O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2017

(*NOVEMBER*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY

MONTHLY REVIEW OF CASES ON CIVIL, CRIMINAL & OTHER LAWS, 2017 (NOVEMBER)

I N D E X

	(iv) ***Indian Registration Act***			
15.	*Bhramarbar Ray versus Bishnu Charan Routray and others* ***Dr. A.K. Rath, J.*** *In the High Court of Orissa ,Cuttack.*	***Section 49 of the Indian Registration Act***	*Date of Judgment:03.11.2017*	***74-77***

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2. Section 100 of Civil Procedure Code

Bayanabai Kaware vs. Rajendra

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

In the Supreme Court of India

Date of Judgment - 23.11.2017

Issue

In the matter of declaration of title in respect of the suit land.

Leave granted.

This appeal is filed by the Defendant against the final judgment and order dated 11/12.10.2012 passed by the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Second Appeal No. 304/1997 whereby the Single Judge of the High Court allowed the appeal filed by the Respondent herein and reversed the judgment/decree dated 26.08.1996 passed by the 3rd Additional District Judge, Nagpur in Regular Civil Appeal No. 152/1989 which arose out of judgment/decree dated 31.01.1989 passed by 3rd Joint Civil Judge, Junior Division, Nagpur in Regular Civil Suit No. 1210/1985, which had dismissed the Respondent's civil suit.

In order to appreciate the short controversy involved in the appeal, few relevant facts need mention here in below. The Appellant is the Defendant whereas the Respondent is the Plaintiff in a civil suit out of which this appeal arises.

The dispute relates to plot No. 12 of field No. 13/3, P.H. 44 situated in Mouza Parsodi Tahsil, District Nagpur admeasuring 1625 sq.ft. (hereinafter referred to as the "suit land").

The suit land originally belonged to one Housing Co-Operative Society called-"Subhash Nagar Gruha Nirman Sahakari Sanstha Limited, Nagpur" (hereinafter referred to as "Society"). The Respondent purchased the suit land from the Society vide registered sale deed dated 29.12.1981 and was, accordingly, placed in possession of the suit land by the Society.

In March 1985, it was noticed by the Respondent that the Appellant had encroached upon the suit land owned by him and erected a kacha hut on one portion of the suit land without any authority. This led the Respondent to serve legal notice dated 22.04.1985 on the Appellant asking her to remove the hut, which was illegally erected by her on the suit land. Since the Appellant did not remove the hut, the Respondent filed a suit being Civil Suit No. 1210/85 in the

Court of Civil Judge, Junior Division, Nagpur against the Appellant claiming possession and mesne profits in relation to the suit land.

The suit was founded essentially on the allegation, inter alia, that the Respondent is the owner of the suit land having purchased the same from the Society by registered sale deed dated 29.12.1981 (Ex. P-31). It was alleged that the Respondent was placed in possession of the suit land pursuant to the sale deed. It was alleged that the Appellant, in March 1985, un-authorisedly entered into the suit land and erected one hut on one portion of the suit land and hence, the suit is filed by the Respondent seeking possession of the suit land and also claiming the mesne profits from the Appellant.

The Appellant filed written statement and denied the Respondent's claim. According to her, the suit land was allotted to one Dhondiba Lodhi by the Society, who then constructed his house on the land and on his death, his wife-Hirabai became its owner. It was then averred that Hirabai entered into an agreement with the Appellant on 22.05.1972 to sell the suit land and pursuant to the agreement, was placed in possession of the suit land. It was averred that since then the Appellant continued to remain in possession of the suit land without any interruption from anyone and has accordingly acquired ownership of the suit land by virtue of she being in adverse possession of the suit land. This, in substance, was her defense.

The Trial Court framed the issues and parties adduced their evidence. By judgment/decree dated 31.01.1989, the Trial Court dismissed the Respondent's suit. It was held that, firstly, the Respondent failed to prove the sale deed (Ex. P-31) inasmuch as the sale deed had some kind of discrepancies and also no attesting witness was examined; secondly, the Appellant was in possession of the suit land since 1972 and hence perfected her title over it by adverse possession; thirdly, the dispute, which is the subject-matter of civil suit, pertained to the business of the Society and hence covered by Section 91 of the Maharashtra Cooperative Societies Act (in short "the Act") and is, accordingly, barred Under Section 163(1) of the Act.

The Respondent, felt aggrieved by the judgment of the Trial Court, filed First Appeal before the 3rd Additional District Judge, Nagpur being Regular Civil Appeal No. 152 of 1989. The Appellate Court, by judgment dated 26.08.1996, dismissed the appeal and affirmed the judgment and decree of the Trial Court. The Appellate Court reversed the two findings of the Trial Court. One was in relation to the bar contained in Section 91 of the Act and the other relating to the plea of adverse possession. In other words, the Appellate Court reversed the two

findings of the Trial Court and held that, firstly, the bar contained in Section 91 of the Act does not hit the civil suit and hence maintainable in Civil Court and secondly, the Appellant (Defendant) failed to prove her adverse possession over the suit land and hence cannot be declared the owner of the suit land on the strength of her alleged adverse possession over it. However, since the Appellate Court confirmed the finding of the Trial Court insofar as it pertained to not properly proving the sale deed dated 29.12.1981 (Ex. P-31), the suit was dismissed. In other words, the Appellate Court also held that the Respondent (Plaintiff) was not able to prove the sale deed dated 29.12.1981 in accordance with law and hence no decree could be passed in Respondent's favour in relation to the suit land on the strength of such unproved sale deed.

Felt aggrieved by the judgment of the Appellate Court, the Respondent (Plaintiff) filed Second Appeal Under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") in the High Court (Nagpur Bench). The High Court framed the following question of law:

> Whether it is necessary for the Plaintiff Appellant to examine his vendor and attesting witnesses to prove his title to the suit property in a suit for recovery of possession against the encroacher when there is a registered sale deed executed by his vendor in his favour?

The Appellant (Defendant), however, did not file any cross objection Under Order 41 Rule 22 of the Code to challenge the adverse findings recorded by the First Appellate Court and, therefore, those findings attained finality.

By impugned judgment, the High Court allowed the Second Appeal and while setting aside of the judgments/decrees of the two courts below decreed the Appellant's suit. The High Court held that the Respondent has proved the sale deed as required in law and, therefore, he was entitled to claim decree for possession on the basis of the sale deed (Ex. P-31) as an owner against the Appellant. Felt aggrieved, the Defendant filed the present appeal by way of special leave against the judgment of the High Court before this Court.

Heard Mr. Anshuman Singh, learned Counsel for the Appellant and Mr. Rahul Chitnis, learned Counsel for the Respondent.

Having heard the learned Counsel for the parties and on perusal of the record of the case, we are inclined to dismiss the appeal as, in our opinion, the High Court is right in its reasoning and its conclusion.

As observed supra, the only question involved in the appeal before the High Court was whether the sale deed dated 29.12.1981 (Ex. P-31) in relation to the suit land was duly proved by the Respondent.

The Trial Court and the First Appellate Court held that since the sale deed was not properly proved, the Respondent's suit was dismissed whereas the High Court reversed the said finding and held that the sale deed was duly proved as required in law and accordingly passed the decree for possession against the Appellant in relation to the suit land.

We agree with the reasoning of the High Court. In our opinion also, the Respondent was able to prove the sale deed and was, therefore, rightly held entitled to claim decree for possession of the suit land on the strength of the sale deed dated 29.12.1981 (Ex. P-31) against the Appellant.

It is for the reasons that, firstly, the execution of the sale deed does not need any attesting witness like the gift deed, which requires at least two attesting witnesses at the time of its execution as per Section 123 of the Transfer of Property Act, 1882; and Secondly, Section 68 of the Evidence Act, 1872, which deals with the examination of the attesting witness to prove the execution of the document, does not apply to sale deed, which is governed by Section 54 of the Transfer of Property Act.

It is not in dispute that the Appellant (Defendant) in this case did not dispute the Respondent's vendor's (Housing Society) title. On the other hand, she, in clear terms, admitted their title in her written statement. It is also not in dispute that the Respondent entered in witness box and proved its execution and further did not raise any objection when the sale deed was being exhibited in evidence and indeed, rightly for want of any legal basis.

In the light of these admitted facts, we are of the view that the sale deed dated 29.12.1981 was duly proved by the Respondent and was, therefore, rightly relied on by the High Court for passing a decree of possession against the Appellant. It was, in our opinion, a clear case where the Respondent had a better title of the suit land as against the Appellant, who had no title to the suit land. All that the Appellant had was a plea of adverse possession which was not held proved. This being the only point involved in the case and the same having been answered against the Appellant, we find no merit in the appeal. The appeal thus fails and is accordingly dismissed.

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3. Order 6 Rule 17

Lutumani Singh & others Versus Siba Sankar Behera and others

Biswanath Rath, J.

In the High Court of Orissa, Cuttack.

Date of Judgment :7.11.2017

Issue

In the matter of consideration of an application for amendment of plaint during pendency of an appeal.

This civil miscellaneous petition involves allowing an application for amendment at the instance of the plaintiffs during pendency of the appeal.

Taking this Court to the pleadings available in the plaint and the judgment and decree involved therein, learned counsel for the petitioners submitted that even though there is no dispute that an amendment can be permitted in appeal but for the amended provision of Order 6 Rule 17, a party seeking amendment is required to satisfy the factum of due diligence so as to establish that in spite of all his efforts, it was not possible for him to bring such amendment previously. Referring to the provisions contained in Order 6 Rule 17 and the citations of the Hon'ble Apex Court in the case of *Chander Kanta Bansal versus Rajinder Singh Anand* as reported in AIR 2008 SC 2234 and another in the case of *Vidyabai and Ors. versus Padmalatha and Anr.* as reported in AIR 2009 SC 1433 and taking this Court to the relevant portion therein learned counsel for the petitioner submitted that for support of the above decisions to the petitioners' case, this Court should interfere with the impugned order and thereby, reject the application under Order 6 Rule 17 at the instance of the appellant therein.

In his opposition learned counsel for the opposite parties taking this Court to the proposed amendment submitted that the amendment involving taking out some plots affects the judgment and decree and further taking this Court to the observations made in the impugned order submitted that there has been right consideration of the issue involved leaving any scope for this Court to interfere with the same.

Considering the rival contentions of the parties and looking to the schedule of property involved in the suit and the prayer involved therein and also looking to the proposed amendment, this Court observes, allowing the amendment may affect the party and will also take away the effect of the judgment and decree. There is also possibility of rehearing of the suit inviting additional written statements as well as evidence from both the sides. Further, looking to the tenor of the amendment brought by way of application under

Order 6 Rule 17 of C.P.C. and the reasons assigned for bringing such amendment at a belated stage, this Court is not satisfied with the explanation of the petitioners that the petitioners were unable to establish that the proposed amendment portion could not have been brought in spite of due diligence and during pendency of the suit.

Under the circumstance, this Court finds, there is no satisfaction of the ingredient of the Order 6 Rule 17 of C.P.C. Taking into consideration the citations cited by the learned counsel for petitioners, this Court on perusal of both the decisions finds, the decisions have the support to the case at hand in favour of the petitioner.

Perusal of the judgment cited by Sri Biswal, learned counsel for the opposite parties this Court finds, the amendment application involved therein was by way of an attempt during pendency of the suit, which is not the position involving the case at hand. For the amendment herein being moved at the appellate stage, this Court observes, the decisions cited by the learned counsel for the opposite parties has no application to the case at hand.

For the observations made hereinabove and for the settled position of law requiring satisfaction of factum of due diligence, this Court finds, there has been no proper consideration of the application for amendment by the lower appellate Court. As a consequence, interfering with the impugned order, this Court sets aside the same and thereby, rejects the application under Order 6 Rule 17 of C.P.C.

The civil miscellaneous petition succeeds. No cost.

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4. Order 8 Rule 6A of CPC

Rama Chandra Mohanty Versus Bhuban Barik & another

Biswanath Rath, J.

In the High Court of Orissa,Cuttack.

Date of Judgment : 10.11.2017

Issue

In the matter of acceptance of counter claim after thirteen years of filing written statement.

This Civil Misc. Petition involves an order allowing amendment so also accepting the counter-claim to the written statement.

Assailing the impugned order, vide Annexure-1, Sri A.P.Bose, learned counsel for the petitioner referring to the provision contained in Order 8 Rule 6-A of C.P.C. pleaded that for filing of the written statement on 18.2.2005 even though the amendment could be maintainable for the trial having not been commenced but no counter-claim in the year 2017 would have been entertained. Taking this Court to several documents, Sri Bose, learned counsel for the petitioner established that the suit was initiated in the year 2000, vide T.S. No.21/2000 and re-numbered as C.S. No.906/2010. Written statement was also filed within time frame on 18.2.2005, whereas an application for amendment along with a counter-claim appearing at Annexure-4 was also filed in the month of June, 2017. Referring to a decision of the Hon'ble apex Court in Ramesh Chand Ardawatiya vrs. Anil Panjwani reported in AIR 2003 SC 2508 and other decision of this Court in Shrimati Basanti Jena vrs. Smt. Apani Bewa & others, reported in 2013 (Supp.-II) OLR-616, Sri Bose, learned counsel for the petitioner submitted that for the restrictions in the provision of Order 8 Rule 6-A of C.P.C. and the decisions of the Hon'ble apex Court as well as this Court referred to herein above, the impugned order remains unsustainable. Hence, Sri Bose requested this Court for interfering with the impugned order at Annexure-1 and setting aside the same.

Sri U.C.Mishra, learned counsel for O.Ps.1 & 2, while opposing the submissions of the learned counsel for the petitioner, referring to the decision of the Hon'ble apex Court in Vijay Prakash Jarath vrs. Tej Prakash Jarath reported in AIR 2016 SC 1304 submitted that the decision having the support of the claim of the O.Ps.1 & 2 thus has the support to the impugned order. Sri Mishra thus contended that there is no scope for interfering with the impugned order.

Considering the rival contentions of the parties, this Court finds, there is no dispute that the suit was filed in the year 2004 and the written statement was

also filed on 18.2.2005. Similarly, the application for amendment of the written statement along with the counter-claim was also filed in the month of June, 2017. For the restriction in the Order 8 Rule 6-A of C.P.C., this Court is now to proceed to ascertain as to whether the counterclaim having been filed after thirteen years of initiation of the suit could be entertainable. This Court takes into consideration the provision at Order 8 Rule 6-A of C.P.C., which reads as follows :-

"Order 8 Rule 6-A- Counter claim by defendant.- (1) A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of to suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not: Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the court. (2) Such counter-claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim. (3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the court. (4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

Reading of the provision quoted herein above, it appears, for the restriction in the Rule 6-A(I), a counter-claim can only be filed in respect of a cause of action accruing the defendants against the plaintiff either before or after filing of the suit but before the defendants have delivered their defence or before the time limited for settling their defence has expired. Whether such counter-claim is in the nature of a claim for damage or not ?

Taking into consideration the decisions cited by the learned counsel for the petitioner, as indicated herein above, in paragraph-28 of which the Hon'ble apex Court held as follows :-

"28. Looking to the scheme of Order VIII as amended by Act No. 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counter-claim which in the light of Rule 1 read with Rule 6-A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Rule 9. In the latter two cases the counter-claim

though referable to Rule 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under Order VI Rule 17 of the CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under Order VIII Rule 9 of the CPC if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counterclaim being utilized as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. But certainly a counter-claim is not entertainable when there is no written statement on record. There being no written statement filed in the suit, the counter-claim was obviously not set up in the written statement within the meaning of Rule 6-A. There is no question of such counter-claim being introduced by way of amendment; for there is no written statement available to include a counter claim therein. Equally there would be no question of a counter-claim being raised by way of 'subsequent pleading' as there is no 'previous pleading' on record. In the present case, the defendant having felled to file any written statement and also having forfeited his right to filing the same the Trial Court was fully justified in not entertaining the counter-claim filed by the defendant-appellant. A refusal on the part of the Court to entertain a belated counter-claim may not prejudice the defendant because in spite of the counterclaim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim. Similarly, taking into consideration a similar situation, this Court referring to the judgment referred to herein above delivering a judgment, vide 2013 (Supp.-II) OLR-616 has also the same view.

Looking to the provision contained in Order 8 Rule 6-A(I) of C.P.C. and considering the aforesaid decisions, this Court is of firm opinion that the counter-

claim having been filed after thirteen years of filing of the written statement is per se not maintainable.

Now coming to examine the decision cited by Sri Mishra, learned counsel for O.Ps.1 & 2 in Vijay Prakash Jarath (supra), the suit involved there was instituted in the year 1992, written statement was also filed in the year 1992 and the counterclaim was filed in the year 1996. The Hon'ble apex Court though taking into account the decision in Ramesh Chand Ardawatiya (supra) applying the discretion has condoned the delay in filing the counter-claim. Further taking into consideration that the High Court erred in taking into consideration that for the cause of action arose therein previous to filing of the written statement, for the different in the facts scenario herein, this Court finds, the decision shown by the learned counsel for O.Ps.1 & 2 has no application to the present case.

Under the circumstance, this Court while disapproving the reasons accepting the counter-claim by the trial 7 court interferes with the impugned order at Annexure-1 and sets aside the order at Annexure-1 so far it relates to acceptance of the counter-claim while maintaining the order, vide Annexure-1 so far it relates to amendment of the written statement. Finding the suit is of the year 2004 though re-numbered in 2010, this Court directs the trial court to conclude the trial involving the suit indicated herein above within a period of six months from the date of communication of this order. Amended written statement be filed within a period of ten days hence. The Civil Misc. Petition succeeds in part. The order at Annexure-1 is interfered with and modified to the extent indicated herein above.

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5. Section 125(3) Of Cr.P.C

Naresh Chandra Panda Vs. Smt. Minarani Panda & Others

S. K. Sahoo ,J.

In the High Court of Orissa, Cuttack

Date of Judgment : 06.11.2017

Issue

In the matter of procedure for enforcement of the order of arrear maintenance awarded in favour of the wife in an application under Section 125 of Cr.P.C.

None appears on behalf of the petitioner.

Mr. Yeeshan Mohanty, learned Senior Advocate appearing for the opposite parties is present.

In this application under section 482 of Cr.P.C., the petitioner Naresh Chandra Panda has challenged the impugned order dated 31.03.2005 passed by the learned J.M.F.C., Soro in Crl. Misc. Application No.8 of 2005 in issuing non-bailable warrant of arrest as well as distress warrant against the petitioner for realization of the total arrear maintenance dues with the condition not to execute the non-bailable warrant of arrest, if distress warrant amount is realized.

Learned counsel for the opposite parties submitted that the opposite parties filed an application under section 125 of Cr.P.C. claiming maintenance against the petitioner. The opposite party no.1 happens to be the wife and the opposite parties nos. 2 and 3 are the daughters of the petitioner and the opposite party no.1. The learned J.M.F.C, Soro adjudicated the 125 Cr.P.C. application in Misc. Case No.21 of 2001 and vide judgment and order dated 20.06.2002 directed the petitioner to pay a sum of Rs.400/- to the opposite party no.1 and Rs.300/- each to the opposite parties nos.2 and 3 from the date of order towards their maintenance. It appears that subsequently another application under section 127 Cr.P.C. was filed by the opposite parties for enhancement of the maintenance amount and such application was adjudicated ex-parte and the learned Magistrate enhanced the monthly maintenance amount vide order dated 08.10.2004 to the tune of Rs.500/- for the opposite party no.1 and Rs.1000/- each for the opposite parties nos.2 and 3 and the enhanced maintenance amount was directed to be paid from the date of filing of the 127 Cr.P.C. petition i.e. on 15.09.2003.

It is submitted by the learned counsel for the opposite parties that since the petitioner failed to comply the order passed by the learned J.M.F.C., Soro, an

application under section 125(3) of Cr.P.C. was filed by the opposite parties and accordingly, the impugned order was passed. The learned counsel for the opposite parties further submitted that even though the first maintenance order was passed in the year 2002 and it was enhanced on 08.10.2004 but the petitioner has not paid the maintenance amount at the enhanced rate and thereafter, stopped paying maintenance. He further submitted that there is no illegality in the impugned order passed by the learned Magistrate in the issuance of non-bailable warrant of arrest and distress warrant.

Section 125(3) Cr.P.C. provides that the Magistrate may issue a warrant for levying the amount of maintenance due as provided for levying fines if the person fails to comply the order of the Magistrate without sufficient cause. The Magistrate even may sentence such person to imprisonment for a term which may extend to one month or until payment if sooner made for the whole or any part of each month's allowance for maintenance or interim maintenance or litigation expense remaining unpaid.

In case of Rajendra Kumar Pradhan -Vrs.- Smt. Pramila Pradhan reported in 1993 (Vol. II) Orissa Law Reviews 284, a Division Bench of this Court held that passing simultaneous order for issuing distress warrant as well as nonbailable warrant of arrest against a person who has failed to comply with order relating to maintenance without sufficient cause is not proper. In normal circumstances, issuance of distress warrant is a condition precedent for exercise of the power to sentence conferred by that section. It, however, deserves to be noticed and emphasized that even the language of the section does not require that after distress warrant had been issued, the wife should wait till the process visualized by section 421 of the Code comes to an end, because all that the second part of the section requires to become operative is "execution of the warrant". The section has been so worded very rightly because if the end of the process were to be awaited, the wife would hardly be able to get the benefit of the order because of the delay involved and the result would be that the speedy remedy made available by section 125 to destitutes would be almost rendered nugatory. It was further held that in a case distress warrant may not be insisted upon, if the Court were to be satisfied on the facts of that case that such an exercise would be futile.

The purpose for which sentence has been prescribed under section 125(3) Cr.P.C. is not a sentence stricto senso rather it is a mode of enforcement of the maintenance order passed by the Court to recover the amount of maintenance with expedition and without compelling the destitute lady and her children to come to the corridors of the Court frequently to get the maintenance amount. It is not only the duty of the Court adjudicating the maintenance application to see

that the order of interim maintenance/maintenance is passed at an earliest in favour of the deserving applicants but also to see that the applicants get the benefit of the maintenance order at an earliest otherwise it will remain a mere paper justice than subserving the cause of substantial and real justice. Procedures are handmade of the justice. It is meant to enhance its cause and not to scuttle the same.

In the present case, even though the learned Magistrate issued N.B.W. and D.W. simultaneously against the petitioner for realization of total arrear dues of maintenance but he was careful enough in directing that if the distress warrant amount is released, N.B.W.A. is not to be executed. The purport of the order is that first there shall be attempt to realize the arrear maintenance amount due in the manner provided for levying fines under Section 421 of Cr.P.C. and if it becomes possible to realize such amount then non-bailable warrant shall not be executed. Therefore, execution of N.B.W. was a conditional order which would be effective in case of failure to realize the arrear maintenance amount in the manner as provided under section 421 of Cr.P.C.

In view of the aforesaid ratio laid down by the Division Bench and the conduct of the petitioner in avoiding to make payment of the maintenance dues, I find no illegality or infirmity in the impugned order dated 31.03.2005 Accordingly, the CRLMC application stands dismissed.

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6. Section 302 of Cr.P.C.

Chand Devi Daga and Ors. vs. Manju K. Humatani and Ors.

A.K. Sikri and Ashok Bhushan, JJ.

In the Supreme Court Of India

Date of Judgment - 03.11.2017

Issue

In the matter of substitution of legal heirs of the deceased appellant in Criminal Misc. Petition challenging the dismissal of the revision petition by High Court confirming dismissal of complaint petition by the Magistrate.

Relevant extract

This appeal has been filed against the judgment of the High Court of Chhatisgarh allowing an IA filed by the legal representatives of the Petitioner in Criminal Misc. Petition. The Respondents aggrieved by the order of the High Court dated 02.02.2017 has filed this appeal.

The brief facts necessary for deciding this appeal are:

Smt. Chandra Narayan Das whose legal representatives are the Respondent Nos. 1 to 7 had filed a complaint against the Appellants alleging offence Under Sections 420, 467, 468, 471, 120B, 201 and 34 Indian Penal Code. The husband of Smt. Chandra Narayan Das was a lease holder of a shop situated in the Civic Centre, Bhilai Steel Plant, Chhatisgarh. Shop No. 12 was allowed in the name of the husband of Appellant No. 1 in the year 1959.

Although, husband of the Appellant No. 1, a Member of Parliament had died in 1952 itself, it was alleged by the complainant that certain agreements were got executed by legal heirs of Member of Parliament which constituted commission of offence. The complaint was dismissed by the Magistrate vide order dated 26.02.2015 holding that prima facie case Under Sections 420, 467, 468, 120B and 201/34 Indian Penal Code is not made out against the Accused.

Smt. Chandra Narayan Das filed a criminal revision before the Additional Sessions Judge, Durg which was dismissed by VIIIth Additional Sessions Judge, Durg vide judgment dated 20.11.2015. Criminal Misc. Petition against the said order dated 20.11.2015 was filed in the High Court of Chhatisgarh by Smt. Chandra Narayan Das. The High Court on 18.02.2016 issued notice in the Criminal Misc. Petition. After issuance of notice the Petitioner, Smt. Chandra Narayan Das died on 02.04.2016. An application was filed by the legal heirs of Smt. Chandra Narayan Das praying them to be substituted in place of the Petitioner. The application was opposed by the Appellants. The High Court vide

its order dated 02.02.2017 allowed the said application and permitted the legal representatives of Smt. Chandra Narayan Das to come on record for prosecuting the Criminal Misc. Petition. Aggrieved by the said judgment, the Appellants have come up in this appeal.

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

There is no dispute regarding facts and events in the present case. The original complainant died during the pendency of the Criminal Misc. Petition before the High Court which was filed challenging the order of the Sessions Judge rejecting the criminal revision against the order of Magistrate dismissing the complaint.

Section 256 of Code of Criminal Procedure, 1973 is contained in Chapter XX with the heading "Trial of summons-cases by Magistrates". Section 256 on which reliance has been placed provides as follows:

Section 256. Non-appearance or death of complainant.-

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the Accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the Accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of Sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

At this stage reference to Section 302 of the Code of Criminal Procedure is necessary. Section 302 of the Code of Criminal Procedure is contained in Chapter XXIV with the heading "General provisions as to inquiries and trials". Section 302 relates to permission to conduct prosecution which is to the following effect:\

Section 302. Permission to conduct prosecution

1. Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate-General or

Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the Accused is being prosecuted.

2. Any person conducting the prosecution may do so personally or by a pleader.

This Court had occasion to consider Sections 256 and 302 in Balasaheb K. Thackeray and Anr. v. Venkat @ Babru, (2006) 5 SCC 530. In the above case complaint was filed Under Section 500 read with Section 34 Indian Penal Code. A petition was filed Under Section 482 of the Code 1973 against the order of issue of process in the High Court which was dismissed. SLP was filed in this Court in which notice was issued and during the pendency of the appeal it was noted that complainant had died. It was contended that the complaint be dismissed on the ground that complainant is dead. This Court in the above context referred to Sections 256 and 302. This Court repelled the argument of the Appellant that complaint be dismissed on the ground that complainant had died. Following was held in paragraphs 3 to 6:

3. Learned Counsel for the Appellants with reference to Section 256 of the Code submitted that the complaint was to be dismissed on the ground of the death of the complainant. As noted above learned Counsel for Respondent 1's legal heirs submitted that the legal heirs of the complainant shall file an application for permission to prosecute and, therefore, the complaint still survives consideration.

4. At this juncture it is relevant to take note of what has been stated by this Court earlier on the principles applicable. In Ashwin Nanubhai Vyas v. State of Maharashtra with reference to Section 495 of the Code of Criminal Procedure, 1898 (hereinafter referred to as "the old Code") it was held that the Magistrate had the power to permit a relative to act as the complainant to continue the prosecution. In Jimmy Jahangir Madan v. Bolly Cariyappa Hindley after referring to Ashwin case it was held that heir of the complainant can be allowed to file a petition Under Section 302 of the Code to continue the prosecution.

5. Section 302 of the Code reads as under:

302. Permission to conduct prosecution.--(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the

Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the Accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader.

6. To bring in application of Section 302 of the Code, permission to conduct the prosecution has to be obtained from the Magistrate inquiring into or trying a case. The Magistrate is empowered to permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person other than the Advocate General or the Government Advocate or a Public Prosecutor or Assistant Public Prosecutor shall be entitled to do so without such permission.

Two Judge Bench in Jimmy Jahangir Madan v. Bolly Caiyappa Hindley (dead) By L.Rs., (2004) 12 SCC 509 referring to this Court's judgment in Ashwin Nanubhai Vyas (supra) had held that heirs of complainant can continue the prosecution. Following was held in paragraph 5:

5. The question as to whether the heirs of the complainant can be allowed to file an application Under Section 302 of the Code to continue the prosecution is no longer res integra as the same has been concluded by a decision of this Court in the case of Ashwin Nanubhai Vyas v. State of Maharashtra in which case the Court was dealing with a case Under Section 495 of the Code of Criminal Procedure, 1898, which is corresponding to Section 302 of the Code. In that case, it was laid down that upon the death of the complainant, under the provisions of Section 495 of the said Code, mother of the complainant could be allowed to continue the prosecution. It was further laid down that she could make the application either herself or through a pleader. Undisputedly, in the present case, the heirs themselves have not filed the applications to continue the prosecution, rather the same have been filed by their power-of-attorney holders....

In view of what has been discussed above, we are of the view that High Court did not commit any error in allowing the legal heirs of the complainant to prosecute the Criminal Misc. Petition before the High Court. We do not find any error in the order of the High Court. The appeal is dismissed.

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7. Section 378 of Cr.P.C.

State of Uttarakhand Vs. Jairnail Singh

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

In the Supreme Court of India

Date of Judgment - 13.11.2017

Issue

Appeal by State against acquittal passed by High Court of Uttarkhand at Naintal setting sentence order of conviction and sentence passed by the Sessions Court under Section 307 of IPC and Section 25(1-A) Arms Act,1959.

Relevant Extract

Leave granted.

This appeal is filed by the State against the final judgment and order dated 22.05.2014 passed by the High Court of Uttarakhand at Nainital in Criminal Appeal No. 33 of 2005 whereby the High Court allowed the appeal filed by the Respondent (Accused) herein and set aside the order of conviction and sentence dated 01.03.2005 passed by the Trial Court in Session Trial Nos. 319 & 320 of 2000 by which the Respondent (Accused) was convicted Under Section 307 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and Section 25(1-A) of the Arms Act, 1959 and sentenced him to undergo rigorous imprisonment for ten years and a fine of Rs. 5000/- Under Section 307 of Indian Penal Code, in default of payment of fine, to further undergo imprisonment for three months and to undergo rigorous imprisonment for five years and a fine of Rs. 1000/- Under Section 25(1-A) of the Arms Act, in default of payment of fine, to further undergo imprisonment for one month. Both the sentences were directed to run concurrently.

The prosecution case is that on 12.12.1999 at 17.45 hrs., the First Information Report (FIR) was lodged by Asgar Ali, son of Allah Diya, resident of Mohalla Naudhauna, Kasba and Police Station Sherkot, District Bijnore in Police Station Nanakmatta, Dist. Udham Singh Nagar, Uttarakhand. As per the contents of the FIR lodged by Asgar Ali-the Complainant, on 08.12.1999, he along with his brother Akbar Ali and 10-12 other persons were doing the trading of sale purchase of paddy of Village Devipura. On 12.12.1999, at around 11.00 hrs., when Akbar Ali (injured victim) was weighing paddy of Jairnail Singh (Accused) in his village at Devipura, at that time, Jairnail Singh came and made an allegation on Akbar Ali that more paddy has been weighed while it had been shown less. Akbar Ali denied the allegation. Therefore, Jairnail Singh started abusing Akbar Ali and when Akbar Ali objected, the quarrel erupted and Jairnail Singh took out a 12 bore country made pistol from his right pocket of his pant and fired on the temple of Akbar Ali, due to which Akbar Ali fell down at the spot. Asgar

Ali(complainant) and other companions of Akbar Ali tried to grab Jairnail Singh but he succeeded to escape from the spot with the pistol in south direction. The Complainant and his companions took the injured Akbar Ali to the Government Hospital, Nanamatta on his tractor trolley where no doctor was available. Therefore, they went to Government Hospital, Khatima where doctor referred the injured to the Government Hospital, Pilibhit where the injured was examined.

During the investigation, the Investigating Officer on 13.12.1999 at about 12.30 p.m. arrested Jairnail Singh from Nanak Sagar Dam and recovered the pistol, which was without license. After completion of the investigation, the Investigating Officer filed the charge-sheet Under Section 307 Indian Penal Code and Section 25 of the Arms Act against Jairnail Singh (Accused).

The Judicial Magistrate, Khatima, Dist. Udham Singh Nagar, committed the case for trial to the Session Court. After committal of the case to the Session Court, Udham Singh Nagar, Rudrapur, the Sessions Judge, framed charges against the Accused-Jairnail Singh Under Section 307 Indian Penal Code and Section 25 of the Arms Act in Session Trial Case No. 320 of 2000 for the offence punishable Under Section 307 Indian Penal Code and Session Trial Case No. 319 of 2000 for the offence punishable Under Section 25 of the Arms Act. The Accused denied the charges.

The Trial Court conducted the trial in both the cases together. By judgment dated 01.03.2005, the Trial Court convicted the Accused for the offences punishable Under Section 307 of Indian Penal Code and Section 25 of the Arms Act and sentenced him to undergo rigorous imprisonment for ten years for the charge Under Section 307 Indian Penal Code and a fine of Rs. 5000/-, in default of payment of fine, to further undergo imprisonment for three months and also to undergo rigorous imprisonment for five years Under Section 25(1-A) of the Arms Act and a fine of Rs. 1000/-, in default of payment of fine, to further undergo imprisonment for one month. Both the sentences were directed to run concurrently.

Aggrieved by the judgment of the Trial Court, the Respondent (Accused) filed an appeal being Criminal Appeal No. 33 of 2005 before the High Court. The High Court, by impugned judgment, allowed the appeal and set aside the order of conviction and sentence of the Respondent-Accused passed by the Trial Court in Session Trial Nos. 319 and 320 of 2000.

Felt aggrieved, the State has filed this appeal by way of special leave before this Court.

Heard Mr. Rajiv Nanda, learned Counsel for the Appellant (State) and Mr. Adarsh Upadhyay, learned Counsel for the Respondent (Accused).

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

In other words, in our view, the reasoning and the conclusion of the High Court in acquitting the Respondent of the charges Under Section 307 Indian Penal Code and Section 25(1-A) appears to be just and proper as set out below and to which we concur and hence it does not call for any interference by this Court.

First, the parties involved in the case namely, the victim, his brother, who was one of the eye-witnesses with other two eye-witnesses and the Accused were known to each other then why the Complainant-brother of victim in his application (Ex-P-A) made immediately after the incident to the Chief Medical Superintendent, Pilibhit did not mention the name of the Accused and instead mentioned therein "some sardars".

Second, according to the prosecution, the weapon used in commission of offence was recovered from the pocket of the Accused the next day, it looked improbable as to why would the Accused keep the pistol all along in his pocket after the incident for such a long time and roam all over.

Third, the weapon (pistol) alleged to have been used in the commission of the offence was not sent for forensic examination with a view to find out as to whether it was capable of being used to open fire and, if so, whether the bullet/palate used could be fired from such gun. Similarly, other seized articles such as blood-stained shirt and soil were also not sent for forensic examination.

Fourth, weapon (Pistol) was not produced before the concerned Magistrate, as was admitted by the Investigating Officer.

Lastly, if, according to the prosecution case, the shot was hit from a very short distance as the Accused and the victim were standing very near to each other, then as per the medical evidence of the Doctor (PW-6) a particular type of mark where the bullet was hit should have been there but no such mark was noticed on the body. No explanation was given for this. This also raised some doubt in the prosecution case.

In our considered opinion, the aforesaid infirmities were, therefore, rightly noticed and relied on by the High Court for reversing the judgment of the Session Court after appreciating the evidence, which the High Court was entitled

to do in its appellate jurisdiction. We find no good ground to differ with the reasoning and the conclusion arrived at by the High Court.

In other words, it cannot be said that the aforementioned infirmities were either irrelevant or in any way insignificant or technical in nature as compared only to the ocular version of the witnesses. The prosecution, in our view, should have taken care of some of the infirmities noticed by the High Court and appropriate steps should have been taken before filing of the charge-sheet to overcome them. It was, however, not done. The benefit of such infirmities was, accordingly, rightly given to the Respondent by the High Court.

In the light of the aforementioned infirmities noticed in the prosecution case which, in our opinion, were material, the decision cited by the learned Counsel for the Appellant (State) cannot be applied to the facts of the case at hand. It is distinguishable.

Since the State has challenged the order of acquittal in this appeal, unless we are able to notice any kind of illegality in the impugned judgment, we cannot interfere in such judgment. In other words, it is only when we find that the impugned judgment is based on no evidence or/and it contains no reasoning or when it is noticed that the reasoning given are wholly perverse, this Court may consider it proper in appropriate case to interfere and reverse the decision of the High Court.

But when the High Court while reversing the decision of the Session Court acquits the Accused and assigns the reasons by appreciating the entire evidence in support of the acquittal, then this Court would not be inclined to interfere in the order of acquittal. In our view, it is necessary for the High Court while hearing the appeal arising out of the order of conviction to appreciate the entire evidence and then come to its conclusion to affirm or reverse the order. In a case of later, which results in reversal, with which we are here concerned, it is necessary for the High Court to assign cogent reasons as to why it does not consider it proper to agree with the reasoning of the Sessions Judge by pointing out material contradiction in evidence and infirmities in the prosecution case. Case at hand is of this nature. In view of foregoing discussion, we find no merit in the appeal. The appeal fails and is accordingly dismissed.

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8. Section 302 of Indian Penal Code

Kaira Munda vs. State of Odisha

Sanju Panda and S.N. Prasad, JJ.

In the High Court of Orissa, Cuttack

Date of Judgement - 11.11.2017

Issue

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

The instant Jail Criminal Appeal is against the judgment and sentence dtd. 10th April, 2006 passed by the Ad hoc Additional Sessions Judge, (F.T.) Champua in S.T. Case No. 99/108 of 2004, arising out of G.R. Case No. 66 of 2004, corresponding to Champua P.S. Case No. 43 of 2004 of the Court of S.D.J.M., Champua whereby and where under the appellant has been found guilty for commission of offence U/s. 302 I.P.C. and was convicted to undergo rigorous imprisonment for life.

The prosecution story in brief, as per F.I.R. is that on 12.04.2004 at about 10 P.M. complainant Sridhar Munda of village Sana Hundula accompanied by his brother Budhuram Munda appeared before the Officer-in-Charge of Champua P.S. and orally reported that in that morning at about 9 A.M. while he and other villagers had gone to the forest on a 'Paridhi', his younger brother Budhuram informed him that their father, appellant Kaira Munda has killed their mother by means of an axe. The complainant immediately came to his house along with his brother Budhuram and after opening the door of their house found that their mother was lying dead in a pool of blood and she has sustained injuries on his neck, back and base of her ear. According to the complainant the appellant had left the weapon of offence, stained with blood, near the dead body. The complainant subsequently reported the matter to the village Chowkia and then sent his younger brother to their uncle's house at village Sunaposi. Later on the village Ward Member came to know about the same. The complainant disclosed that about one year back there was regular quarrel between his father and mother over the illicit relationship existing between his father and one Gurubari Munda. He further disclosed that in the previous evening both his father and mother had quarrel in which his father had threatened his mother to take away her life. The complainant alleged that his father, in order to satisfy his anger, has killed his mother by means of an axe at about noon on that day and after killing her, his father had absconded.

The police registered Champua P.S. Case No. 43 of 2004 and took up investigation, thereafter submitted charge-sheet against the appellant for commission of offence U/s. 302 I.P.C. and accordingly the appellant was put to trial. The appellant has been convicted U/s.302 I.P.C. and sentenced to undergo rigorous imprisonment for life by the impugned judgment which has been assailed by the appellant by way of instant appeal.

This court, in order to examine the legality and propriety of the judgment containing the finding of the Trial Court, has gone through the depositions of the witnesses. The prosecution has put 10 witnesses for their examination and cross-examination.

P.W.1 is the son of the deceased Sukumati Munda who has deposed that he was informed by his younger brother Budhuram Munda that their father has killed their mother by an axe. That was about noon time, getting said information, he rushed to his house and on reaching their, he found the door of their house was locked from outside and on opening the same, he saw his mother was lying on the ground in a pool of blood inside the kitchen room. On verification, he found bleeding injuries on her head near the neck and other parts of her body. He also found an axe lying near the dead body and immediately reported the same to the Chowkia of the village and thereafter to his uncle and then to the local police. In the cross-examination he has confirmed his statement which he has stated in examination-in-chief.

P.W.2, namely, Budhuram Munda who has given information to P.W.1 regarding commission of murder of his mother has deposed that in the morning he had gone to catch fish from the village pond and on his return to his house, he saw his mother was lying dead inside the kitchen and it was locked from outside, he opened the door and seeing her dead, again locked the same and went away to inform P.W.1. He has also informed to his uncle and thereafter police came and F.I.R. has been registered.

In the cross-examination he deposed that the axe which was marked as M.O.I is a common object in their village. He identified M.O.I as theirs. He further stated that in their house there are two rooms and his father and mother use one room and he and P.W.1 use the other room. His sister also shares their room. He has further stated that when he left for fishing, his father was absent in their house. His father is an irregular labourer, he used to stay back in the house after few days of work. His father used to quarrel with the villagers when he was under the state of intoxication and he does not pull well with the villagers.

P.W.3, namely, Birbal Munda is the nephew of the deceased and he has been informed by P.W.1 and P.W.2 while he was in jungle their father killed their mother by an axe and fled away. He has corroborated the statements made by P.Ws. 1 & 2 in his examination-in-chief. It is evident from his deposition that he is a hear-say witness having been informed by P.Ws. 1 & 2 about the occurrence.

P.W.4 is the sister-in-law of the appellant and the deceased was her younger sister. She has also been informed by P.Ws. 1 & 2 that their father has killed her younger sister and looked the door from outside.

P.W.5 - Mohan Munda is the brother-in-law of the appellant who has also been informed about the incident. P.W.6 - Susmita Munda is the niece of the appellant

P.W.7 is the doctor who has conducted autopsy over the dead body and found following injuries:-

i) incised wound of size 4" X 1 1/2" X 1/2" on left upper arm over the elbow joint.

ii) incised wound of size 1" X 3/4" X 1/2" on the head in front of the left ear.

iii) incised wound of size 3" X 1 1/2" X 1/2" on the back of the neck.

iv) incised wound of size 3" X 1 1/2" X 1" on the lateral part of left shoulder.

v) incised wound of size 3" X 1 1/2" X 1" on the left shoulder.

vi) incised wound of size 3" X 1 1/2" X 1" on left side of back

On dissection he found fracture of 6th and 7th ribs on the left side with laceration of left side lungs.

He has opined that the cause of death was due to shock and haemorrhage, the time of death was within 18 to 30 hours from the time of his examination, the injuries were ante-mortem in nature and the same are sufficient to cause death of a person in ordinary course of nature. He has deposed in course of trial that the assault is possible by the seized axe (M.O.I) produced before him for examination.

P.W.8 is the Ward Member of the occurrence village, he is also a post-occurrence witness. P.W.9 is also a post occurrence witness. P.W.10 is the investigating officer who in course of investigation has examined the complainant and other witnesses at the spot, prepared the spot map of the place of occurrence, when he came to know that the culprit is the father of the informant, he searched for him but he was found absent in his house,

subsequently he has surrendered before the police on the same day at about 10.15 P.M. where he has admitted to have committed murder of his deceased wife by means of an axe, accordingly he arrested the appellant and seized his wearing apparels and prepared seizure list in presence of witnesses. The said seizure list has been marked as Ext. 7. The wearing apparel of the appellant includes one old checked lungi having blood stain on it, marked as M.O.IV. On the next morning he held inquest over the dead body and prepared inquest report in presence of witnesses under Ext. 4 then he dispatched the dead body to S.D. hospital, Champua for post mortem examination. He also seized blood stained earth and sample earth from the spot and prepared seizure list. He found the weapon of offence (axe) lying at the spot which was sent to the hospital along with the dead body.

The seized articles have been sent for its chemical examination before the forensic laboratory. The examination report of forensic examination report has been perused by this court showing the result of examination of Saya, Saree, Budia, Lungi, sample earth, blood stained earth, sample blood & nail clippings. The result of examination regarding Saya, Saree, Budia, Lungi and Earth has been found to be stained with blood of human origin of 'A' blood group. The report of biology and serology examination of medico legal exhibits have been perused by this court, the same is in corroboration with the examination report given by the Director, Chemical Examiner, Government of Orissa wherein also the seized articles wee found to be stained with blood of human origin of 'A' group. The examination report given by the Director, Chemical Examiner contains reference of a 'Budia' which is known in English as axe and the blood stained with the 'Budia' has been found to be of human origin with 'A' group which is exactly same to that of the blood group of deceased.

It is in the light of these factual backgrounds which have been surfaced by the investigating officer in course of investigation, the legality and propriety of the judgment impugned is to be seen by this court.

Learned counsel appearing for the appellant has submitted that there is no eye witness of the occurrence, the offence is totally based upon circumstantial evidence and it is settled that if there is missing of chain, the conviction will not be held to be proper.

This court, in order to examine the argument advanced on behalf of the appellant as to whether there is missing of chain or not, has appreciated the deposition of witnesses, place of occurrence, the post mortem examination report and the chemical examination report of the seized articles.

It is evident from the materials available on record that there is no eye witness to the occurrence. The informant is the younger son of the deceased alleging allegation of commission of murder against his father who happens to be in illicit relationship with one another lady of the local village. It has come in course of investigation that due to such illicit relationship with another lady the mother and father of the informant used to quarrel regularly. It is also evident that in the house there were two rooms, in one room the mother and father remains and in other room the brother and sister shares. At the time of occurrence when P.W.1 was going out, he has seen that his father in the house was doing some cleaning work and when he was outside, he was informed by P.W.2 who happens to be his younger brother that their mother has been killed by their father. When both the brothers came to their house, they found that the house was locked from outside, they opened the door, gone inside and found that their mother was lying on the floor of the kitchen with pool of blood and one axe was lying besides the dead body. Both the brothers immediately have informed to their uncle, the local villagers and ultimately the local police. All have come and witnessed the place of occurrence, the dead body, the weapon used for commission of murder but they have not found the appellant, the father of the informant. It has come on record that when P.W.1 has gone outside the house his father and mother were only there in the house and when he came on being informed by P.W.2 that their mother has been killed, they found the house was bolted from outside. It has not come that in the house there were other persons also living, rather it has come that it is only a two roomed house, one room used by mother and father and other room used by brothers and sister, the sister was not there. Save and except them there was none in the house.

When police came, the used weapon of offence, i.e. axe has been seized, the father was searched but not found by the police but subsequently he surrendered at 10.15 P.M. in the same night where he has confessed his guilt and thereafter police has seized his wearing apparels, taken the blood sample, wearing apparels of the deceased, the axe has been seized and sent for its medical examination. The medical examination report suggests that the blood stained in the axe is of

human origin having blood group 'A' likewise in the wearing apparels of the appellant it has also blood stains of human origin having 'A' blood group.

It is the factual position in the case that the blood sample of the deceased was taken and when it was enquired into in the medical examination and compared with the seized articles stained with blood, the blood group tallied. It is, thus, evident that although it is a case of circumstantial evidence, right from the beginning, i.e. the mother and father remains in the house alone, the house was bolted from outside when P.Ws.1 and 2 reached to their house, when open the house, they found the dead body lying on the floor of the kitchen with an axe lying besides the dead body and the wearing apparels as also the axe were found with blood stains of having 'A' blood group which tallied with the blood group of the deceased.

In these factual backgrounds it is to be seen that why the sons and daughter will make false complaint against their father, nothing has brought on record by the defence in this regard, rather the prosecution has brought on record the reason/motive to commit murder, i.e. having illicit relationship with one another lady of the village, as such the argument advanced on behalf of the learned counsel for the appellant that there is missing of chain is not correct rather the guilt is proved from the circumstantial evidence added with forensic evidence.

In view of these factual backgrounds and when this court has appreciated the finding given by the trial court, this court is of the considered view that passing the judgment of conviction by the trial court can no way be said improper, rather it is based upon the principle of proving the guilt in the case of circumstantial evidence having been corroborated by the sons and sisters of the appellant.

In view thereof this court is of the considered view that the judgment impugned suffers from no infirmity. Accordingly the same is declined to be interfered with.

In the result this appeal fails and it is dismissed.

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9. Section 302 of IPC read with Section 34 of IPC

Kuna Vs. The State of Odisha

N.V. Ramana and Amitava Roy, JJ.

In the Supreme Court of India

Date of Judgement - 17.11.2017

Issue

In the matter of conviction of appellant under section 302/34 of IPC – Challenged.

Relevant Extract

The Appellant, successively convicted by both the courts below along with one Pravati Behera Under Section 302 of the Indian Penal Code, 1860 (for Short, hereinafter to be referred to as "IPC/Code") along with Section 34 of the Code is in appeal seeking remedial intervention.

Whereas the Trial Court by the judgment and order dated 26.1.2001, as stated hereinbefore, convicted the Appellant and the co-accused Pravati Behera, the High Court by the verdict impugned, though has affirmed the conviction of both, had left the co-accused at liberty to move an application for premature release from the jail and for appropriate orders Under Sections 433 and 433-A of the Code of Criminal Procedure, 1973 (for short, hereinafter to be referred to as "Cr.P.C."). Noticeably, the Appellant and co-accused had been charged along with Section 302 Indian Penal Code for the offence Under Section 203 as well but were acquitted thereof by the Trial Court. Though an appeal was preferred by the State against such acquittal, the High Court has affirmed their exoneration as well.

We have heard Mr. Krishnan Venugopal, learned senior Counsel for the Appellant and Mr. Shibashish Misra for the Respondent.

The prosecution case unfolds with a written information lodged by Premananda Behra (PW12) with the police on 20.2.2000, whereby the unnatural death of his brother Santosh Behera by hanging from the roof of a shed adjacent to his (deceased) house, was reported. In the course of the investigation, following the registration of said information, Niranjan Behera (PW1) disclosed to Daitari Behera (PW5) that the Appellant along with the co-accused Pravati Behera had in the intervening night of 19/20.2.2000 murdered the deceased in his house and thereafter had suspended his dead body from the roof of the nearby shed. PW1 claimed to have witnessed the incident of murder. Following this information, the investigation took a different turn. The Appellant and the co-accused were arrested and eventually, charge-sheet was laid against them.

Notably, on 26.2.2000, Gunahari Behera (PW6) and Makhan Behera (PW8) also came to the police station and reported that PW1 had disclosed to

them as well to have witnessed the Appellant and the co-accused committing murder of Santosh Behera (deceased) in his house and thereafter, hanging the dead body from the roof of the nearby shed. The investigating officer in the process of investigation, amongst others caused the inquest of the dead body to be made, prepared a spot map Ex. P-11, effected seizure, amongst others inter alia of a rope and also got the post-mortem of the dead body done before submitting the charge-sheet as mentioned hereinabove. The formal FIR was registered on 26.2.2000 Under Sections 302/203 read with Section 34 Indian Penal Code.

At the trial, the Accused persons were charged Under Sections 302/203/34 Indian Penal Code. They having denied the allegations, were made to stand trial. The prosecution examined as many as 16 witnesses, and after recording the statements of the Accused persons Under Section 313 Code of Criminal Procedure and on a consideration of the materials on record, the Trial Court convicted the Appellant and co-accused Under Section 302 Indian Penal Code read with Section 34 of the Code and sentenced them to undergo imprisonment for life and to pay fine of Rs. 100/-, in default to suffer R.I. for 30 days.

In recording the conviction, the Trial Court laid utmost emphasis on the testimony of PW1, who apart from narrating the incident of murder, also deposed about the extra-marital relationship between the Accused persons, though they were related as nephew and aunt. Reliance was also placed on the evidence of Musimani Behera (PW3), the mother of the deceased, who, perceived to have hinted at well to this unacceptable liaison. The Trial Court noted the opinion of Dr. Rupabhanu Mishra (PW11), who conducted the post-mortem examination that the cause of death of Santosh Behera was asphyxia as a result of constriction of the neck and not due to hanging by rope. The Trial Court, however discarded the prosecution case of illicit relationship between the Accused persons and the motive of murder stemming therefrom. It was however of the view that lack of motive notwithstanding, the testimony of PW1, PW5, PW6 and PW8 taken together proved the charge against the Accused persons and, therefore, returned the finding of guilt against them, qua the offences for which they had been charged.

Both the Appellant and co-accused preferred separate appeals before the High Court and as hereinbefore stated, by the decision assailed, their conviction Under Section 302/34 Indian Penal Code and the sentence awarded thereupon was affirmed. The High Court, in determining so, sustained the prosecution's plea of motive of murder founded on extra-marital relationship between the Accused

persons and arrived at the conclusion drawing sustenance from the evidence of PW1 as well as PW3, the mother of the deceased, who testified to have rebuked both of them for their deplorable conduct. The High Court, as well believed the version of the incident, as narrated by PW1 and disclosed to PW5, PW6 and PW8 albeit after a lapse of three days. The High Court accepted the explanation of PW1 for the delay in such disclosure that the Appellant had threatened him with dire consequences, if he did so.

Mr. Krishnan Venugopal, learned senior Counsel for the Appellant has emphatically urged that as the testimony of PW1, the sole eye witness, as claimed by the prosecution, is wholly unbelievable, the conviction of the Appellant is palpably illegal and is liable to set-aside. Apart from contending that the FIR filed after six days of the incident was inexplicably delayed rendering the prosecution case unworthy of any credit, the learned senior Counsel maintained that the High Court has grossly erred in accepting that the motive behind the murder was the illicit relationship between the Accused persons, necessitating the elimination of the deceased. The learned senior Counsel was particularly critical of the unnatural conduct of PW1, who incomprehensibly remained indifferent and silent though his uncle was murdered in his view and that the incident, according to him, ranged for about an hour. Further, his unexplained silence about the gruesome murder by the Accused persons for about three days also rendered him wholly untrustworthy, he urged. Mr. Krishnan argued as well that not only PW1 at the relevant time was admittedly in an intoxicated state, his presence at the place of occurrence was not free from doubt. The learned senior Counsel underlined that it being in the evidence that there were several houses of the close relatives of the deceased and PW1 in the locality, the claim of PW1 to be a silent eye witness to the incident, is wholly unbelievable. The learned senior Counsel insisted as well that in absence of any material on record that the area was sufficiently lighted, it was wholly unacceptable that PW1 could see the incident from his house at a distance of 15 cubits. In the attendant facts and circumstances, Mr. Venugopal maintained that the conviction of the Appellant on the testimony of a solitary witness, whose version was laden with inconsistencies, absurdities, and improbabilities, is patently illegal and cannot, in any view of the matter, be sustained in law. He discarded the evidence of PW5, PW6 and PW8, relied upon by the two courts below, on the ground that their testimonies were wholly inconsequential being in the nature of "hearsay", they having derived the knowledge of the incident from PW1, as reported to them by him. Mr. Venugopal has urged that if the version of PW1 is disbelieved, as it ought to be, in view of the inherent incongruities, the other materials on record do not unerringly evince the complicity of the Accused persons in the offence and thus,

the Appellant is liable to be acquitted. He argued as well that the injuries enumerated in the inquest report and the medical evidence/post-mortem report, also are inconsistent and contradictory in description, thus rendering the prosecution version highly improbable. The learned Counsel emphasised that the evidence on record by no means convincingly establish the illicit relationship between the Accused persons and that the High Court did fall in error in accepting the same.

In refutation, the learned Counsel for the Respondent-state has asserted that the evidence of the sole eye witness PW1 is coherent, consistent and cogent and is fully complemented by medical evidence and thus the prosecution having been able to prove the charge beyond all reasonable doubt, the conviction and sentence of the Appellant and his co-accused does not merit interference. Having regard to the vivid narration of the incident in minute details, as provided by PW1, the courts below were perfectly justified in relying on his sole testimony, he urged. As the medical evidence, mentioning the cause of death, is wholly corroborative of the version of PW1, there is no scope to doubt the culpability of the Accused persons, he argued. The learned Counsel dismissed the demur of the defence that the evidence of PW1 was vitiated by contradictions, embellishments and inconsistencies. According to Mr. Misra, the statement on oath of PW1 is amply supported by that of Kumari Nomita Behera (PW2), the daughter of the deceased and PW12, who, in the next morning, did detect the dead body of the deceased in a hanging posture from the roof of the adjacent shed, as deposed by PW1. As the testimony of PW1 together with that of PW3, the mother of the deceased persuasively prove the illicit relationship between the Accused persons, the High Court was justified in accepting the same to be the motive for the offence, in the attendant facts and circumstances of the case, he insisted. The learned Counsel for the Respondent urged that as PW1 had been threatened with death by the Appellant, if he dared to disclose the commission of offence, the delay on the part of the witness (PW1) to confide about the same in PW5, PW6 and PW8 after three days and the filing of the FIR after six days per se, is not fatal for the prosecution. The decision of this Court in Gulam Sarbar v. State of Bihar (2014) 3 SCC 401 was cited to reinforce the contention that when ocular evidence is in conformity with the medical evidence, conviction based thereon is legal and valid.

To appropriately appreciate the competing assertions, it is expedient to evaluate the evidence having a direct bearing on the offence allegedly committed for the offence involved. PW1, who is the cousin brother of the Appellant and incidentally the nephew of the co-accused Pravati Behera, deposed on oath that

there was a lingering love affair between the Accused persons from before the occurrence and that he had seen them in a compromising position in the house of the deceased, six months' prior to the incident. The witness stated that he informed about this to the mother of the deceased, who rebuked the Accused persons. He stated that in the night of occurrence at 9.30 p.m., he had gone to witness a video show in the village, where the children of Parvati Behra, the co-accused were also present. According to him, in the course of the show, the Appellant asked him to accompany him for liquor and though the witness initially resisted, he eventually left the video show with the Appellant. He stated further that they then went to the house of Baisakhu Behera, where the Appellant purchased liquor and consumed the same and forced the witness as well to drink. The witness stated that they then proceeded towards their respective homes and when they were nearing their houses, the Appellant concealed himself in a lane near the house of the witness. PW1 stated that at that time, he saw the deceased and Pravati Behera coming out of their house to ease themselves. On their way back to the house, Pravati Behera entered first and when the deceased was about to enter, the Appellant struck him twice from the back, as a result of which, he (deceased) fell down. According to the witness, the Appellant sat on the chest of the deceased and pressed his neck by his hands and Pravati Behera covered his mouth with her hands, as a result of which the deceased soon became suffocated and died. The witness stated that thereafter the Accused persons brought a rope, tied it around the neck of the deceased and suspended the dead body from the roof of the adjacent shed. Thereafter, the Appellant locked Pravati Behera in the house from outside and threatened to kill him, if he disclosed the offence to anyone, whereafter the witness returned home. PW1 stated that it was three days thereafter that he narrated the incident to PW5, PW6 and PW8.

In cross-examination, the witness in substance stated that his house, that of the deceased, PW12 and other relatives were located nearby and that the courtyard in between his house and that of the deceased measured about 15 cubits. The witness conceded that there were about 150 to 200 houses adjacent to his house, situated at a distance of 20 to 25 cubits. He further stated that at that point of time, he was little intoxicated, and he was then inside his compound. PW1 deposed as well that though the occurrence took place for about an hour, he did not raise any alarm asking for help. He admitted that on the next day, though about 5000 people had gathered, he did not disclose the incident either to them or to the police. He however sought to explain his conduct by stating that he did not do so as he had been threatened by the Appellant but after three days, he gathered courage and informed PW5, PW6 and PW8 of the incident.

PW3, the mother of the deceased deposed that she had rebuked the Accused persons on several occasions on noticing "secret talks' between them. The testimony of PW5 and PW6 in essence is that on 20.2.2000, PW1 disclosed to them the incident and the fact that he had witnessed the same. PW8 stated that about 5/6 days after the incident, when he asked PW1 about the same, he disclosed to him stating that the Appellant and Pravati Behera had committed murder of Santosh Behera. To all these three witnesses, as stated by them, PW1 disclosed in sequence the facts, as narrated by him on oath.

Dr. Rupabhanu Mishra (PW11), who performed the post-mortem examination on the dead body of the deceased had apart from mentioning the external injuries by way of abrasions etc. opined that death was due to asphyxia by pressing of neck and was not due to hanging by rope. PW12, as already alluded to hereinabove, stated on oath that on 20.2.2000, he had gone to the house of the deceased to hand over the keys of his Sweet Meat Shop, where the deceased was employed, but was told by his wife from inside the house that he (deceased) had gone out by locking the door from outside. The witness stated that it was then 5/5.30 a.m. and when he returned with his torch light, he detected the dead body of Santosh Behera hanging from the roof of adjacent shed by a rope. He then requested PW5 to write a report which he thereafter lodged with the police. S.I. Narendra Kumar Sarangi (PW16) is the Investigating Officer, who enumerated the steps taken by him during the investigation and proved amongst others Ex P-11, the spot map.

The Accused persons in response to the questions, laying the incriminating evidence against them denied the correctness thereof and stood by their plea of innocence.

Before recording the final conclusions on the basis of the evidence on record, beneficial it would be to briefly note the legal propositions enunciated in the authorities cited at the Bar.

That conviction can be based on a testimony of a single eye witness if he or she passes the test of reliability and that it is not the number of witnesses but the quality of evidence that is important, have been propounded consistently in Anil Phukhan (1993) 3 SCC 282, Ramji Surya (1983) 3 SCC 629, Patnam Anandam: (2005) 9 SCC 237 and Gulam Sarbar (2014) 3 SCC 401 with the apparent emphasis that evidence must be weighed and not counted, decisive test being whether it has a ring of truth and it is cogent, credible, trustworthy or otherwise.

That in a case where the charge is sought to be proved only on circumstantial evidence, motive plays an important part in order to tilt the scale was, amongst others underscored in Mohmadkhan Nathekhan (2014) 14 SCC 589

With reference to Section 3 of the Evidence Act, which defines "proved", "disproved" and "not proved", this Court in Lokeman Shah and Anr. v. State of West Bengal AIR 2001 SC 1760 recalled its observations in M. Narsinga Rao v. State of A.P., 2001 Crl. L.J. 515 as hereinbelow:

A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of a particular case, to act upon the supposition that it exists, (vide Section 3 of the Evidence Act). What is required is materials on which the court can reasonably act for reaching the supposition that a certain fact exists. Proof of the fact depends upon the degree of probability of its having existed. The standard required for reaching the supposition is that of a prudent man acting on any important matter concerning him.

Prior thereto, in Vijayee Singh and Ors. v. State of U.P. (1990) 3 SCC 190, this Court dwelling on the same theme, had recorded the following exposition:

It can be argued that the concept of 'reasonable doubt' is vague in nature and the standard of 'burden of proof' contemplated Under Section 105 should be somewhat specific, therefore, it is difficult to reconcile both. But the general principles of criminal jurisprudence, namely, that the prosecution has to prove its case beyond reasonable doubt and that the Accused is entitled to the benefit of a reasonable doubt, are to be borne in mind. The 'reasonable doubt' is one which occurs to a prudent and reasonable man. Section 3 while explaining the meaning of the words "proved", "disproved" and "not proved" lays down the standard of proof, namely, about the existence or non-existence of the circumstances from the point of view of a prudent man. The Section is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of a fact, in other words, "believe it to exist" and secondly in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence. The Act while adopting the requirement of the prudent man as an appropriate concrete

standard by which to measure proof at the same time contemplates of giving full effect to be given to circumstances or condition of probability or improbability. It is this degree of certainty to be arrived where the circumstances before a fact can be said to be proved. A fact is said to be disproved when the court believes that it does not exist or considers its non-existence so probable in the view of a prudent man and now we come to the third stage where in the view of a prudent man the fact is not proved i.e. neither proved nor disproved. It is this doubt which occurs to a reasonable man, has legal recognition in the field of criminal disputes. It is something different from moral conviction and it is also different from a suspicion. It is the result of a process of keen examination of the entire material on record by 'a prudent man'.

The quintessence of the enunciation is that the expression "proved", "disproved" and "not proved", lays down the standard of proof, namely, about the existence or non-existence of the circumstances from the point of view of a prudent man, so much so that while adopting the said requirement, as an appropriate concrete standard to measure "proof", full effect has to be given to the circumstances or conditions of probability or improbability. It has been expounded that it is this degree of certainty, existence of which should be arrived at from the attendant circumstances, before a fact can be said to be proved.

It is on the touchstone of this legal exposition that the evidence in the case in hand, has to be appreciated. Admittedly, PW1 is the solitary eye witness to the incident. He is related both to the deceased and the Accused-Appellant. Whereas the deceased is his uncle, the Appellant is his cousin brother. He claims to have accompanied the Appellant from the video show till the place of occurrence. At the relevant time, he was admittedly intoxicated. The incident, as per the prosecution version, occurred between 1 a.m. to 2 a.m. in the intervening night of 19/20.2.2000 in the house of the deceased which was located about 15 cubits from the compound where the house of PW1 was situated. The spot map Ex. P-11 prepared by the I.O. (PW16) noticeably does not mention about any source of

light in the locality. It does not even indicate as to whether the area was lighted at the time of incident so as to make the viewing of the incident possible by PW1 from the place, where he was located. It is intriguing that though PW1 claimed that the duration of the incident was about one hour and that the Appellant first did assault the deceased from behind twice on which he (deceased) fell down, whereafter he (Appellant) sat on his chest and throttled him and that co-accused Pravati Behera covered the mouth of deceased to facilitate his suffocation to death, he did not utter a sound or make a shriek or raise any alarm either to prevent the occurrence or to muster assistance from the inhabitants in the locality. This is more so as he admitted that there were about 150 to 200 inhabitants, lodging nearby apart from the fact that the houses of his relatives as well of the deceased were almost in the same campus. His plea that he did not disclose the incident to others immediately as he had been threatened by the Appellant does not explain or justify in any manner whatsoever his inexplicable silence or indifference during the time of commission of occurrence. In the overall scenario, the plea of the defence that the evidence of PW1 is highly improbable, absurd and doubtful, cannot be lightly brush aside more particularly in view of the test of essentiality of the degree of certainty, necessary to accept that the facts narrated by this witness as proved. To recall, the incident at the first place had been registered as a case of unnatural death and was after six days of the occurrence converted into one Under Sections 302/203/34 Indian Penal Code against the Appellant and the co-accused on the disclosures made by PW1, PW5, PW6 and PW8. Apart from the fact that testimony of PW5, PW6 and PW8 can by no means be construed to be substantive in nature, these witnesses having derived the knowledge from PW1, we are inclined to accept the analysis of the materials on record on the aspect of motive as made by the Trial Court.

The testimony of PW1 with regard to the illicit relationship between the Accused persons, his revelation to the mother of the deceased that he and the co-accused were seen in a compromising position in their house with the door open and the reprimand of the mother (PW3) for the "secret talks" between them

(Accused persons) lack in persuasion to conclude that the prosecution had been able to prove such relationship and therefore, the motive for the murder by them. The medical evidence to the effect that death had occurred by asphyxia as a result of constriction of the neck and not due to hanging by rope, though conforms to the manner of execution of the offence, as narrated by PW1, in view of inherent improbabilities and incongruities in his evidence, we do not consider it safe to base the conviction of the Appellant and the co-accused thereon. Dehors testimony of PW1, and the motive as alleged by the prosecution, there is no other tangible and clinching material on record in support of the charge against the Appellant and the co-accused. The inference of motive by the High Court drawn from the evidence of PW1 and PW3, in the overall perspective as discussed hereinabove, is apparently flawed.

On a totality of the consideration of all relevant facts and circumstances, we are of the unhesitant opinion that the evidence of PW1, as a witness of incident of murder, as projected by him is wholly unacceptable being fraught with improbabilities, doubts and oddities inconceivable with normal human conduct or behaviour and, thus cannot be acted upon as the basis of conviction. The testimonies of PW3, PW5, PW6, PW8 and PW11, even if taken on their face value, fall short of the requirement of proof of the charge beyond all reasonable doubt. The Appellant and the co-accused are thus entitled to the benefit of doubt in the singular facts and circumstances of the case. The contrary view taken by the courts below is against the weight of the evidence on record and the exposition of law attested by the decisions cited at the Bar and traversed as hereinabove.

In the result, the appeal succeeds and is allowed. As a consequence, the Appellant is acquitted and is ordered to be set at liberty if not required in connection with any other case

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10. Section 325 of IPC

The State of Uttar Pradesh Vs. Tribhuwan and Ors.

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

In the Supreme Court of India

Date of Judgment - 06.11.2017

Issue

In the matter of preferring appeal by the State against inadequacy of sentence passed by the High Court.

This appeal is filed by the State against the judgment and order dated 10.02.2006 of the High Court of Judicature at Allahabad in Criminal Appeal No. 211 of 1982 whereby the High Court partly allowed the appeal filed by the Accused persons and while upholding the conviction of the five Accused interfered in the sentence and its quantum awarded to the Accused persons by order dated 22.01.1982 passed by the IVth Additional Sessions Judge, Azamgarh in Sessions Trial No. 132 of 1981.

Having regard to the short controversy, which now remains for decision in this appeal as a result of subsequent events occurring in the case after the incident in question which took place way back in the year 1980, it is not necessary to set out the facts in detail except those which are relevant for the disposal of the appeal.

Six Accused persons, (1) Tribhuwan (2) Sita Ram (3) Ram Suresh (4) Rajendra (5) Ram Vijay and (6) Jogendra were the residents of a village-Seerpatti District Azamgarh (UP). One Ram Lagan (deceased) was also the resident of same village. The houses of Accused persons and Ram Lagan were situated in the same cluster and were in the close vicinity of each other. All the Accused persons, Ram Lagan and his family members were known to each other.

On 14.06.1980 around 8.00 p.m., Tribhuwan was passing in front of Ram Lagan's house when pet dog of Ram Lagan sitting in front of his house started barking on Tribhuwan, due to which Tribhuwan got infuriated and started hurling filthy abuses to Shobh Nath-son of Ram Lagan, his family members and Ram Lagan, who were sitting on the door steps of their house.

This incident, unfortunately, aggravated and led to filthy verbal exchanges between Ram Lagan, Shobh Nath and Tribhuwan. Tribhuwan then went to his house after threatening Ram Lagan and his son that he would come back soon to teach them a lesson. After sometime, Tribhuwan came back along with five persons, namely, Sita Ram, Ram Suresh, Ram Vijay, Rajendra and Jogendra with weapons (Pistol, Farsa, Lathi, Spear) in their hands. This incident attracted many

persons living in the area and who were passing on the road. The altercation and the attack by the Accused persons resulted in causing injuries to Ram Lagan and one Baij Nath (PW-2). Both injured persons were taken to nearby hospital for treatment. After sometime, Ram Lagan succumbed to his injuries in the hospital whereas Baij Nath survived.

After making necessary investigation, six Accused persons, named above, were apprehended and put to trial for commission of the offences punishable Under Sections 147, 148, 302, 324/149 and 325/149 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") in Session Trial No. 132 of 1981 before the IVth Additional Sessions Judge, Azamgarh.

The Sessions Judge, by his order 22.01.1982, acquitted one accused-Jogendra from all the charges whereas convicted remaining five Accused and sentenced each of them as under:

Name of the accused	conviction	sentence
Jogendra	acquitted	
Ram Vijay	Under Section 302 Indian Penal Code Section 325/149 Indian Penal Code Section 148 Indian Penal Code	Life imprisonment RI for four years RI for two years
Tribhuwan	Section 324/149 Indian Penal Code Section 325/149 Indian Penal Code Section 148 Indian Penal Code	RI for two years RI for four years RI for two years
Sita Ram	Section 324/149 Indian Penal Code Section 325/149 Indian Penal Code Section 147 Indian Penal Code	RI for two years RI for four years RI for one year
Ram Suresh	Section 147 Indian Penal Code Section 324/149 Indian Penal Code	RI for one year RI for two years
	Section 325/149 Indian Penal Code	RI for four years
Rajendra	Section 147 Indian Penal Code Section 324/149 Indian Penal Code Section 325/149 Indian Penal Code	RI for one year RI for two years RI for four years

The five accused, namely, Tribhuwan, Sita Ram, Ram Suresh, Rajendra and Ram Vijay, who suffered conviction and sentence, filed Criminal Appeal No. 211/1982 before the High Court. So far as the State is concerned, they did not file any cross appeal against that part of the order of the Sessions Court by which one Accused person-Jogendra was acquitted of the charges and other Accused persons though convicted for other offences but stood acquitted of the charge of murder. As a consequence, the order of the Sessions Judge so far as the State was concerned, became final.

The High Court, by impugned judgment, partly allowed the appeal and while upholding the conviction of the five Accused interfered in the sentence and its quantum awarded to each Accused persons. The High Court modified the sentence of the five Accused as under:

Name of the accused	conviction	Sentence
Ram Vijay	Section 304 Part I Indian Penal Code Section 148 Indian Penal Code Section 325/149 Indian Penal Code	RI for 10 years Fine of Rs. 3000/- In default of payment of fine, to undergo RI for three months Fine of Rs. 10,000/- In default of payment of fine, to undergo RI for one year
Tribhuwan	Section 148 Indian Penal Code Section 325/149 Indian Penal Code	Fine of Rs. 3000/- In default of payment of fine, to undergo RI for three months Fine of Rs. 10,000/- In default of payment of fine, to undergo RI for one year
Sita Ram	Section 147 Indian Penal Code	Fine of Rs. 1000/- In default of payment of fine, to undergo RI for one month
	Section 325/149 Indian Penal Code	Fine of Rs. 10,000/- In default of payment of fine, to undergo RI for one year

Ram Suresh	Section 147 Indian Penal Code	Section 325/149 Indian Penal Code Fine of Rs. 1000/- In default of payment of fine, to undergo RI for one month Fine of Rs. 10,000/- In default of payment of fine, to undergo RI for one year
Rajendra	Section 147 Indian Penal Code Section 325/149 Indian Penal Code	Fine of Rs. 1000/- In default of payment of fine, to undergo RI for one month Fine of Rs. 10,000/- In default of payment of fine, to undergo RI for one year

The State, however, felt aggrieved of the judgment of the High Court, filed this appeal by way of special leave before this Court.

During pendency of this appeal, two Respondents, namely, Sita Ram (Respondent No. 2) and Rajendra (Respondent No. 4) died. As a consequence thereof, the appeal against Sita Ram and Rajendra stood abated. Ram Suresh (Respondent No. 3) also died and the appeal stood dismissed as abated against him also by this Court's order dated 26.07.2010.

So far as the appeal against Ram Vijay (Respondent No. 5) is concerned, the same was also dismissed by this Court's order dated 26.07.2010 for non-compliance of the orders by the Appellant (State) qua Ram Vijay. As a consequence thereof, the appeal against Ram Vijay also does not survive for its consideration on merits.

This appeal is now survived only against Tribhuwan (Respondent No. 1) for its consideration on merits.

The short question, which arises for consideration in this appeal, is whether any case is made out by the State against Accused person-Tribhuwan (Respondent No. 1) seeking any kind of interference in his order of conviction and acquittal or in award of sentence and, if so, to what extent?

Heard Mr. Ratnakar Dash, learned senior Counsel for the Appellant-State and Mr. Sidharth Dave, learned Counsel for the Respondent.

Learned Counsel for the Appellant (State) has argued only one legal point in support of the appeal. According to learned Counsel, the Sessions Judge rightly convicted Respondent No. 1 (Tribhuwan) for an offence punishable Under Section 325 read with Section 149 Indian Penal Code and, accordingly, awarded rigorous imprisonment of four years to him but the High Court though was right in upholding the conviction fell in error in setting aside the jail sentence of four years awarded to him by the Sessions Court and substituting the same by imposing only a fine of Rs. 10,000/-.

Learned Counsel urged that imposition of jail sentence and fine both is mandatory once the Accused is held guilty for the offence punishable Under Section 325 Indian Penal Code which may extend upto 7 years. Learned Counsel urged that the High Court, in its discretion, could reduce the award of jail sentence to any period less than four years but, in no case, it could set aside the entire jail sentence and substitute it by awarding a sentence of fine of Rs. 10,000/-. It is not permissible in law and hence to this extent, the judgment of the High Court deserves to be set aside and the order of the Sessions Judge be restored.

In reply, the submission of learned Counsel for Respondent No. 1 (accused-Tribhuwan) was that admittedly Respondent No. 1 has undergone 40 days' jail sentence partly as under-trial prisoner and remaining after suffering the conviction from the Sessions Court. It was, therefore, his submission that such imprisonment can be taken as imposing jail sentence of 40 days to Respondent No. 1 Under Section 325 Indian Penal Code. In other words, his submission was that though the High Court instead of awarding any jail sentence awarded only the fine of Rs. 10,000/- but since Respondent No. 1 has, in the meantime, already undergone 40 days' jail sentence partly after his arrest pending investigation, inquiry and then partly during pendency of trial and appeal, he should be held to have been awarded jail sentence for 40 days for an offence punishable Under Section 325 Indian Penal Code. Learned Counsel urged that Respondent No. 1 would thus be entitled to take benefit of set off of the period as already undergone by him Under Section 428 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") once he is awarded jail sentence to that extent on his conviction.

Learned Counsel further pointed out that this Court should also take into consideration the two circumstances appearing in the case, namely, the incident

in question occurred in 1980 and in the meantime, 37 years has passed in prosecuting this litigation, and second, both the Courts below, on appreciation of evidence, have come to a conclusion that no injury was caused by Respondent No. 1 to the deceased and to injured Baij Nath (PW-2). It was, therefore, his submission that the interest of justice would, accordingly, be met, if Respondent No. 1's conviction Under Section 325 Indian Penal Code is maintained by awarding him jail sentence of what he has already undergone, i.e., 40 days with fine amount of Rs. 10,000/- which has already been awarded by the High Court. Such order of conviction would be in conformity with the requirement of Section 325 of the Indian Penal Code.

Having heard learned Counsel for the parties and on perusal of the record of the case, we find force in the submission of the learned Counsel for the Appellant and also of Respondent No. 1 (Tribhuwan).

Section 325 of Indian Penal Code and Section 428 of the Code are relevant for deciding the appeal. These Sections read as under:

Section 325 of Indian Penal Code

325. Punishment for voluntarily causing grievous hurt.-Whoever, except in the case provided for by Section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 428 of Code of Criminal Procedure

428. Period of detention undergone by the Accused to be set off against the sentence of imprisonment.-Where an Accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him:

Provided that in cases referred to in Section 433A, such period of detention shall be set off against the period of fourteen years referred to in that section.

So far as Section 325 Indian Penal Code is concerned, its reading would show that once the Accused is held guilty of commission of offence punishable

Under Section 325 Indian Penal Code, then imposition of jail sentence and fine on the Accused is mandatory. In other words, the award of punishment would include both, i.e., jail sentence and fine. So far as jail sentence is concerned, it may extend upto 7 years as per Court's discretion whereas so far as fine amount is concerned, its quantum would also depend upon the Court's discretion.

So far as Section 428 of Code is concerned, it provides that the period of detention spent in jail as under-trial or as convict will be set off against his total jail sentence once awarded to him in connection with the same offence.

This Court (Three Judge Bench) had the occasion to interpret Section 428 of the Code in the case of State of Maharashtra and Anr. v. Najakat Alia Mubarak Ali, (2001) 6 SCC 311 wherein this Court speaking through Justice K.T. Thomas representing majority view held as under:

15.....We may now decipher the two requisites postulated in Section 428 of the Code:

(1) During the stage of investigation, enquiry or trial of a particular case the prisoner should have been in jail at least for a certain period.

(2) He should have been sentenced to a term of imprisonment in that case.

If the above two conditions are satisfied then the operative part of the provision comes into play i.e. if the sentence of imprisonment awarded is longer than the period of detention undergone by him during the stages of investigation, enquiry or trial, the convicted person need undergo only the balance period of imprisonment after deducting the earlier period from the total period of imprisonment awarded. The words "if any" in the Section amplify that if there is no balance period left after such deduction the convict will be entitled to be set free from jail, unless he is required in any other case. In other words, if the convict was in prison, for whatever reason, during the stages of investigation, enquiry or trial of a particular case and was later convicted and sentenced to any term of imprisonment in that case the earlier period of detention undergone by him should be counted as part of the sentence imposed on him.

In our considered opinion, the High Court was, therefore, not right in setting aside the entire jail sentence of Respondent No. 1 while upholding his

conviction Under Section 325 Indian Penal Code. The High Court, in our view, ought to have either upheld the award of jail sentence of four years awarded by the Sessions Court or reduce the jail sentence to any reasonable term but it had no jurisdiction to fully set aside the jail sentence and substitute it by imposing only fine of Rs. 10,000/-.

As rightly argued by the learned Counsel for Respondent No. 1, the period already undergone by Respondent No. 1 (40 days) while Respondent No. 1 was in detention, as under-trial and as convict, was also a jail sentence and could be treated as jail sentence once awarded to Respondent No. 1 Under Section 325 Indian Penal Code, and accordingly its benefit by way of set off could be given to him Under Section 428 of Code.

In our considered opinion, having regard to the time consumed in the litigation (37 years) coupled with the findings of two Courts below wherein it was held that Respondent No. 1 did not cause any injury to the deceased and injured Baij Nath (PW-2), we are inclined to uphold Respondent No. 1's conviction Under Section 325 Indian Penal Code and award to Respondent No. 1's punishment of imprisonment of 40 days with fine of Rs. 10,000/- and in default of payment of fine, to undergo one month rigorous imprisonment.

Since Respondent No. 1 has already undergone the jail sentence of 40 days partly as under-trial and partly as convict, he is not required to undergo any further jail sentence in the case at hand.

Respondent No. 1, however, claims to have deposited a fine amount of Rs. 10,000/- imposed by the High Court. If that be so then he need not undergo any more jail sentence. However, this fact must be verified by the Sessions Court on receipt of this judgment.

The appeal thus is allowed in part. The impugned judgment is modified to the extent indicated above.

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11. Section 376 D and Section 341 of IPC

Gobara Majhi and another Versus State of Orissa

Dr. D. P. Choudhury, J.

In the High Court of Orissa ,Cuttack.

Date of Judgment: 21.11.2017

Issue

***In the Matter of conviction of the appellant under section 376-D and 341 of IPC –Challenged*.**

This captioned Jail Criminal Appeal is filed by the appellants from Jail against the judgment of conviction and sentence passed under Sections 376-D and 341 of the Indian Penal Code (hereinafter called as "I.P.C.") by the learned Additional Sessions Judge, Kalahandi, Bhawanipatna in C.T. Case No.68 of 2013 (Sessions)(T) sentencing each of the appellants to undergo R.I. for twenty years and to pay fine of Rs.3000/- only in default R.I. for six months for offence under Section 376-D IPC. Further, both the appellants were sentenced to undergo S.I. for one month for the offence under Section 341 of IPC. Both the sentences were directed to run concurrently.

The conspectus of the case of the prosecution is that on 14.4.2013, the victim at about 3.00 pm had gone to Stone Crusher to break stone for preparation of metal chips. She had gone with her children. - 2 - It is alleged inter alia that the present appellants and co-accused Bisam Majhi came there and drove out the children in spite of their unwillingness to leave their mother. It is further case of the prosecution that the appellants pulled the saree, saya and blouse of the victim in spite of her protest. Co-accused Bisam Majhi assaulted the victim by means of lathi causing injury on her person. Thereafter, present appellants committed rape upon the victim one after another and after the occurrence they fled away from the spot. Thereafter, the victim came to her house and informed the matter to her husband. On the next day, they lodged the FIR being scribed by one outsider. Police took up investigation. During investigation, victim was examined and her medical examination was also conducted. Witnesses were examined and wearing apparels and the lathi used by coaccused Bisam were seized. The seized materials were sent for chemical examination. After completion of the investigation, charge sheet has been submitted against the present appellants and co-accused Bisam.

The plea of the appellants as revealed from their examination recorded under section 313 of Cr.P.C. and suggestions made to the prosecution witnesses during cross-examination that they have been falsely implicated in this case and there is no iota of evidence against them.

The prosecution, in order to prove its case, has examined as many as 15 witnesses out of which P.Ws.1 and 2 are witnesses to the seizure of wearing apparels, P.Ws.3,4,5 and 6 are co-villagers, P.W.7 is the informant, P.W.8 is the daughter of the victim and an eye witness, P.W.9 is the husband of the informant, P.W.10 is the doctor, P.W.11 is the scribe of the FIR, P.W.12 is a witness to the seizure of saya and lathi, P.W.15 is the IO who submitted the charge sheet and P.W.16 is the preliminary I.O. The defence examined none.

Learned Trial Court, after analyzing the evidence of each witness, found both the appellants guilty under Section 376-D/341 IPC but acquitted them of all other charges. As such, he convicted and sentenced the appellants as stated above. Learned trial Court acquitted co-accused Bisam of all the offences.

Mr.Dash, learned counsel for the accused-appellant strenuously urged that trial Court has committed error by convicting the appellants under Sections 376-D/341 of IPC as the evidence available on record do not show consistently about the occurrence of rape. According to him, due to dispute between the parties with regard to disposal of metals, a false case has been filed against the appellants.

Mr.Patra, learned Additional Standing Counsel submitted that the law is well settled that a conviction can be based on the sole testimony of the prosecutrix because she is injured bodily and in mind. Further, it is submitted that the evidence of the victim is clear without having any conjectures to prove the occurrence. The statement of one of the child of the victim well corroborates her evidence. Moreover, the evidence of the doctor lends sufficient corroboration to the evidence of the victim about the forcible sexual intercourse for which the judgment of conviction and sentence passed against the appellants are correct and legal.

Before going to the fact, the law on the appreciation of evidence of the prosecutrix should be analyzed to certain extent because the statement of the prosecutrix has to be weighed properly without seeking any corroboration.

Now, in the present case, the statement of the victim, who is examined as P.W.7, reveals that she along with her minor son and daughter had gone to the spot for breaking stones. While breaking the stones, the appellants came there unitedly and drove the children. When the children expressed their reluctance, they chased them and out of fear, the children fled away. It further reveals from the statement of P.W.7 that the appellants caught hold the hands of the victim and co-accused Gobara committed rape on her first and accused-Jakson committed rape thereafter. They tore her wearing clothes while undressing her.

When she raised protest, co-accused Bisam assaulted her by means of a lathi causing injury on her person. After the occurrence, at 6.00 pm she returned and narrated the incident to her husband. They contacted the villagers but they did not listen to them. So, they lodged FIR. During cross-examination, she admitted that at the relevant point of time, no other labourer was present at nearby places. She admitted that there were about 10 sheds where other persons where to break the stones. If the labourers used to break the stones at a nearby place, a doubt arises as to why no labour was there near the occurrence place. Further, it appears that the co-accused persons tore the saya and blouse but did not state about the toring of her saree. It is improbable to conceive that without toring saree, there could be damage to blouse and saya. No torn saree is seized. She is found to be a major woman aged about 30 years. But, admitted that she was not wearing any panty or chadi at the relevant time which gives doubt more in the mind of the Court as to how the woman had gone to the field without any under garments being put on. She, in the cross-examination, has stated that appellant-Jackson caught hold of her shoulders and hands while the appellant-Gobara committed rape and while the appellant-Gobara was holding her hand, appellant-Jackson committed rape on her. During her cross-examination, she resisted while appellants committed rape but did not elaborate the manner of resisting of such commission of rape. She had not explained about any injury caused to her body or private part while successive forcible intercourse took place but only admitted that she got injury on her hand and swelling on her back side due to the assault made by the accused-Bisam. When there is no injury sustained by her either on external part of the body or on her private part and no manner of protest explained by her, the presumption of the absence of consent as per Section 146(A) of the Evidence Act is rebutted. If she has gone to work place, it is not known why she has gone at 3.00 pm instead of morning. Moreover, when there is no labourer present near the occurrence place, she should not have started breaking of metals but to return her house, which is 2 to 3 kms away from the spot.

The statement of the victim (P.W.7) shows that she has lodged the FIR which was reduced into writing by one outsider whose name has not been disclosed. It appears that she has disclosed the incident before Purnami Biswal, Suresh Pradhan and Dhane Harijan of their village during cross-examination, but in her examination in chief, she has not stated to have informed such fact to any of the villagers just after the occurrence. In view of this departure, the statement of the prosecturix cannot be relied on solely to prove the forcible sexual intercourse committed by the present appellants. Hence, the same requires corroboration. The evidence of P.Ws.3, 4, 5 and 6, before whom the victim stated

to have narrated the occurrence, shows that they are ignorant of the occurrence. They also denied to have stated before the police that they came to know about the occurrence from the victim and her husband. Although their statements were confronted to them, the same have not been confronted to the I.O. So, they cannot be said to be hostile to the prosecution. On the other hand, they have not corroborated the evidence of P.W.7 about the occurrence of sexual assault alleged against the present appellants.

The statement of the daughter of the victim (P.W.8) shows that she is aged about 12 years old and the certificate of the learned Trial Court has been given about her competence to depose in the case. Although, certificate is given about her competence but the manner of suggestion of the Court to her understanding has not been explained. On the other hand, learned trial Court has not recorded the questions and answers adduced by P.W.8. The Trial Court should remember the procedure for examining the child witness. Even if the certificate is given by the Trial Court about her competence to depose but the level of understanding of P.W.8 can be only judged after recording the questions put to her and answers given by her or after ascertaining the answers to the questions put by it and both of same should be recorded so as to satisfy the appellate Court that the child is quite competent to depose. The procedural abnormality at times lands the well written judgment vulnerable. However, the evidence of P.W.8 shows that she had gone with her mother and while breaking stones, appellants came to the spot. She stated that the appellant-Gobara asked her to leave the place and assaulted her by means of lathi. Out of fear, she fled away. The assault on P.W.8 is not corroborated by P.W.7. However, she along with her brother left the spot for home. It appears from her evidence that her mother narrated the occurrence before her father. It is not known from her evidence as to why they did not witness the occurrence at a little distance and called the other people to help their mother. When P.W.8 is 12 years old is quite understating to save her mother by calling other persons from nearby place. However, the absence of attempt on the part of P.W.8 to save the victim also raises doubt in the case of the prosecution.

P.W.9 is the husband of the victim. It appears from his evidence that he heard about the occurrence from the victim. However, he is a post occurrence witness.

The evidence of the doctor (P.W.10) shows that she examined the victim on 16.04.2013 at about 11.00 am and found the following injuries:

"1) The age of victim was more than 20 years as per ossification test;

2) Hymen was absent. Labia Majora exposes Labia Minora, Posterior commeasure and forchutee were torn; external os admits two fingers easily. Vaginal canal capacious, rugosity diappear. The cervix is healthy and multiporous;

3) The physical injuries found over her person as follows:- (a) lacerated wound of size 0.5 cm X 0.5 cm X skin dip over frontal area, (b) bruise of size 2 cm X 2 cm over forehead, (c) bruise of size 5 cm X 5 cm over left scapula and shoulder joint. The said external injuries were suggestive of forcible sexual intercourse.

4) No seminal sticking over the private part;

5) There was no foreign hair detected during physical examinaiton;

6) V.D.R.L. test found non-reactive;

7) Vaginal swab collected, dired, preserved in vial, sealed, levelled and handed over to the accompanying constable. Her Blood Group was 'A' positive." She proved the medical examination report of the victim vide Ext.5. In cross-examination, she stated that she opined forcible sexual intercourse basing on her external injury. She has never stated that the genital feature of victim are evident of sexual intercourse. On the other hand, the victim has stated that she got the physical injuries due to assault by co-accused Bisam. The opinion of the doctor that external injuries are suggestive of forcible sexual intercourse is an opinion but the statement of the victim matters more than the doctor in this regard. Therefore, the physical injuries are actually caused due to assault on her person by coaccused Bisam. However, the opinion of the doctor hardly features to prove the recent sexual intercourse with her, who is a married woman having children and thus do not convince about any injury on her private part due to rape as alleged by the victim.

In Modi's 20th edition of Medical Jurisprudence and Toxicology, it is observed that in grown-up females, if the public hairs are found matted due to the presence of semen, they should be cut off with a pair of scissors and examined for the presence of spermatozoa. Similarly, in grown-up virgin girls, unmarried or married women, when they offer resistance marks of violence, such as bruises, scratches of finger nails, etc., may be found on the external genitals, perinaeum, abdomen, chest, back, limbs, neck and face. In this case, the I.O (P.W.16) has proved the report of the doctor vide Exts.11 and 12 towards examination of appellantJackson and Gobara respectively. But concerned doctor is not examined to prove the same. It is not a case where doctor was not available or not traceable to prove the same. However, Exts.11 and 12 do not show about injury on the person of appellants to prove forcible sexual intercourse.

Similarly, victim woman has been examined on 16th April but the occurrence occurred on 14th April and she is a married woman having two children. So, the features as found by the doctor (P.W.10) in her report do not prove about forcible sexual intercourse with her at the instance of the appellants so as to prove gang rape as alleged by her.

The evidence of P.W.10 thus does not lend sufficient corroboration to the statement of the victim about forcible sexual intercourse by the present appellants with the victim. Hence, the statement of victim does not find necessary corroboration or assurance from the evidence of the doctor to justify her case of forcible sexual intercourse by the present appellants.

It reveals from the statements of P.Ws.1, 2, 7, 12 and 14 that the wearing apparels of the victim were seized but the seizure list does not disclose about seizure of any tore blouse and saree although tore saya was seized. If there is resistance from the side of the victim and the appellant tore her wearing clothes why those clothes were not seized. Non-seizure of material object also creates doubt in the mind about the veracity of the victim. At the same time, the prosecution proved the seizure of wearing apparels of the appellants.

The I.O (P.W.16) stated to have sent all the seized materials for chemical examination but the chemical examination report vide Ext.13 does not disclose about any blood or semen on the wearing clothes of the victim. Thus, the seizure of wearing apparels of the appellants does not improve the case of the prosecution same. However, in toto, the necessary assurance or the corroboration to the statement of the victim are lacking. Hence, I am of the view that the prosecution has not proved the charge of gang rape or wrongful restraint against the appellants beyond all reasonable doubts.

Learned Trial Court has passed the judgment of conviction and sentence by analyzing the evidence in the manner which is not sustainable in accordance with law. Therefore, this Court does not find correctness with the finding of the learned Trial Court. In the result, the Jail Criminal Appeal is allowed and the judgment of conviction and sentence passed by the learned Additional Sessions Judge, Kalahandi, Bhawanipatna in C.T. Case No.68 of 2013 (Sessions)(T) is set aside and the appellants are acquitted of the offence under Sections 376-D and 341 of IPC and they be set at liberty forthwith, if their detention is not required otherwise. The LCR be sent back immediately.

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12. Section 6 of Protection of children from Sexual Offences Act ,2012 and Section 376(2)(i) of IPC

Sagar Kuldi Versus State of Orissa

S. K. SAHOO, J.

In the High Court of Orissa, Cuttack.

Date of Hearing and Judgment: 11.11.2017

Issue

In the matter of conviction of the appellant under section 6 of the POSCO Act as well as Section 372(2)(i) of IPC sentencing ten years RI and to pay a fine of Rs.5000/- in default further RI of six months for both the offences –Challenged.

The appellant Sagar Kuldi faced trial in the Court of the learned Judge, Special Court, Dhenkanal in C.T./Special Case No.07 of 2013 for the offences punishable under sections 376(2)(i)/506 of the Indian Penal Code and section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereafter for short 'POCSO Act'). 2 The learned trial Court vide impugned judgment and order dated 30.09.2015 though acquitted the appellant of the charge under section 506 of the Indian Penal Code, however, found him guilty under section 6 of the POCSO Act as well as section 376(2)(i) of the Indian Penal Code and sentenced him to undergo R.I. for ten years and to pay a fine of Rs.5000/-, in default of payment of fine to undergo further R.I. for a period of six months for both the offences and the sentences were directed to concurrently.

The prosecution case, as per the First Information Report lodged by the victim on 15.06.2013 before the Inspector in charge, Parjang police station is that on that day at about 12.00 noon while she had been to Malajharan Sahi for grazing of goats, the appellant Sagar Kulidi was also present there and he was also grazing the goats and he made the victim nude forcibly and committed rape on her and also threatened her with dire consequence not to disclose the incident before anybody.

On the basis such first information report, Parjang P.S. Case No. 112 of 2013 was registered on 15.06.2013 under section 376(2)(i) of the Indian Penal Code and section 4 of the POCSO Act.

P.W.3 Pradeep Kumar Das, who was the Inspector in charge of Parjang police station, after registration of the case, took up investigation, examined the informant (victim) and other witnesses. He visited the spot, prepared the spot map (Ext.2) and on the next date i.e. on 16.06.2013, he arrested the appellant and sent him for medical examination to C.H.C., Parjang. He also sent the victim for

medical examination to C.H.C., Parjang where P.W.4 Dr. Madhusudan Jena examined both the victim as well as the appellant and prepared their medical examination reports. The escort party, who had taken the appellant as well as the victim for medical examination, produced some sample items collected by doctors which were seized under seizure lists Exts.3 and 5. The wearing apparels of the appellant were seized under seizure list Ext.4 and that of the victim were also seized on her production under seizure list Ext.6. The medical examination reports were obtained on 30.06.2013. P.W.3 handed over the charge of investigation to P.W.5 Bamadev Sankhual who re-examined the informant and other witnesses, made a prayer to the Court of learned S.D.J.M., Kamakhyanagar to dispatch the exhibits to S.F.S.L., Rasulgarh for chemical examination and after completion of investigation, he submitted charge sheet on 14.08.2013 under section 4 376(2)(i) of the Indian Penal Code and section 6 of the POCSO Act. 4.

After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned trial Court framed charges against the appellant as aforesaid and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

During course of trial, in order to prove its case, the prosecution examined six witnesses. P.W.1 Gurubari Kuldi is the mother of the victim and she stated that on the date of occurrence at about 11.00 a.m., the victim came crying to the house and disclosed about the commission of rape on her by the appellant and she noticed the wearing apparels of the victim were stained with blood and injuries on her right hand and private part. She intimated the fact to her husband and ultimately a meeting was convened in the village and the appellant was called to the meeting but he did not agree to the accusation leveled against him. P.W.2 is the victim who narrated the incident and she is the informant in the case 5 P.W.3 Pradeep Kumar Das, P.W.5 Bamadev Sankhual are the Inspectors in charge of Parjnag police station who are the Investigating Officers. P.W.4 Dr. Madhusudan Jena examined the victim as well as the appellant on police requisition and proved its medical examination repots under Ext.7 and Ext.8 respectively. P.W.6 Akshaya Kumar Panda was the Headmaster of Bagahamunda Ashram School who proved the school admission wherein the date of birth of the victim had been mentioned as 10.11.2000. The prosecution exhibited ten documents. Ext.1 is the F.I.R., Ext.2 is the spot map, Exts.3, 4, 5 and 6 are the seizure lists, Ext.7 is the medical examination report of victim, Ext.8 is the medical examination report of appellant, Ext.9 is the office copy of forwarding report of exhibits to S.F.S.L., Rasulgarh and Ext.10 is the school admission

register where the victim was prosecuting her studies. The prosecution also proved three materials objects. M.Os.I, II and III are the X-ray plates. 6. The defence plea of the appellant was one of denial.

The learned trial Court after analyzing the evidence on record came to hold that the entry in the school admission 6 register showing the age of the victim as 13 years and six months finds corroboration from the medical examination report marked as Ext.7 and oral testimony of the victim and her mother and that the credibility of the school admission register cannot be doubted. It was further held that on collective reading of the oral and documentary evidence, it is found that the victim girl was 13 years and six months old as on the date of occurrence i.e. on 15.06.2013. The learned trial Court after taking all the evidence into consideration held that the victim was subjected to forcible sexual intercourse by the appellant on the date of occurrence and that the prosecution has very well proved the charges under section 376(2)(i) of the Indian Penal Code and section 6 of the POCSO Act. The learned trial Court however found that the prosecution has failed to substantiate the charge under section 506 of the Indian Penal Code. 8. Since the engaged counsel for the appellant did not appear to argue the appeal, Miss. Mandakini Panda was engaged as the counsel for the appellant and she was supplied with the copy of the paper book and granted time to prepare the case properly. She placed the impugned judgment and evidence and submitted that there is no clinching material relating to the age of the victim to be minor and the finding of the learned trial Court that the victim was thirteen years and six months old as on the date of occurrence is perverse. She further stated that the victim has stated in her cross-examination that the appellant only dragged her but has not committed any sexual act and therefore, the conviction of the appellant under section 376(2)(i) of the Indian Penal Code as well as section 6 of the POCSO Act is not sustainable in the eye of law. She further contended that in view of section 42 of the POCSO Act, the learned trial Court should not have imposed punishment for both the offences i.e. section 376(2)(i) of the Indian Penal Code as well as section 6 of the POCSO Act. Miss. Samapika Mishra, learned Addl. Standing Counsel for the State on the other hand supported the impugned judgment and order of conviction and submitted that the evidence of the victim, the evidence of the doctor as well as the evidence of Headmaster of the school where the victim was prosecuting her studies at the time of occurrence clearly proves that the victim was thirteen years and six months as on the date of occurrence and therefore, the learned trial Court has rightly held the age of the victim to be such. It is further contended by her that the victim has vividly narrated the occurrence and her disclosure before her mother immediately after the occurrence is 8

admissible as res gestae under section 6 of the Evidence Act and moreover, the victim was examined by the doctor on the very next day of the occurrence who found bleeding injuries on her private parts which corroborates her evidence and therefore, it cannot be said that there is any infirmity or illegality in the order of conviction. It is further contended that since rape has been committed on a school going girl aged about thirteen years and six months, the punishment which has been imposed cannot be said to be on the higher side and therefore, the appeal should be dismissed.

Coming to the conviction and sentence imposed by the learned Trial Court, it appears that the learned trial Court has held that the charge against the appellant has been well proved under section 6 of the POCSO Act as well as under section 376(2)(i) of the Indian Penal Code and accordingly convicted him and while imposing sentence, the learned trial Court has sentenced the appellant to undergo R.I. for ten years and to pay a fine of Rs.5000/- and in default of payment of fine, to undergo further R.I. for a period of six months for both the offences and it was directed that both the sentences are to run concurrently. Section 42-A of the POCSO Act provides that the provisions of POCSO Act shall be in addition to and not in derogation of the provisions of any other Act. Therefore, the legislature, in its wisdom, thought that POCSO Act would supplant and would be in addition to the other criminal provisions and where there was any inconsistency, the provisions of POCSO Act would override any other law to the extent of inconsistency. Section 42 of the POCSO Act states about 'alternate punishment'. Where an act or omission constitutes an offence punishable under the POCSO Act and also under sections 166-A, 354-A, 354-B,354-C, 354-D, 370, 370-A, 375, 376, 376-A, 376- C, 376-D,376-E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree. In view of the section 42 of the POCSO Act, it is clear that even though the Court can prosecute and convict the appellant both under section 376(2)(i) of the Indian Penal Code as well as under section 6 of the POCSO Act but the Court cannot impose punishment for both the offences and can only impose 10 punishment for the offence which is greater in degree. The choice being that of the learned trial Judge, he has to see which of the offences carries punishment of greater degree and accordingly impose punishment. Section 71 of the Indian Penal Code states that where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the offender shall not be punished with a more severe punishment than the Court which tries him could

award for any of such offences. Section 26 of the General Clauses Act, 1897 which deals with provision as to offences punishable under two or more enactments states that where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence. In view of the special provision under section 42 of the POCSO Act, the Court can prosecute and convict the appellant both under section 376(2)(i) of the Indian Penal Code as well as under section 6 of the POCSO Act but so far as punishment is concerned, the Court has to choose from the two which would obviously carry punishment of greater degree. Therefore, the imposition of punishment for both the offences i.e. under section 376(2)(i) of the Indian Penal Code and section 6 of the POCSO Act by the learned trial Court is nothing but a legal error. 10. Now coming to both the offences, it is seen that whereas for proving a charge under section 376(2)(i) of the Indian Penal Code, inter alia, it is to be proved that the age of the victim was under sixteen years of age, for proving a charge under section 6 of the POCSO Act, it is to be proved that the victim was below the age of eighteen years and the victim comes within the definition of 'child' as enumerated under section 2(1)(d) of the POCSO Act. Keeping in view the age factor as required for both the sections, it is to be seen how far the prosecution has successfully proved the age aspect of the victim as on the date of occurrence i.e. on 15.06.2013. On the age aspect of the victim, the evidence of three witnesses i.e. P.W.2, P.W.4 and P.W.6 are relevant. P.W.2 is the victim and she has stated on oath that she was aged about 13 years and she was a student of class-IX at the time of her deposition as on 5th January 2015. She stated in her evidence that she was reading in class-VIII at Baghamunda Ashram High School at the time of occurrence. In her cross-examination, she has stated that she cannot say her date of birth and she further 12 stated that she cannot say what was her age when she got admission in the school and she cannot say as to why she was stating her age to be thirteen years. She further stated that prior to three years of incident, she had attended her puberty. Therefore, when the victim herself was not aware about her date of birth and she was also not aware why she was stating her age to be thirteen years, on the basis of her statement at the time of deposition, it cannot be conclusively held that the victim was aged about thirteen years and six months at the time of occurrence as held by the learned trial Court. Coming to the evidence of her mother who has been examined as P.W.1, she has stated that she cannot say what was the age of the victim and also she cannot say if the age of the victim was more than nineteen years. She has further stated she cannot say her own age so also the age of her husband and the age of the victim girl. Admittedly, the father of the victim has not

been examined in the case. Therefore, neither from the evidence of the victim nor from the evidence of her mother, it appears as to what was the actual age of the victim as on the date of occurrence. The evidence of P.W.4, the doctor relating to her age is based on the ossification test report. The doctor has stated that he conducted the ossification test on the victim by taking Xrays of various joints such as wrist joint, hip joint, elbow joint and knee joint etc. at District Headquarters Hospital, Dhenkanal and after perusal of the above, he found the age of the victim was within 13 to 14 years. He proved the X-ray plates as M.Os.I, II and III. However, in the cross-examination, the doctor has stated that the X-ray was done on 17.06.2013 and prior to that he had submitted the report vide Ext.7. He further stated that he is not an expert of dental, radiology and orthopedic. In view of such evidence of the doctor, when the X-ray plates were not available at the time of giving his opinion regarding the age of the victim, the statement of the doctor that the age of the victim was within thirteen to fifteen years, cannot be accepted. The Xray report has not been proved in this case. Now coming to the evidence of the P.W.6, the Headmaster of the school where the victim was prosecuting her studies, he stated that the victim took admission in the school in Class-II on 24.04.2007 and her date of birth as per entry made in the school admission register was 10.11.2000. He further stated that Benudhar Mohanta was the Headmaster when the entry was made in the admission register. The relevant entry has been marked as Ext.10/1. However, in the cross-examination P.W.6 has stated that he cannot say who had written Ext.10/1 and no reference papers are available in the register to conclude that 10.11.2000 was the actual date of birth of the victim. He further stated that he cannot say basing on whose information, Ext.10/1 was entered in the said register. Therefore, when it is not clear as to on whose information, the date of birth of the victim has been entered in the school admission register and that to on what basis and the relevant witness who had made such entry has not been examined by the prosecution, it is very difficult to accept on the basis of the entry made in the school admission register that the victim was a child as on the date of occurrence. No doubt she was reading in class-VIII as stated by her in her examination in chief when the occurrence took place but it is very difficult to conclusively arrive at a finding that the victim must have been a minor as on the date of occurrence merely because she was a student of class-VIII. Therefore, from the combined reading of the evidence of the victim, her mother, the doctor as well as the Headmaster of the school, it is not established beyond all reasonable doubt that the age of the victim was below sixteen years so as to convict the appellant under section 376(2)(i) of 15 the Indian Penal Code or below eighteen years so as to convict him under section 6 of the POCSO Act. 11. Now coming to the evidence regarding

commission of rape, the victim has stated that while she had been to Malajharan jungle for grazing of goats, the appellant was also grazing goats there and he came near her, dragged her and then undressed her by opening her pant and forcibly committed rape on her for which she sustained bleeding injury on her private part. She further stated that she resisted the appellant but he did not listen to her and after commission of rape, the appellant left the spot. The victim further stated that she came to the house and narrated the entire incident before her mother and her mother verified her body and her private part and intimated the fact to her father. The evidence of the victim on this aspect has practically remained unchallenged in the cross-examination and nothing has been brought out to disbelieve such testimony. Even though the victim has stated in the cross-examination that the appellant only dragged her and has not committed any sexual act but on a question put by the learned trial Court that how the appellant committed rape on her, the victim has clarified that by penetrating his penis in her vagina, the appellant committed rape on her. The evidence of the victim is corroborated by her mother (P.W.1) who has stated that on the date of occurrence at about 11.00 a.m. the victim came crying and when she asked her the reason of her crying, the victim told her that the appellant dragged her and forcibly committed rape on her and she found bleeding injury on her right hand and private part and her wearing dress was stained with blood. The evidence of the doctor (P.W.4) is very relevant and he has stated that he examined the victim on 16.06.2013 and found the victim's undergarments were soaked with blood and her Panjabni was soaked with mud. He found the pubic hairs, breasts and her axillary hairs were well developed and on examination of female genitals, he found there was presence of blood clots, labia majora and labia minora were injured and lacerated. There was laceration in posterior commissure, fourchette and vestibule of 1st degree. Hymen general appearance of opening was irregular and tears were present. There was fresh bleeding and vaginal canal was full of clots and condition of cervix pinhole was covered with clots. The doctor has further stated that lacerated injuries inflicted over lower end of labia, posterior commissure and fourchetee might be due to penetration of penis. He found blood was oozing out of the injury 17 on the vagina which was full of clots. The doctor has further stated that the victim was not accustomed to regular sexual intercourse. Therefore, the evidence of the victim gets sufficient corroboration from the medical evidence. It appears that the wearing apparels of the victim and her sample blood, sample saliva, sample public hair and sample vaginal swab etc. were sent for chemical analysis but the chemical examination report has not been proved which is a really sorry state of affairs. It is not only the duty of the Public Prosecutor in a case of this nature to take immediate steps for production

of such report prior to the framing of charge but also of the learned trial Court. In case of Sunil @ Jai Singh Rautia -Vrs.- State of Orissa reported in (2015) 61 Orissa Criminal Reports 150 decided on 06.04.2015, it is held by me that it is the duty of the prosecutor as well as the trial Court to see that the chemical examination report is made available even before the charges are framed and copy of such report is furnished to the accused. However, non-proving of the chemical examination report no way affects the prosecution case relating to the commission of rape by the appellant on the victim and therefore, I am of the view that the prosecution has successfully 18 established that the appellant has committed rape on the victim on 15th June 2013. Since the age of the victim has not been proved to be below the required age, the order of conviction passed by the learned trial Court under section 376(2)(i) of the Indian Penal Code as well as section 6 of the POCSO Act is hereby set aside, instead the appellant is convicted under section 376(1) of the Indian Penal Code. Taking into account the young age of the petitioner, the substantive sentence is reduced from R.I. for ten years to R.I. for seven years. The fine amount of Rs. 5000/- (rupees five thousand) and the default sentence of six months as was imposed by the learned trial Court remains unaltered. 12. In view of the enactment of the Odisha Victim Compensation Scheme, 2012, keeping in view the nature and gravity of the offence committed on a school going girl and her family background, I feel it necessary to recommend the case of the victim to District Legal Services Authority, Dhenkanal to examine the case of the victim after conducting necessary enquiry in accordance with law for grant of compensation under the Orissa Victim Compensation Scheme, 2012. Let a copy of the order be sent to the District Legal Services Authority, Dhenkanal for compliance. 19 Lower Court's record with a copy of this judgment be communicated to the learned trial Court forthwith for information and necessary action.

Before parting with the case, I would like to put on record my appreciation to Miss Mandakini Panda, the learned counsel engaged for the appellant for her effort in arguing the matter and she shall be entitled to her professional fees which is fixed at Rs.2,500/-.

The Jail Criminal Appeal is allowed in part.

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13. Section 263 of Indian Succession Act

Lynette Fernandes Vs. Gertie Mathias since Deceased by L.Rs.

Arun Mishra and Mohan M. Shantanagoudar, JJ.

In the Supreme Court of India

Date of Judgment - 08.11.2017

Issue

In the matter of revocation of will after 31 years of granting of probate.

Relevant Extract

This appeal arises out of judgment dated 30th November, 2006, passed by High Court of Karnataka, Bangalore, in Miscellaneous First Appeal No. 2744/00 (ISA). Facts leading to this appeal are as under:

Mrs. Lynette Fernandes (Appellant) is one of the three daughters of Mr. Richard P. Mathias and Mrs. Gertie Mathias (original Respondent). After the demise of Mrs. Gertie Mathias, her other two children were brought on record as Respondents. Mr. Richard P. Mathias died at Mangalore on 05.11.1959, leaving behind a Will executed by him on 11.08.1959 bequeathing all his assets to his wife Mrs. Gertie Mathias. Mrs. Gertie Mathias (original Respondent) filed an application for grant of probate which was granted to her by the Trial Court on 09.09.1960, in O.P. No. 26/1960. As on that date, all the three children of Mrs. Gertie Mathias were minors, and the Appellant attained majority on 09.09.1965. She filed a suit for partition on 06.07.1995, claiming 1/4th share of the properties referred to in the Will of the deceased Mr. Richard P. Mathias. The same is said to be still pending. The Appellant herein did not initiate any action either against her mother or against her other siblings in respect of the Will and the probate in question till the year 1996. The Appellant filed P & SC No. 23 of 1996 Under Section 263 of Indian Succession Act, before the District Court, Bangalore, seeking revocation of probate granted to Mrs. Mathias on 09.09.1960. It means that the Appellant approached the jurisdictional Court for cancellation of probate after about 36 years from the date of grant of probate. The learned District Judge dismissed the application both on merits as well as on grounds of limitation. The High Court in M.F.A. No. 2744/00 (ISA) upheld the findings of the District Judge, and consequentially dismissed the appeal filed by the Appellant herein. The judgments of the District Court and the High Court are called in question in this appeal.

It is necessary to note the provisions of Section 263 of Indian Succession Act, which reads thus:

263. Revocation or annulment for just cause. --The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation. --Just cause shall be deemed to exist where--

(a) the proceedings to obtain the grant were defective in substance; or

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

The aforementioned provision allows revocation of grant of probate of the Will on the existence of 'just cause'. The Appellant seeks to bring her case within explanations (a) & (b) to this Section, as she claims that the proceedings were defective and that the grant was fraudulently obtained.

With respect to the first ground, we are unable to accept the contention that not taking out a citation at Chikmagalur is a substantial defect for the grant of probate. It is a finding of fact by the Trial Court and the High Court that the Appellant and her entire family lived in the 'Highlands' house at Mangalore. As a matter of fact, the Appellant was a minor and lived with her mother when Mrs. Mathias applied for probate. The Appellant has not adduced any evidence to prove that the Will was not genuine. She has not initiated any proceedings to question the validity of the Will. The Will executed by Mr. Richard P. Mathias in favour of Mrs. Gertie Mathias has remained unquestioned.

Section 263 of the Indian Succession Act, makes it very clear as to what 'just cause' means and includes. As mentioned supra, the grant of probate may be revoked or annulled for 'just cause' only. The explanation to this Section further clarifies that 'just cause' shall be deemed to exist where the proceedings to obtain the grant were defective in substance. In our opinion, a mere non-issuance of citation at Chikmagalur where the property is situated does not amount to rendering the proceedings defective in substance under the facts and

circumstances of this case. It may be procedural irregularity in this case inasmuch as though the property existed at Chikmagalur, all the parties including the owner of the property resided at Mangalore. Mr. Richard P. Mathias left behind his Will at Mangalore. Mr. Richard P. Mathias, who bequeathed the property in favour of his wife, also lived in Mangalore till his death. The beneficiary under the Will, namely, Mrs. Gertie Mathias also lived in Mangalore along with her husband and children, including the Appellant. It is also not in dispute that the Appellant lived in Mangalore till the initiation of these proceedings. Even if it is assumed that the citation had been issued at Chikmagalur, the Appellant would not have got any benefit out of the same. The Appellant wanted the citation to be issued at Chikmagalur on the assumption that she would have had the knowledge of the Will and the proceedings. As mentioned supra, since the Appellant was residing at Mangalore, she would not have been benefitted, had the citation been issued at Chikmagalur. Section 263 of the Indian Succession Act vests a judicial discretion in the Court to revoke or annul a grant for 'just cause'. Defective in substance must mean that defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. The very fact that the Appellant kept quiet for 36 long years would clearly reveal that she was not interested in filing a caveat or in opposing grant of probate.

Moreover, as mentioned supra, Mrs. Gertie Mathias was the only beneficiary under the Will, and the Will remained unquestioned till the filing of the application seeking revocation for grant of probate. There is nothing on record to show that the grant of probate would not have been made, had the children of Mr. Richard P. Mathias been arrayed. Moreover, the other two children of Mrs. Mathias have not questioned the grant of probate. On the other hand, they are opposing the Appellant throughout.

The Appellant further contended that the probate was granted to Mrs. Gertie Mathias in 'common form' and not in 'solemn form' and thus, it is open to challenge such a grant of probate. Such argument may not arise in this matter. In England, common form of grant of probate is a matter of right in the absence of all other interested parties, but there is no such right for any applicant who seeks a grant of probate in India. A party seeking the revocation of grant of probate cannot later resort to English law and contend as mentioned supra. The Calcutta High Court in Southern Bank Ltd. v. Kesardeo Ganeriwalla AIR 1958 Cal 377 observed that there is no system in India like the English common form procedure, as the system of grant of probate in India does not contain 'the reason which fortifies the existence of the English rule', namely that in England there is

no judicial determination of the right to probate. In India, judicial determination is a matter of course. Thus, we agree that there cannot be a common form of probate in India. Be that as it may, since the evidence of Mrs. Mathias was recorded at the time of grant of probate by the competent Court of law, it is clear that the probate was granted in favour of Mrs. Mathias after publishing Citation at Mangalore and after due application of mind by the Court. Hence it was solemn form only. Since the provisions of Section 263 of the Indian Succession Act state that a probate can be revoked on grounds of just cause, it was open for the Appellant to approach the Court of law by filing an application Under Section 263 of the Indian Succession Act, seeking revocation. As the Appellant has approached the Court of law, and her application is being dealt with by a rigorous process of adjudication upto this Court, there is no question of common form being an obstacle to her ability to challenge the probate. The question raised by the Appellant on the distinction between common form and solemn form is academic.

Coming to the second ground for just cause, re-allegation that the grant of probate was obtained by the Appellant in fraudulent manner, as mentioned supra, the Appellant has not come forward to adduce any evidence to prove the so called allegation of fraud. The signature of Mr. Richard P. Mathias on the Will has not been challenged. The Trial Court as well as the High Court has recorded the finding that the genuineness of the Will was not challenged by the Appellant. Moreover, the particulars of fraud are neither pleaded nor proved by the party alleging fraud before the District Court. The party alleging fraud must set forth full particulars of fraud and the case can be decided only on the particulars laid out. There can be no departure from them. General allegations are insufficient. Merely because the Appellant has made bald allegations in the revocation application that the Will executed by the deceased is void because the same has been brought out by Mrs. Mathias and the same is constituted by fraud and undue influence, it will not absolve her from providing specifically the particulars of fraud and undue influence. Mere bald pleading will not help her in the absence of proof.

In the absence of any evidence on record showing prejudice because of non issuance of citation at Chikmagalur, and in the absence of any evidence-much less cogent evidence-to prove fraud and undue influence, we conclude that the Trial Court as well as the High Court is justified in concluding that there is no just cause for revocation of grant of probate Under Section 263 of the Indian Succession Act.

One must keep in mind that the grant of probate by a Competent Court operates as a judgment in rem and once the probate to the Will is granted, then such probate is good not only in respect of the parties to the proceedings, but against the world. If the probate is granted, the same operates from the date of the grant of the probate for the purpose of limitation Under Article 137 of the Limitation Act in proceedings for revocation of probate. In this matter, as mentioned supra, the Appellant was a minor at the time of grant of probate. She attained majority on 09.09.1965. She got married on 27.10.1965. In our considered opinion, three years limitation as prescribed Under Article 137 runs from the date of the Appellant attaining the age of majority i.e. three years from 09.09.1965. The Appellant did not choose to initiate any proceedings till the year 25.01.1996 i.e., a good 31 years after she attained majority. No explanation worthy of acceptance has been offered by the Appellant to show as to why she did not approach the Court of law within the period of limitation. At the cost of repetition, we observe that the Appellant failed to produce any evidence to prove that the Will was a result of fraud or undue influence. The same Will has remained un-challenged until the date of filing of application for revocation. No acceptable explanation is offered for such a huge delay of 31 years in approaching the Court for cancellation or revocation of grant of probate.

Under these circumstances, the District Court as well as the High Court is justified in dismissing the application of the Appellant for revocation of grant of probate. The judgments of the District Court and the High Court are hereby confirmed. Accordingly, this appeal stands dismissed.

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14. Section 4 of the Partition Act

Keshaba Charan Nayak and Ors.Vs. Biswanath Swain and Ors.

Dr. Akshaya Kumar Rath, J.

In the High Court of Orissa , Cuttack

Date of Judgment - 01.11.2017

Issue

In the Matter of consideration as to whether the sons of the sister of a co-sharer is a stranger to the family to attract section 4 of the Partition Act.

Defendant Nos. 2 and 3 are the appellants against an affirming judgment.

Respondent Nos. 1 and 2 as plaintiffs instituted T.S. No. 161 of 1977 in the court of the learned Additional Sub-Judge, Cuttack for partition along with a prayer under Sec. 4 of the Partition Act. The case of the plaintiffs is that Kartika Swain had two sons, namely Bhikari and Lokanath, defendant No. 1. The plaintiffs and defendant No. 4 are the sons of Bhikari. Bhikari died 32 years back. The Schedule-A property is the ancestral joint family properties of the parties. The Schedule-B property has been acquired out of the joint family funds. There was no partition between the parties by metes and bounds. While matter stood thus, Bansidhar, youngest son-in-law of Lokanath-defendant No. 1, taking advantage of his old age, blindness and illiteracy had managed to obtain a sale deed on 02.05.1977 in favour of defendant Nos. 2 and 3 in respect of lot No. 2 of Schedule-B without consideration. The recitals of sale deed were not read over and explained to defendant No. 1.

Defendant Nos. 2 and 3 filed joint written statement denying the assertions made in the plaint. The specific case of the defendants is that there was an amicable partition of the suit properties between the parties. Defendant No. 1 purchased Lot No. 2 of Schedule-B property from the recorded owners by means of a registered sale deed dated 23.05.1951. The same was exclusive property of defendant No. 1. He sold the said properties to defendant Nos. 2 and 3 by means of a sale deed dated 02.05.1977 for a valid consideration and delivered possession thereof. They are in possession of the said properties. They are not strangers to the family.

Stemming on the pleadings of the parties, learned trial court struck eleven issues. Parties led evidence. The learned trial court came to hold that Schedule-A and B properties are the joint family properties. There was no previous partition of the properties. Lot No. 2 of Schedule-B is homestead. Defendant Nos. 2 and 3 are strangers to the family. They are bona fide purchasers for value. The sale deed, Ext. A is a genuine document. The plaintiffs and defendant No. 4 are entitled to repurchase the property. Held so, it decreed the suit. Felt aggrieved, defendant Nos. 2 and 3 filed T.A. No. 103 of 1982 before the learned 2nd Additional District Judge, Cuttack. Contention raised by the appellants that they are sister's son of Lokanath, defendant No. 1 and not strangers to the family was negatived. The appeal was eventually dismissed.

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

"Whether the appellants being sister's sons of deceased defendant No. 1, Lokanath can be treated as strangers to the family for the purpose of Sec. 4 of the Partition Act?"

Heard Mr. D.P. Mohanty, learned counsel for the appellants. None appeared for the respondents.

Mr. Mohanty, learned counsel for the appellants submitted that the courts below fell into patent error of law in allowing the prayer of the plaintiffs under Sec. 4 of the Partition Act. According to Mr. Mohanty, when a stranger purchaser files a suit for partition, then only the relief under Sec. 4 of the Partition Act is available to the co-sharers. Elaborating the submission, he submitted that the suit was filed by co-sharers for partition and relief under Sec. 4 of the Partition Act. At the behest of the co-sharers, Sec. 4 of the Partition Act cannot be pressed into service. He relied upon the decisions of the apex court in the cases of Ghantesher Ghosh v. Madan Mohan Ghosh and others, AIR 1997 SC 471, Babulal v. Habibnoor Khan (Dead) by L.Rs. and others, AIR 2000 SC 2684 and Gautam Paul v. Debi Rani Paul and others, AIR 2001 SC 61.

Mr. Mohanty, learned counsel further contended that a Bench of this Court in the case of Prahallad Ch. Mohanty and another v. Surendra Nath Mohanty and others, 2008(I) OLR-863 took a contrary view. The decision is contrary to the decision of the apex Court in the case of Ghantesher Ghosh (supra).

In Alekha Mantri vs. Jagabandhu Mantri and others, AIR 1971 Orissa 127, this Court held that Sec. 4 of the Partition Act would also be applicable where the suit for partition was brought by a member of the undivided family against the stranger transferee and it is not necessary that the latter should have filed the suit.

There were divergent views of different High Courts including this Court in the case of Alekha Mantri (supra) with regard to scope and ambit of Sec. 4 of the Partition Act. The same has been set at rest by the apex Court in the case of Ghantesher Ghosh (supra). The apex Court held thus:-

"A mere look at the aforesaid provision shows that for its applicability at any stage of the proceedings between the contesting parties, the following conditions must be satisfied:

(1) A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;

(2) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;

(3) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the concerned co-owner;

(4) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and

(5) While accepting such a claim for pre-emption by the existing co-owner of the dwelling house belonging to the undivided family, the court should make a

valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house".

In Babulal v. Habibnoor Khan (Dead) by L.Rs. and others, AIR 2000 SC 2684, the apex Court taking a cue from Ghantesher Ghosh (supra) held that one of the basic conditions for applicability of Sec. 4 as laid down by the aforesaid decision and also as expressly mentioned in the Section is that the stranger/transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned. Before Sec. 4 of the Partition Act can be pressed in service by any of the other co-owners of the dwelling house, it has to be shown that the occasion had arisen for him to move under Sec. 4 of the Act because of the stranger transferee himself moving for partition and separate possession of the share of the other co-owner which he would have purchased. It was further held that if the ratio of Alekha Mantri (supra) is held to take the view that a stranger purchaser who does not move for partition of joint property against the remaining co-owners either as a plaintiff or even as a defendant in the partition suit claiming to be as good as the plaintiff nor even as a successor of the decree holder seeks execution of partition decree, can still be subjected to Sec. 4 of the Partition Act proceedings, then the said view would directly conflict with the decision of this Court in Ghantesher Ghosh's case (supra) and to that extent it must be treated to be overruled.

In Gautam Paul (supra), the apex Court held that Sec. 4 of the Partition Act should be given a liberal interpretation. However, giving a liberal interpretation does not mean that the wordings of the Section and the clear interpretation thereof be ignored. The relevant wordings are "dwelling-house belonging to an undivided family". Thus it must be dwelling house belonging to an undivided family. The further requirement is that the transfer must be to a person who is

not a member of "such family". The words "such family" necessarily refers to the undivided family to whom the dwelling house belongs. It was further held that merely because a person is related by blood through common ancestor, does not make him a member of the family within the meaning of the term as used in Sec. 4 of the Partition Act.

Both the courts below concurrently held that the Lot No. 2 of Schedule-B property is homestead. There was no partition by metes and bounds. Merely because defendant Nos. 2 and 3 are related by blood through a common ancestor, does not make them a member of the family within the meaning of the term as used in Sec. 4 of the Partition Act as held by the apex court in the case of Gautam Paul (supra). The courts below fell into the patent error of law in allowing the prayer under Sec. 4 of the Partition Act. They are strangers to the family. The substantial question of law is answered accordingly.

Learned Single Judge of this Court in Prahallad Ch. Mohanty (supra) held that in a suit filed by one of the members of the joint family for partition where the stranger purchaser has been arrayed as defendant, the plaintiff can ask for relief of repurchase of the property from the stranger purchaser. Such inference is legally acceptable as it is in consonance with the benevolent legislative scheme behind enactment of Sec. 4 of the Partition Act, which is for insulating the domestic peace of members of undivided family occupying a common dwelling house from the encroachment of a stranger transferee of the share of one undivided co-owner as a stranger-outsider to the family may obviously be having different outlook and mode of life than the members of the joint family. Though decision of the apex Court in the case of Ghantesher Ghosh (supra) was drawn to the attention of the Court, but then a contrary view was taken. The observation in Prahallad Ch. Mohanty (supra) runs contrary to the decisions of the apex Court in the cases of Ghantesher Ghosh and Babulal (supra). The judgment also suffers from internal inconsistencies. In view of the authoritative pronouncement of the apex Court in the case of Ghantesher Ghosh Babulal (supra), the decision is impliedly overruled.

A priori, the judgments and decrees of the courts below with regard to prayer under Sec. 4 of the Partition Act is set aside. The appeal is allowed in part. No costs.

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15. Section 49 of the Indian Registration Act

Bhramarbar Ray versus Bishnu Charan Routray and others

Dr. A.K. Rath, J.

In the High Court of Orissa ,Cuttack.

Date of Judgment:03.11.2017

Issue

In the matter of application of principles of collateral stransaction in case of a document required by law to be registered if not registered.

This is a plaintiff's appeal against reversing judgment. The suit was for partition along with a prayer under Sec.4 of the Partition Act.

The case of the plaintiff is that the suit land is the ancestral property of the plaintiff and defendant nos.1 to 7. The residential house of the parties stands over the same. The suit properties were not partitioned amongst the co-sharers by metes and bounds. The parties possessed the suit land according to their convenience. Defendant nos.5 and 7 had transferred the suit schedule land to the defendant no.8 by means of a registered sale deed dated 4.11.1981 without his consent. Defendant no.8 was a stranger to the family. With this factual scenario, the suit was instituted seeking the reliefs mentioned supra.

The contesting defendant no.8 filed written statement stating therein that there was a partition between the plaintiff and his co-sharers much prior to his purchase. In the partition, plot no.1042 fell to the share of defendant nos.5 to 7. The plaintiff and other co-sharers have no right, title and interest over the suit plot. The suit land is not liable to be partitioned. The plaintiff is not entitled to re-purchase the said land under Sec.4 of the Partition Act. It is apt to state here that defendant no.8 died during pendency of the suit, whereafter his legal heirs have been substituted as defendant nos.8(a) to 8(d). They adopted the written statement filed by the defendant no.8. The other defendants were set exparte.

On the interse pleadings of the parties, learned trial court struck eight issues. Parties led evidence. Learned trial court held that the suit property is the ancestral property of the plaintiff. There was no partition between the co-sharers. Held so, it decreed the suit. Feeling aggrieved, the defendant no.8 filed T.A. No.24 of 1988 before the learned Second Additional District Judge, Cuttack. Learned lower appellate court placing reliance on the unregistered partition deed, Ext.E, record of right, Ext.F, rent receipts, Ext.K & K/1, and the evidence on record and pleadings held that there was a prior partition between the parties. The sale deed is valid. Held so, it allowed the appeal.

The second appeal was admitted on the substantial questions of law enumerated in ground nos.2 and 3 of the memorandum of appeal. The same are: "(ii) Whether Ext.E (unregistered partition deed) is admissible in evidence to prove partition ? (iii) Whether the validity of Exhibit-E can be accepted in view of Registered partition deed Ext.1 which was executed on 23.6.70 ?"

Heard Miss Soumya Mishra, learned counsel for the appellant and Mr. D.P. Mohanty, learned counsel for the respondents.

Miss Mishra, learned counsel for the appellant submits that the suit schedule property is the ancestral property of the plaintiff. There was no partition between the co-sharers. Learned lower appellate court committed a manifest illegality and impropriety in placing reliance on the unregistered partition deed, Ext.E and held that there was a partition between the parties. She further submits that the unregistered partition deed can be relied upon by the collateral purpose. There is no evidence on record that the suit schedule property was partitioned between the co-sharers by metes and bounds. She relies on a decision of the apex Court in the case of S. Kaladevi vs. V.R. Somasundaram and others, (2010) 5 SCC 401.

Per contra, Mr. D.P. Mohanty, learned counsel for the respondents submits that the suit schedule property was partitioned between the co-sharers. Thereafter the co-sharers, namely, defendant nos.5 and 7 alienated the suit schedule property in favour of the defendant no.8. The alienation was for legal necessity. There is no perversity in the finding of the learned lower appellate court.

In S. Kaladevi (supra), the apex Court held: "10. Section 17 of the 1908 Act is a disabling section. The documents defined in clauses (a) to (e) therein require registration compulsorily. Accordingly, sale of immovable property of the value of Rs.100 and more requires compulsory registration. Part X of the 1908 Act deals with the effects of registration and non-registration.

Section 49 gives teeth to Section 17 by providing effect of non-registration of documents required to be registered. Section 49 reads thus: "49.Effect of non-registration of documents required to be registered.—No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall— (a) affect any immovable property comprised therein, or (b) confer any power to adopt, or (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered: Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be

registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (1 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument."

The main provision in Section 49 provides that any document which is required to be registered, if not registered, shall not affect any immovable property comprised therein nor such document shall be received as evidence of any transaction affecting such property. The proviso, however, would show that an unregistered document affecting immovable property and required by the 1908 Act or the Transfer of Property Act, 1882 to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. By virtue of the proviso, therefore, an unregistered sale deed of an immovable property of the value of Rs.100 and more could be admitted in evidence as evidence of a contract in a suit for specific performance of the 5 contract. Such an unregistered sale deed can also be admitted in evidence as evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of the 1908 Act. 13. Recently, in K.B. Saha and Sons (P) Ltd. v. Development Consultant Ltd. this Court noticed (SCC pp.576-77, para 33) the following statement of Mulla in his Indian Registration Act (7th Edn., at p.189): "The High Courts of Calcutta, Bombay, Allahabad, Madras, Patna, Lahore, Assam, Nagpur, Pepsu, Rajasthan, Orissa, Rangoon and Jammu & Kashmir; the former Chief Court of Oudh; the Judicial Commissioner's Court of Peshawar, Ajmer and Himachal Pradesh and the Supreme Court have held that a document which requires registration under Section 17 and which is not admissible for want of registration to prove a gift or mortgage or sale or lease is nevertheless admissible to prove the character of the possession of the person who holds under it."

This Court then culled out the following principles: (K.B. Saha case, SCC p.577, para 334)

"1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose. To the aforesaid principles, one more principle may be added, namely, that a document required to be registered, if unregistered, can be admitted in evidence as evidence of a contract in a suit for specific performance."

In the instant case, the learned lower appellate court has not solely relied upon the unregistered partition deed, Ext.E. The learned lower appellate court placed reliance on the record of right, Ext.F, rent receipts, Ext.K & K/1 and on a threadbare analysis of the evidence on record and pleadings came to hold that there was a partition of the suit schedule property. There is no perversity or illegality in the finding of the learned lower appellate court. The substantial questions of law are answered accordingly.

In the wake of aforesaid, the appeal, sans merit, deserves dismissal. Accordingly, the appeal is dismissed. No costs.

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