O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2017

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ODISHA JUDICIAL ACADEMY
MONTHLY REVIEW OF CASES ON CIVIL, CRIMINAL & OTHER LAWS, 2017 (January)
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2. Order XXI Rule 95 of CPC

Article 134 of Limitation Act, 1963

United Finance Corporation vs M.S.M. Haneefa .

R.K. Agrawal & R. Banumathi , JJ.

In the Supreme Court of India

Date of Judgment -11 .01.2017

Issue

Whether period of limitation will start from the date of confirmation of sale or order sale becomes absolute for delivery of possession in case of an auction sale – Discussed.

Relevant Extract

The appellant/Corporation-decree holder filed a suit for realisation of the suit claim and the said suit was decreed for a sum of Rs.2,72,100/- along with interest. In execution of the decree, the property of respondent/judgment-debtor was auctioned on 27th October, 2001 and the same was purchased by the appellant/decree-holder himself. The appellant/decree holder purchased schedule item No.2 property to an extent of 1 acre and 50 cents comprised in Survey No.458/1 of Parassala Village along with the building situated therein. The sale was made absolute on 1st June, 2002. Sale certificate was issued to the appellant on 17th March, 2003. In the meanwhile, the first respondent/judgment-debtor filed an application to set aside the auction sale (Order XXI Rule 90 C.P.C.) and also another application for appointment of the Commissioner to value the property. Both the applications came to be dismissed by the executing court. Being aggrieved by the order dismissing the Commissioner's application (E.A.No.77/2002), the first respondent/judgment-debtor filed revision before the High Court in C.R.P.No.2829/2002 in which the High Court has granted stay of further proceedings in the execution petition. The Civil Revision Petition came to be dismissed on 9th July, 2003.

Thereafter, on 30th August, 2003, auction purchaser appellant filed an application under Order XXI Rule 95 C.P.C. for delivery of possession of the immovable property purchased in the court auction sale. In the said application by order dated 12th August, 2005, the executing court ordered delivery of possession which was challenged by the judgment-debtor before the High Court in C.R.P.No.894/2005. By the impugned order dated 2nd January, 2006, the High Court allowed the revision and dismissed the

application filed by the appellant under Order XXI Rule 95 CPC on the ground that it is barred by limitation.

Challenging the impugned order, learned counsel for the appellant submitted that the court auction sale does not become absolute on the passing of a mere order of confirmation of sale as enjoined by Order XXI Rule 92(1) C.P.C. but it becomes absolute only on the termination of proceedings initiated to set aside the order confirming the sale. It was further submitted that the steps taken by the judgment-debtor to set aside the court auction sale were pending consideration before the High Court in C.R.P.No.2829/2002, which proceedings came to be terminated only on 9th July, 2003 and hence the application filed by the appellant under Order XXI Rule 95 C.P.C. on 30th August, 2003 was well within the period of limitation as stipulated under Article 134 of the Limitation Act, 1963. It was contended that in terms of Section 15(1) of the Limitation Act, the period of stay granted by the High Court between 17.09.2002 to 09.07.2003 should be excluded and the High Court erred in allowing the revision thereby dismissing the application filed under Order XXI Rule 95 C.P.C. as barred by limitation.

This appeal arises out of order passed by the High Court of Kerala at Ernakulam allowing the revision in CRP No.894 of 2005 dated 2nd January, 2006 and thereby dismissing the application filed by the appellant under Order XXI Rule 95 C.P.C. on the ground that the application is barred by limitation and declining direction for delivery of possession of the immovable property purchased in the court auction sale to the appellant.

Challenging the impugned order, learned counsel for the appellant submitted that the court auction sale does not become absolute on the passing of a mere order of confirmation of sale as enjoined by Order XXI Rule 92(1) C.P.C. but it becomes absolute only on the termination of proceedings initiated to set aside the order confirming the sale. It was further submitted that the steps taken by the judgment-debtor to set aside the court auction sale were pending consideration before the High Court in C.R.P.No.2829/2002, which proceedings came to be terminated only on 9th July, 2003 and hence the application filed by the appellant under Order XXI Rule 95 C.P.C. on 30th August, 2003 was well within the period of limitation as stipulated under Article 134 of the Limitation Act, 1963. It was contended that in terms of Section 15(1) of the Limitation Act, the period of stay granted by the High Court between 17.09.2002 to 09.07.2003 should be excluded and the High Court erred in allowing the revision thereby dismissing the application filed under Order XXI Rule 95 C.P.C. as barred by limitation.

Per contra, Mr. Basava Prabhu S. Patil, learned senior counsel appearing for the respondent submitted that as per the decision in Ganpat Singh (Dead)

by LRs. vs. Kailash Shankar and Others (1987) 3 SCC 146, an application filed by the auction purchaser under Order XXI Rule 95 C.P.C. for delivery of possession of property would be covered by Article 134 of the Limitation Act and in the present case limitation will start from 1st June, 2002 i.e. the date of confirmation of sale and hence the application filed on 30th August, 2003 is beyond the period of limitation. Placing reliance on Pattam Khader Khan vs. Pattam Sardar Khan and Anr. (1996) 5 SCC 48, it was further contended that for filing application by the auction purchaser for delivery of possession (under Order XXI Rule 95 C.P.C.), issuance of sale certificate is not the sine qua non and therefore the appellant cannot contend that the application filed on 30th August, 2003 is within the period of limitation. The learned senior counsel further submitted that the High Court has noted the fact that the first respondent/judgment-debtor has already deposited the entire amount and since the decree-holder/appellant-Corporation itself is the auction purchaser, this is not a fit case warranting interference in exercise of extraordinary jurisdiction under Article 136 of the Constitution of India, notwithstanding the leave already granted.

We have carefully considered the rival contentions and perused the impugned order and other materials on record. The point falling for consideration is whether the High Court was right in holding that the application filed by the auction purchaser under Order XXI Rule 95 C.P.C. for delivery of possession of immovable property was barred by limitation.

Article 134 of the Limitation Act will apply to an application filed under Order XXI Rule 95 C.P.C. by the auction purchaser for delivery of possession of property sold in execution of a decree. The limitation for filing an application under Order XXI Rule 95 C.P.C. is one year from the date when the sale becomes absolute.

As pointed out earlier, in terms of Article 134 of the Limitation Act, an application for delivery of possession by a purchaser of immovable property at a sale in execution of a decree has to be filed within a period of one year from the date when the sale becomes absolute. Considering the scope of the expression as to when the sale becomes absolute in the case of Chandra Mani Saha and Ors vs. Anarjan Bibi and others AIR 1934 PC 134 it was held as under:

"…In order to ascertain when such a sale as is referred to in the said Article becomes absolute, reference must be made to the Civil Procedure Code, and the orders and rules contained in the Sch.1 thereto, for that is the Code which contains the provisions relating to the sale of immoveable property in execution of decrees. Order 21, Rules 82 to 96, in the said schedule are applicable to sales of immoveable property. Rules 89, 90 and 91 deal with applications to set aside a sale and Rule 92 (1) provides as follows:

"Where no application is made under Rule 89, Rule 90, or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute." There is no doubt that the above-mentioned rule is applicable to the present case ; for as already stated the judgment-debtors did apply to set aside the sale, and the Subordinate Judge disallowed the applications on 15th April 1924, and on 22nd April 1924, he confirmed the sales. The sales, therefore, became absolute on 22nd April 1924, at any rate so far as the Court of the Subordinate Judge was concerned. But the judgment-debtors had a right of appeal under Order 43, Rule (1)(j) against the orders of the Subordinate Judge by which he disallowed their applications to set aside the sales. This right of appeal the judgment-debtors exercised. Upon the hearing of the appeals, the High Court, by reason of the provisions of Section 107 (2) of the Code had the same powers as the Court of the Subordinate Judge. In the present case, the High Court dismissed the appeals and on such dismissal the orders of the Subordinate Judge confirming the sales became effective and the sales became absolute. In considering the meaning of the words in Article 180 of the Limitation Act, it is useful to consider the converse case. Take a case in which the Subordinate Judge allowed the application to set aside the sale; in that case, of course, there could be no confirmation of the sale as far as the Subordinate Judge was concerned, as there would be no sale to be confirmed. But if, on appeal, the High Court allowed the appeal, and disallowed the application to set aside the sale, the High Court would then be in a position to confirm the sale, and on such an order of confirmation by the High Court the sale would become absolute. Again, take a case in which the Subordinate Judge disallowed the application to set aside the sale; there would then be confirmation of the sale by the Subordinate Judge and the sale would become absolute as far as his Court was concerned. If the High Court allowed an appeal, and set aside the sale, there would then be no sale, and, of course, no confirmation and no absolute sale.

Upon consideration of the sections and orders of the Code, their Lordships are of opinion that in construing the meaning of the words "when the sale becomes absolute" in Article 180, the Limitation Act, regard must be had not only to the provisions of Order 21, Rule 92(1), of the schedule to the Civil Procedure Code, but also to the other material sections and orders of the Code, including those which relate to appeals from orders made under Order 21, Rule 92(1). The result is that where there is an appeal from an order of the Subordinate Judge, disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Article 180 of the Limitation Act, until the disposal of the appeal, even though the Subordinate Judge may

have confirmed the sale, as he was bound to do, when he decided to disallow the above-mentioned application." [Underlining added] The same view was reiterated in the case of Sri Ranga Nilayan Rama Krishna Rao vs. Kandokori Chellayamma AIR 1953 SC 425.

Considering the facts of the present case in the light of the above principles, in our view, the sale could not have become absolute till the proceedings in the revision in C.R.P.No.2829/2002 was over and the revision was disposed of. The judgment-debtor, as discussed earlier, had filed two applications E.A.No.315/2001- (i) to set aside the sale alleging that the property was sold for a lower price as a result of which substantial injury was caused to him and (ii) another application in E.A. No.77/2002- an application for appointing Advocate-Commissioner to assess the value of the property. As against the order dismissing E.A.No.77/2002, the judgment- debtor has filed the revision in C.R.P.No.2829/2002. So long as the said revision was pending, the court auction sale was yet to become absolute. For the sake of arguments, assuming that the said revision was allowed, then in that case the court auction sale would have been set aside on the ground that the property was sold for a lesser price. Therefore, till the revision in C.R.P. No. 2829 of 2002 was disposed of in one way or the other, the sale was yet to become absolute. Be it noted that in Article 134 of the Limitation Act, the legislature has consciously adopted the expression "when the sale becomes absolute" and not when the sale was confirmed. As against the order dismissing E.A No.77/2002 since the revision was preferred by the judgment-debtor and the same came to be disposed of on 9th July, 2003 the sale became absolute only on 9th July, 2003. The application filed under Order XXI Rule 95 C.P.C on 30th August, 2003 was well within the period of limitation. In our view, the High Court was not right in holding that the application under Order XXI Rule 95 C.P.C was barred by limitation and the impugned order cannot be sustained.

In the result, the impugned order of the High Court in C.R.P.No.894 of 2005 dated 2nd January, 2006 is set aside. This appeal is allowed. The Executing Court is directed to restore E.A.No.297/2003 in O.S.No.57/1985 and to dispose of the same in accordance with law. No costs.

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3. Order 41 Rule 17

Sudhansu Sekhar Tripathy vs State Of Orissa And Another

Dr. A. K. Rath, J.

In the High Court of Orissa, Cuttack.

Date of Judgment -21.01.2017

Issue

Dismissing of appeal on merit ,when appellant was absent –Challenged .

Relevant Extract

The plaintiff is the appellant against a reversing judgment. Since the appeal is to be disposed of on a short point, the facts need not be stated in detail. Suffice it to say that the plaintiff instituted T.S. No.18 of 1991 in the court of the learned Additional Munsif, Berhampur for permanent injunction impleading the respondents as defendants. The suit was decreed. Against the judgment and decree passed by the learned trial court, the defendant no.1 (respondent no.1 herein) filed Title Appeal No.10 of 1993 in the court of the learned District Judge, Berhampur, which was subsequently transferred to the court of the learned A.D.J., Berhampur and renumbered as T.A.No.10/93(T.A.11/92-GDC). On the date of hearing, the learned counsel for the appellant was not present, but then the learned appellate court decided the matter on merit and set aside the judgment and decree passed by the learned trial court.

This appeal was admitted on 11.3.1996 on the following substantial questions of law. They are:-

"(i) Whether the appellate court has interpreted the provisions of Order 41, Rule 17 C.P.C., correctly an whether there was justification to allow the appeal in absence of the appellant:

(ii) Whether assessment of holding tax by the Municipality amounts to concession of title in favour of the plaintiff ;

(iii) Whether respondent no.2 who was the respondent no.2 in Title Appeal could have canvassed the contentions on behalf of the State of Orissa the appellant no.1 in the Title Appeal;

(iv) Whether non-compliance of recruitment under Section 80 of the Civil Procedure Code and Section 349 of the Orissa Municipal Act make the plaintiff unsuited".

Heard Mr.S.P.Mohanty, learned counsel for the appellant and Ms.S.Mishra, learned Additional Standing Counsel for the State-respondent no.1. None appeared for respondent no.2.

Mr.Mohanty, learned counsel for the appellant submitted that since the learned counsel for the appellant was absent when the appeal was posted for hearing, the learned appellate court committed a manifest illegality and impropriety in deciding the appeal on merit. He further submitted that when an appeal is posted for hearing, the counsel for the appellant does not appear, the appellate court has to dismiss the appeal. The appellate court has no jurisdiction to decide the appeal on merit.

Order 41 Rule 17 C.P.C. provides : "(1)Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal be dismissed.

Explanation: Nothing this sub-rule shall be construed as empowering the court to dismiss the appeal on the merits.

(2) Hearing appeal ex parte. -- Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte."

The apex Court had the occasion to interpret the said provision in the case of Abdur Rahman Vrs. Athifa Begum, (1996) 6 SCC 62. Taking a cue from Abdur Rahman (supra), the apex Court in the case of Harbans Pershad Jaiswal (Dead) by legal representatives Vrs. Urmila Devi Jaiswal (Dead) by legal representatives, (2014) 5 SCC 723 held thus:-

"11. It is clear from the above that whereas appeal can be heard on merits if the respondent does not appear, in case the appellant fails to appear, it is to be dismissed in default. The Explanation makes it clear that the court is not empowered to dismiss the appeal on the merits of the case. As different consequences are provided, in case the appellant does not appear, in contradistinction to a situation where the respondent fails to appear, as a fortiori, Rule 19 and Rule 21 are also differently worded. Rule 19 deals with readmission of appeal "dismissed for default", where the appellant does not appear at the time of hearing, Rule 21 talks of "rehearing of the appeal" when the matter is heard in the absence of the respondent and ex parte decree made. In Abdur Rahman case, this Court made it clear that because of non-appearance of the appellants before the High Court, the High Court could not have gone into the merits of the case in view of specific course of action that could be chartered (viz. dismissal of the appeal in default above) continued in the Explanation to Order 41 Rule 17 CPC and by deciding the appeal of the appellants on merits, in his absence. It was held that the High Court had transgressed its limits in taking into account all the relevant aspects of the

matter and dismissing the said appeal on merits, holding that there was no ground to interfere with the decision of the trial court.

In Ajit Kumar Singh case as well, the same legal position is reiterated as is clear from para 8 of the said judgment which is reproduced below:

"8. There can be no doubt that the High Court erroneously interpreted Rule 11(1) of Order 41 CPC. The only course open to the High Court was to dismiss the appeal for non-prosecution in the absence of the advocate for the appellants. The High Court ought not to have considered the merits of the case to dismiss the second appeal.(See: Rafiq v. Munshilal). The same view was reiterated in Abdur Rahman v. Athifa Begum."

The irresistible conclusion is that where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the course open to the appellate court is to dismiss the appeal for non-prosecution or to adjourn the same to another date.

The learned appellate court has travelled beyond its jurisdiction in deciding the appeal on merit in absence of the learned counsel for the appellant. The substantial question of law enumerated in ground no.(i) has been answered in negative.

The next question is that even if the appeal was to be dismissed for non-prosecution, whether that order is to be recalled on the application made by the appellant. Under Rule 19 of Order 41 C.P.C., the appellant has to show sufficient cause for his non- appearance.

In the result, the judgment and decree dated 28.11.1995 and 11.12.1995 passed by the learned 1st Additional District Judge, Ganjam, Berhampur in Title Appeal No.10 of 1993 is set aside. The matter is remitted back to the learned appellate court. The learned appellate court shall decide the application of the appellant for his non-appearance and then proceed with the hearing of the appeal. Accordingly, this appeal is allowed to the extent indicated above. Since the appeal has been remitted back to the learned appellate court for de novo hearing, the substantial questions of law enumerated in ground nos.(ii) to (iv) are left open.

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4. *Second Appeal*

State Of Orissa and another vs Abu Bakkar Habib

Dr. A.K. Rath, J.

In the High Court of Orissa, Cuttack

Date of Judgment - 20. 01. 2017

Issue

Second Appeal –Adverse Possession –Its Manner of proof and legal consequences.

Relevant Extract

The respondent as plaintiff instituted the suit for declaration of right, title and interest and permanent injunction impleading the appellants as defendants. The case of the plaintiff is that his father late Habib Abdul Latiff purchased the suit plot under a Kararnama dated 9.6.79 for a consideration of Rs.3500/- from one Adarmani Mohanty. Adarmani delivered possession of the land to his father. Since the date of purchase his father and after death of his father, he is in possession of the land openly, peacefully, continuously. It is further stated that Adarmani occupied the suit plot as trespasser in the year 1958 and constructed 5 numbers of katcha rooms over it. After sale, he had demolished the katcha house and constructed a pucca house over the suit plot and doing his business on it. While the matter stood thus, Encroachment Case No.805/70 was initiated. Thereafter in the year 1979-80, the Tahasildar, Dharmagarh initiated Encroachment Case No.210/79-80 against the father of the plaintiff. His father died in November, 1979, but the case proceeded against a dead person. The Tahasildar, Dharmagarh passed order of eviction and forfeited the articles therein to the State. In spite of the said proceeding, he continued to possess the suit plot. Though the suit plot has been recorded as Anabadi in the name of the Government in the ROR but the original encroacher Adarmani possessed the same till she delivered possession of the same to the father of the plaintiff in the year 1979 under a Kararnama. Thus, he has acquired title by way of adverse possession. The land is required to be settled in his name since he has acquired title by way of adverse possession. He is ready to pay nazrana for settlement of land in his name.

Pursuant to issuance of summons, the defendants entered appearance and filed a comprehensive written statement denying the assertions made in the plaint. The specific case of the defendants is that the suit land has been recorded in the name of the Government as Anababadi padia under Nazul

Khatiam 482 in the last settlement. The same is the exclusive property of the Government. Adarmani had no saleable right over the land and as such the alleged transaction is void. Adarmani was in unauthorised occupation of the suit land in or about the year 1969. When this fact came into the notice of the Tahasildar, Encroachment Case No.805/70 was initiated against her. Necessary fine and penalty was imposed on her and the order of eviction was passed. The plaintiff was substituted in the encroachment case. The suit land has been reserved for public purpose in the master plan of Junagarh Town. Further the Encroachment Case No.200/79 was initiated against the plaintiff. The possession of the suit land by Adarmani, father of the plaintiff and plaintiff is illegal and unauthorised.

On the interse pleadings of the parties, learned trial court struck seven issues. The same are quoted hereunder.

"(1) Whether the suit land is government land ?

(2) Whether Adarmani Mohanty was in possession of the suit lands since 1958 and acquired title ?

(3) Whether the transfer of the suit land by Adarmani in favour of the plaintiff's father is legal ?

(4) Whether the plaintiff or his father has acquired title by adverse possession ?

(5) Is there any cause of action ?

(6) Is there suit maintainable ?

(7) To what relief the plaintiff is entitled ?"

To substantiate the case, the plaintiff had examined two witnesses and on his behalf three documents had been exhibited. On behalf of the defendants, one document had been exhibited.

Learned trial court came to hold that the suit land is a Government land and answered issue no.1 in affirmative. With regard to the issue nos.2 and 3, it held that Adarmani was not in possession of the suit land since 1958. In Encroachment Case No.805 of 1970 initiated against Adarmani, she paid penalty. Adarmani was not in continuous possession of the suit land. She had no semblance right, title and interest over the suit land and as such the alienation is void. With regard to issue no.4, learned trial court held that the plaintiff cannot acquire any title over the suit land by way of adverse possession.

Learned appellate court tacked the possession of Adarmani, father of the plaintiff as well as plaintiff and came to hold that the plaintiff is in possession of the suit land peacefully, continuously and to the knowledge of the defendants for more than thirty years and as such perfected title by way of adverse possession. Held so, learned appellate court allowed the appeal.

The second appeal was admitted by a Bench of this Court on 04.07.2016 on the following substantial question of law.

"Whether the lower appellate court is right in upsetting finding of the trial court by going to hold that the plaintiff has perfected title over the suit land by adverse possession having got the possession of the property from his father who was in possession on the strength of his purchase dated 06.09.1979 from his vendor namely, Adarmani Mohanty who was in possession since the year 1958 ?"

In Annasaheb Bapusaheb Patil and others vs. Balwant alias Balasaheb Babusaheb Patil (dead) by LRs. & heirs etc., AIR 1995 SC 895, the apex Court held that adverse possession means a hostile assertion i.e. a possession which is expressly or impliedly in denial of title of the true owner. Under Article 65 of the Limitation Act, 1963, burden is on the defendants to prove affirmatively. A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. It was further held that where possession could be referred to a lawful title, it will not 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 title at all.

Admittedly, the proceeding under the OPLE Act was initiated against Adarmani and penalty was imposed. She paid the same. Thus, she admits the title of the State. Her possession was not hostile to the real owner and amount to a denial of her title to the property claimed. Adarmani was an encroacher. An encroacher of a Government property has no right to alienate the same. At best the plaintiff is a trespasser on the suit property. Thus this is a case of one trespasser trespassing against another trespasser.

In Gurbinder Singh and another vs. Lal Singh and another, AIR 1965 SC 1553, the apex Court held thus:

"xxx xxx xxx Thus this is a case of one trespasser trespassing against another trespasser. There is no connection between the two and, therefore, in law their possession cannot be tacked on to one another. As pointed out by Varadachariar J., in Rajagopala Naidu v. Ramasubramania Ayyar, AIR 1935 Mad 449 :

"Further the doctrine of independent trespassers will come in only when the second man trespasses upon the possession of the first or the first man abandons possession."

In view of the authoritative pronouncement of the apex Court in the case of Gurbinder Singh and another (supra), the leaned appellate court fell into patent error of law in tacking the possession of two encroachers in holding that the plaintiff has perfected title by way of adverse possession. In the wake of aforesaid, the judgment and decree dated 15.11.1997 and 29.11.1997 respectively passed by learned District Judge, Kalahandi-Nuapada, Bhawanipatna in T.A. No.8 of 1994 is set aside. The appeal is allowed. No costs.

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5. Section 154 , 147,148 ,149and Section 482 of Cr. P.C.

The State Of Telangana vs Habib Abdullah Jeelani & Ors .

Dipak Misra & Amitava Roy ,JJ.

In the Supreme Court of India

Date of Judgment -06.01.2017

Issue

Whether refusing to exercise inherent power in quashing of investigation but can direct the investigating agency to restrain on exercising the accused person during investigation.

Relevant Extract

The facts lie in a narrow compass. On the basis of a report by the informant under Section 154 CrPC, FIR No. 205/2014 dated 26.07.2014 was registered at Chandrayanagutta Police Station, Hyderabad for the offences punishable under Sections 147, 148 149 and 307 of the Indian Penal Code (IPC). Challenging the initiation of criminal action, the three accused persons, namely, accused Nos. 1, 2 and 5, (respondent Nos. 1, 2 and 3 herein) invoked inherent jurisdiction of the High Court in Criminal Petition No. 10012 of 2014 for quashing of the FIR and consequential investigation. As the impugned order would show, the learned single Judge referred to the FIR and took note of the submissions of the learned counsel for the petitioners therein that all the allegations that had been raised in the FIR were false and they had been falsely implicated and thereafter expressed his disinclination to interfere on the ground that it was not appropriate to stay the investigation of the case. However, as a submission had been raised that the accused persons were innocent and there had been allegation of false implication, it would be appropriate to direct the police not to arrest the petitioners during the pendency of the investigation and, accordingly, it was so directed.

The seminal issue that arises for consideration in this appeal, by special leave, is whether the High Court while refusing to exercise inherent powers under Section 482 of the Code of Criminal Procedure (CrPC) to interfere in an application for quashment of the investigation, can restrain the investigating agency not to arrest the accused persons during the course of investigation.

It is submitted by Mr. Harin P. Raval, learned senior counsel appearing for the State that the informant had sustained grievous injuries and was attacked by dangerous weapons and custodial interrogation of the accused persons is absolutely essential. According to him, the High Court in exercise of inherent power under Section 482 CrPC can quash an FIR on certain well known parameters but while declining to quash the same, it cannot extend the privilege to the accused persons which is in the nature of an anticipatory bail.

Learned senior counsel would submit that the nature of the order passed by the High Court is absolutely unknown to the exercise of inherent jurisdiction under Section 482 CrPC and, therefore, it deserves to be axed.

Ms. Nilofar Khan, learned counsel appearing for the respondent Nos. 1 to 3 in support of the order passed by the High Court submitted that the custodial interrogation is not necessary in the facts of the case. She would further submit that the plentitude of power conferred on the High Court under Section 482 CrPC empowers it to pass such an order and there being no infirmity in the order, no interference is warranted by this Court.

The controversy compels one to visit the earlier decisions. In King Emperor v. Khwaja Nazir Ahmad[1] while deliberating on the scope of right conferred on the police under Section 154 CrPC, Privy Council observed:- "… so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course subject to the right of the Court to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it and not until then."

Having stated what lies within the domain of the investigating agency, it is essential to refer to the Constitution Bench decision in Lalita Kumari v. Government of Uttar Pradesh and Ors[2]. The question that arose for consideration before the Constitution Bench was whether "a police officer is bound to register a first information report upon receiving any information relating to commission of a cognizable offence under Section 154 CrPC or the police officer has the power to conduct a 'preliminary inquiry' in order to test the veracity of such information before registering the same"? While interpreting Section 154 CrPC, the Court addressing itself to various facets opined that Section 154(1) CrPC admits of no other construction but the literal construction. Thereafter it referred to the legislative intent of Section 154 which has been elaborated in State of Haryana and Ors. v. Bhajan Lal and Ors.[3] and various other authorities. Eventually the larger Bench opined that

reasonableness or credibility of the information is not a condition precedent for the registration of a case.

The exceptions that were carved out pertain to medical negligence cases as has been stated in Jacob Mathew v. State of Punjab[4]. The Court also referred to the authorities in P. Sirajuddin v. State of Madras[5] and CBI v. Tapan Kumar Singh[6] and finally held that what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed.

Once an FIR is registered, the accused persons can always approach the High Court under Section 482 CrPC or under Article 226 of the Constitution for quashing of the FIR. In Bhajan Lal (supra) the two-Judge Bench after referring to Hazari Lal Gupta v. Rameshwar Prasad[7], Jehan Singh v. Delhi Administration[8], Amar Nath v. State of Haryana[9], Kurukshetra University v. State of Haryana[10], State of Bihar v. J.A.C. Saldanha[11], State of West Bengal v. Swapan Kumar Guha[12], Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi[13], Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre[14], State of Bihar v. Murad Ali Khan[15] and some other authorities that had dealt with the contours of exercise of inherent powers of the High Court, thought it appropriate to mention certain category of cases by way of illustration wherein the extraordinary power under Article 226 of the Constitution or inherent power under Section 482 CrPC could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice.

In the instant case, the High Court has not referred to allegations made in the FIR or what has come out in the investigation. It has noted and correctly that the investigation is in progress and it is not appropriate to stay the investigation of the case. It has disposed of the application under Section 482 CrPC and while doing that it has directed that the investigating agency shall not arrest the accused persons. This direction “amounts” to an order under Section 438 CrPC, albeit without satisfaction of the conditions of the said provision. This is legally unacceptable.

“36. In the case at hand the direction to admit the accused persons to bail on their surrendering has no sanction in law and, in fact, creates a dent in the sacrosanctity of law. It is contradictory in terms and law does not countenance paradoxes. It gains respectability and acceptability when its solemnity is maintained. Passing such kind of orders the interest of the

collective at large and that of the individual victims is jeopardised. That apart, it curtails the power of the regular court dealing with the bail applications.

In this regard it is to be borne in mind that a court of law has to act within the statutory command and not deviate from it. It is a well-settled proposition of law what cannot be done directly, cannot be done indirectly. While exercising a statutory power a court is bound to act within the four corners thereof. The statutory exercise of power stands on a different footing than exercise of power of judicial review. This has been so stated in Bay Berry Apartments (P) Ltd. v. Shobha[19] and U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey[20]."

It has come to the notice of the Court that in certain cases, the High Courts, while dismissing the application under Section 482 CrPC are passing orders that if the accused-petitioner surrenders before the trial magistrate, he shall be admitted to bail on such terms and conditions as deemed fit and appropriate to be imposed by the concerned Magistrate. Sometimes it is noticed that in a case where sessions trial is warranted, directions are issued that on surrendering before the concerned trial judge, the accused shall be enlarged on bail. Such directions would not commend acceptance in light of the ratio in Rashmi Rekha Thatoi (supra), Gurbaksh Singh Sibbia (supra), etc., for they neither come within the sweep of Article 226 of the Constitution of India nor Section 482 CrPC nor Section 438 CrPC. This Court in Ranjit Singh (supra) had observed that the sagacious saying "a stitch in time saves nine" may be an apposite reminder and this Court also painfully so stated.

Having reminded the same, presently we can only say that the types of orders like the present one, are totally unsustainable, for it is contrary to the aforesaid settled principles and judicial precedents. It is intellectual truancy to avoid the precedents and issue directions which are not in consonance with law. It is the duty of a Judge to sustain the judicial balance and not to think of an order which can cause trauma to the process of adjudication. It should be borne in mind that the culture of adjudication is stabilized when intellectual discipline is maintained and further when such discipline constantly keeps guard on the mind.

In view of the aforesaid premises, we allow the appeal, set aside the impugned order of the High Court and direct that the investigation shall proceed in accordance with law. Be it clarified that we have not expressed anything on any of the aspects alleged in the First Information Report.

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6. Section 301 Cr.P.C.

Section 302 , 304-B, 201 498_A ,120-B IPC and

Section 3 & 4 of DP Act

Ajay Kr. Ghoshal Etc vs State Of Bihar

Dipak Misra & R. Banumathi ,JJ.

In the Supreme Court of India

Date of Judgment -31.01.2017

Issue

Setting aside the judgment of conviction and sentencing by the trial Court and ordering retrial if justified.

Relevant Extract

Briefly stated, case of the prosecution is that on 15.05.2007, Asim Kumar Chatarjee (PW-5) filed a complaint before the Officer-in-Charge, Tilakmanjhi, stating that his sister Bandhavi @ Bani Ghoshal was married to Raj Kumar son of Ajay Kumar Ghoshal on 03.02.2007 and at the time of her marriage, the complainant gave cash and ornaments as per his capacity and all the usual gifts given in a marriage to the accused-appellants. PW-5 asserted that the husband, father-in-law and mother-in-law (Munmun Ghoshal) kept demanding dowry from his deceased sister and upon his inability to fulfill their demands, they in turn tortured Bandhavi Ghoshal mentally and physically. The complainant stated that on 15.05.2007, he received information from Bhagalpur about the death of his sister deceased Bandhavi @ Bani Ghoshal in her matrimonial home, in suspicious circumstances and he went to Bhagalpur. The complainant stated that he saw the dead body of his sister and noticed that her wrist veins were cut and her body had the marks of hanging, assault and electrocution. On the basis of aforesaid, FIR was registered under Section 304 (B), Section 34 IPC at Kotwali (Tilkamanjhi) P.S. Case No.281 of 2007. After completion of investigation, the charge- sheet was filed against the appellants under Sections 302, 304B, 201, 498A, 120B IPC and Sections 3 and 4 of Dowry Prohibition Act.

In order to prove guilt of the accused, the prosecution has examined twelve witnesses and exhibited documents and material objects. Upon consideration of evidence, the trial court vide judgment dated 06.04.2015, held that the prosecution has proved the guilt of the accused beyond reasonable doubt and convicted all the appellants/accused persons, by judgment dated 09.04.2015. For conviction under Section 304B read with Section 120B IPC, the trial court imposed sentence of imprisonment for ten years on each of the appellants. The appellants were convicted under Section 201 IPC and were sentenced to undergo rigorous imprisonment for five years

as well as fine of Rs.10,000/- each with default sentence and rigorous imprisonment for two years for the conviction under Section 4 of Dowry Prohibition Act.

Being aggrieved by the verdict of conviction and the sentence imposed upon them, the appellants/accused preferred separate appeals before the High Court. Upon consideration of the contentions of the parties, the High Court in paras (29) and (30) of its judgment pointed out certain lapses on the part of Investigating Officer/trial court and held that the trial court failed to take appropriate action on the lapses. After quoting relevant extracts from the judgments in Mina Lalita Baruwa vs. State of Orissa and Ors. (2013) 16 SCC 173 and Nar Singh vs. State of Haryana (2015) 1 SCC 496, the High Court set aside the judgment of the conviction and sentence recorded by the trial court and the matter was remitted back to the trial court to proceed afresh in accordance with law. Being aggrieved, the accused-appellants have preferred these appeals.

These appeals are directed against the common final order dated 28.08.2015 passed by the High Court of Judicature at Patna in Criminal Appeal (SJ) No.230 of 2015, Criminal Appeal (SJ) No.275 of 2015, Criminal Appeal (SJ) No.232 of 2015 and Criminal Appeal (SJ) No.243 of 2015 setting aside the judgment of the trial court and directing the retrial of Session Trial No.14 of 2008/637 of 2008 against the appellants.

We have heard the learned counsel for the State as well as counsel for the complainant i.e. brother of the deceased Asim Kumar Chatarjee. Both of them submitted that the evidence available on record is sufficient to sustain the conviction of the accused-appellants.

We have carefully considered the rival contentions and perused the impugned order and other materials on record. The question falling for consideration is whether there was serious irregularities in the prosecution case thereby necessitating retrial and whether the irregularities pointed out by the High Court are such as resulting in miscarriage of justice thereby constraining the High Court to set aside the judgment of the Sessions Court and direct for retrial.

In para (29) of its judgment, the High Court pointed out certain lapses; but has not stated as to how such alleged lapses has resulted in miscarriage of justice necessitating retrial. Certain lapses either in the investigation or in the ‘conduct of trial’ are not sufficient to direct retrial. The High Court being the First Appellate Court is duty bound to examine the evidence and arrive at an

independent finding based on appraisal of such evidence and examine whether such lapses actually affect the prosecution case; or such lapses have actually resulted in failure of justice. The circumstances that should exist for warranting retrial must be such that whether the trial was undertaken by the court having no jurisdiction or trial was vitiated by serious illegality or irregularity on account of misconception of nature of proceedings or that irregularity has resulted in miscarriage of justice.

Though the word "retrial" is used under Section 386(b)(i) Cr.P.C., the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the Court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the Court refused to hear certain witnesses who were supposed to be heard.

This Court, while dealing with the question whether the High Court should have quashed the trial proceedings only on account of declaration of the legal position made by the Supreme Court concerning the procedural aspect about the cases involving offences under the SC/ST Act, this Court stated, "a de novo trial should be the last resort and that too only when such a course becomes so desperately indispensable; it should be limited to the extreme exigency to avert 'a failure of justice'. Observing that any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial".

In Zahira Habibulla H. Sheikh and Anr. vs. State of Gujarat and Ors. (2004) 4 SCC 158, [Best Bakery case] being an extraordinary case, the Supreme Court was convinced that the witnesses were threatened to keep themselves away from the Court and in such facts and circumstances of the case, not only the Court directed a 'de novo' trial but made further direction for appointment of the new prosecutor and retrial was directed to be held out of the State of Gujarat. The law laid down in Best Bakery case for retrial was in the extraordinary circumstances and cannot be applied for all cases.

After considering the question a "speedy trial" and "fair trial" to a person accused of a crime and after referring to a catena of decisions and observing that guiding factor for retrial must always be demand of justice, in

Mohd. Hussain @ Julfikar Ali vs. State (Govt. of NCT of Delhi) (2012) 9 SCC 408, this Court held as under:-

"41. 'Speedy trial' and 'fair trial' to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of an accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

XXXXXXXX "

As discussed earlier, the High Court has not shown as to how the alleged lapses pointed out by the High Court have resulted in miscarriage of justice. When the accused prefers an appeal against their conviction and sentence, the appellate court is duty bound to consider the evidence on record and independently arrive at a conclusion. In our considered view, the High Court erred in remitting the matter back to the trial court for fresh trial and the impugned order cannot be sustained. In the result, the impugned judgment of the High Court is set aside and these appeals are allowed. The matter is remitted back to the High Court for consideration of the matter afresh. The High Court shall afford sufficient opportunity to the accused-appellants and the prosecution and also to the informant Asim Kumar Chatarjee-brother of the deceased (in terms of Section 301 Cr.P.C.) and proceed with the matter afresh in accordance with law. We make it clear that we have not expressed any opinion on the merits of the matter.

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7. Section 439 of Cr. P. C.

kalandi charan lenka vs. state of Orissa

Dr. Durga Prasanna Choudhury, J.

In the High Court of Orissa , Cuttack

Date of Judgment - 16.01.2017

Issue

If bail can been granted in certain circumstances in case of non-bailable offences -discussed

Relevant Extract

The factual matrix leading to the case of the prosecution is that the informant is a woman studying in the Pattamundai Women's College at Pattamundai. It is alleged, inter alia, that her father has got three daughters and his first daughter is mentally retarded girl and the second daughter is the informant herself. The victim girl while studying in College unknown obscene messages came in her mobile imputing her character. Before this also from unknown mobile number, obscene messages affecting the character of the informant also had come through Cell phone of her father. Her father after going through the message became remorse and asked the informant-victim about the matter. So, the victim woman was mentally disturbed by seeing these obscene messages. Then during the year 2015-2016 the written letters containing vulgar languages imputing the character of the victim girl came to her father. Such letters came with sexual remark and with a design to denigrate the character of the victim girl. The messages not only affect the character of the victim girl but also connected the other male members to have sex with the victim girl.

Not only this but also it is alleged, inter alia, that the pamphlet against the character of the victim girl was also pasted on the wall of the Hostel where the victim girl was residing for which she has to change her place of study. But the culprit did not forget to follow her. Wherever the victim girl studied, the printed pamphlets with sexual remarks against the victim girl were pasted on the walls. Finally a fake Facebook Account in the name of the victim girl was created and in the Facebook the morphed naked photographs of the victim girl were transmitted with intention to outrage her modesty. Then the victim girl was bound to inform the Police in writing to take legal action against the culprit.

During course of investigation, Cyber Cell of the Crime Branch examined various witnesses and sent mail to different service providers to trace out the mobile number along with IMEI number. The victim has been examined under Section 164 Cr.P.C. She stated that the petitioner who was very acquainted with the family of the complainant has proposed to marry her and when this

marriage could not be finalized, he suspected him to have transmitted the obscene letters, scandalous mail and published the pamphlets imputing the character of the victim girl. Through such obscene and vulgar mails and creation of the fake Facebook Account in the name of the victim girl, the petitioner has exhibited his intention to intimidate her with the purpose to exploit her sexually. So, the Cyber Cell of the Crime Branch after collecting evidence came to know that it is the petitioner who was involved with these types of nefarious cyber crimes. Then the petitioner was arrested and forwarded to court. As per the prosecution, the investigation is going on.

This is an application under Section 439 Cr.P.C. to release the petitioner on bail who is allegedly involved for the offences under Sections 354-A/354-D/465/469/506/507/509 of the I.P.C. read with Section 66-C/66-D/67/67-A of the Information Technology Act.

Considered the submissions of both the counsels. Perused the Case Diary and other papers produced in this case. Before going through the fact of the case, the well known principle for considering the bail under Section 439 Cr.P.C. is necessary to be reproduced here for better appreciation. In the case of Neeru Yadav v. State of U.P. and another, reported in 2014 (14) SCALE 59, referring to the case of Prahlad Singh Bhati v. NCT, Delhi & another, (2001) 4 SCC 280, the Hon'ble Supreme Court have observed in paragraphs 10 and 11 as follows:-

10. xx xx xx

"(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

In Chaman Lal V. State of U.P.; MANU/SC/0631/2004 : (2004) 7 SCC 525, the Court has laid down certain factors, namely, the nature of accusation, severity of punishment in case of conviction and the character of supporting evidence, reasonable apprehension of tampering with the witness or

apprehension of threat to the complainant, and prima facie satisfaction of the Court in support of the charge which are to be kept in mind." With due regard to the said principle, the court while considering the bail application under Section 439 of Cr.P.C. has to consider various aspects as observed in the aforesaid decision.

During investigation, Crime Branch has sent mail to Facebook Law Enforcement Response Team and other Mobile Service Providers, namely, Nodal Officers of Vodafone Spacetel Ltd., Bharti Airtel Ltd., AIRCEL, TATA Telecommunications Ltd., Reliance Communications Ltd., IDEA Cellular Ltd., BSNL and after extensive investigation came to know that the accused had accessed and operated the fake Facebook Account using the Vodafone account in the name of the victim girl through internet by using Vodafone ISP and the Airtel ISP. The I.O. also found that good numbers of SIM Cards with different IMEI numbers have been used by the accused to commit the offence. The Enquiring Officers of different service providers have also given certificate under Section 65-B of the Evidence Act about the print out retrieved as to the messages and morphed naked photographs of victim girl.

After going through all the materials, it appears that through the electronic form there is stalking, online transmission of sexual explicit or obscene morphed naked picture of the victim. So, the offences under the Information Technology Act (hereinafter called the "I.T. Act") prima facie cannot be ruled out. Moreover, in Sharat Babu Digumarti v. Govt. of NCT of Delhi (S.L.P. (Criminal) No. 7675 of 2015, disposed of on 14th December, 2016) the Hon'ble Apex Court have been pleased to observe in para-28 which is as follows:-

"28. Having noted the provisions, it has to be recapitulated that Section 67 clearly stipulates punishment for publishing, transmitting obscene materials in electronic form. The said provision read with Section 67A and 67B is a complete code Page 28-28 relating to the offences that are covered under the IT Act. Section 79, as has been interpreted, is an exemption provision conferring protection to the individuals. However, the said protection has been expanded in the dictum of Shreya Singhal (supra) and we concur with the same. Section 81 also specifically provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. All provisions will have their play and significance, if the alleged offence pertains to offence of electronic record. It has to be borne in mind that IT Act is a special enactment. It has special provisions. Section 292 of the IPC makes offence sale of obscene books, etc. but once the offence has a nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. We are

inclined to think so as it is a special provision for a specific purpose and the Act has to be given effect to so as to make the protection effective and true to the legislative intent".

With due regard, in the above case under Sections 292, 294 of I.P.C. and Sections 67, 67A and 67B of the I.T. Act, charge was made but the Hon'ble Apex Court was pleased to opine that when the offence under the I.T. Act is made out, similar offence under Section 292 of I.P.C. cannot go together for the reason that the I.T. Act being special provision would operate in the field of offence committed through electronic form. Applying the ratio of the case, in the instant case the entire obscene message and fake Facebook account showing stalking and obscene representation or morphed naked photograph of the victim are all prima facie committed by the petitioner through electronic form as per the Police papers. Moreover, the material about the pamphlets or any other form of defamation to the character of the victim pasted on the wall of the College or hostel as alleged being not investigated to have been made by the present petitioner except a suspicion is raised about his involvement with such crime. But offences under the I.T. Act are prima facie made out against the petitioner. On the other hand, the offences under the I.P.C. against the petitioner is yet to be made out. Be that as it may, offence under Section 67A of the I.T. Act as made out prima facie in this case against the petitioner is non-bailable.

Thus, balancing the act committed, prima facie offence found out against the petitioner and protection of the dignity/right of victim woman, the petitioner should be released on bail by imposing strict conditions. So, let the petitioner be released on bail of Rs. 50,000/- (Rupees fifty thousand) with two solvent sureties each, out of which one surety should be one of his parents, for the like amount to the satisfaction of the learned J.M.F.C., Pattamundai in G.R. Case No. 225 of 2015 arising out of Cyber Crime P.S. Case No. 07 of 2016 on conditions that (i) he would appear before the Investigating Officer on every Sunday at 10.00 A.M. till Final Form is submitted and also would be available to the I.O. as and when required for the purpose of further investigation, if any, after submission of Final Form; (ii) He would not commit any offence including the offence through the electronic form while on bail; (iii) He would not induce or threaten the victim woman or her parents or any prosecution witnesses directly or indirectly through any manner; and (iv) He would also not visit the town of Pattamundai where the victim or her family members reside and place where the victim is studying or working except in the occasion when he would have to appear before the I.O. or before the Court in seisin of the matter till submission of Final Form and in the event of filing of charge-sheet till conclusion of the trial.The BLAPL is accordingly disposed of.

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8. Section 482 of Cr.P. C.

Sudarsan Das and Ors. Vs. Sarojini Mohapatra

S.K. Sahoo, J.

In the High Court of Orissa , Cuttack

Date of Judgment- 30.01.2017

Issue

Order of taking cognizance under Section 456,427,354,323,380,506(II)read with section 34 of IPC and issuance of process – Challenged.

Relevant Extract

The opposite party Smt. Sarojini Mohapatra filed a complaint petition in the Court of learned S.D.J.M., Nilgiri against the petitioners and one Arun Mahalik alleging therein that on 09.01.2003 night at about 1.30 a.m., the petitioners along with other police personnels entered inside her house premises, banged on the door and directed the inmates of the house to open the door. In spite of all efforts, when the door was not opened, they forced open the window of the bedroom, focused torch light inside the house and threatened the husband of the complainant directing him to open the door. Out of fear, the family members of the complainant shouted for help remaining inside the house. The accused persons then broke open the wooden door of the backyard and also broke open the second door by means of a crowbar, entered inside the house of the complainant and then into the bed room of her son and daughter-in-law. Then they woke up the daughter-in-law of the complainant, dragged her out of the bed. Thereafter the petitioner No. 1 and co-accused Arun Mahalik tied up the elder son of the complainant and carried him outside. When the daughter-in-law of the complainant came to the rescue of her husband, the petitioner No. 2 assaulted her and made her flat on the ground. The son of the complainant was carried outside and he was assaulted by the petitioner No. 2 by means of a lathi on his back and thigh. Co-accused Arun Mahalik dragged the other son of the complainant outside and all the accused persons kicked open the door of the bedroom. It is the further case of the complainant that when request was made to the accused persons not to enter into the house with shoes as it would affect the religious sentiment of the complainant's family members, they did not pay any heed to such request, on the other hand they demanded Rs. 5,000/- (five thousand only) and threatened to arrest the family members of the complainant and institute a false case against them. The accused persons tried to drag the husband of the complainant who was an old and ailing person and suffering from high blood pressure. The complainant requested the police officials to leave her husband but they did not pay any heed to her request. When the

villagers and other witnesses arrived at the spot and protested, the accused persons left the spot giving threat to the family members of the complainant. Co-accused Arun Mahalik snatched away a gold chain from the neck of the complainant on the instruction of petitioner No. 1. The complainant informed the Circle Inspector of Nilgiri Police Station about the occurrence through registered post and on 11.01.2003. She also informed the Superintendent of Police, State Commission for Women regarding the incident through registered post. No action was taken on the representation of the complainant for which the complaint petition was filed on 16.01.2003. The learned Magistrate recorded the initial statement of the complainant-opposite party, conducted inquiry under section 202 of Cr.P.C., during course of which three witnesses were examined and then passed the impugned order holding that prima facie material are available in respect of the offences.

The petitioners Sudarsan Das and Baikunthanath Mishra have filed this application under section 482 of the Code of Criminal Procedure challenging the impugned order dated 26.05.2003 passed by the learned S.D.J.M., Nilgiri in I.C.C. Case No. 06 of 2003 in taking cognizance for the offences punishable under sections 456, 427, 354, 323, 380, 506(II) read with section 34 of the Indian Penal Code and issuance of process against them.

The learned counsel for the petitioners relied upon the decisions of this Court in case of Sarat Chandra Rath Vs. Malti Tandi reported in (2014) 59 Orissa Criminal Reports 1, Satyabadi Padhi Vs. Nepal Chandra Kar reported in 2001 (1) Orissa Law Reviews 238, Kremjit Mohananda Vs. Mohanpani Karua reported in 1995 (II) Orissa Law Reviews 284, Rohit Kumar That Vs. State of Orissa reported in (2010) 46 Orissa Criminal Reports 614 and Sangram Keshari Behera Vs. Niladi Dhir reported in (2012) 52 Orissa Criminal Reports 362.

Mr. Satyabrata Pradhan, learned counsel for the opposite party-complainant on the other hand contended that the overt act committed by the accused-petitioners in outraging the modesty of the daughter-in-law of the complainant, committing theft of the gold necklace of the complainant, forcibly entering into the house of the complainant during mid-night cannot be said to have been done in discharge of the official duty of the petitioners and therefore, the protective umbrella of requirement of sanction is not necessary. The learned counsel for the opposite-party placed reliance in the case of Keshaba Jena Vs. Pradipta Kishore Das reported in (1989) 2 Orissa Criminal Reports 34, Samir Chandra Guha Vs. K. Pradhan reported in (1989) 2 Orissa Criminal Reports 356, Kailash Chandra Mahanta Vs. Ganeswar Amanta reported in 1990 (I) Orissa Law Reviews 432, Devinder Singh Vs. State of Punjab reported in (2016) 64 Orissa Criminal Reports (SC) 380, Choudhury Parveen Sultana Vs.

State of West Bengal reported in: (2009) 3 Supreme Court Cases 398 and Pranab Kumar Pradhan Vs. State of Orissa reported in (2016) 63 Orissa Criminal Reports 1051.

In view of the aforesaid discussion regarding the applicability of section 197 of Cr.P.C. and looking at the factual aspects, it is clear that the petitioners had been to the house of the complainant on the night of occurrence in connection with official duty i.e. to arrest the two sons of the complainant against whom first information reports had been lodged at Nilgiri Police Station for commission of offences, inter alia, under section 307 of the Indian Penal Code. It further appears that in spite of warning being given to open the door of the house, the family members of the complainant did not oblige the same for which force was applied to the back door of the house and the police officials entered inside the house of the complainant and arrested her two sons and produced them in the police station on the very same day. The arrest memos were prepared and station diary entries were made. The complainant in her initial statement has stated that the accused persons came to her house and knocked the door but they did not open the door for which they broke the window and called them out so as to open the door and in spite of that as they did not open the door, the accused persons went to the back side of the house, broke the door and forcibly entered inside the house. Similar statement has been made by Sabita Mohapatra who is the daughter-in-law of the complainant during her examination in course of inquiry under section 202 of Cr.P.C. The extract of the station dairy entry No. 173 dated 09.01.2003 of Nilgiri Police Station made at 4.30 a.m. indicate that the owner of the house Damodar Mohapatra (husband of the complainant) and his two sons did not open the door and the sons of the complainant were intentionally avoiding arrest and trying to escape and therefore, force was applied to the back side tin door which was opened in presence of the witnesses and the sons of the complainant were taken into custody after being chased.

Section 47 of Cr.P.C. compels the householders to afford the police, facilities in carrying out their duties. Under sub-section (1) of section 47 of Cr.P.C., the police officer is to be allowed free ingress into the house for the purpose of search and afforded all reasonable facilities for a search therein, and where free ingress is not possible, the police officer is authorised to force himself into the house. There is no doubt that the authority who is to effect the arrest must strictly abide by the safeguards enumerated under section 47 of the Code, in other words their power is not unlimited. Whether the action of the police officers was or was not justified has to be considered in the facts and circumstances of each case. The arrest is permissible only in a case where

the circumstances of the said case so require and there is a justification for making the arrest otherwise not.

In both the cases which had been instituted against the sons of the complainant, the allegations are for commission of offence under section 307 of the Indian Penal Code which is a cognizable and non-bailable offence and therefore, the police officer is empowered to arrest the accused without warrant. In the complaint petition, though it is mentioned that when the daughter-in-law of the complainant tried to rescue her husband, the petitioner No. 2 assaulted him by means of fists, kick blows and slaps for which she fell down on the ground but in her initial statement, the complainant has stated that when her daughter-in-law raised protest, the petitioner No. 2 dragged her saree and assaulted by a lathi and made her lie down. The daughter-in-law of the complainant has not stated that any of the petitioners dragged her saree nor any such allegation is there in the complaint petition. The station diary entries indicate as to how and why the force was used to arrest the sons of the complainant. Even though some overt acts have been alleged against the petitioners like dragging of the daughter-in-law of the complainant, commission of theft of necklace and assault to the complainant but there are serious discrepancies in the statements of the witnesses in that respect.

The learned Magistrate has not considered the sanction aspect at all while taking cognizance of the offences and issuing process against the petitioners. In spite of the order passed by this Court in case of Sangram Keshari Behera (supra), the learned Magistrate has not inquired from the complainant as to whether the petitioners against whom, the complaint has been lodged had any connection with any official duty, which was being discharged by them at the time of alleged incident. The act complained of due to which the offence is stated to have been committed appears to have been committed by the petitioners while acting or purporting to act in the discharge of their official duty. Even though the allegations are that of commission of excesses by the petitioners while performing their official duties, in my humble view, the petitioners could not have been prosecuted without sanction from the competent authority. Sanction for prosecution under section 197 of the Cr.P.C. by the appropriate authority is a necessary pre-requisite before a Court of competent jurisdiction takes cognizance of an offence. Resultantly, the impugned order suffers from non-application of mind and is hereby set aside. Accordingly, the CRLMC application is allowed.

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9. Section 148,302,201, And 149 of IPC

Ram Chander and Ors. Vs.State of Haryana

A.K. Sikri and Abhay Manohar Sapre, JJ.

In the Supreme Court of India

Date of Judgement - 02. 01.2017

Issue

Conviction –credibility of testimony of witnesses-related witness-evidentiary value.

Relevant Extract

These appeals are filed against the common final judgment and order dated 12.08.2008 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal Nos. 448-DB and 395-DB of 1998 whereby the Division Bench of the High Court dismissed the appeals filed by the Appellants herein and upheld the judgments/orders of conviction and sentence rendered by the Trial Court.

The case of the prosecution is as under:

One Hari Singh (since dead) was married to Messo (deceased). Out of this wedlock, the couple was blessed with three daughters, namely, Dholi alias Krishna, Sumitra and Raj Bala. Raj Bala was aged around 15 years and the youngest amongst the three daughters. Both Dholi and Sumitra were married at a place (village) called Kagdana whereas Rajbala was unmarried.

Hari Singh has two brothers, namely, Sohan Lal (Accused-since dead) and Bhoop Singh. Sohan Lal has four sons, namely, Ram Chander, Ranbir alias Randhir, Ram Kumar and Om Parkash (Accused-Appellants herein). Messo has one sister Guddi (PW-9) who is married to Bhoop Singh.

Messo and Raj Bala (mother and daughter) were living in one house at village Arnianwali. Guddi was their next-door neighbour. Messo was in search of a boy for Raj Bala and had selected one boy from a place called Manak Dewan for which talks had been going on for the last one month or so from the date of incident. The engagement ceremony was accordingly fixed for 22.09.1996 at Arnianwali. Dholi alias Krishna (married daughter of Messo) had, therefore, come to her mother's place at Arnianwali on 19.09.1996 to help her mother and sister-Raj Bala for the ceremony.

On 20.09.1996, around 3 p.m. Sohan Lal along with his four sons, namely, Ranbir, Ram Chander, Ram Kumar and Om Parkash, came to the house of Messo and told her to desist from settling the marriage of Raj Bala with a boy from Manak Dewan. Sohan Lal said that they could settle it according to their own choice. Sohan Lal, who was not happy with the marriage proposal, expressed his total unhappiness and did not want the marriage proposal to fructify. He then threatened Messo that in case she did not agree to his proposal then both (Messo and Raj Bala) would not see the sun the next day. After giving this threat, Sohan Lal along with his sons (appellants herein) left the place. Dholi and Guddi were present along with Messo and Raj Bala when Sohan Lal and his four sons had come.

Messo fearing with the threat of Sohan Lal asked her daughter Dholi to go immediately to her brother, Ram Sarup at village Dhigtania which was around 20 KM away from her house and inform him about happening of such incident with her. Dholi, accordingly, went there and narrated the incident to Ram Sarup-her maternal uncle. She then stayed overnight with Ram Sarup.

On 21.09.1996, in the early hours, when Dholi and Ram Sarup accompanied by one Om Prakash-Sarpanch of Village Dhigtania reached to the house of Messo, they found both, Messo and Raj Bala, missing from the house. They, therefore, went to the house of Guddi (PW-9), who was living next to the house of Messo. They noted that Guddi was weeping and was in the state of shock.

When they inquired from her about the whereabouts of Messo and Raj Bala, Guddi told them that Sohan Lal and his four sons had come in the night and murdered Messo and Raj Bala, burnt their bodies in house and carried the remains of the dead bodies and ashes in a cart driven by the tractor from her house to an unknown place.

This led to the registration of FIR bearing No. 197 (Ex-PA-1) dated 21.09.1996 by Dholi at Police Station Nathusari Chopta naming Sohan Lal and his four sons (appellants herein) as accused persons for committing the murder of her mother-Messo and sister-Raj Bala. The police authorities then started investigation, visited the spot, recorded the statements of the witnesses, prepared the spot map, recovered several articles from the spot and arrested

the accused persons. On being interrogated, the accused made disclosure statements about the manner in which ashes/bones of both the deceased were disposed of in a nearby Canal known as-Sheranwali Canal and also disclosed the place where the weapons used in commission of the offence and tractor with cart were kept. On such disclosure being made, the police made recoveries of the articles at the instance of the accused.

After completion of the investigation, the case was committed to the Court of Sessions and the accused persons were charged for commission of the offences punishable Under Sections 148, 302 read with Section 149 and 201 of the Indian Penal Code, 1860 (for short 'Indian Penal Code').

On 07.08.1997, Om Parkash-one of the accused escaped from police custody from Civil Hospital Sirsa. Proceedings Under Sections 82 and 83 of the Code of Criminal Procedure, 1973 (for short 'the Code') were initiated against him. He was declared 'Proclaimed Offender' and proceedings Under Section 299 of the Code were ordered to be taken up against him. The trial of other accused, however, proceeded on merits.

The prosecution, in support of his case, examined as many as 11 witnesses whereas the defence did not choose to lead any evidence. Proceedings Under Section 313 of the Code were carried out. After completion of the trial, the Trial Court (Additional Sessions Judge, Sirsa), vide judgment dated 27.07.1998, convicted Sohan Lal, Ranbir @ Randhir, Ram Chander and Ram Kumar for the offences punishable Under Sections 148, 302/149 and 201/149 Indian Penal Code and sentenced them to undergo rigorous imprisonment for a period of one year each Under Section 148 Indian Penal Code. Ram Chander and Ranbir @ Randhir to undergo imprisonment for life Under Section 302 Indian Penal Code and to pay a fine of Rs. 5000/- each, in default of payment, further to undergo rigorous imprisonment for a period of one year each. Sohan Lal and Ram Kumar were sentenced to imprisonment for life Under Section 302/149 Indian Penal Code and to pay a fine of Rs. 5000/- each, in default of payment of fine, further to undergo rigorous imprisonment for a period of one year each. All the four accused were sentenced to undergo rigorous imprisonment for a period of two years each for the offences punishable Under Section 201/149 Indian Penal Code. All the sentences were ordered to run concurrently.

After arrest of Om Parkash on 22.02.1999, a separate trial was conducted against him and after its completion, the Trial Court, by a separate judgment dated 7/8.08.2000, convicted him for the offences punishable Under Sections 148, 302/149 and 201/149 Indian Penal Code and sentenced him to undergo rigorous imprisonment for one year Under Section 148 Indian Penal Code imprisonment for life and fine of Rs. 5000/- with default Clause Under Section 302/149 Indian Penal Code and rigorous imprisonment for two years Under Section 201/149 Indian Penal Code. All the substantive sentences were ordered to run concurrently.

In substance, the submissions were that firstly, the Appellants were falsely implicated in the incident inasmuch as none of the Appellants were connected with the commission of the offence in question in any way so also their complicity in the commission of the offence could not be established by the prosecution for want of evidence against any of them.

The second submission was that neither the motive for commission of the offence and nor the presence of any of the Appellants either jointly and individually was proved at the time of the commission of the offence by the prosecution and the evidence adduced by the prosecution is not sufficient to implicate the Appellants for commission of the offence.

The third submission was that the two Courts below erred in placing reliance on the evidence of the so-called eye-witness-Guddi (PW-9) as according to the learned Counsel, her testimony, if scanned properly would neither inspire confidence and nor will command creditability due to her close relationship with the deceased family.

The fourth submission was that apart from the evidence of Guddi (PW-9), no independent eye-witness to the incident was examined by the prosecution, therefore, it is not safe to rely on the uncorroborated testimony of Guddi (PW-9) for sustaining the Appellants' conviction.

The fifth submission was that when the prosecution claimed that on the strength of disclosure statement of one accused, they recovered "Ashes and Bones" from the canal, this itself renders the case of the prosecution wholly unacceptable because ashes could never be recovered from canal.

The sixth submission was that it looked highly improbable that no villager could witness the incident except Guddi(PW-9). This, according to learned Counsel, is sufficient to hold that the prosecution failed to establish the complicity of the Appellants in commission of the crime.

The seventh submission was that no expert opinion was obtained to find out as to whether bones recovered were human bones or animal bones?

It is basically these submissions, which were elaborated by the learned Counsel for the Appellants with reference to the evidence on record.

In reply, learned Counsel for the Respondent supported the impugned order and contended that since both the Courts below, on proper appreciation of evidence, have held that the Appellants were involved in the commission of the offence in question and committed brutal murder of two innocent ladies, mother and daughter, and further both the Courts have given cogent reasons while rejecting their submissions and hence there arises no reason to interfere in the impugned order.

Having heard the learned Counsel for the parties and on perusal of the record of the case, we find no merit in the appeals.

At the outset, we may take note of one legal principle consistently reiterated by this Court since inception that it is not the function of this Court to re-assess evidence and an argument on a point of fact which did not prevail with the Courts below cannot avail the Appellants in this Court (see observation of learned Judge - Saiyid Fazl Ali, J. while speaking for the Bench in the case of **Lachhman Singh and** Ors**.** v. State AIR 1952 SC 167).

As mentioned above, the only eye-witness to the incident in question is Guddi (PW-9). Both the Courts below found her testimony to be natural, credible and consistent.

Guddi (PW-9) is the real sister of the deceased Messo and she was living next to the house of Messo. She, in her evidence, narrated in detail her family tree and their inter se relations including her relation with the accused family.

On scanning the aforementioned evidence, we are of the considered opinion that both the Courts below were justified in accepting the evidence of

Guddi (PW-9) for resting the Appellants' conviction upon it. We, while concurring with the reasoning and the conclusion of both the Courts below, give our reasons infra. In our view, the following facts are proved with the aid of evidence.

First, Guddi (PW-9) was next-door neighbour to the house of both the deceased where the incident took place. Second, she was closely related to the deceased family and the family of the accused. Third, she knew the accused persons and the family members of the deceased very well much prior to the date of incident being a part of the same families. Fourth, she was fully aware of the marriage issue of Raj Bala. Fifth, she was present at the time of threat given by Sohan Lal and his sons (accused) to Messo. Sixth, she was able to see the incident graphically due to sufficient space available in the common wall. Seventh, Scientific Assistant, Kiran Kumar (PW-7) on inspection of the place of occurrence proved that the common wall has space. He said *"there was open space between this wall and the room"*. Eighth, it also corroborates with the evidence of Hardawari Lal (PW-11) and the spot map (EX-PU) of the place of incidence that the wall and the open space therein did exist; Ninth, Guddi's narration of entire incident is so graphic that it looks natural. It also shows how confidently she was able to narrate the role of every accused in commission of the offence. Tenth, the existence of blood stains on wall and earth coupled with fresh mud and cow dung put on the walls/earth duly proved by Hardawari Lal, Investigating Officer(PW-11) and Kiran Kumar (PW-7) corroborates Guddi's statement that "Ram Chander-*one of the accused before leaving the place of occurrence cleaned the place with mud and cow-dung*". Eleventh, it is not possible to give description of an incident in such graphic manner and that too by a middle aged illiterate housewife unless she had actually seen such incident and why should Guddi (PW-9) give evidence against the Appellants and falsely implicate them when there is no evidence to prove their previous animosity; Twelfth, motive to eliminate the two deceased was proved by Guddi against the Appellants and lastly, nothing could be brought out to shake her testimony in cross-examination.

The submission of learned Counsel for the Appellants that since Guddi (PW-9) was in close relation with the deceased persons, she should not be believed for want of evidence of any independent witness, deserves to be

rejected in the light of the law laid down by this Court in **Dalbir Kaur and** Ors**.** v. State **of Punjab** (1976) 4 SCC 158, and **Harbans Kaur and Anr. v.** State **of Haryana** (2005) 9 SCC 195, which lays down the following proposition:

There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused.

In **Namdeo v.** State **of Maharashtra** (2007) 14 SCC 150, this Court further held:

38. ...it is clear that a close relative cannot be characterised as an "interested" witness. He is a "natural" witness. His evidence, however, must be scrutinised carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one.

It is the consistent view of this Court that minor discrepancies, even if noticed, would not affect the prosecution case, if there is a sufficient independent evidence to sustain the conviction. (**See - Vijay @ Chinee v.** State **of Madhya Pradesh** (2010) 8 SCC 191, Paras 23 & 23). In this case, the evidence adduced was found sufficient to sustain the conviction and we find no good ground to take a different view from the one taken by the two Courts below and concur with their findings and views by giving our own reasons mentioned supra.

In view of foregoing discussion, the appeals are found to be devoid of any merit. The appeals thus fail and are accordingly dismissed. In case if any of the Appellants is on bail, his bail bond stands cancelled and he is directed to be taken into custody forthwith to undergo remaining period of sentence awarded to him by the Sessions Court.

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10. Section 302/34 of IPC

Md. Sajjad Vs. State of West Bengal

Pinaki Chandra Ghose & U.U. Lalit, JJ.

In the Supreme Court f India

Date of Judgment - 06.01.2017

Issue

When one accused did not prefer appeal on conviction whether convicts be sustainable the co-accused. Who prefer an appeal and if benefit of doubt also be extended to non-appealing accused –discussed.

Relevant Extract

According to the prosecution, on 12.07.1993 at about 6.00 AM PW6 Gautam Kheto found a dead body lying on the road in front of his house with a handkerchief tied around the neck. He reported the incident which was recorded in G.D. Book of Muchipara Police Station dated 12.07.1993, whereafter the police conducted inquest on the dead body and sent it for autopsy. The dead body was having a tattoo on the right fore-arm with "Ramchandra Singh" written in Hindi. Post-mortem examination was conducted by PW18 Dr. Rabindra Basu who opined that the death was due to strangulation and the ligature mark and head injuries were ante-mortem in nature.

At about 10.10 PM on the same day i.e. 12.07.1993 PW4 Jai Kishore Guin came to Muchipara Police Station and made a statement that he had heard conversation between PW3 Kailash Srivastava and PW16 Shyamlal Jadav which suggested that they had knowledge about the incident. The investigating officer could then find both PW16 Kailash Srivastava and PW6 Shyamlal Yadav on 13.07.1993. According to both these witnesses they had seen an old man and four other persons alighting from a taxi near a sweetmeat shop in Akrur Dutta Lane and that the old man, who was in drunken condition was taken away by the other persons. According to these witnesses, the number of taxi was 3157. The investigating officer then located the taxi driver, i.e. PW5 Laxminarayan Dey, who stated that in the intervening night of 11.07.1993 and 12.07.1993 five persons had boarded his taxi, four persons were younger in age, while one was an old man. According to this witness there was some altercation amongst them; that near a sweetmeat shop all of them alighted

and that when they came back only four of them had returned. He thereafter dropped them at Rajabazar.

PW8 Saraswati Singh lodged a report on 16.07.1993 that her husband named Ramchandra Singh was missing since 11.07.1993. Two days later she was called to the police station and shown certain photographs but she could not identify the picture. After few days, she again went to the police station with her nephew who could identify the picture to be that of Ramchandra Singh, the husband of said PW8 Saraswati Singh.

On the strength of suspicion expressed by said PW8 Saraswati Singh the Appellant Mohd. Sajjad and one Sk. Sahid @ Bablu were arrested on 09.09.1993 and 11.09.1993 respectively. Both these persons were subjected to test identification parade on 06.10.1993 in which PWs 3, 5 and 16 identified them. After completion of investigation charge-sheet was filed against the Appellant and said Sk. Sahid @ Bablu for the offences punishable Under Section 302 read with Section 34 Indian Penal Code while three persons, namely, Mohd. Sehzada, Sheikh Kaloo and Sheikh Panchu were stated to have been absconding and declared as proclaimed offenders.

After considering the material on record the trial court found that the prosecution was successful in bringing home its case against both the accused. Though the evidence regarding confession was discarded by the trial court, it found the evidence of three witnesses, namely, PWs 3, 5 and 16 regarding identification of the accused to be trustworthy. It observed as under:

It is true that the Test Identification Parade was held two months after the incident of murder but the accused were absconded and they were arrested on 9th September and 11th September and the Test Identification Parade was held on 6th October, 1993. It is also true that the witnesses did not disclose or give any description of the accused in their statement before the police. But the fact that the accused were identified by the witnesses in Court which is substantive evidence and the proceedings of Test Identification Parade are used to corroborative evidence. But, it should be remembered here also that this is not only evidence on the prosecution side as the prosecution case hinges on circumstantial evidence and besides the evidence of identification of the accused of three PWs which is merely a link of the chain of

circumstances while there are other names which have completed the chain. I reiterate here that the names of the accused came out from the statement of the widow who has given a vivid description of the incident as to how they (accused) came colder to her family while dealing in kerosene oil and the motive of the accused as ascribed by her to commit the murder of her husband was to grab her money and for committing some other heinous crimes of which the PW10 has stated in her evidence. So, when the entire chain of circumstantial evidence is complete, it is futile to challenge any link separately unless there is glaring instance of disbelief.

The circumstances that the deceased was last seen in the company of four persons including the Appellant and said Sk. Sahid @ Bablu and that the Appellant had disputes with PW8, wife of the deceased, weighed with the trial court in accepting the case of the prosecution. The Trial Court did not find it safe to rely on the confessional statement of Sk. Shahid @ Bablu. The Trial Court by its judgment dated 19.12.1996 convicted the Appellant and said Sk. Sahid @ Bablu for the offences punishable Under Section 302 read with Section 34 Indian Penal Code. After hearing the parties, the trial court by its order dated 23.12.96 sentenced both the accused to suffer imprisonment for life and to pay fine of Rs. 5,000/- each, in default whereof to suffer rigorous imprisonment for six months.

In the present case, apart from the identification by PWs 3, 5 and 16 and their version that they had seen the deceased in the company of four persons on the night intervening 11.7.1993 and 12.7.1993, there is nothing which could point in the direction of the guilt of the Appellant and said Sk. Sahid @ Bablu. The confessional statement having been discarded, there is no other material to lend any corroboration. The matter thus stands and rests purely on the identification by PWs 3, 5 and 16 apart from the suspicion expressed by PW 8 Saraswati Singh.

In the instant case none of the witnesses had disclosed any features for identification which would lend some corroboration. The identification parade itself was held 25 days after the arrest. Their chance meeting was also in the night without there being any special occasion for them to notice the features of any of the accused which would then register in their minds so as to enable them to identify them on a future date. The chance meeting was also for few

minutes. In the circumstances, in our considered view such identification simpliciter cannot form the basis or be taken as the fulcrum for the entire case of prosecution. The suspicion expressed by PW 8 Saraswati Singh was also not enough to record the finding of guilt against the Appellant. We therefore grant benefit of doubt to the Appellant and hold that the prosecution has failed to establish its case against the Appellant.

Mr. Mrinal Kanti Mandal, learned Advocate is right in submitting that in certain cases this Court had granted benefit even to a non-appealing accused. In Bijoy Singh v. State of Bihar , 2002 (8) SCC 147, this Court observed that if on evaluation of the case, a conclusion is reached that no conviction of any accused was possible the benefit of that decision must be extended to the similarly situated co-accused even though he had not challenged the order by way of the appeal. To similar effect was the dictum of this Court in Suresh Chaudhary v. State of Bihar ,2003 (4) SCC 128 and in Pawan Kumar v. State of Haryana ,2003 (11) SCC 241 and in Mohinder Singh and Anr. v. State of Punjab and Ors. , 2004 (12) SCC 311.

In the circumstances we allow the present appeal, set aside the judgments of conviction recorded by the courts below against the Appellant and acquit him of all the charges leveled against him. We further direct that the benefit of this acquittal and our decision will also enure to the advantage of the non-appealing accused namely Sk. Sahid @Bablu.

The appeal is thus allowed in aforesaid terms. The Appellant was released on bail during the pendency of this appeal. His Bail bonds stand discharged.

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11. Section 302 of IPC and Section 41,312 of IPC

Section 114 of Evidence Act

Raj Kumar Vs. State (NCT of Delhi)

Ranjan Gogoi & Ashok Bhushan, JJ.

In the Supreme Court of India

Date of Judgment- 20. 01. 2017

Issue

When robbery and murder could not be proved to have occurred at the same transaction. Conviction under Section 302 is questionable -Discussed .

Relevant Extract

The entire case of the prosecution is based on circumstantial evidence. P.W. 5-Ombir Singh, the husband of the deceased in his deposition has stated that he resides with his wife, three children, his sister Raj Bala (P.W. 9) and niece Sarvesh (P.W. 21). Accused Raj Nirmal Gautam @ Raju (since deceased) was a tenant in one of the two rooms in their house. On 11th September, 1991 at around 9.00 p.m. accused Raj Nirmal Gautam along with the present Appellant Raj Kumar and one more person named Dharmender alias Babloo came to his house and together they played a game of cards. After some time he went to his room and slept. Raj Nirmal, Raj Kumar (Appellant herein) and Dharmender stayed in the room for the night and left early next morning at about 6.30 a.m. While leaving, accused Raj Nirmal told P.W. 5 that he was going to his village and may not return for the night. At around 7.30 a.m., his sister Raj Bala (P.W. 9) who used to reside with him, his niece Sarvesh and the children left for school. He also left for his workplace at around 7.35 a.m. According to P.W. 5, at about 2.30 p.m. he received a telephone call in his office informing him that his wife had met with an accident. He, therefore, reached home by 3.30 p.m. and found the dead body of his wife. The almirah was found unlocked and all the goods therein lying scattered. A number of jewellery items including gold ornaments were found missing.

The accused Raj Nirmal Gautam and Raj Kumar (Appellant herein) were apprehended on 16th September, 1991 when they were alighting from a bus. On their personal search, various jewellery items were recovered from them which were duly seized by seizure memos Ex. PW-14/C and Ex. PW-14/D. The jewellery items so recovered from the possession of the accused were identified by P.W. 5 (Ombir Singh) to be belonging to his wife. The accused had

no reasonable explanation to offer for their possession of the jewellery items. They however claimed that they were not guilty.

The accused Appellant had been convicted by the learned trial Court for the offence punishable Under Section 302 read with Section 34 Indian Penal Code and has been sentenced to undergo rigorous imprisonment for life and a fine of Rs. 2,000/-, in default, to suffer rigorous imprisonment for a period of two months more. He has also been convicted Under Section 411 Indian Penal Code and sentenced to undergo rigorous imprisonment for one year. Both the sentences were directed to run concurrently. In appeal, while the conviction Under Section 302 Indian Penal Code has been maintained along with sentence imposed, the conviction Under Section 411 Indian Penal Code has been set aside. Instead, the accused Appellant has been convicted for commission of offence punishable Under Section 392 Indian Penal Code and sentenced to undergo rigorous imprisonment for one year for commission of the said offence. Aggrieved, this appeal has been filed.

It transpires that there are two material circumstances which have been proved by the prosecution. Firstly, that in the night prior to the incident i.e. on 11th September, 1991 the accused were present in the house; and secondly that on 16th September, 1991 from the possession of the accused persons recovery of gold ornaments was made which belonged to the deceased. Such possession has not been explained by the accused. Even if the court is to accept the evidence of P.W. 12 that in the morning of the day of the incident the witness had seen the accused in the neighbourhood in a perplexed state, notwithstanding the contradictions and inconsistencies in the said evidence as already noticed, at the highest, another circumstance could be added to the above two, namely, that the accused persons were seen in the neighbourhood in the morning of the incident. The question that confronts the court is whether on the basis of the aforesaid circumstances the case of the prosecution can be taken to have been proved beyond all reasonable doubts.

The above circumstance, if coupled with the recovery of the ornaments of the deceased from the possession of the accused, at best, create a highly suspicious situation; but beyond a strong suspicion nothing else would follow in the absence of any other circumstance(s) which could suggest the

involvement of the accused in the offence/offences alleged. Even with the aid of the presumption Under Section 114 of the Evidence Act, the charge of murder cannot be brought home unless there is some evidence to show that the robbery and the murder occurred at the same time i.e. in the course of the same transaction. No such evidence is forthcoming.

In view of what has been found above, we do not see as to how the charge against the accused/Appellant Under Section 302 Indian Penal Code can be held to be proved. The learned trial court as well as the High Court, therefore, seems to be erred in holding the accused guilty for the said offence. However, on the basis of the presumption permissible under Illustration (a) of Section 114 of the Evidence Act, it has to be held that the conviction of the accused Appellant Under Section 392 Indian Penal Code is well founded. Consequently, we hold that the prosecution has failed to bring home the charge Under Section 302 Indian Penal Code against the accused and he is acquitted of the said offence. The conviction Under Section 392 Indian Penal Code is upheld. As the accused Appellant, who is presently in custody, had already served the sentence awarded to him Under Section 392 Indian Penal Code, we direct that he be set at liberty forthwith. The appeal, consequently, is partly allowed in terms of the above.

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12. Article 215 and 129 of the Constitution of India

Vitusah Oberoi and Ors. Vs. Court of its own motion

T.S. Thakur, C.J.I. & A.M. Khanwilkar, J.

In the Supreme Court of India

Date of Judgment - 02.01.2017

Issue

Power to punish for contempt does not extend to punish for the contempt of a superior Court.

Relevant Extract

Appellants No. 1 and 2 are the Editor and City Editor respectively of Mid Day, an English Daily Newspaper, with a large circulation in the National Capital Region. Appellant No. 3 happens to be the Printer and Publisher of the papers while Appellant No. 4 is a Cartoonist working for the said paper. The genesis of the suo motu contempt proceedings initiated by the High Court of Delhi lies in a story that appeared in 'Mid Day' in its issue dated 2nd May, 2007 under the title "Injustice". The substance of the publication brought to light the alleged misuse of the official residence of Justice Sabharwal who demitted office as Chief Justice of India on 13th January, 2007, by the same being shown as the registered office of three companies promoted by Justice Sabharwal's sons. A second story published on 18th May, 2007 in Mid Day pointed out that Justice Sabharwal's son had entered into a partnership with shopping malls and commercial complex developers just before Justice Sabharwal passed orders for sealing of commercial establishments running in residential areas in different parts of Delhi. This, according to the story, benefitted the partnership business of Justice Sabharwal's sons. On 19th May, 2007 came a third story that quoted some senior lawyer's saying that if the facts about Justice Sabharwal's sons' partnership business benefitting from the orders of Justice Sabharwal's Bench were true, then Justice Sabharwal should not have heard the case. The paper also carried in the same issue a cartoon by Mohd. Irfan Khan, Appellant No. 4 showing as if Justice Sabharwal's family had benefitted from the orders passed by Justice Sabharwal's Bench.

It was in the above backdrop that Shri R.K. Anand, an advocate practicing in Delhi High Court appears to have placed a copy of the newspaper dated 18th May, 2007 before a Division Bench of the High Court of Delhi on 21st May, 2007 to draw the attention of the Court about the Article published in the said paper maligning the former Chief Justice of India and tending to lower the image of the judiciary in the eyes of the common man. Prima facie satisfied that the news item was objectionable and tended to lower the image

of judiciary in the eyes of the common man, the High Court initiated suo-motu contempt proceedings and issued show cause notices to Appellants No. 1 to 3. On 25th May, 2007 Shri Anand appears to have filed another copy of Mid Day newspaper dated 19th May, 2007 before the High Court which carried the cartoon drawn by the Appellant No. 4, the paper's cartoonist. The High Court found the same also to be objectionable and issued notice even to Appellant No. 4 to show cause why contempt proceedings may not be initiated against him.

In these appeals, the Appellants call in question the correctness of an order dated 11th September, 2007 passed by a Division Bench of the High Court of Delhi whereby the Appellants have been found guilty of contempt and directed to remain present in person before the High Court for being heard on the quantum of sentence to be awarded to them.

The genesis of the suo motu proceedings initiated by the High Court, as noticed earlier, lay in the publication of the articles, stories and write ups questioning the propriety of certain orders passed by a two-Judge bench of this Court of which Justice Y.K. Sabharwal was the Presiding Judge. The substance of the offending publication was that Justice Sabharwal had by reason of the orders passed by the bench benefitted the partnership business of his sons in real estate development in and around Delhi. The text and the context of the said publications was focused entirely on the question whether Justice Sabharwal should have heard the matters and passed sealing orders of commercial properties in residential areas of Delhi which orders were perceived to be beneficial to the real estate business of his sons. What is, therefore, undeniable is that the publications were actually seen as contemptuous vis-a-vis the Supreme Court. No part of the publications referred to the High Court of Delhi or any other High Court for that matter. The publications did not refer to any Judge or any order of any Court subordinate to the High Court of Delhi. Initiation of proceedings by the High Court in such circumstances was, it is evident, meant to vindicate the Supreme Court more than the High Court who initiated those proceedings. The question is whether the High Court could do so. The Appellants argued and, in our opinion, rightly so that the Supreme Court was and is competent to punish for contempt of itself.

There is, from a plain reading of the above, nothing in the Contempt of Courts Act, 1971 or in Article 215 of the Constitution which can be said to empower the High Court to initiate proceedings suo-motu or otherwise for the contempt of a superior Court like the Supreme Court of India. As a matter of fact, the Supreme Court Under Article 129 and High Court Under Article 215 of

the Constitution are both declared to be Courts of Record. One of the recognised attributes of a court of record is the power to punish for its contempt and the contempt of courts subordinate to it. That is precisely why Articles 129 and 215, while declaring the Supreme Court and the High Courts as Courts of Record, recognise the power vested in them to punish for their own contempt. The use of the expression "including" in the said provisions is explanatory in character. It signifies that the Supreme Court and the High Courts shall, as Courts of Records, exercise all such powers as are otherwise available to them including the power to punish for their own contempt. Whether or not the power to punish for contempt of a subordinate court was an attribute of a court of record fell for consideration of this Court in Delhi Judicial Service Association v. State of Gujarat MANU/SC/0478/1991 : (1991) 4 SCC 406. The argument there was that the Supreme Court could not initiate contempt proceedings based on an incident that involved a subordinate court like a Chief Judicial Magistrate working in the State of Gujarat. That contention was examined and rejected by this Court. It was held that the language employed in Article 129 indicated that the Supreme Court is a Court of Record and was entitled not only to punish for its own contempt but to do all that which is within the powers of a Court of Record. This Court held that since the Constitution has designed the Supreme Court as a Court of Record, Article 129 thereof recognises the existing inherent power of a Court of Record in its full plenitude including the power to punish for its own contempt and the contempt of its subordinate. The Court said:

Article 129 declares the Supreme Court a court of record and it further provides that the Supreme Court shall have all the powers of such a court including the power to punish for contempt of itself (emphasis supplied). The expression used in Article 129 is not restrictive instead it is extensive in nature. If the Framers of the Constitution intended that the Supreme Court shall have power to punish for contempt of itself only, there was no necessity for inserting the expression "including the power to punish for contempt of itself." The Article confers power on the Supreme Court to punish for contempt of itself and in addition, it confers some additional power relating to contempt as would appear from the expression "including." The expression "including" has been interpreted by courts, to extend and widen the scope of power. The plain language of the Article 129 clearly indicates that this Court as a court of record has power to punish for contempt of itself and also something else which could fall within the inherent jurisdiction of a court of record. In interpreting the Constitution, it is not permissible to adopt a construction which would render any expression superfluous or redundant. The courts ought not accept any such construction. While construing Article 129, it is not permissible to ignore

the significance and impact of the inclusive power conferred on the Supreme Court. Since, the Supreme Court is designed by the Constitution as a court of record and as the Founding Fathers were aware that a superior court of record had inherent power to indict a person for the contempt of itself as well as of courts inferior to it, the expression "including" was deliberately inserted in the Article. Article 129 recognised the existing inherent power of a court of record in its full plenitude including the power to punish for the contempt of inferior courts. If Article 129 is susceptible to two interpretations, we would prefer to accept the interpretation which would preserve the inherent jurisdiction of this Court being the superior court of record, to safeguard and protect the subordinate judiciary, which forms the very back bone of administration of justice. The subordinate courts administer justice at the grass root level, their protection is necessary to preserve the confidence of people in the efficacy of Courts and to ensure unsullied flow of justice at its base level.

The power to punish for contempt vested in a Court of Record Under Article 215 does not, however, extend to punishing for the contempt of a superior court. Such a power has never been recognised as an attribute of a court of record nor has the same been specifically conferred upon the High Courts Under Article 215. A priori if the power to punish Under Article 215 is limited to the contempt of the High Court or courts subordinate to the High Court as appears to us to be the position, there was no way the High Court could justify invoking that power to punish for the contempt of a superior court. That is particularly so when the superior court's power to punish for its contempt has been in no uncertain terms recognised by Article 129 of the Constitution. The availability of the power Under Article 129 and its plenitude is yet another reason why Article 215 could never have been intended to empower the High Courts to punish for the contempt of the Supreme Court. The logic is simple. If Supreme Court does not, despite the availability of the power vested in it, invoke the same to punish for its contempt, there is no question of a Court subordinate to the Supreme Court doing so. Viewed from any angle, the order passed by the High Court appears to us to be without jurisdiction, hence, liable to be set aside.

We, accordingly, allow these appeals, set aside the judgment of the High Court and discharge the Rule issued by the High Court. The parties to bear their own cost.

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13. Article 226 and 227

Ram Chandra Das vs State Of Orissa And Others

Dr. D.P. Choudhury , J.

In the High Court of Orissa ,Cuttack.

Date of Judgment-19.01.2017

Issue

Granting of pension to non jailed workers /fighter (freedom)-Discussed.

Relevant Extract

The factual matrix leading to the case of the petitioner is that the petitioner is an active Freedom Fighter of Pre-independent period as he had dedicated his young life for the cause of the Nation and its Independence. During 1938 when "Nilagiri Praja Mandal" was reigning, the petitioner was a front ranking participant in the freedom struggle but he was not imprisoned as he was hiding himself in Nilagiri forest. As there was no Scheme under the Government of India and Orissa for non-jailed and non-imprisoned freedom fighters, they brought out a Scheme called Freedom Swatantra Sainik Sanman Pension (hereinafter called 'the Scheme') to honour such freedom fighters. As per the Scheme the petitioner has applied way back in between the year 1980 to 1990 for sanctioning pension or allowance. Under the Scheme, whoever the applicant is required to be certified by the Freedom Fighter Pensioner. Petitioner has filed the said Certificate of Shri Keshab Chandra Panigrahi to show that the petitioner was an active worker in the "Nilagiri Praja Mandal" during the year 1938. Another freedom fighter namely Kartikeswar Mohapatra has also certified in the similar manner in favour of the petitioner. After the application submitted by the petitioner, the Finance Department issued letter to the Sub-Treasury Officer, Nilagiri for verification of documents and genuineness of the Certificates given by the above freedom fighters. But without application of mind and appraisal of evidences, the prayer of the petitioner was rejected.

Be it stated that the purported order of rejection is erroneous, arbitrary and non-application of mind. So, the petitioner filed the present case to issue direction to the opposite parties to grant non-jailed Freedom Fighters' Pension from the year 1990 and current pension.

Per contra, counter is filed by the opposite party No.1 stating therein that the writ petition is not maintainable under law and facts. It is the case of the opposite parties that the petitioner is not eligible under the Liberalized Freedom Fighters' Pension Scheme, 2002 because the applicant has not applied to Government for Freedom Fighters' Pension prior to 27.8.1990 (the cutoff date) in the prescribed format as required under the said Scheme 2002.

The petitioner has not also produced the original documents, i.e., Personal Knowledge Certificates from the Central Freedom Fighters' Pension holder or State (Jailed) Freedom Fighters' Pension holder along with the application by the aforesaid date nor could he produce the proof of submission of such application by the aforesaid cut-off date. Since there are documents not filed fulfilling the criteria to receive pension under the aforesaid Scheme, the opposite party No.1 rightly rejected the prayer for proper examination of the documents. Even if the Personal Knowledge Certificates submitted by the petitioner were verified, but that criteria is not enough to sanction Freedom Fighters' Pension (Non-jailed) unless he has fulfilled the other conditions, i.e., submission of application prior to the cut-off date. So, the opposite parties claim for rejection of the writ petition.

This writ petition has been filed challenging the rejection of the prayer of the petitioner to allow him pension under the Freedom Fighters' Pension Scheme for non-jailed workers/fighters.

The main points for consideration:-

(i) Whether the petitioner has filed the necessary application by the cutoff date ?

(ii) Whether he is entitled to the Non-Jailed Freedom Fighters' Pension ?

The above documents vide Annexure-2 series have neither been denied in the counter nor by submissions by the learned Additional Standing Counsel. Unless the applications are received, the follow up action vide Annexures-4, 5 and 7 could not have been taken by the opposite parties. Even if the petitioner has not filed the application on format but the application sent by him along with affidavit of Shri Keshab Chandra Panigrahi to the Hon'ble Chief Minister on different dates by the cutoff date must have reached the Finance Department so as to prompt them to take action by asking the petitioner to remove the defects and send the papers to the Sub- Treasury Officer to verify the identification of the Freedom Fighters' Pension holder Shri Panigrahi. So, the reason taken by the opposite parties that the applications were not submitted prior to 27.8.1990 is neither acceptable nor appreciated. Therefore, the Court is of the opinion that the petitioner has filed the application for sanction of the said pension under the Scheme by the cutoff date. Point No.(i) is answered accordingly. POINT NO.(ii)

When it is opined that the application has been received by the time and follow up action has been taken, it is for the opposite parties to consider the same. It is trite in law to say that the pension allowable to the Freedom

Fighters is not only to give them some financial benefits but also to honour a Freedom Fighter who has sacrificed for the freedom of the nation.

With due regard to the aforesaid decision, it must be held that the technicalities should not stand on the way to refuse the Freedom Fighters' Pension as the pension is only granted to honour the Freedom Fighters who have fought for the independence of the nation. Freedom Fighters' Pension is not a bounty but an honour to the nation and the heroes who have sacrificed their lives for the nation. So, keeping in view of the aforesaid decision and principles enunciated therein, it must be held that the application of the petitioner should have been considered instead of rejecting the same in accordance with the Scheme. So, since provisions of the Scheme have not been properly followed, the order of rejection of pension vide Annexure-8 is illegal and improper. Point No.(ii) is answered accordingly.

CONCLUSION

It has been already observed in the aforesaid paragraphs that petitioner has submitted his application by the cutoff date but the same has not been acted upon by opposite parties properly. Since it is observed above that Annexure-8 is neither legal nor proper, the same is liable to be quashed and the Court do so.

The opposite party No.1 is directed to receive a proper application in format from the petitioner, if it finds that the applications submitted by the cutoff date as observed in the aforesaid paragraphs are inadequate, along with the required documents and dispose of the same by verifying the PKC filed by the petitioner and on verification if they are found genuine, the opposite party No.1 would sanction the Freedom Fighters' Pension from the cutoff date, i.e., 27.8.1990 and also allow the current Freedom Fighters' Pension. The petitioner is directed to cooperate the opposite parties in supplying the necessary documents. The entire exercise is to be completed within a period of four months from today. The writ petition is disposed of accordingly.

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14. Article 226 and 227 of the constitution of India

Sampad Samal Vs. State of Odisha and others

Vineet Saran , Chief Justice & Dr. B.R. Sarangi, JJ.

In the High Court of Orissa, Cuttack.

Date of Judgment - 02.01.2017

Issue

Jurisdiction of right to reject when these is adequate ground fir it and in an arbitrary manner –discussed.

Relevant Extract

A tender call notice was issued by opposite party no.3, Integrated Tribal Development Agency (ITDA), Kaptipada, Udala on 22.08.2015, which was in respect of 21 works. The dispute in the present petition relates to the AFR works at serial no.1 and 2. The petitioner, along with several other persons, had filed their tenders for serial no. 1 and 2. As per the tender conditions, the tenders were opened on 22.09.2015 and the petitioner was found to be the lowest bidder in respect of both the works, i.e., at serial no.1 and 2, which was after having been given the benefit of the resolution of the State Government dated 11.10.1977, as the petitioner belongs to scheduled caste/schedule tribe community.

When the opposite parties did not finalize the tender in his favour, on 21.11.2015, the petitioner filed a representation before opposite party no.3. Since the representation was not decided, the petitioner filed W.P.(C) No. 21633 of 2015, which was disposed of on 15.12.2015 with the direction to opposite party no.3, the Project Administrator, ITDA to dispose of the representation within a period of two months. Then, instead of first deciding the representation of the petitioner, opposite party no.3 vide its order dated 03.02.2016 cancelled the entire tender call notice dated 22.08.2015. Then, a day thereafter, i.e. ,on 04.02.2016 the representation of the petitioner was decided and he was informed that the entire tender call notice has itself been cancelled. Challenging the order dated 04.02.2016, as well as cancellation of the tender call notice dated 22.08.2015 vide order dated 03.02.2016, this writ petition has been filed.

The submission of Mr. A.K. Biswal, learned counsel for the petitioner is that there is no dispute about the fact that the tenders of the petitioner with regard to work at serial no.1 and 2werethe lowest and, since the petitioner

was otherwise fully qualified, he ought to have been awarded the work. It is contended that once the bids of the participants had been opened, the rates quoted by the petitioner have been disclosed, and in case a fresh tender for the same work is called then the petitioner would be prejudiced. It is also submitted that the representation of the petitioner ought to have been first decided by opposite party no.3 before the order dated 03.02.2016 was passed, cancelling the entire tender call notice. It is further contended that the reason assigned for rejecting the representation of the petitioner is frivolous and the impugned orders are liable to be quashed.

Per contra, learned Addl. Government Advocate has submitted that the primary reason for cancelling the tender call notice was that 90 days period had expired since the opening of the tenders, and invoking conditionno.17of the tender document, the tender call notice has been cancelled by resorting to clause-10 of the term and condition of the tender papers, in terms of which "the authority reserves the right to reject any or all tenders without assigning any reason thereof." It is also submitted that the opposite parties did not take a final decision relating to the finalization of the tenders, as one Kaptipada Contractors Association had filed a representation on 08.09.2015 praying for acceptance of the tender documents by hand instead of through registered post/speed post, as provided for in the tender notice. The said representation having not been considered, the Kaptipada Contractors Association filed W.P.(C) No. 16617 of2015, which is pending. However, admittedly, no interim order has been passed in the said writ petition.

From the submissions advanced by learned counsel for the parties, it appears that primary reason for cancelling the tender call notice dated 22.08.2015 was that 90 days period had expired and that further time had not been extended. Clause 17 of the detailed tender call notice provides :"All tenders received will remain valid for a period of 90 days from the last date prescribed for receipt of tenders and validity of tenders can also be extended if agreed by the tenderers and the Department."

A tenderer cannot be allowed to suffer because of the fault and inaction of the opposite parties. In the present case, it is clear that the opposite parties sat over the matter and allowed 90 days to expire, without there being any fault of the tenderer and then for cancelation of the tender call notice, gave

the reason that 90 days period has expired. If this is permitted, then in every case, after the opening of tender, where the lowest bidder does not suit the opposite party, they can always sleepover the matter without taking any decision and resorting to clause 17 of the detailed tender call notice, cancel the notice itself, which in our opinion, cannot be justified. Had there been any fault on the part of the petitioner, the case would have been different. In the present case, the opposite parties have not stated anywhere that either the conditions stipulated were not fulfilled by the petitioner or that his tender was not the lowest. As such, not awarding the work to the petitioner in terms of the tender call notice, cannot be justified in law.

The other ground which has been taken for rejecting the representation of the petitioner, is pendency of the writ petition filed by the Kaptipada Contractors Association, in which admittedly no interim order has been passed. The tender documents clearly stipulate filing of the tenders by speed post/registered post, which the petitioner and several other bidders had complied. Merely because there was a challenge in a writ petition and prayer was made that tenders should be permitted to be received by hand, in which no positive order has been passed by the Court and the last date for filing of the tender had already expired, cancelling the tender, merely because of pendency of such frivolous petition cannot be justified in law.

Further, resorting to clause 10 of the terms and condition of tender papers, whereby right to reject is reserved by the authority concerned without assigning any reason, can be justified only when there is proper and adequate ground for passing an order of cancellation and not in an arbitrary manner, as has been done in the present case.

In Madan Lal v. Changdeo Sugar Mills, AIR 1962 SC 1543, the apex Court held that the elementary rule is that words used in a section must be given their plain grammatical meaning.

In Jugal Kishore v. Raw Cotton Co Ltd., AIR 1955 SC 376, the apex Court held as follows:“That the cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the Legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning, the court may

adopt the same. But if no such alternative construction is possible, the court must adopt the ordinary rule of literal interpretation."

In Amar Singhji v. State of Rajasthan,AIR 1955 SC 504, the Supreme Court again observed as follows: "Recourse to rules of construction would be necessary only when a statute is capable of two interpretations. Where the language is clear and the meaning plain, effect must be given to it."

In view of the law laid down by the apex Court, as discussed above, the first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself. If the words used are capable of one construction only, then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act.

Applying the aforesaid well settled principles to the present context and taking into consideration the conditions stipulated in clause-17 of the tender document read with clause-10 of the terms and conditions of the tender paper and giving them their plain meaning, as the authority concerned has passed the impugned order of cancellation, without any proper and adequate ground, rather, as it is clear, in an arbitrary manner because of pendency of frivolous petition, the same cannot be sustained in the eye of law.

In view of the aforesaid, this writ petition deserves to be allowed and is accordingly allowed. The orders dated 04.02.2016 and 03.02.2016 are quashed only to the extent with regard to work at serial no.1 and 2of the tender call notice dated 22.08.2015. The petitioner would thus be entitled to be awarded the contract with regard to the works at serial no.1 and 2of the said tender call notice, in accordance with the terms of the tender call notice, which should be complied with within six weeks from today. No order as to costs. A copy of this judgment be given to learned Addl. Government Advocate for the State free of cost for necessary compliance. Urgent certified copy of this judgment be given to the petitioner on payment of usual charges.

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15. Articles 226 and 227 of the Constitution of India.

State of Odisha and another vs Sri Ashok Ku. Purohit and Others

Kumari Sanju panda & Sujit Narayan Prasad , JJ.

In the High Court of Orissa, Cuttack.

Date of hearing and Judgment: 02.01.2017

Issue

Rule 15(3) of OCS(Classification ,Control and Appeal) Rules, 1962

Relevant Extract

This writ petition is by the State of Orissa assailing the order passed by Orissa Administrative Tribunal, Bhubaneswar in O.A. No.733 of 2012 dtd.24.03.2015 whereby and where under the Tribunal after quashing the order of punishment has directed the authorities to proceed with the enquiry afresh after supplying the documents in accordance with the provision under Rule 15(3) of the Orissa Civil Service (Classification, Control and Appeal) Rules, 1962 (herein after referred to as the Rules, 1962).

The brief fact for the case is that opposite party no.1 was appointed as Special Land Acquisition Officer, Daitari -Bansapani Rail Link Project, Keonjhar, appointed as Land Acquisition Officer and Rehabilitation and Resettlement Officer, Kanpur Major Irrigation Project, Kanpur in addition of his own duty vide order dtd.26.10.98. The Special Land Acquisition Officer and Rehabilitation and Resettlement Officers are declared as Appointing Authority in respect of class-III and class-IV staff borne under the Water Resources Department and working in various offices. The opposite party no.1 being the head of office and discharging the duty of Land Acquisition Collector under the administrative control of Water Resources Department, appointed three Amins and one Chairman on 89 days basis as per the instruction of the Collector, Keonjhar for smooth management of the day to day work, subsequently 6 Amins and Chairman were redeployed to the office of the Special Land Acquisition Officer, Mahanadi-Chitroptala Island Irrigation Project, Cuttack as per the order of the Government in the Water Resources Department. The Collector, Keonjhar had also appointed some persons to perform their duties in the aforesaid organization. The Government in their letter dtd.1.10.2001 directed the Special Land Acquisition Officer and Rehabilitation and Resettlement Officer to relieve the staff of Collectorate, accordingly, 13 employees were relieved. The Collector, Keonjhar being aggrieved by such action of the opposite party no.1 made some allegation against him, on the basis of which, a disciplinary proceeding was initiated vide memo or charge dtd.07.11.2002 and he was called upon to submit his written statement of defence. The opposite party no.1 had submitted his written defence denying the charges, being not satisfied with the written statement of defence,

Inquiring Officer was appointed. The charges were enquired into and after conclusion of the enquiry, the Inquiring Officer submitted his report holding the applicant guilty of the charges. The applicant thereafter was called upon to submit his representation on the finding of the Inquiring Officer, accordingly he submitted the same, the disciplinary authority had issued notice to show cause on 21.06.2008 on the proposed punishment without supplying the statement of the disciplinary authority as required under Rule 15(1)(b) of the Rules, 1962, he had submitted his show cause reply against the proposed punishment with a prayer to give him opportunity to be heard in person and allow him to adduce further evidence to defend the charges.

The opposite party no.1 had approached the Tribunal vide O.A. No.91 of 2009 assailing the proposed punishment, the Tribunal has directed the authorities to consider the show cause of the applicant and to give him opportunity of being heard in person before passing final order, he was called upon for personal hearing and ultimately the petitioner has made request to supply certain documents which were not supplied to him and as such the opposite party no.1 had challenged the second show cause notice before the Tribunal again by filing O.A. No.271 of 2010 wherein the Tribunal had directed to pass a speaking order within a period of 2 months from the date of receipt of show cause which he will submit, thereafter the disciplinary authority proceeded to conclude the enquiry by imposing punishment vide order no.1294 dtd.23.6.2012 whereby and where under the punishment of withholding 5 annual increments with cumulative effect and debarring him from promotion for a period of 5 years has been inflicted, which has been challenged before the Tribunal, subject matter of the instant writ petition.

We after hearing learned counsels for the parties and after going through the documents available on record, have found the fact which is not in dispute that the opposite party no.1,while working as a Special Land Acquisition Officer ,had been departmentally proceeded for commission of irregularities for which imputation of charges has been supplied.

There is no denial about the settled proposition of law that the delinquent employee has to be given adequate and sufficient opportunity of being heard to defend the charges and to that effect rule has also been formulated under the Rules, 1962 wherein under the provision of Rule 15(3) it has been provided that the Government Servant shall, for the purpose of preparing his defence, be supplied with all the records on which the allegations are based. He shall also be permitted to inspect and take extracts from such other official records as he may specify, provided that such permission may be refused if, for reasons to be recorded in writing in the opinion of the disciplinary authority such records are not relevant for the purpose or it is

against the interest of the public to allow him access thereto, meaning thereby the disciplinary authority is duty bound to supply the relevant document on which the allegations are based. We, in the light of the statutory provision and the material brought on record, have scrutinized the entire aspect of the matter vis-à-vis the nature of allegation and found that the charges have been formulated against opposite party no.1 which is with respect to illegal appointment of Amins / Chairman without following the due procedure and contrary to the Finance Department circulars in vogue during the relevant time as also disbursement of amount of compensation not in favour of the legal claimants.

The inquiring officer has forwarded the report before the disciplinary authority. The disciplinary authority ,after accepting the report submitted by the inquiring officer, has asked the opposite party no.1 to give comment upon the finding given by the inquiring officer which has duly been replied by him and thereafter the disciplinary authority has imposed punishment withholding 5 annual increments along with direction not to promote him for a period of 5 years.

So far as these documents are concerned, we in order to examine as to whether these documents were at all available with the delinquent employee or not or whether any prejudice has been caused to him ,for that purpose we have taken note of the submission of the show cause notice having been filed by the opposite party no.1 on 2.8.2008 which has been annexed as annexure-8 to the writ petition wherein the reference of Finance Department circulars dtd.13.7.1998 and 14.3.2001 has been made by the opposite party no.1 himself and by taking reference of these documents it has been stated at paragraph6 of annexure-8 that these documents are meant for observance of economy and austerity measures, meaning thereby these circulars were well within the knowledge of the opposite party no.1 and that is the reason he has never demanded these documents at any occasion either from the inquiring officer or from the disciplinary authority. So far as the documents related to charge no.2, which have been referred in the order of Tribunal at paragraph “11”, i.e. the order No.578 dtd.7/2000, order no.848/6.11.2000and other documents and the L.A. Case No.13 of 1993 (1997),the same were also within the knowledge of opposite party no.1, since the same have also been referred in the reply submitted by him as contained in annexure-8 to the writ petition.

We, after going through the entire records, particularly, the defence reply submitted stage by stage by opposite party no.1,have found that no document has ever been demanded by the delinquent employee, rather whatever document the opposite party no.1 is saying before the Tribunal,

which has not been supplied to him, was well within his knowledge and that is the reason he has given reference of these documents in his reply.

There is no dispute about the fact that the document has to be supplied, but it is also not in dispute that in case the document has not been supplied, it is the duty of the delinquent employee to make requisition before the authority to supply the document and in that situation if the document has not been supplied, or the supply has been rejected without assigning any reason, then only it can be concluded that the document which was relevant for its consideration, since has not been supplied, as such prejudice has been caused to the delinquent employee, but we have found nowhere from the record that any requisition has ever been made by the delinquent employee in this regard.

We have further gathered from the admission of the opposite party no.1 that he has admitted with respect to charge no.1 which pertains to appointment of Amins / Chairman, i.e. the allegation leveled against him. We have also found regarding charge no.2 that the opposite party no.1 is admitting the said charge.So far as charge no.3 is concerned which pertains to the money having been paid in favour of the in-genuine persons which is also been admitted and the persons who were entitled have been cross-examined by opposite party no.1 before the inquiring officer and have supported the charge leveled against him. In such an admitted position, taking into consideration this aspect of the matter, when the inquiring officer has found the charges proved, can on the ground of non-supply of some official document, the order of punishment will be quashed and that is the question to be considered by this Court.

The document which has been shown not to be supplied to the opposite party no.1 is the Finance Department circulars and other different circulars pertaining to the power of appointment and the record of the land acquisition case, particularly caseno.13 of 1997. So far as the circular issued by the Finance Department is concerned, it has been issued by the State Government and the same was well within the knowledge of opposite party no.1 and that is the reason the same has been referred in his reply, non-payment of compensation in favour of the genuine persons have also been admitted by the opposite party no.1 as we have gathered from the record, hence merely on the ground of technicality, by taking help of the provision of Rule 15, the order of punishment which has been quashed by the Tribunal cannot be said to be proper in view of the discussion made herein above and taking into consideration the factual and legal position as has been discussed herein above the order of Tribunal is not sustainable in the eye of law. Accordingly the order of Tribunal is quashed. In the result the writ petition is allowed.

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Juvenile Justice (Care and Protection of Children) Act, 2000

16. Section 7A of JJCPC Act , 2000

Sri Ganesh Vs. State of Tamil Nadu and Anr.

Pinaki Chandra Ghose & U.U. Lalit, J J.

In the Supreme Court of India

Date of Judgement -06.01.2017

Issue

Remitting back of the matters of the trial Court on revision to have a fresh look ,on the determination of age of a juvenile under Section 7 A done with documentary evidence –Challenged.

Relevant Extract

It was alleged that the appellant had become friendly with the victim while they had reached 10+2 standard; that this fact was known to the family of the appellant who treated the victim as their daughter-in-law; that the appellant had committed sexual intercourse with the victim on 5 to 6 occasions; and that the behavior of the family of appellant later changed and they refused to perform the marriage. It was alleged that the appellant thus committed offence under Section 376 IPC while his family members were guilty of offence under Sections 417 read with 109 IPC and 506(ii) IPC. Appropriate charges under the aforesaid Sections having been framed, Criminal O.P. No.9823 of 2011 was filed in the High Court seeking quashing of those charges. The High Court by its Order dated 20.06.2012 quashed the charges as against the parents and uncle of the appellant but dismissed the challenge raised by the appellant. Consequently the trial proceeded only against the appellant for the offence punishable under Section 376 IPC. On 18.09.2012, the victim deposed before the trial court as PW-1. In her examination-in-Chief she deposed: ".....I firmly believed that the accused and his family will not leave me and our marriage would definitely solemnize. After this the accused forced me and had intercourse with me 5 to 6 times." The victim however in her examination in chief did not give any probable period or time when the intercourse had last taken place. In her cross-examination conducted on 06.10.2012, to a pointed query she answered, "We had intercourse finally in August, 2009".

At that juncture, the cross-examination of the victim was stopped and a plea of juvenility of the appellant was raised. It was submitted that going by the assertions of the victim, the appellant was definitely a juvenile on the

alleged dates of occurrence. Criminal M.P. No.10872 of 2012 under Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to "the Act") was also filed praying that the age of the appellant be determined in terms of the provisions of the Act and the Rules framed thereunder. The complainant was also allowed to make her submissions. After hearing the parties, the Court posted the application for pronouncement of Orders on 04.12.2012. However, on 28.11.2012 an application under Section 216 of Cr.P.C. was filed by the prosecution for adding charge under Section 417 against the appellant. The request for addition of the charge was dismissed by the trial court which order was affirmed by the High Court by its Order dated 15.02.2013. The complainant challenged the order of the High Court by filing SLP(Crl.) No. 1899 of 2013which was dismissed by this Court on 12.08.2014. The trial court thereafter postponed the issue of juvenility to be considered at the stage of final determination of the matter, which order was challenged by the appellant by filing petition under Section 482 of Cr.P.C. The challenge was accepted by the High Court and by Order dated 8.12.2014 it directed: "The learned III Additional Sessions Judge shall first decide the claim of juvenility raised by the petitioner herein and then to proceed with further in accordance with law. At any rate, appropriate decision on the claim of juvenility shall be made within a period of 30 days as provided in Rule 8B of the Tamil Nadu Juvenile Justice (Care and Protection of Children) Rules, 2001 from the date of receipt of the records from the trial court."

The matter was then heard by the trial court which after considering the relevant material on record declared the appellant to be juvenile in conflict with law under Section 7A of the Act. The trial court found the date of birth of the appellant to be 19.10.1991. Going by the assertions made by the victim that the sexual intercourse between them lastly occurred in the month of August, 2009, the trial court found that on the date of occurrence, the appellant was a juvenile.

The complainant being aggrieved, challenged the aforesaid determination by filing Criminal Revision Case No.383 of 2015 in the High Court of Madras. The High Court by its Judgment and Order dated 13.10.2015 allowed said criminal revision and remitted the matter back to the trial court for fresh consideration. It was observed: "It is evident that the trial court has

not determined the correct age of the second respondent/accused or the date of occurrence in the facts and circumstances of the case. The trial court also did not take note of the fact that the offence alleged to have been committed was a continuing offence. The trial court also did not consider the expert opinion obtained from a Medical Officer to determine the age of the second respondent/accused. The trial court has also not ascertained correctly the date on which the first occurrence took place and the last occurrence committed by the accused/second respondent herein. The trial court was carried away by an admission made by the complainant during the course of cross-examination."

This appeal by special leave challenges the Judgment and Order dated 13.10.2015 passed by the High Court of Madras in Criminal Revision Case No.383 of 2015. In order to avoid any identification of the victim, we have transposed the original respondent No.1 namely, the Complainant as respondent No.2 and the State is now shown as respondent No.1 in the matter. Appearing for the appellant in support of the appeal, Mr. A. Ramesh, learned Senior Advocate submitted that the determination of age of a juvenile has to be principally on the basis of documentary evidence and only in the absence of such documentary evidence, medical opinion could be pressed into service. In his submission the High Court was completely in error in setting aside the view taken by the trial court and in remitting the matter for fresh consideration.

Once the court, following the above mentioned procedures, passes an order, that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in sub-rule (5) of Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of Rule 12. Further, Section 49 of the JJ Act also draws a presumption of the age of the juvenility on its determination.

In the present case the trial court took into account the documentary evidence as contemplated in the statutory provisions and returned a finding that the date of birth of the appellant was 19.10.1991. During the course of its judgment the High Court could not find such conclusion to be vitiated on any ground. In the face of the relevant documentary evidence, there could be no medical examination to ascertain the age of the appellant and as such the

consequential directions passed by the High Court were completely unwarranted. Further, if the allegations of the prosecution are that the offence under Section 376 IPC was committed on more than one occasion, in order to see whether the appellant was juvenile or not, it is enough to see if he was juvenile on the date when the last of such incidents had occurred. The trial court was therefore justified in going by the assertions made by the victim in her cross examination and then considering whether the appellant was juvenile on that date or not. We thus find that the approach of the High Court in the present case was incorrect and completely misdirected. Even if we were to remand the matter back to the High Court for fresh consideration, in our view it would be an empty formality in the face of finding of fact rendered by the trial court. We, therefore, allow this appeal and set aside the Judgment and Order under appeal. The view taken by the trial court is restored and the matter stands disposed of in terms of the directions issued by the trial court as stated above. The appeal is allowed in aforesaid terms.

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17. Section 147(2) of the Orissa Municipal Act

V. Shyamasundar Rao vs Berhampur Municipal Council

Dr. A.K. Rath , J.

In the High Court of Orissa, Cuttack.

Date of Judgment: 27.01.2017

Issue

Recovery of holding tax without compliance of Section 147(2) – Challenged.

Relevant Extract

The respondent as plaintiff instituted the suit for recovery of arrear municipality taxes for the years from1981-82 to 1983-84amounting to Rs.9259.39 paise. The case of the plaintiff is that the defendant is the owner of a house situated in Berhampur Municipality. He paid taxes under the provisions of the Orissa Municipal Act every year in four quarterly instalments. He has committed default in the payment of the taxes amounting to Rs.9259.39 paise. In spite of repeated demands, he did not pay.

Pursuant to issuance of summons, the defendant entered appearance and filed written statement denying the assertions made in the plaint. According to him, the enhancement of the tax was made arbitrarily without issuing demand notice to him and as such the same is infraction of principle of natural justice. Learned trial court came to hold that the enhancement of tax without one month's notice is without jurisdiction . It further held that the plaintiff is entitled to an amount of Rs.1257.04 paise only.

The suit was decreed in part. Assailing the judgment and decree, the plaintiff filed T.A. No.80/85 in the court of the learned District Judge, Ganjam, Berhampur, which was subsequently transferred to the court of the learned 1stAdditional District Judge, Ganjam, Berhampur and renumbered as T.A. No.97/88. Learned lower appellate court held that P.W.2 in his deposition stated that the defendant appealed against the assessment before the A.D.M. The A.D.M. revised the valuation which was not challenged. D.W.1 in his deposition stated that the assessment was revised to Rs.1046.28 paise per quarterly by the A.D.M. Since the defendant preferred appeal, it cannot be said that there was no notice earlier to the suit to attract Sec.147(2) of the Orissa Municipal Act. The defendant nowhere in the written statement has taken the plea of non-service of notice under Sec.147(2) of the Orissa Municipal Act. Held so, learned lower appellate court allowed the appeal and set aside the judgment and decree of the learned trial court and decreed t he suit.

The second appeal was admitted by a Bench of this Court on the following substantial question of law. " Whether the learned lower appellate court was justified in holding on the materials available on record that despite non - compliance of Section 147(2) of the Orissa Municipal Act, holding tax is recoverable ?"

Heard Mr. Budhiram Das, learned counsel on behalf of Mr. N.C. Pati, learned counsel for the appellant. None appears for the respondent. Mr. Das, learned counsel for the appellant submitted that in case of enhancement of tax , notice under Sec.147(2) of the Orissa Municipal Act is compulsory. No notice was issued. In view of the same, the suit is liable to be dismissed. He relied on the decision of the apex Court in the case of G. Narayan Murty (and after him) Smt. G. Simhachallamma vs. Berhampur Municipality and others, 1986(II) OLR -483. Section 147(2) of the Orissa Municipal Act, which is the hub of the issue, is quoted hereunder."(2) The Executive Officer shall give at least one month notice to any person interested, of any alteration which he proposes to make under Clauses (a), (b), (c) or (d) of Sub-section (1) and of the date on which the alteration will be made."

The aforesaid provision was the subject matter of interpretation n G. Narayan Murty (and after him) Smt. G. Simhachallamma (supra).In view of the authoritative pronouncement of the case in G. Narayan Murty (and after him) Smt. G. Simhachallamma (supra), the irresistible conclusion is that one month's notice under Sec.147(2) of the Orissa Municipal Act is a sine qua non before enhancement of taxes by the Municipality.

The reasons assigned by the learned lower appellate court is difficult to fathom. In paragraph 3, 4 and 6 of the written statement, it is specifically pleaded that before enhancement of taxes, no demand notice was issued. Merely because, the defendant preferred appeal before the A.D.M. challenging the enhancement of taxes, the same cannot be construed that before the enhancement was made, notice was issued. There is no material on record that before enhancement of tax, the plaintiff had issued notice under Sec.147(2) of the Orissa Municipal Act.

Learned lower appellate court fell into patent error of law in decreeing the suit. The judgment and decree of the learned lower appellate court is set aside. The suit is decreed in part. No costs.

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