O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2017

(*OCTOBER*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY

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

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2. Order I Rule 10 & Order XXII Rule 4 of CPC

Pankajbhai Rameshbhai Zalavadia Vs. Jethabhai Kalabhai Zalavadiya (deceased) through L.Rs. and Ors.

Arun Mishra & Mohan M. Shantanagoudar , JJ

In the Supreme Court of India

Date of Judgment - 03.10.2017

Issue

In the matter of substituting the legal Representatives of deceased defendant Under Order 1 Rule 10 C.P.C who died prior to the filing of the suit.

Relevant Extract

This appeal arises out of the judgment dated 05.03.2014 passed by the Gujarat High Court in Special Civil Application No. 16985 of 2011 dismissing the Special Civil Application filed by the Appellant, consequently affirming the order passed by the trial Court rejecting the application filed Under Order 1 Rule 10 of the Code of Civil Procedure (hereinafter referred to as the "Code").

The brief facts leading to this appeal are as under:

The Appellant filed a suit on 24.06.2008 seeking to set aside a sale deed executed in March 1995 in respect of a parcel of land which was purchased by Defendant No. 7. As on the date of filing of the suit, Defendant No. 7 was already dead. Upon the report of the process server to this effect, the trial Court on 31.03.2009 ordered that the suit had abated as against Defendant No. 7. Initially, the Appellant filed an application Under Order 22 Rule 4 of the Code for bringing on record the legal representatives of deceased Defendant No. 7. The trial Court while rejecting the said application on 09.09.2009 observed thus:

According to the ratio laid down in the above said cases Order 22 Rule 4 of Code will apply only when the party dies during the pendency of the proceeding. Further held that a suit against dead person is admittedly a nullity and therefore, Order XXII Rule 4 cannot be invoked. Further held that the provisions of Order XXII Rule 4 of Code and Order 1 Rule 10 of Code are different and independent. Therefore, according to heirs of deceased Defendant, the heirs cannot be joined as party because the suit is filed against dead person.

In the matter on hand, the sale was made in favour of Defendant No. 7, and the validity of the sale deed was the subject matter of the suit. The purchaser of the property, i.e. Defendant No. 7, though dead at the time of

filing the suit, was made one of the Defendants erroneously. The persons who are now sought to be impleaded Under Order 1 Rule 10 of the Code are the legal representatives of the deceased Defendant No. 7. Therefore, there cannot be any dispute that the presence of the legal representatives of the deceased is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions in the suit. Their presence is necessary in the suit for the determination of the real matter in dispute. Therefore, they are needed to be brought on record, of course, subject to the law of limitation, as contended Under Section 21 of the Limitation Act.

Merely because the earlier application filed by the Appellant Under Order 22 Rule 4 of the Code was dismissed on 09.09.2009 as not maintainable, it will not prohibit the Plaintiff from filing another application, which is maintainable in law. There was no adjudication of the application to bring legal representatives on record on merits by virtue of the order dated 09.09.2009. On the other hand, the earlier application filed Under Order 22 Rule 4 of the Code was dismissed by the trial Court as not maintainable, inasmuch as Defendant No. 7 had died prior to the filing of the suit and that Order 22 Rule 4 of the Code comes into the picture only when a party dies during the pendency of the suit. The only course open to the Appellant in law was to file an application for impleadment to bring on record the legal representatives of deceased Defendant No. 7 Under Order 1 Rule 10 of the Code. Hence, the order passed by the trial Court on the application filed Under Order 22 Rule 4 of the Code, dated 09.09.2009, will not act as res-judicata.

Order 1 Rule 10 of the Code enables the Court to add any person as a party at any stage of the proceedings, if the person whose presence in Court is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of multiplicity of proceedings is also one of the objects of the said provision. Order 1 Rule 10 of the Code empowers the Court to substitute a party in the suit who is a wrong person with a right person. If the Court is satisfied that the suit has been instituted through a bona fide mistake, and also that it is necessary for the determination of the real matter in controversy to substitute a party in the suit, it may direct it to be done. When the Court finds that in the absence of the persons sought to be impleaded as a party to the suit, the controversy raised in the suit cannot be effectively and completely settled, the Court would do justice by impleading such persons. Order 1 Rule 10(2) of the Code gives wide discretion to the Court to deal with such a situation which may result in prejudicing the interests of the

affected party if not impleaded in the suit, and where the impleadment of the said party is necessary and vital for the decision of the suit.

This Court in the case of Karuppaswamy and Ors. v. C. Ramamurthy, MANU/SC/0354/1993 : 1993 (4) SCC 41 has permitted the Plaintiff to modify the application filed by him Under Order 22 Rule 4 of the Code to make it an application under the provisions of Sections 151 and 153 of the Code. In the said matter also the suit was filed against a dead person. This Court proceeded further to conclude that the Plaintiff has shown good faith as contemplated Under Section 21(1) of Limitation Act and hence the impleadment of the legal representatives/heirs must date back to the date of the presentation of the plaint. In the said matter, it was observed thus:

4. A comparative reading of the proviso to Sub-section (1) shows that its addition has made all the difference. It is also clear that the proviso has appeared to permit correction of errors which have been committed due to a mistake made in good faith but only when the court permits correction of such mistake. In that event its effect is not to begin from the date on which the application for the purpose was made, or from the date of permission but from the date of the suit, deeming it to have been correctly instituted on an earlier date than the date of making the application. The proviso to Sub-section (1) of Section 21 of the Act is obviously in line with the spirit and thought of some other provisions in Part III of the Act such as Section 14 providing exclusion of time of proceeding bona fide in court without jurisdiction, when computing the period of limitation for any suit, and Section 17(1) providing a different period of Limitation starting when discovering a fraud or mistake instead of the commission of fraud or mistake. While invoking the beneficent proviso to Sub-section (1) of Section 21 of the Act an averment that a mistake was made in good faith by impleading a dead Defendant in the suit should be made and the court must on proof be satisfied that the motion to include the right Defendant by substitution or addition was just and proper, the mistake having occurred in good faith. The court's satisfaction alone breaths life in the suit.

In the matter on hand, though the trial court had rightly dismissed the application Under Order 22 Rule 4 of the Code as not maintainable at an earlier point of time, in our considered opinion, it needs to be mentioned that the trial Court at that point of time itself could have treated the said application filed Under Order 22 Rule 4 of the Code as one filed Under

Order 1 Rule 10 of the Code of Civil Procedure, in order to do justice between the parties. Merely because of the non-mentioning of the correct provision as Order 1 Rule 10 of the Code at the initial stage by the advocate for the Plaintiff, the parties should not be made to suffer. It is by now well settled that a mere wrong mention of the provision in the application would not prohibit a party to the litigation from getting justice. Ultimately, the Courts are meant to do justice and not to decide the applications based on technicalities. The provision Under Order 1 Rule 10 Code of Civil Procedure speaks about judicial discretion of the Court to strike out or add parties at any stage of the suit. It can strike out any party who is improperly joined, it can add any one as a Plaintiff or Defendant if it finds that such person is a necessary or proper party. The Court Under Order 1 Rule 10(2) of the Code will of course act according to reason and fair play and not according to whims and caprice. The expression "to settle all questions involved" used in Order 1 Rule 10 (2) of the Code is susceptive to a liberal and wide interpretation, so as to adjudicate all the questions pertaining to the subject matter thereof. The Parliament in its wisdom while framing this Rule must be held to have thought that all material questions common to the parties to the suit and to the third parties should be tried once for all. The Court is clothed with the power to secure the aforesaid result with judicious discretion to add parties, including third parties. There cannot be any dispute that the party impleaded must have a direct interest in the subject matter of litigation. In a suit seeking cancellation of sale deed, as mentioned supra, a person who has purchased the property and whose rights are likely to be affected pursuant to the judgment in the suit is a necessary party, and he has to be added. If such purchaser has expired, his legal representatives are necessary parties. In the matter on hand, since the purchaser of the suit property, i.e., Defendant No. 7 has expired prior to the filing of the suit, his legal representatives ought to have been arrayed as parties in the suit while presenting the plaint. As such impleadment was not made at the time of filing of the plaint in view of the fact that the Plaintiff did not know about the death of the purchaser, he cannot be non-suited merely because of his ignorance of the said fact. To do justice between the parties and as the legal representatives of the purchaser of the suit property are necessary parties, they have to be impleaded Under Order 1 Rule 10 of the Code, inasmuch as the application Under Order 22 Rule 4 of the Code was not maintainable.

As mentioned supra, it is only if a Defendant dies during the pendency of the suit that the provisions of Order 22 Rule 4 of the Code can be invoked. Since one of the Defendants i.e. Defendant No. 7 has expired prior to the filing of the suit, there is no legal impediment in impleading the

legal representatives of the deceased Defendant No. 7 Under Order 1 Rule 10 of the Code, for the simple reason that the Plaintiff in any case could have instituted a fresh suit against these legal representatives on the date he moved an application for making them parties, subject of course to the law of limitation. Normally, if the Plaintiff had known about the death of one of the Defendants at the time of institution of the suit, he would have filed a suit in the first instance against his heirs or legal representatives. The difficulty that the High Court experienced in granting the application filed by the Plaintiff Under Order 1 Rule 10 of the Code discloses, with great respect, a hyper-technical approach which may result in the miscarriage of justice. As the heirs of the deceased Defendant No. 7 were the persons with vital interest in the outcome of the suit, such applications have to be approached keeping in mind that the Courts are meant to do substantial justice between the parties and that technical Rules or procedures should not be given precedence over doing substantial justice. Undoubtedly, justice according to the law does not merely mean technical justice but means that law is to be administered to advance justice.

Having regard to the totality of the narration made supra, there is no bar for filing the application Under Order 1 Rule 10, even when the application Under Order 22 Rule 4 of the Code was dismissed as not maintainable under the facts of the case. The legal heirs of the deceased person in such a matter can be added in the array of parties Under Order 1 Rule 10 of the Code read with Section 151 of the Code subject to the plea of limitation as contemplated Under Order 7 Rule 6 of the Code and Section 21 of the Limitation Act, to be decided during the course of trial.

In view of the above, the impugned judgment of the High Court is set aside. The appeal is allowed. The Trial Court is directed to implead the legal representatives of deceased Defendant No. 7 and bring them on record, subject to the plea of limitation as contemplated Under Order 7 Rule 6 of the Code, as well as Under Section 21 of the Limitation Act, 1963, to be decided during the trial.

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3. Order XXXVIII Rule 5 of CPC

Pramod Kumar Swain And Another vs Smt. Annapurna Guha

Biswanath Rath, J.

In the High Court of Orissa, Cuttack.

Date of Judgment : 09.10.2017

Issue

In the matter of an order allowing arrest and attachment of the properties of the defendant/petitioner –Challenged.

Relevant Extract

This Civil Misc. Petition involves a challenge to the order dated 20.5.2017 passed in I.A. No.1/2017 arising out of Civil Suit No.469 of 2017, vide Annexure-9 thereby allowing an application under Order 38 Rule 5(1) of C.P.C. at the instance of the plaintiff-opposite party.

Sri Baug, learned counsel for the defendants, the present petitioners while objecting the impugned order and referring to the pleading involving the property submitted that the application was wholly not maintainable and there is no question of application of provision at Order 38 Rule 5 of C.P.C. to the case at hand. Sri Baug also resisted the impugned order on the premises of trial court exceeding its jurisdiction vested in it. Referring to the decision of the Hon'ble apex Court as well as this Court, Sri Baug further submitted that the impugned order also suffers on account of settled position of law.

Sri R.Roy, learned counsel for the opposite party taking this court to the allegation against the petitioner in respect of the property involved and the plea taken in the application under Order 38 Rule 5 of C.P.C. contended that the opposite party in the given circumstances has a strong case under Order 38 Rule 5 of C.P.C. and the trial court giving a serious consideration has passed the impugned order which need not be interfered with.

Hearing the rival contentions, going through the pleadings of the parties in the application under Order 38 Rule 5 of C.P.C. and its objection in the court below and on perusal of the impugned order, this Court finds, the provision at Order 38 Rule 5 reads as follows :-

"Order 38 - Arrest and Attachment Before Judgment.

Rule 5 - Where defendant may be called upon to furnish security for production of property.- (1) Where, at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,--

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his propert from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void."

Now looking to the application under Order 38 Rule 5 of C.P.C., this Court finds, the plaintiff has the following pleading and schedule of property :-

"4.That the schedule vehicles are in the custody of Lingaraj Police in C.T. Case No.4114/2016 (Lingaraj P.S. Case No.165/2016). Admittedly the schedule vehicles were plying in Jagatsinghpur. The opp. Parties are permanent residents of Jagatsinghpur district. Now they have made up their mind to release the vehicle from the police custody and remove these from the local limits of the jurisdiction of this Hon'ble Court. There are every apprehension that the opp. Parties are about to dispose of the schedule vehicles with an intention to obstruct the execution of the decree to be passed in favour of plaintiff.

5. That there are evidence in record which reveals that the plaintiff has very good chances to win in the suit. Except the schedule vehicles the

petitioner has no knowledge regarding assets, properties of the defendant. In case the decree for realisation of money is passed the decree could be satisfied only after alienation of the schedule vehicles."

"SCHEDULE OF VEHICLES

1."Swaraj 735 FE" tractor bearing Regd. No.OR-21E-2448, chassis No.WATA31418047855, engine No.OR-21E-2449.

2. Tractor trailer bearing Regd. No.OR-21e- 2449, chassis No.NDE1221112.

3. Hero Glamour motorcycle bearing Regd. No.OD-21B-5230, chassis No.MBLJA06AMEGL14019, engine No.JA06EJEGL19553."

Bare reading of both the above, this Court nowhere finds either any disclosure of disposal of the property or any attempt by the defendants to remove the whole or part of the property from the local limits of the jurisdiction of the Court. It is on the other hand, pleading in the plaint and the objection of the defendants clearly indicates the property put under attachment for being available outside the local jurisdiction of the Court undertaking the process. Mere bald statement that defendants are trying to dispose the property does not satisfy the required ingredients under Order 38 Rule 5 of C.P.C. On the other hand, under the specific case of the defendants that both the vehicles not only purchased outside the local jurisdiction of the court but have also been registered outside the jurisdiction of the court further since both the properties are on hypothecation for being financed by a financial institution, both the properties are yet to become the properties of the defendants as the financial institution is the absolute owner of the property so long as there is no absolute clearance of the loan amount and the defendants till such period are only the custodian of the same.

Now taking into account the decision of the Hon'ble apex Court in the case of Rajendran & others vrs. Shankar Sundaram & others, reported

in (2008) 2 SCC 724, Hon'ble apex Court in paragraphs-5, 6, 7 & 12 held as follows :-

"5. The appellants in their written statement inter alia raised a contention that since the amount of Rs. 50 lakhs purported to have been taken in advance by defendant No.2 in connivance with defendant Nos. 3 & 8 had not been used for the benefit of the partnership firm, no order of attachment could be issued as against the appellants herein. The said contention of the appellants was accepted by a learned Single Judge of the High Court by his order dated 10-12.2002 opining :

"The copy of the partnership deed date 01-4-1996 has been filed by the contesting defendants in the typed set. A perusal of the same clearly disclosed that the 2nd Defendant was not a partner in the 1st defendant firm. Moreover, the plaintiff had also not filed any record to show that the second defendant was already in a partner (sic) in the first defendant firm and the borrowal was also made only for the firm. Unless and until, it is established by the plaintiff, I am of the view that the plaintiff is not entitled to seek any interim order calling upon the defendants to execute a security."

In dealing a matter of similar nature, this Court in the case of Prasad Film Laboratories vrs. M/s.Pragnya Pictures & another reported in 83 (1997) CLT 737 has even gone to the extent opining that even disclosure of disposal of some of the properties unless the party satisfies that such disposal is intentional in order to frustrate the judgment and decree to come in, there is no satisfaction of the ingredient of Order 38 Rule 5 of C.PC. In another decision in the case of Lt.Col.K.S.Bakshi vrs. Jagjit Singh Sabharwal reported in 91 (2001) CLT 37 following a decision of this Court reported in AIR 1987 Orissa 107, this Court finds, two ingredients must be satisfied for exercising power under Order 38 Rule 5 of C.P.C. firstly the intention of defendants must be to obstruct or delay the execution of any decree likely to be passed and secondly, with the above intention, the defendants are attempting to dispose of or remove partly or whole property from the jurisdiction of the court. Same is also the view of

this Court in 1989 (I) OLR-466. This Court deciding the case in 1987 (II) OLR-546 even has gone to the extent of saying that there must be material or evidence to support such allegation and mere application seeking attachment won't do.

For the discussions involving the case at hand, for absence of material to satisfy the ingredients of Order 38 Rule 5 of C.P.C., for the involvement of vehicles sought for attachment under hypothecation with financial institution being the first charge to such property, the decisions of different courts referred to herein above, opposite party applying such casual approach to application under Order 38 Rule 5 of C.P.C., this Court finds, the order impugned is not only passed in non-consideration of the ingredients of Order 38 Rule 5 of C.P.C. for having any foundation in such apprehension and further in absence of consideration as to whether such properties are within the jurisdiction of the court taking up such issues ? and whether the properties under hypothecation involving financial institution not being party to case at hand, the order impugned remained unsustainable. The impugned order also remains contrary to the settled position of law discussed herein above.

Under the circumstance, this Court, while interfering in the impugned order sets aside the same and rejects the application under Order 38 Rule 5 of C.P.C. Civil Misc. Petition succeeds. No cost.

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4. Section 482 of Criminal Procedure Code

Ch. Kiran Kumar And Others vs. State Of Orissa

S.K. SAHOO ,J.

In the High Court of Orissa: Cuttack

Date of Hearing and Judgment: 09.10.2017

Issue

In the matter of rejection of petition under Section 311 of Cr.P.C. for recalling Pws. 9,10,11&12 for further cross- examination .

Heard Mr. Biswa Kumar Mishra, learned counsel for the petitioners and Mr. Prem Kumar Patnaik, learned Addl. Government Advocate for the State.

The petitioners in this application under section 482 Cr.P.C. have challenged the impugned order dated 03.05.2005 passed by the learned Sessions Judge, Koraput-Jeypore in C.T. 2 No. 251 of 2003 in rejecting the petition under section 311 of Cr.P.C. filed by the petitioners in recalling P.Ws. 9, 10, 11 and 12 for further cross-examination with regard to the material objects.

The learned Trial Court after considering the petition filed by the petitioners and the contentions raised, has been pleased to observe that after going through the evidence of the witnesses P.Ws. 9, 10, 11 and 12, no material aspect has beenleft behind by the defence to be put to those witnesses and no useful purpose would be served in recalling those witnesses to put questions with regard to the material objects and therefore, holding that it is not essential for the just decision of the case, the petition was rejected.

Mr. Biswa Kumar Mishra, learned counsel for the petitioners contended that the petitioners are facing serious charges and the four witnesses to whom the petitioners intend to recall for further cross-examination have identified the material objects in Court which are the school bag, note book and tiffin box, water bottle etc. of the victim girl who was allegedly kidnapped by the petitioners and no questions have been put by the defence inadvertently on those material objects and therefore, if opportunity is not provided to the petitioners to put questions

on the material objects proved by the prosecution then they will be seriously prejudiced.

Mr. Prem Kumar Patnaik, learned Addl. Government Advocate opposed to such prayer and contended that there is no illegality or infirmity in the impugned order and just to delay the proceeding, the method has been adopted by the petitioners and therefore, no relief can be granted to them.

In case of Godrej Pacific Tech. Ltd. -Vrs.- Computer Joint India Ltd. reported in (2008) 41 Orissa Criminal Reports 221, it is held as follows:-

"8. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

The issue involved in this case is whether the minor girl was kidnapped for ransom etc. or not as provided under section 364-A of the Indian Penal Code. The witnesses have identified some of the articles belonged to the victim girl and those were marked as material objects in this case. P.W.9 identified school bag (M.O.I), note book (M.O.II) and tiffin box (M.O.IV), P.W.10 identified school bag (M.O.I) and tiffin box= (M.O.IV), P.W.11 identified school bag (M.O.I) and water bottle (M.O.V) and P.W.12 identified school bag (M.O.I). The petitioners have been afforded the opportunity to cross-examine all the witnesses and in fact they have

exercised their right. P.Ws. 9, 10, 11 and 12 have also been cross-examined at length. I am of the view that merely because specific questions relating to material objects have not been put to the witnesses, the defence is prejudiced in any manner particularly when the issue involved can be effectively adjudicated without such cross examination. The Court is not expected to do charity in allowing petitions for recall of witnesses for further cross examination after the party exercised his right of cross examination fully. It is only in exceptional cases that the Court would exercise such right on being satisfied that it is essential for the just decision of the case otherwise it would open the floodgate for filing such petitions causing unnecessary delay in disposal of the trial. If some relevant questions are left out to be put in the cross examination, recall petition should be filed immediately specifying such questions for the consideration of the Court. If due to the evidence of a witness who is examined afterwards or some material change in the circumstances, a recall petition is filed at a belated stage specifying further questions to be put in the cross examination, the Court has to consider the same in the facts situation keeping in mind the relevancy of such questions and its necessity in the just decision of the case.

After carefully going through the evidence of P.Ws. 9, 10, 11 and 12, I am of the humble view that recalling of the witnesses is not necessary for the just decision of the case. The four witnesses were examined on 21.09.2004 and not only the petition for recall was filed at a belated stage but there was necessity for recalling the witnesses and therefore, the learned Trial Court was quite justified in rejecting the petition and I find no infirmity or illegality in the impugned order and accordingly, the application under section 482 of Cr.P.C. being devoid of merits, stands dismissed.

Since it is a case of the year 2003, the learned Trial Court shall do well to expedite the proceedings in C.T. No. 251 of 2003 and conclude the same within a period of six months from the date of receipt of the order of this Court.

The stay order passed on 07.06.2005 in Misc. Case No. 1310 of 2005 stands vacated.

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5. Section 482 of Cr.P.C.
Babaji Charan Nayak Versus Orissa Machinery & Sanitary
S.K. SAHOO

In the High Court of Orissa, Cuttack
Date of Hearing & Judgment: 09.10.2017

Issue

In the matter of quashing of order of taking cognizance of offences under Sections 138(c) , 142(1)(b) of NI Act.

Relevant Extract

Heard Mr. Samvit Mohanty, learned counsel for the petitioner.

None appears on behalf of the opp.party.

The petitioner Babaji Charan Nayak in this application under section 482 Cr.P.C. has challenged the impugned order dated 25.02.2003 passed by the learned S.D.J.M., Jagatsinghpur in I.C.C. Case No. 127 of 2002 in taking cognizance of the offence under section 138 of the Negotiable Instruments Act, 1881 (hereafter 'N.I. Act') read with section 420 of the Indian Penal Code and issuance of process against him. The opposite party is the complainant and the petitioner is the accused in the complaint petition.

The relevant dates for the adjudication of the issue involved in this application which are mentioned in the complaint petition are as follows:-

The cheque in question which was for an amount of Rs.17,511/- (rupees seventeen thousand five hundred eleven) was issued by the petitioner in favour of the complainant Orissa Machinery & Sanitary on 20.12.2001 bearing no.233903 drawn on the Cuttack Central Co-operative Bank Ltd. at Kujanga Branch towards the cost of the purchased articles. The cheque was presented by the complainant in Syndicate Bank, Jagatsinghpur Branch on 12.06.2002 for collection of dues. The cheque was dishonored on 17.06.2002 by the Cuttack Central Cooperative Bank, Ltd. Kujang Branch on the ground of insufficient funds in the account of the petitioner. The Syndicate Bank, Jagatsinghpur accordingly intimated about such dishonour to the complainant on 20.06.2002. The complainant personally approached the petitioner on 04.07.2002 and served notice for payment of dues within the stipulated period of fifteen days. The petitioner requested the complainant for one month time for payment of the outstanding dues. On 26.10.2002 the complainant issued a legal notice to the petitioner by

registered post with A.D. for payment of the dues within fifteen days from the date of receipt of the notice. On 04.12.2002 the complainant received back the legal notice with endorsement of the postal department that the addressee refused to receive the registered letter. The complaint petition was filed on 21.12.2002.

Learned counsel for the petitioner relying upon the dates which are mentioned in the complaint petition contended that the taking of cognizance by the learned S.D.J.M., Jagatsinghpur is barred by limitation in view of the provision under section 142 of the N.I. Act. Learned counsel further contended that though the proviso to section 142(1)(b) of the N.I. Act stipulates that cognizance of a complaint can be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period but the impugned order does not reflect any such satisfaction by the learned Magistrate. It is further contended that clause (b) of the proviso to section 138 of the N.I. Act prescribes that the payee or the holder in due course of the cheque, as the case may be, shall make a demand for the payment of the cheque amount by giving a notice in writing to the drawer of the cheque within fifteen days (substituted as 'within thirty days' w.e.f. 06.02.2003) of the receipt of information by him from the bank regarding the return of the cheque as unpaid. It is further contended that clause (c) of the proviso to section 138 of the N.I. Act prescribes that if the drawer of the cheque fails to make payment of the cheque amount to the payee or to the holder of the cheque as the case may be, within fifteen days of the receipt of the notice as contemplated under clause (b), cause of action would arise and then the complaint petition has to be filed within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138 of the N.I. Act as per the clause (b) to section 142(1) of the N.I. Act. It is further contended that in the case in hand, the bank intimated the complainant regarding dishonour of the cheque on 20.06.2002 and the personal notice was served on the petitioner on 04.07.2002 by the complainant stipulating fifteen days for payment of the dues. If the payment was not made within the stipulated period and the cause of action arose then the complaint petition should have been filed within one month from such date as per the clause (b) to section 142(1) of the N.I. Act which has not been done inasmuch as the complaint petition was filed on

21.12.2002. It is further contended that after service of the first notice on the petitioner on 04.07.2002, there is no provision under the N.I. Act to serve a second notice by registered post on 26.10.2002 as was done in this case. The second notice dated 26.10.2002 is obviously much beyond the period of fifteen days as prescribed under clause (b) of the proviso to section 138 of the N.I. Act. It is further contended that the cause of action would arise on the basis of first valid notice, if the drawer of the cheque fails to make payment of the cheque amount to the payee or to the holder of the cheque as the case may be, within fifteen days of the receipt of the notice and not on the basis of second notice.

The complainant approached the petitioner on 04.07.2002 and personally served the notice on him within the statutory period of fifteen days after receipt of intimation from the Syndicate Bank, Jagatsinghpur regarding the dishonour of cheque on 20.06.2002. This is a valid notice as contemplated under clause (b) of the proviso to section 138. Since the petitioner failed to make the payment of the cheque amount to the complainant within fifteen days of the receipt of the said notice, the cause of action arose on the completion of fifteen days. The complaint petition should have been made within one month of the date on which the cause of action arose which has not been done in this case. Therefore, the complaint petition filed in this case is beyond the period as prescribed under section 142(1)(b) of the N.I. Act. In that eventuality, the order of cognizance which was otherwise barred by limitation could have been taken had the learned Magistrate condoned the delay in filing complaint petition after being satisfied with the explanation furnished by the complainant that the later had sufficient cause for not making the complaint within the prescribed period.

In case of S.L. Construction and Anr. -Vrs.- Alapati Srinivasa Rao and Anr. reported in (2009) 42 Orissa Criminal Reports (SC) 303, it is held as follows:-

32. As the issuance of cheque, non-payment thereof on presentation, issuance of a valid notice calling upon the drawer of the cheque to pay the amount in question and the appellants' failure to pay to the complainant the amount in question within a period of 15 days from the date of receipt of a copy of the said notice upon them, a cause of action arose for filing a

complaint petition, in our opinion, the High Court cannot be said to have committed any error in passing the impugned judgment.

33. In view of the findings aforementioned, we have no hesitation to hold that the cause of action for filing a complaint arose only once and not more than once as contented by by Mrs. Desai, learned Counsel."

Therefore, since the complaint petition has been filed beyond the prescribed period of one month and the learned Magistrate has not condoned the delay after being satisfied with the sufficient cause shown by the complainant for not making the complaint within such prescribed period, on a careful consideration of the submission made at the Bar and the ratio laid down in the decisions referred to above, I am of the view that impugned order dated 25.02.2003 passed by the learned S.D.J.M., Jagatsinghpur in I.C.C. Case No. 127 of 2002 in taking cognizance of offences punishable under section 138 of the N.I. Act read with section 420 of the Indian Penal Code is not sustainable in the eye of law and accordingly, the same stands quashed. I would have granted certain time to the complainant- opposite party to approach the learned Magistrate and permitted him to file appropriate application in the complaint petition for condoning the delay in filing the complaint petition showing sufficient cause but since the amount of the cheque is not that high and about fifteen years is going to be passed since the date of institution of the complaint petition, I refrained from passing any such order in favour of the complainant-opposite party. Accordingly, the CRLMC application is allowed.

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6. Section 302 of IPC

Sunadhar Bag vs State Of Orissa

I. Mahanty& Biswajit Mohanty, JJ.

In the High Court of Orissa: Cuttack.

Date of Judgment: 12.10.2017

Issue

Conviction under section 302 of IPC sentencing appellant to undergo imprisonment for life and to pay fine Rs. 20,000/- i.d to undergo rigorous imprisonment for two years more –Challenged.

Relevant Extract

This appeal has been directed against the judgment and order dated 28.8.2008 passed by the learned Additional Sessions Judge (F.T.C.), Bolangir in Sessions Case No.68/44 of 2007 convicting the appellant under Section-302 of the I.P.C. and sentencing him toundergo imprisonment for life and to pay a fine of Rs.20,000/- and in default to undergo R.I. for two years more.

The case of the prosecution is that on 25.1.2007 P.W.4-informant had gone to Mandal village for cutting tree. While cutting tree at around 4 to 5 P.M. it was intimated to him that his son deceased Sabara Gahira aged about 11 years, who had taken the bullock for grazing had not returned home. Hearing this, P.W.4 immediately returned home and heard from his wife and daughter (P.W.7) that though the bullock had returned, their son had not returned. During search, he found the dead body of his son near Badadunguritala nala. While the dead body was covered under the sand, the legs were visible. P.W.4 brought the dead body to the thrashing floor of Pramod Thakur and there he saw mark of injuries on the neck, head, back and left ear of his son on account of assault by axe. The background facts according to P.W.4 as indicated in the F.I.R. are that the appellant was married to the sister of the informant (P.W.4). They were staying together in a house in front of the house of the informant. In the last Chaitra month, P.W.4 became ill and on account of such illness the wife of the informant blamed the appellant for having committed sorcery on her husband. As a result, quarrel ensued between the family of the informant with the appellant. In such background, the appellant left the village of informant and went away to village Sargiguda. It is alleged that on account of

sorcery practised by the appellant, the informant was not able to walk properly. Later on he was cured after taking medicine. Few days prior to the occurrence, the appellant (who is the brother-in-law of the informant) had come to the village of the informant. Seeing him, the wife of P.W.4 (informant) started blaming the appellant as the informant was not able to walk properly on account of sorcery practiced by him. This resulted in another quarrel and the appellant threatened the informant to the effect that earlier he had a narrow escape and next time either P.W.4 or his son would be murdered.

On the last Wednesday prior to the date of occurrence, the appellant visited the house of the informant (P.W.4) and abused him as the P.W.4 had stacked the cotton bundles in front of his house. P.W.4 admitted to have stacked the cotton bundles and assured to remove the same. On 25.1.2007 while the informant was going to the village Mandal, he saw the appellant near the school with vermillion on his head and axe on his hand. When he saw him, the appellant concealed himself.

In such background, P.W.4 lodged a written report on 25.1.2007 at 9 P.M. as he was of the firm opinion that in order to settle scores, the appellant had killed his son with repeated assault with an axe. Upon receipt of such report, P.S. Case No.8 of 2007 was registered by P.W.11 and he took up the investigation. Exhibit-11 is that F.I.R. On completion of the investigation, charge sheet was filed against the appellant and accordingly the appellant stood trial.

The plea of the appellant was that of a complete denial and false implication.

The prosecution in order to bring home the charges examined as many as 14 witnesses. P.Ws.1, 3 and 5 are the witnesses to the inquest. P.Ws. 2 and 12 are the seizure witnesses. P.W.4 (who happens to be brother-in-law of the appellant) is the informant. P.W.6 is a witness, who has stated about having heard the shouting of the deceased near the place of occurrence. P.W.7 is the daughter of P.W.4 and sister of the deceased. P.Ws.8 and 9 are the witnesses to the disclosure statement and recovery of weapon of offence. P.W.10 is the doctor, who conducted postmortem and

P.W.11 is the Investigating Officer. P.W.13 is the photographer and P.W.14 is a witness before whom it was claimed that the appellant had made extra judicial confession. The prosecution also proved Exhibits 1 to 18 and M.O.I to M.O.VII. The appellant had not adduced any evidence.

Mr. Jagabandhu Sahu, learned counsel for the appellant submitted that this being a case of circumstantial evidence where the chain of circumstance is not complete, the learned court below has gone wrong in convicting the appellant. According to him, the learned court below committed a mistake by relying on the motive of the appellant though the evidence relating to such motive is highly deficient. He further submitted that the learned court below has gone wrong in putting reliance on the disclosure statement under Exhibit-6 though one of the witnesses to such disclosure statement, namely, P.W.9 has turned hostile and the evidence of other witness P.W.8 has been demolished in the cross-examination. On this subject, Mr. Sahu relied on a decision of this Court in Baichandra Majhi -v- State of Orissa as reported in 2012 (Suppl.II) OLR 120. He mainly relied on Para-10 of the said judgment. He further submitted that the learned court below ought not to have believed in the evidence of P.W.6, who is not an independent witness, but is an interested witness. Further, P. W.6, who claims to have heard the shout of the deceased has not seen as to who was shouting. Lastly, he submitted that M.O.I, i.e., Tangia is of little help as P.W.4 and P.W.6. have stated nothing specifically about Tangia, which has been marked as M.O.I. Mr. Sahu did not dispute that the present case is a case of homicide.

Mr. Samantaray, learned Standing Counsel on the other hand supported the order of conviction and contended that such order should not be interfered with as the learned trial court on elaborate discussion of the evidence and circumstances on record has arrived at a correct conclusion.

Before we scan the evidence in order to assess the strength of rival submissions made by the parties, we would like to point out that present is a case of circumstantial evidence.

Law relating to circumstantial evidence has been laid down by the Supreme Court in Sharad Birdhichand Sarda -v- State of

Maharashtra as reported in (1984) 4 S.C.C. 116. There the Supreme Court has made it clear that the following conditions must be fulfilled before a case against the appellant can be said to be fully established.

"(1) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established, It may be noted here that this Court intimated that the circumstances concern 'must be or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobude -vrs- State of Maharashtra, where the following observations were made (SCC Para 19, P.807: SCC (Cri) P.1047). Certainly, it is a primary principle that the accused must be and not merely may be guilt before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused his guilt, (3) The circumstances should be of a conclusive nature and tendency, (4) They should exclude every possible hypothesis except the one to be proved, and (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused".

Keeping in mind the above noted five golden principles, let us proceed to scan the evidence on record.

Here there is no dispute that this is a case of culpable homicide. P.W.4, who happens to be the informant has stated in examination- in-chief that the appellant was his brother-in-law (sister's husband) and the deceased Sabar Gahir was his son. The deceased was about 11 years old at the time of occurrence, which took place on a Thursday. At about 2 P.M. on the date of occurrence, after taking lunch he was going to Mandal to cut trees for Murali Khamari. On his way, he found the appellant with an axe with vermillion mark on his head. On seeing P.W.4, he fled away. While

cutting trees, his wife informed him through Sudam Khamari with regard to non-return of the deceased son although the bullocks have returned to the house. Hearing this he rushed to the house where his wife and daughter disclosed that in spite of their search in nearby area they were not able to locate the deceased. As his bullocks ordinarily graze at Badadunguritala nala side, he went there. While searching, he came in contact with a leg of a dead body and identified the same to be his son's. The dead body was covered with sand from head to waist. After removing the same from the sand, he found injuries on his head, back and neck and carried the dead body to the thrashing floor of Pramod Thakur. Thereafter, he informed the matter to his family members and suspected the appellant as he was moving with Tangia. Again they came back to the thrashing floor to guard the dead body. At that point of time his brother (P.W.5) and other villagers had arrived there. Thereafter, P.W.4 went to the police station to report the incident. As he was an illiterate person, he narrated the incident to the nearby betel shop owner Anil Kumar Naik, who scribed the F.I.R. on his dictation and instruction. After writing, he read over and explained the contents of the same to him and finding the same to be true he put his L.T.I. thereon. As per the direction of the Thanababu, Belpada P.S. he returned to the thrashing floor to guard the dead body. After conducting inquest over the dead body, the police sent the same for postmortem examination. He further testified that the appellant was married to his sister and after her death, the appellant married another lady. The house of appellant was in front of his house. The appellant was a practitioner of sorcery and had applied the same on him. As a result, he was unable to move without the help of the stick. Concerning that, there was a quarrel between his wife and the appellant last year, wherein the appellant had threatened to kill his deceased son or him. Eight days prior to the occurrence, the appellant had come to his village and abused him and again threatened to kill either him or his son. The deceased was his only son. On the date of occurrence the appellant had come to his house in the morning and asked as to who had stacked cotton bundles in front of his house. Though P.W.4 (informant) admitted to have kept the same and assured to shift the said materials, but the appellant being enraged threatened to kill them. In the cross-examination, P.W.4 stated that the thrashing floor lay between his house and Badadunguritala nala. While he kept the dead body on the thrashing floor, non-else was present. When he found the dead body it was already

evening and he saw the shirt of the deceased lying nearby. He did not inform anybody about the missing child. Satrughana Gahir accompanied him to the police station. He had only informed about the incident to his family members and none else, but the villagers had assembled at the thrashing floor. The scribe was not known to him earlier. At 9 P.M. he handed over the written report to the Thanababu. After lodging F.I.R., the O.I.C. directed him to go back to village to guard the dead body. He did not take his statement at the time of lodging of F.I.R. He did not know the name of the person through whom the wife informed him about non-return of his son, but Sudam had informed him knowing from that person through whom the information was given by the wife. The appellant has constructed his house which is located in front of his house. From the date of marriage of his sister with the appellant, he was aware that the appellant was habituated to the sorcery works. He was also practising sorcery in other villages. For that purpose, he was getting goats and hens. However, he admitted that he had not heard of any of the villagers quarreling with the appellant for application of sorcery. After taking medicine from Saroj Thakur, who is both a Kabiraj and a sorcerer, he was cured. He denied a suggestion that the appellant had not applied any sorcery on him and that he had never threatened to kill him and his son. He had intimated co-villagers about such threat. Some villagers including P.W.8 came to pacify the matter in the month of Chaitra of that year. Prior to 7 to 8 days of the occurrence, the incident that had happened was not intimated to any villagers for conciliation. However, the co- villagers were present on 24.1.2007 morning when the appellant quarreled with them. On 25.1.2007 he saw the appellant at 2 P.M. He testified that he was mentally fit after seeing the dead body of his son. He saw the injuries near ear, head and back of his son and the dead body was covered with dry sand. He denied a suggestion that the appellant had not committed the murder of his son and that on account of his enmity he has foisted the case against the case against the appellant.

An analysis of evidence shows that though P.W.4 speaks about being threatened with dire consequences thrice by the appellant, however, F.I.R. under Ext.11 shows he was threatened with dire consequences only once i.e. some days prior to occurrence. However, such inconsistency has not been put to him during cross- examination. Further, the evidence of P.W.4

relating to he being threatened thrice remains undemolished in cross-examination. Therefore, the appellant cannot derive any benefit from the above noted inconsistency. Rather, a holistic analysis of evidence of P.W.4 coupled with the evidence of P.Ws.5 & 7 clearly show that there was quarrel and ill-feeling between P.W.4 and his family members with appellant for which the appellant had threatened to kill both P.W.4 and the deceased. P.W.5 has fully corroborated the evidence of P.W.4 relating to threat held out by the appellant to P.W.4 and his deceased nephew one year prior to the occurrence and 7/8 days prior to occurrence. With regard to the third occurrence, there is a minor inconsistency. While P.W.4 states that such threatening took place on the date of occurrence; according to P.W.5, the third threatening took place a day prior to occurrence. Keeping in mind the fact that both these witnesses are rustic and illiterate villagers, who adduced their evidence one year after the occurrence before the court, the above discrepancy can only be described as a minor one. Further, in his cross-examination, P.W.5 has clearly stated that he had heard thrice the appellant threatening to kill P.W.4 or his son. P.W.7, the sister of deceased like P.Ws.4 & 5, is a rustic villager, who has endorsed her testimony with L.T.I. Though vis-a-vis the evidence of P.Ws.4 & 5, there is some inconsistency in her evidence as to timing of threat however she has clearly testified that prior to occurrence, the appellant was threatening to kill her father or brother. Though in Para-4 of her cross-examination, she has stated that the appellant never had any ill-feeling towards the deceased, however, she has made it clear that the appellant had ill-feeling towards her parents. A holistic interpretation of her evidence coupled with the evidence of P.Ws. 4 & 5 would show that the appellant had the motive to settle the score with the parents of the deceased and he chose to settle the same in a manner where it would hurt the parents most though he might not have any ill-feeling towards the deceased.

Further, P.W.7 has in her cross-examination has stated about land of P.W.6 being situated near the Badadunguritala nala, where the ghastly crime was committed. She also stated that P.W.6 had grown channa in his field in the year of occurrence and was guarding his channa grain. P.W.6 has corroborated the version of P.W.7 when in his cross-examination he has stated that his channa land was nearer to Badadunguritala nala than other cultivators. He had been to his gram field at 2 P.M. While there, he

heard shouting of a boy and proceeded in that direction. Near the Nala, he found the appellant holding a Tangia with mark of vermillion and with his Dhoti stained with blood. Though the exact version of shouting as stated by him in his examination-in-chief cannot be believed as in his cross-examination he has admitted that he has not told such exact version before the police, however his version relating to hearing of shout has remained undemolished. In his cross-examination, he has stated that at 4 P.M. he heard the sound of a boy and the deceased was the village boy. P.W.6 has also given L.T.I. endorsing his testimony. Thus, he is also an illiterate and rustic villager. In such background, nothing much can be read into his inconsistent version of hearing the sound of a boy so also hearing the sound of man as stated by him in his cross examination. Rather, while testifying that he heard the sound of a boy, he has also stated that the deceased was their village boy. Taking the totality of circumstances, one can reasonably infer that what P.W.6, a rustic illiterate villager clearly meant is that on hearing the voice of deceased, when he was going to the spot from where such sound emanated, he found the appellant with Tangia on hand with blood stained Dhoti. Later, the appellant himself has handed over the blood stained Dhoti to the I.O.-P.W.11. Such conduct of the appellant assumes importance under Section-8 of the Evidence Act. P.W.11 has also seized blood stained earth from the Nala in presence of witnesses vide Ext.3. Further, from near the spot, P.W.11 has also seized one faded green colour half shirt stained with blood vide Ext.4. That apart the postmortem report under Ext.9 was prepared on 26.1.2007 at about 2.30 P.M. and there the doctor P.W.10 has opined that the death had occurred within 24 hours of such examination. P.W.6 has stated that he had heard the cry at around 4 P.M. It may not be out of place to indicate here that P.W.4 has seen appellant on 25.1.2007 at 2 P.M. with axe and vermillion mark on his forehead. At 4 P.M. of the same day P.W.6 while going towards the Nala met appellant in a similar fashion with blood stained Dhoti. All these provide various chains in circumstantial evidence.

From an analysis of evidence of P.Ws.8 & 9, one can see while P.W.9 has turned hostile, the evidence of P.W.8 is replete with contradictions as he has stated in his cross-examination that contents of Ext.6 were not read over by the Thanababu and they did not sign any paper at police station but put their signatures only near the hut of Budu Tandi i.e. the place of

recovery and further that contents of seizure list were not read over and explained to them. Notwithstanding all these P.W.11 has clearly stated that during interrogation, the appellant confessed to have committed the crime by means of axe and to have concealed the same in hut located in the land of Budu Tandi. He further stated that he would show the place of concealment and give recovery of axe. Vide Ext.6 such confessional statement was recorded in presence of P.Ws.8 & 9 and thereafter the appellant led him and other witnesses and gave recovery. Though the evidence of P.Ws.8 & 9 in this regard is not of much help for reasons indicated earlier, but still then the evidence of I.O. (P.W.11) on the said matters remains undemolished. Law nowhere requires the investigating agency to have the signatures of independent witnesses on the disclosure statement of an accused recorded under Section-27of the Evidence Act. Further, it has been made clear by the Supreme Court in the case of Modan Singh -v- State of Rajasthan reported in (1978) 4 SCC 435 that if the evidence of the I.O., who recovered the material objects is convincing, the evidence of recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version. In Mohd. Aslam -v- State of Maharashtra reported in (2001) 9 SCC 362, the Supreme Court has reiterated the said view. In such background, evidence of P.W.11 on the matter of leading to discovery of Tangia (M.O.I) cannot be ignored. This again emerges as a strong circumstance against the appellant.

In such background, we have to examine the submissions of learned counsel for the appellant. His first submission was that the evidence with regard to motive of the appellant to commit the murder was highly deficient. We refuse to accept such submission because the evidence of P.Ws.4,5 and 7 clearly shows that there was ill-feeling between the appellant and P.W.4 and his wife and prior to the occurrence he has given threat to eliminate both P.W.4 and the deceased. Though there exist some minor discrepancy with regard to timing of threat between the evidence of P.Ws.4, 5 and 7, however, a holistic reading of their evidence would show that there was bad blood between the appellant and P.W.4 and accordingly, the appellant had held out the threat several times. P.W.5 corroborates the version of P.W.4 with regard to threat held by the appellant one year prior to the occurrence so also the threat held out 8 days prior to the occurrence. With regard to the last occurrence, there is a minor discrepancy inasmuch

as while the P.W.4 indicates that such threat was held out by the appellant on the date of occurrence, P.W.5 has stated about such a threat being held out by the appellant one day prior to the occurrence. Being rustic villagers, such discrepancy in the evidence of P.Ws.4 and 5 is of not much consequence. P.W.7 has stated that there was a quarrel in the previous year and also a quarrel 4 to 5 days prior to the occurrence where the appellant threatened to do away the lives of P.W.4 and her brother. She has also stated prior to the occurrence the appellant was threatening her father (P.W.4) to kill him and her brother. Like P.W.4, P.W.7 has also attached L.T.I. to the copies of her deposition. These show both of them to be illiterate and rustic villagers. Therefore, her saying in the cross-examination that the appellant had no ill-feeling towards her deceased brother cannot mean much as in her examination-in-chief she has clearly stated that the appellant threatened to kill both her father (P.W.4) and her deceased brother. Not having ill-feeling may be one thing but in order to settle the score, a person can do harm to another by killing his close relatives, though he may not be having any ill-feeling towards that close relative.

Now to the next argument of the learned counsel for the appellant that since P.W.9 has turned hostile and the version of P.W.8 is inconsistent therefore the evidence leading to discovery should be ignored in the background of the decision reported in Baichandra Majhi -v- State of Orissa (2012 Suppl.II OLR) 120. In our opinion, the said case is factually distinguishable. There the conviction was made solely on the basis of leading to discovery under Section-27 of the Evidence Act. There this Court dis-believed the disclosure statement leading to discovery as the witnesses leading to discovery stated that the disclosure statement on which the police told him to put his signature was never read over and explained to them. Here as indicated earlier strong motive of the appellant has been proved by the prosecution by way of cogent evidence. Further, the evidence of P.W.6 also offers a strong circumstantial evidence. He has clearly stated that his cultivable land was situated near Badadunguritala nala and he having heard the cry of the deceased coming from Badadunguritala nala went towards that spot. While going towards Badadunguritala nala he found the appellant near the Nala with Tangia and blood stained Dhoti. P.W.4 also supports/corroborates such evidence with regard to spot of

occurrence being Badadunguritala nala from where he found the dead body of his son. P.W.11 and other seizure witnesses have also stated about the seizure of blood stained earth from the spot at Badadunguritala nala and the chemical examination report at Exhibit-18 shows that the blood stained earth to contain the blood of human origin of Group-B. It also indicates the half shirt and half pant of the deceased containing human blood of Group-B. The argument that P.W.6 is not an independent witness, but an interested witness has no leg to stand as he had denied the suggestion that the parents of deceased have sold him to P.W.6 and he had kept the deceased as his son. Further, the argument that evidence on leading to discovery has lost all its meaning as evidence of P.W.8 is inconsistent and as P.W.9 has turned hostile, cannot be accepted as the evidence of I.O. (P.W.11) in this regard remains convincing and has not been demolished in cross-examination. Recovery of weapon of offence as made from the place could not have been possible but for the information supplied by the appellant. For all these reasons, the evidence of the I.O. with regard to leading to discovery of axe (M.O.I) cannot be ignored. Further, in Baichandra Majhi case (supra) the weapon of offence which was sent for chemical examination did not contain any blood. Here on the contrary, the chemical examination report finds the Tangia i.e. weapon of offence to be stained with blood. Furthermore, P.W.10 has clearly stated that the injuries inflicted on the deceased were possible by such an axe.

With regard to the last submission of Mr. Sahu, learned counsel for the appellant that since P.W.4 and P.W.6 have not specifically spoken about Tangia under M.O.I, this is fatal to prosecution, cannot be accepted because as per the version of P.W.11, the appellant himself had led to recovery of such Tangia. Further despite inconsistencies in his evidence, P.W.8 has made it clear in his re- examination that M.O.I is the Tangia recovered from the hut of Budu Tandi.

In such background, according to us, the cumulative effect of the sequence of events as discussed earlier would show that there exists a complete chain of circumstantial evidence of conclusive nature against the appellant. For all these reasons, we are of view that the appellant has been rightly convicted and accordingly, the appeal is devoid of any merit and is dismissed.

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7. Section 307 of IPC

Shyam Sharma vs The State Of Madhya Pradesh

R.K. Agrawal & S. Abdul Nazeer , JJ.

In the Supreme Court of India

Date of Judgment-04.10.2017

Issue

In the matter of convicting under Section 307 of IPC and sentenced to 3 years Rigorous Imprisonment and fine of Rs. 1000/- i.d five months.-Challenged.

The appellant-Shyam Sharma has called in question the legality and correctness of the judgment in Criminal Appeal No.190 of 1999, dated 19th January, 2007 passed by the High Court of Judicature at Madhya Pradesh, Jabalpur Bench at Gwalior Signature Not Verified Digitally signed by MEENAKSHI KOHLI Date: 2017.10.04 15:01:27 IST Reason:

whereby the judgment dated 31.3.1999 passed by the Sessions Judge, Gwalior, in Sessions Trial No. 379/1996 has been affirmed.

The Appellant-Shyam Sharma was convicted by the Sessions Judge, under Section 307 IPC and was sentenced to undergo three years rigorous imprisonment along with a fine of Rs.1,000/- and in the event of default in payment of fine, he was directed to further undergo additional imprisonment of five months.

The contention of Mr. V. Giri, learned senior counsel, appearing for the appellant, is that the independent witnesses Anoop Bhargava (PW-1) and Ramprakash (PW-4) did not support the prosecution case. Manjeet Singh (PW-3) is an interested witness. The appellant is a computer engineer and has no criminal background. At the most, the appellant can be convicted under Section 324 of the IPC. On the other hand, learned counsel appearing for the respondents has supported the judgment of the High Court.

We have carefully considered the submissions of the learned counsel made at the Bar and perused the materials placed on record. As rightly submitted by the learned counsel for theappellant, both Anoop Bhargava (PW-1) and Ramprakash (PW-4) have turned hostile. It was established that Manjeet Singh has sustained gunshot injury. Dr. Vikram Singh Tomar (PW-2), on examination, found two entry wounds over the lateral aspect of left shoulder and interior aspect of upper part of left scapula region of Manjeet Singh. However, firearm injury suffered by Manjeet Singh (PW-3) could not be impeached in their cross-examination. It is also evident that the accused fired at Manjeet Singh without any pre-meditation. The injury suffered by Manjeet Singh was not on the vital part of his body. In our view, the prosecution has failed to prove that accused intended to cause the death of the deceased. Therefore, the appellant can only be convicted under Section 324 of the IPC and not under Section 307 of the IPC. Therefore, the appellant is convicted under Section 324 of the IPC instead of Section 307 of the IPC.

The appellant has already been imprisoned for about four months. Having regard to the facts and circumstances of the case, it is just and proper to reduce the sentence to the period already undergone by the appellant-Shyam Sharma. Ordered accordingly.

The appeal is allowed in the aforesaid terms.

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8. Section 375 Exception 2 of IPC

Independent Thought Vs. Union of India (UOI) and Ors.

Madan B. Lokur and Deepak Gupta, JJ.

In the Supreme Court of India

Date of Judgement -10.10.2017

Issue

In the matter of discrimination regarding age of consent of unmarried girl child vis-a-vis married girl child for consensual sexual intercourse.

Relevant Extract

Madan B. Lokur, J.

The issue before us is limited but one of considerable public importance - whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape? Exception 2 to Section 375 of the Indian Penal Code, 1860 (the Indian Penal Code) answers this in the negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the Indian Penal Code creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil.

We make it clear that we have refrained from making any observation with regard to the marital rape of a woman who is 18 years of age and above since that issue is not before us at all. Therefore we should not be understood to advert to that issue even collaterally.

The writ petition

The Petitioner is a society registered on 6th August, 2009 and has since been working in the area of child rights. The society provides technical and hand-holding support to non-governmental organizations as also to government and multilateral bodies in several States in India. It has also been involved in legal intervention, research and training on issues concerning children and their rights. The society has filed a petition Under Article 32 of the Constitution in public interest with a view to draw attention to the violation of the rights of girls who are married between the ages of 15 and 18 years.

According to the Petitioner, Section 375 of the Indian Penal Code prescribes the age of consent for sexual intercourse as 18 years meaning thereby that any person having sexual intercourse with a girl child below 18 years of age would be statutorily guilty of rape even if the sexual activity was with her consent. Almost every statute in India recognizes that a girl below 18 years of age is a child and it is for this reason that the law penalizes sexual intercourse with a girl who is below 18 years of age. Unfortunately, by virtue of Exception 2 to Section 375 of the Indian Penal Code, if a girl child between 15 and 18 years of age is married, her husband can have non-consensual sexual intercourse with her, without being penalized under the Indian Penal Code, only because she is married to him and for no other reason. The right of such a girl child to bodily integrity and to decline to have sexual intercourse with her husband has been statutorily taken away and non-consensual sexual intercourse with her husband is not an offence under the Indian Penal Code.

Learned Counsel for the Petitioner submitted that absolutely nothing is achieved by entitling the husband of a girl child between 15 and 18 years of age to have non-consensual sexual intercourse with her. It was also submitted that whatever be the (unclear) objective sought to be achieved by this, the marital status of the girl child between 15 and 18 years of age has no rational nexus with that unclear object. Moreover, merely because a girl child between 15 and 18 years of age is married does not result in her ceasing to be a child or being mentally or physically capable of having sexual intercourse or indulging in any other sexual activity and conjugal relations. It was submitted that to this extent Exception 2 to Section 375 of the Indian Penal Code is not only arbitrary but is also discriminatory and

contrary to the beneficial intent of Article 15(3) of the Constitution which enables Parliament to make special provision for women and children. In fact, by enacting Exception 2 to Section 375 of the Indian Penal Code in the statute book, the girl child is placed at a great disadvantage, contrary to the visionary and beneficent philosophy propounded by Article 15(3) of the Constitution.

For the present, the counter affidavit of the Union of India refers to the National Family Health Survey - 3 (of 2005) in which it is stated that 46% of women in India between the ages of 18 and 29 years were married before the age of 18 years. It is also estimated, interestingly but disturbingly, that there are about 23 million child brides in the country. As far as any remedy available to a child bride is concerned, the counter affidavit draws attention to Section 3 of the Prohibition of Child Marriage Act, 2006 (the PCMA). Under Section 3(1) of the PCMA a child marriage is voidable at the option of any contracting party who was a child at the time of the marriage. The marriage can be declared a nullity in terms of the proviso to Section 3(1) of the PCMA through an appropriate petition filed by the child within two years of attaining majority and by approaching an appropriate court of law. It is also stated that in terms of Section 13(2)(iv) of the Hindu Marriage Act, 1955 a child bride can petition for a divorce on the ground that her marriage (whether consummated or not) was solemnized before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining 18 years of age. In other words a child marriage is sought to be somehow 'legitimized' by the Union of India and the onus for having it declared voidable or a nullity is placed on the child bride or the child groom.

An early marriage is explained as involving the marriage of a child, that is, a person below the age of 18 years. It is stated that "Minor girls have not achieved full maturity and capacity to act and lack ability to control their sexuality. When they marry and have children, their health can be adversely affected, their education impeded and economic autonomy restricted. Early marriage also increases the risk of HIV infection." Among the under-documented forms of violence against women are included traditional harmful practices, prenatal sex selection, early marriage, acid throwing and dowry or "honour" related violence etc.[3]

As a first step in this direction, child marriages were criminalized by enacting the PCMA in 2006 but no corresponding amendment was made in Section 375 of the Indian Penal Code, as it existed in 2006, to decriminalize marital rape of a girl child.

Section 375 of the Indian Penal Code defines 'rape'. This Section was inserted in the Indian Penal Code in its present form by an amendment carried out on 3rd February, 2013 and it provides that a man is said to commit rape if, broadly speaking, he has sexual intercourse with a woman under circumstances falling under any of the seven descriptions mentioned in the section. (A woman is defined Under Section 10 of the Indian Penal Code as a female human being of any age). Among the seven descriptions is sexual intercourse against the will or without the consent of the woman; Clause 'Sixthly' of Section 375 makes it clear that if the woman is under 18 years of age, then sexual intercourse with her-with or without her consent-is rape. This is commonly referred to as 'statutory rape' in which the willingness or consent of a woman below the age of 18 years for having sexual intercourse is rendered irrelevant and inconsequential.

However, Exception 2 to Section 375 of the Indian Penal Code provides that it is not rape if a man has sexual intercourse with a girl above 15 years of age and if that girl is his wife. In other words, a husband can have sexual intercourse with his wife provided she is not below 15 years of age and this is not rape under the Indian Penal Code regardless of her willingness or her consent.

However, sexual intercourse with a girl under 15 years of age is rape, whether it is with or without her consent, against her will or not, whether it is by her husband or anybody else. This is clear from a reading of Section 375 of the Indian Penal Code including Exception 2.

Therefore, Section 375 of the Indian Penal Code provides for three circumstances relating to 'rape'. Firstly sexual intercourse with a girl below 18 years of age is rape (statutory rape). Secondly and by way of an exception, if a woman is between 15 and 18 years of age then sexual intercourse with her is not rape if the person having sexual intercourse

with her is her husband. Her willingness or consent is irrelevant under this circumstance. Thirdly sexual intercourse with a woman above 18 years of age is rape if it is under any of the seven descriptions given in Section 375 of the Indian Penal Code (non-consensual sexual intercourse).

The result of the above three situations is that the husband of a girl child between 15 and 18 years of age has blanket liberty and freedom to have non-consensual sexual intercourse with his wife and he would not be punishable for rape under the Indian Penal Code since such non-consensual sexual intercourse is not rape for the purposes of Section 375 of the Indian Penal Code. Very strangely, and as pointed out by Sakshi before the LCI, the husband of a girl child does not have the liberty and freedom under the Indian Penal Code to commit a lesser 'sexual' act with his wife, as for example, if the husband of a girl child assaults her with the intention of outraging her modesty, he would be punishable under the provisions of Section 354 of the Indian Penal Code. In other words, the Indian Penal Code permits a man to have non-consensual sexual intercourse with his wife if she is between 15 and 18 years of age but not to molest her. This view is surprisingly endorsed by the LCI in its 172nd report adverted to above.
Protection of Human Rights Act, 1993

Section 3 of the POCSO Act defines "penetrative sexual assault". Clause (n) of Section 5 provides that if a person commits penetrative sexual assault with a child, then that person actually commits aggravated penetrative sexual assault if that person is related to the child, inter alia, through marriage. Therefore, if the husband of a girl child commits penetrative sexual assault on his wife, he actually commits aggravated penetrative sexual assault as defined in Section 5(n) of the POCSO Act which is punishable Under Section 6 of the POCSO Act by a term of rigorous imprisonment of not less than ten years and which may extend to imprisonment for life and fine.

The duality therefore is that having sexual intercourse with a girl child between 15 and 18 years of age, the husband of the girl child is said to have not committed rape as defined in Section 375 of the Indian Penal Code but is said to have committed aggravated penetrative sexual assault in terms of Section 5(n) of the POCSO Act.

There is no real or material difference between the definition of rape in the terms of Section 375 of the Indian Penal Code and penetrative sexual assault in the terms of Section 3 of the POCSO Act.[6] The only difference is that the definition of rape is somewhat more elaborate and has two exceptions but the sum and substance of the two definitions is more or less the same and the punishment (Under Section 376(1) of the Indian Penal Code) for being found guilty of committing the offence of rape is the same as for penetrative sexual assault (Under Section 4 of the POCSO Act). Similarly, the punishment for 'aggravated' rape Under Section 376(2) of the Indian Penal Code is the same as for aggravated penetrative sexual assault Under Section 6 of the POCSO Act. Consequently, it is immaterial if a person is guilty of the same sexual activity under the provisions of the POCSO Act or the provisions of the Indian Penal Code - the end result is the same and only the forum of trial changes. In a violation of the provisions of the POCSO Act, a Special Court constituted Under Section 28 of the said Act would be the Trial Court but the ordinary criminal court would be the Trial Court for an offence under the Indian Penal Code.

At this stage it is necessary to refer to Section 42-A inserted in the POCSO Act by an amendment made on 3rd February, 2013. This Section reads:

-A. Act not in derogation of any other law.-The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

The consequence of this amendment is that the provisions of the POCSO Act will override the provisions of any other law (including the Indian Penal Code) to the extent of any inconsistency.

One of the questions that arises for our consideration is whether there is any incongruity between Exception 2 to Section 375 of the Indian Penal Code and Section 5(n) of the POCSO Act and which provision overrides the other. To decide this, it would be necessary to keep Section 42-A of the POCSO Act in mind as well as Sections 5 and 41 of the Indian Penal Code which read:

5. Certain laws not to be affected by this Act.-Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of

officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law.

"Special law".-A "special law" is a law applicable to a particular subject.

These two provisions are of considerable importance in resolving the controversy and conflict presented before us.

Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act)

The Juvenile Justice (Care and Protection of Children) Act, 2015 (the JJ Act) is also relatable to Article 15(3) of the Constitution. Section 2(12) of the JJ Act defines a child as a person who has not completed 18 years of age. A child in need of care and protection is defined in Section 2(14) of the JJ Act, inter alia, as a child "who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage". Clearly a girl child below 18 years of age and who is sought to be married is a child in need of care and protection. She is therefore, required to be produced before a Child Welfare Committee constituted Under Section 27 of the JJ Act so that she could be cared for, protected and appropriately rehabilitated or restored to society.

Brief summary of the existing legislations

It is obvious from a brief survey of the various statutes referred to above that a child is a person below 18 years of age who is entitled to the protection of her human rights including the right to live with dignity; if she is unfortunately married while a child, she is protected from domestic violence, both physical and mental, as well as from physical and sexual abuse; if she is unfortunately married while a child, her marriage is in violation of the law and therefore an offence and such a marriage is voidable at her instance and the person marrying her is committing a punishable offence; the husband of the girl child would be committing aggravated penetrative sexual assault when he has sexual intercourse with her and is thereby committing a punishable offence under the POCSO Act. The only jarring note in this scheme of the pro-child legislations is to be found in Exception 2 to Section 375 of the Indian Penal Code which provides that sexual intercourse with a girl child between 15 and 18 years of age is not rape if the sexual intercourse is between the girl child and her husband. Therefore, the question of punishing the husband simply does not arise. A girl child placed in such circumstances is a child in need of care and

protection and needs to be cared for, protected and appropriately rehabilitated or restored to society. All these 'child-friendly statutes' are essential for the well-being of the girl child (whether married or not) and are protected by Article 15(3) of the Constitution. These child-friendly statutes also link child marriages and sexual intercourse with a girl child and draw attention to the adverse consequences of both.

While we are not concerned with the general question of marital rape of an adult woman but only with marital rape of a girl child between 15 and 18 years of age in the context of Exception 2 to Section 375 of the Indian Penal Code, it is worth noting the view expressed by the Committee on Amendments to Criminal Law chaired by Justice J.S. Verma (Retired). In paragraphs 72, 73 and 74 of the Report it was stated that the out-dated notion that a wife is no more than a subservient chattel of her husband has since been given up in the United Kingdom. Reference was also made to a decision of the European Commission of Human Rights which endorsed the conclusion that "a rapist remains a rapist regardless of his relationship with the victim."

Assuming some objective is sought to be achieved by the artificial distinction, the further question is: what is the rational nexus between decriminalizing sexual intercourse under the Indian Penal Code with a married girl child and an unclear and uncertain statutory objective? There is no intelligible answer to this question particularly since sexual intercourse with a married girl child is a criminal offence of aggravated penetrative sexual assault under the POCSO Act. Therefore, while the husband of a married girl child might not have committed rape for the purposes of the Indian Penal Code but he would nevertheless have committed aggravated penetrative sexual assault for the purposes of the POCSO Act. The punishment for rape (assuming it is committed) and the punishment for penetrative sexual assault is the same, namely imprisonment for a minimum period of 7 years which may extend to imprisonment for life. Similarly, for an 'aggravated' form of rape the punishment is for a minimum period of 10 years imprisonment which may extend to imprisonment for life (under the Indian Penal Code) and the punishment for aggravated penetrative sexual assault (which is what is applicable in the case of a married girl child) is the same (under the POCSO Act). In other words, the artificial distinction merely takes the husband of

the girl child out of the clutches of the Indian Penal Code while retaining him within the clutches of the POCSO Act. We are unable to understand why this is so and no valid justification or explanation is forthcoming from the Union of India.

On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (i) To let the incongruity remain as it is-this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 of the Indian Penal Code-in the present case this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years-this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 of the Indian Penal Code-this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 of the Indian Penal Code in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonize the system of laws relating to children and require Exception 2 to Section 375 of the Indian Penal Code to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of our Constitution can be preserved and protected and perhaps given impetus.

We make it clear that we have not at all dealt with the larger issue of marital rape of adult women since that issue was not raised before us by the Petitioner or the intervener.

We express our gratitude to Mr. Gaurav Agrawal, Advocate and Ms. Jayna Kothari, Advocate for the effort that they have put in and the able assistance that they have given us for the purpose of deciding this case.

Deepak Gupta, J.

I have gone through the extremely erudite and well written judgment of my learned brother Lokur, J.. I fully agree with both the reasoning given by him and the conclusions arrived at. However, I am expressing my own views in this separate concurring judgment wherein I have given some other reasons while reaching the same conclusion.

The issue is whether a girl below 18 years who is otherwise unable to give consent can be presumed to have consented to have sex with her husband for all times to come and whether such presumption in the case of a girl child is unconscionable and violative of Articles 14, 16 and 21 of the Constitution of India.

Section 3 of the Majority Act, 1875 provides that a person shall attain the age of majority on completing the age of 18 years and not before. It would, however, be pertinent to mention that Section 2 of the Indian Majority Act contains a non-obstante Clause excluding laws relating to marriage, divorce, dower and adoption from the provisions of that Act. Under Section 4(i) of the Guardians and Wards Act, 1890 a minor has been defined to mean a person, who has not attained majority under the Majority Act. Under Section 4(a) of the Hindu Minority and Guardianship Act, 1956 a minor has been defined to mean a person who has not completed the age of 18 years. Under the Representation of the People Act, 1951 a person is entitled to vote only after he attains the age of 18 years.

Under the provisions of the aforesaid Acts a person, who is a minor and not a major, is not entitled to deal with his property. The property of such a minor can be sold or transferred only if such sale or transfer is for the benefit of the minor and after the permission of the court. Section 11 of the Indian Contract Act, 1872 provides that only a person who has attained the age of majority and is of a sound mind is competent to enter into a contract. A contract entered into by a minor is treated to be a void contract. Another important provision to which reference may be made is Section 198(6) of the Code of Criminal Procedure (for short 'the Code'). The same reads as follows:

Prosecution for offences against marriage:

xxx xxx xxx

(6) No Court shall take cognizance of an offence Under Section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual

inter-course by a man with his own wife, the wife being under eighteen years of age, if more than one year has elapsed from the date of the commission of the offence.

The age "eighteen" was substituted for "fifteen" by Act 5 of 2009 w.e.f. 31.12.2009. A perusal of the aforesaid provision also makes it clear that a complaint with regard to commission of offence Under Section 375 Indian Penal Code punishable Under Section 376 Indian Penal Code can be taken cognizance of by a court within one year of the commission of the offence even where "the wife" is below 18 years of age. It is, therefore, apparent that while amending Section 198 of the Code, the legislature was visualising that there can be marital rape with a "wife" aged less than 18 years but was prescribing a limitation of one year, for taking cognizance of such an offence. However, no consequential amendment was made to Exception 2 of Section 375 Indian Penal Code.

It is a well settled principle of law that when the constitutional validity of the law enacted by the legislature is under challenge and there is no challenge to the legislative competence, the Court will always raise a presumption of the constitutionality of the legislation. The courts are reluctant to strike down laws as unconstitutional unless it is shown that the law clearly violates the constitutional provisions or the fundamental rights of the citizens. The Courts must show due deference to the legislative process.

I am conscious of the self imposed limitations laid down by this Court while deciding the issue whether a law is constitutional or not. However, if the law is discriminatory, arbitrary or violative of the fundamental rights or is beyond the legislative competence of the legislature then the Court is duty bound to invalidate such a law.

I am not impressed with the arguments raised by the Union of India. Merely because something is going on for a long time is no ground to legitimise and legalise an activity which is per se illegal and a criminal offence. No doubt, it is totally within the realm of Parliament to decide what should be the age of consent under Clause Sixthly of Section 375 Indian Penal Code. It is also within the domain of the Parliament to decide what should be the minimum age of marriage. The Parliament has decided in both the enactments that a girl below 18 years is not capable of giving consent to have sex and legally she cannot marry. Parliament has also, in no uncertain terms, prohibited child marriage and come to the conclusion that

child marriage is an activity which must come to an end. If that be so, can the practice of child marriage which is admittedly "an evil", and is also a criminal offence be set up as an exception in a case of a girl child, who is subjected to sexual intercourse by her so called husband. Shockingly, even if this sexual intercourse is forcible and without the consent of the girl child, then also the husband is not liable for any offence. This law is definitely not right, just and fair and is, therefore, arbitrary.

Since this Court has not dealt with the wider issue of "marital rape", Exception 2 to Section 375 Indian Penal Code should be read down to bring it within the four corners of law and make it consistent with the Constitution of India.

In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 Indian Penal Code in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:-

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India;

(ii) it is discriminatory and violative of Article 14 of the Constitution of India and;

(iii) it is inconsistent with the provisions of POCSO, which must prevail.

Therefore, Exception 2 to Section 375 Indian Penal Code is read down as follows:

Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape. It is, however, made clear that this judgment will have prospective effect.

It is also clarified that Section 198(6) of the Code will apply to cases of rape of "wives" below 18 years, and cognizance can be taken only in accordance with the provisions of Section 198(6) of the Code.

At the cost of repetition, it is reiterated that nothing said in this judgment shall be taken to be an observation one way or the other with regard to the issue of "marital rape".

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9. Section 408 of IPC &
Sections 3 & 7 of the Essential Commodities Act ,1955.
Santosh S/o. Dwarkadas Fafat Vs. State of Maharashtra.
Kurian Joseph & R. Banumathi ,JJ.
In the Supreme Court of India
Date of Judgment -10.10.2017.
Issue
In the matter of re arrest of accused for custodial interrogation –Challenged.

Leave granted. The appellant is one of the accused in Crime No. 63 of 2016 registered at Goregaon Police Station, Goregaon, Maharashtra for offences under Section 408 of the Indian Penal Code, 1860 read with Sections 3 and 7 of the Essential Commodities Act, 1955. The allegation is that he received misappropriated food-grains meant for public distribution. In the order dated 07.10.2016, the Additional Sessions Judge, Gondia rejected the application for anticipatory bail. The High Court of Judicature at Bombay, Nagpur Bench, as per order dated 24.10.2016 was also of the same view, although the same court had initially granted interim protection. Thus aggrieved, the appellant is 1 REPORTABLE before this Court.

On 07.11.2016, this Court passed the following Order: "Learned counsel for the petitioner seeks an adjournment, so as to enable him to obtain instructions, whether or not the petitioner is ready and willing to deposit the total amount of Rs.45,08,469/- for the misappropriated grains, referred to in the first information report. At request, and in the interest of justice, post for hearing on 11.11.2016. Instructions be obtained, in the meantime."

The amount was deposited. Accordingly, the Court granted interim protection by order dated 18.11.2016 staying the arrest. On the submission made by the learned Counsel appearing for the State that the appellant was not cooperating with the investigation, this Court on 24.08.2017, passed the following Order: "Learned counsel appearing for the respondent/State submits that in view of the order dated 18.11.2016 there is no cooperation on the part of the petitioner.

Therefore, the order dated 18.11.2016 regarding the stay of arrest of the petitioner is modified to the effect that the Investigating Officer is free to arrest the petitioner. However, after arrest he shall be released on bail on execution of a personal bond to the tune of Rs.2,00,000/- (Rupees Two Lacs) with two solvent sureties for the like amount.

The petitioner is directed to cooperate with the investigation by responding to the call and attending the place wherever and whenever required by the Investigating Officer. The respondent/State is directed to file a status 2 report with regard to the cooperation extended by the petitioner within two weeks. Post on 12.09.2017."

The Investigating Officer (hereinafter referred to as "the IO") has accordingly filed a Status Report dated 11.09.2017, which reads as follows:
"xxx xxx xxx

1. Pursuant to the order dated 24.08.2017, the Petitioner was arrested and released on bail after completing necessary formalities.

2. Thereafter, the petitioner has been called daily to the Police Station by me towards investigation. Upon inquiry, the petitioner did not answer the questions properly. The petitioner reiterated that he has not purchased the food grains. Thereafter, I made Gulam Sarver Fharukh Khan i.e. the accused No. 1 to sit in from of the petitioner and asked him certain questions. The accused No.1 Gulam was the godown keeper. Gulam specifically submitted that he knows the petitioner very well. Gulam further submitted that he has nothing to say than the statement recorded during the police custody in remand. In his statement, Gulam had given the modus operandi of the petitioner which has been mentioned in detail in the Counter Affidavit.

3. Since there is no cooperation by the petitioner, the petitioner is not entitled for the relief of anticipatory bail. For proper completion of investigation the custody of the petitioner is very much necessary. .."

We are informed that the co-accused have been released on bail.

It appears, the IO was of the view that the custody of the appellant is required for recording his confessional statement in terms of what the co-accused had already stated in the Statement under Section 161 of the Code

of Criminal Procedure, 1973. The IO was of the opinion that the appellant was not cooperating because he kept reiterating that he had not purchased the food-grains. The purpose of custodial interrogation is not just for the purpose of confession.

The right against self-incrimination is provided for in Article 20(3) of the Constitution. It is a well settled position in view of the Constitution Bench decision in Selvi and others v. State of Karnataka 1, that Article 20(3) enjoys an "exalted status".

This provision is an essential safeguard in criminal procedure and is also meant to be a vital safeguard against torture and other coercive methods used by investigating authorities. Therefore, merely because the appellant did not confess, it cannot be said that the appellant was not cooperating with the investigation. However, in case, there is no cooperation on the part of the appellant for the completion of the investigation, it will certainly be open to the respondent to seek for cancellation of bail.

Having regard to the peculiar facts and circumstances of the case, we are of the view that the liberty as above should be left 1 (2010) 7 SCC 263 4 to the jurisdictional Sessions Court, i.e., Sessions Court, Gondia.

In case there is no cooperation on the part of the appellant for the completion of the investigation, it will be open to the respondent to approach the Sessions Court, Gondia, Maharashtra in which case the Sessions Court having regard to the materials already collected by the IO, if so satisfied that the custodial interrogation of the appellant is still required for completion of the investigation, will be free to pass appropriate orders.

The appeal is disposed of as above.

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10. Section 16 (c) of Specific Relief Act

Nadiminti Suryanarayan Murthy (D) through LRS. Vs. Kothurthi Krishna Bhaskara Rao & Ors.

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

In the Supreme Court of India

Date o0f Judgement -09.10.2017

Issue

In the matter of execution of a deed of sale pursuant to an agreement of sale and alienation of suit land in favour of a third party.

Relevant Extract

This appeal is filed by original defendant No.6 against the final judgment and order dated 11.07.2003 passed by the High Court of Judicature of Andhra Pradesh at Hyderabad in L.P.A. No. 121 of 1998 whereby the High Court set aside the judgment and order dated 02.02.1996 in Appeal No. 2061 of 1989 and upheld the judgment and decree 1 dated 13.09.1989 passed by the subordinate Judge, Amalapuram in O.S. No.50 of 1983 thereby decreeing the plaintiff's (respondent No.1 herein) suit against defendant No.6 (original appellant herein) for specific performance of agreement in relation to the suit house.

In order to appreciate the controversy raised in the appeal, it is necessary to state the relevant facts hereinbelow.

Nadiminti Suryanarayan Murthy-the original appellant herein (since dead and represented now by the present appellants as his legal representatives) was defendant No.6 whereas respondent No.1 herein is the plaintiff and original respondent No.2 (defendant No.1), since dead and represented through legal heirs (defendant Nos.2-3) whereas Respondent Nos.3-4 are defendant Nos. 4 and 5 in the suit out of which this appeal arises.

One Surya Narayana was the owner of a house situated in village Amalapuram in Andhra Pradesh (described in detail in schedule appended to the plaint - hereinafter referred to as "suit house"). He died in 1980 leaving behind his wife (defendant No.1) and daughters (defendant Nos. 2 and 3) and grand children (defendant Nos. 4 and 5). He left a will in favour

of his wife giving her life interest. She, therefore, got the suit house. These defendants claiming to be the co-owners of the suit house then let out the suit house to defendant No. 6 in 1981 on monthly rent of Rs.150/-.

On 18.01.1983, defendant Nos. 1 to 5 entered into an agreement with the plaintiff (respondent No.1) for sale of the suit house in favour of the plaintiff for a sum of Rs.46,000/-. The plaintiff accordingly paid Rs.1000/- as advance money to defendant Nos. 1 to 5 and the balance amount was 3 to be paid by the plaintiff to defendant Nos. 1 to 5 at the time of the registration of the sale deed, which was to be executed within six months. The plaintiff (respondent No. 1) accordingly arranged for the balance money. However, defendant Nos. 1 to 5, on the other hand, went on promising the plaintiff to execute the sale deed in his favour as agreed upon between them as per agreement dated 18.01.1983 and on the other hand, defendant Nos. 1 to 5, instead of executing a sale deed in favour of the plaintiff, executed the sale deed on 09.02.1983 in favour of defendant No. 6 for Rs.45000/-.

This gave rise to filing of the civil suit by the plaintiff (respondent No. 1) on 14.07.1983 against all the six defendants in the Court of Subordinate Judge, Amalapuram out of which this appeal arises. The suit was for specific performance of agreement dated 18.01.1983 and in alternate for refund of consideration paid by the plaintiff and also for the damages sustained by the plaintiff.

The plaintiff inter alia averred that he was and has always been ready and willing to perform his part of the agreement and, in fact, performed his part by paying advance amount of Rs.1000/- in terms of the agreement to defendant Nos. 1 to 5 and was/is always ready and willing to pay the balance consideration at the time of registration of sale deed. It was averred that even before expiry of six months' period, which was to expire in July 1983, defendant Nos. 1 to 5 sold the suit house to defendant No. 6 on 09.02.1983 itself and thus committed breach of agreement dated 18.01.1983 by not performing their part of the agreement by executing the sale deed in plaintiff's favour and hence the suit to seek specific performance of agreement dated 18.01.1983 for execution of the 5 sale

deed in relation to the suit house and, in alternative, for refund of money paid to defendant Nos. 1 to 5 and for damages for the loss suffered.

Defendant Nos. 1 to 5 filed their common written statement whereas defendant No. 6 filed his written statement. So far as defendant Nos. 1 to 5 are concerned, they came out with a case that they had first entered into an agreement on 04.01.1983 with defendant No. 6 to sell the suit house for Rs.45,000/-. However, the plaintiff, on coming to know of the transaction, approached defendant Nos. 1 to 5 and requested them to sell the suit house to him and said that he will persuade defendant No. 6 to withdraw from the deal and instead allow him to purchase the suit house.

It was averred that the plaintiff further assured to defendant Nos. 1 to 5 that in case, if for any reason, he fails to persuade defendant No. 6 to withdraw from the transaction then he will back out to which defendant Nos. 1 to 5 agreed and accordingly entered into an agreement with the plaintiff on 18.01.1983. Defendants (1 to 5) then averred the background as to why they agreed to sell the suit house to defendant No. 6. According to them, Late Surayanarayna had borrowed some money (Rs.1400/- and Rs.1200/-) during his lifetime from one creditor (Smt. M. Venkatalakshmi) but before he could repay the loan, he died.

The creditor, therefore, went on pressing defendant Nos. 1 to 5 for its repayment and it is with this background defendant Nos. 1 to 5 entered into the sale agreement with defendant No. 6 on 04.01.1983 for sale of suit house to defendant No. 6. The defendants also gave some more details to justify the prior agreement with defendant No. 6.

So far as defendant No. 6 is concerned, while denying the plaintiff's claim more or less reiterated 7 the stand taken by defendant Nos. 1 to 5. He defended the sale in his favour being made for valid consideration with bona fide intention. He also alleged that his agreement being prior in point of time to the plaintiff's agreement, the same was legal and valid.

Parties adduced evidence. The Trial Court, by judgment dated 13.09.1989, decreed the plaintiff's suit. The Trial Court held that the agreement dated 04.01.1983 with defendant No. 6 for sale of suit house was not genuine and bona fide agreement. It was also held that the sale

deed dated 09.02.1983 executed pursuant to such agreement was not a genuine sale deed and no consideration was passed between defendant Nos. 1 to 5 and defendant No. 6 for sale and purchase of the suit house.

It was further held that the agreement dated 18.01.1983 between the plaintiff and defendant Nos. 1 to 5 was a genuine agreement which was also acted upon pursuant to which defendant Nos. 1 to 5 had received part payment from the plaintiff. It was then held that the plaintiff was willing to perform his part of the agreement but it were the defendant Nos. 1 to 5, who committed the breach.

The Trial Court, with these findings, decreed the suit against the defendants and passed the decree for specific performance in relation to the suit house directing the defendants to execute the sale deed in plaintiff's favour on accepting Rs.45,000/- from the plaintiff.

Felt aggrieved, defendant No. 6 filed first appeal before the High Court. The learned Single Judge allowed defendant No. 6's appeal and set aside the judgment/decree of the Trial Court and, in consequence, dismissed the plaintiff's suit. Felt aggrieved, the plaintiff filed letters patent appeal before the Division Bench of the High Court. By 9 impugned order, the Division Bench allowed the plaintiff's appeal and while setting aside of the judgment of the Single Judge restored that of the Trial Court. As a result, the plaintiff's suit stood decreed against the defendants in relation to the suit house, which directed performance of the agreement dated 18.01.1983 in plaintiff's favour. Felt aggrieved, defendant No. 6 has filed the present appeal by way of special leave before this Court.

Heard Ms. Manjeet Kirpal, learned counsel for the appellant and Mr. Sri Harsha Peechara, learned counsel for the respondents.

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

The main question involved in this case is which agreement is bona fide and genuine - the one dated 04.01.1983 between defendant Nos. 1 to 5 10 and defendant No. 6 or the other dated 18.01.1983 between defendant Nos. 1 to 5 and the plaintiff? The other question is whether the plaintiff was ready and willing to perform his part of the agreement dated 18.01.1983 and secondly, whether he was able to prove the breach committed by

defendant Nos. 1 to 5 in not performing their part of the agreement? This question would arise only if the agreement dated 18.01.1983 is held bona fide and genuine and the other dated 04.01.1983 is held bogus.

In our opinion, the Trial Court and Division Bench were right in holding that the agreement dated 18.01.1983 was a genuine and bona fide agreement with defendant Nos. 1 to 5 whereas the agreement dated 04.01.1983 set up by defendant Nos. 1 to 6 claiming to be prior in point of time as against the plaintiff's agreement a bogus agreement 11 brought into existence only to somehow avoid execution of the agreement dated 18.01.1983 of the plaintiff.

In our view, the reasoning and the conclusion arrived at by the Division Bench is proper and reasonable. It is based on proper appreciation of evidence and hence does not call for any interference in our appellate jurisdiction. This we say for the following reasons.

On perusal of the pleadings and the evidence, it is also evident to us that defendant Nos. 1 to 5, in clear terms, admitted the execution of the agreement with the plaintiff which they had entered into on 18.01.1983. They further admitted its part performance when they accepted advance money from the plaintiff. In the light of these material facts, if they had already entered into an agreement on 04.01.1983 with defendant No. 6 then where was any occasion for them to have entered into another agreement thereafter much less on 18.01.1983 to sell the same property to the plaintiff.

Indeed, in such circumstances, they should have simply expressed their inability to sell the suit house to the plaintiff telling him about their prior agreement with defendant No. 6. In other words, in such situation, they could have simply informed the plaintiff that he was late in approaching them and it is not possible for them to sell the suit house to him. They, however, did not do so.

The conduct of defendant Nos. 1 to 5 and 6 was, in our opinion, clear. They somehow wanted to avoid execution of the plaintiff's agreement and wanted to sell the suit house to defendant No.6. This they could achieve only by creating an agreement which was prior to that of the plaintiff's agreement.

Both the Courts, on appreciating the evidence, therefore, rightly concluded that the agreement dated 04.01.1983 between defendant Nos. 1

to 5 and defendant No. 6 was a bogus agreement and was created to scuttle the execution of plaintiff's agreement dated 18.01.1983. It was rightly held that they even got the sale deed executed on 09.02.1983 before the expiry of six months' period to avoid performance of plaintiff's agreement dated 18.01.1983.

Once we affirm the findings of the Courts below (Trial Court and Division Bench) that the agreement dated 18.01.1983 was a bona fide agreement whereas the agreement dated 04.01.1983 was a bogus agreement, the next question arises for consideration is whether the plaintiff has proved the necessary ingredients of Section 16 (C) of the Specific Reliefs Act so as to enable him to claim 14 specific performance of his agreement. In other words, the next question is whether the plaintiff was able to prove that he was ready and willing to perform his part of the agreement and that he has always been ready and willing to perform his part of the agreement and has, in fact, performed his part and secondly, whether defendant Nos. 1 to 5 committed the breach in not performing their part and, if so, its effect?

On going through the record, we are inclined to concur with the findings of the two courts (Trial Court and Division Bench) on these issues as, in our opinion, both the Courts below were right in recording the findings in plaintiff's favour for the following reasons.

It is not in dispute that the plaintiff did perform his part when he paid advance money of Rs.1000/- to defendant Nos. 1 to 5 in terms of the 15 agreement dated 18.01.1983. It is also not in dispute that the sale deed was to be executed within 6 months, i.e., up to July 1983. It is also not in dispute that defendant Nos. 1 to 5 executed the sale deed in favour of defendant No. 6 on 09.02.1983. So the breach on the part of defendant Nos. 1 to 5 was apparent inasmuch as nothing more was required to be proved by the plaintiff once these facts became undisputed. In spite of that, the plaintiff sent a notice (Ex-A-2) calling upon defendant Nos. 1 to 5 to execute the sale deed in his favour but it was not adhered to by the defendants.

23. In our considered opinion, the story set up by both the sets of defendants in their respective written statements, as to in what circumstances, the agreement dated 04.01.1983 came to be executed between defendant Nos. 1 to 5 and defendant No. 6 was wholly unrealistic, irrelevant 16 and cooked up one. The two Courts below (Trial Court and

Division Bench), therefore, rightly disbelieved it and we fully concur with their reasoning.

Indeed, if the main intention of defendant Nos. 1 to 5 was to sell the suit house and to liquidate the debts of the family and we accept their story to that extent for the sake of argument, yet, in our view, the said purpose could have been achieved by the defendants by sale of suit house to the plaintiff also. The sale consideration agreed with the plaintiff was rather more (Rs.46,000/-) as against defendant No. 6, who purchased it for Rs. 45,000/-. In other words, if the intention of defendant Nos. 1 to 5 was to liquidate the debt by sale of suit house then such purpose could be achieved by selling the suit house to the plaintiff as well and there was no special reason to sell it only to defendant No. 6. It was 17 rather clear that he was keen to purchase the suit house at any cost because being a tenant of the suit house, he was in its occupation.

So far as the other story that how and why Late Surya Narayana took loan and from whom he took etc. was of no relevance for deciding the question of specific performance between the parties for the simple reason that it was an internal matter of defendant Nos.1-5, Surya Narayana and his creditor. Both the Courts below (Trial Court and Division Bench), therefore, rightly rejected this part of story pleaded by the defendants as being wholly irrelevant.

In the light of foregoing discussion, we are of the considered opinion that both the Courts below were right in decreeing the plaintiff's suit for specific performance of the agreement dated 18.01.1983 against the defendants and we uphold this finding.

In the light of foregoing discussion and subject to modification as directed above, the appeal is accordingly finally disposed of.

Let the compliance of this judgment including execution of decree of the Trial Court be made by the parties within three months from the date of receipt of this judgment.

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11. Sections 138 & 147 of Negotiable Instruments Act, read with Sections 258 and 357 (3) of Cr.P.C.

M/S Meters And Instruments Private Limited and Ors. vs Kanchan Mehta

Adarsh Kumar Goel & Uday Umesh Lalit ,JJ.

In the Supreme Court of India

Date of Judgment -05.10.2017

Issue

In the matter of regulation of proceeding for an offence under Section 138 of NI Act when the accused is willing to deposit the cheque amount and the compliant is not willing to accept the same .

Relevant Extract

Leave granted. These appeals have been preferred against the order dated 21st April, 2017 of the High Court of Punjab and Signature Not Verified Haryana at Chandigarh in CRLM Nos.13631, 13628 and 13630 of Digitally signed by MADHU BALA Date: 2017.10.06 05:24:42 IST Reason: 2017. The High Court rejected the prayer of the appellants for compounding the offence under Section 138 of the Negotiable Instruments Act, 1881 (the Act) on payment of the cheque amount and in the alternative for exemption from personal appearance.

When the matters came up for hearing before this Court earlier, notice was issued to consider the question "as to how proceedings for an offence under Section 138 of the Act can be regulated where the accused is willing to deposit the cheque amount. Whether in such a case, the proceedings can be closed or exemption granted from personal appearance or any other order can be passed."

Few Facts: The Respondent Kanchan Mehta filed complaint dated 15th July, 2016 alleging that the appellants were to pay a monthly amount to her under an agreement. Cheque dated 31 st March, 2016 was given for Rs.29,319/- in discharge of legal liability but the same was returned unpaid for want of sufficient funds. In spite of service of legal notice, the amount having not been paid, the appellants committed the offence under Section 138 of the Act. The Magistrate vide order dated 24th August, 2016, after considering the complaint and the preliminary evidence, summoned the appellants. The Magistrate in the order dated 9 th November, 2016

observed that the case could not be tried summarily as sentence of more than one year may have to be passed and be tried as summons case. Notice of accusation dated 9th November, 2016 was served under Section 251 Cr.P.C.

Appellant No.2, who is the Director of appellant No.1, made a statement that he was ready to make the payment of the cheque amount. However, the complainant declined to accept the demand draft. The case was adjourned for evidence. The appellants filed an application under Section 147 of the Act on 12 th January, 2017 relying upon the judgment of this Court in Damodar S. Prabhu versus Sayed Babalal H.(2010) 5 SCC 663The application was dismissed in view of the judgment of this Court in JIK Industries Ltd. versus Amarlal versus Jumani, (2012) 3 SCC 255 which required consent of the complainant for compounding. The High Court did not find any ground to interfere with the order of the Magistrate. Facts of other two cases are identical. Hence these appeals.

We have heard learned counsel for the parties and learned amicus who has been duly and ably assisted by S/Shri Rishi Malhotra, Ravi Raghunath, Dhananjay Ray and Sidhant Buxy, advocates. We proceed to consider the question.

The object of introducing Section 138 and other provisions of Chapter XVII in the Act in the year 1988 3 was to enhance the acceptability of cheques in the settlement of liabilities. The drawer of cheque is made liable to prosecution on dishonour of cheque with safeguards to prevent harassment of honest drawers. The Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to amend the Act was brought in, inter-alia, to simplify the procedure to deal with such matters. The amendment includes provision for service of summons by Speed Post/Courier, summary trial and making the offence compoundable.

This Court has noted that the object of the statute was to facilitate smooth functioning of business transactions. The provision is necessary as in many transactions cheques were issued merely as a device to defraud the creditors. Dishonour of cheque causes incalculable loss, injury and inconvenience to the 3 Vide the Banking, Public Financial Institutions

and Negotiable Instruments Laws (Amendment) Act, 1988 payee and credibility of business transactions suffers a setback 4. At the same time, it was also noted that nature of offence under Section 138 primarily related to a civil wrong and the 2002 amendment specifically made it compoundable 5. The offence was also described as 'regulatory offence'. The burden of proof was on the accused in view of presumption under Section 139 and the standard of proof was of "preponderance of probabilities" 6 . The object of the provision was described as both punitive as well as compensatory. The intention of the provision was to ensure that the complainant received the amount of cheque by way of compensation. Though proceedings under Section 138 could not be treated as civil suits for recovery, the scheme of the provision, providing for punishment with imprisonment or with fine which could extend to twice the amount of the cheque or to the both, made the intention of law clear. The complainant could be given not only the cheque amount but double the amount so as to cover interest and costs. Section 357(1)(b) of the Cr. P.C. provides for payment of compensation for the loss caused by the offence out of the fine7. Where fine is not imposed, compensation can be 4 Goa Plast (P) Ltd. v. Chico Ursula D'Souza (2004) 2 SCC 235 5 Vinay Devanna Nayak v. Ryot Sewa Sahakari Bank Ltd.(2008) 2 SCC 305 6 Rangappa v. Sri Mohan (2010) 11 SCC 7 R. Vijayan v. Baby (2012) 1 SCC 260 awarded under Section 357(3) Cr.P.C. to the person who suffered loss. Sentence in default can also be imposed. The object of the provision is not merely penal but to make the accused honour the negotiable instruments.

In view of the above scheme, this Court held that the accused could make an application for compounding at the first or second hearing in which case the Court ought to allow the same. If such application is made later, the accused was required to pay higher amount towards cost etc9. This Court has also laid down that even if the payment of the cheque amount, in terms of proviso (b) to Section 138 of the Act was not made, the Court could permit such payment being made immediately after receiving notice/summons of the court10. The guidelines in Damodar (Supra) have been held to be flexible as may be necessary in a given situation 11. Since the concept of compounding involves consent of the complainant, this Court held that compounding could not be permitted merely by unilateral payment, without the consent of both the parties.12 8 Lafarge Aggregates &

Concrete India (P) Ltd. v. Sukarsh Azad (2014) 13 SCC 779 9 Damodar S. Prabhu (supra) 10 (2006) 6 SCC 456, (2007) 6 SCC 555 11 Para 23 in Madhya Pradesh State Legal Services Authority versus Prateek Jain and Anr. (2014) 10 SCC 690 12 Rajneesh Aggarwal v. Amit J. Bhalla (2001) 1 SCC 631

While the object of the provision was to lend credibility to cheque transactions, the effect was that it put enormous burden on the courts' dockets. The Law Commission in its 213 th Report, submitted on 24th November, 2008 noted that out of total pendency of 1.8 crores cases in the country (at that time), 38 lakh cases (about 20% of total pendency) related to Section 138 of the Act. This Court dealt with the issue of interpretation of 2002 amendment which was incorporated for simplified and speedy trials. It was held that the said provision laid down a special code to do away with all stages and processes in regular criminal trial 13. This Court held that once evidence was given on affidavit, the extent and nature of examination of such witness was to be determined by the Court. The object of Section 145(2)was simpler and swifter trial procedure. Only requirement is that the evidence must be admissible and relevant. The affidavit could also prove documents 14. The scheme of Sections 143 to 147 of the Act was a departure from provisions of Cr.P.C. and the Evidence Act and complaints could be tried in a summary manner except where the Magistrate feels that sentence of more than one year may have to be passed. Even in such cases, the procedure to be followed may not be exactly the same as in Cr.P.C. The expression "as far as possible" in Section 143 leaves 13 Mandvi Cooperative Bank Ltd. v. Nimesh B. Thakore(2010) 3 SCC 83, paras 25, 26 14 Para 41, ibid sufficient flexibility for the Magistrate so as not to affect the quick flow of the trial process. The trial has to proceed on day to day basis with endeavour to conclude the same within six months. Affidavit of the complainant can be read as evidence. Bank's slip or memo of cheque dishonour can give rise to the presumption of dishonour of the cheque, unless and until that fact was disproved.

The sentence prescribed under Section 138 of the Act is upto two years or with fine which may extend to twice the amount or with both. What needs to be noted is the fact that power under Section 357(3) Cr.P.C. to direct payment of compensation is in addition to the said prescribed

sentence, if sentence of fine is not imposed. The amount of compensation can be fixed having regard to the extent of loss suffered by the action of the accused as assessed by the Court. The direction to pay compensation can be enforced by default sentence under Section 64 IPC and by recovery procedure prescribed under Section 431 Cr.P.C.

It is, thus, clear that the trials under Chapter XVII of the Act are expected normally to be summary trial. Once the complaint is filed which is accompanied by the dishonored cheque and the bank's slip and the affidavit, the Court ought to issue summons. The service of summons can be by post/e-mail/courier and ought to be properly monitored. The summons ought to indicate that the accused could make specified payment by deposit in a particular account before the specified date and inform the court and the complainant by e-mail. In such a situation, he may not be required to appear if the court is satisfied that the payment has not been duly made and if the complainant has no valid objection. If the accused is required to appear, his statement ought to be recorded forthwith and the case fixed for defence evidence, unless complaintant's witnesses are recalled for examination.

Having regard to magnitude of challenge posed by cases filed under Section 138 of the Act, which constitute about 20% of the total number of cases filed in the Courts (as per 213 th Report of the Law Commission) and earlier directions of this Court in this regard, it appears to be necessary that the situation is reviewed by the High Courts and updated directions are issued. Interactions, action plans and monitoring are continuing steps mandated by Articles 39A and 21 of the Constitution to achieve the goal of access to justice 28. Use of modern technology needs to be considered not only for paperless courts but also to reduce overcrowding of courts. There appears to be need to consider categories of cases which can be partly or entirely concluded "online" without physical presence of the parties by simplifying procedures where seriously disputed questions are not required to be adjudicated. Traffic challans may perhaps be one such category. Atleast some number of Section 138 cases can be decided online. If complaint with affidavits and documents can be filed online, process issued online and accused pays the specified 28 Hussain vs. Union of India (2017)5 SCC 702 amount online, it may obviate the need for

personal appearance of the complainant or the accused. Only if the accused contests, need for appearance of parties may arise which may be through counsel and wherever viable, video conferencing can be used. Personal appearances can be dispensed with on suitable self operating conditions. This is a matter to be considered by the High Courts and wherever viable, appropriate directions can be issued.

From the above discussion following aspects emerge:

i) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

ii) The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

iii) Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

iv) Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with

default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.

v) Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under Section 143 of the Act read with Section 258 Cr.P.C. As already observed, normal rule for trial of cases under Chapter XVII of the Act is to follow the summary procedure and summons trial procedure can be followed where sentence exceeding one year may be necessary taking into account the fact that compensation under Section 357(3) Cr.P.C. with sentence of less than one year will not be adequate, having regard to the amount of cheque, conduct of the accused and other circumstances.

The appeals are disposed of.

It will be open to the appellants to move the Trial Court afresh for any further order in the light of this judgment.

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