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ON

CIVIL, CRIMINAL & OTHER LAWS, 2017

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Odisha Judicial Academy, Cuttack, Odisha

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

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2. Section 439 of Cr. P. C.
Mahimananda Mishra Versus State of Orissa
Dr. D.P. Choudhury, J.
In the High Court of Orissa, Cuttack
Date of Judgment: 20.06.2017
Issue
In the matter of granting bail to the accused for allegedly committing offences punishable under sections 341/307/120–B/34 of Indian Penal Code read with sections 25/27 of Arms Act and Section 9(B) of I. E. Act.

Heard Mr. K.T.S. Tulsi, learned Senior Advocate for the petitioner and Mr. J. Katikia, learned Additional Government Advocate for the State. Hearing on bail was taken up on 8.5.2017, 11.5.2017, 15.5.2017, 17.5.2017, 19.5.2017 and 20.6.2017.

This is an application under Section 439 Cr.P.C. filed by the petitioner for releasing him on bail for his involvement in the alleged offences under Sections 341/307/120(B)/34 of the I.P.C. read with Sections 25/27 of Arms Act and Section 9 (b) of I.E. Act.

The factual matrix leading to the case of the coming from the Court at about 7.30 P.M. on 20.9.2013 with his relative Hadu @ Susanta Kumar Pal in his Car, near Khannagar High School four Motorcyclists came and one of them hurled bomb towards him and also fired gun for which both Abhaya and Susanta got multiple injuries on their persons. Since Abhaya was driving the vehicle, he could not keep balance and met an accident. However, the vehicle stopped and thereafter they were shifted to S.C.B. Medical College & Hospital, Cuttack. In the Hospital they were treated as Indoor patient and after some time, they were discharged. In the F.I.R. it has been stated that there was a rift with regard to the land dispute between Purnananda Padhiary and his brother and he suspected that due to such land dispute his life was in a state of danger and consequently there was such attempt on his life to kill. This is a case of 2013. Thereafter the investigation proceeded. During investigation, the witnesses were examined. Police also in the year 2017 arrested co-accused Ganesh Sahoo, who disclosed the name of the petitioner to have instigated him to cause death of injured Abhaya Bhatta for the simple reason that the present petitioner was interested to purchase that land of Padhiary brothers for which the injured was also interested. However, at present the charge-sheet has been submitted against the petitioner and co-accused Ganesh Sahoo for the offences as alleged above.

SUBMISSIONS

Mr. K.T.S. Tulsi, learned Senior Advocate appearing for the petitioner submitted that neither the F.I.R. nor the statement of the witnesses clearly mention about the role of the present petitioner either as conspirator or sharing intention of the co-accused Ganesh Sahoo. He further stated that the occurrence took place on 20.9.2013 whereas the petitioner was arrested on 26.12.2016. Since these four years have elapsed, investigation has been only kept open and the present petitioner being in custody in another case has been arrested in this case. He further stated that the statement of Abhaya Bhatta initially recorded has not disclosed about the complicity of the present petitioner but when recorded later, has given another picture showing the complicity of the present petitioner. So, he submitted that the Police has tried his best to make false allegation against the present petitioner to deny bail. He further submitted that the statements of Rabindra Kumar Padhiary, Kedarnath Swain and Upendra Kumar Mohapatra do not show the involvement of the petitioner in any manner.

Mr. Tulsi, learned Senior Advocate for the petitioner further submitted that co-accused Ganesh Sahoo has been arrested on 4.1.2017 and on the same day his confessional statement has been recorded where the present petitioner has been knowingly made as co-accused. According to him the statement of the co-accused was extracted after his arrest although the petitioner is not in any manner involved in this case. He further submitted that the injuries have not been substantiated by the prosecution and the statement of Abhaya Bhatta hardly speak about any conspiracy by the present petitioner. He submitted that the statement of the witnesses recorded by the Police only shows that present petitioner being the owner of the OSL Company had expressed his desire to purchase the land of Shri Padhiary and due to dissention between Punananda Padhiary and his brothers, again the meeting took place for return of the money to the petitioner and accordingly about Rs.45 lakhs has been returned to the present petitioner by Padhiary and the dispute was closed for which there is no any occasion to point out any finger to the involvement of the present petitioner. Mr. Tulsi further submitted that when there is no dispute at all, the involvement of the present petitioner shown by the Police is just to malign his reputation and his business. He further submitted that the statement of witnesses are contradictory with each other about the occurrence as some witnesses state about act of hurling the bombs by four persons and statement of rest witnesses show that only two motorcyclists came and one of them hurled the bomb. So, he

submitted that this is a concocted story prepared by the prosecution to deny the right to bail of the petitioner.

Mr. Tulsi cited the decision in *Indra Dalal v. State of Haryana* reported in *(2015) 11 SCC 31* where Their Lordships observed that discoveries unrelated to confessions sought to be made admissible under Section 27 of the Evidence Act and would not surmount bar of Sections 25 and 26 of the Evidence Act. Such approach is not permissible in law. Inadmissible confessions made to police officer or in police custody cannot be made basis of conviction with the aid of other connected evidence available on record. He also cited the decision reported in *Adambhai Sulemanbhai Ajmeri and others v. State of Gujarat,* reported in *(2014) 7 SCC 716* where Their Lordships observed that the statement of witnesses recorded one year after the occurrence cannot be taken into consideration and such statement should be discarded. He also cited the decision reported in *2005 (2) SCC 13; Jayendra Saraswathi Swamigal V. State of Tamil Nadu* where Their Lordships have observed at paragraph-15 in the following manner:
"15. Shri Tulsi, learned senior counsel for the respondent, has also referred to certain other pieces of evidence which, according to him, showed the complicity of the petitioner with the crime in question. He has submitted that the petitioner had talked on phone to some of the co-accused. The material placed before us does not indicate that the talk was with A-6 and A-7 who are alleged to have assaulted the deceased or with A-5, A-8, A-9 and A-10, who are alleged to have been standing outside. Learned counsel has also submitted that there are two other witnesses who have heard the petitioner telling some of the co-accused to eliminate the deceased. The names and identity of these witnesses have not been disclosed on the ground that the interrogation is still in progress. However, these persons are not employees of the Mutt and are strangers. It looks highly improbable that the petitioner would talk about the commission of murder at such a time and place where his talks could be heard by total strangers".

Finally Mr. Tulsi submitted that recently the Hon'ble Supreme Court in the case of *Vinod Upadhyay v. State of U.P*. (Special Leave to Appeal (Crl.) No(s).143/2016) have been pleased to observe that in 25 criminal cases registered against the petitioner of that case, when the petitioner has been acquitted in 11 cases, the concession of bail should be allowed. He further submitted that with regard to the criminal antecedents against the present petitioner, in most of the cases the petitioner is on bail. So, he submitted to release the petitioner on bail with any condition as deemed fit and proper.

Mr. J. Katikia, learned Additional Government Advocate submitted that the F.I.R. has narrated about the incident and same has also led to the investigation of the case. During investigation, the injured persons have been examined by the Doctor where the Doctor found severe bleeding injuries in different parts including vital parts of the body of injured. He further submitted that there are statement of the witnesses Upendra Kumar Mohapatra and Rabindra Bastia recorded under Section 164 Cr.P.C. indicating the clear complicity of the present petitioner because in a meeting just before the occurrence the present petitioner has threatened the injured Abhaya Bhatta of dire consequence as he had to return the money to Sri Padhiary. He further submitted that the statements of these witnesses are clear enough to show the conspiracy made by the present petitioner to make attempt on the life of the injured persons.

Mr. Katikia, learned Additional Government Advocate further submitted that the statement of Sana and Bapina, who are witnesses to the occurrence have clearly narrated the occurrence. They have identified the co-accused Ganesh Sahoo. According to him, Sana and Bapina had admitted that Ganesh Sahoo has made extra-judicial confession before them about the threatening of the present petitioner in a meeting to Abhaya Bhatta to kill him. Apart from this, they narrated that the statement of co-accused Ganesh Sahoo is clear enough to show that the present petitioner had instigated him to cause death of Abhaya Bhatta and the co-accused Ganesh Sahoo when could not complete the murder has also narrated before the petitioner about his failure to kill him. In addition to that, he submitted that there are six criminal antecedents against the petitioner for which he should not be released on bail. Both the parties admitted that charge-sheet has been submitted against the present petitioner.

DISCUSSIONS

Considered the submissions of the respective counsel. It is reported in *AIR 1980 SC 785 (Niranjan Singh and another v. Prabhakar Rajaram Kharote and others)* where their Lordships observed at para-3 in the following manner:-

“ xx xx xx

Detailed examination of the evidence and elaborate documentation of the merits should be avoided while passing orders on bail applications. No party should have the impression that his case has been prejudiced. To be satisfied about a prima facie case is needed but it is not the same as an exhaustive exploration of the merits in the order itself ”.

It is also reported in *(2004) 7 SCC 528 (Kalyan Chandra Sarkar v. Rajesh Ranjan alias Papu Yadav and another)* where their Lordships also directed to

consider the relevant factors before granting bail and Their Lordships at para- 11 have observed in the following manner:

"11. The law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:
(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.
(c) Prima facie satisfaction of the Court in support of the charge; (See *Ram Govind Upadhyay Vs. Sudarshan Singh; (2002) 3 SCC 598 and Puran Vs. Rambilas; (2001) 6 SCC 338*)."

Similarly the principles of bail are reported in **(2010) 14 SCC 496; *Prasanta Kumar Sarkar v. Ashis Chatterjee and another*** where their Lordships have observed at para-9 in the following manner:
"9.We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that among other circumstances, the factors to be borne in mind while considering an application for bail are:
(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
(ii) nature and gravity of the accusation;
(iii) severity of the punishment in the event of conviction;
(iv) danger of the accused absconding or fleeing, if released on bail;
(v) character, behavior, means, position and standing of the accused;
(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and
(viii) danger, of course, of justice being thwarted by grant of bail."
(See *State of U.P. v. Amarmani Tripathi; (2005) 8 SCC 21, Prahlad Singh Bhati v. NCT of Delhi;* (2001) *4 SCC 280, and Ram Govind Upadhyay v. Sudarshan Singh; (2002) 3 SCC 598).*

Keeping in mind of all the principles made above, let me find out whether the petitioner is entitled to grant of bail or not. No doubt the F.I.R. speaks about the incident of 2013 and in the F.I.R. it is clearly mentioned that while the injured Abhaya Bhatta was returning by his Car bearing Registration No.OR-05- AE-6247 along with his brother-in-law Hadu @ Susanta Pal in the front seat, two Motorcycles came speedily and overtook the Car and blocked the same in front of it. It also appears from the F.I.R. that the Motorcyclists hurled bomb towards them and fired gun for which both of them sustained multiple bleeding injuries on their person. Yet Abhaya Bhatta drove the vehicle and it hit somewhere but did not know what happened thereafter. Finally he found himself in the Hospital. The Doctor's reports as appears from the Case Diary show that both the injured persons have sustained multiple bleeding injuries on their person.

The statement of Abhaya Kumar Bhatta recorded murdered but the culprits have not been apprehended so far. His statement further shows that the present petitioner had desired to purchase the land from one Rabi Padhiary at Bhanpur but due to opposition by the injured that could not be successful and there was a meeting held by the present petitioner in his office where the present petitioner and other persons were present. In that meeting the present petitioner had told him not to obstruct in any way to occupy the vacant land but the injured did not agree for which the present petitioner has threatened him with dire consequence. Further he stated that there was exchange of land between his father and the father of Purnananda Padhiary but due to dispute between Padhiary brothers injured could not get the land and on the other hand Purnananda Padhiary made agreement with petitioner to sell same for Rs.45 lakhs. Since other brothers did not agree, Rabindra had to return money to petitioner, resultantly petitioner kept grudge over injured Abhaya. So, he has strong conviction that the present petitioner has engaged the co-accused persons to kill him. Statements of Rabindra Padhiary and Kedarnath Swain support such statement of injured Abhaya Bhatta.

The statement of Abani Mohapatra shows that there was meeting where in his presence the present petitioner asked the injured to get rid of this land

dispute otherwise he has to face the dire consequence. Similarly the statements of Rabindra Bastia and Upendra Mohapatra recorded under Section 164 Cr.P.C. show that before the occurrence in 2013, the present petitioner had threatened the injured not to come on his way otherwise he has to face the consequence. No doubt the statement of Sana and Bapina are also relevant to know that co13 accused Ganesh Sahoo has made extra-judicial confession before them to implicate the present petitioner because the present petitioner has asked him to kill Abhaya Bhatta and accordingly he has also arranged bombs for Ganesh Sahoo and Ganesh Sahoo used the same. No doubt the extrajudicial confession has to be decided during trial but at present same has got relevancy to consider bail.

On going through the further materials, co-accused Ganesh Sahoo has also made confessional statement before the Police stating that present petitioner has explained the difficulty before him and asked him to kill Abhaya Bhatta while he was returning from his Court work every day via Khannagar and accordingly the petitioner has given him four hand made bombs and as per planning Ganesh Sahoo has hurled the bombs to the injured persons causing serious injuries on their person and subsequently he has narrated the incident to witnesses Sana and Bapina. No doubt the statement of Ganesh Sahoo is a coaccused statement which is a weak piece of evidence but in view of the decision of *Haricharan Kurmi v. State of Bihar; AIR 1964 SC 1184* it lends assurance to the evidence on record.

No doubt from the material it is evident that injured persons got injuries due to bomb blast and firing by gun and petitioner has threatened the injured with dire consequence due to land dispute in which petitioner and injured both are interested. Extra-judicial confession of co-accused Ganesh Sahoo corroborates above material. So, confession of co-accused Ganesh Sahoo under Section 30 of the Evidence Act lends sufficient assurance to above evidence to show complicity of the petitioner as conspirator.

Of course, the argument of Mr. Tulsi, learned Senior Advocate has got force to the extent that after four years of incident the petitioner and co-accused have been arrested. From the material it appears that some witnesses have been examined in 2013 and some have been examined in 2017. Since offence under Section 307 of I.P.C. committed by any person other than live convict has got maximum sentence for imprisonment for life and no time limit is prescribed for completion of investigation in such major offence as long as accused is not arrested, the argument of the learned Senior Advocate for the petitioner has got least force to grant bail.

Of course, the decisions cited by the learned Senior Advocate for the petitioner with regard to *Adambhai Sulemanbhai Ajmeri and others* (supra) that the statement of the witnesses recorded after one year of the occurrence cannot be believed. Such question will arise about the admissibility or credibility when the evidence will be adduced before the court below. However, the Court is of the view that sufficient materials are there to find out a prima facie case or reasonable ground to believe the complicity of the present petitioner with the commission of the offence. Apart from this, in *Jayendra Saraswati's* case (supra) offence of conspiracy has been discussed. But facts of present case being different, bail is considered in the present material.

Both the parties have admitted that charge-sheet has been submitted. In serious offence even if charge-sheet is submitted, as per the decision of the Hon'ble Supreme Court, the Court cannot take lenient view to enlarge the petitioner on bail.

Of course, there are criminal antecedents against the present petitioner as per memo filed by the learned Additional Government Advocate and countering that learned Senior Advocate submitted that the petitioner is on bail in some cases. Thus, petitioner has got criminal antecedent of similar major offences which are weighed against petitioner to go on bail.

In terms of above discussion and having found prima facie case or reasonable ground to believe that petitioner has complicity with the commission of offence, I am loath to grant bail to the petitioner. For the larger interest of public and society, petition for bail being devoid of merit stands rejected.

Before parting this case, the Court place on record of its appreciation to the lucid submission of Mr. K.T.S. Tulsi, learned Senior Advocate on different decisions of Hon'ble Supreme Court. At the same time, learned Additional Government Advocate has candidly brought the facts to the knowledge of the Court. However, for abundant caution that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer for bail made by the petitioner. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done by the trial court seized of the trial on the evidence adduced before it. The BLAPL is dismissed accordingly.

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3. Section 482 of Cr.P.C.

Kamalakanta Nayak Versus State of Orissa & another

S. K. Sahoo, J.

In the High Court of Orissa, Cuttack.

Date of Hearing & Judgment: 19.06.2017

Issue

In the matter of quashing of the order of taking cognizance taken under sections 448/354/376/511/506 of the Indian Penal Code and issuance of process against the petitioner.

This application under section 482 of the Criminal Procedure Code has been filed by the petitioner Kamalakanta Nayak challenging the impugned order dated 11.10.2004 passed by the learned J.M.F.C., Basudevpur in I.C.C. Case No. 79 of 2004 in taking cognizance of offences punishable under sections 448/354/376/511/506 of the Indian Penal Code and issuance of process against him.

It appears that the opp. party no.2 Smt. Bharati Nayak filed the complaint petition on 31.08.2004 relating to the incident dated 26.08.2004 wherein she had alleged that in the absence of her husband, the petitioner entered inside her house, misbehaved with her and outraged her modesty and attempted to commit rape on her and when she cried aloud, the neighbours arrived at the spot and the petitioner fled away. The opp. Party no.2 disclosed the incident not only before her husband but to others and also reported the matter to the Superintendent of Police who asked her to come on 30th August, 2004 but subsequently when the opp. party no.2 met the Superintendent of Police, he refused to register the case for which there was delay in filing the complaint petition.

After filing of the complaint petition, the initial statement of the complainant-opp. party no.2 was recorded and inquiry was conducted under section 202 Cr.P.C., during course of which witnesses were examined. The learned J.M.F.C., Basudevpur vide order dated 11.10.2004 after perusing the complaint petition, statements of the witnesses recorded under sections 200 & 202 Cr.P.C. came to hold that prima facie case is made out against the petitioner and that there is sufficient ground to proceed against him and accordingly, took cognizance of offences under sections 448/354/376/511/506 of the Indian

Penal Code and issued process against the petitioner which is impugned in this application under section 482 Cr.P.C.

Mr. B.S. Dasparida, learned counsel appearing for the petitioner while challenging the impugned order dated 11.10.2004 contended that not only there is delay of about five days in filing the complaint petition by the opp. party no.2 but a case was registered at the instance of the petitioner against the opp. party no.2 on 28.08.2004 at Naikanidihi police station, on the basis of the Naikanidihi P.S. Case No. 75 of 2004 was registered under sections 341/294/323/ 324/506 of the Indian Penal Code which corresponds to G.R. Case No. 202 of 2004 on the file of learned J.M.F.C., Basudevpur. In the said case, during course of investigation, the petitioner was also medically examined and after conclusion of investigation, the Investigating Officer found prima facie case under sections 341/294/323/324/307/506 of the Indian Penal Code against the opp. party no.2 Smt. Bharati Nayak and accordingly, submitted charge sheet against her on 06.10.2004 and on the basis of such charge sheet, the learned J.M.F.C., Basudevpur vide order dated 08.10.2004 has been pleased to take cognizance of the offences and issued process against the opp. party no.2. It is further contended by the learned counsel for the petitioner that the complaint petition was filed just as a counter blast to the F.I.R. lodged by the petitioner at Naikandihi police station and the delay has remained unexplained and the complaint petition has been filed just to harass and humiliate the petitioner and therefore, the complaint case proceeding should be quashed.

Law is well settled as held in case of **Nagawwa -Vrs.- Veerana reported in A.I.R. 1976 S.C. 1947** that the order of the Magistrate issuing process against the accused can be quashed by the High Court under the following circumstances:-

(i) Where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(ii) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(iii) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(iv) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

It is not the case of the petitioner that the ingredients of the offences are not attracted on the face of the complaint petition or on the statements of the witnesses recorded either under section 200 or 202 Cr.P.C. or that the allegations are absolutely absurd and improbable or that the complaint suffers from fundamental legal defects. On the other hand, it is the case of the petitioner that just as a counter blast to the F.I.R. lodged by him, the complaint petition was filed by the opp. party no.2. Whether the complaint petition is a counter blast to the first information report submitted by the petitioner or not, whether the allegations made in the complaint petition are acceptable or not and whether there is truthfulness in the version of the complainant and her witnesses or not, the same has to be adjudicated at the appropriate stage by the learned Trial Court. Merely on the ground that a case was initially instituted by the petitioner against the opp. party no.2 at Naikanidihi police station, on the basis of which charge sheet was submitted against the opp. party no.2, the same cannot be a ground to quash the complaint case proceeding particularly, when on the face of the complaint petition, the ingredients of the offences are prima facie made out.

Law is well settled that exercise of inherent power under section 482 of Cr.P.C. is not the rule but it is an exception which is to be used sparingly, with circumspection and in rarest of rare cases. When the order of cognizance is challenged, the High Court is not required to embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not.

In view of the aforesaid observation, I am not inclined to exercise my inherent power under section 482 of Cr.P.C. to quash the impugned order. Accordingly, the CRLMC application being devoid of merit and stands dismissed. The learned Trial Court at the time of adjudicating the matter during trial shall not be influenced by any observation made while disposing of this application under section 482 of Cr.P.C.

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4. Section 482 of Cr.P.C.

Tathagata Satpathy & Another Versus Santilata Choudhury & others

S. K. Sahoo, J.

In the High Court of Orissa, Cuttack

Date of Judgment: 19.06.2017

Issue

In the matter of quashing of the order of taking cognizance under sections 500/501/34 of Indian Penal Code and issuance of processes against the petitioners.

The petitioners Tathagata Satapathy and Dandapani Misra in Criminal Revision No.391 of 2001 have challenged the impugned order dated 02.07.2001 passed by the learned J.M.F.C., Cuttack in I.C.C. Case No.52 of 1995 in rejecting their application for recalling the order dated 29.04.1995 passed by the learned S.D.J.M. (Sadar), Cuttack in taking cognizance of offences under sections 500, 501 read with section 34 of the Indian Penal Code and issuance of process against them.

The petitioners Sitakanta Mohapatra and Niranjan Sahoo in Criminal Revision No.375 of 1998 have challenged the impugned order dated 29.07.1998 passed by the learned S.D.J.M. (Sadar), Cuttack in I.C.C. Case No.52 of 1995 in rejecting their application for recalling the very same order dated 29.04.1995 passed by the learned S.D.J.M. (Sadar), Cuttack. Since both the revision petitions arise out of the same case in which the applications filed by the respective petitioners to recall the very same order of taking cognizance and issuance of process have been rejected, with the consent of the parties, those were heard analogously and are being disposed of by this common judgment.

The opposite party Santilata Choudhury (hereafter 'the complainant') filed the complaint petition in the Court of learned S.D.J.M. (Sadar), Cuttack on 06.04.1995 stating therein that she was an active social worker and a member of National Congress and was the Vice President of the Cuttack District Congress (I) Seva Dal and she was also the Secretary of Mahila Congress. It is further stated in the complaint petition that the petitioner no.1 Sitakanta Mohapatra (Criminal Revision No.375 1998) was defeated in the last assembly election and the petitioner no.2 Niranjan Sahoo (Criminal Revision No.375 of 1998) was a henchman of petitioner no.1 and was the President of Barchana Block Congress and both the petitioners were envious and zealous against the complainant as she was inducted in the Congress Seva Dal. Both the petitioners with their supporters called a meeting and published defamatory news items in the newspapers i.e. 'Dharitri', 'Pragativadi' and 'Matrubhasa' without any basis to

cause harm to the reputation of the complainant with malafide intention. It is stated that the printer and publisher of the newspapers have not published the news items in good faith and by such publication, the complainant who had a social standing, reputation and respect was defamed and the general public formed a bad impression on the complainant after reading such items. It is further stated that the witnesses named in the complaint petition handed over the newspapers to the complainant and after going through the news items, the complainant sent pleader notices to accused nos.1 and 2 (petitioners in Criminal Revision No.375 1998) who did not reply to the notices and since the complainant was mentally upset, she thought it proper to take shelter in the Court of law. The complainant filed the news items published in 'Dharitri', 'Pragativadi', 'Matrubhasa' as well as the pleader notices to accused nos. 1 and 2 along with the complaint petition.

The learned S.D.J.M. (Sadar), Cuttack recorded the initial statement of the complainant and on being prima facie satisfied, took cognizance of the offences under sections 500, 501 read with section 34 of the Indian Penal Code vide order dated 29.04.1995 and issued process against all the six accused persons named in the complaint petition including the petitioners in both the revision petitions.

On perusal of the lower Court records which was called for by this Court, it is found that after cognizance of offences was taken by the learned S.D.J.M. (Sadar), Cuttack, on 17.12.1997 the accused no.1 and 2 (petitioners in Criminal Revision No.375 1998) filed a petition to recall the order of taking cognizance which was rejected vide order dated 29.07.1998 which is impugned in Criminal Revision No.375 of 1998.

The order of taking cognizance and issuance of process against accused no.6 Pravakar Mishra who is stated to be the editor and publisher of 'Matrubhasa' was recalled by the learned S.D.J.M. (Sadar), Cuttack vide order dated 29.07.1998 considering his petition for recall dated 13.01.1998.

The trial of the complaint case started and the complainant Santilata Choudhury was examined on 01.03.1999 as P.W.1 and she supported her case and she was also crossexamined by the learned defence counsel for accused nos. 4 and 5 (petitioners in Criminal Revision No.391 of 2001). The three news items published in Dharitri, Pragativadi and Matrubhasa were also marked as exhibits. The order sheet dated 18.03.1999 indicates that a petition was filed by accused no.1 Sitakanta Mohapatra (petitioner in Criminal Revision No.375 1998) to recall

the complainant (P.W.1) for cross-examination which was allowed on 22.04.1999. On 21.06.1999 accused nos. 4 and 5 (petitioners in Criminal Revision No.391 of 2001) filed a petition to decide on the point of jurisdiction. On 17.08.1999 another petition was filed by accused no.3 Priyaranjan Das to decide on the point of jurisdiction. On 03.01.2000 both the petitions filed by accused nos. 3, 4 and 5 to decide the point of jurisdiction were rejected by the learned J.M.F.C., Cuttack. On 28.02.2001 separate petitions were filed by accused nos. 3, 4 and 5 to recall of the order of cognizance. Considering such petitions filed by the accused nos. 3, 4 and 5, the order dated 02.07.2001 was passed by the learned J.M.F.C., Cuttack which is impugned in Criminal Revision No.391 of 2001.

In Criminal Revision No.375 of 1998 which was filed on 28.08.1998, notice was issued to the complainant on 20.10.1998 and though Misc. Case No.287 of 1999 was filed on 27.04.1999 for stay of further proceeding of the complaint petition but no stay order was passed.

In Criminal Revision No.391 of 2001, notice was issued on 03.08.2001 and further proceeding of the complaint case proceeding was stayed.

Mr. Kalayan Patnaik, learned Senior Advocate appearing for the petitioners in Criminal Revision No.391 of 2001 contended that the alleged defamatory news items were published in different newspapers on different dates and those were not one and same but their contents were also different and therefore, one complaint petition against all the three newspapers for different publications is not maintainable. It is further contended that the news item published in 'Dharitri' does not constitute an offence of defamation and the learned S.D.J.M. (Sadar), Cuttack had no territorial jurisdiction to entertain the complaint petition as the complainant belongs to village Khaira under Barachana police station in the district of Jajpur and the witnesses who stated to have handed over the newspapers to the complainant are also of either Jajpur or Kendrapara district and therefore, since no cause of action arose within the territorial jurisdiction of the S.D.J.M. (Sadar), Cuttack, complaint petition should not have been entertained at Cuttack. The learned counsel further contended that there is no pleading in the complaint petition regarding the territorial jurisdiction of the concerned Court. Learned counsel relied upon the decisions of the Hon'ble Supreme Court in the cases of Abhay Lalan -Vrs.- Yogendra Madhavalal reported 1998 Criminal Law Journal 1667, Navinchandra N. Majithia -Vrs.- State of Maharashtra reported in A.I.R. 2000 S.C. 2966 and Oil Natural Gas Commission -Vrs.- Utpal Kumar Basu reported in 1994 (3) SCALE 22.

Mr. Karunakar Jena, learned counsel appearing for the petitioners in Criminal Revision No.375 of 1998 contended that the petitioners are neither publishers nor editors of any of the newspapers i.e. 'Dharitri', 'Pragativadi' and 'Matrubhasa' and the contents of the alleged defamatory news items, if taken on its face value do not constitute the ingredients of the offences under which cognizance was taken and therefore, the issuance of process against the petitioners is illegal. It is further stated that such a complaint petition was filed with oblique motive due to political dispute and the judicial process should not be used as an instrument of oppression. It is contended that the chances of ultimate conviction of the petitioners for the alleged offences is bleak and therefore, no useful purpose would be served in allowing the prosecution to continue. The learned counsel relied upon the decisions rendered in the cases of State of Haryana -Vrs.- Ch. Bhajanlal reported in AIR 1992 SC 604, Madhavrao Jiwajirao Scindia -Vrs.- Sambhajirao Chandrojirao Angre reported in AIR 1988 SC 709, Biraja Panda -Vrs.- State of Orissa reported in Vol.81 (1996) Cuttack Law Times 417, Ramesh Chandra Das -Vrs.- Premalata Patra reported in (1988) 1 Orissa Criminal Reports 577, Manda Marandi -Vrs.- State of Orissa reported in (2008) 39 Orissa Criminal Reports 359, M/s. Zandu Pharmaceutical –Vrs.- Md. Sharaful Haque reported in 2005 (Vol.I) Orissa Law Review (SC) 51.

The ratio of the decisions relied upon by the learned counsel appearing for the petitioners in Criminal Revision No.375 of 1998 would indicate that where accepting the case of the complainant in its entirety, the prima facie ingredients of the offences are not attracted or the chances of ultimate conviction is bleak and continuance of the criminal proceeding would amount to abuse of process of the Court, the High Court can exercise its inherent jurisdiction under section 482 of Cr.P.C. to quash the proceeding otherwise it would be miscarriage of justice. The Court cannot be utilized for any oblique purpose. Where no prima facie case is available in support of the complaint case and the complainant is not coming to the Court with clean hand, the High Court can exercise its inherent power and quash the order of taking cognizance.

So far as the ratio of the decisions relied upon by the learned counsel appearing for the petitioners in Criminal Revision No.391 of 2001 are concerned, in the case of Abhaya Lalan - Vrs.- Yogendra Madhablal reported 1998 Criminal Law Journal 1667, it was held as follows:

"5.……The question involved is one of jurisdiction. If, as a matter of fact, the learned Magistrate has no jurisdiction to try the complaint and if the

Magistrate proceeds with the complaint, it will be an abuse of the process of the Court and for the purpose of securing the ends of justice, interference can be made by the High Court in exercise of its inherent powers under section 482 of the Code."

In the case of Navinchandra N. Majithia -Vrs.- State of Maharashtra reported in A.I.R. 2000 S.C. 2966, it is held that so far as the question of territorial jurisdiction with reference to a criminal offence is concerned, the main factor to be considered is the place where the alleged offence was committed.

In the case of Oil Natural Gas Commission -Vrs.- Utkal Kumar Basu reported in 1994 (3) SCALE 22, it is held that in determining the objection of lack of territorial jurisdiction, the Court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon and inquiry as to the correctness or otherwise of the said facts and the question of territorial jurisdiction must be decided on the facts pleaded in the petition.

In the case of Subramanian Swamy -Vrs.- Union of India reported in (2016) 64 Orissa Criminal Reports (SC) 561 where the constitutional validity of sections 499 and 500 of the Indian Penal Code and sections 199(1) to 199(4) of Cr.P.C. was challenged, it was held that Cr.P.C. governs the territorial jurisdiction and needless to say, if there is abuse of the said jurisdiction, the person grieved by the issue of summons can take appropriate steps in accordance with law. In matters of criminal defamation, the heavy burden is on the Magistracy to scrutinize the complaint from all aspects. He must be satisfied that ingredients of section 499 of I.P.C. are satisfied. Application of mind in the case of complaint is imperative.

Law is well settled that where a newspaper containing a defamatory article is printed and published at one place and is circulated or sold at other places by or on behalf of the accused responsible for the printing and publishing the newspaper, then there would be publication of the defamatory article in all such other places and the jurisdictional Magistrate can entertain the complaint for defamation. (Ref:- 1994 Criminal Law Journal 3510, P.Lankesh -Vrs.- H. Shivappa). In the case of Martin Lottery Agencies -Vrs.- S. Maniraman reported in 2005 Criminal Law Journal 3146, it is held that crimes are local and justifiable only by the local Courts within whose jurisdiction those crimes are committed and only when a criminal offence commenced within the jurisdiction of one Court and completed within the jurisdiction of another Court, it may be tried by either

of the Courts but, it is to be seen by the Court that the area within which offence is committed as the same is relevant for deciding the place of trial and if the offence is committed wholly outside the jurisdiction, a Magistrate cannot try the case. Considering the facts of that case, it was further held that there is no material on record to show that the newspaper "Athirshtam" was circulated and sold at Gangtok, Sikkim and as such the Trial Court had rightly held that it has no territorial jurisdiction to entertain and try the case. Even assuming the offence was committed at Madurai, Tamil Nadu, the parties being the residents of Tamil Nadu, Madurai is the right place of trial and mere statement of a witness that he heard rumors about the publication of the defamatory articles/items in the newspaper "Athirshtam" in Tamil language and some of their friends had brought those newspapers and made the witness understand in Nepali language and, knowledge of such rumors at Gangtok will not constitute the requirements of publications or circulation or selling of those newspapers at Gangtok within the territorial jurisdiction of the Trial Court.

In the case of S. Bangarappa -Vrs.- Ganesh Narayan Hegde reported in 1984 Criminal Law Journal 1618, where the alleged defamatory statement made by the accused in the press conference at 'B' was published in the evening newspaper 'Sanje Vani' on the same day at 'B' and in the daily newspaper 'Samyukta Karnataka' in the early hours of the very next day at 'H', it was held that the Court at 'H' had jurisdiction to try the offence of defamation. Section 179 Cr.P.C. applies to those offences which, by their very definition, consist of an act and its consequence. In short, the act and its consequence must together constitute an offence. The offence of defamation consists not only of the statement said to have been made but also its publication. The publication is a consequence of the alleged statement said to be made by the accused. Therefore, the Court that would have jurisdiction must be the Court where the act has been done or where the consequence has ensued. The consequence contemplated by Section 179 is not a remote consequence of the act done. 'Consequence' is confined to that which is an ingredient of the offence for which the accused person is being tried. It was not the case of accused that 'Samyukta Karnataka' made a reference to the publication of the news item in 'Sanje Vani' and made it a sure for publication in its paper. The publication of the statement in 'Samyukta Karnataka' had nothing to do with the publication made by 'Sanje Vani'. Looking to the close Proximity of time and the place, unity of purpose or design in publishing the same, one can very well make out that the publication of the alleged statement 'Samyukta Karnataka' was a consequence of the statement made in the press conference. Therefore, it cannot be said that the publication of

the statement in 'Sanje Vani' completed the alleged offence of defamation in 'B' itself. It may be that the Court at 'B' also might have had jurisdiction but the fact remains that an independent paper like 'Samyukta Karnataka' independent of the publication in 'Sanje Vani', published that statement in 'H'. Therefore, the publication of the alleged statement in 'Samyukta Karnataka' will be a consequence within the meaning of Section 179 Cr.P.C. Once the consequence of publication has taken place at 'H', it cannot be said that Court at 'H' has no jurisdiction to try the present offence.

In the case of Dr. Subramaniam Swamy -Vrs.- P.S. Pai reported in 1984 Criminal Law Journal 1329, the Bombay High Court was dealing with a case of alleged defamatory statement made by the accused in press conference at Chandigarh but the statement in the newspaper was circulated and read in Bombay. On the question of jurisdiction, the Bombay High Court held that the particular newspaper in which the impugned news item is published is circulated and read in the city of Bombay where the complainant resides. The Court took the view that the consequence of the statement made at Chandigarh has been completed at Bombay by circulation of the said newspapers, and, therefore, the offence of defamation is complete in the city of Bombay. As per Section 179 of the Code, both the Courts at Chandigarh and at Bombay will have jurisdiction to entertain a complaint under Section 500 of the Indian Penal Code.

In the case of M.P. Narayana Pillai -Vrs.- M.P. Chacko reported in 1986 Criminal Law Journal 2002, where in the matter relating to defamatory proceedings out of the news item published and the cognizance taken by the Court was challenged, the Hon'ble High Court of Kerala held as follows:-

"7. One of the contentions of the petitioners is that the Magistrate acted illegally in taking cognizance of the offence when he had no territorial jurisdiction to entertain the complaint. That contention does not appear to be correct. It is true that the Kalakaumudi Weekly is printed and published from Trivandrum but in order to maintain a prosecution for defamation in a particular Court, there need only be publication of the libel within the jurisdiction of the Court where the complaint is filed. Jurisdiction has to be decided on the basis of the allegations in the complaint for the purpose of a proceeding under Section 499. The very allegation of the 1st Respondent in the complaint is that it was published at Vaikom also and it was from there that he got and read a copy of it. Being a weekly publication intended to be read by people, it is enough for the complainant to show that the publication was delivered within the limits of the territorial jurisdiction of

the Court in order to invest that Court with jurisdiction. It need not be shown that the defamatory matter was seen or read by any particular person within the jurisdiction of that Court. Since the weekly is being printed and published for the purpose of reading by the people when it is shown that it was published it could be presumed that it was read."

In the case of **K.M. Mathew -Vrs.- State of Kerala reported in (1992) 5 Orissa Criminal Reports 66,** in a case of defamation, the Magistrate held that the complaint in so far as it relates to the Chief Editor could not be proceeded with. The Kerala High Court reversed the order of the Magistrate. The Hon'ble Supreme Court allowed the appeal and held as follows:-

"In the instant case there is no averment against the Chief Editor except the motive attributed to him. Even the motive alleged is general and vague. The complainant seems to rely upon the presumption under Section 7 of the Press and Registration of Books Act, 1867 ('the Act'). But Section 7 of the Act has no applicability for a person who is simply named as 'Chief Editor'. The presumption under Section 7 is only against the person whose name is printed as 'editor' as required under Section 5(1). There is a mandatory (though rebuttable) presumption that the person whose name is printed as 'Editor' is the editor of every portion of that issue of the newspaper of which a copy is produced. Section 1(1) of the Act defines 'Editor' to mean 'the person who controls the selection of the matter that is published in a newspaper'. Section 7 raises the presumption in respect of a person who is named as the editor and printed as such on every copy of the newspaper. The Act does not recognise any other legal entity for raising the presumption. Even if the name of the Chief Editor is printed in the newspaper, there is no presumption against him under Section 7 of the Act. (See State of Maharashtra -Vrs.- Dr. R.B.Chowdhary and Ors. 1968 Criminal Law Journal 95 ; D.P.Mishra -Vrs.- Kamal Narain Sharma and Ors., (1971) 3 SCR 257; Narasingh Charan Mohanty -Vrs.- Surendra Mohanty, (1974) 2 SCR 39 and Haji C.H.Mohammad Koya -Vrs.- T.K.S.M.A. Muthukoya, (1979) 1 SCR 664.)

It is important to state that for a Magistrate to take cognizance of the offence as against the Chief Editor, there must be positive averments in the complaint of knowledge of the objectionable character of the matter. The complaint in the instant case does not contain any such allegation. In the absence of such allegation, the Magistrate was justified in directing that the complaint so far as it relates to the Chief Editor could not be proceeded

with. To ask the Chief Editor to undergo the trial of the case merely on the ground of the issue of process would be oppressive. No person should be tried without a prima facie case. The view taken by the High Court is untenable. The appeal is accordingly allowed. The order of the High Court is set aside."

In the case of Jawaharlal Darda v. Manoharrao Ganpatrao Kapsikar reported in (1998) 4 Supreme Court Cases 112, a news item was published on 04.02.84, the complaint in that behalf was filed by the complainant on 02.02.87 and the news item merely disclosed what happened during the debate which took place in the Assembly on 13.12.83. It stated that when a question regarding misappropriation of Government funds meant for Majalgaon and Jaikwadi was put to the Minister concerned, he had replied that a preliminary enquiry was made by the Government and it disclosed that some misappropriation had taken place. When questioned further about the names of persons involved, he had stated the names of five persons, including that of the complainant. The said proceedings came to be published by the accused in its Daily on 04.02.84. As because the name of the complainant was mentioned as one of the persons involved and likely to be suspected, he filed a complaint before the learned C.J.M. alleging that as a result of publications of the said report, he had been defamed. It is quite apparent that what the accused had published in its newspaper was an accurate and true report of the proceedings of the Assembly. Involvement of the respondent was disclosed by the preliminary enquiry made by the Government. If the accused bona fide believing the version of the Minister to be true published the report in good faith, it cannot be said that they intended to harm the reputation of the complainant. It was a report in respect of public conduct of public servants who were entrusted with public funds intended to be used for public good. It was further held that the facts and circumstances of the case disclose that the news items were published for public good, in holding not liable for criminal defamation.

The relevant news item which was published in the Odia daily 'Dharitri' dated 08.12.1994 under the caption "Criminals are encouraged to join Congress" indicates that more than hundred Congress leaders from thirty nine Grama Panchayats of Barchana and Dharmasala Block of Jajpur District came to PCC Office at Bhubaneswar and presented a memorandum addressing to the President indicating therein by way of protest not to accept Pramod Choudhury and Santilata Choudhury (complainant) in the Congress Party as they are inter-provincial smugglers.

According to the complainant, this part of the news item published in Odia daily 'Dharitri' is defamatory. The newspaper 'Dharitri' in its last page indicates that it was printed and published by Sri Dandapani Misra (petitioner in Criminal Revision No.391 of 2001) on behalf of Samajbadi Society at Navajat Printers, B-15, Industrial Estate, Bhubaneswar and edited by Tathagata Satpathy (petitioner in Criminal Revision No.391 of 2001). It is further mentioned, inter alia, that the newspaper has an office at Cuttack in Pithapur and the phone number of the office has been given.

On perusal of the complaint petition, it is clear that nowhere it is mentioned as to where the complainant came to know about the news item though it is mentioned therein that the witnesses handed over the newspapers to the complainant and the complainant on going through these newspapers gave pleader notice to the accused. The pleader notice dated 11.12.1994 which is available on record also does not indicate as to where the complainant came to know about the news item. There is no dispute that the complainant has given her address at village-Khaira, P.S.-Barchana, District-Jajpur and the witnesses cited in the complaint petition are either of District- Jajpur or Kendrapara. There is no averment that the defamatory matter was seen or read by any particular person within the jurisdiction of the Court of learned S.D.J.M. (Sadar), Cuttack. However, since there is an office of the newspaper 'Dharitri' at Cuttack in Pithapur as mentioned in the back of the newspaper, the complainant has prima facie established that the publication was delivered within the limits of the territorial jurisdiction of the Court of learned S.D.J.M.(Sadar), Cuttack in order to invest that Court with jurisdiction. On careful analysis of the news item published in 'Dharitri', there is nothing against the two petitioners Sitakanta Mohapatra and Niranjan Sahoo in Criminal Revision No.375 of 1998. The news item reflects the summary of the contents of memorandum presented by the Congress leaders of thirty nine Grama Panchayats at PCC Office, Bhubaneswar addressed to the President. It is quite apparent that what the petitioners in Criminal Revision No.391 of 2001 had published in the newspaper 'Dharitri' was the summary of the contents of memorandum and it is not their individual opinion. It seems that the report was published in the news paper 'Dharitri' in good faith without any intention to harm the reputation of the complainant.

Similarly, in the news item published in 'Pragativadi' dated 07.12.1994 under the caption 'Charles Sobhraj of Orissa in Congress Party', though similar news item regarding presentation of memorandum against the complainant to

the PCC President has been mentioned along with the summary of the memorandum but there is nothing against the two petitioners Sitakanta Mohapatra and Niranjan Sahoo in Criminal Revision No.375 of 1998.

In the news items published either in Odia daily 'Dharitri' or in 'Pragativadi', there are no materials that such publications were at the instance of the petitioners Sitakanta Mohapatra and Niranjan Sahoo in Criminal Revision No.375 of 1998. Even the names of these two petitioners do not find place in the news items. Though in the news item published in 'Matrubhasa', some statements of petitioners Sitakanta Mohapatra and Niranjan Sahoo have been published but since the order taking cognizance against accused no.6 Pravakar Mishra who is stated to be the editor and publisher of 'Matrubhasa' was recalled vide order dated 29.07.1998, such news item cannot be utilized against petitioners Sitakanta Mohapatra and Niranjan Sahoo.

In view of the above analysis, though the power of this Court to quash the criminal proceedings pending before the subordinate Courts must be exercised sparingly and with circumspection but when on the available materials on record, the ingredients of offences under sections 500, 501 read with section 34 of the Indian Penal Code are not attracted against any of the petitioners in the two criminal revision petitions i.e. Criminal Revision No.391 of 2001 and Criminal Revision No.375 of 1998 and chances of ultimate conviction of any of the petitioners is bleak and continuance of the criminal proceeding would amount to abuse of process of the Court, in the fitness of things and in exercise of my inherent jurisdiction under section 482 of Cr.P.C., in order to prevent miscarriage of justice, I am inclined to accept the prayer made by the petitioners and quash the criminal proceedings against them in I.C.C. Case No.52 of 1995 pending in the Court of learned J.M.F.C., Cuttack. Before parting, I would humbly say that the constitutional freedom of speech and expression is subjected to reasonable restraints but it cannot be suppressed on the ground of convenience. Any attempt to destroy the fourth pillar of Indian democracy by any atheistic demon Hiranyakashipu and to control the fair and honest media reporting for ulterior motive can have a devastating effect and would give rise to Lord Narasimha Avatar. Therefore, practice of tolerance is a welcome sign in constitutional scheme.

Accordingly, Criminal Revision No.391 of 2001 and Criminal Revision No.375 of 1998 are allowed.

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5. Section 302 of Indian Penal Code

Madanayya Vs. State of Maharashtra

Ashok Bhushan and Deepak Gupta, JJ.

In the Supreme Court of India

Date of Order - 09.06.2017

Issue

Appellant convicted under section 302 of Indian Penal Code and sentenced to undergo rigorous imprisonment for life and to pay fine – challenged.

This appeal is directed against the judgment and order dated 15th February, 2008 of the High Court of Bombay, Nagpur Bench in Crl. A. No. 146/2003 whereby it upheld the judgment dated 17th January, 2003 passed by the Additional Sessions Judge, Gadchiroli convicting the Appellant Under Section 302 of Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs. 200/- and in default of payment of fine to undergo further rigorous imprisonment for one month.

The undisputed facts are that the Accused was married to Gatakka (PW. 3). He was living in the house of his in laws. Gatakka had one sister Poshakka who was married. Her husband died and thereafter she started living in her parental house and was treated as the wife of the accused. Poshakka delivered two children from her relationship with the Accused but both the children died soon after their birth.

The case of the prosecution is that because the children born from Poshakka did not survive the Accused used to beat her regularly. On the night intervening 23.08.2001 and 24.08.2001, the Accused gave fist and kick blows to Poshakka. The Accused and Poshakka were sleeping in one room and Gatakka along with her mother and children were sleeping in another room. In the morning Poshakka came out of the room and narrated the entire incident of merciless beating by the accused. She had severe pain in her abdomen. She died the same day i.e. 24.08.2001. In fact the first report regarding her death was lodged by the Accused himself in which he stated that his wife had gone to answer the call of nature and after she came back, she was foaming from mouth and died soon thereafter. The police investigated the matter and the Accused was charged for having murdered Poshakka who was living as his wife. He has been convicted and sentenced by both the courts and hence this appeal.

The learned Counsel appearing on behalf of the Appellant submits that as per the medical evidence the death of Poshakka occurred in the morning of 25.08.2001 and Poshakka died due to strangulation. He, therefore, submits that the entire prosecution case is false.

We have carefully gone through the judgment of the High Court as well as the record of the case. The story of the prosecution is fully supported by PW-3 Gatakka the wife of the accused. There is no reason why she should falsely implicate her husband in the death of her sister. She states that while she was sleeping in the adjoining room, the Accused along with Poshakka was sleeping in another room which was locked from inside. Throughout the night the Accused was beating Poshakka and in the morning Poshakka told Gatakka (PW-3) that the Accused had beaten her. Both the courts below have relied upon the statement of PW-3 and we see no reason to disbelieve her statement. Therefore, we are of the view that Poshakka died due to injuries caused on her person by the Appellant-accused.

The next point raised by the learned Counsel is that even if the prosecution story is believed, no case Under Section 302 Indian Penal Code is made out.

We have gone through the postmortem report and there is no doubt that there were number of injuries on the body of the deceased. None of the injuries by itself was sufficient for causing death. The cumulative effect of the injuries is that the deceased died. The issue that arises is whether the Accused had the intention of causing death of the deceased. We cannot ignore the fact that the deceased woke up in the morning and narrated the incident to her sister PW-3, and she survived till 5.00 p.m. in the evening. The postmortem report also shows that she died within a couple of hours after partaking a heavy meal. In this view of the matter, it is difficult to impute the intention to kill to the Appellant. Therefore, we convert the conviction of the Accused from one Under Section 302 to Section 304 Part-II. As the Appellant has been behind bars for sixteen years, in our view, this is sufficient punishment for his crime and therefore, we reduce the sentence after altering the sentence as aforesaid to the period of incarceration already undergone by the Appellant-accused. He shall be released forthwith unless wanted in any other case.

The appeal stands partly allowed accordingly.

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6. Section 302/309 of Indian Penal Code

Satish Nirankari Versus State of Rajasthan

A. K. Sikri, J.

In the Supreme Court of India

Date of Judgment - 09.06.2017

Issue

Appellant convicted under section 302 and 309 of Indian Penal Code and sentenced to Life Imprisonment for committing murder and sentenced to three months simple imprisonment for attempting to commit suicide – Challenged.

Relevant Extract

Pooja, daughter of Pramod Bhatnagar (Informant) went missing on November 01, 1995. On that day, she had left her home at 5.30 PM to attend her MBA classes. However, she did not return back. Her father and family members became anxious and worried when they found that she had not returned till 9.00 PM. Before they could go out to search for her, one Ashok informed them around 10.00 PM, that Pooja was admitted to SMS Hospital, Jaipur. On receiving this information, the informant rushed to the hospital. After reaching there, he found that body of Pooja was lying there as she was already dead. As per the informant she was murdered by the appellant herein, who had strangulated her neck by squeezing the same. Next morning, the Informant lodged written report of the murder of Pooja with the Police Station, Gandhi Nagar, Jaipur, stating the aforesaid facts.

On the basis of the report, case was registered and police sprung into action. Dead body of Pooja was subjected to autopsy. Statements of various witnesses were recorded and necessary memos were drawn. The appellant was arrested. Challan was filed in the court implicating the appellant alleging that the appellant had committed the murder. The case came up for trial before the Special Judge (Communal Riots/Man Singh murder), Jaipur who framed the charges under Sections 302 and 309 of the Indian Penal Code (for short, 'IPC'). The appellant denied the charges and claimed trial. The trial was held wherein the prosecution produced as many as 16 witnesses. Statement of the appellant, thereafter, was recorded under Section 313 of the Code of Criminal Procedure (for short, 'Cr.PC') wherein the appellant claimed innocence and rebutted the prosecution story. The version projected by him was that Pooja was madly in love with him and wanted to marry him. However, her parents did not agree for their marriage. Accordingly, both, the appellant and Pooja had decided to commit suicide. Both of them consumed copper sulphate, though the quantity taken by the appellant was lesser in comparison with that of Pooja. Soon after Pooja

started vomiting. At this juncture, he went out of the room to seek help. When he returned back he found Pooja hanging. He untied the noose of cable wire which was used for the purpose of hanging and removed her to the hospital with the help of the neighbours.

Arguments were heard by the Special Judge. Aforesaid story put forth by the appellant did not convince the trial court judge, who after analyzing the prosecution evidence, came to the conclusion that the prosecution was able to prove, beyond reasonable doubt, charges against the appellant. Holding that Pooja did not commit suicide but was murdered, the trial court found the appellant guilty of murder. It imposed the sentence of life imprisonment for committing that crime, punishable under Section 302, IPC. The trial court also held that since the appellant had himself admitted that he had consumed copper sulphate with the intent to commit suicide, offence under Section 309 also stood proved. For this offence, the appellant was directed to undergo simple imprisonment of three months. Monetary fines for both the offences were also inflicted with default clauses.

The appellant preferred appeal against the said judgment under Section 374 Cr.PC by approaching the High Court of Judicature for Rajasthan. This appeal has been dismissed by the High courtvide impugned judgment dated February 19, 2007. Aggrieved by this outcome, he has challenged the order of the High Court, which is the subject matter of the present appeal.

From the aforesaid prosecution story narrated in brief along with the defence version, it becomes clear that it is only the appellant who is involved in the episode in-question. The only aspect on which the controversy revolves around is as to whether it is the appellant who committed murder of Pooja or Pooja had committed suicide? Since, this is the only narrow scope of the appeal, arguments were advanced by the counsel for the parties revolving around this limited aspect. Obviously, our discussion would also remain within the bounds of the aforesaid controversy, eschewing other details which are not warranted and relevant for the purposes of deciding this appeal. It would be apposite to take into consideration some of the admitted facts which would also help in resolving the dispute.

Deceased Pooja was a student of English Literature and simultaneously she had joined Management course of American Institute for which she was attending classes in the evening. Shewas 23 years of age. Satish (appellant) was

non-matric and Pooja fell in love with the appellant while she was teenager. She wrote a few love letters to the appellant during that period. On November 01, 1995, Pooja left her house at 5.30 PM, but she did not reach to attend management classes. Around 10 PM, one Ashok informed the father of Pooja that she was admitted to the Hospital. When parents of Pooja reached hospital, they found Pooja dead.

Pooja was found hanging in the house which bears Municipal No. D-9 Indrapuri, Jaipur. This house belonged to one Priyambda, daughter of Vidya Bhushan, Advocate (PW-1) and was under construction on the relevant date, though the construction was almost complete. Thus, at the time of incident nobody was staying in the house. How this incident happened and under what circumstances the incident came to be noticed and Pooja was taken to hospital are described by Vidya Bhushan (PW-1), Mahesh Sharma (PW-2), Vinod Kumar Gupta, Advocate (PW-4) and Karni Singh Rathore, Advocate (PW-13). Their statements need to be noted, in brief, at this stage.

Vidya Bhushan, advocate (PW-1), in his deposition stated that the D-9, Indrapuri belonged to his daughter Priyambda and its construction was almost complete. Key of the house usually remained near electricity meter so that labourers could do their work. Although Mahesh was not his son, he was living with him since his childhood. In the year 1990-91, he got installed Dishantenna in the house and its control room was at the ground floor. Satish who was a mechanic of dish-antenna associates with Mahesh in that work. On November 01, 1995 Vinod Gupta, Advocate informed him over telephone around 8.30 PM that in his house at Indrapuri a girl was lying unconscious and a boy was pelting stones. Thereupon, he directed Mahesh to make inquiry. Mahesh later on informed him that from his house one boy and a girl were removed to the hospital. He further stated that site-plan (Ex. P-1) was drawn in his presence and in the ground floor of his house, a register, purse, wrist watch, small box of vermillion, metal glass, glassware contained copper sulphate Neela-Thotha, fruit juice and many other articles were found. In cross-examination, he stated that two cable wires were hanging from the railing of staircase. Garlands of rose and glass bangles were also lying. He also stated that he had seen Pooja (deceased) once when she came to his house with Satish. Satish wanted to marry her and he

Mahesh Sharma (PW-2) deposed that the house D-9, Indrapuri was in the name of Vidhya Bhushan's daughter, Priyambda. In that house he with the assistance of appellant installed dish-antenna. When the business of dish-

antenna was in progress, one day the appellant came to the house with a girl whose name was Daisy. On November 01, 1995 around 9 PM Vidhya Bhushan directed him to go to the said house. On reaching the house he was informed by neighbour Vinod Gupta that a boy and a girl consumed poison and they were vomiting. Karni Singh Ji thereafter took them to SMS Hospital.

Vinod Kumar Gupta, advocate (PW-4) deposed that plot No. D-9, adjacent to his house, belonged to Vidhya Bhushan, Advocate. On November 01, 1995 around 9 PM while he was sitting on dining table he noticed that somebody was pelting stones at his house. He came out of the house and found that on plot No. D-9 a boy was vomiting. The boy told him that he and his girlfriend consumed poison. The boy made request to save him and gave telephone number of his brother. Vinod Gupta communicated information about the incident to Vidhya Bhushan and the brother of the boy. After fifteen minutes three persons came on a scooter and the girl was removed to the hospital.

Karni Singh Rathore, Advocate (PW-13) in his deposition stated that on November 01, 1995 around 9 PM he had gone to the house of his relative Anand Singh Rathore at Satya Vihar Colony for taking dinner. As soon as he reached one boy of Video parlour came to him and requested him to save the life of his brother. He then carried a boy and a girl to the hospital. The condition of the girl was serious.

At this juncture, we reproduce the post-mortem report (Ex. P-4) wherein the following ante-mortem injuries were found on the dead body of Pooja:
"1.A ligature mark 29cm x 0.5cm placed 8 cm above supra sterna notch in mid line and is nearly transversely all around the neck, another ligature mark commencing from the left side of the upper border of ligature mark on one above 3 cm from the mid line and is running obliquely upwards backwards laterally and disappearing in chairs just post to the left mastoid process and it is 06 cm below left ear labule. Right side 2 cm from the upper border of ligature mark no one running obliquely upwards backwards and laterally upto below right mastoid process and it is 04cm below right ear lobule the ligature mark number one is deep and upper one is not deeper brown coloured
2. Hematoma 5cm x 4cm on occipital region. Medical board that conducted autopsy on the dead body opined that the cause of death was asphyxia due to pressure on neck with ligature."

It would also be pertinent to mention here that Pooja was wearing bangles, bindi and had also applied Sindoor. Garlands were also there.

An alleged suicide note (Ex. P-3), purportedly written by Pooja was also found from the place of incident in the register belonging to Pooja which register Pooja had presumably taken along with her as she had left the house to attend her management classes. This suicide note reads as under:

‘“Dear Mummy Papa

We both are taking our lives. We cannot live without each other. We tried a lot to make you understand but you refused to listen to us. We and no one else are responsible for our death. It is our last desire that we both be cremated together on one pyre. Hope you would definitely fulfil our last desire.

Your daughter Sd/- Daisy

Dear Bhaisahab

Must fulfil our last desire. Satish” Sd/- Satish.”

The aforesaid facts proved on record would demonstrate that the appellant and Pooja were alone in the house which belonged to a third person, at the time of incident. There is no eyewitness of the occurrence. Both had consumed copper sulphate. However, since the appellant had consumed lesser quantity, and was, therefore, fully conscious as he had gone out and drawn the attention of Vinod Kumar Gupta (PW-4) towards the incident by pelting stones at his house. At the same time, cause of death of Pooja was Asphyxia and ligature marks were found over her neck. Thus, it is not the consumption of copper sulphate which resulted into her death. At this juncture, we would also like to reproduce the entire statement of the appellant recorded under Section 313, Cr.PC where he claimed his innocence:

“I am not guilty, case is false. Puja alias Daisy was residing near my house. Houses of both of us were situated close to each other. We both used to visit the houses of each other. Puja used to visit my house. Since childhood, strong friendship developed between us. We both started loving each other. We used to write love letters to each other as well. Exh. D.6 to Exh. D.11 letters were written by Puja only to me which were given by me to police. We both wanted to marry but parents of Puja were against our marriage. On 21.10.95 it was birthday of Puja. That day I went to the house of her parents about our marriage whereupon they flatly refused for the same and got angry and abused and beat Puja and threatened to kill me. On 1.11.95 Puja came to me and told that today her parents

have beaten her black and blue. They beat her daily and do not allow her to meet you. Thereupon, we both decided that today we would marry each other. We both went to the market on scooter and from there Puja herself bought make up items, bangles, bindi, etc. Also purchased garlands for marriage. We both performed marriage before the photo of God by exchange garlands. Thereafter, Puja said that he parents and relatives are very dangerous people they would kill me and you. She said now she does not want to live and would commit suicide. I explained to her but she did not agree to my advice. Then I told her that I cannot live without you. Pooja said that we lived together and should die together. Then, she wrote a note to her parents in which I also put my signature and Puja also signed it. Then she brought jug fill with liquid like copper sulphate from the white washing material lying there in the house D-9, Inderpuri. She gave that to me also and herself consumed it. I consumed in small quantity and I thought that one should not commit suicide and then I put down the glass. In the meanwhile, condition of Daisy started deteriorating and she started vomiting. I went out for help and knocked at the door of neighbour Vinod, Advocate but no one came out inspite of knocking the door for long and thereupon from outside I threw stones at his house. After sometime, Vinod came out and I requested him to save Daisy and have (*sic.)* him telephone number of my brother. After that I went back to the house and saw Puja hanging with wire and withering in pain and then I ran to her and got her freed from the hanging and she fell down on the floor and I also sat beside her and started attending her. After some time, my brother Ashok reached. I told him to call parents of Puja whereupon he said that first arrange for her treatment as that could save her. Thereupon, I also considered it better and then we were taken to the hospital. There I sent Ashok to the house of Puja to inform her parents. I do not know what happened after that."

Keeping in view the aforesaid aspects, we proceed to discuss the vital issue.

Mr. Huzefa Ahmadi, learned senior counsel for the appellant stated that the circumstantial evidence which has surfaced on record clearly leans in favour of the appellant's version. He submitted that prosecution accepted that there was a love affair between the appellant and Pooja. It is also accepted that parents of Pooja were against their marriage. Not only this, since Pooja was determined to marry the appellant, she was maltreated and physically beaten by her parents. On the fateful day, i.e., November 01, 1995, Pooja had told the appellant that she was beaten black and blue by her parents. Therefore, she was upset and, at that moment, both decided to marry each other. It is for this reason that Pooja had

herself brought make up items like bangles, bindi, sindoor etc. and she purchased garlands for marriage. It is in these circumstances that they married each other before the photo of God. However, immediately thereafter, Pooja became paranoid as she had an apprehension that their marriage will not be accepted by her parents and relatives who were very dangerous and in all likelihood they would kill both Pooja and the appellant. Under this fear she decided to commit suicide and did not change her decision inspite of appellant's advice. At this stage, appellant also decided to end his life as he did not want to live without Pooja. In that heat of the moment both of them decided to end their lives. It is under these circumstances that they took liquid like copper sulphate from the washing material which was lying in the house, D-9, Indrapuri. Emphasizing these facts coupled with the subsequent events, that is, the circumstances under which the appellant, after seeing that condition of Pooja was deteriorating, went out and sought help of neighbour, Vinod Kumar Gupta (PW-4). He also submitted that when nobody came out from the house of PW-4 after he knocked at the door, the appellant frantically threw stones at his house to gain attention, forcing him to come out. From these circumstances, Mr. Ahmadi pleaded that the entire conduct of the appellant, taken together, would clearly show that the appellant had not killed Pooja and would not have done so as he loved her immensely from the childhood. He also highlighted the following facts which were pleaded before the High Court.

"(i) The prosecution failed to establish motive behind the guilt.

(ii) Following material facts were left unnoticed by the learned trial judge:-

"a. Pooja had left her house on November 1, 1995 at 5 PM and this fact is established by the statements of Pramila Bhatnagar (PW9) and Pramod Bhatnagar (PW12) but there is no evidence as to where she remained from 5 PM to 9 PM.

b. There is no evidence from where the accused purchased Sindoor (Vermilion), Bindi and Bangles.

c. There is no evidence as to who did the make-up.

d. There is no evidence from where poison was purchased and who had administered poison.

e. There is no evidence as to who were the associates of Ashok. Even Ashok had not been examined by the prosecution.

f. Appellant also consumed poison and was admitted in hospital for about 5 months.

(iii) There is no definite opinion of the doctor that death of Pooja was homicidal. The possibility that the death could be suicidal could not be ruled out.

(iv) The fact that Pooja committed suicide was established from the letter (Ex. P-3) which was written by her. He submitted that the courts below had simply gone by the testimony of Pooja's mother, who had denied the handwriting of Pooja on Ex. P-3, which was neither here nor there as it was self-serving evidence.
On the other hand, prosecution did not make any attempt to either compare the handwriting on Ex. P-3 with admitted handwriting of Pooja or sought any opinion of handwriting expert.
(v) In this behalf, he also referred to the deposition of PW-16, S.H.O. Gandhi Nagar, Police Station."

Mr. Ahmadi read out the relevant portion from the deposition of Vidya Bhushan, Advocate (PW-1), who had supported appellant's version to the extent that he knew that Pooja and the appellant were in love with each other and Pooja's parents were opposing the same. PW-1 had even told them that he would persuade their parents for their marriage. Else, both should go to court for marriage. He also referred to the deposition of Pramod Bhatnagar (PW-12), father of Pooja — deceased who had accepted in his cross-examination that he was Kayasth and in their family no Kayasth had ever married a Sindhi. He had also deposed that love marriage had never taken place in their family.

Learned counsel for the State, on the other hand, read out the depositions of Manju Bhatnagar, aunt of the deceased (PW-8), Pramot Bhatnagar, father of the deceased and Pramila Bhatnagar (mother of the deceased). All of them had consistently stated that they recognised the handwriting of Pooja and Ex. P-3 was not written by her. They had stated that Pooja was not in the habit of writing in Hindi and she used to write in English only. It was also explained by PW-9 that the letter started with addressing them as 'Mummy Papa' whereas she never used to call her 'mummy' and never called her father 'papa'. Instead she was addressing them as Jiji and Kaka Saheb respectively. She also never used the words 'My dear' for her parents. They also deposed to the effect that at the end of that letter name 'Daisy' was written which was not the name of her daughter. The learned State Counsel also drew the attention of the Court to the seizure memo of articles which were seized from the place of occurrence. He submitted that apart from other articles like garlands, bindi packet, vermillion, dark red colour box (sindoor), etc. It was also significant to note that in the articles belonging to Pooja, one mark sheet of University of Rajasthan was found in the polythene bag as well as prospectus of University of Rajasthan for post-graduate studies 1995-96 with form and also one syllabus of University of Rajasthan for M.A. English on which her name, Pooja Bhatnagar, was written with pen. Two passport size

photographs of Pooja in black and white on the back of which No. 5134307 was written, were also found in her bag. With the aid of these articles, learned counsel submitted that Pooja had ambitions for higher studies and the aforesaid papers showed that she was planning to apply for admission in M.A English in the University. With these kinds of ambitions, there was no question of Pooja taking her life by committing suicide. He also relied upon the judgments of the Trial Court as well as the High Court and the manner in which evidence was discussed and analysed by the two courts below holding that the circumstances conclusively established chain of evidence so complete as not to believe any unreasonable ground for the conclusion consistent with the innocence of the appellant and that the circumstantial evidence conclusively proved that it was a case of murder committed by the appellant and, particularly, emphasised that as per post-mortem report cause of death was Asphyxia. Further, Dr. S.K. Pathak (PW-3), who conducted autopsy on the dead body of Pooja had specifically stated that hematoma measuring 5cmX4cm was found on occipital region. There was second ligature mark ending towards back of the neck which was caused by strangulation. He further submitted that the story projected by the appellant that when he came out of the house for help, Pooja had hanged herself with wire was so improbable that no credence could be given to it, as it was not possible for a lonely girl, after consuming poison to gather such strength to hang herself. He also submitted that the High Court was perfectly justified in its conclusion that the version of the appellant that Pooja herself brought copper sulphate from the house, D-9, Indrapuri, was highly unbelievable being stranger in the house of an advocate to arrange that poison.

We have given our due considerations to the submissions advanced by the counsel on either side and have also minutely gone through the judgments of the courts below alongside the deposition of witnesses which were referred to and relied upon by both the parties in support of their respective cases. As is clear from the factual discussion recorded upto now, it is a case of circumstantial evidence and there is no eyewitness to the incident in-question. Cause of death of Pooja, as per the medical report, was Asphyxia and ligature mars were found over her neck. Further, both the appellant as well as Pooja had consumed copper sulphate. It is the quantum of the said poisonous substance which made the difference. Inasmuch as lesser quantity consumed by appellant was the reason that he survived, coupled with the fact that he could be taken to the hospital before his conditions deteriorated. However, he remained in the hospital for 50 days which shows that the substance consumed by him also had deleterious effects. It is also an admitted case that both Pooja and appellant were in love with

each other which had blossomed over a period of time. They were neighbours and were frequently meeting. Their affection for each other was known to Pooja's family but was not taken positively. Father of Pooja (PW-8) has himself stated that because of difference in caste, he being a Kayasth and the appellant being a Sindhi, such an inter-caste marriage had not happened in their family. He, thus, accepted that Pooja's family refused to give their blessings to the intentions of couple to tie a matrimonial chord. In this backdrop, question that arises is as to whether both of them wanted to marry even if Pooja's parents and family members did not approve of the alliance and they got married in the manner mentioned by the appellant in his statement under Section 313 of the Cr.P.C.

The story put forth by the appellant is plausible. As per him, Pooja was subjected to physical abuse and beatings and was, in fact, mercilessly beaten even on the day of incident. When she was madly in love with the appellant and wanted to marry him, there is a possibility that after receiving such kind of shabbily treatment at the hands of her parents, in anguish she may have decided to revolt and, therefore, proposed to the appellant, that they should get married for which they chose a secluded place. This fact cannot be wished away that from the place of the incident, bare essentials necessary for a marriage which a couple would like to perform in such circumstances, have been recovered. These are in the form of garlands, bangles, bindi, sindoor etc. Thus, the appellant and the decease got married in such a charged atmosphere. After the marriage was performed, Pooja might have started thinking as to what would lie ahead. Knowing the adamant, stiff and belligerent attitude of her family, she might have realised that in no case this marriage would be accepted in her family. Going by the previous behaviour of her family members, she might have nurtured the apprehension that neither she nor the appellant would be spared by her family members. At this stage, she could have insisted for putting an end to their lives themselves. Such kind of thinking is not unusual in a situation in which the parties were placed, and the mind can work in such a direction. On this hypothesis, it becomes a case of committing suicide by Pooja, as projected by the appellant.

Other hypothesis is equally plausible. Going by the fact that Pooja was in love with the appellant and though she wanted to marry him, she might have told the appellant that because of stiff resistance from her family she would not marry the appellant as she would go by the wishes of the family even when she personally did not approve of this. Such a reaction on the part of a girl to sacrifice her love and accept a decision of her parents, even though unwillingly, is a

common phenomenon in this country. If this was the situation and after she communicated to the appellant her intention not to marry him as she was suffering physical torture because of continuing the said relationship, it may not have been liked by the appellant. It also happens in love that when a man is not able to get a girl which he wants, he may go to the extent of killing her as he does not want to see her alliance with any other person. This might be the motive in the mind of appellant. However, whether events turned in this way is anybody's guess as no evidence of this nature has surfaced. It is not even possible for the prosecution to state any such things as whatever actually happened was only known to two persons, one of whom is dead and other is in dock.

Which of the two hypothesis prevails in the present case, is the question? We have to keep in mind that this Court is dealing with a criminal matter where appellant is charged with committing murder of Pooja. Criminal cases cannot be decided on the basis of hypothesis. Another aspect which is to be kept in mind is that it is for the prosecution to prove the guilt of the accused charged for such an offence and that too, beyond reasonable doubt. In a case where there is no eyewitness and, which rests on circumstantial evidence, the prosecution is obligated to prove all those circumstances which leave no manner of doubts to establish the guilt of the accused person, i.e., chain of circumstances must be complete and must clearly point to the guilt of the accused. Chain of continuous circumstances means that all the circumstances are linked up with one another and the chain does not get broken in between. It is now well established, by catena of judgements of this Court, that circumstantial evidence of the following character needs to be fully established:

(i) Circumstances should be fully proved.

(ii) Circumstances should be conclusive in nature.

(iii) All the facts established should be consistent only with the hypothesis of guilt.

(iv) The circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused **(*see State vs. Dr. Ravindra; 1992 (3) SCC 300)*; *Chandrakant vs. State of Gujarat; (1992) 1 SCC 473*.** It also needs to be emphasised that what is required is not the quantitative, but qualitative, reliable and probable circumstances to complete the claim connecting the accused with the crime. Suspicion, however grave, cannot take place of legal proof. In the case of circumstantial evidence the influence of guilt can be justified only when all the incriminating facts and circumstances are found to be not compatible with the innocence of the accused or the guilt of any other person.

Following tests laid down in ***Padala Veera Reddy vs. State of A.P.1*** also need to be kept in mind:

"10. (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, 1 **1989 Supp (2) SCC 706 : 1991 SCC (Cri) 407** should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only e consistent with the guilt of the accused but should be inconsistent with his innocence."

Sir Alfred Wills in his book ***Wills' Circumstantial Evidence*** (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence:

"(1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;

(2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;

(3) in all cases, whether of direct or circumstantial evidence, the best evidence must be adduced with the nature of the case admits;

(4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and

(5) if there by any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."

In the present case, the circumstances which have been weighed by the courts below in arriving at the finding of guilt of the appellant are the following:

(i) The appellant and deceased were alone together in a lonely house belonging to a third party which were lying vacant and was at the advance stage of construction.

(ii) Post-mortem report suggested that cause of death of Pooja was Asphyxia and ligature marks were found over her neck.

(iii) Though, both the appellant and Pooja consumed copper sulphate, the quantity consumed by the appellant was much less because of which he was in

full senses and he could go out and draw attention of a neighbour towards the incident by pelting stones at his house.
(iv) When the condition of Pooja, as a consequence of consuming poison, had deteriorated there was no reason for her to hang herself.
(v) The High Court has queried as to how could a lonely girl after consuming poison fathom strength to hang herself.
(vi) The statement of the appellant that Pooja herself brought copper sulphate from the place in which they were housed was highly unbelievable. The High Court has queried that being a stranger in the house of a third person how she could arrange it.
(vii) Since in the said house only Pooja and the appellant were there, it is the appellant who was supposed to explain the circumstances because of the legal position contained in Section 106 of the Evidence Act, which the appellant has failed to do.
(viii) We may remark, at the outset, that observation of the High Court that the appellant did not discharge the burden cast upon him by virtue of Section 106 of the Evidence Act is not correct. The appellant has given his explanation to each and every circumstance in his statement under Section 313, Cr.P.C. He has also cross-examined the prosecution witnesses on this aspect. Apart from his own oral statement, there could not have been any other evidence and it was not possible for him to produce any other witness as well, when this fact is accepted that there was no third person available. It would be a different issue as to whether his statement is worthy of any credence and that aspect shall be discussed later at an appropriate stage. What is emphasized here is that primary burden always remains on the prosecution to establish the guilt of the accused, which is not only cardinal principle of the criminal jurisdiction, but also enshrined in Section 101 of the Evidence Act.

Therefore, in the first instance, the matter needs to be examined from the angle as to whether the prosecution has been able to prove the guilt. While doing so, it can be discussed as to those facts which were within the special knowledge of the appellant, whether his explanation in this behalf is convincing or not.

Having said so, we would like to start with the purported suicide note (Ex. P-3) as that is the most material piece of evidence if that is in fact the suicide note of deceased, no further discussion is needed because it is sufficient to prove the innocence of the appellant. It is not in dispute that this note was found in the notebook belonging to Pooja. It was found at the time of inquest proceedings and was specifically taken into possession by the Police Officer (PW-16). The said

suicide note is discarded by the courts below believing the statements of mother, father and aunt of deceased to the effect that it is not in the handwriting of Pooja. While taking this course of action, both the courts below conveniently ignored the pertinent statement made by Investigating Officer, Suresh Saini (PW-16) that "it is correct that none of witnesses told me that this that (*sic.)* Ex P-3 suicide note is not in the handwriting of Puja alias Daisy. Witnesses stated that it is in the handwriting of Puja only."

Thus, when the suicide note was recovered in the presence of PW-12 (father of the deceased) and was seized by the I.O. at that point of time, family members of Pooja did not deny that the same was not in the handwriting of the deceased. On the contrary, this very I.O. has further mentioned in his deposition that these witnesses had stated that this note was in the handwriting of Pooja only. Following deposition of PW-12 in this behalf, in fact, clinches this aspect of the issue: "Word Daisy written in suicide note Exh. P.3 regarding which I ensured from witnesses and from the investigation that this Daisy is another name of Puja. It is correct that no witness told me this about Exh. P.3 suicide note that it was not in the handwriting of Puja alias Daisy. Witnesses stated that it is in the handwriting of Puja only. It is also correct that none of witnesses Manju Bhatnagar, Pramod Bhatnagar, Devender Mohan Bhatnagar, Pramila told me that Daisy is not the other name of Puja and none of the aforesaid witnesses denied the fact of Exh. P-3 written in the handwriting of Puja. I conducted investigation till the time of getting suspended on 14.02.1996. It is correct that commission of offence found under Section 306 IPC till the time of arrest of accused and he was arrested under this Section only. It is correct that after arrest of accused supplementary statement of Smt. Pramila Bhatnagar were taken on 23.12.1995 and kept in the file. It is correct that after recording supplementary statement of Pramila Bhatnagar, same were kept in the file. It is correct that Pramila Bhatnagar admitted in her statements that Exh. D-6 Exh. D-11 are in the handwriting of Puja. I do not remember that I had asked Pramila Bhatnagar or not regarding handwriting of Exh. P.3 that this handwriting is of Puja."

[Emphasis supplied]

In view of the above, statements of the family members of deceased in the court to the effect that Ex.P-3 was not in the handwriting of the Pooja does not inspire confidence and appears to be an afterthought. In fact, it appears that there was no controversy regarding this aspect in the mind of I.O. It is for this reason that neither any effort was made to have the comparison of the writing on Ex. P-3 with the admitted handwriting of Pooja nor was any expert opinion taken

thereupon. In any case, this appears to be a big flaw in the investigation inasmuch as even if there was any controversy, such an evidence should have been collected by the prosecution. Failure to do so, coupled with the statement of I.O. leaves no manner of doubt Ex. P-3 is in the handwriting of Pooja. That is sufficient to hold that it was a case of suicide and not murder. It may also be mentioned that after collecting the aforesaid evidence, the I.O. had initially charged the appellant with the offence under Section 306, IPC, i.e., abetment to suicide. This is sufficient to extend the benefit of doubt to the appellant.

That apart, conduct of the appellant on the day of incident, when examined in the aforesaid background, creates a dent in the prosecution case. In this behalf, the learned counsel for the appellant drew our attention to the following acts of the appellant on that day.

The deceased and appellant had gone to the place of incident together. It is not even the case of the prosecution that appellant abducted deceased and forcibly took her to the place of incident. This can also be seen in light of prior affair of the parties.

Since the parties are in love with each other and families are against it, they decided to get married. It is established that deceased was wearing bindi, make-up, sindoor (vermillion) and 12 red bangles. From the place of incident from the place of incident following articles were removed – Bindi, Vermillion, bangles, rose garland, make up material, metal glass, one tumbler containing copper sulphate water, fruit juice (8-9/AD).

Both appellant and deceased thereafter consumed poison however, the appellant stopped short whi8le drinking poison and wanted to be alive. The appellant made effort to save deceased and came out of the house, raised alarm, and called for help from PW-4 – Vinod Gupta (neighbour) and told him to call his brother – Ashok. PW-4 in addition to Ashok, also called PW-1 (owner of the house where incident took place). The said facts are corroborated by PW-4 and PW-1.

The appellant made sure that deceased was taken to hospital for save her. The said fact is corroborated by the statement of Pw-13 – Karni Singh – who stated that he took appellant and deceased to the hospital. PW-13 also stated that Ashok told him appellant and deceased had affair.

If appellant's intention was to commit murder of the deceased and escape, he could have just left the deceased at the spot and deceased would have died of poisoning. It was pointless and futile for appellants to additionally hang deceased. Moreover, if such was the intention of the appellant, he would not have called for help or raised alarm with neighbours. The appellant also would not have committed t he murder in the place where he worked and operated from.

If appellant's intention was to commit murder, he could have run away from the spot of incident as admittedly, there is no eyewitness of the whole incident.

If appellant's intention was to commit murder, he would not have directed his brother – Ashok to call for deceased's parents, which he admittedly did.

Admittedly appellant also consumed poison and was in hospital for 50 days. Appellant is also convicted for Section 309 IPC for attempting to commit suicide.

We have pointed out above that the High Court had made two observations as reasons in support of the conclusion that it is the, appellant who committed murder**.** First reason was that it was highly unbelievable that Pooja could arrange the poison from a house belonging to a stranger. Second reason was that after consuming poison, a lonely girl could not fathom strength to hang herself. These are mere conjectures. There had to be a positive evidence that the appellant had administered poison to the deceased, which is missing. Moreover, following circumstances are assumed by the High Court, which are again unwarranted.

"i. Deceased might have fallen in love with appellant while she was a teenager, but at the age of 23 years having ambition to become IAS officer, it cannot be believed that she wanted to marry appellant.

ii. Possibility cannot be ruled out that appellant was desperately wanting to marry deceased and took her lonely place. When deceased did not agree, appellant first offered poison with Thums-up and later ties cable wire to the neck of the deceased and pushed her head on the wall. The appellant later put vermillion and bangles on the body of the deceased."

Coming to the cause of death, learned counsel for the appellant had argued before us, as well as in the High Court, that as per Modi's Medical Jurisprudence & Toxicology there are 16 main distinctions in death caused by hanging or

strangulation. According to medical evidence second ligature mark was ending towards back of the neck and it was oblique going upwards and ligature mark was shining. The hyoi bone was intact there was no fracture of larynx and trachea. There were no scratches, abrasions and bruises on face, mouth and ears. There were no abrasions and ecchymosed around about the edges of ligature mark. Subcutaneous tissues under ligature mark were white, hard and glistering. There were no injuries to muscles of neck. The saliva was dribbling. If the death would have been strangulation then fracture of larynx and trachea and hyoi bone was a must there should have scratches abrasions and fingernail marks and bruises on the face neck and other parts of the body. Saliva would not have dribbling, ligature mark would have been horizontal and not oblique it would have lower down in the neck and not upwards to the chin. There should have been abrasions and ecchymosed round about the edges of the ligature marks. Subcutaneous tissues should have ecchymosed there should have been some injuries to muscles of neck carotid arteries, internal coat should have been ruptured, whereas there was no such rupture. The prosecution failed to prove that the cause of death was homicidal. Dr. S.K. Pathak (PW-3) did not say that death was homicidal in nature. Post-mortem Report (Ex. P-4) also does not say that it was homicidal.

This aspect is not even dealt with by the High Court. Further, the alleged weapon, i.e., cable wire was not sent to CFSL and to any scientific laboratory to confirm fingerprints of the appellant. All the aforesaid factors amply demonstrate that the prosecution has not been able to bring out and prove the guilt of the appellant beyond reasonable doubt. There are lurking doubts in the story of the prosecution and many missing links which are pointed out above.

In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances shall be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

We are, therefore, of the opinion that prosecution has not been able to prove the guilt of the appellant beyond reasonable doubt. As a consequence, this appeal is allowed setting aside the conviction of the appellant under Section 302 of the IPC. The appellant shall be released forthwith, if not wanted in any other case.

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7. Sections 8,62,63 & 73 of the Contract Act

Kanchan Udyog Limited Versus United Spirits Limited

Navin Sinha, J.

In the Supreme Court Of India

Date of Judgment-19.06.2017

Issue

In the matter of termination of agreement and claim for damages.

The appellant's suit, C.S. No.839 of 1990, for damages and wrongful termination of contract, was decreed by the learned Single Judge on 02.12.1999. It has been reversed in appeal preferred by the respondent, on 14.01.2005 in APD No.14 of 2000, and the suit dismissed.

The appellant entered into an agreement with the respondent for establishment of a non-alcoholic beverages bottling plant at Dankuni, West Bengal, and sale under the respondent's trade mark, 'Thrill', 'Rush', 'Sprint', and 'McDowell's Sparkling Soda.' The respondent provided technical consultancy for establishment of the plant, incorporated in the Project Engineering Services Agreement dated 11.09.1985. A Bottler's agreement dated 26.10.1985 was separately executed, valid for ten years with a renewal option, containing the respective rights and obligations of the parties, along with a Marketing agreement. The concentrate (Essence), for preparation of the non-alcoholic beverage, was to be supplied by the respondent. The beverage was to be sold in specified districts of West Bengal, as provided for in the marketing agreement.

The appellant, on 15.12.1985 applied for loan, Exhibit 'C', to the West Bengal Industrial Development Corporation (hereinafter referred to as 'the WBIDC') for establishment of the bottling plant at an estimated cost of Rs.226.80 lakhs. In accordance with procedures, it was processed by the West Bengal Consultancy Organisation Ltd. (hereinafter referred to as 'WEBCON'), which independently prepared a techno-economic feasibility report, 'Exhibit F1'. Loan was then advanced to the appellant by the WBIDC, and the West Bengal State Financial Corporation. Commercial production commenced on 01.01.1987. The bottler's agreement was terminated by the respondent on 16.03.1988. Commercial production at the plant ceased in May, 1989, and the suit was instituted by the appellant in 1990. The learned Single Judge decreed the Suit, awarding damages for Rs.2,73,38,000/- towards loss of anticipated profits, and a sum of Rs.1,60,00,000/- towards costs for installation of the plant, after deducting Rs.9.05 lakhs payable by the appellant to the respondent as consultancy charges. The respondent was held liable to pay to the appellant a

sum of Rs.4,24,33,000/- with interest @ 10% from the date of suit till payment. The Division Bench in appeal reversed the decree, and dismissed the Suit.

Sri Paras Kuhad, learned senior counsel appearing for the appellant, submitted that the bottler's agreement valid for ten years, was terminated unilaterally and prematurely by the respondent on 16.03.1988, contrary to clause 26 of the agreement. The appellant had never denied performance of its obligations under the agreement. The appellant had not signed and returned the termination letter, in acceptance, as reiterated by the respondent on 25.07.1988. The appellant did not sign any fresh agreement with M/s. Venkateswara Essence & Chemicals Pvt. Ltd. (hereinafter referred to as 'VEC') for supply of concentrates by it, in lieu of the respondent. The acceptance of concentrates by the appellant directly from M/s. VEC for a short time span, under clause 5 of the agreement, cannot be construed either as novation of the original contract under Section 62 of the Indian Contract Act (hereinafter referred to as 'the Act'), or acquiescence to any new arrangement by substitution of a new contract. It was an act done under compulsion, and not voluntarily. A novation of contract, can take place only by mutual consent in a tripartite arrangement. In absence of any fresh tripartite agreement executed between the parties, it is futile to contend novation. The respondent also continued to deal with the appellant under the original agreement, even while it sought to persuade the appellant to sign the fresh agreement.

The respondent was the domain expert. Relying on its assurance, the appellant had made a business investment. A reasonable profit was, therefore, naturally expected. The loss of anticipated profits was due to the failure of the respondent to provide adequate aggressive marketing and advertisement support under the bottler's agreement, in an extremely competitive market. The assumption of the respondents that there existed a market for their brand products 'Thrill', 'Rush', 'Sprint', was totally misconceived, believing in which the appellant had made the investment. A party committing breach of contract, was liable for such damages as are estimated as not unlikely to result from the breach, at the time of making of the contract. The appellate court erred in relying upon future events, to hold that the appellant could not be foreseen to earn profits. Any temporary difficulties that the appellant may have had in its own operations, were not insurmountable, and could have easily been overcome, if the respondent had facilitated smooth running of the business and earning of profits thereby. The claim for damage was required to be assessed by a broad estimation, taking into consideration all significant factors, evaluating the

chances for earning profit, and not determination of actual profitability. Reliance was placed on ***Wellesley Partners LLP v. Withers LLP***, (2015) EWCA Civ 1146.

The claim for loss of anticipated profits was not based on the WEBCON report, 'Exhibit F1'. Neither was it based on 'Exhibit W1', the report prepared by Dr. Baisya, the then technical survey manager of the respondent. It was based on Exhibit 'C', the loan application submitted by the appellant to the WBIDC along with enclosures, containing details of profitability, cash flow, cost of production and estimation of sales. It was prepared with the assistance of Dr. Baisya, duly proved by Sri Binod Khaitan of the appellant. The appellate court did not express any reservation about the sufficiency of proof regarding the document. The fact that it may not have been established to the satisfaction of the court, that it was jointly prepared with Dr. Baisya, does not detract from its contents or admissibility of the same. The agenda notes of the meeting of WBIDC dated 19.02.1986 which considered the profitability projections based on its own market survey report, was also duly proved by the appellant's witness Sri Binod Khaitan. The original minutes, and the application for financial assistance had been summoned by the court from WBIDC by subpoena. These were cumulatively sufficient to assess estimated loss of production and the profitability that would have accrued if the business had remained operational. This loss of profitability was therefore clearly in contemplation of the parties at the time of entering into the contract, and which alone would be the relevant date for assessment of claim for damages. The breach by the respondent of the bottler's agreement was the direct cause for loss of anticipated profits. Alternately, the causation had to be determined in a holistic manner by a cumulative assessment. The claim for loss of profitability is based on gross profits, and not net profits, as in that event several heads of claims regarding expenses would automatically get covered. The Project Services Agreement demonstrates that success of the business was primarily the responsibility of the respondent, dependent on the fulfillment of its obligations.

The appellant had taken all reasonable steps for mitigation of damages as available to it, by exploring alternate use of its bottling plant by other bottlers, including sale of the plant, relying on the Explanation to Section 73 of the Act. The appellate court, despite noticing the efforts made by the appellant, erred in applying the test for success of the endeavor, instead of the endeavour made. The appellant was not expected to take such steps involving unreasonable expenses, risk or injury to itself. The respondents were required to affirmatively demonstrate that the appellant had acted unreasonably, despite availability of

opportunity, in its duty to mitigate the loss. Reliance was placed on ***M. Lachia Shetty & Sons Ltd. vs. Coffee Board, Bangalore***, (1980) 4 SCC 636. Even if the respondent were to succeed on this aspect, the only consequence would be in the matter for computation of damages only, and not its denial completely.

The bottling plant set up by the respondent under the Project Services Agreement was specific to their product and needs. It was not saleable in open market. The investment of Rs.2.52 crores in establishment of the plant, by the appellant, was borne out from its balance sheets. The learned Single Judge erroneously awarded Rs.1.60 crores only. It has been unjustifiably set aside in appeal. The claim for establishment cost of the plant, and loss of anticipated profitability, do not constitute a double claim for damages. Capital cost was claimed towards cost of the plant, it having become non-operational and stood scrapped. Loss of profitability was confined to loss of net profits that would accrue by operation of the plant. The claim for costing, including the capital cost of the project, and profitability are distinct issues. If the plant had remained operational, the investment cost and profitability both would have accrued.

Sri Jaideep Gupta, learned senior counsel appearing for the respondent, referring to clause 7 of the bottler's agreement, submitted that it was not a business partnership agreement. The appellant was unable to run its business for more than one reason, attributable to it alone. The change in excise regime dated 22.09.1987, made it an economic compulsion to route concentrates through M/s. VEC to avoid higher excise duty, which in turn would affect the price and saleability of the product, ultimately to the detriment of the appellant itself. At the Bangalore meeting, twelve out of fourteen bottlers, agreed for the new arrangement. The appellant also started to place orders and received concentrates directly from M/s. VEC from April 1988 but abruptly stopped doing so in May, 1989. The claim for damages was raised belatedly only thereafter by filing the suit in 1990, and after the appellant had shut down the plant because of its own inability to run the business. There had been no breach by the respondent. The original agreement underwent a novation *sub silentio*, in the facts of the case, under Sections 8 and 62 of the Act, even if it had not been formally reduced to writing. Reliance was placed on ***McDermott International Inc vs. Burn Standard Co. Ltd. & Ors.***, (2006) 11 SCC 181. Alternately, if the supply of concentrates was accepted by the appellant from M/s. VEC in view of clause 5 of the bottler's agreement, there had not been any termination of the contract by the respondent. The appellant had further acquiesced to the new

arrangement for supply of concentrates, and by its conduct had waived the claimed legal rights under the bottler's agreement.

The termination of the contract was not the causation or dominant cause for loss of anticipated profits. Reliance was placed on ***Galoo Ltd. & Ors. vs. Bright Grahame Murray & Anr.***, (1994) 1 WLR 1360. The appellant rested its claim for loss of expected profitability before the High Court on Exhibit 'F1' and W1', but failed to prove both the documents in accordance with law. In the present appeal, for the first time, it was now being claimed on the basis of Exhibit 'C'. Annexure 'M' to the plaint, the claimed loss of profitability is only a reproduction of Exhibit 'C'. The latter has already been the subject of independent consideration in Exhibit 'F1' the WEBCON report. The appellant failed to prove that Exhibit 'C' was prepared jointly with Mr. Baisya. There was absolutely no material to demonstrate any real or substantial chance for earning profit by the appellant. Profit projections made in a loan application for viability of a project to avail finance, are mere speculative assumptions and cannot be a yardstick to claim loss of anticipated profits. The appellant also failed to take steps to mitigate its losses under Section 73 of the Act for 'remedying the inconvenience caused' by the breach either by utilisation of the plant for bottling by others, availing concentrates from M/s. VEC or selling the plant immediately after closure in May, 1989 to fetch a higher rate, but did so belatedly in 1996. Reliance was placed on ***M/s. Murlidhar Chiranjilal vs. M/s. Harishchandra Dwarkadas & Anr.***, (1962) 1 SCR 653 and ***Payzu v. Saunders***, (1919) 2 KB 581.

The appellant cannot claim both reliance loss with regard to the investment in establishment of the plant, and expectation loss with regard to anticipated profitability from the plant, simultaneously. If no profit was likely to accrue from the plant, award of reliance loss would confer a windfall on the appellant and would increase the damages in proportion to the appellant's own inefficiency rather than in gravity of the breach and offend the principles of causation. Reliance was placed on Pollock and Mulla, 14th edition, ***Cullinane vs. British Rema Manufacturing Co. Ltd***., (1954) 1 QB 292 and ***C&P Haulage vs. Middleton***, (1983) 3 All ER 94. The respondent cannot be made the undertaker for the inability of the appellant to run its business profitably for lack of sufficient business acumen. The award of Rs.1.60 crores towards establishment cost of the plant is also erroneous. It does not take into consideration the depreciation of the plant, and assigns no reason for fixation of the quantum.

We have considered the submissions. The learned Single Judge referring to Section 73 of the Act, on basis of the averments made in the plaint, allowed the claim for loss of anticipated profits relying upon Exhibit 'F1', the WEBCON report, and Exhibit 'W1', the report prepared by Dr. R.K. Baisya, holding that the respondent having committed breach of the agreement, was obliged to put the appellant in the same position by grant of compensation, as the appellant would have been if the contract had been performed. The appellant was also entitled to cost of the plant, as it was useless for any other purpose. The appellant was unable to mitigate its damages as the product did not find acceptability, and the efforts of the parties to persuade Pepsi and Coca Cola to utilise the bottling plant, also came to naught. The appellant was awarded Rs.2,73,38,000/- towards loss of anticipated profits for ten years and a sum of sum of Rs.1.60 lakhs towards the cost of plant, being the price it fetched in the auction sale to Cadbury-fry by the West Bengal Financial Corporation. A negative finding was returned in one line, on the issue if the suit was barred by waiver and acquiescence, without any discussion.

The appellate court examined the copious oral and documentary evidence in detail, and has rendered reasoned findings. It was held that Exhibit 'F1' and Exhibit 'W1' had not been proved in accordance with law, and therefore, were inadmissible in evidence. Serious doubt was expressed, for reasons discussed, if the latter had even ever been tendered in evidence, holding that the two documents could not form the basis for awarding damages for loss of anticipated profits. We need not deliberate on the issue any further, as in appeal before us, the appellant has pressed the claim only on basis of the loan application, Exhibit 'C', submitted by it to the WBIDC. Annexure 'M' to the plaint, the claim for loss of anticipated profits was held to be a reproduction of Exhibit 'C'. The WEBCON report, Exhibit 'F1' was based on independent assessment including consideration of Exhibit 'C'. The primary document, Exhibit 'F1' not having been proved, any assumptions in Exhibit 'C' already considered in the latter, could not be the basis for a profit projection. There was no evidence in support of the claim that Exhibit 'C' had been prepared in association with Dr. R.K. Baisya. No adverse inference could be drawn against the respondent and it was for the appellant to have summoned Dr. Baisya as a witness to prove its case, since he had since resigned and left the Company.

Contrary to the claim of the appellant, that the plant would be a profitable enterprise in the second year of its operation ending March, 1988, the appellant itself acknowledged in its letter dated 09.05.1988, that the appellant would make

losses in the next six years upto 1992-93, requesting for supplies of concentrates on credit for five years. The business of the appellant failed to take off due to lack of business acumen, its inability to manage its own finances, and failure to deploy manpower distribution in accordance with its own projections in the loan application submitted by it to the WBIDC. The respondent had provided sufficient advertising and marketing support to the appellant, and its expenditure for the same was far in excess of that made by the appellant, whose bank account reflected severe lack of financial resources, leading to its inability to make payments to its bottle suppliers, for the concentrates, consultancy fees etc.

In the bottlers conference on 15.10.1987 at Bangalore, consequent to the new excise regime, twelve out of fourteen bottlers had agreed to the new arrangement for supply of concentrates by M/s VEC, instead of the respondent. The appellant also placed orders on M/s VEC, and received supplies of concentrates directly from March, 1988 till January, 1989 even while it continued to avail marketing services from the respondent also. Thus business relations continued between the parties even after termination of the bottler's agreement.

A unilaterally projected profitability in a loan application, which is a mere assumption, cannot be the basis for assessment of damages especially when the appellant conceded that it would not be in a position to earn profit till 1992-93. No evidence had been led with regard to the actual course of the market for cold drinks during 1987-88, and whether other bottlers had made profits. The appellant had failed to demonstrate any real and substantial chance of earning profit, considering that there was no brand acceptance by the consumers also.

Considering the principle of causation to award loss of anticipated profits by breach of agreement, it was held in the facts of the case, that it was not the result of the breach, but was a composition of various factors like lack of brand acceptance, financial crunch of the appellant and lack of adequate infrastructure by it. The claim for damages was therefore, remote as there was not even a speculated chance for making profit by the appellant.

The appellant had failed to take steps for mitigation of damages. It was the respondent which had pursued matters with Pepsi for utilisation of the appellant's plant. The appellant had failed to satisfy that the proposal could not go through for reasons not attributable to it. Likewise, the further details desired by Coca Cola do not appear to have been furnished by the appellant. Even though

the plant stopped operation in May, 1989 when it was relatively new, no effort was made for sale and/or utilisation of plant till its auction sale in 1996.

Relevant to the discussion, is the bottler's agreement. Clause 7 of the same stipulated that the Company and the bottler were not partners or agents of each other. The bottler was required to make sufficient investment to meet the best quality standards, and satisfy every demand of beverages, within the specified territory by promoting and developing the merchandise in a proper and vigorous manner so as to compete effectively with other competing brands. The availability of trained personnel for the purpose was the responsibility of the appellant. It was required to prepare a marketing programme before October of the current year, for the next year. The expenses for advertising and promotional activities would attract the Company's participation and be normally not less than 50% of the agreed quantum. The appellant was also at liberty to develop its own promotional campaigns locally. The agreement thus contained the mutual rights and obligations. Though the appellant contends lack of adequate advertising and market support by the respondent, nothing has been demonstrated with regard to the steps taken by it to fulfill its obligations under the agreement. This assumes relevance in view of findings of the appellate court, regarding the financial crunch faced by the appellant, its failure to pay suppliers of concentrates and bottles, requesting for deferred payment of the same, the request not to insist on payment of consultancy fees, and inability to deploy sufficient manpower as per its own projection contained in the loan application on which it seeks to rely.

Clause 5 of the bottler's agreement provided for supply of concentrates by the respondent, or from such suppliers as shall be nominated by it. Twelve out of fourteen bottlers had agreed at the Bangalore convention on 15.10.1987 to the new arrangement for supply of concentrates through M/s. VEC. The appellant also commenced placement of orders directly and received concentrates from M/s. VEC since 22.04.1988 and continued to do so even after its letter dated 11.01.1989, by placing orders on 08.03.1989 till it finally discontinued after closure of the plant in May, 1989. It is not the case of the appellant, based on evidence, that M/s. VEC failed to supply concentrates, or that it did not meet standards, or was insufficient to meet its marketing obligations, much less that any other of the twelve bottlers had complained in this regard. The bottling of McDowells Sparkling Soda was an entirely different issue and could have been continued by the appellant notwithstanding the controversy regarding the concentrates. The plea of the respondents for novation of the contract referring

to Section 8 and 62 of the Act, *sub silentio* finds support from the observations in ***McDermott International Inc.*** (supra) as follows:

"151. Clause 5 of the contract categorically states that MII was to procure the material which was to be reimbursed by BSCL. The extra amount incurred by MII for procuring materials having extra thickness, therefore, was not payable. To the aforementioned extent, there has been a novation of contract. MII had never asserted, despite forwarding of the contention of ONGC, that it would not comply therewith. It, thus, accepted in sub silentio."

The novation of a contract could take place *sub silentio* was also noticed in ***BSNL vs. BPL Mobile Cellular Ltd.,*** (2008) 13 SCC 597 as follows**:**

"45….. They might have also been held bound if they accepted the new rates or the periods either expressly or *sub silentio*….."

The learned Single Judge framed an issue also with regard to waiver, estoppel and acquiescence, then answered it in the negative in a singular line, without any discussion. Waiver and acquiescence may be express or implied. Much will again depend on the nature of the contract, and the facts of each case. Waiver involves voluntary relinquishment of a known legal right, evincing awareness of the existence of the right and to waive the same. The principle is to be found in Section 63 of the Act. If a party entitled to a benefit under a contract, is denied the same, resulting in violation of a legal right, and does not protest, foregoing its legal right, and accepts compliance in another form and manner, issues will arise with regard to waiver or acquiescence by conduct. In the facts of the present case, the conduct of the appellant in placing orders and receiving supply of concentrates directly from M/s. VEC, for a period of nearly one year, and continuing to do so even after it wrote to the respondent in this regard, without recourse to any legal remedies for denial of its legal right to receive concentrates from the respondent, undoubtedly amounts to waiver by conduct and acquiescence by it to the new arrangement. The plea that it was done under compulsion, and not voluntarily, is devoid of any material, substance and evidence. It is unacceptable and merits no consideration. Alternatively, if it was an assignment under Clause 5 of the agreement, there had been no termination of the contract by the respondent. Waiver by conduct was considered in ***P. Dasa Muni Reddy vs. P. Appa Rao,*** (1974) 2 SCC 725, observing as follows:

"13. Abandonment of right is much more than mere waiver, acquiescence or laches…..Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party

would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. Waiver some times partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question….."

Waiver could also be deduced from acquiescence, was considered in ***Waman Shriniwas Kini vs. Ratilal Bhagwandas & Co.,*** 1959 Supp (2) SCR 21, observing as follows:

"13……Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right. It may be deduced from acquiescence or may be implied…."

Exhibit 'C' was a loan application, submitted by the appellant to the WBIDC. There is no evidence that it was prepared together with the respondent. The intent and purpose of a loan application is entirely different, relevant only for the purpose of the borrower vis-à-vis the lender. The most fundamental characteristic a prospective lender will want to examine in a loan application are assessment of the Credit History of the Borrower, Cash Flow History and Projections for the Business, Collateral that is Available to Secure the Loan and Character of the Borrower. The profitability projections in such an application are only broad estimates based on assumptions and presumptions of the borrower intended to convince the lender of the viability of its project, in absence of which the loan application itself may not be considered. The appellant's projections in it of assumed estimated profitability for viability of the project also went completely awry from its own admission that there was no likelihood of profit in the next 5 to 6 years. Viability of the project for sanction of loan cannot lead to an automatic presumption of profits, in the facts of the case, especially

when there is evidence that the appellant did not even deploy manpower in accordance with the projections made by it in the loan application. It was not sanctioned on basis of the assumption of the appellant for earning profits. The loan was sanctioned by the WBIDC on basis of the techno-economic feasibility report by WEBCON Exhibit 'F1'. The loan application, after consideration, lost its independent identity and got subsumed in Exhibit 'F1'.Annexure 'M' to the plaint containing the projected estimated profitability was only a reproduction of Exhibit 'C'. The primary document was Exhibit 'F1', which took into consideration Exhibit 'C' also. The former being inadmissible in evidence, as not having been proved in accordance with law, the appellant cannot seek to prove indirectly what it has been unable to prove directly. The conclusion of the appellate court that Exhibit 'F-1' being the primary document, the claim for loss of anticipated profits on basis of Exhibit 'C' was unsustainable, cannot be faulted with.

In the facts of the present case, it cannot be held that the breach alone was the cause for loss of anticipated profits, much less was it the primary or dominant reason. The appellate court has adequately discussed the appellant's letter dated 04.07.1987 thanking the respondent for its advertising support. During the year 1986-87, the respondent spent Rs.2,05,13,376.14 for advertising purposes evident from its balance sheet. Similarly, in 1987-88, it spent Rs.1,65,87,158.73 towards advertisement and sale promotions. On the contrary, for the year ending 31.03.1987, the appellant spent Rs.6,68,856.00 towards advertisement and in the year 1987-88 it spent only Rs.39,288.00. The fact that it was unable to pay for the concentrates seeking deferred payment, acknowledgement on 09.05.1988 that it would continue to suffer loss for the next six years upto 1992-93 seeking long term credit for five years for supply of concentrates and its acknowledgement in letter dated 27.04.1987 that due to "many factors already discussed with you we have not been able to run the factory and the sales of our product have not picked up in the market", and not to press for payment of consultancy fees, failure to deploy adequate manpower as per its own projections demonstrates the poor financial condition of the appellant as the prime reason for its inability to run the plant and earn profits. As against a value of Rs.4,26,685.19 of raw materials in 1989, the appellant had an over draft of Rs.13,89,000.00. It had a credit entry of Rs.5,135.00 only in July, 1988 in its account with the State Bank of India. The current account with the Union Bank of India reflected a balance of Rs.1,28,619.25 on 28.03.1989. The Bank balance on 31.03.1989 reflected from its balance sheet was only Rs.43,345.38, and its loss as reflected in the balance sheet on 31.03.1987 was Rs.18,47,018.11. In the facts of the present case, it cannot be held that the breach by the respondent was the cause, much less the dominant

cause for loss of anticipated profits by the appellant. In ***Galoo Ltd.*** (supra) the emphasis was on the common sense approach, holding that the breach may have given the opportunity to incur the loss but did not cause the loss, in the sense in which the word "cause" is used in the law. The following passage extracted therein from Chitty on Contracts, 26th ed. (1989) Vol. 2, pp. 1128-1129, para 1785 may be usefully set out: "The important issue in remoteness of damage in the law of contract is whether a particular loss was within the reasonable contemplation of the parties, but causation must also be proved: there must be a causal connection between the defendant's breach of contract and the plaintiff's loss. The courts have avoided laying down any formal tests for causation: they have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of plaintiff's loss."

Wellesley Partners LLP (supra) itself carves out an exception to the principle that a contract breaker is liable for damage resulting from his breach, if at the time of making the contract, a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach. After noticing The Achilleas (2009) AC 61 it was observed:

"69……The Achilleas shows that there may be cases, where based on the individual circumstances surrounding the making of the contract, this assumed expectation is not well founded.

The observations noticed therein from para 23 and 24 of the ***Parabola case*** (2011) QB 477 are also considered relevant as follows: "23….The next task is to quantify the loss. Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation) taking all significant factors into consideration.
24…..The judge had to make a reasonable assessment and different judges might come to different assessments without being unreasonable. An appellate court will be slow to interfere with the judge's assessment.

The appellate court with reference to evidence has adequately discussed that the appellant failed to take steps to mitigate it losses under the Explanation to Section 73 of the Act. We find no reason to come to any different conclusion from the materials on record. If concentrates were available from M/s. VEC, the appellant had to offer an explanation why it stopped lifting the same after having

done so for nearly a year, and could have continued with the business otherwise and earned profits as observed in ***Payzu Ltd.*** (supra)**.** It could also have taken steps to sell the unit after its closure in May, 1989 rather than to do so belatedly in 1996. No reasonable steps had been displayed as taken by the appellant for utilisation of its bottling plant by negotiations with others in the business. Nothing had been demonstrated of the injury that would have been caused to it thereby.

That leaves the question with regard to reliance loss and the expectation loss. Whether the two could be maintainable simultaneously or were mutually exclusive? In Pullock & Mulla, 14th Edition, Volume II, page 1174, the primary object for protection of expectation interest, has been described as to put the innocent party in the position which he would have occupied had the contract been performed. The general aim of the law being to protect the innocent party's defeated financial expectation and compensate him for his loss of bargain, subject to the rules of causation and remoteness. The purpose of protection of reliance interest is to put the plaintiff in the position in which he would have been if the contract had never been made. The loss may include expenses incurred in preparation by the innocent party's own performance, expenses incurred after the breach or even pre-contract expenditure but subject to remoteness. The following passage from the same is considered appropriate for extraction:

"No Recovery for Both, the Expectation Loss and the Reliance loss." Although the rules as to damages seek to protect both the expectation and the reliance interests, the innocent party cannot ordinarily recover both expectation loss, viz., loss of profit, and reliance loss, viz., expenses incurred in reliance on the promise; that would involve double counting. He has to choose between the two measures. However, he cannot claim reliance losses to put himself in a better position that if the contract had been fully performed: else, the award of damages for reliance losses would confer a windfall on the plaintiff, and would increase the damages in proportion to the claimant's inefficiency in performance, rather than in proportion to the gravity of the breach, and probably of normal principles of causation. In such cases, therefore, the plaintiff can recover the loss on account of the wasted expenditure or outlay only to the extent of the expected gain; and the onus of proving lies on the party committing the breach to show that the reliance costs (or any part of them) would not have been recouped, and would still have been wasted, had the contract been performed."

In **C & P Haulage** (supra), which considers **Cullinane** (supra) also, it has been observed as follows: "The law of contract compensates a plaintiff for damages resulting from the defendant's breach; it does not compensate a plaintiff for damages resulting from his making a bad bargain. Where it can be seen that the plaintiff would have incurred a loss on the contract as a whole, the expenses he has incurred are losses flowing from entering into the contract, not losses flowing from the defendant's breach. In these circumstances, the true consequence of the defendant's breach is that the plaintiff is released from his obligation to complete the contract-or in other words, he is saved from incurring further losses. If the law of contract were to move from compensating for the consequences of breach to compensating for the consequences of entering into contracts, the law would run contrary to the normal expectations of the world of commerce. The burden of risk would be shifted from the plaintiff to the defendant. The defendant would become the insurer of the plaintiff's' enterprise. Moreover, the amount of damages would increase not in relation to the gravity or consequences of the breach but in relation to the inefficiency with which the plaintiff carried out the contract. The greater his expenses owing to inefficiency, the greater the damages."

In view of the conclusion, that the appellant was not entitled to any expectation loss towards anticipated profits, for reasons discussed, any grant of reliance loss would tantamount to giving a benefit to it for what was essentially its own lapses. There are no allegations of any deficiency in the plant. Contrary to its claim of Rs.2.52 crores towards cost of the plant, the learned Single Judge awarded Rs.1.60 crores without any discussion for the basis of the same. Though the appellant had preferred a cross appeal, it did not press the same.

The aforesaid discussion leads to the inevitable conclusion that the appellant had failed to establish its claim that the breach by the respondent was the cause for loss of anticipated profits, that the profitability projection in its loan application was a reasonable basis for award of damages towards loss of anticipated profits. The appellant had failed to abide by its own obligations under Exhibit 'C' and lacked adequate infrastructure, finances and manpower to run its business. It also failed to take reasonable steps to mitigate its losses. The appeal lacks merit and is dismissed.

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