons being appointed in the post of Lecturers in the subject is concerned, the cap remains for the purpose for Grant-in-Aid providing the yard stick. Here, the governing body is not questioning that and in fact is estopped from doing so as held in case of *Majhipada M.E. School* (supra).

The next objection is that the appellant is not going to the college which is not acceptable on the face of the order of the Director dated 25.02.2014 (Annexure -H) pursuant to his assertion that he was not allowed to take up classes in the college. The last and important question is the appellant's elevation to the first post of Lecturer in Political Science. Learned Tribunal has said that the appellant was not having the requisite qualification with 55% of marks at the time of his elevation to the first post on 07.07.2007. Undoubtedly, rule 13(2)(b) of the GIA Order, 2008 prescribes that one has to possess educational qualification and experience required for holding the post at the time of his recruitment. When the appellant was appointed on 21.12.1995, he was having 53% of marks i.e., more than 48 % of marks as required under rule 4(2)(d) of Orissa Education Service (Higher Secondary Branch) Method of Recruitment and Conditions of Services Rules, 1991. This rule has undergone amendment on 11.06.1997, whereby 48% of marks has been enhanced to 55%

of marks. Although it has to be said to have been so done looking at the challenge in the field and the need, as also to improve the quality of education at that particular time of amendment, yet such amendment of the rule cannot stand to apply retrospectively. The Division Bench of this Court in case of *Dillip Raj Pradhan* (supra) has considered that case where the petitioner had been working as a Lecturer in Oriya and holding the first post of Lecturer in the College. The question of possession of required percentage of mark had arisen there. It has been held therein:-

"11. We are of the considered view that whereas no objection could have been taken to the appointment of the petitioner on 28.02.1986 and that the promulgation with the 1991 Rules, since the petitioner satisfied the requirement of rule 4(2)(d) thereof, he became entitled to be declared as a competent and eligible teacher suitable for appointment in Junior College. No doubt, it is true that in 1997, the eligibility requirement was enhanced to 55% marks. Such amendment and enhancement would obviously cover appointments or after the said date of amendment and not earlier operation and would operate prospectively from the date of its enactment. In the present case, the amendment of 1997 to Rule 4(2)(d) does not contain any stipulation making the said amendment retrospective and obviously, therefore, no objection can be raised neither to the appointment of the petitioner in the year 1986 and the petitioner is to be held as a person holding the requisite qualification for holding the post of Lecturer in Junior College. Further even applying the judgment of the Hon'ble Apex Court in the case of Damodar Nayak (supra) and the Judgment of the Full Bench of Orissa High Court in the case of State of Orissa v. Pranaya Kumar Mohapatra, the petitioner having possessed the requisite qualification to the appointment as Junior Lecturer on the date of his appointment, as well as on the date of when the Grant-in- Aid Order 1994 came into force, there is no reasonable
basis for denying the petitioner approval of his service and release of Grant-in-Aid in his favour." So, in the instant case, the appellant having achieved 53% of marks at the time of recruitment, the elevation thereafter is dependant upon the happening of the incident as provided in that notification of the Government dated 27.12.2010 as regards the resignation and death of the person in the particular post. Para -3 of said circular says that if a teaching staff resigns from his/ her service and dies in service and the governing body of the

college has elevated the Lecturer of the same college who has been appointed as per his / her eligibility / admissibility, he would be entitled to receive the Grant-in-Aid/ Block Grant in the former post of Lecturer who resigns or dies in service. This has been omitted by corrigendum dated 10.10.2011 after remaining in force from 27.12.2010 to 09.10.2011. Thus, the finding of the Tribunal as regards non-possession of qualification by the appellant and the consequential elevation are unsustainable and cannot be allowed to stand. For the aforesaid, the findings arrived at by the learned Tribunal are hereby set aside.

Resultantly, the appeal stands allowed and in the peculiar facts and circumstances of the case without cost. The respondent no. 1 and 2 are hereby directed for according approval to the appointment of the appellant against the fist post of Lecturer in Political Science and as being entitled to the benefits in accordance with Grant-in-Aid Order, 2008.

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14. Section 20 of Specific Relief Act,1963
Jayakantham & Others Vs Abay Kumar
Arun Mishra & Dr. D. Y. Chandrachud , JJ.

In the Supreme Court of India
Date of Judgment -21.02.2017

Issue

Dismissal decree of a suit by the District Judge when confirmed by the Hon'ble Single Judge –Challenged

Relevant Extract

This appeal arises from a judgment rendered by a learned Single Judge of the Madras High Court on 11 June 2015 in a second appeal under Section 100 of the Code of Civil Procedure, 1908. Dismissing the second appeal, the learned Single Judge confirmed the judgment of the Principal District Judge, Villupuram by which an appeal against the judgment of the sub-Judge, Kallakurichi was dismissed. The trial court decreed the suit for specific performance instituted by the respondent against the appellants. The subject matter of the suit for specific performance is a property bearing survey No. 314/1A at Kallakurichi village admeasuring 735 square feet upon which a residential house is situated. An agreement to sell was entered into between the appellants and the father of the respondent on 2 June 1999. The consideration agreed upon was rupees one lakh sixty thousand of which an amount of rupees sixty thousand was received as advance. The balance was to be paid when the sale deed was executed. Time for completion of the sale transaction was reserved until 2 June 2002. A legal notice seeking performance of the agreement was issued on 7 May 2002. In response, the defence that was set up was inter alia that the agreement to sell was executed only as a security for a loan transaction.

While evaluating whether specific performance ought to have been decreed in the present case, it would be necessary to bear in mind the fundamental principles of law. The court is not bound to grant the relief of specific performance merely because it is lawful to do so. Section 20(1) of the Specific Relief Act, 1963 indicates that the jurisdiction to decree specific performance is discretionary. Yet, the discretion of the court is not arbitrary but is "sound and reasonable", to be "guided by judicial principles". The

exercise of discretion is capable of being corrected by a court of appeal in the hierarchy of appellate courts. Sub-section 2 of Section 20 contains a stipulation of those cases where the court may exercise its discretion not to grant specific performance. Sub Section 2 of Section 20 is in the following terms : " Section 20 (2). The following are cases in which the court may properly exercise discretion not to decree specific performance-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance." However, explanation 1 stipulates that the mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, will not constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Moreover, explanation 2 requires that the issue as to whether the performance of a contract involves hardship on the defendant has to be determined with reference to the circumstances existing at the time of the contract, except where the hardship has been caused from an act of the plaintiff subsequent to the contract. In the present case, the material on the record contains several aspects which will have to weigh in the balance. There is no dispute about the fact that the father of the respondent who entered into an agreement on his behalf (and deposed in evidence) carried on money lending business. The consistent case of the appellants in reply to the legal notice, in the written statement as well as in the course of evidence was that there was a transaction of a loan with the father of the respondent. The evidence of DW2 was to the following effect : " The defendant was having a relationship with plaintiff's father, Babu Dhanaraj in respect of loan transaction. Already the Defendant No. 2 has taken loan from Babu Dhanapathy Raj and bought a lorry and was driving it. In this case, in order to return the loan of Rs. 1,00,000/- as per the instruction of Babu Dhanapathy Raj

only on the basis of trust, the Exhibit P1 agreement to sell was executed. In the said document, I have put my signature as a witness."

During the course of the evidence, the appellants produced material (Exhibit D3) indicating that the value of the property was six lakhs thirty thousand on 20 November 2006. The agreed consideration between the parties was rupees one lakh sixty thousand of which an amount of rupees sixty thousand was paid at the time of the execution of the agreement. The sale transaction was to be completed within three years against the payment of the balance of rupees one lakh. The appellants also relied upon Exhibit D2 which indicated that the value of the property as on 1 April 1999. These aspects were adverted to in the judgment of the trial court and the first appellate court while setting out the evidence, but have evidently not been borne in mind in determining as to whether a decree for specific performance could judiciously have been passed.

In our view the material which has been placed on record indicates that the terms of the contract, the conduct of parties at the time of entering into the agreement and circumstances under which the contract was entered into gave the plaintiff an unfair advantage over the defendants. These circumstancesmake it inequitable to enforce specific performance. For the above reasons a decree for the payment of compensation in lieu of specific performance would meet the ends of justice. As we have noted earlier the father of the respondent paid an amount of rupees sixty thousand to the appellants in June 1999 of the total agreed consideration of Rs. 1.60 lakhs. The appellants have voluntarily offered to pay an amount of rupees ten lakhs, as just compensation in lieu of specific performance. In our view, the ends of justice would be met by directing the appellants to pay to the respondent an amount of rupees fifteen lakhs in lieu of specific performance.

The decree for specific performance shall accordingly stand set aside and shall stand substituted with a direction to the appellants to pay a sum of rupees fifteen lakhs to the respondent in lieu of specific performance. The amount shall be paid within two months from the date of receipt of a copy of this judgment. Upon the expiry of the period of two months, the amount shall carry interest at the rate of 9 per cent per annum, till payment or realization. The appeal shall stand allowed in these terms. There shall be no order as to costs.

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Orissa Consolidation of Holding & Prevention of Land Act ,1972

15. Section 9(3) of the Orissa Consolidation of Holding & Prevention of Land Act ,1972

Mahadev Biswal & others versus Natabar Biswal (dead) Pratap Kumar Biswal & others

Biswanath Rath , J.

In the High Court of Orissa : Cuttack

Date of Judgment: 02.02.2017

Issue

Proper appreciation of and objection case –Discussed.

Relevant Extract

This writ petition is filed for declaration as to why the order passed by the Consolidation Officer so far it relates to Objection Case No.1086 of 1990 involving Annexcure-1, the order passed by the Deputy Director, Consolidation in Appeal Case No.262 of 2992 under Annexure-2 and the order passed by the Consolidation Commissioner in Revision Case No.14 of 1993 under Annexure-3 shall not be quashed and thereby allowing the claim of the petitioners regarding their entitlement to 1/3rd share out of the entire joint family properties and not 1/6th as wrongly held by the courts below.

It be stated here that the Objection Case No.1086 of 1990 was heard along with Objection Case No.1178 of 1990, 862 of 1990, 993 of 1990, 1031 of 1990, 1176 of 1990, 1022 of 1990, 1012 of 1990 and 1134 of 1990 in a proceeding under Section 9(3) of the Orissa Consolidation of Holding & Prevention of Fragmentation of Land Act, 1972 (hereinafter for short called as "the Act") and disposed of by a common order under Annexure-1. As the present petitioners interest involved only in Objection Case No.1086 of 1990, the petitioners preferred Appeal Case No.262 of 1992 confining their claim involving the decision in Objection Case No.1086 of 1990 and having lost the appeal, preferred Revision Case No.14 of 1993.

Filing Objection Case No.1086 of 1990, the applicants therein made the following prayer: "1. deleting names of ops Padmalav, Subal, A-gani and Subani from khata no.196 on the ground that they are not the co-sharers and they are not the physical possession over the suit lands.

2. For allocation of share of Sanatan Biswal, sons 5 annas 4 pahi, Mohadeba Biswal and 5 annas 4 pahi, and rest 5 annas 4 pahi goes to successors of late Kulamani Biswal in 3 branches in Prananath having are ana 9 1/3 pa-hishare. Punananda having one anna 9 1/3 pahi share and Natabar Biswal and others of one anna 9 1/3 pahi. Accordingly, they are in possession

over the lands in 196 Khata and partition be effected and separate records be prepared.

L.R. Plot No.1395 is in possession of Mahadev Biswal where as there has been reflection of possession note of Udi Murudi against this plot by way of illegal purchase. As such, this plot be recorded in the name of Mahadev Biswal.

Area of L.R. Plots 1395 and 1396 be enhanced as per possession after field enquiry. Vendees Purchased lands from the khata be separately recorded and as per Kachhafarda attached and separate records be prepared by effecting partition."

By filing objection Case No.1086 of 1990, the objectors therein disclosed that the lands involved are ancestral properties. Dama, Shyam, Rama and Bulei four sons of Gopal Biswal inherited the same and each of them had 1/4th share in the family properties. However, admittedly Rama died issueless and the said branch was completely extinguished leaving behind only 3 branches, namely, Dama, Shyam and Bulei. Thus, each of the branches inherited 1/3rd share out of the total ancestral properties. Mahadev Biswal being the descendant of the branch of Shyam inherited 1/3rd share out of the total ancestral properties. It is further claimed that Mahadev being descendent of the branch of Shyam inherited 1/3rd share alone. The present petitioners, who were the descendants of the branch of Bulei inherited and are otherwise entitled to 1/3rd share of Bulei. Similarly, the descendants of Dama's share i.e. Natabar Biswal and others, opposite parties have inherited 1/3rd share of Dama. It is alleged that the Consolidation Officer by clubbing the matter involving different issues and absolutely not hearing all these cases committed error apparent on the face of record in allotting 2/3rd share of Dama branch, allotting 1/6th share to the petitioners and 1/6th share to Mahadev, who represents Shyam's share. In filing appeal at their instance, the petitioners alleged that the appellate authority instead of the petitioners clear case that their interest only involved in the Objection Case No.1086 of 1990 and they have not been aggrieved by the orders of the Consolidation Officer, so far it relates to the other objection cases are concerned, dismissed the appeal on an erroneous finding that since the judgment in objection cases involved 9 cases, the petitioners should have preferred 9 appeals and the appeal has been dismissed on this mere technical ground. Revision being preferred vide Consolidation Revision Case No.14 of 1993, even though had one such revision is dismissed upholding the view of the appellate authority observing that the petitioners should have preferred 9 appeals but at the same time entered into

the merit of the case and finally without proper appreciation of the matter involved in this particular objection case again confused itself by entering into the other issues involved therein in connection with the other objection cases and has arrived at a wrong and erroneous finding.

Considering the rival contentions of the parties and after going through the discussions made in the original case as well as appeal and revision, this Court finds the case requires decision on two aspects viz (i) if the finding of the appellate authority and the revisional authority so far it relates to maintainability of one appeal for the involvement of 9 Objection Cases in the impugned order vide Annexure-1 is justified or not? (ii) For the facts and circumstances involved in the case, whether the revisional authority for its entering into merit of the case is justified in dismissing the revision curtailing the right of appeal accrued in favour of the petitioners?

Coming to decide on the Issue No.1, this Court finds the case of the petitioners as well as the private opposite parties admittedly involved in Objection Case No.1086 of 1990. Petitioners have specific pleading in the appeal as well as in the revision that the petitioners have not been aggrieved by the orders of the original authority involved the other 8 Objection Cases. There is also no denial to this aspect by the private opposite parties.

A Single Bench of this Court referring to a decisions of Hon'ble Apex Court in the case of *Narahari & Ors. v. Shankar & Ors.*, *AIR 1953 SC 419,* in the case of Braja Mohan Das v. Radha Mohan Das, *AIR 1961 Orissa, 41,* in the case of Golak Behari Biswal & Anr. v. Karunakar Rout, *AIR 1987, Orissa 236*, in the case of Ram Chandra Das v. Girija Nandini Devi, *AIR 1966 SC 323* and in the case of *Sahu Madho Das v. Mukunda Ram, AIR 1955 SC 481* held that one Second Appeal is maintainable against a common judgment involving 2 Title Appeals on the premises that Title Appeals arose out of one suit, which is not the situation here. In the case of *Abdul Rahim & others v. State of Orissa & others*, *41 (1975) CLT 714,* a Division Bench of this Court held that since the claims before the Estate Abolition authority were separate altogether, separate appeals for separate claimants was desirable and joint appeal as against such common orders was not maintainable. In another Division Bench in the case of *Bula Kandia and others v. Radhakanta Deb and others*, *1990 (I) OLR 378,* this Court, dealing with a similar situation but involving proceeding under the Orissa Land Reforms Act maintained the writ petition only in respect of two appeals therein. For the facts involved in the case, and for the admitted position in the case at hand that the petitioners had a specific case that they

have not been aggrieved by the orders passed involving other objection cases and their appeal was confined to the order concerning Objection Case No.1086 of 1990, this Court though does not find any quarrel with the proposition already held by this court in the judgment supra, but for the admitted position, as indicated hereinabove, involving the case at hand held one appeal at the instance of the petitioners was very much maintainable. As a consequence, this Court sets aside the finding of both the appellate authority as well as Revisional authority in so far it relates to issue no.1 and answer the Issue no.1 accordingly.

Now coming back to the Issue No.2, for the observation of this Court hereinabove that the appellate authority as well as the Revisional authority made wrong in finding the single appeal not maintainable and further since this Court finds that the right to appeal being a statutory right, the Revisional authority instead of proceeding to merit of the case should have remitted back the matter to the appellate authority for its decision on merits.
appellate authority for its decision on merit.

Be that as it may, considering the rival contention of the parties and looking to the limited claim of the petitioner involving the Objection Case No.1086 of 1990, this Court observes the Revisional authority even if entered into the merit of the case has failed in considering independent claims involved in particular objection case. For this, this Court also finds the findings of the revisional authority on merit of the case is also not sustainable in the eye of law and the case needs fresh adjudication by the appellate authority.

Under the circumstances, while interfering in the orders passed by the appellate authority as well as revisional authority, this Court sets aside the both and remits the matter back to the appellate authority to decide the merit involving the order concerning Objection Case No.1086 of 1990 and a fresh order be passed by the appellate authority giving opportunity of hearing to the petitioners and the present private opposite parties and further without being influenced by the observation already made by the Revisional authority under Annexue-3 already set aside by this judgment. In the result, the writ petition succeeds but however to the extent indicated hereinabove. There is no order as to cost.

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