O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2017

(*MARCH*)

Odisha Judicial Academy, Cuttack, Odisha

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

	***(v)* O.C.H. & P.F.L. Act**			
16.	*Sadasiva Panda Versus Prajapati Panda And Another* ***In the High Court of Orissa.***	***Section 34, 34(2), 35(1) of the Orissa Consolidation of Holding and Prevention of Fragmentation of Land Act .***	***Date of Judgment - 03.03.2017***	***55-60***

****

2. Order 21 Rule 22(2) ,Rule 23&Rule 64 of CPC
Order 47Rule (1) of CPC

Rita Mohanty and another Versus Mamata Kumari Sasmal and others.

Dr. A. K. Rath , J.

In the High Court Orissa.

Date of Judgment- 03.03.2017

Issue

No objection filed to the executability of the decree before the order, but filed subsequently is barred by constructive res judicate – Discussed.

Relevant Extract

The mother of the petitioners, Chanchal Behera as plaintiff instituted the suit for permanent injunction impleading the opposite parties as defendants. The defendants filed a counter claim for a decree of mandatory injunction against the plaintiff directing her to remove encroachment from the suit land. The suit and counter claim were tried by the learned Civil Judge (Junior Division), 2nd Court, Cuttack. The suit was dismissed, whereas the counter claim was decreed. Aggrieved by the judgment and decree, the plaintiff filed R.F.A.No.54 of 2004 and R.F.A.No.55 of 2004 before the learned 2nd Additional District Judge, Cuttack, which were eventually dismissed. Thereafter she filed Review Petition No.7 of 2009 under Order 47 Rule 1 C.P.C. to review of the judgment. The same was dismissed. While the matter stood thus, the D.Hrs. levied Execution Case No.3 of 2010. Notice was issued to the judgment debtor under Order 21 Rule 22 C.P.C., but she did not file any objection. Thereafter the D.Hrs. filed requisite for issuance of writ for delivery of possession. They also filed an application for appointment of Civil Court Commissioner. The learned trial court held that on 8.10.2012 the J.Drs.no.5 and 7 appeared. They took several adjournments for filing of objection. Since no objection was filed, the case was posted for taking steps by the D.Hrs. On 25.8.2014 the D.Hrs. filed PCR bearing No.918 dated 25.8.2014 towards the drummer cost along with a petition for appointment of Civil Court Commissioner. The J.Drs. had an opportunity to file objection. Since no objection has been filed to the executability of the decree before the order of allowing the D.Hrs. for depositing cost towards drummer cost, the objection filed subsequent thereto must be deemed to be barred by res judicata. This petition challenges the order dated 4.9.2014 passed by the learned Civil Judge

(Jr.Division), 2nd Court, Cuttack in not accepting the objection of the J.Drs. no. 5 and 7 to the Execution Petition No.3 of 2010. In the instant case, the defendants had unsuccessfully challenged the judgment and decree of the learned trial court before the learned 2nd Additional District Judge, Cuttack, which were eventually dismissed. The said judgments had attained finality. Pursuant to issuance of notice, the J.Drs. entered appearance on 8.10.2012. They took successive adjournments for filing objection. On 16.12.2013 a memo was filed the J.Drs. that they had removed the encroachment. On 1.7.2014, it was brought to the notice of the Court by the D.Hrs. that encroachment had not been removed. On 25.8.2014, D.Hrs filed PCR No.918 dated 25.8.2014 evidencing deposit of drummer cost along with one petition to appoint Civil Courts Commissioner. The order of the executing court directing the D.Hrs. to deposit the drummer cost amounts to an order under Rule 23 for executing the decree. No objection therefore having been filed to the executability of the decree before that order, the objection filed subsequent thereto must be deemed to be barred by the principle of constructive res judicate.

Before parting with the case, it is apt to refer the decision of the apex Court in the case of Bhavan Vaja case. It was held: "19. It is true that an executing court cannot go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree it can and in appropriate cases, it ought to take into consideration the pleadings as well as the proceedings leading up to the decree. In order to find out the meaning of the words employed in a decree the court, often has to ascertain the circumstances under which those words came to be used. That is the plain duty of the execution court and if that court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it."

xxx xxx xxx"

The learned court below shall keep in view the enunciation of law laid down by the apex Court in Bhavan Vaja (supra) while executing the decree. In the result, the petition, being devoid of any merit, is dismissed. No costs.

* * * * * * *

3. Order 26 Rule 9 of CPC

Benudhar Mohapatra & Others Versus Collector Cum District Magistrate ,Nayagarh & Others ***.***

Dr. A. K. Rath ,J.

In the High Court of Orissa.

Date of Judgment -03.03.2017

Issue

In the matter of provision under Order 26 Rule 9 of PC regarding appointment of Civil Court Commissioner and the requirements of law therefor.

Relevant Extract

The petitioners as plaintiffs instituted Civil Suit No.05 of 2011 in the court of the learned Civil Judge (Junior Division), Nayagarh for declaration of right, title and interest and correction of settlement map. Pursuant to issuance of summons, defendants entered appearance and filed written statement denying the assertions made in the plaint. In course of hearing of the suit, the plaintiffs filed an application under Order 26 Rule 9 CPC for appointment of a civil court commissioner to answer the following questions;

"A) Whether the Hal Settlement Map of disputed land is prepared in accordance with the Hal Settlement R.O.R. of village Sinduria of the plaintiffs;

B) Whether the Hal Settlement Map is prepared in accordance with Sabik Settlement Map of the disputed land;

C) Whether the disputed land of the plaintiffs measuring Ac.1.39 decimals has been reduced by Ac.0.14 decimals in the Hal Settlement Map;

D) Whether the area of disputed "Nayan Jori" situates to the immediate; western portion of disputed land the Hal Settlement has been increased in the Hal Settlement Map and not in accordance with Sabik Settlement Map of the disputed land and the Sabik Settlement "Nayan Jori"; E) Whether Ac.0.14 decimals of disputed land of the plaintiff have been amalgamated in the adjoining disputed "Nayan Jori" from the Western portion of the disputed land of the plaintiffs in the Hal Settlement Map."

The defendants filed an objection to the same. Learned trial court held that the answer sought by the plaintiffs in the questionnaires can be adduced by examining the witnesses in the court. The object of local investigation is not to collect evidence. Held so, learned trial court rejected the application.

This petition challenges the order dated 17.11.2016 passed by the learned Civil Judge (Junior Division), Nayagarh in Civil Suit No.05 of 2011. By the said order, learned trial court rejected the application of the plaintiffs under Order 26 Rule 9 CPC for appointment of a civil court commissioner.

The plaintiffs asserted that Radhakrishna Mohapatra, father of the plaintiff nos.1 to 4 and grand father of plaintiff nos.5 to 7, had purchased an area of Ac.1.75 decimals of land appertaining to Sabik Khata No.316, Plot No.405 of Mouza-Sinduria by means of registered sale deed dated 11.5.1964 from one Laxmi Dibya. The same corresponds to Hal Khata No.763, Hal Plot No.1319. He sold an area of Ac.0.36 decimals to different persons. In the hal settlement map, the area has been reduced to Ac.0.14 decimals. The land has been recorded in the name of Road & Building Department. Though the Commissioner Settlement in Revision Case No.343 of 2006 directed the Tahasildar, Nayagarh for correction of map but the same has not been done. Since dispute pertains to measurement of the land, the same can be ascertained by deputing a pleading commissioner. The plaintiffs can adduce evidence with regard to question nos.A to D. Since defendants are the State of Orissa and its functionaries, there is no impediment to appoint an Amin Commissioner to ascertain the question no.E only.

In view of the discussions made above, the order dated 17.11.2016 passed by the learned Civil Judge (Junior Division), Nayagarh in Civil Suit No.05 of 2011 is quashed. Learned trial court shall appoint an Amin Commissioner to submit the report with regard to Question no.E only. The petition is disposed of.

* * * * * * *

4. Order 47 Rule (1) of CPC

Sasi (D) through LRS. Vs. Aravindakshan Nair and Others.

Dipak Misra & Mohan M. Shantanagoudar, JJ.

In the Supreme Court of India.

Date of Judgment -03.03.2017

Issue

Whether delay in disposal of review application which was kept pending for span of four years ,was justified.

Relevant Extract

In this special leave petition, the challenge is to the order dated 9th March, 2012, passed by the learned Single Judge of the High Court of Kerala at Ernakulam in R.S.A. No.345 of 2012 and the order dated 26th October, 2016, passed in Review Petition No.886 of 2012.

A Regular Second Appeal was preferred before the High Court under Section 100 of the Code of Civil Procedure challenging the judgment and decree passed in Appeal Suit No.149 of 2008, which had given the stamp of approval to the judgment and decree passed by the learned Munsiff, Alappuzha in O.S. No.518 of 2003. The learned Single Judge of the High Court dismissed the Second Appeal on 9th March, 2012. The appellant therein filed a review petition under Order 47 Rule 1 C.P.C. on 20th September, 2012. The review was barred by limitation and eventually, the same was not entertained on merits.

We are really not concerned with the entertaining of an application for review with some delay, but what is perplexing is that the review petition preferred in 2012, was kept pending for almost four years and, thereafter, the High Court has dismissed the same by observing that an effort has been made to seek review of the main judgment as if the High Court was expected to exercise appellate jurisdiction while dealing with an application for review.

Order 47 Rule 1 of the Code of Civil Procedure reads as follows:-

"1. Application for review of judgment.-

(1) Any person considering himself aggrieved -

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred.

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation.- The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.

In the case at hand, be it clearly stated, we are really not concerned with the exercise of the power of review and its limitation by the court. We are concerned with the delay in disposal of the application for review which was kept pending for a span of four years.

An application for review, regard being had to its limited scope, has to be disposed of as expeditiously as possible. Though we do not intend to fix any time limit, it has to be the duty of the Registry of every High Court to place the matter before the concerned Judge/Bench so that the review application can be dealt with in quite promptitude. If a notice is required to be issued to the opposite party in the application for review, a specific date

can be given on which day the matter can be dealt with in accordance with law. A reasonable period can be spent for disposal of the review, but definitely not four years. We are compelled to say so as the learned counsel for the petitioner has submitted that there is a delay of 1700 days in preferring the special leave petition against the principal order as he was prosecuting the remedy of review before the High Court. The situation is not acceptable.

We are obliged to observe certain aspects. An endeavour has to be made by the High Courts to dispose of the applications for review with expediency. It is the duty and obligation of a litigant to file a review and not to keep it defective as if a defective petition can be allowed to remain on life support, as per his desire. It is the obligation of the counsel filing an application for review to cure or remove the defects at the earliest. The prescription of limitation for filing an application for review has its own sanctity.The Registry of the High Courts has a duty to place the matter before the Judge/Bench with defects so that there can be pre-emptory orders for removal of defects. An adroit method cannot be adopted to file an application for review and wait till its rejection and, thereafter, challenge the orders in the special leave petition and take specious and mercurial plea asserting that delay had occurred because the petitioner was prosecuting the application for review. There may be absence of diligence on the part of the litigant, but the Registry of the High Courts is required to be vigilant. Procrastination of litigation in this manner is nothing but a subterfuge taken recourse to in a manner that can epitomize "cleverness" in its conventional sense. We say no more in this regard.

We request the High Courts not to keep the applications for review pending as that is likely to delay the matter in every court and also embolden the likes of the petitioner to take a stand intelligently depicting the same in the application for condonation of delay. Let a copy of this order be sent to the Registrar General of each of the High Courts so that it can be placed before the learned Chief Justice/Acting Chief Justice of the High Court to do the needful in the matter.As earlier indicated, the special leave petition has to pave the path of dismissal and accordingly it stands dismissed, both on the ground of delay, as well as also on merits.

* * * * * * *

5. Section 302,323 & 34 of IPC

Dabar Purty and Ors. Vs. State of Orissa

Kumari Sanju Panda & S.N. Prasad, JJ.

In the High Court of Orissa.

Date of Judgment - 02.03.2017

Issue

Conviction for murder –Common Intention-Sentenced to Life Imprisonment with fine –Challenged.

Relevant Extract

The appellants along with seven others faced the trial for commission of offence under Sections 302, 323 read with Section 34 of the I.P.C. having committed murder of one Rala Bandra and causing injury to his wife Pala Dei (informant) on her head and left hand.

The prosecution case as reveals from the record are as follows:-

The accused persons are members of S.U.C.L. and demanded subscription from the deceased-Rala Bandra. He has refused to give such subscription for which they convened a meeting on 28.9.1992 and take serious note for not paying the subscriptions to the party funds. The accused persons in a group on the date of occurrence i.e. 29/30.9.1992 being armed with weapons proceeded to the house of the deceased. While the deceased came out to urinate he was assaulted by the accused persons. Immediately the deceased's wife who is the informant tried to intervene but she was also assaulted by both the appellants on her head and left hand. She found her husband died on being assaulted by accused Patra Singh Janka, Dabar Purty along with other accused persons by means of hard and blunt weapons. As a result of which the deceased sustained severe bleeding injury and fell down succumbed to the injury.

The appellants namely, Dabar Purty and Patra Singh Janka convicted under Section 302 read with Section 34 of the I.P.C. by the learned Sessions Judge, Balasore-Bhadrak in Sessions Trial No. 198 of 1994 arising out of G.R. Case No. 225 of 1992 (S.D.J.M., Udala) by judgment dated 18th July, 1995 and sentenced them to undergo imprisonment for life with a fine of Rs. 2,000/- each in default to undergo a further imprisonment of two months each.

The present appeal is preferred by them challenging the said findings of the trial court. During pendency of the appeal the appellant No. 2-Patra Singh Janka died as informed by learned counsel for the appellants as such the appeal is abated in respect of deceased appellant. The appeal is confined to appellant No. 1-Dabar Purty only.

The appellants along with seven others faced the trial for commission of offence under Sections 302, 323 read with Section 34 of the I.P.C. having committed murder of one Rala Bandra and causing injury to his wife Pala Dei (informant) on her head and left hand.

The court below has considered the affidavit filed by the informant which was marked as Ext. C. The Ext. C is not a substantial piece of evidence as the said affidavit of the informant was not confronted to the deponent in the trial by the prosecution nor opportunity granted to the defence for cross-examination of the deponent. The so called informant died before commencement of the trial without being examined in Court. On that erroneous impression the court below acquitted the other accused persons and convicted the two appellants even though the eye witness P.W. 4 has not named regarding presence of both the appellants on the spot and made specific overt act or assaulted on the deceased. Therefore the finding of the court below is an error of record that P.W. 4 has named the present appellants assaulted the deceased.

P.W. 7 was declared as hostile. However on examination of his evidence on record he has denied the circumstances resulting the death of the deceased at the threshold. It is settled that the evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution treats him as a hostile and cross examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether, but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof. In the present case however the evidence of P.W. 7 cannot be dependable as he has from the inception denied regarding the circumstances resulting death of the deceased so also his presence at the spot.

In view of the above discussion the judgment and sentence passed by the court below is liable to be set aside as the same is not sustainable. Accordingly, we allow the appeal and set aside the order of conviction and sentence passed by the learned Sessions Judge, Balasore-Bhadrak in S.T. No. 198 of 1994. The appellant No. 1-Dabar Purty is acquitted from the charge under Section 302 read with Section 34 of the I.P.C. The appellant No. 1-Dabar Purty being on bail by virtue of order dated 6.8.1996 the said bail bond executed by him stands discharged and he be set at liberty forthwith if his detention is not required in any other crime. Lower Court records along with copy of judgment be sent forthwith to the trial Court for necessary action.

* * * * * * *

6. Section 341 /323/326 read with 34 of IPC

Keshab Bhutia and Ors. Vs. State of Orissa

S.K. Sahoo, J.

In the High Court of Orissa.

Date of Judgment - 10.03.2017

Issue

Revision against the upheld judgment of conviction by the trial Court –Discussed.

Relevant Extract

The prosecution case as per the first information report dated 22.09.1988 lodged by Bhagaban Naik (P.W. 1) before the Officer in charge, Talcher Police Station is that on 04.02.1988 at about 4.00 p.m. while he was returning home from South Balanda, at Deulapasi Chhaka, the petitioners and others wrongfully restrained him and assaulted him as a result of which he lost both his eyes. It is stated that some of the witnesses who saw the occurrence intimated at the house of the informant and accordingly, the wife of P.W. 1 came to the spot and took him to the house and thereafter, the matter was reported at the Police Station but the police officers did not take any action.

On the basis of the first information report, Talcher P.S. Case No. 95 of 1988 was registered under sections 341/326/34 of the Indian Penal Code against the petitioners and others.

During course of investigation, the investigating officer examined the witnesses, visited the spot, consulted the Medical Officer and after completion of investigation submitted charge sheet on 25.11.1988 under sections 341/323/326/34 of the Indian Penal Code.

The learned Trial Court vide impugned judgment and order dated 24.04.1996 found the petitioners guilty of the offences charged and

sentenced each of them to undergo S.I. for a period of one month for the offence under section 341 of Indian Penal Code, R.I. for a period of six months for the offence under section 323 of the Indian Penal Code and R.I. for a period of two years for the offence under section 326 of the Indian Penal Code and the sentences were directed to run concurrently.

The petitioners preferred an appeal in the Court of Session which was heard by the learned Additional Sessions Judge, Talcher in Criminal Appeal No. 29/79 of 1996/2000 and the learned Appellate Court vide impugned judgment and order dated 14.11.2000 has been pleased to upheld the impugned judgment and order passed by the learned Trial Court and dismissed the criminal appeal, hence the revision.

None appears on behalf of the petitioners to argue the matter. A criminal revision petition, once admitted, cannot be dismissed for default but has to be adjudicated on merits. The Code of Criminal Procedure does not contemplate of making an order of dismissal of revision for default. Once the records of the Courts below are called for, the High Court can exercise its powers under section 401 read with section 397 of Cr.P.C. to examine the correctness, legality or propriety of the order, recorded or passed irrespective of the fact whether the counsel for the petitioner is present or not at the time of call of the matter for final hearing. Therefore, with the assistance of the learned counsel for the State, I went through the records, the evidence led in the case, the impugned judgments and the grounds taken in the revision petition to decide the case on merit.

On perusal of the grounds taken in the revision petition, it is found that one ground has been taken that the Station Diary Entry No. 43 dated 04.02.1988, on the basis of which the injury requisition was issued by the

police officer for the medical examination of P.W. 1 to Talcher Sub-divisional Hospital has not been proved in the case. Another ground has been taken that the incident took place on 04.02.1998 and the F.I.R. was lodged on 13.09.1988 and the delay in filing the F.I.R. has not been explained by the prosecution and therefore, the learned Courts below ought to have viewed the prosecution case with suspicion. Further grounds have been taken that two of the Investigating Officers i.e. S.I. Udhav Behera and S.I. Akhaya Kumar Naik as mentioned in the charge sheet have not been examined by the prosecution and for that reason, material contradictions in the evidence of P.W. 1 and P.W. 6 could not be proved and the defence has been seriously prejudiced for such non-examination. Another ground has been taken that the solitary evidence of the injured P.W. 1 cannot be said to be of unimpeachable character as he was involved in seven to eight cases and therefore, the Courts below should not have relied upon his evidence to convict the petitioners.

Now coming to the complicity of the petitioners, as has already been discussed, there is consistent evidence against the petitioners Ratnakar @ Ratha Bhutia and Anukula Naik that they wrongfully restrained the informant while he was coming on his cycle and assaulted him on his eyes as a result of which the informant became blind and therefore, the judgment and order of conviction of these two petitioners by the learned Trial Court for the offences under sections 341 and 326 of the Indian Penal Code which was confirmed by the learned Appellate Court cannot be interfered with. However, for causing the self same injuries to P.W. 1 which are grievous in nature, the two petitioners cannot be convicted also under section 323 of the Indian Penal Code in addition to section 326 of the Indian Penal Code and therefore, the order of conviction under section 323 of the Indian Penal Code is set aside.

So far as petitioners Keshab Bhutia and Sripati @ Pati Bhutia are concerned, the evidence of P.W. 1 is omnibus in nature and no specific overt act has been attributed against any of them and therefore, it is very much risky to convict those petitioners of the offences charged and accordingly, I am inclined to give benefit of doubt to the petitioners Keshab Bhutia and Sripati @ Pati Bhutia and they are acquitted of all the charges.

Accordingly, the Criminal Revision No. 681 of 2000 is allowed. The impugned judgment and order of conviction of the petitioner Sripati @ Pati Bhutia under sections 326/323/341 of the Indian Penal Code is set aside and he is acquitted of all the charges.

So far as Criminal Revision No. 41 of 2001 is concerned, the impugned judgment and order of conviction of the petitioner Keshab Bhutia under sections 326/323/341 of the Indian Penal Code is set aside and he is acquitted of all the charges. So far as petitioners Ratnakar @ Ratha Bhutia and Anukula Naik are concerned, the revision petition is partly allowed. They are acquitted of the charge under section 323 of the Indian Penal Code but their order of conviction under sections 326 and 341 of the Indian Penal Code and the sentence passed thereunder stands confirmed.It appears that the petitioners Ratnakar @ Ratha Bhutia and Anukula Naik are on bail by virtue of the order of this Court dated 16.02.2001 passed in Misc. Case No. 50 of 2001. They are directed to surrender before the learned Trial Court within a period of two weeks from today to serve the sentence imposed on them failing which the learned Trial Court is at liberty to take appropriate steps for their arrest. In the result, Criminal Revision No. 681 of 2000 is allowed and Criminal Revision No. 41 of 2001 is allowed in part.

* * * * * * *

7. Section 376(1) & Section 450 of IPC

Raja @ Rajendra Naik Vs. State of Orissa

S. K. Sahoo , J.

In the High Court of Orissa.

Date of Hearing & Judgment -09.03.2017

Issue

Revision –When conviction by the trial court was partly confirmed and partly set aside by the application –Discussed.

Relevant Extract

The petitioner Raja @ Rajendra Naik faced trial in the Court of learned C.J.M. - cum - Asst. Sessions Judge, Boudh in S.T. No. 03 of 1995 for offences punishable under sections 450 and 376(1) of the Indian Penal Code on the accusation that on 13.05.1994 at about 12.00 noon, he committed house trespass by entering into the house of Kalandi Behera (P.W. 1) in order to commit an offence of rape and also committed rape on the victim "KB" (P.W. 2), the wife of P.W. 1.

The learned Trial Court vide impugned judgment and order dated 28.10.1995 found the petitioner guilty under sections 450 and 376(1) of the Indian Penal Code and sentenced him to undergo R.I. for a period of seven years and to pay a fine of Rs. 1,000/- (rupees one thousand), in default, to undergo S.I. for a period of six months for the offence under section 450 of the Indian Penal Code and R.I. for a period of seven years and to pay a fine of Rs. 2000/- (rupees two thousand), in default, to undergo S.I. for a period of six months under section 376(1) of the Indian Penal Code. Both the substantive sentences were directed to run concurrently.

The petitioner preferred an appeal in the Court of Session which was heard by the learned Additional Sessions Judge, Boudh in Criminal Appeal No. 10 of 2000 (Criminal Appeal No. 38 of 1995-D.C.) and the learned Appellate Court vide impugned judgment and order dated 18.11.2000 though acquitted the petitioner of the charge under section 450 of the Indian Penal Code but upheld the order of conviction under section 376 of the Indian Penal Code and the sentence imposed by the learned Trial Court for such offence, hence the revision.

The prosecution case, as per the first information report lodged by Kalandi Behera (P.W. 1) before the officer in charge of Purunakatak police station is that on 13.05.1994 he had been to the house of one Keshaba Naik who is his caste man on account of daughter's marriage of the later. On that day at about 12.00 noon when P.W. 1 returned home, he found that his wife (P.W. 2) and the petitioner were engaged in sexual intercourse inside the house. P.W. 1 suddenly locked the door (tatti) of the house and went to call the co-villagers including the father of the petitioner. By the time P.W. 1 returned back, the petitioner fled away from the house cutting the door which was seen by others. The co-villagers told P.W. 1 that they cannot settle the matter in the village and accordingly P.W. 1 lodged the first information report.

On receipt of the first information report, Purunakatak P.S. Case No. 25 of 1994 was registered on 13.05.1994 under section 376 of the Indian Penal Code by P.W. 16 Santanu Kumar Padhi, officer in charge of Purunakatak police station and he himself took up investigation.

Adverting to the contentions raised at the Bar by the respective parties and coming first to the medical evidence, it appears that the victim was examined by P.W. 11 Dr. Shantilata Das on 15.5.1994 at District Headquarters Hospital, Phulbani which is two days after the occurrence. The doctor did not find any external injury over the body of the victim. Secondary sex character was found well developed and no injury was found on the breast of the victim. On internal examination, no fresh injury was found present over the vulva. No foreign hair or matting of hair was present. The doctor opined that there is no evidence of recent sexual intercourse and there is no external injury present over the body and foreign hair and seminal stain were found absent over the private part and examination of vaginal smear indicated absence of spermatozoa. The medical examination report was marked as Ext. 7. In the cross examination, the doctor has stated that vaginal spermatozoa alive will remain present for 72 hours and dead spermatozoa may be available beyond 72 hours. The doctor has further stated that in case force is used for sexual intercourse and the victim tries to resist, there would be external injury on the abdomen, chest, back, limbs etc. P.W. 13 Patitapaban Panigrahi, the Pathology Specialist examined the vaginal fluid collected from the victim by

P.W. 11 and he opined that plain smear examination did not reveal either living or dead spermatozoa. P.W. 14 Dr. S. Gangadharan conducted ossification test of the victim and after analyzing x-ray plates, he opined that the age of the victim was more than 21 years. His report has been marked as Ext. 11.

The petitioner was medically examined by P.W. 15 Dr. Gyanaranjan Biswal on 15.05.1994 who stated that there was no scratch mark, no injury and there was no discharge and smegma was found absent and he found that the petitioner was capable of performing sexual intercourse but there was no sign of recent sexual intercourse and there was no injury on the private parts of the body.

It has come from the evidence of P.W. 1 that the houses of other persons are close to his house and those persons were residing in their respective houses with their family. Nobody has stated to have heard any shout of the victim. P.W. 1 has not stated either in the F.I.R. or in the chief examination to have heard any shout of the victim prior to seeing the petitioner committing sexual intercourse with the victim. Though the victim has stated that she was forcibly dragged and in spite of her vehement protest, the petitioner forcibly committed sexual intercourse with her but the medical evidence is completely silent in that respect. There is no evidence that at the time of commission of the crime, the victim was either threatened with any weapon or her mouth was gagged or her hands and legs were tied and therefore, in such a situation a married lady like P.W. 2 would have raised protest against the commission of rape by the petitioner and in that event there was chance of external injuries both on the victim as well as on the petitioner.

It is the prosecution case that P.W. 1 saw the petitioner and the victim were having sexual intercourse inside the bed room. It is most peculiar that in spite of noticing the arrival of her husband, the victim has not sought for his help to rescue her from the petitioner. If the victim was protesting and shouting at the time of commission of rape as stated by her and P.W. 1 came at that point of time, he would have first tried to rescue the victim and apprehend the petitioner but his peculiar conduct in closing the door of the bed room without any kind of protest and going away to the

neighbourhood to call others including the father of the petitioner appears to be an unbelievable story which rather suggests that perhaps he saw both the victim and the petitioner in a compromising position and the victim also noticed the arrival of her husband and therefore, in order to save her skin, chance of false implication of the petitioner by the victim cannot be ruled out.

The evidence of the witnesses who have seen the petitioner running away from the house of the informant is not very much material for arriving at a conclusion that the petitioner raped the victim inasmuch as even in a case of consent for sexual intercourse inside the bed room, when it was detected, ordinarily it was expected from the petitioner to escape from the spot.

The wearing apparels of the victim as well as the accused were sent for chemical analysis but the prosecution has not made any attempt to prove the chemical analysis report.

The evidence of the witnesses as well as the surrounding circumstances coupled with the medical examination reports of the victim and the petitioner goes against the prosecution case relating to commission of forcible sexual intercourse on the victim by the petitioner. Both the Courts below have proceeded pedantically without making an in depth analysis of facts and circumstances and evidence led in the trial in its proper perspective.

In view of the facts and circumstances discussed above, I am not able to agree with the findings of the Courts below and accordingly hold that the case against the petitioner has not been established by the prosecution beyond all reasonable doubt.

In the result, the revision petition is allowed and the impugned judgment and order of conviction and the sentence passed thereunder are hereby set aside and the petitioner is acquitted of the charge under section 376 of the Indian Penal Code.

* * * * * * *

8. Section 409,420,468,471,477-A of IPC

Ch. Gobinda Rao Vs. Asst. General Manager, State Bank of India and Ors.

Dr. B.R. Sarangi, J.

In the High Court of Orissa .

Date of Judgment -10.03.2017

Issue

When a person has been acquitted of the criminal charges can the authority issue dismissal orders ,conducing a displinary proceeding – Challenged.

Relevant Extract

The petitioner, while working as Head Assistant (Accounts), State Bank of India at Jeypore, was in-charge of pension payment section as an officiating officer in Scale-I cadre from June, 1995 to August, 1998. It is alleged that during the period from 09.12.1996 to 06.11.1997, he committed irregularities of serious nature in respect of pensions, savings bank accounts of the pensioners and dishonestly misappropriated a sum of Rs. 73,000/- by cheating the pensioners fraudulently and forging their accounts. The said fact, having come to the notice of the Bank authorities, was enquired into by an investigating team, which submitted a report against the petitioner in August, 1998. On the basis of such report, the Chief Manager lodged an FIR in writing against the petitioner before the IIC, Town Police Station, Jeypore on 12.11.1998, which was registered as Jeypore Town P.S. Case No. 266 of 1998 under Sections 409/420/468/471/477-A, IPC. During investigation, the Investigating Officer seized various documents, examined witnesses and submitted charge sheet against the petitioner. The petitioner faced trial and, after its completion, was acquitted of the charges levelled against him by judgment dated 27.10.2003 passed in G.R. Case No. 735 of 1998.

On the self same matter, simultaneously, a departmental proceeding was initiated against the petitioner and, by letter dated 03.08.1998, he was asked, by the Chief Manager, to show cause. On 31.08.1998, the petitioner, on the basis of the allegations raised on 03.08.1998, was put under suspension. On 29.07.2002, charge sheet was submitted levelling 33 charges against the petitioner. The act of omission and commission in banking transaction, being misconduct as per "Shastry Award", the petitioner was called upon to submit explanation vide memorandum dated

11.05.1999. In response to the same, the petitioner submitted his reply on 10.07.1999. Thereafter, on 12.10.2000, the petitioner submitted a detailed explanation to the charge sheet dated 29.07.2000 denying the allegations made against him. It was contended specifically that the petitioner discharged his duty in good faith. As he was an active union member holding the posts of Branch Chairman and President of S.B.I. Staff Co-operative Credit Society Ltd., Jeypore, the rival union set up and got the charge sheet filed against him. Consequentially, the petitioner was harassed both in criminal and departmental proceedings.

Pursuant to order dated 25.10.2000, one Sri P.K. Patnaik was appointed as enquiry officer. Enquiry continued and finally the enquiry officer submitted report on 27.09.2001. The petitioner, on 15.07.2002, submitted explanation to the inquiry report before the disciplinary authority stating inter alia that the enquiry officer was biased, and therefore, the report should not be accepted. But, without appreciating the materials on record and also the objection raised by the petitioner, the disciplinary authority passed an order on 10.08.2002 dismissing the petitioner from the bank service with immediate effect and the period of suspension was directed to be not treated as on duty. Against the said order imposing punishment, the petitioner preferred an appeal, which was rejected by office order dated 04.10.2002, hence this writ application.

The admitted fact being that the petitioner, while working as Head Assistant on State Bank of India, Jeypore Branch in the district of Koraput, was officiating in-charge of Pension Section as an Officer in the cadre of JMGS-I. During the period from June 1995 to August, 1998 he looked after most of the work relating to pension payment through SB Accounts in the Branch, i.e., calculation of pension, arrear pension, putting through pension scroll, passing credit and debit transactions of SB Account holders drawing pension through the Bank, handling medical loans sanctioned to pensioners, maintaining passing scrolls for releasing cash drawals from SB Accounts of pensioners, checking SB Day Book and maintaining SB progressive Balance Book relating to Pension Ledger. While discharging such duties, the petitioner was alleged to have committed financial irregularity and, in order to keep the absolute devotion, diligence, integrity and honesty, as well as to win the confidence of the public in general and

depositors in particular, the departmental proceeding was initiated and ultimately, the disciplinary authority imposed the penalty of dismissal from bank service with immediate effect treating the suspension period as not on duty. The petitioner preferred appeal against such order of imposing penalty, which was confirmed by the appellate authority.

A perusal of the impugned order dated 10.08.2002 (Annexure-11) passed by the disciplinary authority imposing penalty of dismissal from service with immediate effect and treating the suspension period as not on duty, as well as the order dated 04.10.2002 (Annexure-12) of the appellate authority would show that both are cryptic and no reason has been assigned in support of the same. Imposition of such penalty of dismissal from service, being a major one, on receipt of reply from the delinquent, the authority has to give reason why such major penalty has been imposed. The impugned orders, having not contained any reason in support of imposing such major penalty, cannot sustain in the eye of law.

Franz Schubert said:

"Reason is nothing but analysis of belief."

In Black's Law Dictionary, 5th Edition 'reason' has been defined as:

"faculty of the mind by which it distinguishes truth from falsehood good from evil, and which enables the possessor to deduce inferences from facts or from prepositions."

The recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice. The requirement of giving reasons is based on sound principles. The requirement is intended to achieve the following objects and laudable purposes:

In the first instance, the requirement to give reasons ensures application of mind to the material, for, how does one give reasons for an order unless one applied one's mind to the material which it is called upon to consider.

Secondly, it incorporates a built-in safeguard against arbitrariness in the exercise of power. It immediately introduces an element or rationality into an executive decision-making process. The requirement makes the authority pause for a moment and articulate for itself why it was making the order. It feels that it is answerable for its order and the validity of the order would be tested at the touch-stone or reasoning, rationality and logic.

Thirdly, it makes any further examination or review in appeal or other proceedings before courts more meaningful and effective. It enables all subsequent authorities dealing with the matter to know how the mind of the authority, which made the order, was functioning; what is it that appealed to it when it made the order and how it dealt with the objections as to why the order should or should not be made.

Lastly, it is intended to inform the person aggrieved, if an individual, or if it involves wider rights, interest, freedoms the public in general, as to why the action has been taken. This requirement would be particularly important where there remains a superadded requirement of publication in a Gazette. Such an order has to meet the larger public gaze. The authority in such cases is answerable to the people in general because the nature of the order is such that all of them must be informed as to what order has been made and why it has been made.

In view of the law discussed above, applying the same to the present fact, it appears that the impugned orders in Annexure-11 and 12 passed by the disciplinary authority, as well as the appellate authority, having been passed without reasons, the same cannot sustain in the eye of law. Accordingly, the same are hereby quashed. The matter is remitted back to the disciplinary authority to consider and pass a reasoned order in accordance with law by affording reasonable opportunity of hearing to the petitioner. Needless to say that it is a year old case, the authority shall do well to dispose of the matter by passing a reasoned order as expeditiously as possible.

The writ application is accordingly allowed to the extent indicated above. No order as to cost.

* * * * * * *

9. Sections 409,418,423 & 425 of IPC

K. Sitaram and Ors. Vs. CFL Capital Financial Service Ltd. and Ors. ***R.K. Agrawa & A.K. Goel, JJ.***

In the Supreme Court of India

Date of Judgment - 21.03.2017

Issue

Appeal against dismissal order of writ for quashing of a case – Discussed.

Relevant Extract

This appeal has been filed against the judgment and order dated 07.01.2011 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 1279 of 2010 whereby learned single Judge of the High Court dismissed the writ petition filed by the Appellants herein.

Brief facts:

(a) The complainant-Respondent Company borrowed a sum of Rs. 900 lakhs comprising Rs. 180 lakhs through cash credits from the consortium of Banks (of which the State Bank of Travancore was the lead bank) and a sum of Rs. 720 lakhs being working capital demand Loan. Due to non-payment of the loan amount, the account became Non-Performing Asset. In order to recover the amount against the borrower, the State Bank of Travancore filed OA No. 96 of 2003 before the Debts Recovery Tribunal (DRT), Mumbai. On 22.07.2005, the DRT passed a partial decree awarding a sum of Rs. 812.26 lakhs with 12 per cent interest.

(b) On 29.03.2006, the State Bank of Travancore assigned the debts due from the complainant-Company to the Kotak Mahindra Bank together with all the securities through an Assignment Deed. On 11.01.2007, the borrower-the Respondent Company assigned to Kotak Mahindra Bank the debt due towards it from one Ravishankar Industries Pvt. Ltd. of more than Rs. 32 crores with an agreement that any excess recovery over and above Rs. 90 lakhs from Ravishankar Industries Pvt. Ltd. would be shared equally between the Kotak Mahindra Bank and the complainant-Company. It is pertinent to mention here that the fact of the alleged Assignment Deed came to the notice of the complainant-Company only on 17.01.2007 when the Kotak Mahindra Bank handed over a copy of the application for

substituting themselves in place of State Bank of Travancore to the Respondent-Company.

(c) The Kotak Mahindra Bank initiated process for substituting its name in place of the assignor-State Bank of Travancore in the recovery application and also withdraws two criminal complaints filed by the Respondent-Company against Ravishankar Industries Pvt. Ltd. without any information to the Respondent-Company. On 28.04.2007, the Kotak Mahindra Bank moved an application before the Recovery Officer-I for appropriating Rs. 67.5 lakhs due towards the complainant-Company, being 50 per cent of the amount of Rs. 135 lakhs received in excess of Rs. 90 lakhs from the Ravishankar Industries Pvt. Ltd., against the claim towards the State Bank of Travancore.

(d) On 16.05.2007, the complainant-Respondent Company filed a complaint against the Kotak Mahindra Bank and its officers being No. 18/SW/07 before the Metropolitan Magistrate, Bandra, Mumbai Under Sections 409, 418, read with 120-B of the Indian Penal Code, 1860 (in short 'the Indian Penal Code'). On 25.06.2007, the Additional Chief Metropolitan Magistrate, Bandra, Mumbai issued process against all the Accused in the complaint dated 16.05.2007. The Accused therein preferred Criminal Revision Applications being Nos. 1024-1026 of 2007 before the Court of Sessions for Greater Bombay. Learned Additional Sessions Judge, vide order dated 03/05.04.2008, allowed the revision applications while setting aside the order of issue of process dated 25.06.2007.

(e) A fresh complaint being No. 0800009/SW/08 was filed by the complainant-the Respondent Company before the Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Mumbai Under Sections 409, 418, 423 and 425 read with Section 120-B of the Indian Penal Code against the State Bank of Travancore, Kotak Mahindra Bank Limited and its officers. The Metropolitan Magistrate, I/C ACMM, 8th Court, Esplanade, Mumbai, vide order dated 25.01.2008, issued process against the officers of the State Bank of Travancore and Kotak Mahindra Bank Limited. On 11.05.2008, learned Magistrate excluded the officers of the Kotak Mahindra Bank Limited in view of an application filed by the Respondent-Company to withdraw the complaint against them.

The present appeal has been filed for quashing of Criminal Case No. 0800009/SW/08 pending in the Court of Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Mumbai and for setting aside the order dated 25th January 2008, by which process was issued against all the persons Accused in the complaint. Appellant No. 1 herein was working as Managing Director with the State Bank of Travancore during the period 11th May 2006 to 30th June 2007. Appellant No. 2 herein worked with the Bank as the Deputy General Manager during the period from January 2005 to November 2006.

The Respondent-Company filed a complaint alleging offence punishable Under Sections 409, 418, 423 and 425 read with Section 120-B of the Indian Penal Code against the Appellants herein. The Bank had in December 1995 sanctioned loan of Rs. 180 lakhs by way of cash credit facility and Rs. 720 lakhs by way of working capital demand loan, totaling to Rs. 900/- lakhs and the complainant-Company executed various documents in favour of the Bank. As the Respondent-Company was unable to pay its dues to the Bank, the Bank had filed recovery proceedings before the Tribunal wherein a partial decree for a sum of Rs. 812.26 lakhs had been passed.

He further contended that the Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Chairman and General Managers of the Company when the Accused is the Company. When the Company is the offender, vicarious liability of the directors cannot be imputed automatically, in the absence of any statutory provisions to this effect.

As the Appellants herein have challenged the legality of the order of issue of process, it would be worthwhile to recapitulate the law regarding issue of process. The relevant point that arises for consideration at this stage is whether the material available is sufficient enough to constitute a prima facie case against the accused.

When a person files a complaint and supports it on oath, rendering himself liable to prosecution and imprisonment if it is false, he is entitled to be believed unless there is some apparent reason for disbelieving him; and he is entitled to have the persons, against whom he complains, brought

before the court and tried. The only condition requisite for the issue of process is that the complainant's deposition must show some sufficient ground for proceeding. Unless the Magistrate is satisfied that there is sufficient ground for proceeding with the complaint or sufficient material to justify the issue of process, he should not pass the order of issue of process. Where the complainant, who instituted the prosecution, has no personal knowledge of the allegations made in the complaint, the magistrate should satisfy himself upon proper materials that a case is made out for the issue of process. Though under the law, a wide discretion is given to magistrate with respect to grant or refusal of process, however, this discretion should be exercised with proper care and caution. In view of the above, we are of the considered opinion that there was suppression of facts by both the Banks and the State Bank of Travancore was duty bound to inform the Respondent-Company about the Assignment dated 29.03.2006. As regards the Appellants herein, Appellant No. 1 herein has claimed to have joined the State Bank of Travancore on 11.05.2006 i.e. subsequent to the assignment deed dated 29.03.2006 whereas Appellant No. 2 was the signatory to the said deed. There is no denying the fact that both the Appellants were responsible for day to day functioning of the State Bank of Travancore. Furthermore, admittedly, Appellant No. 1 was in employment of the State Bank of Travancore at the time of the execution of the deed of assignment and the Appellant No. 2 was the signatory to it. On a bare perusal of the complaint, it creates an iota of doubt as to why the Respondent-Company was kept in dark by the State Bank of Travancore at the time of alleged Assignment Deed dated 29.03.2006. However, from the admitted position, it is evident that the complainant-Respondent Company in its wisdom had withdrawn the complaint against the two persons, who were the officers of the Kotak Mahindra Bank Ltd. from a common complaint made against four persons. However, we do not find any reason as to why the remaining two persons, being the present Appellants, who were the officers of the State Bank of Travancore at the relevant time, are being prosecuted. Hence, the complaint against the present Appellants does not survive and in the interest of justice the same is liable to quashed and is accordingly quashed. In view of the above discussion, the appeal succeeds and is allowed. However, there shall be no order as to costs.

* * * * * * *

10. Section 506,354 and 302 read with 34 of IPC

M.G. Eshwarappa & Ors vs State Of Karnataka .

N.V. Ramana & Prafulla C. Pant , JJ.

In the Supreme Court of India.

Date of Judgment -02.03.2017

Issue

Appeal against acquittal when reversed whether justified – Discussed.

Relevant Extract

Prosecution story, in brief, is that PW-16 Niranjanappa (complainant) was elder brother of accused No. 1 M.G. Eshwarappa. Accused No. 2 M.G. Shivaraj and accused No. 3 M.G. Girish are sons of M.G. Eshwarappa. Accused No. 4 Hebballi Shivappa is brother-in-law of accused No. 2 M.G. Shivaraj. There was a family dispute between the complainant and his brother Eshwarappa pertaining to immovable property, and reaping of fruits of tamarind tree in the backyard of the complainant's house. There used to be quarrel every now and then between the families of two brothers. Prior to the incident, on 03.03.1998 at about 3.00 p.m. the accused persons, armed with deadly weapons, came to the house of the complainant objecting to the plucking of tamarind fruits by the complainant's family, and threatened them of dire consequences. With the intervention of the neighbours dispute got pacified temporarily. Thereafter, as the accused persons went away, the complainant along with his son Basavaraj (deceased) and daughter Rajeshwari (PW-1) went to Honnali to consult their legal counsel, and to get the complaint lodged against the accused. The three left the village Marigondanahalli at about 5.00 p.m. for Honnali, but the counsel was not found at his residence. On this, complainant Niranjanappa (PW-16) asked his son and daughter to return to the village as he wanted to wait for the arrival of the counsel. At about 6.30 p.m. Basavaraj and Rajeshwari left Honnali on way back to their

village. When the two had covered a distance of about two kilometers, and were only one kilometer away from their village, four accused namely - M.G. Eshwarappa, M.G. Shivaraj, M.G. Girish and Hebballi Shivappa intercepted them. Eshwarappa (A-1) was armed with club, Shivaraj (A-2) was armed with Kandli (heavy sharp edged weapon), and Girish (A-3) and Shivappa (A-4) were armed with iron rods. The first blow was given by Shivaraj with Kandli on the head of Basavaraj on which he fell down. His sister Rajeshwari (PW-1) to save her brother lied down on him and requested the accused to leave her brother. On this Shivaraj (A-2) dragged her on one side. In the process she also suffered minor injuries. Thereafter Girish (A-3) and Shivappa (A-4) assaulted already injured Basavaraj with iron rods. Basavaraj started bleeding from the injuries received by him. The accused persons presuming that the injured is dead left the place. PW-1 Rajeshwari started crying. One Kammar Rudresh, who was returning on a bicycle from Shimoga after selling his flowers, asked her as to what had happened, and then left for the village to inform his family members of the injured in order to get some bullock cart. This incident occurred around 7.30 p.m. There was moon light. At about 8.00 p.m. Parvathamma (PW-29) mother of the injured, along with other villagers reached at the spot and injured Basavaraj was first taken to Chellur. After some time Niranjanappa (PW-16) also reached there, and after engaging a motor van, the injured was taken to Shimoga hospital, where he was admitted at 10.45 p.m. However, Basavaraj could not be saved and succumbed to the injuries soon after midnight at about 0040 hrs. A report (Ext. P-5) was given at the nearest Police Station Doddapet on which PW-28 M. Gopalappa (Station House Officer) rushed to the hospital. He sent intimation (Ext. P-6) to the jurisdictional Police Station Nyamathi, where the same was registered as Crime No. 49 of 1998. PW-33 S.G. Patil (Police Inspector) took up the

investigation and, after taking the dead body in his possession, prepared the inquest report (Ext. P-28) and interrogated witnesses including Rajeshwari (PW-1), Niranjanappa (PW-16) and Parvathamma (PW-29). PW-2 Dr. C. Francis conducted the post mortem examination on 04.03.1998 at 11.00 a.m. and prepared the autopsy report (Ext. P-2). He opined that the deceased had died due to shock and haemorrhage as a result of injuries suffered by him on the head. On conclusion of investigation the charge-sheet was filed against all the four accused for their trial in respect of offences punishable under Sections 506, 354 and 302 read with Section 34 of Indian Penal Code (IPC). After the case was committed to the Court of Sessions, the trial court framed charge of offences punishable under Sections 506, 323, 354 and 302 read with Section 34 IPC, to which the accused pleaded not guilty and claimed to be tried. As many as 33 witnesses were got examined by the prosecution. The oral and documentary evidence was put to the accused and, after hearing the parties, the trial court acquitted the accused holding that the charge against them is not proved beyond reasonable doubt.

The State of Karnataka preferred appeal against acquittal of the accused before the High Court. The High Court, after re-appreciating the evidence, held that the finding recorded by the trial court is perverse and contrary to the evidence on record. The appeal was allowed by the High Court. (Since accused No. 3 M.G. Girish had meanwhile died, his appeal stood abated.) The High Court convicted rest of the three accused, namely Eshwarappa, Shivaraj and Hebballi Shivappa under Sections 506, 354 and 302 read with Section 34 IPC, and after hearing on sentence, each of the convicts is sentenced under Section 302 read with Section 34 IPC to imprisonment for life and to pay fine of ?10,000/-. In default of payment of fine, the defaulter, if any, was directed to undergo rigorous imprisonment

for a further period of one year. In view of the sentence awarded in respect in respect of offence punishable under Section 302/34 IPC, qua rest of the offences no punishment was awarded by the High Court. The convicts have preferred this appeal under Section 379 of Code of Criminal Procedure (Cr.P.C.). During pendency of appeal before this Court, appellant No. 1 (M.G. Eshwarappa) has died and his appeal stands abated. Having gone through the entire evidence on record, as narrated above, we agree with the High Court that the trial court committed grave error by accepting the defence case that the deceased might have died of the injuries suffered in an accident, as the possibility was not ruled out by PW-2 Dr. C. Francis. We have carefully gone through the statement of Dr. C. Francis. What he has stated in the cross-examination is "such injuries can be caused to a person if he meets accident". There is no suggestion of the fact that at the place of incident any vehicle had passed through at the time of the indicent.

The trial court appears to have taken support of conjectures and surmises. In the circumstances, we are of the opinion that the High Court has correctly held that the view taken by the trial court is perverse and against the evidence on record. Lastly, learned senior counsel for the appellants referred to the case of Muluwa son of Binda and others v. The State of Madhya Pradesh[3] and it is submitted that where two views are possible, the High Court should not interfere with the order of acquittal passed by the trial court. We agree with the principle of law that when two views are possible, the view taken by the trial court should not be disturbed, but in the present case the view taken by the trial court, as discussed above, was perverse and rightly held so by the High Court. For the reasons, as discussed above, we find no force in this appeal which is liable to be dismissed. Accordingly, the same is dismissed.

The appellants M.G. Shivaraj and Hebballi Shivappa (appellant Nos. 2 and 3) are on bail. Their bail bonds stand cancelled and the sureties are discharged. They shall surrender forthwith before the trial court to undergo the sentence awarded by the High Court.

* * * * * * *

11. Article 226 and 227 of the Constitution of India

Nagarjuna Construction Company Ltd. Versus Bhubaneswar Development Authority and others

Chief Justice Mr. Vineet Saran & Dr. B.R. Sarangi ,J.

In the High Court of Orissa .

Date of Judgment - 15.03.2017

Issue

In the matter of contract before parties and cancellation of the same by one party –Legal Consequences.

Relevant Extract

The Bhubaneswar Development Authority (BDA) had, on 05.11.2013, invited Expression of Interest (EOI) for the selection of executants for the work, namely, 'Construction of Affordable Housing (LIG)' at Subudhipur, Bhubaneswar. In response to the same, five participants had submitted their bids, out of which four were found to be technically qualified, which included the petitioner. After complying with all the formalities, the petitioner was found to be the lowest bidder in the financial bid and hence the bid of the petitioner was accepted on 02.05.2014. Pursuant thereto, on 16.05.2014, a bid contract/agreement was executed between the petitioner and the BDA. There were certain formalities which were to be complied, which included the environment clearance, as well as interest free mobilization advance, which all were complied with by the petitioner.

The record shows that after execution of the contract on 16.05.2014, on 25.08.2014, the Vice Chairman of BDA wrote to the Commissioner-cum-Secretary, Housing and Urban Development Department, Government of Odisha intimating the Government of the entire sequence of events which led to the acceptance of the bid of the petitioner and the execution of the contract. In the said letter, it was also mentioned that the budget estimate was duly approved by the authority and the administrative approval for the said project was also given by the Government of Odisha.

The case of the petitioner is that it had completed all formalities for execution of the work. But all on a sudden, on 05.08.2015, the petitioner received an order from the Chief Engineer-cum-Engineering Member, BDA, Bhubaneswar intimating that the agreement executed with the petitioner has been cancelled. Challenging the same, this writ petition has been filed.

Along with the counter affidavit, the opposite party-BDA justified the passing of the said order stating that the same was based on the report of the Tender Committee dated 11.06.2015, which was enclosed with the counter affidavit as Annexure-C. After receiving the counter affidavit, the petitioner filed an amendment application, by which it challenged the said report of the Tender Committee dated 11.06.2015 also.

From the record it does not transpire that the order dated 05.08.2015, cancelling the contract already executed in favour of the petitioner, was done for the reason that approval for the same had not been obtained from the State Government. The short order, by which contract has been cancelled, is reproduced below:

"*The Agreement bearing No. P-1/of 01-2014-15 for the work "Construction of affordable housing (LIG) at Subudhipur (7 Acre site)" is hereby cancelled on administrative ground with no financial liabilities on either side."* All that has been stated in the said order is that the agreement is being cancelled on administrative ground. It is well settled law that once a contract or an agreement is concluded, the same can be cancelled or withdrawn only after affording the affected party opportunity of hearing by giving a show cause notice, and considering its reply, and also by assigning reasons for passing such order.

The apex Court in *State of Orissa v. Dr. (Miss) Binapani Dei*, AIR 1967 SC 1269 held that if there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. Similar view has also been taken in *A.K. Kraipak v. Union of India,* AIR 1970 SC 150, *A.R. Antulay v. R.S. Nayak,* (1988) 2 SCC 602, *R.B. Shreeram Durga Prasad and Fatechand Nursing Das v. Settlement Commission (I.T. & W.T.),* AIR 1989 SC 1038. Thus, even though the said provision may not provide for notice to be given to the party affected before issuance of any order, but the same has to be read down in the said provision.

In *Smt. Menaka Gandhi v. Union of India*, AIR 1978 SC 597, the Constitution Bench of the apex Court held as follows:-

"Although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. The principle of audi alteram partem, which mandates that no one shall be condemned unheard, is part of the rules of natural justice."

Similar view has also been taken by this Court in *Bijay Kumar Paikaray v. State of Odisha and others,* 2017 (I) ILR –CUT- 252 : 2017 (I) OLR-439. Reasons being a necessary concomitant to passing an order, the appellate authority can thus discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference to those given by the original authority.

"*Nihil quod est contra rationem est licitum*" means as follows:
"nothing is permitted which is contrary to reason. It is the life of the law. Law is nothing but experience developed by reason and applied continually to further experience. What is inconsistent with and contrary to reason is not permitted in law and reason alone can make the laws obligatory and lasting."
Therefore, recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is pertinent to note that a decision is apt to be better if the reasons for it are set out in writing because the reasons are then more likely to have been properly thought out. It is vital for the purpose of showing a person that he is receiving justice. In *Re*: *Racal Communications Ltd. (1980)2 All ER 634 (HL)*, it has been held that the giving of reasons facilitates the detection of errors of law by the court.

In *Padfield v. Minister of Agriculture, Fisheries and Food* (1968) 1 All E.R. 694, it has been held that a failure to give reasons may permit the Court to infer that the decision was reached by the reasons of an error in law.

In *Union of India v. Mohan Lal Capoor*, AIR 1974 SC 87 it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. In the present case, the order dated 05.08.2015 is devoid of any reason and admittedly the same has been passed without complying with the principle of natural justice, as the opposite party-BDA has accepted that no show cause notice or opportunity of any kind was afforded to the petitioner prior to passing of the impugned order. On this sole ground, the writ petition deserves to the allowed.

Further, the justification given by the opposite party- BDA in the counter affidavit, that the impugned order dated 05.08.2015 was passed on the basis of the report of the Tender Committee dated 11.06.2015, also does not have much force. The contention of the learned counsel for the petitioner appears to be correct that such report of the Tender Committee

has nothing to do with the proposal of the BDA as the Committee itself accepted that the same does not come within the purview of the Tender Committee of the Department and that the Committee was not in favour of considering the proposal of the BDA. As such, the justification given by the opposite party-BDA in the counter affidavit for passing the impugned order dated 05.08.2015 is also not tenable.

We may here draw attention to the observations of Bose J. in *Gordhandas Bhanji,* AIR 1952 SC 16 (at page. 18):

"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the anguage used in the order itself."

The Constitution Bench of the apex Court in *Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi,* AIR 1978 SC 851, the apex Court held :

" …… when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out." Orders are not like old wine becoming better as they grow old.

Applying the above principles of law laid down by the apex Court to the present case, it is clear that the impugned order has been passed without any basis, and without following the established procedure of law.

19. Accordingly, for the reasons given hereinabove, this writ petition stands allowed. The order dated 05.08.2015 is quashed. No order to cost.

* * * * * * *

12. Sections 65 &70 of the Contract Act
Section 80 of CPC

Pratibha Prakash Bhavan Vs. State of Orissa and Ors.

Dr. Akshaya Kumar Rath, J.

In the High Court of Orissa .

Date of Judgment - 17.03.2017

Issue

Placing order without jurisdiction whether will justify not passing order for the order executed by supplying goods-challenged.

Relevant Extract

This is an appeal by the plaintiff against the judgment and decree dated 23.1.1989 and 6.2.1989 respectively passed by the learned 1st Addl. District Judge, Ganjam-Berhampur in Money Appeal No. 11 of 1988 reversing the judgment and decree dated 14.7.1988 and 22.7.1988 respectively passed by the learned Subordinate Judge, Berhampur in Money Suit No. 72 of 1987.

The plaintiff instituted the suit for realisation of Rs. 15,658/- from the defendants. The case of the plaintiff is that it deals in forms, registers and stationeries etc. The Block Development Officer, Raikia, defendant No. 2, in his official capacity having agreed to the terms and conditions and rate of the plaintiff placed an order for supply of forms and registers etc. Therefore, the plaintiff supplied all the articles on four different occasions and submitted a consolidated bill amounting to Rs. 10,370/-. As defendant No. 2 did not make any payment against the said bill, it issued a statutory notice under Section 80 CPC

Pursuant to issuance of summons, the defendants entered appearance and filed a written statement denying the assertions made in the plaint. The case of the defendants is that defendant No. 2 was not empowered to place orders for local purchase worth more than Rs. 10,000/-. The plaintiff had violated the terms and conditions of the agreement by not supplying all the articles in time, for which the defendant had incurred huge expenses by deputing a messenger and transporting some of the articles sent by the plaintiff to Phulbani through a transport company.

On the inter se pleadings of the parties, learned trial court struck four issues. To prove his case, the plaintiff had examined one witness and on his behalf, twelve documents had been exhibited. The defendants had examined one witness and on their behalf, one document had been exhibited. Learned trial court decreed the suit. The defendants filed Money Appeal No. 11 of 1988 before the learned 1st Addl. District Judge, Ganjam, Berhampur, which was allowed.

The appeal was admitted on the following substantial questions of law;

I. Whether in view of the findings of both the courts below that the B.D.O. had placed orders in his official capacity and the articles that were supplied and were utilized by the State Government, Sections 65 and 70 of the Indian Contract Act will come to the aid of the appellants?

II. When a person lawfully does anything for another person, not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, the things so done or delivered?

III. Whether the learned Appellate Court is justified in his interpretation of Ext. A which forms the foundation of the suit?"

Section 65 of the Indian Contract Act provides obligation of person who has received advantage under void agreement, or contract that becomes void. The same is quoted below:

"65. Obligation of person who has received advantage under void agreement, or contract that becomes void.-When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

The judgment relied on by Ms. Mishra, learned Addl. Standing Counsel is distinguishable on facts. In Jit Ram Shiv Kumar (supra), the Municipal Committee of Bahadurgarh, established Mandi in Bahadurgarh

Town with a view to improve trade in the area. The Municipal Committee decided that the purchasers of the plots for sale in the Mandi would not be required to pay octroi duty on goods imported within the said Mandi. Pursuant to the said decision, a resolution was passed by the Municipality. Hand bills were issued for the sale of the plots on the basis of the resolution. It was proclaimed that such Mandi would remain exempt from payment of octroi. Subsequently the Committee resolved to levy octroi duty on goods. The resolution was annulled by the Punjab Government. Thereafter, the Committee passed a resolution requesting the State Government to cancel the committee's earlier resolution granting levy of octroi. The Government accepted the same. The appellants being aggrieved by the decision filed writ petition in the Punjab and Haryana High Court. The Full Bench of the High Court rejected the petition. The matter went to the apex Court. The apex Court held that the plea of estoppel is not available against the State in the exercise of its legislative or statutory functions. It was further held that the principle of estoppel is not available against the Government in exercise of legislative, sovereign or executive power. The apex Court further held that Sections 65 and 70 provide for certain reliefs in void contracts and in unenforceable contracts where a person relying on a representation has acted upon it and put himself in a disadvantageous position. The Indian Constitution as a matter of high policy in public interest has enacted Article 299 so as to save the Government liability arising out of unauthorized acts of its officers and contracts not duly executed. The apex Court further held that on a consideration of the decisions of this Court it is clear that there can be no promissory estoppel against the exercise of legislative power of the State. So also the doctrine cannot be invoked for preventing the Government from acting in discharge of its duty under the law. The Government would not be bound by the act of its officers and agents who act beyond the scope of their authority and a person dealing with the agent of the Government must be held to have notice of the limitations of his authority. The Court can enforce compliance by a public authority of the obligation laid on him if he arbitrarily or on his mere whim ignores the promises made by him on behalf of the Government. It would be open to the authority to plead and prove that there were special considerations which necessitated his not being able to comply with his obligations in public interest.

By no stretch of imagination, it can be said that the action of the BDO was unauthorized. In view of the same, the decision in the case of Jit Ram Shiv Kumar (supra) is distinguishable on facts. Furthermore, in earlier occasion the plaintiff had supplied the goods. The money was not paid on the ground that the BDO was not authorized to place the order. This Court has negatived the contention of the State and decreed the suit. The substantial questions of law are answered accordingly.

14. Before parting with the case, it is apt to refer a decision of this Court in the case of State of Orissa and another v. Sri Dwarika Das Agarwalla, 2017 (I) OLR 256. This Court held:

"No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manne as he wishes. State is a virtuous litigant. About 60 years back in the case of Firm Kaluram Sitaram v. The Dominion of India, AIR 1954 Bombay 50, Chief Justice Chagla (as he then was) speaking for the Bench stressed that when the State deals with a citizen it should not ordinarily rely on technicalities, and if the State is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent judges, as an honest person."

In the wake of the aforesaid, the judgment and decree of the learned Addl. District Judge, Jeypore is set aside. The judgment and decree of the learned Subordinate Judge, Jeypore is affirmed. The suit is decreed. The appeal is allowed, but in the circumstances of the case, parties are to bear their own costs throughout.

* * * * * * *

<u>The Arms Act</u>

13. Section 25 of
Sections 302/34 of IPC
Pawan and Ors. Vs. State of Haryana
N.V. Ramana & Prafulla C. Pant, JJ
In the Supreme Court of India.
Date of Judgment - 08.03.2017

Issue

Appeal against conforming conviction by the trial court, if justified.

Relevant Extract

Prosecution story, in brief, is that Deepak (deceased) was elder brother of PW-6 Amit Kumar (complainant). Amit Kumar had a business of selling flowers, and his elder brother used to do the delivery work. Their neighbour Gola (not examined) had taken a loan of ` 10,000/- on interest from Accused Pawan, and he (the debtor) had returned the same except ` 250/-. On 09.11.2000 at about 8.30 p.m. Accused Pawan @ Rajinder Singh and his cousin Accused Ajit @ Dara Singh demanded remaining ` 250/- from Gola to which the deceased requested them to waive the said amount due to which some altercation took place between the deceased and the two Accused. About half an hour thereafter both the Accused came back on a scooter, and Deepak (deceased) also left with them but on his separate scooter bearing registration No. HR 51 E-4749. Deepak did not return till late night. On this, PW-6 Amit Kumar and his father Ram Nath started search for him. In the next morning they came to know that dead body of a person is lying near Air Force ground. Both, father and son went there and saw that it was the dead body of Deepak. Suspecting that Appellants Pawan @ Rajinder Singh and Ajit @ Dara Singh had committed the murder, a report (Ex PE-1) was given to the police in the early hours of 10.11.2000 mentioning their names. On the basis of said report, First Information

Report No. 803 dated 10.11.2000 (Ex. PK) was registered at Police Station, N.I.T., Faridabad.

This appeal is directed against judgment and order dated 02.04.2014, passed by the High Court of Punjab and Haryana in Criminal Appeal No. D-391-DB of 2002 whereby said Court has dismissed the appeal affirming the conviction and sentence Under Section 302/34 Indian Penal Code, against Accused/Appellants Pawan @ Rajinder Singh and Ajit @ Dara Singh, recorded by the Additional Sessions Judge, Fast Track Court No. 1, Faridabad. The High Court has further affirmed the conviction and sentence recorded against Accused/Appellant Ajit @ Dara Singh Under Section 25 of the Arms Act, 1959.

After putting the documentary and oral evidence Under Section 313 Code of Criminal Procedure to the Accused persons, the trial court found both the Accused guilty of charge of offence punishable Under Section 302/34 Indian Penal Code. Accused Ajit @ Dara Singh was further found guilty of charge of offence punishable Under Section 25 of Arms Act, 1959. They were awarded sentence, as already mentioned above.

On appeal by the convicts, High Court agreed with the findings of the trial court and dismissed the appeal. Hence this appeal before us through special leave.

In view of the conclusions given by Forensic Science Laboratory on points (1), (2) and (3), quoted above, we are of the view that the prosecution story, as narrated by PW-4 Pappu and PW-5 Surender Singh, is highly doubtful.

Apart from this, though the motive of crime is not necessarily required to be proved, but in the case like the present one where the Appellants are named on suspicion by informant PW-6 Amit Kumar in the First Information Report (which does not contain names of PW-4 Pappu and PW-5 Surender Singh as witnesses who had seen the occurrence), the motive appears to be relevant fact. PW-6 Amit Kumar has simply mentioned that the deceased had asked the two Accused to waive of the remaining amount of ` 250/- from the loan of ` 10,000/- taken by Gola but the same does not appear to be a convincing motive to commit the crime by the Appellants. Prosecution has not examined Gola if he had taken loan of ` 10,000/- and paid off the same minus the amount ` 250/-.

Even otherwise, in the First Information Report it is nowhere mentioned why actually Deepak (deceased) had gone in his separate scooter with the two Appellants from his house.

For the reasons, as discussed above, we find that the trial court as well as the High Court has erred in law in holding that the charge against the two Accused stood proved.

In the light of appreciation of evidence, as above, we are of the opinion that the prosecution has failed to prove the charge of offence punishable Under Section 302/34 Indian Penal Code against the two Accused. We further hold that the charge of offence punishable Under Section 25 of the Arms Act, 1959 against Accused Ajit @ Dara Singh is also not proved beyond reasonable doubt. Accordingly, the appeal deserves to be allowed. The appeal is allowed. Both the Accused, namely Pawan @ Rajinder Singh and Ajit @ Dara Singh, are acquitted of the charges. The Appellants shall be set at liberty forthwith if not required in connection with any other case.

* * * * * * *

14. Sections 13 and 19 of the Hindu Marriage Act 1955
Section 25 of the CPC

Krishna Veni NagamVs. Harish Nagam

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

In the Supreme Court of India

Date of Judgment - 09.03.2017

Issue

Whether any order can be passed so as to provide a better alternative to each individual being required to move this court.

Relevant Extract

This transfer petition has been filed for transfer of Case No. 179A/2013 Under Section 13 of the Hindu Marriage Act, 1955 (the Act) titled "Harish Nagam v. Krishna Veni Nagam" pending on the file of II Presiding Judge, Family Court, Jabalpur, Madhya Pradesh to the Family Court Hyderabad, Andhra Pradesh.

Case of the Petitioner-wife is that she was married to the Respondent-husband in the year 2008 at Kukatpally, Hyderabad. She was blessed with a girl child in 2009. While living in her in-law's house at Jabalpur, she was ill-treated. She was subjected to mental and physical torture. She suffered injury on her spinal cord. She left the matrimonial home in 2012.

The Respondent-husband filed application for restitution of conjugal rights which was later on got dismissed as withdrawn. Thereafter, a divorce petition has been filed at Jabalpur while the Petitioner has filed a domestic violence case at Hyderabad. Since the Petitioner-wife, along with her minor daughter, is living with her parents, she cannot undertake long journey and contest the proceedings at Jabalpur by neglecting her minor child. She also apprehends threat to her security in attending proceedings at Jabalpur.

On 7th January, 2015, notice was issued and stay of proceedings was granted. The matter has been pending in this Court for more than two years.

On 9th January, 2017 when the matter came-up for hearing, the following order was passed:

"This petition is filed Under Section 25 of the Code of Civil Procedure seeking transfer of proceedings initiated by the Respondent Under Section 13 of the Hindu Marriage Act at Jabalpur. According to the Petitioner, who is the wife of the Respondent, she will face acute hardship in contesting the proceedings at Jabalpur as she is living at Hyderabad. The marriage took place at Hyderabad. The Petitioner has to look after her minor daughter who is living with her.

Undoubtedly Under Section 19 of the Hindu Marriage Act, the petition of the present nature could be filed at the place where the marriage is solemnized or the Respondent, at the time of the presentation of the petition, resides or where the parties to the marriage last resided together or where the wife is residing on the date of the presentation of the petition, in case she is the Petitioner or in certain situations (as stipulated in Clause iv) where the Petitioner resides.

This Court is flooded with petitions of this nature and having regard to the convenience of the wife transfer is normally allowed. However, in the process the litigants have to travel to this Court and spend on litigation. Question is whether this can be avoided?

We are of the view that if orders are to be passed in every individual petition, this causes great hardship to the litigants who have to come to this Court. Moreover in this process, the matrimonial matters which are required to be dealt with expeditiously are delayed.

In these circumstances, we are prima facie of the view that we need to consider whether we could pass a general order to the effect that in case where husband files matrimonial proceedings at place where wife does not reside, the court concerned should entertain such petition only on the condition that the husband makes appropriate deposit to bear the expenses of the wife as may be determined by the Court. The Court may also pass orders from time to time for further deposit to ensure that the wife is not handicapped to defend the proceedings. In other cases, the husband may take proceedings before

the Court in whose jurisdiction the wife resides which may lessen inconvenience to the parties and avoid delay. Any other option to remedy the situation can also be considered.

However, before passing a final order, we consider it necessary to hear learned Attorney General who may depute some law officer to assist this Court.

List the matter on 31st *January, 2017.*

We also request Mr. C.A. Sundaram, Senior Advocate to assist this Court as amicus curiae. A set of papers may be furnished to the amicus."

(Emphasis added)

Thus, the question is whether an order can be passed so as to provide a better alternative to each individual being required to move this Court.

As noted in the Order dated 9th January, 2017 quoted above, Section 19 of the Act permits proceedings to be filed not only at a place where the wife resides but also at place where marriage is solemnized or the place where the parties last resided together. It is mostly in the said situations that the wife has hardship in contesting proceedings. At the same time, under the law the husband is legally entitled to file proceedings at such places. Territorial jurisdiction of court is statutorily laid down in Code of Civil Procedure or other concerned statutes.

Accordingly, we have heard Shri C.A. Sundaram, learned senior Counsel as amicus curiae. Learned amicus has suggested that Section 19 of the Act should be interpreted to mean that the jurisdiction at the place other than where wife resides being available only at the option of the wife or that such jurisdiction will be available in exceptional cases where the wife is employed and the husband is unemployed or where the husband suffers from physical or other handicap or is looking after the minor child. Even though we are unable to give such interpretation in the face of plain language of statute to the contrary and it is for the legislature to make such suitable amendment as may be considered necessary, we are certainly

inclined to issue directions in the interest of justice consistent with the statute.

Mr. Nadkarni, learned Addl. Solicitor General has suggested that it will be appropriate to give some directions to meet the situation. He submitted that paramount consideration in dealing with the issue ought to be the interest of justice and not mere convenience of the parties. Thus, where husband files a petition at a place away from the residence of the wife, the husband can be required to bear travel and incidental expenses of the wife, if it is so considered appropriate in the interest of justice. At the same time, if the husband has genuine difficulty in making the deposit, proceedings can be conducted by video conferencing. At least one court room in every district court ought to be equipped with the video conferencing facility. The interest of the minor child has also to be kept in mind along with the interest of the senior citizens whose interest may be affected by one of the parties being required to undertake trips to distant places to face the proceedings. Protracted litigation ought to be avoided by better management and coordination so that number of adjournments can be reduced.

We have considered the above suggestions. In this respect, we may also refer to the doctrine of *forum non conveniens* which can be applied in matrimonial proceedings for advancing interest of justice.

We are thus of the view that it is necessary to issue certain directions which may provide alternative to seeking transfer of proceedings on account of inability of a party to contest proceedings at a place away from their ordinary residence on the ground that if proceedings are not transferred it will result in denial of justice.

We, therefore, direct that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the Defendants/Respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for ensuring that summoning of Defendant/Respondent does not result in denial of justice. Order

incorporating such safeguards may be sent along with the summons. The safeguards can be:

i) Availability of video conferencing facility.

ii) Availability of legal aid service.

iii) Deposit of cost for travel, lodging and boarding in terms of Order XXV Code of Civil Procedure.

iv) E-mail address/phone number, if any, at which litigant from out station may communicate.

We hope the above arrangement may, to an extent, reduce hardship to the litigants as noted above in the Order of this Court dated 9th January, 2017. However, in the present case since the matter is pending in this Court for about three years, we are satisfied that the prayer for transfer may be allowed. Accordingly, we direct that proceedings in Case No. 179A/2013 Under Section 13 of the Act titled "Harish Nagam v. Krishna Veni Nagam" pending on the file of II Presiding Judge, Family Court, Jabalpur, Madhya Pradesh shall stand transferred to the Family Court, Hyderabad, Andhra Pradesh. If the parties seek mediation the transferee court may explore the possibility of an amicable settlement through mediation. It will be open to the transferee court to conduct the proceedings or record evidence of the witnesses who are unable to appear in court by way of video conferencing. Records shall be sent by court where proceedings are pending to the transferee court forthwith.

The Registry to transmit a copy of this order to the courts concerned. A copy of this order be sent to all the High Courts for appropriate action. We place on record our appreciation for the valuable assistance rendered by Mr. Atmaram N.S. Nadkarni, learned Additional Solicitor General and Mr. C.A. Sundaram, learned Senior Advocate. The transfer petition is disposed of accordingly.

* * * * * * *

15. Section 13(1)(ia) & Section 9 of the Hindu Marriage Act

Suman Singh vs Sanjay Singh

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

In the Supreme Court of India

Date of Judgment-08.03.2017

Issue

When decree of dissolution of marriage has been granted whether restitution of conjugal rights can be claimed and granted subsequently .

Relevant Extract

Facts, in brief, to appreciate the controversy involved in the appeals need mention infra.

The marriage between the appellant and the respondent was solemnized on 26.02.1999 at Delhi as per the Hindu rites. The respondent-husband is working as "Caretaker" in the Government of NCT of Delhi whereas the appellant is a housewife. Out of this wedlock, one daughter was born on 15.06.2002 and the second daughter was born on 10.02.2006. Both daughters are living with the appellant.

On 11.07.2010, the respondent (husband) filed a petition for dissolution of marriage under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as "The Act") in the Family Courts, Rohini, Delhi against the appellant (wife). The respondent sought decree for dissolution of marriage essentially on the ground of "cruelty".

The Trial Court framed the following issues on the basis of pleadings in the case:

Whether after solemnization of marriage, the Respondent has treated the Petitioner with cruelty? OPP Whether the Petitioner is entitled to the decree of divorce as prayed? OPP

Relief The following issues were framed based on the pleadings in the petition under Section 9 of the Act:

Whether the Petitioner is entitled to the restitution of conjugal rights as prayed? OPP Relief

Parties adduced the evidence. By order dated 14.12.2012, the Family Court allowed the petition filed by the respondent. It was held that the grounds alleged by the respondent amounted to mental cruelty within the meaning of Section 13(1)(ia) of the Act and the same having been proved by the respondent, he was entitled to claim a decree for dissolution of marriage against the appellant. Accordingly, the Trial Court granted decree for dissolution of marriage in favour of the respondent and dissolved the marriage. Since the decree for dissolution of marriage was passed against the appellant, the petition filed by the appellant against the respondent seeking restitution of conjugal rights was dismissed.

The appellant, felt aggrieved by the aforesaid order, filed first appeals before the High Court. In appeals, the question was whether the Trial Court was justified in granting decree for dissolution of marriage to the respondent (husband) and, in consequence, was justified in dismissing the petition for restitution of conjugal rights filed by the appellant (wife).

By impugned judgment, the High Court dismissed the appeals and affirmed the judgment/decree of the Trial Court. The appellant (wife), felt aggrieved, has filed these appeals by special leave against the judgment of the High Court.

This we hold for more than one reason. First, almost all the grounds taken by the respondent in his petition were stale or/and isolated and did not subsist to enable the respondent to seek a decree for dissolution of marriage. In other words, the incidents of cruelty alleged had taken place even, according to the respondent, immediately after marriage. They were solitary incidents relating to the behavior of the appellant. Second, assuming that one or more grounds constituted an act of cruelty, yet we find that the acts complained of were condoned by the parties due to their subsequent conduct inasmuch as admittedly both lived together till 2006 and the appellant gave birth to their second daughter in 2006. Third, most of the incidents of alleged cruelty pertained to the period prior to 2006 and some were alleged to have occurred after 2006. Those pertained to period after 2006 were founded on general allegations with no details pleaded such as when such incident occurred (year, month, date etc.), what was its background, who witnessed, what the appellant actually said etc.

In our view, the incidents which occurred prior to 2006 could not be relied on to prove the instances of cruelty because they were deemed to have been condoned by the acts of the parties. So far as the instances alleged after 2006 were concerned, they being isolated instances, did not constitute an act of cruelty.

A petition seeking divorce on some isolated incidents alleged to have occurred 8-10 years prior to filing of the date of petition cannot furnish a subsisting cause of action to seek divorce after 10 years or so of occurrence of such incidents. The incidents alleged should be of recurring nature or continuing one and they should be in near proximity with the filing of the petition.

Few isolated incidents of long past and that too found to have been condoned due to compromising behavior of the parties cannot constitute an act of cruelty within the meaning of Section 13 (1)(ia)of the Act.

In our considered opinion, both the Courts below failed to take note of this material aspect of the case and thus committed jurisdictional error in passing a decree for dissolution of marriage

In our considered view, as it appears to us from perusal of the evidence that it is the respondent who withdrew from the appellant's company without there being any reasonable cause to do so. Now that we have held on facts that the respondent failed to make out any case of cruelty against the appellant, it is clear to us that it was the respondent who withdrew from the company of the appellant without reasonable cause and not the vice versa.

In view of foregoing discussion, the appeals succeed and are allowed. The impugned judgment is set aside. As a result, the petition filed by the respondent (husband) under Section 13(1) of the Act seeking dissolution of marriage is dismissed. As a consequence thereof, the marriage between the parties is held to subsist whereas the petition filed by the appellant against the respondent under Section 9 of the Act seeking restitution of conjugal right is allowed. A decree for restitution of conjugal right is, accordingly, passed against the respondent.

We hope and trust that the parties would now realize their duties and obligations against each other as also would realize their joint obligations as mother and father towards their grown up daughters. Both should, therefore, give quite burial to their past deeds/acts and bitter experiences and start living together and see that their daughters are well settled in their respective lives. Such reunion, we feel, would be in the interest of all family members in the long run and will bring peace, harmony and happiness. We find that the respondent is working as a "Caretaker" in the Government Department (see Para 4 of his petition). He must, therefore, be the "Caretaker" of his own family that being his first obligation and at the same time attend to his Government duties to maintain his family.

****

16. Section 34, 34(2), 35(1) of the Orissa Consolidation of Holding and Prevention of Fragmentation of Land Act .

Sadasiva Panda Versus Prajapati Panda And Another

Dr. A. K. Rath,J.

In the High Court of Orissa.

Date of Judgment -03.03.2017

Issue

Appeal against affirming Judgment.

Relevant Extract

The case of the plaintiff is that defendant no.1 was the owner of the suit land. The consolidation record of right was published in his name. To press his legal necessity, defendant no.1 approached him on 13.7.1985 to sell the land for consideration of Rs.5000/-. The suit property was adjoining to his homestead land.

He accepted the proposal. He paid an amount of Rs.2600/- towards advance to defendant no.1. Possession was delivered to him by defendant no.1 with a stipulation that the latter would take necessary permission and execute the registered sale deed on receipt of balance consideration of Rs.2400/- from him. He requested defendant no.1 number of times to obtain permission to execute the sale deed. While the matter stood thus, on 18.11.1987 he came to know that defendant no.1 was going to sell the suit land in favour of defendant no.2. He filed objection before the Tahasildar, Binka not to accord permission to sell the land. The Tahasildar had ignored the objection and illegally accorded permission to sell the chaka to defendant no.1 in favour of defendant no.2. While the matter stood thus, defendant no.2 tried to take forcible possession of the land on the strength of the sale deed, but he could not. He was ready and willing to purchase the entire land. With this factual scenario, the suit had been filed for declaration that the registered sale deed dated 20.11.1987 executed by defendant no.1 in favour of defendant no.2 is illegal, for a direction to the defendants to execute the sale deed in respect of the suit plot in favour of the plaintiff and for permanent injunction or in alternative for a decree of damages of Rs.12,000/-.

Pursuant to issuance of summons, both the defendants entered appearance and filed a comprehensive written statement denying the assertions made in the plaint. The case of the defendants is that defendant no.1 had not executed any agreement to sale in favour of plaintiff, nor received an amount of Rs.2600/- from him to sell the suit plot. The plaintiff is not in possession of the suit land. About five years before defendant no.1 incurred a loan of Rs.2600/- from Uprendra Panda, elder brother of the plaintiff. On 15.10.1986, the said Upendra Panda demanded repayment of money and insisted upon him to sign on a plain paper to use the same as security for payment of loan amount. Out of fear, he had signed on the blank paper. Apprehending that his property would be grabbed, he made an endorsement on the reverse side of the plain paper that he will get back his land on return of Rs.2600/-. The said blank paper had been utilized for agreement to sell. He entered into an agreement with defendant no.2 on 11.9.1985 to sell the land for consideration of Rs.10,000/-. Since a part of chaka could not be transferred, he wanted to sell the entire chaka. The defendant no.2 agreed for the same. The consideration money for the entre chaka was fixed at Rs.15,000/-. While the matter stood thus, the defendant no.1 applied the Tahasildar, Binka for permission to sell the land in favour of defendant no.2. The Tahasildar granted permission. Thereafter the defendant no.1 sold the entire Chaka no.96 of village Urle to defendant no.2 on receipt of balance consideration money and executed a sale deed in his favour on 20.11.1987. Possession of the land was delivered to vendee. The plaintiff had not objected for grant of permission. The defendant no.2 is the owner in possession of a suit land and the bona fide purchaser of value.

On the inter se pleadings of the parties, the learned trial court framed as many as seven issues. To prove the case, the plaintiff had examined three witnesses and on his behalf, six documents were executed. The defendants had examined two witnesses and on their behalf, four documents were exhibited. On a thread bare analysis of evidence on record and pleadings, the learned trial court came to hold that agreement for sale dated 13.7.1985 is void, since it was for sale of fragment of a chaka. The execution of the agreement is shrouded with suspicious circumstances. It was a manufactured document. It further held that the document in question is in the nature of sale deed. The same being unregistered, it is void. Held so, the learned trial court dismissed the suit. The plaintiff

unsuccessfully challenged the same before the learned District Judge, Bolangir, which was transferred to the court of the learned Additional District Judge, Bolangir and renumbered as Title Appeal No.63/47 of 1991-92. The appeal was eventually dismissed.

The Second Appeal was admitted on 3.9.1998 on the following substantial questions of law enumerated in Grounds Nos.1 to 3 of the appeal memo.

"1. Whether the learned Lower Appellate court committed serious illegality in holding that the agreement (Ext.1/b) is void under Sections 34 and 35 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 without keeping in view that the transfer is void and that an agreement for sale is not a transfer ?

2. Whether the learned Lower Appellate court should have directed the defendant no.1 to refund the part of the consideration money along with amount spent by the plaintiff for improvement of the suit land ?

3. Whether the learned Lower Appellate Court committed serious illegality in not giving any finding relating to the possession of the parties as well as the validity of the sale deed in favour of the defendant no.2 ?"

The learned Advocate for the appellant submitted that both the courts below have committed a manifest illegality and impropriety in holding that the agreement to sell is void as it was fragment of a chaka. He further submitted that since the defendant no.1 has received an amount of Rs.2600/-, the courts below have committed a patent error in not directing the defendant no.1 to pay the same.

Per contra, Mr.Das, learned Advocate for the respondent no.2 submitted that defendant no.1 had not executed any agreement for sale in favour of the plaintiff. The signature of defendant no.1 appearing in the blank paper has been utilized for the purpose of agreement to sell. The defendant no.1 had not received any amount from the plaintiff. To press his legal necessity, the defendant no.1 had alienated the entire chaka after obtaining necessary permission from the competent authority to defendant no.2 for a valid consideration. Thus, the defendant no.2 is the absolutely owner in possession of the suit land.

The question does arise as to whether the defendant no.1 shall refund the amount received towards part consideration to the plaintiff ?

Section 65 of the Indian Contract Act provides obligation of person who has received advantage under void agreement, or contract that becomes void. The same is quoted below:

"65. Obligation of person who has received advantage under void agreement, or contract that becomes void.--When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

The Privy Council in the case of Harnath Kaur v. Indeer Bahadur Singh, AIR 1922 PC 403, held that the section deals with

(a) agreements and (b) contracts. The distinction between them is apparent from section 2. By clause (e) every promise and every set of promises forming the consideration for each other is an agreement, and by clause (h) an agreement enforceable by law is a contract. Section 65, therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By clause (g) an agreement not enforceable by law is said to be void. An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

Taking a cue from the decision in the case of Harnath Kaur (supra), a Full Bench of five Judges of the Hydrabad High Court, in Budhulal v. Deccan Banking Co. Ltd., AIR 1955 Hyd 69 (FB) speaking through Jaganmohan Reddy, J. went on to refer to the observations of Pollock and Mullah in their Treaties on Indian Contract and Specific Relief Acts and held that Section 65 of the Indian Contract Act does not apply to agreements which are void under Section 24 by reason of an unlawful consideration or object and there being no other provision in the Act under which money paid for an unlawful purpose may be recovered back, an analogy of English law will be the best guide. They then referred to the reasoning of the learned authors

that if the view of the Privy Council is right namely that "agreements discovered to be void" apply to all agreements which are ab initio void including agreements based on unlawful consideration, it follows that the person who has paid money or transferred property to another for an illegal purpose can recover it back from the transferee under this section even if the illegal purpose is carried into execution and both the transferor and transferee are in pari delicto. The Bench then proceeded to observe that the view of the learned authors is neither supported by any of the subsequent Privy Council decisions nor is it consistent with the natural meaning to be given to the provisions of Section 65. The section by using the words 'when an agreement is discovered to be void' means nothing more nor less than when the plaintiff comes to know or finds out that the agreement is void. The word 'discovery' would imply the preexistence of something which is subsequently found out and it may be observed that Section 66, Hyderabad Contract Act makes the knowledge (11m) of the agreement being void as one of the prerequisites for restitution and is used in the sense of an agreement being discovered to be void. If knowledge is an essential requisite even an agreement ab initio void can be discovered to be void subsequently. There may be cases where parties enter into an agreement honestly thinking that it is a perfectly legal agreement and where one of them sues the other or wants the other to act on it, it is then that he may discover it to be void. There is nothing specific in Section 65, Indian Contract Act or its corresponding section of the Hyderabad Contract Act to make it inapplicable to such cases. It was further held that a person who gives money for an unlawful purpose knowing it to be so, or in such circumstances that knowledge of illegality or unlawfulness can as a finding of fact be imputed to him, the agreement under which the payment is made cannot on his part be said to be discovered to be void. The criticism that if the aforesaid view is right then a person who has paid money or transferred property to another for illegal purpose can recover it back from the transferee under this section even if the illegal purpose is carried into execution, notwithstanding the fact that both the transferor and transferee are in pari delicto, in our view, overlooks the fact that the courts do not assist a person who comes with unclean hands. In such cases, the defendant possesses at,. advantage cover the plaintiff- in pari delicto potior est conditio defendentio. This specific provision made by the legislature cannot be taken advantage of in derogation of the principle that Section 65 of the

Contract Act is inapplicable where the object of the agreement was illegal to the knowledge of both the parties at the time it was made. In such a case the agreement would be void ab initio and there would be no room for the subsequent discovery of that fact. It further held that where a contract is discovered to be void the promissor can in a suitable case be given the benefit of Sec.65 of the Contract Act.

The principle underlying Section 65 is that a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation as held by Privy Council in the case of Babu Raja Mohan Manucha and others v. Babu Manzoor Ahmad Khan and others, A.I.R. 1943 Privy Council

There is no iota of doubt that the agreement dated 13.7.1985 vide Ext.1 is an agreement to sell. The defendant no.1 had received an amount of Rs.2600/- towards part consideration at the time of entering into an agreement. Both the parties knew that the document would be enforceable in the Court of law. Neither the plaintiff nor defendant no.1 knew that the agreement to be void. Both the parties assumed that agreement was a valid agreement. In view of the same, Section 65 of the Indian Contract Act applies to the facts of this case. The plaintiff is entitled to recover the money paid to the defendant no.1 towards part consideration.

In the wake of the aforesaid, the judgment and decree of the Courts below are set aside. The suit is decreed to the extent indicated above. The Second Appeal is allowed. No costs.

* * * * * * *