O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2018

(*FEBRUARY*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY

MONTHLY REVIEW OF CASES ON CIVIL, CRIMINAL & OTHER LAWS, 2018 (FEBRUARY)

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2. Section 100 of CPC

Gopinath Dhal Versus Sankarsan Dhal and others.

Dr. A.K. Rath, J.

In the High Court of Orissa, Cuttack

Date of hearing and judgment: 05.02.2018

Issue

In the matter of allotment of share in a suit for partition –challenged.

Relevant Extract

Defendant no.1 is the appellant against a reversing judgment.

Respondent nos.1 to 3 as plaintiffs instituted a suit for partition.

The case of the plaintiffs was that Mana Dhal was the common ancestor of the parties. He died leaving behind his three sons Jai, Baidhar and Bhobani. They were separated in mess some time after the revisional settlement. After settlement operation, Jai died leaving behind his sons Bhaktahari, Nilamani, Kunjabehari and Sanatan. Baidhar died leaving behind his son Gopinath, defendant no.1. Bhobani died leaving behind his daughter, Puni. Bhaktahari died leaving behind his sons Sankarsan and Ekadashi, plaintiff nos.1 and 2. Nilamani, Kunjabehari and Sanatan died leaving behind their wives Subhadra, plaintiff no.3, Sudhala, defendant no.2 and Inda, defendant no.3. The suit properties consist of eight lots described in the schedule of the plaint. The properties in lot nos. 1 and were recorded in the names of Jai and Baidhar. The defendant no.1 had 8 annas interest therein. Lot nos.3 to 6 had been recorded in the names of Jai, Baidhar and Bhobani, each having 1/3rd share. The above three branches also had 1/3rd share in Lot nos.7 and 8 properties. The suit properties had not been partitioned by metes and bounds. The plaintiffs requested the defendants for amicable partition. But then, the defendants turned a deaf ear. With this factual scenario, the plaintiffs instituted the suit seeking the relief mentioned supra.

The defendant nos.1 and 7 filed separate written statements denying the assertions made in the plaint. According to defendant no.1, he got half interest in the properties in Lot nos.1 and 2, 2/3rd interest in Lot nos.3, 4 and 7 and 1/3rd interest in Lot nos.5 and 6. It was pleaded that during his minority, the defendant

no.7 obtained a fraudulent and illegal sale deed in respect of Lot no.6 without his knowledge. He came to know of this during hearing of O.L.R. Case No. 638/76 filed by him for assessment of rent. The sale deed had not been acted upon.

The case of the defendant no.7 was that after death of Bhobani, his brothers Jai and Baidhar, succeeded to the property of Bhobani. Jai and Baidhar had half share each in Lot no.6 properties. After the death of Jai and Baidhar, the plaintiffs and defendant nos. 1 to 3 were in possession of those properties. The defendant no.1 was entitled to half share in the Lot no.6. He sold Ac.022 dec. to the defendant no.7 by means of a registered sale deed dated 21.01.47 and delivered possession to him. He is in possession of the same.

On the inter se pleadings of the parties, learned trial court struck five issues. On a threadbare analysis of evidence on record as well as pleadings, learned trial court decreed the suit holding, inter alia, that defendant no.1 had 1/3rd share in the suit schedule properties in Lot no.6. The sale deed dated 21.01.47 executed by defendant no.1 in favour of defendant no.7 was invalid and void. Assailing the judgment and decree of the learned trial court, the defendant no.1 filed T.A. No. 90 of 1981 before the learned Additional District Judge, Jajpur in respect of other lots. Defendant no.7 filed cross objection in respect of Lot no.6. The appeal was dismissed for non-prosecution. The cross objection was allowed. Hence, this second appeal.

The appeal was admitted on the following substantial question of law:-

"Whether the sale deed purported to be executed by the appellant in favour of the respondent no.9 (Ext.A-2) was a void document being without consideration as found by the learned trial court, but no finding on the same was recorded by the lower court ?"

Heard Mr. R.C. Rath, learned counsel for the appellant. None appears for the respondents.

Mr. Rath, learned counsel for the appellant argues with vehemence that Gopinath, defendant no.1, was 16 years old at the time of the execution of the sale

deed. Thus the sale deed executed by defendant no.1 in favour of the defendant no.7 in respect of Ac.022 dec. of land out of Lot no.6 is void. He places reliance on the School Leaving Certificate of defendant no.1 vide Ext.C/3. His alternative submission is that in the event this Court finds that the sale deed is genuine, then the same shall be confined the share of the defendant no.1 only.

The L.C.R. reveals that exhibited documents vide A-3 to J3 had been taken by the learned counsel appearing for the appellant on 24.09.85. Mr. Rath, learned counsel for the appellant expresses his disability to produce the same in Court. Thus in the absence of any material on record, it is difficult to hold that the defendant no.1 was minor at the time of execution of the sale deed. The learned appellate court disbelieved the School Leaving Certificate, since the original one was not called for. There is no perversity in the said finding.

The next question crops up as to the entitlement of the defendant no.7 ? Admittedly, defendant no.1 has executed a sale deed in respect of Ac.022 dec. of land out of Lot no.6. Lot no.6 consists of Ac.44 dec. of land. The learned trial court came to hold that defendant no.1 has 1/3rd share that means Ac.0.14 dec. 66 kadi. Thus excess alienation is void to that extent. The substantial question of law is answered accordingly. 11. In the result, the appeal is allowed to the extent indicated above. Consequently, the suit is decreed in part. There shall be no order as to costs.

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3. ***Section 100 of CPC***

Ranjan Mallik (since dead) through L.R.s and another versus Aintha Mallik and another

Dr. A.K. Rath, J.

In the High Court of Orissa , Cuttack

Date of Judgment: 01.02.2018

Issue

In the matter of declaration of R/T/! and permanent Injunction in respect of suit property, decreed by the Trial Court and reversed by the First Appellant Court –Challenged.

Plaintiffs are the appellants against a reversing judgment. The suit was for declaration of title, confirmation of possession or in the alternative for recovery of possession if the plaintiffs are dispossessed during pendency of the suit, for declaration that the recording of the suit land in the name of defendant no.1 and transfer the land by the defendant no.1 in favour of defendant no.2 are not binding and for permanent injunction.

The case of the plaintiffs was that the suit land belonged to plaintiff no.1. Patta was issued in his favour. The same was recorded in his name. He was in peaceful possession of the same. He used to pay rent. He constructed a dwelling house over a portion of the suit plot and resided therein. Defendant no.1 is his brother. In the hal settlement, the name of defendant no.1 had been recorded. He had no right, title and interest over the suit land. During hal settlement operation, parcha was issued in the names of the plaintiffs in respect of Ac.0.64 dec. appertaining to sabik plot no.198. Sabik plot no.198 had been bifurcated into three separate plots, i.e., hal plot nos.834, 1125 and 1126 appertaining to hal khata no.302. The plaintiff no.1 had encroached upon Ac.0.03 dec. of Government land adjoining to the east of the aforesaid plots. The said area had been included in hal plot no.834. The rest of sabik plot no.198 now corresponds to hal plot no.834/1125 and the suit plot. Taking a cue from wrong recording of the suit land, the defendant no.1 alienated the same in favour of defendant no.2 by means of a registered sale deed dated 7.3.88. The sale deed is illegal and inoperative. When defendant no.2 threatened to dispossess them, the suit was instituted seeking the reliefs mentioned supra.

The defendants filed written statement denying the assertions made in the plaint. The case of the defendants was that plaintiff no.1 and defendant no.1 are brothers. They were living in joint mess and property. Plaintiff no.1 was working as Choukidar of the village Chinara. Defendant no.1 was helping him. Plaintiff no.1 filed Choukidari Jagri Case No.504 of 1965-66 to settle Ac.2.78 dec. of land appertaining to khata no.280 in his favour in accordance with the provisions of the Orissa Offices of Village Police (Abolition) Act, 1964. In the said case, one Daitari Mallik filed objection. Ac.0.26 dec. of land appertaining to sabik

plot no.205 was recorded in the names of plaintiff no.1, defendant no.1 and Daitari Mallik jointly. Daitari Mallik got Ac.0.10 dec. of land whereas plaintiff no.1 and defendant no.1 got Ac.0.08 dec. each. Sabik plot no.198, area Ac.0.61 dec. appertaining to khata no.280 was recorded in favour of plaintiff no.1 along with other Ac.2.17 dec. of land. It was further pleaded that to clear up the outstanding dues, plaintiff no.1 and defendant no.1 sold their homestead land measuring an area Ac.0.16 dec. to Narayan Parida and others in the year 1967-68 and constructed their residential house over sabik plot no.198. Plaintiff no.1 relinquished his title over sabik plot no.184, Ac.0.25 dec. and sabik plot no.682, Ac.0.25 dec. in favour of defendant no.1 and executed a deed of relinquishment. He agreed to execute a registered deed and delivered possession of the land in favour of defendant no.1. Plaintiff no.1 voluntarily relinquished his right, title and interest and possession over Ac.0.01 dec. of land appertaining to sabik plot no.198 which was adjacent to Ac.0.03 dec. of Government land in favour of defendant no.1 in the year 1967. The defendant no.1 was in possession of the same along with his father for a period of more than forty years. He is in possession of Ac.0.04 dec. of land peacefully, continuously and with the hostile animus to the plaintiffs and as such perfected title by way of adverse possession. The settlement authorities recorded the land in favour of defendant no.1. Since the defendant no.1 was in need of money to clear up the outstanding dues, he applied for permission under Sec.22 of the Orissa Land Reforms Act, 1960 before the SubDivisional Officer, Nayagarh to sale the land, which was registered as Misc. Case No.803 of 1987. After obtaining permission, on 8.3.1988, he sold the land to the defendant no.2 by means of a registered sale deed for a valid consideration. It was further pleaded that sabik plot no.198 was originally an area of Ac.0.61 dec. which was recorded in favour of plaintiff no.1. The defendant no.1 had perfected title over Ac.0.01 dec. of land under plot no.834/1126 corresponds to sabik plot no.198. The rest Ac.0.60 dec. of land had been recorded in favour of plaintiff no.1 in the hal settlement operation.

On the interse pleadings of the parties, learned trial court struck seven issues. Parties led evidence, both oral and documentary, to substantiate their cases. Learned trial court came to hold that plaintiff no.1 had not relinquished his title over Ac.0.01 dec. of land appertaining to sabik plot no.198 in favour of defendant no.1. Defendant no.1 failed to prove that he had perfected title over Ac.0.01 dec. of land by way of adverse possession. Since defendant no.1 had no title over plot no.834/1126, the sale deed executed in favour of defendant no.2 is invalid and not binding. Held so, it decreed the suit. The unsuccessful defendants challenged the judgment and decree of the learned trial court before the learned Civil Judge (Sr. Divn.), Nayagarh in T.A. No.2 of 1993. Learned appellate court came to hold that out of Ac.0.04 dec. of land appertaining to hal plot no.834/1126, Ac.0.03 dec. of land belonged to the Government. The nature of the land is Gochar. Ac.0.01 dec. of land appertaining to hal plot no.834/1126 is a part of sabik plot no.198. He disbelieved the plea of defendants that dwelling house stands over the suit land. The plaintiffs had relinquished their right, title and interest in respect of Ac.0.01 dec. of land appertaining to sabik plot no.198 in

favour of defendant no.1 where after defendant no.1 amalgamated the same with the Government land having an area of Ac.0.03 dec. appertaining to sabik plot no.198. The suit plot no.834/1126 is not a part of sabik plot no.198. He disbelieved the plea that the plaintiffs had encroached upon Ac.0.03 dec. of land from the Government land adjacent to sabik plot no.198. The hal record of right in respect of the suit land stands in the name of defendant no.1. Defendant no.1 was in possession over the suit land till 1988 and thereafter he alienated the same in favour of defendant no.2. It further held that defendant no.1 had failed to prove that he had acquired title over Ac.0.01 dec. of land appertaining to sabik plot no.198 by way of adverse possession. It abruptly came to a conclusion that defendant no.1 had perfected his title over the suit land by way of adverse possession. Held so, it allowed the appeal. It is apt to refer that during pendency of the second appeal, the plaintiff no.1-appellant no.1 died. The legal heirs had been substituted.

The second appeal was admitted on the substantial questions of law enumerated in ground nos.a, c and d of the memorandum of appeal. The same are: "a. Whether the judgment of the appellate court can be sustained in the eye of law as neither the oral nor the documentary evidence adduced by the plaintiffs have been taken into consideration. c. Whether the appellate court is justified in holding that the defendant no.1 has perfected his title by way of adverse possession without any pleading and evidence to that effect. d. Whether the appellate court is justified in holding that the sell by defendant no.1 in favour of defendant no.2 is valid particularly when the said defendant no.1 has no title to the said land covered under the sale deed."

Mr. Mahadeb Mishra, learned Senior Advocate for the appellants, submitted that there was no deed of relinquishment in favour of defendant no.1. Defendant no.1 had failed to substantiate the plea of adverse possession. Learned appellate court on untenable and unsupportable grounds reversed the decree.

Plaintiff no.1 had not executed a deed of relinquishment in favour of defendant no.1. No document had been exhibited in the court below. Alternatively, defendant no.1 had pleaded that he had 6 perfected title by way of adverse possession. The plea is mutually destructive. Claim of title to the property and adverse possession are in terms of contradictory.

In Annasaheb Bapusaheb Patil and others vs. Balwant alias Balasaheb Babusaheb Patil (dead) by Lrs. and heirs and others, (1995) 2 SCC 543, the apex Court made an in-depth analysis of claim of title and claim to adverse possession over the property. The apex Court in paragraph-15 of the said report held: "Where possession can be referred to a lawful title, it will not to be considered to be adverse. The reason being that a person whose possession can be referred to a

lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no tide at all." The apex Court in the case of Mohan Lal (deceased) through his LRs. Kachru and others vs. Mirza Abdul Gaffer and another, (1996) 1 SCC 639 held: "As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period of his title by prescription nec vi nec clam nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant.

In paragraph 9 of the judgment, learned appellate court came to a finding that the defendant no.1 had failed to prove that he had acquired title over Ac.0.01 dec. of land appertaining to sabik plot no.198 by way of adverse possession. In the middle of the said paragraph, it abruptly came to a conclusion that defendant no.1 had perfected title by way of adverse possession. The judgment suffers from internal inconsistencies. The irresistible conclusion is that defendant no.1 has no title over Ac.0.01 dec. of land appertaining to sabik plot no.198. Plaintiff has title over the same.

With regard to Ac.0.03 dec. of land, the plaintiffs assert that they had encroached upon the Government land. The nature of the land is Gochar. No declaratory relief can be granted in respect of the Gochar land. The plaintiffs have no title over the same. The substantial questions of law are answered accordingly.

In the result, the impugned judgment is set aside. The appeal is allowed in part. The suit is decreed to the extent indicated above. There shall be no order as to costs.

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4. Section 100(4)&(5) of CPC

Surat Singh (D) Vs. Siri Bhagwan & Ors.

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

In the Supreme Court of India

Date of Judgment -19.02.2018

Issue

In the matter of framing substantial question of law while admitting second appeal-Guidelines given.

Relevant Extract

These appeals are directed against the final judgment and order dated 13.12.2006 passed by the High Court of Punjab & Haryana at Chandigarh in Civil Regular Second Appeal No.382 of 1992 whereby the High Court allowed the appeal filed by respondent No.1 herein, set aside the judgment dated 13.11.1986 of the District Judge, Narnaul in Civil Appeal No.83 of 1984 and reversed the judgment dated 16.05.1984 of the Trial Court in Civil Suit No. 315 of 1981. By order dated 22.01.2007, the High Court also dismissed the application (C.M. No.448-C of 2007 in RSA No.382/1992) filed by the appellant herein for recalling the judgment dated 13.12.2006.

In order to appreciate the short issue involved in the appeals, few relevant facts need mention infra.

One Murti Devi (since dead) and her daughter Smt. Bholi Devi filed Civil Suit No.315/81 in the Court of Sub-Judge, IInd Class, Rewari against one Siri Bhagwan (respondent No.1 herein). The suit was for a declaration that the decree obtained by Siri Bhagwan against Murti Devi on 11.11.1980 in Civil Suit No. 638/1980 in relation to the land measuring 37 Kanals 14 Marlas situated at Village Alampur, Tahsil Rewari, District Mahendergarh be declared null and void and not binding on the plaintiffs because it was obtained by defendant No.1-Siri Bhagwan by playing fraud and 3 misrepresentation on the plaintiff-Murti Devi by taking advantage of her illiteracy and poverty. The defendant No.1-Siri Bhagwan contested the suit.

The Trial Court, by judgment/decree dated 16.05.1984 in C.S. No.315 of 1981 dismissed the suit. Felt aggrieved, the plaintiff-Murti Devi, filed first appeal (C.A. No.83 of 1984) before the District Judge. By Judgment/decree dated 13.11.1986, the first Appellate Court allowed the appeal, set aside the judgment/decree of the Trial Court and decreed the plaintiff's suit.

Felt aggrieved, defendant No. 1- Siri Bhagwan filed Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") in the High Court of Punjab & Haryana out of which these appeals arise. During the pendency of the second appeal, the appellant herein-Surat Singh

purchased the suit land from Murti Devi vide registered sale deed dated 30.07.1988 for Rs.80,000/-.

The appellant-Surat Singh then filed an application under Order 1 Rule 10 read with Order 22 Rule 10 of the Code praying therein to become a party respondent along with original plaintiff/respondent No.1 in the second appeal as a subsequent purchaser of the suit land from the plaintiff/respondent No.1, pending litigation.

By order dated 04.01.1989, Surat Singh's application was allowed and he was allowed to become a party-respondent in the second appeal. In the meantime, Murti Devi expired. Since one daughter of Murti Devi was already on record as plaintiff No.2 and the other daughter was on record as proforma defendant No. 2, the Lis involved in the appeal continued.

By impugned judgment dated 13.12.2006, the Single Judge of the High Court allowed the second appeal, set aside the judgment/decree of the first Appellate Court and restored that of the Trial Court, which resulted in dismissal of the suit filed by Murti Devi and her daughter. Since the impugned judgment dated 13.12.2006 was passed without hearing the appellant herein(respondent No.4 in the High Court), he filed an application under Section 151 read with Order 41 Rule 21 of the Code for recalling the judgment dated 13.12.2006. By order dated 22.01.2007, the High Court dismissed the application. Aggrieved by both the judgment/order dated 13.12.2006 and 22.01.2007, the appellant has filed these appeals by way of special leave in this Court.

Therefore, the short question, which arises for consideration in these appeals, is whether the High Court was justified in allowing the second appeal filed by defendant No. 1-Siri Bhagwan (respondent No.1 herein) and thereby was justified in dismissing the plaintiff's suit by restoring the judgment/decree of the Trial Court.

Having heard the learned counsel for the parties and on perusal of the record of the case, we are constrained to allow the appeals, set aside the impugned judgment and remand the case to the High Court for deciding the second appeal afresh on merits in accordance with law.

The reasons for remanding the case to the High Court are more than one as set out hereinbelow.

First, we find that the High Court allowed the second appeal filed by respondent No. 1 herein without hearing respondent No.4 before it, i.e., (appellant herein). In other words, the High Court allowed the second appeal after hearing the appellant of second appeal only and not respondent No.4 of the second appeal, who was absent at the time of hearing.

When respondent No. 4 (appellant herein) filed an application under Section 151 read with Order 41 Rule 21 of the Code praying for an opportunity of hearing, his application was dismissed by the High Court.

In our opinion, the High Court erred in deciding the second appeal much less allowing it without hearing the contesting respondent No.4 (appellant herein) and also erred in dismissing his application filed under Section 151 read with Order 41 Rule 21 of the Code for rehearing of the second appeal.

Having regard to the nature of controversy involved in the case and further in the light of the grounds on which the application for rehearing of the appeal was founded, the High Court should have granted one opportunity of hearing to respondent No. 4 for opposing the second appeal and for that purpose should have restored the second appeal for its re-hearing on merits in accordance with law.

Second and more important, this Court cannot countenance the manner in which the High Court decided the second appeal on merits.

We find that the judgment of the first Appellate Court, which was impugned in the second appeal, was delivered on 13.11.1986 whereas the second appeal was registered in 1992 (S.A. No.382/92) and the impugned judgment was delivered on 13.12.2006.

The High Court as it seems did not frame any substantial question of law while admitting the appeal as per sub-section(4) of Section 100 though it remained pending for a long time. However, the High Court proceeded to allow the second appeal and while doing so framed the substantial question of law in the concluding para of the impugned judgment.

Sub-section (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is "satisfied" that the case involves a "substantial question of law". Subsection (3) makes it obligatory upon the appellant to precisely state in memo of appeal the "substantial question of law" involved in the appeal. Sub-section (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question.

In other words, once the High Court is satisfied after hearing the appellant or his counsel, as the case may be, that the appeal involves a substantial question of law, it has to formulate that question and then direct issuance of notice to the respondent of the memo of appeal along with the question of law framed by the High Court. Sub-section (5) provides that the appeal shall be heard only on the question formulated by the High Court under sub-section (4). In other words, the jurisdiction of the High Court to decide the second appeal is confined only to the question framed by the High Court under sub-section (4).

The respondent, however, at the time of hearing of the appeal is given a right under sub-section (5) to raise an objection that the question framed by the High Court under sub-section (4) does not involve in the appeal. The reason for giving this right to the respondent for raising such objection at the time of hearing is because the High Court frames the question at the admission stage which is prior to issuance of the notice of appeal to the respondent.

In other words, the question is framed behind the back of respondent and, therefore, sub-section(5) enables him to raise such objection at the time of hearing that the question framed does not arise in the appeal. The proviso to sub-section (5), however, also recognizes the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under sub-section (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of hearing of the appeal.

Adverting to the facts of this case at hand, we are at a loss to understand as to how the High Court while passing a final judgment in its concluding para could frame the substantial question of law for the first time and simultaneously answered the said question in appellant's favour. Obviously, the learned Judge must have done it by taking recourse to sub-section (4) of Section 100 of the Code.

Here is the case where the High Court was under a legal obligation to frame the substantial question at the time of admission of the appeal after hearing the appellant or/and his counsel under sub-section (4) of Section 100 of the Code, but the High Court did it while passing the final judgment in its concluding para.

Such novel procedure adopted by the High Court, in our considered opinion, is wholly contrary to the scheme of Section 100 of the Code and renders the impugned judgment legally unsustainable.

In our considered opinion, the High Court had no jurisdiction to frame the substantial question at the time of writing of its final judgment in the appeal except to the extent permitted under sub-section (5). The procedure adopted by the High Court, apart from it being against the scheme of Section 100 of the Code, also resulted in causing prejudice to the respondents because the respondents could not object to the framing of substantial question of law. Indeed, the respondents could not come to know on which question of law, the appeal was admitted for final hearing.

In other words, since the High Court failed to frame any substantial question of law under sub-section(4) of Section 100 at the time of 14 admission of the appeal, the respondents could not come to know on which question of law, the appeal was admitted for hearing.

It cannot be disputed that sub-section (5) gives the respondents a right to know on which substantial question of law, the appeal was admitted for final hearing. Sub-section (5) enables the respondents to raise an objection at the time of final hearing that the question of law framed at the instance of the appellant does not really arise in the case.

Yet, the other reason is that the respondents are only required to reply while opposing the second appeal to the question formulated by the High Court under sub-section (4) and not beyond that. If the question of law is not framed under sub-section (4) at the time of admission or before the final hearing of the appeal, there remains nothing for the respondent to oppose the second appeal at the time of hearing. In this situation, the High Court will have no jurisdiction to decide such second appeal finally for want of any substantial question(s) of law.

The scheme of Section 100 is that once the High Court is satisfied that the appeal involves a substantial question of law, such question shall have to be framed under sub-section(4) of Section 100. It is the framing of the question which empowers the High Court to finally decide the appeal in accordance with the procedure prescribed under sub-section (5).

Both the requirements prescribed in sub-sections (4) and (5) are, therefore, mandatory and have to be followed in the manner prescribed therein. Indeed, as mentioned supra, the jurisdiction to decide the second appeal finally arises only after the substantial question of law is framed under sub-section (4). There may be a case and indeed there are cases where even after framing a substantial question of law, the same can be answered against the appellant. It is, however, 16 done only after hearing the respondents under sub-section (5).

If, however, the High Court is satisfied after hearing the appellant at the time of admission that the appeal does not involve any substantial question of law, then such appeal is liable to be dismissed in limine without any notice to the respondents after recording a finding in the dismissal order that the appeal does not involve any substantial question of law within the meaning of sub-section (4). It is needless to say that for passing such order in limine, the High Court is required to assign the reasons in support of its conclusion.

It is, however, of no significance, whether the respondent has appeared at the time of final hearing of the appeal or not. The High Court, in any case, has to proceed in accordance with the procedure prescribed under Section 100 while disposing of the appeal, whether in limine or at the final hearing stage.

It is a settled principle of rule of interpretation that whenever a statute requires a particular act to be done in a particular manner then such act has to be done in that manner only and in no other manner. (See- Interpretation of Statutes by G.P. Singh, IXth Edition page 347 and Baru Ram vs. Parsanni (Smt.), AIR 1959 SC 93).

The aforesaid principle applies to the case at hand because, as discussed above, the High Court failed to follow the procedure prescribed under Section 100 of the Code while allowing the second appeal and thus committed a jurisdictional error calling for interference by this Court in the impugned judgment.

While construing Section 100, this Court in the case of Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs., (2001) SCC 179 succinctly explained the scope, the jurisdiction and what constitutes a substantial questions of law under Section 100 of the Code.

It is, therefore, the duty of the High Court to always keep in mind the law laid down in Santosh Hazari (supra) while formulating the question and deciding the second appeal.

In the light of the foregoing discussion, we cannot sustain the impugned judgment which, in our view, does not conform to the requirements of Section 100 of the Code and hence calls for interference in this appeal.

The appeals thus deserve to be allowed. They are accordingly allowed. The impugned judgment is set aside. The case is remanded to the High Court for deciding the second appeal afresh on merits. The High Court will now frame proper substantial question(s) of law after hearing the appellant and if it finds that any substantial question(s) of law arises in the case, it will formulate such question(s) and accordingly hear the appeal on the question(s) framed finally in accordance with law.

We, however, make it clear that we have not applied our mind to the merits of the controversy involved in the appeals, but only formed an opinion to remand the case due to the infirmity noticed in the manner in which the second appeal was decided. The High Court will, therefore, decide the second appeal uninfluenced by any of our observations made in this order.

Since the matter is quite old, we request the High Court to decide the second appeal expeditiously preferable within six months from the date of receipt of this judgment.

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5. Section 302 of IPC

Hadi Sisa Versus State of Orissa

Dr. D.P. Choudhury & I.Mahanty, JJ.

In the High Court of Orissa, Cuttack

Date of Judgment: 21.02.2018

Issue

In the matter of conviction under section 302 IPC and sentenced to undergo imprisonment for life –challenged.

Relevant Extract

This Jail Criminal Appeal is filed by the appellant from Jail assailing the judgment of conviction passed under Section 302 of the Indian Penal Code (hereinafter called as "I.P.C.") by the learned Ad hoc Additional Sessions Judge (FTC), Malkangiri in Criminal Trial No.42/2008 sentencing him to undergo imprisonment for life for the offence under Section 302 IPC and to pay a fine of Rs.5,000/- in default to undergo R.I. for six months for the said offence.

The factual matrix leading to the case of the prosecution is that on 30.04.2008, the appellant assaulted the deceased by shooting arrow from the bow and thus, said arrow pierced to the chest of the deceased. Then, the deceased was carried to CHC, Khariput where the doctor, having found the deceased with injury, lodged the FIR before the police. During investigation, police examined the witnesses and while treatment was going on, the injured succumbed to injuries. So, the post-mortem examination of the injured was also conducted after performing the inquest over the dead body. Police also seized the weapon of offence, wearing apparels of the victim, nail clippings of the appellant, bow and bed head ticket. After completion of the investigation, charge sheet has been submitted.

The plea of the appellant, as revealed from his statement recorded under Section 313 Cr.P.C. and the cross-examination made to the prosecution witnesses that he is innocent and had no intention to kill the deceased and a false case has been filed against him.

The prosecution, in order to bring home the charge against appellant, has examined nine witnesses and the defence examined none. Learned trial Court, after analyzing the evidence of the PWs, found the appellant guilty under Section 302 IPC and sentenced him to undergo imprisonment for life and to pay a fine of Rs.5,000/- in default to undergo R.I. for six months for the said offence.

Mrs.Kasturi, learned counsel for the appellant submitted that the motive of the appellant has not been proved by the prosecution. No intention or knowledge of the appellant is proved to cause the death of the deceased.

According to him, P.W.2 being arrayed as sole eye witness, cannot be trusted because of his peculiar evidence led. Similarly, the evidence of P.W.8 is not clear, cogent and creditworthy.

Mrs.Kasturi, learned counsel for the appellant further submitted that the material available on record would only indicate that the occurrence took place all of a sudden and the mens rea of the appellant is not proved to cause the death of the deceased. So, he submitted to allow the Jail Criminal Appeal by acquitting the present appellant from the charge.

Learned Additional Government Advocate for the State submitted that there is dying declaration of the deceased to the effect that the appellant had intentionally shot the arrow from the bow to cause the death of the deceased. Moreover, since there is direct evidence available against the appellant, the motive for commission of the crime is not required to be proved being academic. As there are lot of evidence proved against the appellant, the judgment of conviction and sentence should be affirmed.

DISCUSSONS

The FIR vide Ext.1 shows that the Medical Officer of CHC, Khariput is the informant in this case. According to him, when the deceased arrived, the arrow was present piercing the hypochondruim (left side) with omentum protruding out. On being asked, the injured informed that the present appellant assaulted him by bow and arrow on his stomach.

P.W.7 is also another doctor, who has treated the injured preliminarily proved the OPD entry vide Ext.4. Of course, he has referred injured to P.W.1.

However, P.W.8 is another doctor who was working as Surgery Specialist at D.H.H. Koraput, corroborating the statement of P.Ws.1 and 7, admitted that he had attended the deceased referred to by PWs.1 and 7. According to him, the deceased was having penetrating arrow shot with arrow in place and he was in condition of shock and in a confuse state. The arrow entry was at the hypocondrium with prolapsed omentum. The deceased has profuse bleeding from left side chest. He had prepared the bed head ticket vide Ext.7 and proved his signature vide Ext.7/1 but on 01.05.2008 at 9.00 pm, the deceased expired.

P.W.8 further testified that Dr.Manoj Kumar Das, who is his colleague, had performed the post-mortem examination over the dead body of the deceased. He has got acquaintance with his handwriting and signature having worked with him together. He proved the post-mortem report vide Ext.10 and signature of Dr.M.K.Das vide Ext.10/1

On perusal of the post-mortem report, it is clear to show that the cause of the death was due to hemorrhagic shock as a result of bleeding from various

internal wounds and accumulation of blood in multiple body cavity as well as injury to various organs.

Even if the doctor conducting autopsy has not examined but taking the evidence of P.Ws.7 and 8 read with the post-mortem report culminatingly go to show that the deceased had died due to arrow shot. So, from the material, it is inferred that the death of the deceased was homicidal.

P.W.2, who is the eye witness to the occurrence, categorically stated that on the date of occurrence, while he and deceased were sitting on their verandah and talking with each other, at that time, the appellant being armed with bow and arrow, shot an arrow aiming at the deceased and the said arrow pierced through the chest of the deceased for which he fell down on the ground. Then, the appellant fled away from the spot. From the evidence of P.W.2, it reveals that the deceased Sania Sisa was shifted to CHC, Khairput and then at the advice of the doctor, the deceased was shifted to District Headquarters Hospital and on the next date, he died. There is nothing revealed from his cross-examination to shake his testimony.

From the evidence of P.W.6, who is the son-in-law of the deceased, it reveals that he was present in his courtyard when the occurrence took place. Hearing the cry of his father-in-law, he rushed to the spot and found the appellant was running away from the spot with his bow. There is nothing revealed from his evidence to discredit his testimony even if he is related to the deceased. On the other hand, his evidence also corroborates the evidence of P.W.2 about the complicity of the appellant to cause death of the deceased.

P.W.3 is not an occurrence witness but he had only been to the spot after coming to know about the death of the deceased.

From the evidence of the IO (P.W.9), it appears that he has seized the bow from the house of the appellant. From the evidence of P.W.8 (doctor), it reveals that police has seized the arrow from him at district headquarter hospital vide Ext.8. It also reveals from the evidence of P.W.9 that the seized bow and arrow had been sent for doctor's opinion. Of course, inquiry report prepared by Dr.Manoj Das is proved vide Ext.11 by P.W.8, who has got acquaintance with the signature and handwriting of Dr.Das. In cross-examination, P.W.8 denied about possibility of such injury by accidental fall on a pointed object. It reveals from Ext.11 that the injuries, as found by P.W.8 and Dr.Das, are possible by the said arrow. Of course that arrow is not produced in Court. Even if the same is not produced in Court, non-controverted evidence of P.W.9 read with the evidence of P.Ws.1, 7 and 8 do not beleaguer the case of the prosecution. So, the prosecution has well proved that the injury could be possible by arrow and bow.

It is revealed from the evidence of PWs that the IO (P.W.9) has seized the wearing apparels of the deceased and appellant. Not only this but also the IO has

seized the nail clippings of the appellant. P.W.13 stated to have sent these items for chemical examination but the report of the chemical examiner has not been proved by the prosecution. In the absence of report of the chemical examiner, no adverse view can be taken against the case of the prosecution as other materials, as discussed above, clearly proved the sudden overt act by the appellant upon the deceased by shooting arrow. The evidence of the P.Ws do not disclose about the previous enmity between the parties. Of course, the motive is not criteria as there lies direct evidence available to prove the complicity of the appellant with the commission of offence.

It is submitted by the learned counsel for the appellant that in view of the facts and circumstances of the present case, the offence under Section 302 IPC is yet to be proved because the mensrea to cause the death of the deceased is not proved by the prosecution. Moreover, there is no motive proved by the prosecution and it appears that the appellant has no knowledge that the injury in ordinary course will cause death of the deceased. Repelling such argument, learned State Counsel submitted that when there is sudden attack by the appellant by shooting arrow, he had intention and knowledge that the injury would cause the death of the deceased in ordinary course of its nature.

From the discussions made hereinabove, we are of the view that the death of the deceased was culpable homicidal one but the single shot by arrow without there being evidence of intention to cause death. The judgment of conviction under Section 302 IPC passed against the appellant, while being not agreed with, the prosecution case for the offence under Section 304-I of IPC against the appellant is well made out. Therefore, we modify the judgment of conviction passed against the appellant under Section 302 of IPC by the learned Ad hoc Additional Sessions Judge (FTC), Balkangiri to Section 304-I IPC.

So far as the sentence of the present appellant is concerned, we are of the view that the appellant is a member of Scheduled Tribe, mens rea of appellant being proved and the appellant is in custody since 2008, in the facts and circumstances, we award sentence for R.I. for ten years and to pay a fine of Rs.5000/- (Rupees Five Thousand) in default to undergo R.I. for six months for the offence under Section 304-I of IPC. The period already undergone may be set off against the imprisonment awarded.

With the above modification of conviction and sentence, the JCRLA is allowed in part.

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6. Section 302 of IPC

Nanda Sethi & others Versus State of Orissa

S. Panda & K.R. Mohapatra, JJ.

In the High Court of Orissa: Cuttack

Date of Judgment: 09.02.2018

Issue

In the matter of conviction under Section 302/34 of IPC and sentenced to undergo imprisonment for life- Challenged.

Relevant Extract

The appellants, namely, Nanda Sethi, Maya@Maheswar Gouda and Kalia Gouda are convicted under Sections 302/34 I.P.C. and sentenced to undergo imprisonment for life for commission of offence under Sections 302/34 I.P.C., vide judgment and order dated 9th May, 2003 passed by the learned Sessions Judge, GanjamGajapati at Berhampur in Sessions Case No.368 of 2001 (arising out of G.R. Case No.961 of 2000 of the file of learned S.D.J.M., Berhampur, corresponding to Berhampur Sadar P.S. Case No.130 (6) dated 09.10.2000), which is under challenge in this appeal.

As would reveal from the FIR, the prosecution case in brief is that 10 to 12 days before the date of occurrence, i.e., 09.10.2000, appellant-Nanda Sethi had attempted to rape the niece of one Budha Teli. At this, the victim warned Nanda Sethi (appellant No.1) to disclose the fact before A.Fakira, who would wipe out his name (kill him). Due to the said incident, the appellants as well as one Sambhu Rao (not charge-sheeted) were searching for an occasion to kill A.Fakira (the deceased). On 09.10.2000 at about 9.30 P.M., A.Fakira (the brother of the informant A. Ganesh Dora-P.W.1) along with others was playing Gudugudu Palli (gambling) at Bado Gurji Chowk of village Ankushpur. At that time, Nanda Sethi-appellant No.1, Maheswar Gouda-appellant No.2 and Kalia Gouda-appellant No.3 along with said Sambhu Rao came from Bada Sahi side being armed with katis and swords. At that time, the informant was sitting on the Verandah of betel and grocery shop of one Nunu Dora. Suddenly, Nanda Sethi dealt a Kati blow on the head of A. Fakira. Thereafter, Sambhu, Maheswar and Kalia also dealt blows by means of swords indiscriminately on the head and neck of the deceased. Seeing the incident, the informant, while proceeding to the spot of occurrence, two brothers of Maheswar Gouda, namely, Panchu Gouda and Deba Gouda arrived there from the direction of Majhi Sahi being armed with Katis. P.W.5-A. Dillesu Dora (an injured), a brother of A.Fakira who was present near the spot, tried to save his brother and in the process was also assaulted by the assailants present there, as a result of which he received injuries on his right shoulder and left leg. By the time, the informant reached at the spot, all six assailants fled away from the spot with the weapons of offence towards Majhi Sahi. Thereafter, the deceased was shifted to M.K.C.G. Medical College and Hospital, Berhampur in an auto rickshaw of Narsu Raulo accompanied by A.Dillesu Dora, where the Doctor declared A.Fakira to be brought dead. The incident was also witnessed by one Shyam Sundar Dora, Suduru Sahu and others, who were present near the spot.

The matter was reported at Berhampur Sadar Police Station by P.W.1 at about 11.00 P.M.

Upon receiving the FIR (Ext.1) the O.I.C., Berhampur Sadar Police Station, P.W.11, registered the P.S. Case No.130 dated 09.10.2000 under Sections 302/34 I.P.C. As Ext.1 disclosed cognizable offence, PW-11 took up investigation. After completion of investigation, charge sheet was submitted against the appellants along with other accused persons under Sections 302/324 read with Section 34 I.P.C.

In order to bring home the charge, the prosecution examined as many as 12 witnesses. P.W.1-A.Ganesh Dora, is the informant, P.W.3-A. Shyam Sundar Dora was gossiping with A. Dillesu Dora (the injured) near the spot, P.W.4, namely, Santosh Kumar Borada was a chance witness stated to be loitering near the spot at the time of occurrence, P.W. 5, namely, A. Dillesu Dora, is the brother of the informant and the deceased, P.W.8, namely, Prasad Kumar Panda is also an eyewitness to the occurrence, P.W.9, namely, Dr. Jatin Kumar Das, who conducted the postmortem of the dead body, P.W.10, namely, Bharat Sethi, is the Constable, who accompanied the dead body for postmortem, P.W.11 is the I.O., P.W.12 is the Doctor, who examined A.Dillesu Dora (the injured). The prosecution also relied upon Ext.1, the F.I.R., Ext.3 inquest report, Exts.4, 5 and 6 are the seizure lists of the weapons of offence. Exts.7, 8 and 9 are the statements of the appellants, giving recovery of the weapons of offence, Ext.12, the postmortem report, Ext.13, the opinion of P.W.9, Ext.14, the command certificate of the dead body, Ext.16 is the spot map and several other documents, in support of their case. The prosecution also produced M.O.I to M.O.IV, the weapons of offence to prove the charges.

The plea of defence was of complete denial of their involvement in the crime.

Taking into consideration the evidence of the witnesses together with attending circumstances, and the arguments advanced by learned counsel for the parties, the impugned judgment of conviction and sentence has been passed.

Learned counsel for the appellants contended that the prosecution has miserably failed to bring home the charges leveled against the appellants.

The prosecution case, if accepted in toto, would not end in conviction under Sections 302/34 8 I.P.C. On the other hand, the appellants in worst case can be convicted under Sections 326/304 Part-II I.P.C. Since the date of their apprehension, all the appellants are in custody and thus they have undergone more than 17 years of sentence in the meantime. Thus, the impugned judgment of conviction and sentence is not sustainable and is liable to be set aside. The appellants are entitled to be set at liberty forthwith.

Mr.S.S.Mohapatra, learned Additional Standing Counsel, on the other hand, submitted that on a compendious reading of evidence of eyewitnesses, namely, P.Ws. 1, 3, 4, 5 and 8 together with medical evidence are sufficient to bring home the charges under Sections 302/34 I.P.C. leveled against the appellants.

We have heard learned counsel for the parties at length and perused the record. Prosecution examined PWs-1, 3, 4, 5 and 8, who are eyewitnesses to the occurrence. PW-1 is the informant and brother of the deceased.

He, in his evidence, has clearly stated as follows:

"3. On 09.10.2000, my deceased brother was playing GUDGUDU PALI (gambling) at the Chok of our village. At that time, it was about 9.30 P.M. Several others were also playing. At that time, I was sitting in the Grocery shop of one Nunu Dora of my village. The said Chok of our village is known Bodo Gorji Chok. At that time, accused persons Nanda Sethi, Kalia Gouda, Maheswar Gouda and one Sambhu Rao (not charge-sheeted), son of G. Raja Rao of my village came from Bodo Sahi side. They were armed with katis and swords. 4. Accused Nanda Sethi gave a kati blow on the head of the deceased A.Fakira. Accused Moheswar, Kalia and 10 their companion Sambhu Rao also assaulted on different parts of the body of the deceased indiscriminately……... My younger brother Dillesu came to the rescue of the deceased. My brother Dillesu was also assaulted by accused Babula and Rabindra. I also ran to the place of occurrence. All the accused persons left the place after assaulting both my brothers towards Majhi Sahi."

In cross-examination, he has clearly stated as follows:-

"8…….. I was sitting facing towards the place of assault, where the GUDUGUDU PALLI was in progress. I saw the accused persons coming from the side of Bada Sahi toward the place, where the game was in progress. Accused Nanda Sethi first assaulted my deceased brother. I cannot say the exact seat of assault attributing to each of the accused persons, but all of them assaulted my brother……" Defence did not put any question to this witness with regard his presence at the spot. At the time of occurrence, P.W.3 was gossiping with A. Dillesu Dora (P.W.5).

He, in his evidence, has stated as follows:-

"2. At that time, accused Nanda Sethi, Maheswar Gouda, Kalia Gounda and one G. Sambhu Rao (not charge-sheeted) came from the side of Bada Sahi being armed with Kati and sword. Accused Nanda Sethi gave kati blows on the head of deceased 11 Fakira and thereafter, all the accused persons assaulted the deceased by means of swords and katis indiscriminately. I saw all of them by illumination of the street light and also by the light of the shops."

He at paragraph-4 of the cross-examination stated as follows:-

"Myself and Dillesu were talking at a distance of about 30' from the place of assault. Houses of Mangulu Bhandari and Uchhab Sahu are very nearer, i.e., about 7 to 8 feet from the place, where we were talking. The betel shop of Nunu Dora is at a distance of 7 to 8 feet from the place, where we were talking at the time of occurrence. The electric pole is at a distance of about 12 feet from the place, where we were talking. The place of gambling 'Gudugudu Palli' was at a distance of 15 feet from the electric pole……".

To a suggestion put by the defence, this witness replied that 'it is not a fact that I have not seen the occurrence and I am stating falsehood to help Ganesh (P.W.1) out of fear'.

P.W.4 is a villager of nearby village. He had gone to Ankushpur to see video on being invited by the deceased. When the deceased was playing Gudgudupalli at the Bada Guruji Chowk, he was loitering near the said place. He has also clearly stated in his evidence as follows:- 12 "The deceased was known to me since last 2 to 3 years. The deceased died on 09.10.2000 due to assault. On the date of occurrence, being called by the deceased, I had gone to their village Ankusapur to see video cinema. On that night, the deceased was gambling (GUDGUDU PALLI) at Bodo Gorji Chok. I was loitering near the said place. At about 9.30 P.M., accused Nanda Sethi, Maheswar Gouda, Kalia Gouda and one Sambhu Rao (not charge-sheeted) came from the side of Bodo Sahi. They were armed with swords and katis. Accused Nanda Sethi dealt kati blow on the head of the deceased. The other accused persons also dealt kati blows and sword blows. One Sambhu Rao also dealt Kati blows on the head of the deceased. Because of the assault on the deceased, all the persons, who were playing gambling left the place……... Dillesu, the brother of the deceased rushed to the place of occurrence. Dillesu was also assaulted by accused Babula Gouda and Rabindra Gouda (absconder). P.W.1 A.Ganesh Dora also came to the place of occurrence and all the accused persons fled away from the spot."

In the cross-examination, he has stated that "……..It is not a fact that A. Ganesh Dora (P.W.1) reached the place of occurrence after the occurrence and after all the accused persons left the place". No question was put to him by the defence with regard to his presence at the place and time of occurrence.

P.W.5 is the brother of the deceased who was also injured in the incident. He, in his evidence, has categorically stated as follows:-

"The occurrence took place on 9.10.2000. On that day, at about 9.30 P.M., GUDUGUDAPALLI (a kind of gambling) was in progress at Gorji Chok of our village. My deceased brother Fakira was also playing along with others. I was at a distance of 20' to 25' from the place of GUDUGUDA PALLI. I was talking with one Syamasundar Dora (P.W.3). At that time, accused Nanda Sethi, Maheswar Gouda, Kalia Gouda and one Sambhu Rao (not charge-sheeted) came being armed with sword and kati from Bodo Sahi side. I could see them perfectly because of

illumination of street light and the electric lights of the shops. Accused Nanda Sethi dealt kati blow the head of my brother repeatedly. Maheswar Gouda and Kalia Gouda also dealt sword blows to my brother. When I was about to proceed to the exact place of assault, at that time, accused Babula Gouda and absconding accused Rabindra Gouda came from Majhi Sahi side being armed with sword and kati. Both Babula Gouda and Rabindra (absconding) assaulted me by Khanda-kati on my right shoulder and left leg causing bleeding injury. While I was receiving assault, my eldest brother Ganesh Dora (P.W.1) came from the betel shop of Nunu located nearby, and all the accused persons fled away towards Majhi Sahi." 14 In the cross-examination, he also categorically denied suggestion that some other persons had killed the deceased and the case was foisted against the appellants. He also denied the suggestion that he had not stated before the Police that he was standing at a distance of 20' to 25' from the place of occurrence and that there was no illumination of the electric light in place of occurrence.

P.W.8 is another eyewitness to the occurrence, who was also playing Gudugudupalli at the spot. He also vividly narrated the incident and categorically said as follows:-

"2……While we were playing, the accused persons Nanda Sethi, Kalia Gouda, Maheswar Gouda and one Sambhu Rao came to the Bodo Gorji Chok. They were armed with Khanda and kati. Accused Nanda Sethi dealt kati blow on the head of deceased Fakira. Thereafter, accused Maheswar Gouda and Kalia Gouda dealt sword blows on different parts of the body of Fakira. All the players of GUDUGUDA PALLI saw the said occurrence…….. Accused Babula Gouda and Rabindra Gouda assaulted Dillesu Dora by means of swords. Ganesh Dora, elder brother of the deceased reached there and all the accused person left towards Majhi Sahi." 15 No question was put by the defence to this witness with regard to his presence at the spot of occurrence. This witness also describes the manner in which the occurrence took place.

On a compendious reading of the aforesaid witnesses, it is crystal clear that all of them were present at the time and spot of occurrence. They have in clear and categorical terms described the incident. P.Ws.4 and 8 have also categorically described the topography of the place of occurrence and presence of the aforesaid witnesses at the time and place of occurrence. It is also manifestly clear that the appellants have reached the spot being armed with deadly weapons. Nanda Sethi first dealt kati blow on the head of the accused. Thereafter, the other two appellants along with Sambhu Rao (not charge sheeted) assaulted the deceased by means of sword and kati indiscriminately, as a result of which, the deceased succumbed to the injuries instantaneously. P.Ws.3 and 5 have categorically stated that the place of occurrence was illuminated by street light and light of the shops nearby. Thus, they have no difficulty in beholding the entire incident. A.Dillesu Dora also received injuries on his right shoulder and left leg in the said incident while he rushed to the spot to save his deceased brother. The testimonies of all the witnesses are quite consistent,

cogent and credible. Although all of them were put to the discrete cross- 16 examination, no material to disbelieve their statements could be brought out from their mouth.

P.W.9, in his deposition, has categorically stated that he had also examined the clothing of the deceased, which showed the cut marks corresponding to the bodily injuries. In his opinion, he stated that all the injuries mentioned above were ante mortem in nature and caused reasonably by heavy cutting weapons. He also stated in paragraph-2 of his deposition that "Death was due to hemorrhage and shock resulting from above mentioned multiple injuries. However, the external injury Nos.1, 2, 3 and 4 along with their corresponding internal injuries were individually as well as collectively fatal to cause death in ordinary course of nature….." In the cross examination, he has clearly stated that "….M.O. I to M.O. IV are sharp cutting and heavy weapons. All the MOs. can cause sharp cutting injuries. It is not a fact that M.Os. I to IV cannot cause the injuries found on the dead body of the deceased." Thus, P.W. 9 has 18 testified that the external injuries and corresponding internal injuries were possible by M.O.I to M.O. IV. The external injury Nos. 1, 2, 3 and 4 and corresponding internal injuries are individually and collectively sufficient to cause death in ordinary course of nature.

The next contention of learned counsel for the appellants is that when circumstances of vital nature were not put to the 20 accused persons during their examination under Section 313 Cr.P.C., such circumstances cannot be utilized against them.

Law is well-settled in State of Punjab Vs. Naib Din, reported in AIR 2001 SC 3955 that circumstances not put to the accused cannot be utilized against him, but the accused to show that he is seriously prejudiced. Hon'ble Supreme Court in the said case held as under:

". That apart, respondent failed to show that there was any failure of justice on account of the omission to put a question concerning such formal evidence when he was examined under Section 313 of the code. No objection was raised in the trial court on the ground of such omission. No ground was taken up in the appellate court on such ground. If any appellate court or revisional court comes across that the trial court had not put any question to an accused even if it is of a vital nature, such omission alone should not result in setting aside the conviction and sentence as an inevitable consequence. Effort should be made to undo or correct the lapse. If it is not possible to correct it by any means the court should then consider the impact of the lapse on the overall aspect of the case. After keeping that particular item of evidence aside, if the remaining evidence is sufficient to bring home the guilt of the accused, the lapse does not matter much, and can be sidelined justifiably. But if the lapse is so vital as would affect the entire case, the appellate or revisional court can endeavour to see whether it could be rectified." (emphasis supplied)

Series of questions were put to the accused-appellants in their examination under Section 313 Cr.P.C. Each question has to be read in harmony and in continuation of the preceding questions and answers made thereto. In the instant case, Question No.3 put to appellant Nos.2 and 3 should not be read in isolation, but in harmony and in continuation with the proceeding question No.2 put to both appellant Nos. 2 and 3. Question No. 2 put to appellant Nos. 2 and 3 is as follows:

"It also transpires from the evidence of P.Ws.1, 3, 4, 5 and 8 that at that time, you along with accused Kalia Gouda/Maya @ Maheswara Gouda, Nanda Sethi and one Sambhu Rao came being armed with kati and sword from Bada Sahi side. What have you to say?" (emphasis supplied)

Question No.3, if read in continuation with question No.2, would indicate that the deceased A.Fakira was assaulted by kati/sword (sharp cutting weapons) by both the appellant Nos. 2 and 3. As such, the contention of Mr. Rath, learned counsel for the appellants does not hold good.

The presence of PWs.1, 3, 5 and 8 cannot be disbelieved merely taking into consideration minor discrepancies in their evidence as pointed out by learned counsel for the appellants. On the other hand, their evidence with regard to sequence of events in commission of the crime is quite consistent and trustworthy. Learned counsel for the appellants could not make out any case to raise 22 doubt with regard to the manner of investigation as well as recovery of weapons. Thus, his contentions in that regard are not acceptable.

Learned counsel for the appellants made an alternative argument to the effect that if the case of the prosecution is accepted in toto, it would end in conviction of the appellants under Section 304 Part-II IPC and not under Section 302 IPC. However, he could not make out any case to convert the conviction to one under Section 304 Part-II IPC. No material has been brought to our notice as to how the deceased had provoked the appellants to commit the crime. On a thorough scrutiny of materials on record, we could not find any material in order to convert the conviction to one under Section 304 IPC.

As such, we find no infirmity in the impugned judgment and order of conviction and sentence dated 09.05.2003 passed by learned Sessions Judge, Ganjam-Gajapati at Berhampur in S.C. No. 368 of 2001. Accordingly, the appeal being devoid of any merit stands dismissed.

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7. Section 482 of Cr. P. C.

Trambaklal Manik. Versus State of Odisha

J. P. Das, J

In the High Court of Orissa ,Cuttack

Date of judgment :16.02.2018

Issue

In the matter of quashing of cognizance taken by SDJM, Balasore under Sections 420/418/467/468/120-B/34 IPC and Section 81 of Indian Registration Act.

Relevant Extract

This is an application under Section 482 of the Code of Criminal Procedure with a prayer to quash the order dated 07.09.2013 of learned S.D.J.M., Balasore taking cognizance of the offences punishable under Sections 420/418/467/468/471/120-B/34, I.P.C. and Section 81 of the Registration Act against the petitioners in T.R. Case No.1169 of 2005.

The Inspector General, Registration, Odisha lodged a report before the Superintendent of Police, Balasore on 23.06.2005 alleging that on receipt of some information that 51 Sale Deeds have been registered in the office of the District Sub-Registrar, Balasore wherein the dates put on each page of those Deeds have been tampered with from 13.05.2004 to 18.09.2004 with an intention to defraud the Government, he made an enquiry and found out that the Sale Deeds were actually executed on 13.05.2004 and as per Section 23 of the Registration Act, the Sale Deed has to be presented before the Registering Authority within four months from the date of execution which according to Section 25 of the said Act can be extended for another four months subject to condonation of delay by the A.D.M.-cum-District Registrar on payment of extra amount. He alleged that the 51 Sale Deeds were executed on 13.05.2004 and the period of four months expired on 13.09.2004. But the documents were presented for registration on 14.01.2005 i.e. after expiry of eight months from the original date of execution on 13.05.2004. He further alleged that the officers of the Office of the SubRegistrar in connivance with the parties over-looked the date which was manipulated from 13.05.2004 to 18.09.2004 and registered the documents which were invalid and void being time-barred. It was further alleged in the F.I.R. that the documents having become void, should have been refused to be admitted for registration but by the fraudulent acts of the concerned officials huge loss was caused to the State Exchequer. It was also submitted that the matter may be handed over to the C.I.D, C.B. for investigation. It was also alleged in the F.I.R. that the Sale Deeds were executed by the Power of Attorney Holder of

American Baptist Mission in respect of a huge patch of valuable land even though a dispute was pending before the civil court about the genuineness of the authority of such Power of Attorney Holder.

Pursuant to the F.I.R., Balasore Town P.S. Case No.225 of 2005 was registered under Section 81 of the Indian Registration Act against three officials of the Office of the Sub-Registrar, Balasore who were allegedly involved in the acts. Thereafter, the investigation was transferred to C.I.D, Crime Branch, Odisha for investigation and after completion of investigation the charge sheet was submitted under Sections 420/418/ 467/468/471/120-B/34, I.P.C. and Section 81 of the Registration Act against 34 accused persons including the present petitioners. By the impugned order dated 07.09.2013 the learned S.D.J.M., Balasore took cognizance of all the offences against 34 accused persons.

It is submitted in the present application that the order of cognizance was passed by the learned S.D.J.M., without application of judicial mind since on admitted facts, as alleged, there was absolutely no offence committed by the accused persons. It was submitted that the Sale Deeds were executed on 13.05.2004 but due to non-payment of consideration by the purchasers, the registration was deferred and finally the vendor received the consideration on 18.09.2004 for which the dates mentioned on those Sale Deeds as 13.05.2004 were corrected as 18.09.2004. It was further submitted that it was presented before the Sub-Registrar on 14.01.2005 i.e. within four months of the execution. Hence, there was no illegality or offence committed by the purchasers or the vendor since there is no bar under any law to change the dates on one's own documents before its presentation for registration, the Stamp Papers having no period of expiry. It was submitted by the learned counsel for the petitioners that by changing the dates from 13.05.2004 to 18.09.2004 for the reason that the consideration amount was not received, the petitioners have committed no offence as has been alleged by the prosecution. It was also submitted and placed before the Court that the Sale Deeds were presented before the Sub-Rregistrar, Balasore on 18.09.2004 itself but it was refused to be registered on the plea that the properties mentioned in those Sale Deeds were undervalued.

Per contra, it was submitted on behalf of the State that the petitioners intentionally manipulated the dates from 13.05.2004 to 18.09.2004 to defraud the 6 State Government by avoiding the penalty amount to be paid in case of non-presentation of the document for registration within a maximum period of eight months. It was submitted further that since the documents were presented after a lapse of eight months from its original date of execution on 13.05.2004, the

documents had become void and the petitioners should have purchased fresh stamp papers. It was submitted that by such fraudulent acts of the petitioners as well as other co-accused persons, the State Exchequer has sustained loss of around twenty lakh rupees.

It was contended on behalf of the petitioners that considering the chain of the circumstances from any angle it can never be said that there was any act of commission or omission on the part of the petitioners so as to make out the offences punishable under Sections 420/418/467/ 468/471/ 120-B/34 of the I.P.C. and Section 81 of the Registration Act for which the cognizance has been taken by the learned S.D.J.M., Balasore in the impugned order.

Lastly, it was contended on behalf of the petitioners that although the F.I.R. was lodged alleging that the dates have been manipulated in fifty one Sale Deeds still Charge sheet has been filed only in relation to thirty four Sale Dees and the rest seventeen Sale Deeds were duly registered on presentation before the Sub-Registrar on 12.01.2005 by way of franking.

The main contentions that were advanced on behalf of the State are that the Sale Deeds were presented for registration after eight months of the original date of execution and those having been registered, huge loss was caused to the State Exchequer since the petitioner avoided the additional fees they were liable to pay due to presentation of the Sale Deeds for registration after the maximum period of permissible eight months from the date of execution. Secondly, it was contended that there was some civil dispute pending relating to the authority of the vendor as the Power of Attorney Holder to execute the Sale Deeds in favour of the purchasers.

So far as the authority of the vendor is concerned, that has no relation with the facts and circumstances of the present case and it needs no mention that the ultimate decision in the civil proceeding, if any, shall bind the parties to the transactions. As regards the delay in presentation of the documents beyond the period of eight months, as discussed hereinbefore, it remained admitted that the documents were originally signed on 13.05.2004 and the date was subsequently changed to 18.09.2004. The documents were presented and registered on 14.01.2005 i.e. after expiry of eight months from 13.05.2004, As stated earlier, it was found out in course of investigation that after changing the date to 18.09.2004 documents were presented for registration on the very day, but the registration was refused on the ground of under valuation. Thereafter, this Court

was moved assailing the said refusal and after getting a direction from this Court, the documents were presented and registered on 14.01.2005.

Thus, in my considered view the delay caused cannot be attributed to the petitioners so as to implicate them with a motive of defrauding the State Government. Had the documents been registered on 18.09.2004, there would have been no illegality except asking the parties to pay the additional fees for the expiry of first period of four months. But, it was not done so and the parties had to approach this Court to set-aside the order of refusal made by the Registering Authority on a plea of under-valuation. Thus, taking the entire facts and circumstances into consideration, I do not find any motive or intention on the part of the petitioners to defraud the State Government so as to be implicated for the offences punishable under Sections 420/418/467/ 468/471/ 120-B/34 of the I.P.C. and Section 81 of the Registration Act.

The uncontroverted allegations made in the F.I.R. and the facts found out in course of investigation, in my considered opinion, do not disclose any offence and make out a case against the accused petitioners, as has been held by the Hon'ble Apex Court, to be one of the grounds where the cognizance should be quashed in exercise of the powers under Section 482 of the Cr.P.C. to prevent the mis-carriage of justice (State of Haryana vrs. Bhajan Lal, AIR 1992 S.C. 604). Hence, I feel this is a fit case where interference is called for in exercise of power under Section 482, Cr.P.C. by this Court.

Accordingly, the impugned order of cognizance dated 07.09.2013 passed by the learned S.D.J.M., Balasore in C.T. Case No.1169 of 2005 against the petitioners is quashed. However, in the given circumstances that the documents were not presented within the period of four months, the petitioners are liable to pay the additional fees which shall be calculated and realized by the concerned authorities according to law. The CRLMC is disposed of accordingly.

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8. Section 482 of Cr.P.C.

M/s. Surveka Distributors Pvt. Ltd. & others Versus M/s. S.R. Retail Zone Pvt. Ltd.

S. K. Sahoo, J.

In the High Court of Orissa, Cuttack

Date of Hearing & Judgment :- 05.02.2018

Issue

In the matter of rejection of petition by SDJM ,BBSR for sending exhibits to the hand writing expert for opinion.

Relevant Extract

The petitioners have filed this application under section 482 of Cr.P.C. for quashing the impugned order dated 06.01.2012 passed by the learned S.D.J.M., Bhubaneswar in I.C.C. No.273 of 2010 in rejecting the petition filed by the petitioners for sending Exts.3 to 5 and Exts.9/1 and 9/2 to the handwriting expert along with admitted writings of the complainant and the accused persons with a direction to make examination of the question documents and to submit the report.

The factual scenario of the case indicates that the opposite party is the complainant in I.C.C. Case No.273 of 2010 and the petitioners are the accused persons the complaint petition was filed for prosecuting the accused 3 persons under section 138 of the Negotiable Instrument Act

During course of trial on 23.12.2011 a petition was filed by the petitioners to send the Exts.3 to 5 as well as Exts.9/1 and 9/2 to the handwriting experts for examination. It is the case of the petitioners that Exts.3 to 5 were the blank cheques which were handed over to the complainant on good faith for use of the same whenever required by the petitioners for the purpose of their business at Bhubaneswar as they were residing at Keonjhar but the cheques were misutilized by the complainant by filling up the blank entries in the cheque and mentioning the date and amount. It is the case of the petitioners that the admitted signatures on the cheque the petitioners is required to be compared with the handwriting mentioned in the body of the cheques and that by making such handwriting examination, it can be ascertained that the cheques had not been written by the accused-petitioners who had signed on the same.

The learned S.D.J.M., Bhubaneswar after taking note of the contentions raised by the respective parties has been pleased to hold that whereas the complainants claim is that the cheque in competent form containing the signature of accused Dibyendu Pattnaik had been given to the complainant to discharge their legally enforceable date but on perusal of the cheques it appears that accused Dibyendu Pattnaik has again initial signature on all the cheques i.e. Exts.3 to 5 and therefore, it is not possible to make comparison of the initials with the details of handwriting appearing on the other parts of the cheques.The learned Magistrate further held that the chance of writing of the cheques by somebody and thereafter putting of the signatures of the account holder and it is the burden on the accused persons to establish their plea regarding issuance of blank cheques by adducing evidence.

Accordingly the petition filed by the accused persons for sending the EXts.3 to 5 and 9/1 and 9/2 was rejected.

None appears on behalf of the opposite party.

Mr. Abhinash Barik, learned counsel appearing for the petitioners contended that when a specific plea has been taken by the accused persons that on good faith the blank signed cheque was kept with the complainant which was misutilized by him and the date and amount has been filled up by the complainant in Exts.3 to 5 in the interest of justice the cheques should have been sent to the handwriting expert for comparison with the admitted handwritings of the complainant and the accused persons and by refusing to entertain such prayer has cost prejudice to the petitioners.

Considering the submissions made by the learned counsel for the petitioners one thing is clear that the accused persons that are not disputing that the signatures which are appearing in Exts.3, 4 and 5 are that of accused Dibyendu Pattnaik but they are disputing that the date and the amount which has been reflected in Exts.3, 4 and 5 are not that of either accused Dibyendu Pattnaik or of any other accused and those were filled up by the complainant. In view of

such specific stand taken by the accused persons in the interest of justice it is necessary that there should have 8 been a direction for examination of the other writings apart from the signatures which is appearing in the cheques Exts.3, 4 and 5 with the admitted handwritings of the accused persons as well as the complainant in order to ascertain the truth. After obtaining the handwriting expert opinion the learned Magistrate could have assist the oral evidence as well as documentary evidence in order to find out the truth whether the case of the complainant that he was handed over signed cheque Exts.3, 4 and 5 in a completed form is correct or the plea taken by the accused persons that it was a blank cheque given to the complainant on good faith which has been misutilized by the complainant is correct up course law is well settled that the report of handwriting expert is not the conclusive proof it is after all an opinion evidence and it should be supported by reasons and the Court has to evaluate the same like any other evidence. It is for the Court to Judge whether the opinion has been correctly reached on the data available or not by not entertaining the prayer of the accused persons in not sending the Exts.3 to 5, the learned Magistrate has prevented the accused persons in proving their defence plea in a better manner.

Accordingly, the same is set aside and the learned S.D.J.M., Bhubaneswar is directed to send the Exts.3 to 5 and 9/1 and 9/2 to the handwriting expert. As prayed for by the accused persons along with the admitted writings of the complainant and the accused persons as well as the signatures of the accused persons for making necessary examination of the question documents and to submit the report as expeditiously as possible. After receipt of the handwriting expert report, the learned S.D.J.M., Bhubaneswar shall proceed with the case in accordance with law.

With the aforesaid observation, the CRLMC application is allowed.

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9. Section 136 of Constitution of India

Pankaj Jain vs Union of India.

A.K. Sikri & Ashok Bhushan , JJ.

In the Supreme Court of India.

Date of Judgment-23.02.2018

Issue

In the matter of releasing an accused on bond in his first appearance in court - interpretation of the word "man" as used in section 88 Cr.P.C.- discussed.

Relevant Extract

Leave granted.

This appeal has been filed against the judgment and order of Allahabad High Court dated 21.12.2017 dismissing the Writ Petition No. 62167 of 2017 filed by the Appellant. The principal issue, which has arisen for interpretation of this Court, is the content and meaning of Section 88 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C."). Before we come to the impugned judgment of the High Court, it is necessary to note a series of litigations initiated at the instance of the Appellant in different courts, arising out of criminal proceeding lodged against him.

A First Information Report Under Sections 120-B, 409, 420, 466, 467, 469 and 471 of Indian Penal Code and Under Sections 13(2) and 13(1)(d) of the Prevention of Corruption Act, 1988 was lodged against one Yadav Singh, the then Chief Engineer of Noida, Greater Noida and the Yamuna Expressway Authorities and a charge sheet dated 15.03.2016 being Charge Sheet No. 02/2016 was submitted in the Court of Special Judge, C.B.I. against several Accused including Yadav Singh and the Appellant Pankaj Jain. The trial court took cognizance by order dated 29.03.2016 summoning Accused for 29.04.2016 for appearance. The Appellant filed an application Under Section 482 Code of Criminal Procedure in the Allahabad High Court being Application No. 31090 of 2016, praying for quashing the entire criminal proceeding of Special Case No. 10 of 2016 as well as summoning order dated 29.03.2016. The application was finally disposed off by the High Court vide order dated 17.10.2016 with a direction that if the applicant appears and surrenders before the Court below within two weeks and applies for bail, then his bail application shall be considered and decided. The Appellant filed an Special Leave Petition (Crl.) No. 10191/2016 against the judgment of the High Court dated 17.10.2016, which was dismissed by this Court as withdrawn on 16.01.2017 with liberty to apply for regular bail.

A supplementary charge sheet was filed on 31.05.2017, on the basis of which a Cognizance Order dated 07.06.2017 was passed by the Special Judge, C.B.I. taking cognizance against the Appellant and other Accused Under Sections 120B, 420, 468, 471 of Indian Penal Code and Sections 13(2) and 13(1)(d) of the

Prevention of Corruption Act, 1988. Again an application Under Section 482 Code of Criminal Procedure being Application No. 18849 of 2017 was filed by the Appellant in the High Court praying for quashing the criminal proceeding in pursuance of supplementary charge sheet dated 31.05.2017. The High Court vide its order dated 06.07.2017 disposed of the application Under Section 482 Code of Criminal Procedure directing that if the applicant appears and surrenders before the Special Judge, C.B.I. within two weeks and applies for bail, it is expected that the same will be disposed of expeditiously in accordance with law. It was further directed in the meantime for a period of two weeks, effect of non-bailable warrant shall be kept in abeyance. The Appellant aggrieved by the order of the High Court dated 06.07.2017 again filed an Special Leave Petition (Criminal) No. 7749 of 2017, which was disposed of by this Court on 24.11.2017 granting further two weeks' time to the Petitioner (Appellant) to apply for regular bail before the Special Judge, C.B.I. with a direction to the trial court to consider the said application for bail forthwith.

On 27.11.2017, the case was taken up by the Special Judge, C.B.I. The Court noticed that Appellant and one other Accused was not present. The Court ordered for issuing non-bailable warrants and process of Sections 82 and 83 of Code of Criminal Procedure against the Appellant. On the same day, noticing the order passed by this Court on 24.11.2017 in S.L.P. (Criminal) No. 7749 of 2017, the learned Special Judge stayed the orders against the Appellant for a period of two weeks' as per order of this Court. The Appellant further filed Writ Petition (Criminal) No. 199 of 2017 in this Court Under Article 32 of the Constitution of India contending that the Petitioner (Appellant), who was not arrested during investigation by the C.B.I., has to simply surrender and give a bond Under Section 88 of the Code of Criminal Procedure. A direction to that effect was sought for by this Court. This Court disposed of the writ petition vide its order dated 06.12.2017 noticing the earlier order of this Court dated 24.11.2017 with the following order:

"In view of our aforesaid orders dated 24.11.2017, we are of the opinion that the Petitioner should, in the first instance, appear before the trial Court, which is the course of action already charted out. It would be open to the Petitioner to move an application Under Section 88 Code of Criminal Procedure or a bail application, as may be advised. It will also be open to the Petitioner to rely upon the judgments in support of his contention as noted above. It is for the trial Court to go through the matter and take a view thereupon. Insofar as this Court is concerned, no opinion on merits is expressed.

Mr. Mukul Rohatgi, learned senior Counsel, submits that the Petitioner, who is present in the Court today, shall surrender and appear before the trial Court tomorrow, 07.12.2017. This statement of the learned senior Counsel is noted.

The writ petition stands disposed of in the aforesaid terms."

After order of this Court dated 06.12.2017, the Appellant appeared before Court of Special Judge, C.B.I. and submitted an application dated 07.12.2017. In the application, following prayer has been made:

a) That this Hon'ble Court may be pleased to forthwith take up and dispose this application made by the Applicant Pankaj Jain, who is voluntarily present before this Hon'ble Court, pursuant to the liberty granted by the Hon'ble Supreme Court vide Order dated 6.12.2017 passed in the Writ Petition (Crl.) No. 199 of 2017 read with Order dated 24.11.2017 passed in the SLP (Crl.) No. 7749 of 2017, and to permit him to furnish such bond, as may deemed fit, as per Section 88 of the Code of Criminal Procedure in RC No. RC/DST/2015/A/0004/CBI/STF/DLI dated 30.07.2015/Case No. 10A/2016 and 3/2017 without sending him to any prison;

b) Any such other or further order as this Hon'ble Court may deem fit to grant in the facts and circumstances of the case and in the interest of justice.

The above application dated 07.12.2017 was rejected by the Special Judge, C.B.I. The Special Judge, C.B.I. observed that the word 'may' used in Section 88 signifies that Section 88 is not mandatory and it is a matter of judicial discretion. The Special Judge after noticing the allegations of the Appellant rejected the application No. 14B of 2017. Aggrieved against the judgment dated 07.12.2017, another application No. 101B of 2017 was filed by the Appellant, which was also rejected. The applicant filed a S.L.P. (Crl.) No. 9764 of 2017, which was disposed of vide its order dated 15.12.2017 observing that since the impugned order is passed by the Special Judge, CBI, it would be appropriate for the Petitioner to challenge that order by approaching the High Court. Subsequent to the order dated 15.12.2017, the Petitioner-Appellant filed a Writ Petition No. 62167 of 2017, where the Petitioner-Appellant also sought to challenge the vires of Section 88 as well as writ for Certiorari quashing the order dated 07.12.2017 of trial court.

The writ petition has been dismissed by Division Bench of the High Court vide its judgment and order dated 21.12.2017, against which judgment this appeal has been filed.

We have heard Shri Mukul Rohtagi, learned senior Counsel appearing for the Appellant and Shri Maninder Singh, Additional Solicitor General of India for the Respondent.

Shri Mukul Rohtagi, learned senior Counsel appearing for the Appellant submits that Appellant having not been arrested during investigation when he appeared before the Special Judge, C.B.I., it was obligatory on the part of the Court to have accepted the bail bond Under Section 88 of the Code of Criminal Procedure and released the Appellant forthwith. It is submitted that the Court of Special Judge committed error in rejecting the application Under Section 88. It is further submitted that bail application was not filed by the Appellant since all those, who appeared before the Court were taken into custody and their bail

applications were rejected. Learned senior Counsel submits that although Section 88 uses the word 'may' but the word 'may' has to be read as shall causing an obligation on the Court to release on bond, those, who appeared on their own volition in the Court. He further submits that the High Court committed error in observing that Petitioner has concealed material facts from this Court when he had filed S.L.P. (Criminal) No. 7749 of 2017. It is submitted that all facts were mentioned in S.L.P. (Criminal) No. 7749 of 2017 and observation of the High Court that any fact was concealed is incorrect.

Shri Maninder Singh, learned Additional Solicitor General of India for the Respondent refuting the submission of the Appellant contended that Section 88 Code of Criminal Procedure has been rightly interpreted by the High Court. It is submitted that against the Appellant not only summons but non-bailable warrant and proceedings Under Sections 82 and 83 Code of Criminal Procedure were also initiated by the Special Judge. Hence, he was not entitled for indulgence of being released on submission of bond Under Section 88 Code of Criminal Procedure He further submits that the Court has discretionary power Under Section 88 to release a person on accepting bond, which cannot be claimed as a matter of right by the Accused, who has already been summoned and against whom non-bailable warrant has been issued. It is further submitted that although the Petitioner-Appellant has filed various applications Under Section 482 Code of Criminal Procedure as well as Special Leave Petitions before this Court, but has so far not filed any bail application before the Special Judge, C.B.I. He submits that although liberty was taken by the Appellant from this Court on 16.01.2017 when SLP (Crl.) No. 10190 of 2017 was dismissed as well as on 24.11.2017 when SLP (Crl.) No. 7749 of 2017 was disposed off to apply for regular bail before the Court but inspite of taking such liberty, no application for bail was filed by the Appellant.

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

The main issue which needs to be answered in the present appeal is as to whether it was obligatory for the Court to release the Appellant by accepting the bond Under Section 88 Code of Criminal Procedure on the ground that he was not arrested during investigation or the Court has rightly exercised its jurisdiction Under Section 88 in rejecting the application filed by the Appellant praying for release by accepting the bond Under Section 88 Code of Criminal Procedure

Section 88 Code of Criminal Procedure is a provision which is contained in Chapter VI "Processes to Compel Appearance" of the Code of Criminal Procedure, 1973. Chapter VI is divided in four Sections-A.-Summons; B.-Warrant of arrest; C.-Proclamation and Attachment and D.-Other Rules regarding processes. Section 88 provides as follows:

“88. Power to take bond for appearance.-When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial.

We need to first consider as to what was the import of the words 'may' used in Section 88.

Although, ordinary use of word 'may' imply discretion but when the word 'may' is coupled with duty on an authority or Court, it has been given meaning of shall that is an obligation on an authority or Court. Whether use of the word 'may' is coupled with duty is a question, which needs to be answered from the statutory scheme of a particular statute.

The present is not a case where Accused was a free agent whether to appear or not. He was already issued non-bailable warrant of arrest as well as proceeding of Sections 82 and 83 Code of Criminal Procedure had been initiated. In this view of the matter he was not entitled to the benefit of Section 88

We thus conclude that the word 'may' used in Section 88 confers a discretion on the Court whether to accept a bond from an Accused from a person appearing in the Court or not. The both Special Judge, C.B.I. as well as the High Court has given cogent reasons for not exercising the power Under Section 88 Code of Criminal Procedure We do not find any infirmity in the view taken by the Special Judge, C.B.I. as well as the High Court in coming to the conclusion that Accused was not entitled to be released on acceptance of bond Under Section 88 Code of Criminal Procedure We thus do not find any error in the impugned judgment of the High Court.

In the facts of the aforesaid case, the Court held that the trial court as well as the High Court ought to have exercised the discretion in granting the bail to the Appellant. This Court in above circumstances, granted the bail to the Appellant of that case. There cannot be any dispute to the proposition as laid down by this Court with regard to grant or refusal of the bail, which are well settled. The discretion to grant bail has to be exercised judiciously and in a humane manner and compassionately as has been laid down by this Court in the above case.

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10. Article 136 of the Constitution of India

Dinesh Kumar Kalidas Patel vs. The State of Gujarat

Kurian Joseph and Amitava Roy, JJ.

In the Supreme Court of India

Date of Judgment - 12.02.2018

Issue

In the matter of maintaining conviction under section 201 of IPC when the conviction and sentence passed under Section 498- A IPC is set aside by High Court–Discussed.

Relevant Extract

Leave granted.

The Appellant was convicted by the Sessions Judge, Mehsana (State of Gujarat) for offences Under Sections 498A and 201 of the Indian Penal Code, 1860 (hereinafter referred to as "the IPC"). A sentence of one year rigorous imprisonment and a penalty of Rs. 1,000/- with a default sentence of three months was awarded Under Section 498A and six months and Rs. 500/- with a default sentence of one month for the offence Under Section 201 of the Indian Penal Code.

This is a case where the Appellant's wife committed suicide by hanging. The incident took place on 26.12.1990. The information was conveyed to the family of the deceased. The father and brother of the deceased, who is a doctor by profession, attended the last rites. After more than three months, the father of the deceased filed a complaint before the Judicial Magistrate at Kadi on 01.04.1991. The same was investigated, and the Appellant was charged Under Sections 304B, 306, 498A and 201 read with Section 120B of the Indian Penal Code and Section 4 of the Dowry Prohibition Act, 1961. Along with the Appellant, seven other persons also faced the trial. By judgment dated 12.09.1995, the Sessions Judge convicted the Appellant Under Sections 498A and 201 of the Indian Penal Code but acquitted the seven others.

The appeals fled in 1995 were heard in the year 2015 and, as per the impugned judgment, the Appellant was acquitted of the offence Under Section 498A of the Indian Penal Code but conviction Under Section 201 of the Indian Penal Code was maintained. Thus aggrieved, the Appellant is before this Court.

Heard learned Counsel appearing for the Appellant and learned Counsel appearing for the State.

Several contentions have been raised on merits. That apart, the Appellant has also raised a question of law as to whether the conviction Under Section 201 of the Indian Penal Code could have been maintained while acquitting him of the main offence Under Section 498A of the Indian Penal Code.

Learned Counsel have placed reliance on the decisions of this Court in Palvinder Kaur v. State of Punjab MANU/SC/0038/1952 : AIR 1952 SC 354, Smt. Kalawati and Ranjit Singh v. State of Himachal Pradesh MANU/SC/0030/1953 : AIR 1953 SC 131, and Suleman Rehiman Mulani and Anr. v. State of Maharashtra MANU/SC/0089/1967 : AIR 1968 SC 829.

In V.L. Tresa v. State of Kerala MANU/SC/0093/2001 : (2001) 3 SCC 549, this Court has discussed the essential ingredients of the offence Under Section 201 of the Indian Penal Code at paragraph 12:

12. Having regard to the language used, the following ingredients emerge:

(I) committal of an offence;

(II) person charged with the offence Under Section 201 must have the knowledge or reason to believe that the main offence has been committed;

(III) person charged with the offence Under Section 201 Indian Penal Code should have caused disappearance of evidence or should have given false information regarding the main offence; and

(IV) the act should have been done with the intention of screening the offender from legal punishment.

The decisions in Sou Vijaya (supra) and V.L. Tresa (supra) were noticed in State of Karnataka v. Madesha MANU/SC/7745/2007 : (2007) 7 SCC 35. While the appeal of the State was dismissed, this Court in unmistakable terms held that:

It is to be noted that there can be no dispute that Section 201 would have application even if the main offence is not established in view of what has been stated in V.L. Tresa and Sou. Vijaya cases...

Thus, the law is well-settled that a charge Under Section 201 of the Indian Penal Code can be independently laid and conviction maintained also, in case the prosecution is able to establish that an offence had been committed, the person

charged with the offence had the knowledge or the reason to believe that the offence had been committed, the said person has caused disappearance of evidence and such act of disappearance has been done with the intention of screening the offender from legal punishment. Mere suspicion is not sufficient, it must be proved that the Accused knew or had a reason to believe that the offence has been committed and yet he caused the evidence to disappear so as to screen the offender. The offender may be either himself or any other person.

Having thus analysed the legal position, we shall revert to the factual matrix and see whether the conviction in the facts and circumstances of the case Under Section 201 of the Indian Penal Code could be sustained.

An analysis of the judgment of the Sessions Judge in this context would be quite relevant. At paragraph-16, having analysed the facts and having referred to the minute details of the alleged commission of the offence, the court has entered the following finding:

16....In this manner this entire case suggest that the behaviour of the Accused No. 1 was very suspicious. He has not undertaken the process for the PM of the dead body. He has not declared the facts before the police and the last rites of the dead body have been performed before the maternal family reaches from Ahmedabad. In this manner, while considering the facts on record I come at a conclusion that the Accused No. 1 has failed in his duty as a husband. The husband has kept the wife in a bungalow and has most of the time remained away from her. This is very torturing and harassing for a wife. Thus as per my opinion it is proved by the prosecution on the basis of the facts on record and especially the chit at 0-1 that there was mental harassment upon the deceased Lila, from the side of the Accused No. 1. The fact remains that the Accused No. 1 has not informed the police even though an unnatural death has occurred and the last rites have also been performed without performing the post-mortem and without informing the police. Thus as per my opinion the Accused No. 1 is prima facie guilty of the crime Under Section 498(a) and 201 of the Indian Penal Code and therefore the prosecution has proved the case partly in affirmation.

The High Court, in appeal, however, took the view that the Appellant was not liable to be convicted Under Section 498A of the Indian Penal Code. However, his conviction Under Section 201 of the Indian Penal Code was liable to be maintained. To quote:

5... We have re-appreciated and re-evaluated the evidence on the touchstone of the latest decisions of the Hon'ble Apex Court. Taking into consideration the fact that the complaint was lodged almost after a period of four

months of the incident in question, the fact remains is that no post mortem was performed of the deceased. Even if the case of defence is accepted, it was a premature and unnatural death and therefore the mandatory requirements under the law, at least to inform the police of the death and to get the post mortem of the deceased done, were not fulfilled. Admittedly, nothing has come on record to show that the post mortem was carried out and/or the police complaint was immediately fled. Considering the said aspect, we have all reasons to believe that the offence is made out Under Section 201 of the Indian Penal Code. However, so far as offence punishable Under Section 498A of the Indian Penal Code is concerned, we believe the contention of Mr. Anandjiwala, learned senior advocate for the Accused No. 1, that almost after a period of four months, the complaint was lodged and there is nothing on record to substantiate the case of the prosecution qua cruelty being perpetrated to the deceased for want of dowry and on the contrary, the Accused No. 1 had helped the father of the deceased and gave Rs. 1 lakh. Under the circumstances, we are of the opinion that the learned trial judge has rightly convicted the Accused No. 1 for the offence punishable Under Section 201 of the Indian Penal Code, however, has committed an error in holding conviction of the Accused No. 1 for the offence punishable Under Section 498A of the Indian Penal Code and same is not sustainable.

Thus, the only ground for maintaining the conviction Under Section 201 of the Indian Penal Code is that the Appellant did not give intimation to the police of the unnatural death and that no post-mortem was conducted.

We are afraid, the High Court is not justified in maintaining the conviction Under Section 201 only on the ground that no communication was given to the police and that the post-mortem had not been performed. The Trial Court has taken note of the fact that the father of the deceased and her brother (who is a doctor) had attended the last rites of the deceased and neither of them had any complaint or suspicion at that time of the commission of any offence. The Sessions Court has also taken note of the suicide note left by the deceased wherein she had taken the entire blame on herself. Yet the court has taken the view, from the consideration we have extracted from paragraph-16 of the Sessions court judgment, that the deceased might have been in a state of depression having remained alone for most of the time and it amounted to torture. The Appellant has been acquitted of the offence Under Section 498A by the High Court, and rightly so. The prosecution has also not been able to satisfy the ingredients Under Section 201 of the Indian Penal Code. Neither the Sessions Court nor the High Court has any case that there is any intentional omission to give information by the Appellant to the police. It is also to be noted that

prosecution has no case Under Section 202 of the Indian Penal Code against the Appellant.

As held by this Court in Hanuman and Ors. v. State of Rajasthan MANU/SC/0305/1994 : 1994 Supp (2) SCC 39, the mere fact that the deceased allegedly died an unnatural death could not be sufficient to bring home a charge Under Section 201 of the Indian Penal Code. Unless the prosecution was able to establish that the Accused person knew or had reason to believe that an offence has been committed and had done something causing the offence of commission of evidence to disappear, he cannot be convicted.

There is no such allegation against the Appellant. The last rites of the deceased were performed in the presence of the members of her family. They had no suspicion at that time of the commission of any offence. The private complaint was lodged after more than three months. There is no charge Under Section 202 of the Indian Penal Code of intentionally omitting to give information of the unnatural death to the police. It is also not the case of the complainant that he had requested for post-mortem of the body and that intimation should have been given to the police before the last rites were performed.

In the above facts and circumstances, we are of the view that the Sessions Court is not justified in convicting the Appellant Under Section 201 of the Indian Penal Code and the High Court maintaining the same. Accordingly, the appeals are allowed. The conviction of the Appellant Under Section 201 of the Indian Penal Code is set aside.

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11. Section 6 of the Hindu Succession Act

Danamma @ Suman Surpur vs Amar

A Sikri & A Bhushan, JJ.

In the Supreme Court of India

Date of Judgment - 01 .02. 2018

Issue

In the matter of declaring the daughter born prior to the enactment of 1956 Act as Co-parceners and their entitlement of equal share as that of sons - Discussed .

Relevant extract

The appellants herein, two in number, are the daughters of one, Gurulingappa Savadi, propositus of a Hindu Joint Family. Apart from these two daughters, he had two sons, namely, Arunkumar and Vijay. Gurulingappa Savadi died in the year 2001 leaving behind the aforesaid two daughters, two sons and his widow, Sumitra. After his death, Amar, S/o Arunkumar filed the suit for partition and a separate possession of the suit property described at Schedule B to E in the plaint stating that the two sons and widow were in joint possession of the aforesaid properties as coparceners and properties mentioned in Schedule B was acquired out of the joint family nucleus in the name of Gurulingappa Savadi. Case set up by him was that the appellants herein were not the coparceners in the said joint family as they were born prior to the enactment of Hindu Succession Act, 1956 (hereinafter referred to as the 'Act'). It was also pleaded that they were married daughters and at the time of their marriage they had received gold and money and had, hence, relinquished their share.

The appellants herein contested the suit by claiming that they were also entitled to share in the joint family properties, being daughters of Gurulingappa Savadi and for the reason that he had died after coming into force the Act of 1950.

The trial court, while decreeing the suit held that the appellants were not entitled to any share as they were born prior to the enactment of the Act and, therefore, could not be considered as coparceners. The trial court also rejected the alternate contention that the appellants had acquired share in the said properties, in any case, after the amendment in the Act vide amendment Act of 2005. This view of the trial court has been upheld by the High Court in the impugned judgement dated January 25, 2012 thereby confirming the decree dated August 09, 2007 passed in the suit filed for partition.

In the aforesaid backdrop, the question of law which arises for consideration in this appeal is as to whether, the appellants, daughters of

Gurulingappa Savadi, could be denied their share on the ground that they were born prior to the enactment of the Act and, therefore, cannot be treated as coparceners? Alternate question is as to whether, with the passing of Hindu Succession (Amendment) Act, 2005, the appellants would become coparcener "by birth" in their "own right in the same manner as the son" and are, therefore, entitled to equal share as that of a son?

This amendment now confers upon the daughter of the coparcener as well the status of coparcener in her own right in the same manner as the son and gives same rights and liabilities in the coparcener properties as she would have had if it had been son. The amended provision reads as under:

"6. Devolution of interest in coparcenary property.—(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—

(a) by birth become a coparcener in her own right the same manner as the son;

(b) have the same rights in the coparcenery property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenery property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2)Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.

(3)Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenery property shall be deemed to have been divided as if a partition had taken place and,—

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to

the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation.—For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4)After the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), nothing contained in this sub-section shall affect—

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 (39 of 2005) had not been enacted.

Explanation.—For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005).

(5)Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation.—For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under

the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.]"

The effect of this amendment has been the subject matter of pronouncements by various High Courts, in particular, the issue as to whether the right would be conferred only upon the daughters who are born after September 9, 2005 when Act came into force or even to those daughters who were born earlier. Bombay High Court in Vaishali Satish Gonarkar v. Satish Keshorao Gonarkar2 had taken the view that the provision cannot be made applicable to all daughters born even prior to the amendment, when the Legislature itself specified the posterior date from which the Act would come into force. This view was contrary to the view taken by the same High Court in Sadashiv Sakharam Patil v. Chandrakant Gopal Desale3. Matter was referred to the Full Bench and the judgment of the Full Bench is reported as Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari4. The Full Bench held that clause (a) of sub-section (1) of Section 6 would be prospective in operation whereas clause (b) and (c) and other parts of sub-section (1) as well as sub-section (2) would be retroactive in operation. It held that amended Section 6 applied to daughters born 2 AIR 2012 Bom 110 3 2011 (5) Bom CR 726 4 AIR 2014 Bom 151 prior to June 17, 1956 (the date on which Hindu Succession Act came into force) or thereafter (between June 17, 1956 and September 8, 2005) provided they are alive on September 9, 2005 i.e. on the date when Amended Act, 2005 came into force. Orissa, Karnataka and Delhi High Court have also held to the same effect 5.

The controversy now stands settled with the authoritative pronouncement in the case of Prakash & Ors. v. Phulavati & Ors.6 which has approved the view taken by the aforesaid High Courts as well as Full Bench of the Bombay High Court.

The law relating to a joint Hindu family governed by the Mitakshara law has undergone unprecedented changes. The said changes have been brought forward to address the growing need to merit equal treatment to the nearest female relatives, namely daughters of a coparcener. The section stipulates that a daughter would be a coparcener from her birth, and would have the same rights and liabilities as that of a son. The daughter would hold property to which she is entitled as a coparcenary property, which would be construed as property being capable of being disposed of by her either by a will or any other testamentary disposition. These changes have been sought to be made on the touchstone of equality, thus seeking to remove the perceived disability and prejudice to which a daughter was subjected. The fundamental changes brought forward about in the Hindu Succession Act, 1956 by amending it in 2005, are perhaps a realization of the immortal words of Roscoe Pound as appearing in his celebrated treaties, The Ideal Element in Law, that "the law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change."

Section 6, as amended, stipulates that on and from the commencement of the amended Act, 2005, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. It is apparent that the status conferred upon sons under the old section and the old Hindu Law was to treat them as coparceners since birth. The amended provision now statutorily recognizes the rights of coparceners of daughters as well since birth. The section uses the words in the same manner as the son. It should therefore be apparent that both the sons and the daughters of a coparcener have been conferred the right of becoming coparceners by birth. It is the very factum of birth in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener becomecoparceners by virtue of birth. Devolution of coparcenary property is the later stage of and a consequence of death of a coparcener. The first stage of a coparcenary is obviously its creation as explained above, and as is well recognized. One of the incidents of coparcenary is the right of a coparcener to seek a severance of status. Hence, the rights of coparceners emanate and flow from birth (now including daughters) as is evident from sub-s (1)(a) and (b).

Reference to the decision of this Court, in the case of State Bank of India v. Ghamandi Ram7 in essential to understand the incidents of coparceneryship as was always inherited in a Hindu Mitakshara coparcenary:

"According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (See Mitakshara, Ch. I. 1-27). The incidents of coparcenership under the Mitakshara law are: first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties is common;

secondly, that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property, conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors."

Hence, it is clear that the right to partition has not been abrogated.

The right is inherent and can be availed of by any coparcener, now even a daughter who is a coparcener.

In the present case, no doubt, suit for partition was filed in the year 2002. However, during the pendency of this suit, Section 6 of the Act was amended as the decree was passed by the trial court only in the year 2007. Thus, the rights of

the appellants got crystallised in the year 2005 and this event should have been kept in mind by the trial court as well as by the High Court. This Court in Ganduri Koteshwaramma & Anr. v. Chakiri Yanadi & Anr.8 held that the rights of daughters in coparcenary property as per the amended S. 6 are not lost merely because a preliminary decree has been passed in a partition suit. So far as partition suits are concerned, the partition becomes final only on the passing of a final decree. Where such situation arises, the preliminary decree would have to be amended taking into account the change in the law by the amendment of 2005.

On facts, there is no dispute that the property which was the subject matter of partition suit belongs to joint family and Gurulingappa Savadi was propositus of the said joint family property. In view of our aforesaid discussion, in the said partition suit, share will devolve upon the appellants as well. Since, Savadi died leaving behind two sons, two daughters and a widow, both the appellants would be entitled to 1/5 th 8 (2011) 9 SCC 788 share each in the said property. Plaintiff (respondent No.1) is son of Arun Kumar (defendant No.1). Since, Arun Kumar will have 1/5 th share, it would be divided into five shares on partition i.e. between defendant No.1 Arun Kumar, his wife defendant No.2, his two daughters defendant Nos.3 and 4 and son/plaintiff (respondent No.1). In this manner, the plaintiff/respondent No.1 would be entitled to 1/25 th share in the property.

The appeals are allowed in the aforesaid terms and decree of partition shall be drawn by the trial court accordingly.

No order as to costs.

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12. Section 166 of Motor Vehicle Act,1988.

Munusamy & Ors. Vs. The Managing Director, Tamil Nadu State Transport Corporation (Villupuram) Ltd.

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

In the Supreme Court of India.

Date 0f Judgment -09.02.2018

Issue

Award of compensation also to include future prospects of the deceased –Discussed.

Relevant Extract

This appeal emanates from the judgment and order passed by the High Court of Judicature at Madras dated 16.04.2013 in C.M.A. No.2819 of 2012. The High Court allowed the prayer for grant of enhanced compensation amount in favour of the appellants. The appellants seek further enhancement of compensation amount on the ground that the High Court has not provided for future prospects, while computing the compensation amount. The appellants rely upon the recent decision of the Constitution Bench of this Court in the case of National Insurance Company Ltd. Vs. Pranay Sethi and Ors.1, to buttress their submission.

Before we deal with the grievance of the appellants, it is apposite to reproduce the relevant extract of the impugned judgment which reads thus:

"7. We have heard the learned counsel for the respondent on the above submission.

8. In the absence of specific proof of employment, the Tribunal rightly has taken the earning of the deceased at Rs.4,000/per month and deducted 50% towards personal expenses since the deceased were bachelors. However, the proper multiplier to be adopted in the case must be, since the deceased were 21 and 20 years respectively. A sum of Rs.20,000/to each of the claimants towards loss of love and affection and a further sum of Rs.5,000/towards transport expenses were granted.

9. Accordingly, in C.M.A. No.2819 of 2012 compensation payable would be as follows:

(a) Loss of Dependency Rs.4,32,000/(Rs.4,000/X 12 X 18)

(b) Loss of love and affection Rs. 60,000/

(c) Transport Rs. 5,000/

(d) Funeral Rs. 2,000/1 AIR 2017 SC 5157

(e) Loss of estate Rs. 2,500/Total = Rs.5,01,500/"

On perusal of the judgment under appeal, it is evident that the High Court has not provided for future prospects while computing the compensation amount under the head 'loss of dependency'. The necessity to provide future prospects has been expounded by the Constitution Bench of this Court in National Insurance Company Ltd. (supra). It will be useful to reproduce paragraph No.59 of the said judgment.

On 03.03.2007, the deceased (Palani), who was only around 21 years of age at the time, was riding a motorcycle bearing Registration No. TN22 AP 5092 along with his friend, 6 one Haridass as a pillion rider, from Tambaram to Chengalpattu on GST Road, Maraimalai Nagar, opposite Vikram Hotel, when they collided with a bus bearing Registration No. TN21 N 0943 belonging to the respondent Transport Corporation, which was driven in a rash and negligent manner. The deceased was unmarried and working as a contract worker in Hyundai Car Company, Sriperumbudur. Applying the dictum of the Constitution Bench referred to above, the appellants are justified in insisting for grant of future prospects at the rate of 40% of the established income.

The High Court has held that the earning of the deceased at the relevant time can be taken as Rs.4,000/per month. The High Court did not provide 40% towards future prospects on the established income of the deceased. Thus, the monthly loss of dependency, in the facts of the present case would be Rs.4,000 + 1,600 = Rs.5,600/.

In other words, instead of amount awarded by the High Court towards loss of dependency in the sum of Rs.4,32,000/, the same will stand modified to Rs.6,04,800/(Rupees six lakh four thousand eight hundred only) along with interest at the rate of 9% (nine percent) per annum. We are not disturbing the other directions given by the High Court in respect of other heads.

Accordingly, the respondent Transport Corporation must deposit the additional amount of compensation of Rs.1,72,800/(Rupees one lakh seventy two thousand eight hundred only) along with interest, as awarded in the preceding paragraph, within a period of eight weeks from the date of receipt of the copy of this judgment in the Court of Additional District & Sessions Judge, Fast Track CourtIV, Chennai (Motor Accident Claims Tribunal, Chennai).

In other words, the compensation payable to the appellants would be as follows:

(a) Loss of Dependency Rs.6,04,800/[Rs.5,600 - 50% of 5600)X12X18]

(b) Loss of love and affection Rs. 60,000/

(c) Transport Rs. 5,000/

(d) Funeral Rs. 2,000/

(e) Loss of estate Rs. 2,500/Total = Rs.6,74,300/

As a result, the Appeal stands allowed. The compensation awarded by the High Court is enhanced from Rs.5,01,500/to Rs.6,74,300/[Rupees six lakh seventy four thousand three hundred only]. The respondent Transport Corporation is directed to deposit the entire award amount as indicated above with interest at 9% (nine percent) per annum less the amount already deposited if any, within a period of eight weeks from the date of receipt of a copy of this judgment and the appellants shall be entitled to the compensation in the proportion specified by the Tribunal.

The first and second appellants are entitled to withdraw the amount deposited upon verification of due application and the share of the third appellant (minor) shall be deposited in any of the nationalised banks till she attains majority and the second claimant/mother is entitled to withdraw interest thereon once in three months towards meeting the needs of the minor. Upon turning 18, the minor appellant is entitled to withdraw her respective share.

Accordingly, the appeal is allowed in the aforementioned terms with no order as to costs.

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13. Sections 20(b)(ii)(c), 28 & 23 of NDPS Act

Union of India Vs. Leen Martin & ANR.

N.V. Ramana & S. Abdul Nazeer, JJ.

In the Supreme Court of India

Date of Judgment -01.02.2018

Issue

In the matter of acquittal of respondent no.1 of all the charges under Section 28 read with Section 23 of the N.D.P.S. Act –Challenged.

This criminal appeal arises from the impugned judgment, and order, dated 20.11.2008, in Criminal Appeal No. 379/2007 passed by the High Court of Judicature at Bombay, wherein the High Court acquitted the respondent no.1 of all the charges under sections 8(c), punishable under Section 20(b)(ii) (c) and under Section 28 read with Section 23 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'N.D.P.S Act').

A brief reference to the prosecution case may be necessary for disposal of this case. On 05.05.2004, the officers of Customs, Air Intelligence Unit, at Chhatrapati Shivaji International Airport, Mumbai noticed that a passenger of European origin was found to be suspiciously loitering near the airline counters of Swiss Air. Observing such suspicious behavior, the airline personnel were alerted for segregating the baggage of the respondent no.1. After completing his immigration and custom formalities, respondent no.1 was intercepted by the Intelligence Officer and subjected to examination by a sniffer dog.

When there was an indication about the presence of narcotic or psychotropic substance, he was taken to a baggage examination area. On opening suit case his personal belongings were kept aside, even then, his suit case was found to be abnormally heavy.

On examination, a false bottom was detected and when the false bottom was removed, three rectangular packets wrapped in cellophane tape were discovered containing brown colored substance which tested positive for hashish, a contraband substance. Net weight of the recovered substance was found to be measuring 12.03 Kg. Later, the samples were drawn and the goods were seized under a seizure panchnama. It is to be noted that, on 06.05.2004, respondent no.1 recorded his statement under Section 67 of N.D.P.S Act. After completion of the investigation, charges levelled against him, the accused (respondent no. 1 herein) pleaded not guilty and claimed trial.

The trial court in N.D.P.S. Special Case No. 133 of 2004 conducted full-fledged trial which resulted in conviction of the respondent no.1, for offences under Section 8(c), punishable under Section 20(b)(ii)(c), with rigorous imprisonment for 10 years and fine of Rs. 1,00,000/- in default to suffer simple

imprisonment for six months. Further, the respondent no. 1 was sentenced under Section 28 read with Section 23 of N.D.P.S Act to undergo rigorous imprisonment for 10 years and to pay fine of Rs. 1,00,000/- and in default to suffer simple imprisonment for six months. Both sentences were ordered to run concurrently.

Aggrieved by the order of conviction of the trial court, respondent no. 1 approached the High Court in Criminal Appeal No. 379 of 2007. The High Court by an order dated 20.11.2008, acquitted the respondent no. 1 of all charges as, in the opinion of the High Court, the prosecution failed in establishing that the panchas were present during the seizure procedure. The High Court while setting aside the trial court order observed that the trial court erred in convicting the respondent while relying on the sole evidence of PW-1 which is highly inconsistent and full of contradictions.

Aggrieved by the acquittal of respondent no. 1, Union of India has preferred the present appeal before this court by way of special leave petition.

We have heard the learned counsel appearing for the appellant - Union of India and the learned senior counsel appearing for respondent no.1.

It is brought to our notice by the learned senior counsel appearing for respondent no.1 that his client has already undergone four and a half years of incarceration and he is also not in the country.

Learned counsel appearing for the appellant - Union of India accepts the aforesaid statement.

Taking into consideration the evidence of PWs 8 and 9, panch witnesses, we find that their evidences are contradicting the statement of the Intelligence Officer (PW-1). We may note that except the statement made under Section 67 of the N.D.P.S. Act by respondent no.1, there is no other material to substantiate the case against the said respondent. Both PW-8 and PW-9 have categorically stated that, when they were called by the Intelligence Officer (PW-1) and by the time they reached, the bag was already opened. Further it was admitted by them that, the panchanama was not read over to them.

They were asked to sign on number of papers and they were not aware of the contents. Moreover, PW-1 i.e., the intelligence officer did not state that the bag containing the narcotic substance was opened in the presence of panchas. The cross-examination of PW-9 clearly reveals that he does not agree to the contents of the panchanama with respect to the fact that the search and inspection of the baggage took place in his presence.

His signatures obtained on the panchanama were not voluntarily put, which is apparent from the following statements made by PW-9 during the cross-examination:

"As I was Trainee and new person I did not want to hurt the custom officer, therefore I signed panchanama and articles without reading it."

Moreover, aforesaid conclusion is substantiated by the statement of PW-8 made in the examination-in-chief in the following manner-

"After entering the office room of AIU Section, I saw one open suitcase, number of officers were present and packets were shown to me... I signed on numbers of papers and on packets being shown to me."

It is to be noted that the entire case of the prosecution hinges on the alleged recovery of the narcotic substance from respondent no. 1 but, this very fact is not proved beyond reasonable doubt as independent witnesses PW-8 and PW-9 have portrayed a different story as to the recovery and seizure. In the facts and circumstances of this case exclusive reliance on the statement made by respondent no. 1 would neither be prudent nor safe; especially considering the fact that, the statement of respondent no. 1 procured under Section 67 of the NDPS Act was retracted on 29.06.2004.

After analysis of the above circumstances and evidences; prudence dictates that the statement of the official witness PW-1 cannot be the sole basis for convicting the respondent no. 1. It may be noted that when the statement of official witness is impaired due to infirmities, it is not safe to place reliance upon the same and pass conviction order against the accused. In the present case, as already stated above, the statements of the independent panch witnesses depict a different picture than the one portrayed by the official witness PW-1.

We are of the opinion that the High Court had rightly acquitted the respondent no.1 taking into consideration the aforesaid aspects.

In view of the above and having regard to the fact that the incident is of the year 2004, we find no reason to interfere with the impugned order passed by the High Court. In the result, the appeal lacks merit and is dismissed.

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14. Section 138 of NI Act

P. Ramadas vs. State of Kerala and Ors.

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

In the Supreme Court of India

Date of Judgment -19.02.2018

Issue

In the matter of awarding additional compensation in lieu of simple imprisonment for committing offence under section 138 of the NI Act

This appeal, by special leave, arises from order dated 10th February, 2012 passed by the High Court of Kerala at Ernakulam in Criminal Revision Petition No. 3075/2011.

The Appellant was convicted by the Judicial First Class Magistrate-II, Ottapalam, for offence punishable Under Section 138 of the Negotiable Instruments Act, 1881 and was sentenced to undergo simple imprisonment for 3 months and to pay a compensation of Rs. 2,45,000/- to the Complainant Under Section 357(3) of the Code of Criminal Procedure, 1973, vide his order dated 30th March, 2010 passed in Summary Trial No. 69/2008. In default of payment of compensation, the Appellant was directed to undergo further simple imprisonment of 15 days.

Assailing the judgment of conviction and order of sentence passed by the Judicial First Class Magistrate-II, Ottapalam, the Appellant filed an appeal before the Court of Additional Sessions Judge, Palakkad Division at Ottapalam, which came to be dismissed on 5th August, 2011. Feeling aggrieved, the Appellant approached the High Court of Kerala at Ernakulam by way of criminal revision petition, being Criminal Revision Petition No. 3075/2011. The High Court confirmed the order of conviction and sentence passed by the Trial Court and as confirmed by the lower Appellate Court whilst dismissing the criminal revision petition on 10th February, 2012. Aggrieved by the said order passed by the High Court, the Appellant has approached this Court by way of special leave petition.

This Court issued notice to the Respondents. Respondent No. 1 is represented by Advocate Mr. G. Prakash, (AOR). No appearance has been entered on behalf of Respondent No. 2 (Complainant). When the matter was taken up for hearing on 15th January, 2018, the Court was informed that the Appellant has already deposited the compensation amount of Rs. 2,45,000/- (Rupees two lac forty five thousand). However, considering the submissions made on behalf of the Appellant, the Court passed the following order:

Let the matter be listed on 12.2.2018 to enable the Petitioner to deposit a further sum of Rs. 1,00,000/- (Rupees one lac only) before the trial Court. After the deposit is made, the trial Court shall issue notice to the Complainant for withdrawal of the amount.

If the proof of withdrawal is filed before this Court, this Court may consider for waiver of the sentence relating to imprisonment.

Hearing of the case was accordingly deferred. The Appellant has now produced a receipt dated 5th February, 2018 of having deposited sum of Rs. 1 lac (Rupees one lac) in the Trial Court in terms of our order dated 15th January, 2018. Office Report dated 8th February, 2018 indicates that Respondent No. 2 has been duly served. However, no appearance has been entered on behalf of Respondent No. 2 till date.

After considering the submissions and going through the record of the case, we are of the opinion that it is not possible to interfere with the concurrent finding of fact regarding the finding of guilt recorded against the Appellant. Thus, no interference is warranted against the order of conviction. The only question that must receive our attention is about the sentence awarded to the Appellant.

Having regard to the fact that the Appellant has already deposited the compensation amount of Rs. 2,45,000/- and also deposited further amount of Rs. 1,00,000/- (Rupees one lac) as directed by this Court on 15th January, 2018, what remains to be complied with by the Appellant in terms of the decision of the Trial Court, is to undergo simple imprisonment of 3 months.

Considering the fact that the Appellant has complied with the direction given by this Court vide order dated 15th January, 2018 and taking overall view of the matter, we are of the opinion that interest of justice would be subserved if the order regarding simple imprisonment of three months is modified and in lieu thereof, additional compensation amount of Rs. 1,00,000/- (Rupees One Lac only), already deposited by the Appellant before the Trial Court, is directed to be made over to Respondent No. 2. In other words, Respondent No. 2 is free to withdraw the additional compensation amount of Rs. 1,00,000/- (Rupees One Lac only) already deposited by the Appellant before the Trial Court. This amount be paid to Respondent No. 2 subject to verification of his identity.

We are conscious of the fact that Respondent No. 2 (Complainant) has not appeared before this Court, but the order which we propose to pass is to his advantage and, in all probability, the same would be acceptable to him. We make it clear that if Respondent No. 2-original Complainant is not satisfied with this order, he will be free to apply for recall of the same, which request can be considered appropriately.

Accordingly, we partly allow this appeal in the aforementioned terms. Resultantly, the order of sentence passed by the Judicial First Class Magistrate-II, Ottappalam, dated 30th March, 2010, stands modified to the extent that the Appellant shall pay an additional compensation amount of Rs. 1,00,000/- (Rupees One Lac only) to Respondent No. 2-original Complainant (which is already deposited before the Trial Court), in lieu of simple imprisonment for three months' period. Ordered accordingly.

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15. Section 9(3) of the OCH &PFL Act 1972

Purna Chandra Mishra (since dead), substituted by his LRs and others Versus Commissioner, Consolidation and others.

Biswanath Rath, J.

In the High Court of Orissa, Cuttack

Date of Judgment: 06.02.2018

Issue

In the matter of rejection of the petition to record the names of the petitioners in the consolidation R.O.R-challenged.

This matter involves a challenge to the impugned orders vide Annexures-2 and 3 being passed by the Authorities under the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (for short the "OCH&PFL Act"), thereby restoration of the order vide Annexure-1.

Short background involved in this case is that the petitioners are the legal heirs of Dasarathi Mishra and his wife – Gouri Dibya, whereas the private opposite parties belong to Raghunath, the adopted son of Baidyanath Mishra. Main branch – Baidhar Mishra had four sons, namely, Kasinath Mishra, Lokanath Mishra, Gopinath Mishra and Baidyanath Mishra. Kasinath Mishra survived by Ramachandra Mishra and then Ramachandra Mishra died leaving behind Dasarathi Mishra and his wife – Gouri Dibya. Similarly, Lokanath Mishra survived by Sriya Debi. Gopinath Mishra adopted Gunanidhi who also died issueless. Baidyanath Mishra since remained issueless adopted Raghunath. Originally Ramachandra Mishra, son of Kasinath Mishra had two sons, namely, Raghunath Mishra and Dasarathi Mishra. Since Raghunath was adopted to Baidyanath Mishra, the brother of Kasinath Mishra, Dasarathi Mishra became entitled to the entire share of Ramachandra Mishra. The second branch – Lokanath Mishra appearing to be the second son of Baidhar Mishra, one son, namely, Jogi who got married to Padma Dibya, Sriya Debi was borne out to their wedlock. Similarly, the third branch – Gopinath Mishra though adopted Gunanidhi, but this adopted son died issueless, therefore, the branch of Gopinath got extinguished. Baidyanath Mishra, the fourth son had no issue, thus adopted Raghunath, the grandson of his brother – Kasinath. Therefore, it appears that the present petitioners represent the first branch whereas the private opposite parties represent the fourth branch. Petitioners' case is that the suit land was recorded jointly in the name of Dasarathi Mishra, father of the present petitioners, Padma Dibya, W/o. Jogi Mishra, the second branch and Raghunath Mishra, adopted son of Baidyanath Mishra, the fourth branch. Dasarathi Mishra, the father of the

present petitioners died at an early age leaving behind Gouri Dibya, the wife, Purna Mishra, Damodar Mishra and Dukhishyam Mishra as three sons and Haramani Dibya, a daughter. Purna Mishra died in the meantime and is being substituted by the legal heirs, i.e., petitioner nos.1(a) to 1(e). Dukhishyam Mishra having died issueless much prior to the dispute being raised, Somanath, son of Raghunath was in charge of the entire joint family property, taking advantage of which, he managed to record the share entitled to first branch together with the fourth branch in 1962-63 settlement operations. The present petitioners filed a petition under Section 9(3) of the OCH&PFL Act for recording of their names involving the disputed property. The case of the private opposite parties is that the private opposite parties claimed exclusive right, title and interest over the disputed land by virtue of a purported sale made by Gouri Dibya, the wife of Dasarathi Mishra in favour of Raghunath Mishra, the adopted son of Baidhar Mishra in the year 1946. Further, the private opposite parties asserted their title on the ground that the properties of Baidhar Mishra were amicably partitioned prior to settlement in the year 1929. As evident from the findings of original suit, the suit, i.e., O.S. no.47 of 1965 got confirmed in Title Appeal no.72 of 1967. The private opposite parties also claimed that they got their names recorded in an O.E.A. proceeding vide O.E.A. Case no.7794 of 1963-64. The Consolidation Officer disposed of the Objection Case No.674/96/2000 vide order dated 11.12.2000, thereby allowing the Objection case in favour of the petitioners on the ground that the sale purported to have been made by Gouri Dibya in favour of Raghunath Mishra was by virtue of an unregistered document and, therefore, no settlement record could have been prepared on the basis of an unregistered sale deed and further being co-sharers no claim for adverse possession was maintainable, thereby declining to accept the plea of the opposite parties on the basis of a previous partition. This Objection Case was heard along with Objection Case No.723/143/2000 and another Objection Case No.746/166 of 2000 and were disposed of vide common order dated 11.12.2000, thereby the Consolidation Officer while inclined to allow Objection Case No.674/96/2000, partly allowed the other Objection Cases which resulted in series of Appeals including the petitioners and private opposite parties in Consolidation Appeal no.13 of 2001. This appeal was also taken up along with several other appeals. Finally vide Annexure-2 the Deputy Director, Consolidation set-aside the order passed by the Consolidation Officer in Objection Case no.674/96/2000. Petitioners being aggrieved by the appeal order, preferred Consolidation Revision No.31 of 2001. The revisional authority upon hearing the parties while declining to allow the revision, confirmed the order passed by the appellate authority. Hence, the

present writ petition by the revisional petitioners, subsequently substituted by their legal heirs.

Summarizing the case of the petitioners, Shri Mishra, learned counsel appearing for the petitioners submitted that the entire case of the private opposite parties finds supported from an unregistered sale deed executed by Gouri Dibya not entertainable on two grounds; firstly, the sale deed remained unregistered, therefore, not admissible in the eye of law; and secondly, Gouri Dibya being the wife of Dasarathi Mishra had limited right over the disputed property being a widow of a cosharer. Shri Mishra, learned counsel appearing for the petitioners further submitted that since the petitioners raised a question on the acceptability of the sale deed, it was expedient on the part of the lower appellate Court to decide the said question and draw its conclusion. It is thus contended that the lower appellate Court as well as the revisional Court have failed in appreciating such a legal question. For the judgments of the appellate Court as well as the revisional Court being based mostly on invalid document, it is contended that the foundation being removed, the superstructure has to naturally fall. It is also urged by Shri Mishra, learned counsel appearing for the petitioners that the Courts below have failed in appreciating the benefit of other co-sharers for the order passed in the OEA proceeding, even though they had not joined in the application for settlement. Shri Mishra, learned counsel also urged that the property involved in the Title Suit creating a case of previous partition since completely different than the properties involved in the case at hand, no attachment to the previous partition should have been given by the Courts below, in fact, there has been no previous partition of the disputed property.

Placing reliance on the decisions of the Hon'ble Apex Court as well as this Court in the cases of Yeswant Deorao Deshmukh vrs. Walchand Ramchand Kothari, reported in AIR 1951 SC 16, Gorakhnath Dubey vrs. Hari Narayan Singh and others, reported in AIR 1973 SC 2451, Chairman-cum-Managing Director, Coal India Limited and others vrs. Ananta Saha and others and Dhuma Khan vrs. Commissioner of Consolidation and others, reported in 1997 (I) OLR 222, Shri Mishra, learned counsel appearing for the petitioners attempted to take support of the judgments referred to hereinabove.

In spite of notice, nobody appeared to place the case of the private opposite parties.

Shri U.K. Sahoo, learned Addl. Standing counsel appearing for the opposite party no.1-State while seriously objecting the contentions raised by Shri Mishra,

taking this Court to the observations and findings of the appellate authority as well as the revisional authority, submitted that for the concurrent finding of fact by two Courts, there is no scope for interfering in such orders. Further, findings attained by the Courts below are also based on materials available on record and establishing a clear case against the petitioners. Shri Sahoo, learned Addl. Standing counsel, therefore, requested this Court for rejecting the writ petition for having no ground.

Considering the rival contentions of the parties and taking into account the contentions raised herein, this Court finds, considering the case of the respective parties, the original authority, the Consolidation Officer found the case property is the ancestral property of the objectors in Objection Case No.674/96/2000. The original authority while answering Issue No.2 involved therein, also referring to decision involving Second Appeal No.218 of 1969 came to observe that the family property had been amicably partitioned. Answering Issue No.3, the original authority has also come to observe that the sale deed executed by Gouri Dibya was on behalf of the minor sons in the year 1946 in favour of Baidhyanath Mishra, the son of Raghunath Mishra, but under the premises of unregistered document being relied, held the deed executed by Gouri Dibya in the year 1946 cannot be instrumental in transferring the right, title and interest of the first branch. It is under the above premises, the original authority came to hold the objection case in favour of the petitioners. This Court observes, learned lower appellate court while deciding the Appeal framed three issues (i) Whether the suit land is the joint family property of both the parties ? (ii) Whether the appellants have validly acquired right, title and interest exclusively as per 1952 record of right ? and (iii) Whether the order passed by the learned Civil Court in O.S. No.47/65 has any legal effect ? In dealing with all these three issues, the lower appellate court on appreciation of materials available on record came to hold that in 1962 R.O.R., the suit plots were recorded in M.S. Khata No.222 in favour of Somanath Mishra S/o.Raghunath Mishra Son of Baidyanath Mishra, Narasingh Mishra, Son of Ganesh Mishra. Further during preparation of Land Register under Section 5(2) of OCH & PFL Act the corresponding L.R. Khata No.35 has been 9 recorded in favour of Krushna Prasad Mishra Son of Somanath Mishra, Kamala Mishra Wife of Somanath Mishra, Sailabala Mishra, Wife of Binayak Mishra, Durga Prasad Mishra, Son of Jagannath Mishra, Manika Mishra Wife of Jagannath Mishra, Kismata 13 annas 8 pahis, Siba Krushna Mishra, Naba Krushna Mishra Son of Narasingh Mishra, Sailabala Mishra Wife of Narasingha Mishra, Kismata 4 Pahi under sthitiban status. From the suit record in T.S. No.7/1961 it also reveals, the partition between the predecessor of appellants and respondents has taken place long before 1958 and as a result, there was

already severance of joint family status resulting cosharers recording their names in the Record of Right involving their respective properties. The suit land was recorded exclusively in favour of the predecessor of the appellants and which aspect has never been challenged prior to initiation of the consolidation proceeding. Similarly, examining from another point of view the lower appellate court has also come to hold that the suit land covers M.S. Khata No.222 vested to Government in the year 1963-64.

As per Section 39 of the O.E.A. Act, the Civil Court lacks jurisdiction to take up any such issue as the property was already vested. Since the property was vested in the State Government free from all encumbrances, the O.E.A.Collector is the only competent authority to adjudicate such matters and in fact, the O.E.A. Collector after due enquiry has already settled the land in favour of predecessor of the appellants, which otherwise approves the parties were in separate mess and property, and therefore, the appellants have rightly come to acquire the right, title and interest in respect of the suit land besides the order of the O.E.A. Collector has also not been challenged any further. Following the provision in Section 51 of the OCH & PFL Act, the Consolidation Authority cannot sit over the order of the O.E.A. Collector unless the said order is set aside by any competent court of law. Further on the question of unregistered sale deed, the lower appellate court also taking into consideration the rival contentions and the materials available on record finding that the appellants were in possession of the suit land exclusively with repeated orders of the competent authorities rightly held, no title could have been passed by virtue of an invalid transfer deed. It is under the above premises, the appellate court while allowing the Appeal reversed the order passed by the Consolidation Officer involving Objection Case No.674/96/2000.

From the above narrations and perusal of the records placed herein involving the case, this Court has no hesitation to observe that the findings of the lower appellate court being based on materials available on record remains unassailable. Taking into consideration the revisional order, this Court since finds the revisional authority confirmed the above view of the lower appellate authority, this Court has no hesitation to also hold the revisional order appropriate.

Under the circumstance, this Court finds no scope for interfering with the impugned orders under Annexures-2 & 3 in exercise of power under Article 227 of Constitution of India and thus dismisses the writ petition for having no merit.

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