O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2016

(*OCTOBER*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY

MONTHLY REVIEW OF CASES ON CIVIL, CRIMINAL & OTHER LAWS, 2016 (October)

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2. Order 41 rule 27 of CPC

State Of Orissa versus P. S. N. Rao

Dr. A. K. Rath , J.

In the High Court of Orissa

Date of judgment -05.10.2016

Issue

Acceptance of additional evidence –challenged

Relevant extract

The case of the plaintiff is that the Government of Orissa had issued notifications for acquisition of the suit schedule land for the purpose of construction of M.K.C.G. Medical College, Berhampur. The suit land had been recorded in the name of Government of Orissa in the Department of Health and Family Planning. The final R.O.R. was published in the year 1979. The boundary wall of the Medical College had been constructed over the suit land. On 28.10.1996, the defendant had damaged the boundary wall of the Medical College and started construction over the same. The plaintiff informed the matter to the police about the illegal entry of the defendant over the suit land. The defendant has no semblance of right, title and interest over the suit land.

Pursuant to issuance of summons, the defendant entered appearance and filed a written statement denying the assertions made in the plaint. It is stated that his mother P.Managmma purchased the suit lands from one Tulasi Patra and Purna Chandra Mohanty under three registered sale deeds and remained in possession of the same. The plaintiff had not acquired the suit land at any point of time, nor possessed the same. During the last settlement operation, the suit lands were wrongly recorded in the

name of the plaintiff. It is further stated that he and his family members were staying away from Berhampur. When he learnt about the wrong recording of the suit land in the name of plaintiff, he filed a petition before the Tahasildar to mutate the suit land in his favour. The Tahasildar demanded a no objection certification from the plaintiff. The plaintiff, after discovering that the suit land had not been acquired and included in the Master Plan for Medical College, tried to ascertain from the Revenue authorities and the Land Acquisition Authority about the real position and when the authority reported that the lands had not been acquired, the suit was filed.

On the inter se pleadings of the parties, the learned trial court struck five issues. The same are as follows:-

"1. Is the suit as laid maintainable in the eye of law ?

2. Has the plaintiff any cause of action to bring the suit ?

3. Is the plaintiff entitled for a declaration that he has right, title, interest over the suit land ?

4. Is the plaintiff entitled for a decree of permanent injunction as prayed for ?

5. To what other relief, if any, the plaintiff is entitled ?"

This Second Appeal was admitted on the following substantial questions of law:-

"(i) Whether in absence of records of land acquisition, the lower appellate court committed an illegality in not accepting the letter dated 16.6.1975 of the Land Acquisition Officer, Ganjam indicating

acquisition of the suit property under the Land Acquisition Act as an additional evidence ?

(ii) Whether the R.O.R. vide Ext.1 can be accepted as a proof of acquisition of the disputed land ?"

It is evident from the order no.11 dated 14.9.1999 of the learned lower appellate court in T.A.No.56 of 1998, an application under Order 41 Rule 27 C.P.C. was filed by the appellant along with photostat copies of the documents, but then the learned trial court did not delve into the same and proceeded to decide the appeal.

The question does arise as to whether the learned appellate court can decide the appeal without considering the application filed under Section 41 Rule 27 C.P.C.? In Jatinder Singh (supra), an application under Order 41 Rule 27 C.P.C. for acceptance of additional evidence was filed in the Second Appeal. Though an application under Order 41 Rule 27 C.P.C. was filed for acceptance of additional evidence of the documents, but the High Court failed to take notice of the said application. The apex Court held that when an application for acceptance of additional evidence under Order 41 Rule 27 C.P.C. was filed by the appellant, it was the duty of the High court to deal with the same on merits. The judgment of the High Court was set aside and the matter was remitted back. The same ratio proprio vigore applies to the facts of this appeal.

The next question arises for consideration whether the appellate court can consider the application for additional evidence at any stage of the appeal ?

Keeping in view the enunciation of law laid down by the Privy Council in Persotim Thakur (supra), this Court has examined the case. Hearing of the appeal has not yet commenced. The appellate court is yet to examine the pleadings of the parties and evidence of both oral as well as documentary to adjudge the requirement of provisions of clause (b). Application for adducing additional evidence can only be considered at the time of hearing of the appeal. The learned lower appellate court has not exercised its discretionary power in a judicial manner." (emphasis laid)

In the wake of the aforesaid, the judgment and decree dated 20.9.1999 and 25.9.1999 respectively passed by the learned District Judge, Ganjam-Gajapati in Title Appeal No.56/98 are set aside. The appeal is allowed. The matter is remitted back to the learned lower appellate court for de novo hearing. Since the matter is remitted back to the learned appellate court, this Court has not considered the substantial question of law enumerated in Ground No.(ii). The learned lower appellate court shall decide the appeal in the light of the observations made above.

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3. Section 439 of Cr.P.c

Lt. Col. (Retd.) Rakesh Rana, KC versus State of Orissa

Dr. D. P. Choudhury , J.

In the High Court of Orissa.

Date of Judgment: 06.10.2016

Issue

Application for bail.

Relevant extract

The factual matrix leading to the case of the prosecution is that the petitioner is a retired Lt. Colonel. He formed one Non-Government Organisation (NGO) namely, Sainik Welfare Organisation-India (for short 'SWO-India') with the purpose to look after the welfare of the sitting and retiredservicemen. The petitioner is the Chairman of said SWO and the main object of this SWO is to allot plots for the members of the ex-serviceman and serviceman at the cost to be paid by the members. It is further case of the prosecution that SWO prepared a scheme for allotment of plots in the name and style of "Defence Intercity Vatika, Bhubaneswar" for Rs.35 crores in toto approximately. The petitioner's SWO-India made agreementbwith M/s. Brookson Infrastructure Pvt. Ltd., Bhubaneswar ofbwhich co-accused Purna Chandra Panda is the Managing Directorbto arrange plots at mouza Giringaput, P.S. Chandaka, Bhubaneswar, District-Khurda and develop same for their allotment to the ex-serviceman and serviceman. The petitioner through website made advertisement about details of the application for plots and allotment procedure including necessary money to be deposited for allotment of such plots for residential purpose. The informant along with 541 ex-servicemen and servicemen being lured

by the advertisement applied for plots and accordingly SWO collected Rs.29 crores from the applicants.

It is the further case of the prosecution that the petitioner being the Chairman of the SWO paid Rs.19 crores to the co-accused Purna Chandra Panda. Then accordingly the applicants were asked to keep in contact with co-accused Purna Chandra Panda and co-accused P.K. Barik, who is said to be an employee of SWO-India for execution of sale deeds of allotted lands and their development including preparation of Records-of- Right etc. It is alleged, inter alia, that the informant and many other applicants in spite of repeated approach could not get sale deed executed of allotted land and also delivery of possession of same was not made. So, the informant and some investors informed the Economic Offence Wing of criminal branch to take cognizance of the matter. Although it is stated that 490 investors out of 542 have been supplied with registered sale deeds but on field no such plots exist, the barren land is available without having any boundary and also no delivery of possession has also been made following such sale. So, after investigation chargesheet was submitted against the present petitioner along with other co-accused persons for the offence committed under Sections 406, 420, 467, 468, 471, 120-B of I.P.C. and Section 6 of the Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011.

It appears that in the economic offences the Court should unveil the truth or must separate the grain from the chaff because of rampant economic offences polluting the society. Applying the said principle to the present case, it appears that handing over of money of Rs.19 crores to co- accused Purna Chandra Panda by the present

petitioner does not absolve his responsibility. It also appears from the Case Diary that Purna Chandra Panda has refused to take up the responsibility because he has not got further sum of Rs.6 crores from the present petitioner. Of course Purna Chandra Panda is on conditional bail but the Case Diary shows that he has also failed to perform his part of contract.

Since the present petitioner is the person to have floated the plotted scheme and received the money, he cannot be taken at par with Purna Chandra Panda who has allegedly executed the agreement with SWO - India.

Also petitioner has taken plea that he has filed consumer complaint against co-accused Purna Chandra Panda before the National Commission which has nothing to do with offences for which petitioner is prosecuted. Be that as it may, the case of the present petitioner cannot be at par with the case of co- accused Purna Chandra Panda.

It is reported in (2000) 4 SCC 168; Hridaya Ranjan Prasad Verma and others v. State of Bihar and another where Their Lordships observed the following: "15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time

when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed".

Mr. D. Nayak, learned Senior Advocate for the petitioner submitted that the aforesaid decision clearly shows that in a criminal breach of trust the case under Sections 468, 471 and 420 of IPC should not be prima facie found. The facts and circumstances of the aforesaid case do not apply to the facts and circumstances of the present case as the intention of the present petitioner is clearly available from the beginning when the Scheme is floated as per aforesaid discussion.

Learned Senior Advocate for the petitioner submitted that when chargesheet in this case has been submitted, the detention of the present petitioner is not necessary. It is submitted by the learned Additional Standing Counsel that the investigation is still left open even if the preliminary charge-sheet has been submitted. According to recent trend by the investigating agency the charge-sheet is being filed keeping the further investigation open because of the provisions under Section 173 (8) of Cr.P.C. Even if further investigation is open, the submission of chargesheet in the present case against the present

petitioner can be considered provided there is no prima face case against him. When there are materials available against present petitioner as discussed, it is too early to take a view that the submission of charge-sheet pares away for granting bail to the present petitioner.

Moreover, as appears from material, the petitioner used to stay in Delhi, thus his availability for trial of the case is remote one. The materials also show that petitioner is allegedly involved in similar nature of offences in the State of Jharkhand and Bihar. In such scenario, it is not safe to take lenient view to grant bail although he is a retired Army Officer.

Considering the submissions of learned Counsels for both the parties and in view of aforesaid discussion, for the larger interest of people of the services at large, public and society, I am loath to grant bail to the petitioner. Thus, the bail application being devoid of merit stands rejected.

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4. Section 149,302,102 B of IPC

Harbeer Singh Versus Sheeshpal & Ors

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State of Rajasthan Versus Sheeshpal & Ors

Pinaki Chandra Ghosh & Amitava Roy , JJ.

In the Supreme Court of India .

Date of Judgment - 20.10.2016

Issue

Judgment and order of sentencing -challenged

Relevant extract

These appeals, by special leave, are directed against the judgment and order dated 25 th November, 2011, passed by the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur, in D.B. Criminal Appeal No.290/1995 and D.B. Criminal Appeal No.375/1995, whereby the High Court has quashed and set aside the conviction of the accused respondents. Criminal Appeal Nos.1624-1625 of 2013 are filed by the son of the deceased and Criminal Appeal Nos.217-218 of 2013 are filed by the State of Rajasthan challenging the acquittal order passed by the High Court.

The brief facts of the case as unfolded by the prosecution are as follows: On 21.12.1993, at 7.55 P.M., Bhagwara Ram (PW-8), the brother of the deceased Balbir Singh, gave a written report at P.S. Kotwali Sikar, stating that on 21.12.1993 in the evening at about 6.00 P.M., when his younger brother Balbir (deceased) was returning to his house, two men were standing near the Dhaba of Shankar and he started talking to them. In the meantime, Sheeshpal (son of Khuba Ram) came from the side of Sikar driving his Jeep and with

an intention to kill, hit Balbir and dragged him upto the Dhaba of Suresh as a result of which Balbir died on the spot. The owner of the Dhaba – Suresh Kumar chased them on his motorcycle. It was further stated that the act was committed by Sheeshpal in furtherance of his old enmity with Balbir in connivance with Bhanwarlal, Dhanvir, Mangal (sons of Khuba Ram) and Bhanwarlal's brother-in-law Nemichand and Shiv Bhagwan of Village Gothura Tagalan. It is also mentioned in the written report that at the time of the incident, Sheeshpal was driving the jeep and Nemichand, Shiv Bhagwan, Rajendra and Prakash were with him in the Jeep and it is not mentioned that Bhanwarwal was present in the jeep or at the place of occurrence. The names of Dhanvir and Mangal were dropped later on.

The Police registered a case under Section 302 of the Indian Penal Code and began investigation. Formal FIR was registered, place of occurrence was inspected, site plan was prepared, post-mortem of the dead body was done, Panchnama of the dead body was prepared and the vehicle used in the crime along with number plate of the vehicle and broken parts was seized. Statements of the witnesses were recorded and during investigation accused persons were taken into custody. After completion of the investigation, accused Bhanwar Lal was declared absconding. Charge sheet was filed against the accused persons before the learned Magistrate and the case was committed to the Sessions Court for trial. On Bhanwar Lal's presence, his case was also committed as above and both the cases were amalgamated and trial commenced. Charges under Sections 149, 302, 120B of the IPC were framed against all the

accused persons except Bhanwar Lal. Accused Bhanwar Lal was charged under Sections 302, 120B of IPC. All the accused persons pleaded 'not guilty' and hence they were tried by the Court of Sessions. The Trial Court convicted the accused persons and sentenced them to life imprisonment under Section 302 read with Section 149 of the IPC. They were also sentenced severally under various sections.

Aggrieved by the judgment and order dated 17.06.1995, passed by the Trial Court, the accused persons filed appeals before the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur. The High Court allowed the appeals, set aside the judgment and order passed by the Trial Court and acquitted all the accused persons. Hence, these appeals, by special leave, are filed before this Court.

However, the High Court gave the benefit of doubt to the Respondents and acquitted them on the ground that the prosecution was not able to prove its case beyond all reasonable doubt since the eye-witnesses were interested in the complainant and hence unreliable, while most other prosecution witnesses were chance witnesses. The evidence of the eye-witnesses both as to the fact of the alleged conspiracy and the murder of the deceased, did not inspire confidence; there were inconsistencies and improvements in the deposition of the prosecution witnesses made over their statements recorded under Section 161 Cr.P.C. Further, there was unexplained delay in recording the evidence of certain prosecution witnesses as well as many important and basic lapses in investigation that made the prosecution case suspicious.

In our view, the High Court had rightly considered these omissions as material omissions amounting to contradictions covered by the Explanation to Section 162 Cr.P.C. Moreover, it has also come in evidence that there was a delay of 15-16 days from the date of the incident in recording the statements of PW3 and PW9 and the same was sought to be unconvincingly explained by reference to the fact that the family had to sit for shock meetings for 12 to 13 days. Needless to say, we are not impressed by this explanation and feel that the High Court was right in entertaining doubt in this regard.

As regards the incident of murder of the deceased, the prosecution has produced six eye-witnesses to the same. The argument raised against the reliance upon the testimony of these witnesses pertains to the delay in the recording of their statements by the police under Section 161 of Cr.P.C. In the present case, the date of occurrence was 21.12.1993 but the statements of PW1 and PW5 were recorded after two days of incident, i.e., on 23.12.1993. The evidence of PW6 was recorded on 26.12.1993 while the evidence of PW11 was recorded after 10 days of incident, i.e., on 31.12.1993. Further, it is well-settled law that delay in recording the statement of the witnesses does not necessarily discredit their testimony. The Court may rely on such testimony if they are cogent and credible and the delay is explained to the satisfaction of the Court. [See Ganeshlal Vs. State of Mahrashtra , (1992) 3 SCC 106; Mohd. Khalid Vs. State of W.B. , (2002) 7 SCC 334; Prithvi (Minor) Vs. Mam Raj & Ors., (2004) 13 SCC 279 and Sidhartha Vashisht @ Manu Sharma vs. State (NCT of Delhi) , (2010) 6 SCC 1].

In the light of the above and other reasons recorded by the High Court, we hold that the evidence of the eye witnesses is not truthful, reliable and trustworthy and hence cannot form the basis of conviction. Their presence at the scene of occurrence at the time of the incident is highly unnatural as also their ability to individually and correctly identify each of the accused from a considerable distance, especially when it was dark at the alleged place of occurrence, is itself suspect.

Besides these, the prosecution has also been unable to convincingly connect the jeep of the accused Sheeshpal with the incident beyond reasonable doubt. Further, owing to other lapses in investigation, as recorded by the High Court, we are convinced that the prosecution has been unable to prove its case beyond all reasonable doubt. The view taken by the High Court in the facts and circumstances of the case appears to be a reasonably plausible one.

Thus, in the light of the above discussion, we are of the view that the present appeals are devoid of merits, and we find no ground to interfere with the judgment passed by the High Court. The appeals are, accordingly, dismissed.

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5. Section 302/201/34 of IPC

Bibachha Digal Versus State of Orissa

Vinod Prasad & K. R. Mohapatra ,JJ.

In the High Court of Orissa.

Date of judgment: 28.10.2016

Issue

Conviction of the appellant challenged when the co-accused is acquitted of the same case

Relevant extract

Prosecution case as disgorged in the FIR and later on unfurled before the Trial Court, stated concisely, indicates that one Late Chhanchana Behera, resident of Phulbani Harizan Sahi under Town Police Station, Phulbani, Dist-Kandhamal had two sibling issues, son Kastha Behera/PW1 and daughter Ponia Naik/PW2, who was married to one Parameswar Naik. Kastha Behera/PW1 had two sibling issues, son Bipra Charan Behera/PW8 and daughter Ambika Behera,(deceased). Appellant Bibachha Digal, resident of village Dadikaju, P.S. Phulbani Sadar, District Kandhamal is the husband of Ambika, the deceased. According to the trotted story, appellant and deceased, who both were laborers, being infatuated in love towards each other had eloped and were in living relationships. No formal marriage according to the customary rites was solemnized in between them. Initially both of them resided in Dadikaju, village of the appellant, but subsequently to augment their income they came to Phulbani and started residing in a rented house. Sometimes thereafter, unfoundedly, believing the deceased to be a trollop, that the appellant used to physicallynassault her and create Gandogol. After staying in Phulbanin Sadar for some time the appellant and the deceased returned to appellant's village Dadikaju where the

deceased stayed for another four or five months and thereafter she came back to her parental village and started living with the informant/PW1. It seems that during this period the deceased had made an oral complaint before Rupashree Pratibeshi Mahila SamiteenNarisangh, of which Namita Behera/PW3 was the President and Niroda Behera/PW9 was the Secretary, against the appellant for assaulting her and on that basis the Samiti had initiated actionnagainst the appellant by convening a meeting. Amidst the meeting the deceased had disclosed that the appellant had solemnized bigamous marriage with the acquitted accused Banita Digal, who is his second wife. Appellant had assured in the meeting and had promised to take the deceased back to his house and maintain her dignifiedly. In accordance with the decision of the Nari Sangh, informant father/PW1, accompanied by Ponia Naik/PW2 and his son Bipra/PW8 had taken the deceased to the appellant's house and had left her there. The prosecution evidence after this is somewhat garbled, but it is apparent that a fortnight after their return because to know the welfare of the daughter or because of some rumor aired that the deceased is missing from the house of the appellant, that PW1has sent Ponia Naik/PW2 to inquire about the welfare ofnthe deceased. PW2 when came to Dadikaju did not find the deceased and the appellant and she was informed that they had gone out since last eight or ten days. PW2 therefore returned and informed PW1 about missing of his daughter. On this, PWs1, 2 & 8 came to Dadikaju where they could not locate the appellant and the daughter and on inquiry they were informed that the daughter-Ambika has been murdered by the appellant. The Ward Member of

the said village took them to a place near a bridge where the informant spotted one Saaya, one Sweater lying besides one skull. Sensing that the daughter had been done to death that the informant got his FIR/Ext.1 slated down through one Madhusudan Behera/PW7, arraigning both, the appellant as well as second wife (acquitted accused Banita Digal) as perpetrators of the crime, covered a distance of 8 kms. and lodged his FIR at police Station Phulbani Sadar, on 27.11.2006 at about 9 A.M., which was registered as Crime No. 76/06, u/s 302, 201,34 I.P.C. mentioning date and

We have pondered over rival submissions in the light of the evidences existing on the record. From the examination of the testimonies of the witnesses it transpires that so far as the relationships inter-se between the parties are concerned no challenge at all has been made by the accused to doubt them and therefore, the aforementioned relationships stands proved convincingly. It also emerges that there was some feud between the appellant and the deceased, may be because of suspicion on chastity of the deceased or because of the solemnization of bigamous marriage by the appellant and hence it cannot be cogitated even slightly that appellant could not have any motive to commit deceased murder. However the fact remains is that motive howsoever strong cannot establish a crime. Merely because appellant could and facetious idea to adjudge him guilty. From scanning of record it is apparent that but for imputing motive prosecution has failed to bring convincing evidence on record to connect the appellant with the commission of deceased murder. First of all the attires which were alleged to have been recovered from the spot, were not identified by any of the fact witnesses not

even by the father of the deceased nor it were exhibited as material objects. Neither the informant father/PW1, Aunt (Bua/PW2) and the brother PW8 have deposed about the attires belonging to the deceased and thus there is complete absence of convincing evidence that the recovered cloths belonged to the deceased. So is the case regarding the scattered bones, except the skull. Thus, the prosecution has miserably failed to connect the recovered articles with the deceased. Learned trial judge was also very dissatisfied with the brought out evidences as he himself has observed in Paragraphs 10/11 of the impugned judgment that (i) "*that dead body of the deceased could not be recovered."* (ii) "*One saya and the sweater were already near Nala, the theory of digging of hole and recovery does not invoke confidence. Moreover, the skull and other bones of the deceased were found scattered near the Nala. The possibility of the dead body of the deceased being dragged out from inside the burial place and eaten away by the animals is only to be reasonable deducted. Since the skull bone and other bones are lying scattered on the surface. The Blouse, Saya and Sweater which must be closely stuck/tied to the body of the deceased could not have remained inside the earth and the some articles could not have been recovered by digging the earth. When the dead body was dragged out by the wild animals then in natural course the garments which are tied and attached to the body, must come out. Thus the oral evidence of PW-6 and PW-3 in this regard appears to be unnatural and therefore, does not reach a reasonable mind.*" (iii) "*So, recovery of a spade from his possession simplicitor without evidence to connect the spade with the crime cannot be taken as an incriminating circumstance. Neither any*

blood stain is noticed on the same by the chemical examiner as per his report Ext. 12 nor any witnesses are examined to identify the same as the one use by the accused for digging hole. The possession of a spade by the accused- Bibachha is explainable and there is nothing abnormal as he is a labourer in profession. That being the position the entire prosecution case as regards leading to discovery of the garments and the spade is not proved."

However, learned trial judge has observed that so far as absconding is concerned, that is an incriminating material against the appellant. We are unable to subscribe to such type of a reason because there can be other convincing reasons for such a terrified conduct. Absconding may be because of apprehension without being involved in the crime. It is not a circumstance which is complete in itself so as to hold the appellant guilty of the murder. Co-accused Banita Digal having the same allegation on the same evidence has been acquitted. The reasons for her acquittal slated down by the learned trial judge even apply with full force so far as present appellant is concerned. There is no distinction, so far as the evidence is concerned, between the case of the appellant and that of Banita Digal. Learned Trial Judge had tried to carve out an artificial distinction which opinion by the learned trial judge we are unable to subscribe. The President and Secretary of the Nari Sangha could only

impute motive to the appellant, but as has been held in a catena of decisions by the Hon'ble Apex Court, motive alone is not sufficient to establish the guilt of the accused. Without being verbose and dragging the issue, we are unable to find out any material against the appellant so as to find him guilty of the crime and confirm his conviction and concur with the findings recorded by the learned trial judge.

In essence, we find that the appellant has been wrongly convicted and his appeal deserves to be allowed. The appeal is allowed and impugned judgment and order convicting and sentencing the appellant is hereby setaside and he is acquitted of all the charges. Appellant isnconfined in jail and therefore he is directed to be set at libertynforthwith unless his presence inside the jail is required innnconnection with any other crime. Let this judgment be communicated to the learned Trial Judge as well as concerned Jail Superintendent forthwith for their intimation and follow up action.

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6. Sections 366/376(g)/392 read with Section 34 IPC

Raja and Others Versus State of Karnataka

Pinaki Chandra Ghose & Amitava Roy , JJ.

In the Supreme Court of India.

Date of Judgment-04.10.2016

Issue

Conviction under Section 366 and 376(G) –Challenged.

Relevant extract

Distressed by the reversal of their acquittal from the charge under Sections 366/376(g)/392 read with Section 34 IPC, as recorded by the trial court, the appellants have impeached the impugned judgement and order of their conviction rendered by the High Court in the State appeal

The prosecution was set rolling by an oral report by the prosecutrix with the Sampangiramanagara Police Station between 2.00 A.M. and 3.00 A.M. of 11.10.1997, which was in Tamil language and was translated and recorded by S. Shiva Lingaia, ASI, whereafter a case was registered under Sections 366, 376(g), 392 r/w 34 IPC.

The prosecutrix revealed that she was a resident of No.81, Jasari Kaleeli, Rustum ji Compound, Richmond Road, Bangalore and was earning her livelihood by rendering services as a maid in the house of Shilpa Shetty at Shanti Nagar, Bangalore. According to her, because of the ill-treatment of her husband, she shifted to Bangalore about 8 months prior to the incident by separating from him. She alleged that at about 7.30 P.M. in the previous evening, while she was coming back from work and was at the Richmond Park, an auto rickshaw ,with two persons in it including the driver stopped by her side and she was pulled inside. According to her, after travelling some distance, two other persons also got into the auto rickshaw. The miscreants then blindfolded her, by her chudidar cloth and took her to an auto garage where there was no light. The prosecutrix stated that the abductors lit a candle, spread 2 seats of the auto rickshaw on the ground, laid her forcibly thereon and in spite of her resistance

and objections, forcibly undressed her and raped her by turn. She disclosed that 3 of the four persons ravished her. Out of them, two committed the act twice and the third only once. The prosecutrix further stated that one of the persons brought dosa and idli and also offered the same to her, whereafter they tried to repeat the same act, to which she protested for which she was kicked and fisted and further they snatched her Tali (mangalsootre) gold ear-studs. They then made her to wear her clothes, brought her in the auto rickshaw to a vacant place and discarded her. According to her, these violators were addressing each other as Raju, Venu, Parkash and Francis and claimed that she could identify them, if produced. Investigation followed and in the course thereof, the appellants were apprehended. The fourth person Francis could not be nabbed as he absconded. As a matter of fact, after the submission of the charge-sheet against the appellants, the trial was conducted by segregating the absconding accused. They denied the charge under the above provisions of law.

At the trial, the prosecution examined 11 witnesses and also marked several documents and exhibited material objects seized during the investigation. The appellants rendered their statements under Section 313 Cr.P.C. reiterating their innocence and also examined one witness in defence. The trial court, to reiterate, acquitted the appellants of the charges levelled against them. The High Court by the impugned decision has reversed the acquittal and the appellants thus stand convicted under Sections 376(g) and 392 IPC r/w 34 IPC and have been sentenced to suffer rigorous imprisonment for 10 years.

The instant adjudication being one to examine the tenability of the conviction of the appellants on the reversal of their acquittal, an independent assessment of the evidence on record is indispensable in the interest of justice, two courts of facts having arrived at irreconcilable conclusions on the same materials on records. It would thus be expedient, to analyse the evidence, oral and documentary before adverting to the rival arguments based thereon.

We have lent our anxious consideration to the materials on record as well as the competing arguments based thereon. Having regard to the charge levelled, the fulcrum of the prosecution case logically is the testimony of the prosecutrix. Undeniably therefore the credibility and trustworthiness of the victims version is the decisive factor to adjudge the culpability of the appellants.

Filtering the unnecessary factual details, suffice it is to recount that the incident allegedly had occurred at 7.30 p.m. on a public road while the prosecutrix was returning home after the days work. Her version is that while she was on the way, an auto rickshaw with two persons therein pulled up by her side and she was dragged in forcibly. After moving for about 10 minutes, the abductors were joined by two more persons, whereafter she was taken to a garage and was molested against her will forcibly.

To start with, the prosecutrix has contradicted herself qua the place of alleged kidnapping. In the complaint, she mentioned the spot to be near Richmond park, whereas in her evidence she referred to the same as opposite Johnson market. It is more or less authenticated by the evidence on record that after her abduction and on the way to the garage as narrated by her, she did not scream or cry for help. This is of utmost significance as it is not alleged by her that the abductors had put her under fear on the point of any weapon threatening physical injury thereby. This is more so, as admittedly the prosecutrix at the relevant time was a major and could very well foresee the disastrous consequences to follow. She has admitted in her deposition as well that while she was ravished inside the garage and even during the intermittent breaks, she did not shout for any help. Her version in the complaint with regard to the offending act and the number of persons, who had committed the same, is inconsistent with her testimony on oath at the trial. Notably in the complaint she mentioned about four persons of whom three raped and out of them, two committed the act twice. She did not disclose in her complaint that the accused persons were known to her from before and disclosed that they during the time had been referring to themselves as Raju, Venu, Parkash and Francis. This, however has

been denied by the investigation officer. On oath, she however introduced a fifth person as well. She accused all the four persons to have committed sexual intercourse with her for the second time. Though grudgingly, as admitted by her, she also consumed the food as offered to her by her molesters.

In cross-examination, she admitted that she was not married to Sarvana though she claimed him to be her husband in her examination-in-chief. She disclosed more than once that the accused persons used to tease her for about 5-6 months prior to the incident and that she used to talk to them as well. In view of this admission of hers, the identification by the prosecutrix of the accused persons in the TIP pales into insignificance. She contradicted herself in the cross-examination by stating that three of the four did rape her for the second time. She was also inconsistent with regard to the writer of her complaint.

Her conduct during the alleged ordeal is also unlike a victim of forcible rape and betrays somewhat submissive and consensual disposition. From the nature of the exchanges between her and the accused persons as narrated by her, the same are not at all consistent with those of an unwilling, terrified and anguished victim of forcible intercourse, if judged by the normal human conduct.

Her post incident conduct and movements are also noticeably unusual. Instead of hurrying back home in a distressed, humiliated and a devastated state, she stayed back in and around the place of occurrence, enquired about the same from persons whom she claims to have met in the late hours of night, returned to the spot to identify the garage and even look at the broken glass bangles, discarded litter etc. According to her, she wandered around the place and as disclosed by her in her evidence, to collect information so as to teach the accused persons a lesson. Her avengeful attitude in the facts and circumstances, as disclosed by her, if true, demonstrably evinces a conduct manifested by a feeling of frustration stoked by an intense feeling of deprivation of something expected, desired or promised. Her confident movements alone past midnight, in that state are also

out of the ordinary. Her testimony that she met a cyclist to whom she narrated her tale of woe and that on his information, the Hoysala police came to the spot and that thereafter she was taken to successive police stations before lodging the complaint at Sampangiramanagara police station as well has to be accepted with a grain of salt.

W8, who medically examined her, opined in clear terms that she was accustomed to sexual intercourse and that no sign of forcible intercourse was discernible. This assumes great significance in view of the allegation of forcible rape by 3 to 4 adult persons more than once. The medical opinion that she was accustomed to sexual inter course when admittedly she was living separately from her husband for 1 and ½ years before the incident also has its own implication. The medical evidence as such in the attendant facts and circumstances in a way belies the allegation of gang rape.

The evidence of PW2 Geeta who admittedly had offered shelter to the prosecutrix and her minor daughter, though had been declared hostile, her testimony as a whole cannot be brushed aside. In her testimony, this witness indicated that the prosecutrix used to take financial help from the accused persons and that she used to indulge in dubious late night activities for which her husband had deserted her. The defence plea of false implication as the accused persons had declined to oblige the prosecutrix qua her demand for financial help therefore cannot be lightly discarded in the overall factual scenario. Her version therefore is a plausible one and thus fit in with the defence plea to demolish the prosecution case.

That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu @ Chintu (supra) by drawing sustenance of the proposition amongst others from Khujii vs. State of M.P. (1991) 3 SCC 627 and Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the

dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record.

The seizures said to have been effected by the investigating agency also do not inspire confidence. Not only PW 4 Muthu denied that the seizure of ear studs had been made in his presence, DW1 on oath had stated that this item of jewellery had in fact been purchased by the police from a local shop which he could identify on the basis of the symbol 'MP' inscribed thereon. In any view of the matter, the seized articles per se in absence of any evidence of corroboration of charge would not, irrefutably prove the involvement of the appellants in the offence alleged.

This Court in Raju (supra), while reiterating that the evidence of the prosecutrix in cases of rape, molestation and other physical outrages is to be construed to be that of an injured witness so much so that no corroboration is necessary, ruled that an accused must also be protected against the possibility of false implication. It was underlined that the testimony of the victim in such cases, though commands great weight but the same, cannot necessarily be universally and mechanically accepted to be free in all circumstances from embellishment and exaggeration. It was ruled that the presumption of absence of consent of the victim, where sexual intercourse by the accused is proved as contemplated in Section 114A of the Evidence Act, was extremely restricted in its application compared to the sweep and ambit of the presumption under Sections 113A and 113B of the Indian Evidence Act. It was exposited that insofar as the allegation of rape is concerned, the evidence of the prosecutrix must be examined as that of a injured witness whose presence at the spot is probable but it can never be presumed that her statement should always without exception, be taken as gospel

truth. The essence of this verdict which has stood the test of time proclaims that though generally the testimony of a victim of rape or non consensual physical assault ought to be accepted as true and unblemished, it would still be subject to judicial scrutiny lest a casual, routine and automatic acceptance thereof results in unwarranted conviction of the person charged. Vis-a-vis the scope of interference with a judgment of acquittal, this Court in Sunil Kumar Shabukumar Gupta (Dr.) (supra) echoed the hallowed proposition that if two views are possible, the appellate court should not ordinarily interfere therewith though its view may appear to be the more probable one. While emphasizing that the trial court has the benefit of watching the demeanour of the witnesses and is thus the best judge of their credibility, it was held that every accused is presumed to be innocent unless his guilt is proved and that his presumption of innocence gets reinforced with his acquittal by the trial court's verdict. It was reiterated that only in exceptionable cases and under compelling circumstances, where the judgement of acquittal is found to be perverse i.e. if the findings have been arrived at by ignoring or excluding relevant materials or by taking into consideration irrelevant/inadmissible material and are against the weight of evidence or are so outrageously in defiance of logic so as to suffer from the vice of irrationality, that interference by the appellate court would be called for.

That the appellate court is under an obligation to consider and identify the error in the decision of the trial court and then to decide whether the error is gross enough to warrant interference was underlined by this Court in Shyamal Saha (supra). It was

emphasized that the appellate court is not expected to merely substitute its opinion for that of the trial court and that it has to exercise its discretion very cautiously to correct an error of law or fact, if any and significant enough to warrant reversal of the verdict of the trial court.

The prosecution case, when judged on the touchstone of totality of the facts and circumstances, does not generate the unqualified and unreserved satisfaction indispensably required to enter a finding of guilt against the appellants. Having regard to the evidence on record as a whole, it is not possible for this Court to unhesitatingly hold that the charge levelled against the appellants has been proved beyond reasonable doubt. In our estimate, the view taken by the Trial Court is the overwhelmingly possible one. In contrast, the findings of the High Court are decipherably strained in favour of the prosecution by overlooking many irreconcilable inconsistencies, anomalies and omissions rendering the prosecution case unworthy of credit. Noticeably, the High Court has exonerated the appellants of the charge of abduction under Section 366 IPC, which is an inseverable component of the string of offences alleged against them. Judged by the known parameters of law, the view adopted by the High Court is not a plausible one when juxtaposed to that of the Trial Court. We are of the unhesitant opinion that the prosecution has failed to prove the charge against the appellants to the hilt as obligated in law and thus, they are entitled to the benefit of doubt. The appeal thus succeeds and is allowed. The impugned judgement and order is set-aside. The appellants are on bail. Their bail bonds are discharged.

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7. Section 138 of NI act

Shyam Pal versus Dayawati Besoya And Anr .

Dipak Misra & Amitava Roy , JJ.

In the Supreme Court of India

Date of judgment -28.10.2016

Issue

Conviction and Sentencing u/s 138 of the act –challenged

Relevant extract

The instant appeals call in question the judgment and order dated 08.02.2016 passed by the High Court of Delhi in Criminal Revision Petition No.403 of 2015, sustaining the conviction of the appellant under Section 138 of the Negotiable Instruments Act, 1988 (hereafter referred to as the "Act") as recorded by the Trial Court and affirmed in appeal by the District and Sessions Judge, Saket Court, New Delhi. The High Court while maintaining the substantive sentence of simple imprisonment for 10 months and fine of Rs.6,50,000/- as compensation as awarded by the Trial Court, however has reduced the default sentence from six months simple imprisonment to that of three months. The order dated 22.02.2016 rendered by the High Court declining the prayer for modification of the above decision by directing the release of the appellant, he having already served the sentence in all being in custody from 25.02.2015 has been assailed in the present appeals as well.

The recorded facts divulge that the respondent No.1 had filed two complaints, both under Section 138 of the Act against the appellant in the Court of the Chief Metropolitan Magistrate (South East), Patiala House Court, New Delhi which were registered as C.C. No.407 of 2011 and C.C. No.430 of 2011 alleging that on 31.07.2008

the appellant had visited the residence of the complainant and had requested for a loan of Rs.5 lacs to meet his personal needs which he promised to return on 13.11.2009. On this, as the complaint reads, the respondent/complainant reminded him that she had already lent a sum of Rs.5 lacs to him on 01.05.2008 and that she had no funds to accede to his request for the second installment. However, having regard to the friendly relations, the respondent/complainant on the persuasion of the appellant, did advance a further amount of Rs.5 lacs to him as loan on that date, by somehow arranging the same.

According to the respondent/complainant in connection with the loans advanced, the appellant had issued two cheques bearing Nos.97357 and 97358 for Rs.5 lacs each and drawn on State Bank of Bikaner and Jaipur, Arnar Colony, New Delhi. Both these cheques when presented at the appropriate time, were dishonored with the remarks "funds insufficient". Thereafter, the respondent/complainant issued legal notices and as the same though served, remained unresponded, complaints were filed.

As eventually the arguments in the present appeals have centered around the sentence alone, we do not wish to burden the present rendering with avoidable facts.

The Trial Court after a full dress adjudication, in the two proceedings, returned a finding that the signatures on the cheques were not disputed by the appellant and indeed were issued in discharge of legally recoverable debts subsisting against him and acting on the presumption available under Section 139 of the Act convicted him of the offence under Section 138 of the Act.

Consequently, he was awarded simple imprisonment for 10 months and fine of Rs.6,50,000/- as compensation in both the cases. In case of default of payment of compensation, the appellant was ordered to suffer simple imprisonment of six months in each case. This was by judgments and orders dated 21.01.2014.

The appellant having unsuccessfully appealed against his conviction and sentence before District and Sessions Judge (South East), Saket Court, New Delhi, in both the cases, approached the High Court in revision.

To reiterate, the appellant preferred two revision petitions before the High Court corresponding to his convictions in the two complaint cases, being Criminal Revision Petition No.403 of 2015 (pertaining to the present appeals) and Criminal Revision Petition No.404 of 2015. By separate orders dated 08.02.2016, both these revision petitions were disposed of by maintaining the conviction but moderating the default sentence from simple imprisonment of six months to that of three months. In both the petitions as well, by separate orders dated 22.02.2016, the High Court declined to release the appellant by acting on his plea that he meanwhile had served the substantive as well as default sentence, if construed to have run concurrently. It is a matter of record, that the special leave petition filed against the orders dated 08.02.2016 and 22.02.2016 rendered by the High Court in Criminal Revision Petition No.404 of 2015 has since been dismissed by this Court and, therefore, the conviction and sentence awarded to the appellant in the corresponding complaint case has attained finality.

We have extended our required consideration to few facts and the submissions made.

The materials on record leave no manner of doubt that the complaints filed by the respondents stem from two identical transactions between the same parties whereunder the respondent had advanced loan of Rs.5 lacs each to the appellant on two different dates against which the latter had issued cheques to discharge his debt and that the cheques had been dishonored. The facts pleaded and proved do unassailably demonstrate that the loans advanced had been in the course of a series of transactions between the same parties on same terms and conditions. Significantly in both the cases, following the conviction of the appellant under Section 138 of the Act, the same sentences as well have been awarded. There is thus an overwhelming identicalness in the features of both the cases permitting, the two transactions, though undertaken at different points of time, to be deemed as a singular transaction or two segments of one transaction. This deduction understandably is in the singular facts of the case.

The law on the orientation of two sentences awarded to an offender following his conviction successively, to define the cumulative duration thereof is envisaged in Section 427 of the Code of Criminal Procedure, 1973 .

It was however postulated, that the legal position favours the exercise of the discretion to the benefit of the prisoners in cases where the prosecution is based on a single transaction, no matter

even if different complaints in relation thereto might have been filed. The caveat as well was that such a concession cannot be extended to transactions which are distinctly different, separate and independent of each other and amongst others where the parties are not the same.

The imperative essentiality of a single transaction as the decisive factor to enable the Court to direct the subsequent sentence to run concurrently with the previous one was thus underscored. It was expounded as well that the direction for concurrent running of sentence would be limited to the substantive sentence alone.

Reverting to the facts as obtained in the present appeal, we are of the comprehension, on an appreciation thereof as well as the duration of the appellant's custody, as is evidenced by the certificate to that effect, that the appellant is entitled to the benefit of the discretion contained in Section 427 of the Code. In arriving at this conclusion we have, as required, reflected on the nature of the transactions between the parties thereto, the offences involved, the sentences awarded and the period of detention of the appellant as on date.

It is thus ordered that the substantive sentences of 10 months simple imprisonment awarded to the appellant in the two complaint cases referred to hereinabove would run concurrently. Needless to say, the appellant would have to serve the default sentences, if the fine by way of compensation, as imposed, has not been paid by him. The appeals are thus allowed to this extent. The appellant would be entitled to all consequential reliefs with regard to his release from custody as available in law based on this determination.

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8. *Section 13(1) (ia) & Section 28(1) of the Hindu Marriage Act, 1955*

Narendra versus K. Meena

Anil R. Dave & L. Nageswara Rao , JJ.

In the Supreme Court of India

Date of Judgment -06.10.2016

Issue

Refusing the order of the trial court of divorce –challenged

Relevant extract

The facts giving rise to the present appeal, in a nutshell, are as under : The Respondent wife filed Miscellaneous First Appeal under Section 28(1) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act") before the High Court as she was aggrieved by the judgment and decree dated 17th November, 2001, passed by the Principal Judge, Family Court, Bangalore in M.C. No.603 of 1995 under Section 13(1)(ia) of the Act filed by the Appellant husband seeking divorce.

The Appellant husband had married the Respondent wife on 26th February, 1992. Out of the wedlock, a female child named Ranjitha was born on 13th November, 1993. The case of the Appellant was that the Respondent did not live happily with the Appellant even for a month after the marriage. The reason for filing the divorce petition was that the Respondent wife had become cruel because of her highly suspicious nature and she used to level absolutely frivolous but serious allegations against him regarding his character and more particularly about his extra-marital relationship. Behaviour of the Respondent wife made life of the Appellant husband miserable and it became impossible for the Appellant to stay with the Respondent for the aforestated

reasons. Moreover, the Respondent wanted the Appellant to leave his parents and other family members and to get separated from them so that the Respondent can live independently; and in that event it would become more torturous for the Appellant to stay only with the Respondent wife with her such nature and behaviour. The main ground was cruelty, as serious allegations were levelled about the moral character of the Appellant to the effect that he was having an extra- marital affair with a maid, named Kamla. Another important allegation was that the Respondent would very often threaten the Appellant that she would commit suicide. In fact, on 2th July, 1995, she picked up a quarrel with the Appellant, went to the bathroom, locked the door from inside and poured kerosene on her body and attempted to commit suicide. On getting smell of kerosene coming from the bathroom, the Appellant, his elder brother and some of the neighbours broke open the door of the bathroom and prevented the Respondent wife from committing suicide. The aforestated facts were found to be sufficient by the learned Family Court for granting the Appellant a decree of divorce dated 17th November, 2001, after considering the evidence adduced by both the parties.

Being aggrieved by the judgment and decree of divorce dated 17th November, 2001, the Respondent wife had filed Miscellaneous First Appeal No.171 of 2002 (FC), which has been allowed by the High Court on 8th March, 2006, whereby the decree of divorce dated 17th November, 2001 has been set aside. Being aggrieved by the judgment and order passed by the High Court, the Appellant has filed this appeal.

We have carefully gone through the evidence adduced by the parties before the trial Court and we tried to find out as to why the appellate Court had taken a different view than the one taken by the Family Court i.e. the trial Court.

The High Court came to the conclusion that there was no cruelty meted out to the Appellant, which would enable him to get a decree of divorce, as per the provisions of the Act. The allegations with regard to the character of the Appellant and the extra-marital affair with a maid were taken very seriously by the Family Court, but the High Court did not give much importance to the false allegations made. The constant persuasion by the Respondent for getting separated from the family members of the Appellant and constraining the Appellant to live separately and only with her was also not considered to be of any importance by the High Court. No importance was given to the incident with regard to an attempt to commit suicide made by the Respondent wife. On the contrary, it appears that the High Court found some justification in the request made by the Respondent to live separately from the family of the Appellant husband. According to the High Court, the trial Court did not appreciate the evidence properly. For the aforestated reasons, the High Court reversed the findings arrived at by the learned Family Court and set aside the decree of divorce.

We do not agree with the manner in which the High Court has re- appreciated the evidence and has come to a different conclusion. With regard to the allegations of cruelty levelled by the Appellant, we are in agreement with the findings of the trial Court. First of all, let us look at the incident with regard to an attempt to commit suicide by the Respondent. Upon perusal of the evidence of

the witnesses, the findings arrived at by the trial Court to the effect that the Respondent wife had locked herself in the bathroom and had poured kerosene on herself so as to commit suicide, are not in dispute. Fortunately for the Appellant, because of the noise and disturbance, even the neighbours of the Appellant rushed to help and the door of the bathroom was broken open and the Respondent was saved. Had she been successful in her attempt to commit suicide, then one can foresee the consequences and the plight of the Appellant because in that event the Appellant would have been put to immense difficulties because of the legal provisions. We feel that there was no fault on the part of the Appellant nor was there any reason for the Respondent wife to make an attempt to commit suicide. No husband would ever be comfortable with or tolerate such an act by his wife and if the wife succeeds in committing suicide, then one can imagine how a poor husband would get entangled into the clutches of law, which would virtually ruin his sanity, peace of mind, career and probably his entire life. The mere idea with regard to facing legal consequences would put a husband under tremendous stress. The thought itself is distressing. Such a mental cruelty could not have been taken lightly by the High Court. In our opinion, only this one event was sufficient for the Appellant husband to get a decree of divorce on the ground of cruelty. It is needless to add that such threats or acts constitute cruelty. Our aforesaid view is fortified by a decision of this Court in the case of Pankaj Mahajan v. Dimple @ Kajal (2011) 12 SCC 1, wherein it has been held that giving repeated threats to commit suicide amounts to cruelty.

In the instant case, upon appreciation of the evidence, the trial Court came to the conclusion that merely for monetary considerations, the Respondent wife wanted to get her husband separated from his family. The averment of the Respondent was to the effect that the income of the Appellant was also spent for maintaining his family. The said grievance of the Respondent is absolutely unjustified. A son maintaining his parents is absolutely normal in Indian culture and ethos. There is no other reason for which the Respondent wanted the Appellant to be separated from the family - the sole reason was to enjoy the income of the Appellant. Unfortunately, the High Court considered this to be a justifiable reason. In the opinion of the High Court, the wife had a legitimate expectation to see that the income of her husband is used for her and not for the family members of the Respondent husband. We do not see any reason to justify the said view of the High Court. As stated hereinabove, in a Hindu society, it is a pious obligation of the son to maintain the parents. If a wife makes an attempt to deviate from the normal practice and normal custom of the society, she must have some justifiable reason for that and in this case, we do not find any justifiable reason, except monetary consideration of the Respondent wife. In our opinion, normally, no husband would tolerate this and no son would like to be separated from his old parents and other family members, who are also dependent upon his income. The persistent effort of the Respondent wife to constrain the Appellant to be separated from the family would be torturous for the husband and in our opinion, the

trial Court was right when it came to the conclusion that this constitutes an act of 'cruelty'.

With regard to the allegations about an extra-marital affair with maid named Kamla, the re-appreciation of the evidence by the High Court does not appear to be correct. We consider levelling of absolutely false allegations and that too, with regard to an extra-marital life to be quite serious and that can surely be a cause for metal cruelty.

Taking an overall view of the entire evidence and the judgment delivered by the trial Court, we firmly believe that there was no need to take a different view than the one taken by the trial Court. The behavior of the Respondent wife appears to be terrifying and horrible. One would find it difficult to live with such a person with tranquility and peace of mind. Such torture would adversely affect the life of the husband. It is also not in dispute that the Respondent wife had left the matrimonial house on 12th July, 1995 i.e. more than 20 years back. Though not on record, the learned counsel submitted that till today, the Respondent wife is not staying with the Appellant. The daughter of the Appellant and Respondent has also grown up and according to the learned counsel, she is working in an IT company. We have no reason to disbelieve the aforestated facts because with the passage of time, the daughter must have grown up and the separation of the Appellant and the wife must have also become normal for her and therefore, at this juncture it would not be proper to bring them together, especially when the Appellant husband was treated so cruelly by the Respondent wife. We, therefore, quash and set aside the impugned judgment delivered by the High Court. The decree of divorce dated 17th November, 2001 passed by the Principal Judge, Family Court, Bangalore in M.C. No.603 of 1995 is hereby restored. The appeal is, accordingly, allowed with no order as to costs.

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9. Section 10(1)(d) of ID ACT

Workmen Rastriya Colliery Mazdoor Sangh Versus Bharat Coking Coal ltd. & anr.

T. S .Thakur , CJI ,A .M . Khanwilkar & Dr D Y Chandrachud ,JJ.

In the Supreme Court of India.

Date of Judgment-03.10.2016

Issue

During denying regularization of employees-challenged.

Relevant extract

The Appellant, which is a registered trade union, espoused the cause of the (BCCL). Of the 20 original workmen, 14 are left in the fray. In 1993, a reference was made by the appropriate government under Section 10(1)(d) of the Industrial Disputes Act, 1947 to the Central Government Industrial Tribunal at Dhanbad on the demand raised by the workmen for regularisation. The reference was as follows:-

"Whether the demand of Rashtriya Colliery Mazdoor Sangh for regularization of the workmen on the role of Balihari Colliery of M/s BCCL Ltd., and payments to them of wages as per N.C.W.A. is justified? If so, to what relief the workmen are entitled?"

The Industrial Tribunal delivered an Award on 9 September 1996 in the above mentioned reference, Reference 26 of 1993. By its Award, the Industrial Tribunal allowed the reference in the following terms:-

"The management of BCCL is directed to regularize the concerned workmen as per annexure of the reference as permanent employee as per NCWA in Cat. I within three months from the date of publication of this Award with the wages and other amenities to which they are entitled to. But no back wages is given nor is it claimed. No cost is awarded also to either of the parties. Thus the reference is disposed of and this is my Award".

Separately, the appropriate government made another reference on 11 August 1994, being Reference 204 of 1994, under Section 10(1)(d) of the Industrial Disputes Act, 1947 in respect of 76 workmen who had been denied regularisation in Balihari Colliery. In that reference, an Award was rendered by the Industrial Tribunal on 14 August 2000 directing BCCL to regularise 73 out of 76 workmen. The management challenged the Award in writ proceedings before the High Court (CWJC 3824 of 2000). The High Court by a judgment dated 26 July 2001 dismissed the writ petition. In a Letters Patent Appeal (LPA 543 of 2001), a Division Bench of the High Court by a judgment dated 10 March 2003 modified the Award by directing that as and when the management intended to appoint regular workmen, it shall give preference to the workmen in question, if necessary by relaxing conditions of age and eligibility. The judgment of the High Court was challenged before this Court in Civil Appeal No. 3962 of 2006 by the Union. By a judgment and order dated 18 November 2009 the Civil Appeal was allowed and the Award of the Industrial Tribunal was restored. In consequence the workmen were directed to be reinstated though without any backwages.

In the present case, the Award of the Industrial Tribunal dated 9 September 1996 was modified by a judgment dated 18 May 2004 of the High Court in CWJC 1654 of 1997. The Award was modified in the following terms:- "...the impugned awards are modified to the extent that as and when M/s. B.C.C.L. intends to employ regular workmen, it shall give preference to these 88 plus 20 persons, if they are otherwise found suitable by relaxing the conditions as to the works age appropriately taking into consideration their age at the time of their initial appointment and also by relaxing the condition regarding academic/technical qualification".

No appeal was filed against the impugned judgment of the High Court dated 18 May 2004 by the Union. However, on 22 August 2011 a representation was submitted on behalf of the workmen to the management seeking employment for those governed by the Award dated 9 September 1996, as modified by the High Court on 18 May 2004. Eventually, a writ petition was filed before the High Court

under Article 226 seeking a direction to the employer to furnish employment to 20 workmen in terms of the order of the High Court dated 18 May 2004. The writ petition was dismissed by learned Single Judge on 21 March 2012 on the ground that execution of the Award of the Industrial Tribunal could not be sought by invoking the jurisdiction under Article 226. In a Letters Patent Appeal, the Division Bench by a judgment dated 16 July 2012 affirmed the view of the learned Single Judge. The present proceedings have been instituted to challenge the judgment of the Division Bench dated 16 July 2012.

The narration of facts indicates that the Award of the Industrial Tribunal dated 9 September 1996 directed the management of BCCL to regularise the workmen, but without backwages. The Award was, however, modified by the High Court on 18 May 2004. As a result, the management was only required in case it intended to employ regular workmen, to give preference to the workmen in question by relaxing conditions as to age and eligibility. The order of the High Court was not challenged by the Union representing the workmen. Evidently, no challenge was raised to the modification of the Award by the High Court unlike in the case of Reference 204 of 1994. In that case, the Award of the Industrial Tribunal was modified by a Division Bench of the High Court in a Letters Patent Appeal on 10 March 2003. The judgment of the Division Bench was challenged before this Court by the Union as a result of which, by a final judgment and order dated 18 November 2009, the Award of the Industrial Tribunal was restored and reinstatement was ordered without backwages. In the present case, however, the fact remains that the order of the High Court dated 18 May 2004 was never challenged.

The basic grievance of the workmen is that as a result of the position which has ensued, the workmen governed by the present proceedings of whom only 14 are left in the fray, are virtually without any relief or remedy in practical terms. The workmen were engaged between 1987 and 1989. Nearly 27 years have elapsed since then. Many of the 14 workmen would be on the verge of attaining the age

of retirement. There is no occasion at present to grant them reinstatement since in any event, such relief has been denied in the judgment of the High Court dated 18 May 2004 which has not been challenged. However, the predicament of the workmen is real. Two sets of workmen in the same colliery under the same company have received unequal treatment. The present group of workmen has faced attrition in numbers and has been left with no practical relief. This situation should be remedied, to the extent that is now permissible in law, having regard to the above background. In order to render full, final and complete justice, we are of the view that an order for the payment of compensation in final settlement of all the claims, dues and outstandings payable to the 14 workmen in question would meet the ends of justice.

We accordingly direct that the Respondents shall deposit with the Central Government Tribunal (No.2) at Dhanbad an amount of Rs. Two lakhs each towards compensation payable to each one of the 14 workmen. This amount shall be in full and final satisfaction of all the claims, demands and outstandings. Upon deposit of the amount, the Award of the Industrial Tribunal dated 9 September 1996, as modified by the High Court on 18 May 2004 shall be marked as satisfied. The Respondents shall deposit the amount as directed hereinabove, within a period of two months from today before the Central Government Industrial Tribunal (No.2) Dhanbad in Reference 26 of 1993. The amount shall be disbursed to the workmen concerned subject to due verification of identity by the Industrial Tribunal. The Civil Appeal shall stand allowed in the above terms. There shall be no order as to costs.

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10. Section 33-C-(2) of ID Act

Ramesh Ch. Patra - Versus- P.O., Labour Court, Jeypore and others

Kumari Sanju Panda & Sujit Narayan Prasad ,JJ.

In the High Court of Orissa

Date of hearing and Judgment: 06.10.2016

Issue

Maintainability of the petition -challenged

Relevant extract

Brief case of the petitioner is that he was appointed as News Contributor for three months on 9.12.1988. He continued to discharge duty but remuneration has not given to him, hence issued notice through Advocate demanding payment, however the management has denied its liability. Hence, an application has been filed under Section 33-C(2) of the I.D. Act but however the same was rejected being held to be not maintainable on the ground that the petitioner who is a working journalists could have resorted the procedure contemplated under Section 17(2) of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955, since the remuneration which the petitioner is claiming has been disputed by the management. 3. Before appreciating the legality and propriety of the order, it is necessary to deal with the provision of Section 33-C(2) and the scope of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955.

Section 33-C(2) provides a provision for recovery of money due to an employee from his employer. Sub-section (1) of Section 33C is a provision in the nature of execution proceeding and it contemplates that if money is due to workman under a settlement or an award or

under the provisions of Chapter VA or Chapter VB, he is not compelled to take recourse to the ordinary recourse of execution in a civil Court, but may adopt a summary procedure prescribed by this sub-section.

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The Hon"ble Apex Court in the said case while discussing the scope of Section 33C(1) and 33C(2) has been pleased to hold at para-19, which is being reproduced herein below:-"Para-19. xxx xxx It is remarkable that similar words of limitation have been used in Section 33C(1) because s. 33 C (1) deals with cases where any money is due under a settlement or an award or under the provisions of Chapter VA. It is thus clear that claims made under Section 33C(1), by itself can be only claims referable to the settlement, award, or the relevant provisions of Chapter VA. These words of limitations are not to be found in Section 33C(2) and to that extent, the scope of Section 33C(2) is undoubtedly wider than that of Section 33C(1). It is true that even in respect of the larger class. of cases which fail under Section 33C(2) , after the determination is made by the Labour Court the execution goes back again to Section 33C(1). That is why Section 33C(2) expressly provides that the amount so determined

may be recovered as provided for in sub- section (1). It is .unnecessary in the present appeals either to state exhaustively or even to indicate broadly what other categories of claims can fall under Section 33C(2). There is no doubt that the three categories of claims mentioned in Section 33C(1)fall under Section 33C(2)and in that sense, Section 33C(2)can itself be deemed to be a kind of. execution proceeding; but it is possible that Claims not based on settlements, awards or made under the provisions of Chapter V A, may also be competent under Section 33C(2)and that may illustrate its wider scope. We would, however, like to indicate some of the claims which would not fall under Section 33C(2), because they formed the subject matter of the appeals which have been grouped together for our decision along with the appeals with which we are dealing at present. If an employee is dismissed or demoted and it is his case that the dismissal or demotion is wrongful, it would not be open to him to make a claim for the recovery of his salary or wages under Section 33C(2). His demotion or dismissal may give rise to an industrial dispute which may be appropriately tried, but once it is shown that the employer has dismissed or demoted him, a claim that the dismissal Or demotion is unlawful and. therefore, the employee continues to be the workman of the employer and is entitled to the benefits due to him under a preexisting contract, cannot be made under s. 33 C (2). If a settlement has been, duly reached between the employer and his employees and it fails under Section 18(2) or (3) of the Act and is governed by Section (19) 2 it would not be open to an employee, notwithstanding the said settlement, to claim the benefit as though the said settlement had come to an end. If the settlement

exists and continues to be operative no claim can be made under Section 33C(2) inconsistent with the said settlement. If the settlement is intended to be terminated, proper steps may have to be taken in that behalf and a dispute that may be arise thereafter may to be dealt with according. to the, other procedure prescribed by the Act. Thus, our conclusion is that the scope of Section 33C(2) is wider than Section 33C (1) and cannot be wholly assimilated with it, though for obvious reasons, we do not propose to decide or indicate what additional cases would fall under s. 33G (2) which may not fall under Section 33C(1). In this connection, we may incidentally state that the observations made by this Court in the case of Punjab National Bank Ltd (1), that Section 33C is a provision in the nature of execution should not be interpreted to mean that the scope of Section 33C(2) is exactly the same as Section 33C(1).

So far as the fact of this case is concerned, the petitioner being aggrieved with the action of the management since according to him, the remuneration has not been paid had made application under Section 33C(2) of the I.D. Act and the Tribunal has rejected the application held to be not maintainable with an observation to move to the appropriate Government under Section 17(2) of the Working Journalists Act.

The Tribunal while passing such order has not taken into consideration the intent of the legislation of Section 33C(2) as has been settled by the Hon'ble Apex Court in the case of Central Bank of India 10 (supra), hence applying the said principle, the order passed by the Tribunal is hereby quashed. In the result, the matter is sent back to the Industrial Tribunal for disposal in accordance with law. Accordingly, both writ petitions are disposed of.

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11. Section 3(3), Section 4 of the Orissa Entry Tax Act, 1999 (in short 'the OET Act'.

Section 5 A and Section 12(4) of Orissa Sale Tax Act

Commissioner Of Commercial Tax & Ors versus M/S Bajaj Auto Ltd.& anr .

Shiva Kirti Singh & R.K. Agrawal ,JJ.

In the Supreme Court of India

Date of Judgment -28.10.2016

Issue

Challenging the legality the common judgment

Relevant extract

The respondents are engaged in the sale and purchase of Motor Vehicles and are registered dealers under the Orissa Sales Tax Act, 1947 (in short 'the OST Act') as well as under the Central Sales Tax Act. The respondents had been paying entry tax on the goods when they were bought into the State of Orissa under Section 3(3) of the Orissa Entry Tax Act, 1999 (in short 'the OET Act'). However, they were paying surcharge on the balance amount after deduction of the entry tax paid on the motor vehicles.

The Finance Department, Government of Orissa, by letter dated 20.11.2001, stated that the surcharge under the OST Act shall be calculated on the payable amount of tax due on the taxable turnover (Section 5 & 5A) instead of on the reduced Sales Tax amount after setting off of entry tax. On 30.03.2002, the Sales Tax Officer, Sambalpur-I Circle, passed an order under Section 12(4) of the OST Act wherein surcharge was levied under Section 5A of the OST Act on the gross sales tax payable by the respondent- Company.

Being aggrieved by the demand notice dated 30.03.2002 as well as the letter dated 20.11.2001 issued by the Finance Department of the Government of Orissa, the respondent-Company filed a writ petition being No. 233 of 2002 along with a set of other writ petitions filed by the respondents herein before the High Court of Orissa at Cuttack.

The Division Bench of the High Court, vide common judgment and order dated 05.01.2007, allowed the appeals filed by the respondents herein.

Being aggrieved by the judgment and order dated 05.01.2007, the appellants have preferred these appeals before this Court by way of special leave.

Learned senior counsel for the appellants have taken the stand that there is nothing in the provisions of the OET Act or the Rules made thereunder which would alter the mode of computation prescribed in Section 5A of the OST Act. Section 4 of the OET Act provides for reduction of the liability of a dealer under the Sales Tax Act to the extent of entry tax paid under the OET Act. This provision only appertains to reduction of entry tax. It has nothing to do with the computation of the surcharge under the OST Act. In any event, in terms of Section 4 of the OET Act, reduction of entry tax paid by the dealers is from the liability under the Sales Tax Act. In substance, it means that the total liability under the Sales Tax Act having been determined would then be reduced by the extent of entry tax paid.

The sole question for consideration is whether the 'Surcharge' under Section 5A of the OST Act is to be computed on the gross

amount of sales tax or on the net amount of sales tax after setting of or deducting the amount of entry tax?

Under Section 5 of the OST Act, Sales Tax is payable by a dealer on the taxable turnover at a prescribed rate. Under Section 5A, it is provided inter alia for payment of surcharge. Section 5A of the OST Act (as it stood at the relevant time) reads as under:

"5A Surcharge: (1) Every dealer whose gross turnover during any year exceeds rupees ten lakhs shall, in addition to the tax payable by him under this Act, also pay a surcharge at the rate of ten per centum of the total amount of tax payable by him:….."

It would also be relevant to reproduce Section 4 of the OET Act (as it stood at the relevant time) which reads as under:- "(4) Reduction in Tax Liability:

(1) where an importer of motor vehicle liable to pay tax under sub-section (3) of Section 3 being a Dealer in motor vehicles becomes liable to pay tax under the Sales Tax Act by virtue of sale of such motor vehicles then his liability under the Sales Tax Act shall be reduced to the extent of tax paid under this Act.

Explanation: For the purpose of this sub section the chassis and the vehicle with body built on the chassis shall be treated as one and the same goods.

(2) When an importer or manufacturer of goods specified in Part-III of the schedule except motor vehicles pays tax under sub-section (1) of section 3 or section 26 of this Act, being a Dealer under the Sales Tax Act becomes liable to pay tax under the said Act by

virtue of Sale of such goods, then his liability under the Sales Tax Act shall be reduced to the extent of tax paid under this Act.

(3) The reduction in tax liability of an importer as provided in sub- section (1) or of an importer or manufacturer as provided in sub-section (2) shall not be allowed, unless the entry tax paid and tax payable under the Sales Tax Act are shown separately in the cash memo or the bill or invoice issued by him for the sale by virtue of which such liability accrues."

Rule 18 of the Odisha Entry Tax Rule, 1999 is reproduced hereunder:

"18. Set off of Entry Tax against Sales Tax: (1) When the importer of a motor vehicle liable to pay tax under sub-section (2) of section 3 of this Act being a dealer in motor vehicles becomes liable to pay tax under the Sales Tax Act by virtue of sale of such motor vehicle, his tax liability under the Sales Tax Act shall be reduced to the extent of the tax paid under these rules.

Illustration: Assuming Entry Tax Rate and Sales Tax Rate to be 10%

|1) |Purchase Value of Motor Vehicle | Rs. | | | |2,00,000/- |

|2) |Entry Tax Payable @ 10% | Rs. | | | |20,000/- | | |Total:- | Rs. 2,20,000/-| |3) |Sale Price of the Motor Vehicle | Rs. | | | |2,20,000/- |

|4) |(a) Sales Tax due @ 10% | Rs. | | | |22,000/- | |

|Deduct Entry Tax paid | Rs. | | | |20,000/- | |

|Sales Tax payable | Rs. | | | |2,000/- | | |Total:- | Rs. 2,22,000/-

| Note: If the sales tax payable on such motor vehicle is less than the entry tax paid, then the sales tax payable will be nil.

(2) When an importer of goods specified in Part III of the Schedule to the Act other than motor vehicle, liable to pay tax under this Act is also a dealer liable to pay tax under the Sales Tax Act, then the Sales Tax payable on the sale of goods shall be reduced to the extent of entry tax paid in the same manner as illustrated under the sub-rule(1)." In view of the statutory provision contained in Rule 18 of the Rules, the tax payable under the said Act was to be determined after deduction there from the entry tax paid by a dealer importing vehicle into the State of Orissa.

Since the determination of surcharge payable under the OET Act was relatable and/or linked to the tax payable under the OST Act, a clarification was sought for by one of the dealers in motor vehicles, namely, TELCO which is similarly situated as the Respondent No.1-company from the office of Commercial Tax, in view of the provision contained in Rule 18 of the Rules, which is as under:-

"Surcharge is payable on the amount of tax that becomes payable by a dealer after set off of entry tax paid at the time of purchase of such goods."

On a plain reading of the provisions of the OST Act as well as the OET Act and the Rules, it can be seen that Section 5A of the OST Act creates a charge and imposes liability on every dealer under the OST Act to pay surcharge @ 10% on the amount of tax payable by him under the OST Act. Section 4(1) of the OET Act, in the same way, prescribes for reduction of the tax amount payable by the dealer

to the extent of entry tax already paid for the same article for which sales tax is payable. The Section, does not specifically contemplate anything, which would indicate that the provisions of the OET Act or the Rules have to be taken into consideration while assessing the sales tax or surcharge. In essence, the provisions made in the Rules lay down the modality of 'set off'. It is important to mention here that OST Act was enacted in the year 1947 whereas OET Act was enacted in 1999. The provision of set off has been made in the OET Act and the Rules framed thereunder and not in the OST Act. The heading of Section 4 of the OET Act gives a broad idea regarding the provision of set off by way of "reduction in tax liability". Sub-Sections 1 and 2 of Section 4 of the OET Act provide for reduction of liability under the OST Act.

It is well settled that the objective of framing rules is to fill up the gaps in a statutory enactment so as to make the statutory provisions operative. Rules also clarify the provisions of an Act under which the same are framed. Section 4 of the OST Act is a charging Section attracting liability to pay Sales Tax "on sales and purchases effected". Section 5 of the OST Act provides for rate of Sales Tax. Section 5A of the OST Act levies surcharge on the dealer which is nothing but an additional tax. Therefore, on a plain reading of the provisions under the OST Act as well as under the OET Act, a dealer is not entitled for reduction of the amount of entry tax from the amount of tax payable before the levy of surcharge under Section 5A of the OST Act. A harmonious reading of Rule 18 of the Rules as well as Sections 4, 5, 5-A of the OST Act reveals no conflict or inconsistency. The Rules are to be construed to have been made for

furtherance of the cause for which the Statute is enacted and not for the purpose of bringing inconsistencies.

Section 5A of the OST Act is a self-contained provision and the surcharge, as already seen above, is leviable at the specified per centum of tax payable under the OST Act. Tax payable under the OST Act is independent of the provisions of OET Act. The assessment or quantification or computation of surcharge shall have to be made in accordance with the provisions of the OST Act.

Thus, on a conjoint reading of Section 5 of the OST Act, Section 4 of the OET Act and Rule 18 of the Rules, we are of the considered opinion that the amount of surcharge under Section 5A of the OST Act is to be levied before deducting the amount of entry tax paid by a dealer.

In view of the forgoing discussion, the impugned judgment and order dated 05.01.2007 passed by the High Court cannot be sustained and is liable to be set aside. In the result, all the appeals are allowed; however, the parties shall bear their own cost.

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12. Section 7A

Pramod Kumar Pal -Versus-Government of India, represented through Secretary, Labour Department, Sramasakti Bhawan, New Delhi & others

Dr. D.P. Choudhury ,J.

In the High Court of Orissa .

Date of Judgment: 24.10.2016

Issue

Maintainability of various rules of EPF u/s 2A , 7A of the Act

Relevant extract

The unshorn details of the case of the petitioner is that M/s. Hotel Paradise, Dhenkanal was established by the family members of Mr. Sudam Pal and Madhabananda Pal and after the death of Madhabananda Pal the said establishment was closed since pretty long period. The petitioner was neither the employer of the said establishment nor was looking after the affairs of the establishment for the disputed period, i.e., from 1980 to 1987.

Be it stated, the opposite party No.3 without ascertaining the employer of said establishment and the employees of the establishment for the period from 1980 to 1987 issued notice to the petitioner to deposit a sum of Rs.85,446.20 as determined under Section 7-A of the Act and Scheme made thereunder. The petitioner claims that he has not been offered any opportunity of being heard by the opposite party No.3 before determining the dues to be paid. He also claims that he is not the employer of the said establishment. So, the petitioner after receipt of notice filed a Review Petition on 9.1.1995 to consider his claim. Opposite party No.3 rejected the review petition without granting any opportunity to the petitioner of being heard on 24.4.1995 on the ground that it is barred by limitation. It is the case of the petitioner that after receipt of the impugned order passed by the opposite party No.3 dated 25.6.1993 on 16.12.1994 submitted the review petition within thirty days as per usual practice although the Act and the Scheme thereunder do not provide limitation for filing of review petition.

It is further case of the petitioner that due to non-deposit of the amount determined, the opposite party No.3 and his subordinate officer filed criminal case before the learned Sub- Divisional Judicial Magistrate, Dhenkanal. However, the petitioner challenged the impugned order of the opposite party No.3 before this Court vide O.J.C. No.2226 of 1996 which was disposed of on 2.4.1998 with a direction to the opposite party No.3 to rehear the review application on the question of limitation and at the same time the Court directed the petitioner to appear before the opposite party No.3 on 29.4.1998 to participate in the proceeding.

Be it stated that opposite party No.3 in pursuance of the order of this Court disposed of the case as if it is a proceeding under Section 7-A of the Act. It is the case of the petitioner that even if the Court has remanded the case to hear of the review application on the question of limitation but the opposite party No.3 reiterated his own views as taken in earlier impugned orders challenged before this Court. So, the petitioner came in the second round of litigation challenging the said order along with the order passed in the earlier proceeding under Section 7-A of the Act.

Per contra, the opposite party Nos.1 and 2 filed the counter refuting the allegation made in the writ petition. The opposite party Nos.1 and 2 challenged the writ petition being not maintainable on the ground that the petitioner has alternative remedy available by preferring statutory appeal before the E.P.F. Appellate Tribunal as against the impugned order purportedly passed under Section 7 - A/ 7 - B of the Act. It is also stated that petitioner is the employer of the establishment and since the establishment failed to comply the provision of the Act during the period from 04/1980 to 09/1987, a show cause notice under Section 7 - A of the Act was issued to the petitioner. On several occasions the petitioner refused to receive notice but on 8.1.1988 the petitioner attended the enquiry and took time to produce records. Thereafter due to long absence of the petitioner 27 adjournments were given and finally on 14.2.1990 a notice was published in the daily Oriya newspaper "The Dharitri" for appearance of the petitioner. However, the Advocate for the

petitioner appeared on 13.3.1990 and 9.5.1990 and sought adjournments to produce the records. Since after good number of opportunities offered to the petitioner and his Advocate, the petitioner did not appear, then the Assessing Authority assessed the dues basing on the enquiry report of the Enforcement Officer dated 15.12.1989. As the onus of identification of the employees lies on the employer, the petitioner cannot take the plea that it is the duty of the opposite party No.3 to identify the employees who are entitled to receive provident fund. Since the petitioner has attended the enquiry on 8.1.1988 in the capacity of employer, it is not incumbent upon him to challenge the order on the ground of violation of natural justice.

It is the further case of the opposite party Nos.1 and 2 that the review application under Section 7-B of the Act was filed beyond the limitation period of forty-five days for which it was rejected but as per the order of the High Court the authority decided the issue by passing a speaking order on 20.5.1998 wherein he had deliberated all the contentious issues involved in the proceeding filed by the petitioner before him. So, the impugned orders passed by the opposite party No.3 are legal and proper.

The petitioner filed the rejoinder reiterating the contention made in the writ petition but added that as per the order of this Court he did not file the appeal as provided under Section 7(I) of the Act. In O.J.C. No.2226 of 1996 this Court remitted the matter to the Regional Provident Fund Commissioner for fresh adjudication on the question relating to limitation. But the opposite party No.3 without adjudicating on the question of limitation has disposed of the matter on merit for which the present writ application is filed challenging the same.

In the rejoinder it has also been brought out by the petitioner that the opposite party No.3 filed criminal cases vide 2(C)C.C. Case Nos.153/94, 154/94 and 155/94 against the petitioner due to fault in making payment of E.P.F. contribution and administrative charges for the period in question but the learned Judicial Magistrate First

Class, Dhenkanal after hearing the matter on merit passed the order of acquittal against the petitioner. In the criminal cases the opposite parties failed to prove the petitioner was the employer of the establishment M/s. Hotel Paradise. So, the petitioner is not liable to pay any amount towards E.P.F. contribution and administrative charges to the opposite party No.3.

Reply is filed by opposite party Nos.1 and 2 to the rejoinder. Same facts have been reiterated by the opposite party Nos.1 and 2 in the said reply. Be it stated, the petitioner is the managing partner of the above establishment, namely, M/s. Hotel Paradise being in - charge of the said establishment from 8.11.1978.M/s. New Paradise was established in the same place where M/s. Hotel Paradise was established as M/s.Paradise Cabin. M/s. Paradise Cabin was closed due to death of Managing partner Sri Madhabananda Paland Pramod Kumar Pal took over the said establishment with effect from 8.11.1978 and started the business in the name of M/s. NewParadise after taking over all the materials of said M/s. Paradise Cabin.

Accordingly the petitioner filed the Form No.5A vide Annexure - R - Iand in the said Form he has made declaration of eighteen employees engaged with effect from 8.11.1978. A letter was sent by opposite party No.3 to the petitioner to comply with the provisions of the Act with effect from November 1978. Then the petitioner acknowledging the said letter took time to deposit the P.F. contributions and the said establishment complied up to 03/80 under code No. OR/722 which was assigned to M/s. Paradise Cabin (Hotel). Since the establishment did not comply the provisions of the Act, necessary proceeding under Section 7-A of 8 the Act was started. As the review petition was filed beyond the period of 45 days, it was rejected. But in view of the order of this Court passed in O.J.C. No.2226 of 1996, the authority purportedly passed the order under Section 7 – A of the Act afresh on 20.5.1998. It is also stated that the acquittal in criminal case has nothing to do with the proceeding under Section 7 - A of the Act for which the petitioner is also liable to pay the dues determined by the authority under Section 7- A of the Act.

The main points for consideration :

(i) Whether the writ application is maintainable ?

(ii) Whether the petitioner is the employer of the establishment M/s. Hotel Paradise bearing Code No.OR/722 for the period 4/80 to 9/87 under the provisions of the Act ?

Section 2A of the Act speaks as follows:-

"2A. Establishment to include all departments and branches.- For the removal of doubts, it is hereby declared that where an establishment consists of different departments or has branches, whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment."

It is clear from aforesaid provision that if one establishment was functioning in a place and subsequently another establishment is started in the same place, the earlier establishment cannot cover the new establishment. On the other hand, the new establishment has to be assessed afresh and the assessment for the old establishment ought not to be applied to the new establishment.

In the instant case, it is clear from both the pleadings that M/s. Hotel Paradise was started by one Madhabananda Pal who was employer of said establishment and it continued up to 1979 and in the same place admittedly the establishment in the name and style "New Paradise" of which the present petitioner is the Managing Partner got started. Moreover, opposite parties have not proved that petitioner being successor of Madhabananda Pal has become employer of M/s. Hotel Paradise. Mere standing of "New Paradise" in the same place of M/s. Hotel Paradise having Code No.OR/722 cannot be taken as establishment under Section 2A of the Act. So, it cannot be said that the old establishment is to be assessed showing the petitioner as employer.

Apart from this, opposite party Nos.1 and 2 have not filed any inspection report of the Inspector of Provident Fund who have visited

M/s. Hotel Paradise during the period from 4/80 to 9/87 so as to find out the actual employees employed and other necessary particulars so as to impose the dues to be paid by the petitioner. Moreover, when admitted by opposite party Nos.1 and 2 in their affidavit dated 30.8.2016 that "New Paradise" has been in the same place of M/s. Hotel Paradise, it will not be proper for opposite parties to claim dues for said period from the petitioner who is only the Managing Partner of "New Paradise". Thus, the Court is of the view that petitioner is not the employer of M/s. Hotel Paradise bearing Code No.OR/722 under the provision of the Act. Point No.(ii) is answered accordingly.

From the foregoing discussion as made hereinabove, the Court is of the view that the writ application is maintainable and the petitioner is not the Managing Partner of M/s. Hotel Paradise but he is the Managing Partner of "New Paradise" which is placed in the same place where M/s. Hotel Paradise existed. Since the dues have been demanded by the opposite parties against the establishment M/s. Hotel Paradise for the period from 4/1980 to 9/1987, the petitioner thus appears to be not responsible to pay such amount. Since the establishment of the petitioner "New Paradise" has been placed in the same place where the establishment M/s. Hotel Paradise existed, the impugned proceeding under Section 7-A of the Act and the impugned orders vide Annexures-1, 2 and 4 thereby against the petitioner for the establishment M/s. Hotel Paradise being de hors to the provisions of law are liable to be quashed and the Court do so. The writ application is accordingly allowed.

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13. *Sections 33(5) and 36(2)(b) of the Representation of People Act, 1951 (For short, "the 1951 Act").*

Rajendra Kumar Meshram Vs. Vanshmani Prasad Verma And Anr

Ranjan Gogoi, Prafulla C. Pant ,JJ.

In the Supreme Court of India.

Date of Judgment - 03.10.2016.

Issue

Invalidating of the election - challenged

Relevant extract

According to the respondent-election petitioner, one of the nominations filed by him as a candidate of the Indian National Congress Party was wrongly rejected on the ground that the symbol allotment letter was submitted by the election petitioner after the stipulated time. However as two other nominations filed by the respondent-election petitioner as an independent candidate was accepted, he contested the election in which he lost. Consequently, he challenges the rejection of his nomination as a Indian National Congress Party candidate as being wrongful. Apart from the above ground, the election petition was also filed alleging that the appellant-returned candidate was a government servant. In addition to the above, it was pleaded that the appellant-returned candidate had failed to furnish, along with the nomination paper, a copy/certified copy of the electoral roll of No.80 Singrauli constituency in which electoral roll his name was claimed to be appearing against serial No.118. According to the election petitioner on account of the aforesaid omission the returned candidate was not eligible to participate in the election. His nomination, therefore, was wrongly accepted.

The High Court answered the first two questions in favour of the returned candidate. However, insofar as the third question set forth above is concerned, the conclusion of the High Court is adverse to the returned candidate. In this connection the High Court came to the conclusion that the returned candidate had not filed the electoral roll or certified copy thereof of No.80 Singrauli Constituency and therefore the returning officer had committed an illegality in accepting the nomination of the returned candidate and in not rejecting the same on account of non-compliance of Sections 33(5) and 36(2)(b) of the Representation of People Act, 1951 (For short, "the 1951 Act"). On the said basis the High Court came to the conclusion that the election of the returned candidate was liable to be declared void under Section 100(1)(a) along with Section 100(1)(d)(i) of the 1951 Act. Consequential directions therefore have been issued. Aggrieved this appeal has been filed.

As no cross appeal has been filed by the respondent-election petitioner challenging the findings of the High Court adverse to him, the scope of the present appeal is confined to the correctness of the order of the High Court insofar as the third question set forth above is concerned.

At the outset the relevant part of the pleadings contained in the election petition insofar as the said issue is concerned may be set out as hereunder :-

1.11 That, the election of the respondent as a member of M.P. Legislative Assembly for Devsar Constituency deserves to be declared as void for the reason that the Returning Officer has

wrongly rejected the petitioner's nomination form as candidate sponsored by Indian National Congress and also for wrongly accepting the nomination from the respondent. It is also submitted that the respondent not only failed to submit order by Competent Authority accepting his resignation but also failed to furnish a certified copy of the voter list to entitle him to contest the election from Devsar constituency as he is registered voter of 80, Singrauli constituency and without filing the certified copy of relevant part of voter list he was not eligible to contest from other constituency. Acceptance of respondent's nomination form has materially affected the election result.

1.12 That the respondent has been illegally allowed to contest the election while the petitioner has been wrongly denied the right to contest the election and therefore, this petition.

1.13 That, the rejection of nomination form of the petitioner was illegal and contrary to election law and rules framed thereunder and as such declaring the respondent No.1 (one) as returned candidate from 81, Devsar constituency deserves to be quashed and deserves to be declared as null and void.

1.14 That, the nomination form of the respondent has been wrongly accepted by the Returning Officer ignoring the legal provision. It is submitted that the respondent has not produced any valid documents to prove that he was not in service on the date of filing of his nomination form and he has also not furnished the certified copy of the relevant part of the voter list of the constituency

in which he was registered as voter to entitle him to contest election from other constituency i.e. 81, Devsar Constituency."

In view of the state of the pleadings as noticed above; the issues framed and the evidence led by the parties, we cannot agree with the High Court that the respondent-election petitioner had made out a case for declaration that the result of the election in favour of the returned candidate was void under Section 100(1)(a) of the 1951 Act. Having reached our conclusion on above said basis, it is not necessary to go into the question raised on behalf of the respondent-election petitioner that failure to produce the copy of the electoral roll of the constituency in which a candidate is a voter or a certified copy thereof, by itself, would amount to a proof of lack of/absence of qualification under Section 5 of the 1951 Act. All that would be necessary for us to say in this regard is that any such view would not be consistent with the legislative intent expressed by the enactment of two separate and specific provisions contained in Section 100 (1) (a) and 100 (1) (d) of the 1951 Act.

Though a number of precedents have been cited on behalf of the respondent-election petitioner to sustain the arguments advanced, it will not be necessary for us to take any specific note of the principles of law laid down in any of the said cases inasmuch as all the said cases relate to rejection of nominations on account of failure to comply with the provisions of Section 33(5) of the Act of 1951 which is not in issue before us in the present appeal.

Consequently and for the aforesaid reasons, we cannot sustain the order of the High Court. Accordingly, the same is set aside and the appeal is allowed. The election of the appellant-re turned candidate is declared to be valid in law.

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